Australia's Courts - A Quarter Century of Change*

The Hon Justice Michael Kirby AC CMG**

Silver Servants

In 1974, I was approached by that shrewd and cerebral jurist, the late Jack Sweeney (then a judge of the Australian Industrial Court). He enquired whether I would "entertain" an offer of judicial appointment. The office concerned was that of a Deputy President of the Australian Conciliation and Arbitration Commission. It may be difficult for contemporary lawyers, who did not grow up in the thirty years after the Second World War (as I did), to appreciate the importance and power, in those days, of the national industrial tribunal. It fixed the Basic (later National) Wage[1]. It decided great issues such as equal pay for women doing work of equal value[2]. It pushed forward the protection of Aboriginal workers under federal awards[3]. I considered the invitation a great compliment. I was 35 years of age. Without unseemly haste (but with no great delay either) I accepted appointment. I was welcomed in a Full Bench sitting in Sydney in December 1974. I am thus one of the silver servants of the judiciary: twenty-five years in the judicial harness.

With the retirement in 1995 of Justice Charles Sweeney (appointed 1970) from the Federal Court of Australia, I became the longest serving judge in federal office.

---

* Text for an address at the Third Annual Colloquium of the Judicial Conference of Australia, Gold Coast, Queensland, on 7 November 1998.

** Justice of the High Court of Australia. Formerly Deputy President of the Australian Conciliation and Arbitration Commission (1975-83); Judge of the Federal Court of Australia (1983-84); and President of the New South Wales Court of Appeal (1984-96) and of the Court of Appeal of Solomon Islands (1995-96).

1 *Ex parte H V McKay (The Harvester Case)* (1907) 2 CAR 1 per Higgins J. cf *The National Wage Case* 1975 (1975) 167 CAR 18; B Dabscheck, "1975 National Wage Cases Now We Have an Incomes Policy" (1975) 17 JIL 298; R E McGarvie, "Wage Indexation and the Impact of National Wage Cases" (1976) 2 *Monash Uni L Rev* 153.

2 *Equal Pay Case* 1969 (1969) 127 CAR 1142; *Equal Pay Case* 1972 (1972) 147 CAR 172; R Hunter, "Women Workers and Federal Industrial Law" (1988) 1 AJLL 147.

3 *Cattle Industry (Northern Territory) Award* (1966) 113 CAR 651; *Re Pastoral Industry Award* (1967) 121 CAR 454.

With the retirement of Justice John Cahill (1971) as Vice-President of the New South Wales Industrial Relations Commission and after the recent retirement of Justice Dennis Mahoney (1972) from the New South Wales Court of Appeal, I became the longest serving judge in New South Wales.

Yet there are others who have seen longer service than mine. They include Justice William Pidgeon (1970) and Justice Des Heenan (1970) in Western Australia, Justice Alan Demack (1972) and Chief Judge J P Shanahan (1972) in Queensland and Judge Andrew Wilson in South Australia (1972). There may well be others. Justice Gaudron was already a Deputy President of the Arbitration Commission when I was welcomed in 1974. But she interrupted her judicial service between 1979 and 1987. The Justice of the High Court with the longest continuous judicial service after me is Justice Michael McHugh (1984).

All of the Justices with whom I now sit, except Justice Hayne, have at one time or other appeared before me. Service of such length gives one a perspective both of continuity and change in the judicial institution. From this vantage point, my purpose is to remind you of the enormous changes which have occurred in the years since I received the call.

The High Court and Change

Consider, for example, the changes that have come about in the High Court of Australia. At the end of 1974, the *Commonwealth Law Reports* had reached volume 133. The Chief Justice was Sir Garfield Barwick. Sir Douglas Menzies died on 29 November 1974 at a function of the New South Wales Bar Association which I attended a few days before my own appointment was announced. Also present at that function was the Federal Attorney-General, Senator Lionel Murphy who was to take Menzies' place on the Court. The other Justices at the time were McTiernan, Gibbs, Stephen, Mason and Jacobs. Life tenure was the reward of those appointed to the High Court and other federal courts in those days. So, if they wanted it, in the case of the High Court, was a knighthood and, in due course, membership of the Privy Council with the title "Right Honourable".

The Court was still peripatetic in those days. The building in Canberra had not been commenced. Most of the Court's civil jurisdiction came to it on appeal as of right. The system of confining civil appeals to cases in which the Court granted special leave had not yet been enacted[4]. The business of a court which chooses its cases tends to be different from that of a court whose work is litigant driven. Save for practice matters and cases invoking the constitutional writs, the original jurisdiction of the High Court has shrunk almost to disappearing in the past quarter century.

There was no conception in 1974 that special leave hearings could be conducted by telecommunications. Parties either travelled to Melbourne or Sydney or waited

---

4 *Judiciary Act* 1903 (Cth), s 35(2).

for the Court to make its annual visitation to their capital city. Personal attacks on the Justices were extremely rare. Neither the *Banking Case*[5] nor the *Communist Party Case*[6], important and controversial as they were, provoked attacks on the Justices as individuals. Any hint of such criticism and the Attorney-General would defend the integrity of the Court and its members.

Most appeals to the Privy Council had been abolished before 1974[7]. However, appeals still lay from the State Supreme Courts, allowing many Australian litigants to choose, in effect, the tribunal of ultimate resort. To this extent, our legal system was still yoked with that of England. It was later to be my fate, as President of the New South Wales Court of Appeal, to sit in the last case which went on appeal to the Privy Council from an Australian court[8] following the abolition of future appeals by the *Australia Acts* of 1986.

Back in 1974, the High Court Justices still wore wigs and robes of the traditional character. There was no formal consultation and little public debate about appointments. They were in the gift of the federal government of the day. There were no women on the Court, and never had been. The first woman judge in Australia, Justice Roma Mitchell of the Supreme Court of South Australia (1965), was occasionally spoken of for appointment; but, in the law, women were still extremely rare birds[9].

There was not much talk of implied constitutional rights in those days, although the *Boilermakers Case*[10] drew from the language and structure of Chapter III of the Constitution implications, not spelt out in the text, about the exercise of the judicial power of the Commonwealth. There was little talk of the native title rights of Aboriginals and Torres Strait Islanders, especially after Justice Blackburn's decision in 1971 in *Milirrpum v Nabalco Pty Ltd ("Gove Land Rights Case")*[11]. *Mabo*[12] and *Wik*[13] were but dreams.

International law occasionally intruded into the business of the High Court[14]. But it was treated strictly in accordance with dualist theory, as a distinct and separate regime, of little relevance to Australia's domestic law. Now, hardly a

---

5 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.
6 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
7 *Privy Council (Limitation of Appeals) Act* 1968 (Cth). See also *Privy Council (Appeals from the High Court) Act* 1975 (Cth).
8 *Austin v Keele* (1987) 10 NSWLR 283 (PC).
9 Justice Gaudron was appointed to the High Court in 1987.
10 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
11 (1971) 17 FLR 141.
12 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
13 *Wik Peoples v Queensland* (1996) 187 CLR 1.
14 For example, *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 concerning the power of the federal Parliament to make regulations to secure the execution of the *Aerial Navigation Convention.*

sitting of the High Court goes by without consideration of the domestic implications of international treaty obligations[15] or other forms of international law[16] arising for the Court's consideration.

In the elaboration of the law, and the elucidation of the issues of legal authority, principle and policy which is involved, there was relatively little consideration, twenty-five years ago, of the jurisprudence of common law countries other than England. The links of most jurisdictions of the Commonwealth and Empire still led to London. There were few interconnections with each other. It is difficult in these days of comparative law analysis to recreate in the imagination the time when the light of English law was so dazzling that it blinded Australia's judges and lawyers to every other foreign source of law. Early signs of rebellion could occasionally be seen[17]. But decisions appeared simpler, and certainly briefer in those days, because, in virtually every area of the law outside constitutional law or statutes, the task of Australian judges was usually seen to be that of discovering and applying the most analogous precedent of English authority. An era which had lasted virtually from the beginning of Australia's establishment as a British colony in 1788 faded away in the last quarter of this century. The externalities (such as titles, dress and wigs) were altered a little. But the truly profound changes in the work, procedures and methodology of the High Court of Australia were not always fully realised, including perhaps by all of those close to the Court.

Changes in Other Australian Courts

Changes equally profound have occurred in the other courts of the Australian Commonwealth, both federal and State. A quarter century ago, federal jurisdiction was

---

15 See eg *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 examining the *Refugees Convention* Art 1 as applied by ss 4(1) and 22AA of the *Migration Act* 1958 (Cth); *DeL v Director General, NSW Department of Community Services* (1996) 187 CLR 640 concerning the application of the *Convention on the Civil Aspects of Child Abduction*. See also *DeL v Director General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207; *Akai Pty Ltd v Peoples Insurance Co Ltd* (1996) 188 CLR 418 concerning the policy of the *Insurance Contracts Act* 1984 (Cth) and the insurance policy issued in that case in Singapore containing a clause to the effect that it was to be governed by the laws of England with disputes referred to the courts of England; *Croome v Tasmania* (1997) 191 CLR 119, relating indirectly to a decision of the UN Human Rights Committee under the *International Covenant on Civil and Political Rights* which resulted in the *Human Rights (Sexual Conduct) Act* 1994 (Cth); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 concerning the "refugee" status under the Convention and the "one child" policy in the Peoples' Republic of China; *CSR Ltd v Signa Insurance Australia Ltd* (1997) 187 CLR 345 concerning anti-suit injunctions in relation to concurrent proceedings in Australia and in the United States; *Project Blue Sky v Australian Broadcasting Authority* (1998) 72 ALJR 84 concerning the *Closer Economic Relations Treaty* with New Zealand; *Attorney-General (Cth) v Tse chu-Fai* (1998) 72 ALJR 782 concerning extradition arrangements with Hong Kong. There are many other cases.

16 See eg *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 765f concerning the relevance of international law to ambiguous provisions of the Australian Constitution.

17 See Dixon CJ in *Parker v The Queen* (1963) 111 CLR 610 at 632. cf *Skelton v Collins* (1966) 115 CLR 94.

distinctly limited and federal courts few. That judicial remnant of the *Boilermaker's* decision[18], the Commonwealth Industrial Court, began the process of gradually assimilating most of the federal judicial business below the High Court. The work of the Federal Court of Bankruptcy was merged with that of the Federal Court in 1976[19]. The ground was laid for an expansion which was, after 1976, to grow inexorably into the Federal Court of Australia as we know it today[20].

A signal of what was to come was the renaming of the old Court as the "Australian Industrial Court" in 1974. When Dennis Mahoney QC led me in that Court in the *Mikasa* case[21], we listened philosophically to the prediction of our opponent, Harold Glass QC, that "this is a court avid of jurisdiction". So it was to prove.

The Arbitration Commission was probably at the zenith of its national power and influence in 1974. Its Presidents, Sir Richard Kirby and Sir John Moore, had led it with great ability. Another national tribunal, the Trade Practices Tribunal, had just been established. But the great reforms of administrative law, and the creation of the Administrative Appeals Tribunal, still lay ahead[22].

What a different scene we behold today. The Federal Court of Australia has gone from strength to strength. In the same time, the Family Court of Australia[23] has become a national court of great significance. Swept away are the grounds of divorce and the discretion statements of my youthful days in the legal profession. In their place are entirely different problems, deriving from much higher levels of marriage breakdown and increasing numbers and kinds of personal relationships outside marriage. Now the Federal Attorney-General is proposing the establishment of a federal magistracy[24]. The autochthonous expedient, so brilliantly devised by the founders of the Australian Constitution, has given way to the rapid growth of federal courts and tribunals. Inevitably, this has had its impact on the State courts, the places in which virtually all of Australia's legal business was done twenty-five years ago.

Yet in the period since 1974, the overall numbers of judges in State courts have more than doubled[25]. A particular feature of that interval has been the establishment of permanent Courts of Appeal to discharge the appellate functions of the

---

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

19 *Bankruptcy Act* 1966 (Cth), s 27(1).

20 *Federal Court of Australia Act* 1976 (Cth) s 5(1).

21 *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617 affirming the decision of the Commonwealth Industrial Court: *Festival Stores v Mikasa (NSW) Pty Ltd* (1971) 18 FLR 260.

22 *Administrative Appeals Tribunal Act* 1975 (Cth).

23 *Family Law Act* 1976 (Cth).

24 D M Williams, "Future challenges for the Family Court - minimizing family law litigation", unpublished address to the Third National Conference of the Family Court of Australia, Melbourne, 20 October 1998. For recent comments see Law Council of Australia, Media Release, 21 October 1998 "Law Council Supports Judge's Legal Aid Comments, Asks Attorney for further Details on Federal Magistracy".

25 In 1974 there were 37 Supreme Court judges in New South Wales. Now there are 44. In 1974 there were 48 District Court judges in that State. Now there are 56, together with more than 50 Acting Judges.

State courts. Whereas such a court had been created in New South Wales in 1965, amidst much controversy, the establishment of such courts in Queensland, Victoria and the Northern Territory proved much less contentious. When the High Court was in Perth recently there was talk of the creation of a separate Court of Appeal for Western Australia. Sometimes such proposals are considered in the context of the more general reorganisation of the trial work of the State courts.

Another development, which did not go as far as it might in the twenty-five years since 1974, was the provision of separate commissions to judges serving in other Australian jurisdictions, to participate in appellate and other judicial work elsewhere in the nation. The Federal Court provides appellate judges for mainland and offshore territories. But in an interesting innovation, Justice Priestley of the New South Wales Court of Appeal, received a commission as a judge of the Court of Appeal of the Northern Territory. Judges of the Supreme Court of the Northern Territory were given reciprocal commissions in the Supreme Court of New South Wales in compensation. It always seemed to me that this was an imaginative precedent which might have been extended and used more often in the deployment of Australia's judicial personnel.

Many other things have changed. Judicial education has been introduced throughout Australia by a happy combination of the work of the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration. Media liaison and communication officers have been appointed to replace the previous indifference of the courts, or their traditional reticence, in communicating with the public. Jury trial, which was such a feature of the court system, in New South Wales at least, twenty-five years ago has all but disappeared in civil causes. Use of video hearings has spread from the High Court's special leave days to many of the bail decisions of State Supreme Courts. Whereas twenty-five years ago, Acting Judges were an exception, only appointed as preliminary to permanent confirmation, now, in several jurisdictions, such appointments are common. They present certain dangers to the independence of the courts[26]. In one State at least, the *Constitution Act* has been amended to entrench protection for the tenure not only of judges but also of magistrates[27]. The integrity of State courts has received a measure of protection by the decision of the High Court in *Kable v Director of Public Prosecutions (NSW)*[28], holding that State courts must, as contemplated by the Constitution, be worthy receptacles to receive federal jurisdiction under Chapter III.

The jurisdiction of District and County Courts has expanded greatly in the past twenty-five years as much of the work which was formerly performed in the State Supreme Courts has been divested or transferred to other courts. Magistrates Courts

---

26 M D Kirby, "Acting Judges - A Non-Theoretical Danger" (1998) 7 *Journal of Judicial Administration* 69.

27 *Constitution Act* 1902 (NSW), s 56(1)(2) inserted 1992. See K Gould, "Judicial Independent entrenched in New South Wales?" (1996) *Law Soc J* (NSW) 71. cf *Constitution Act* 1975 (Vic), s 18. cf C A Foley, "s 85 Victorian Constitution Act 1975: Constitutionally entrenched, right or wrong? (1994) 20 *Monash Uni L Rev* 110.

28 (1996) 189 CLR 51.

throughout the nation have been greatly strengthened by legislative protection for their qualifications, independence, tenure and conditions. The Australian magistrate today is proudly called a judicial officer and a colleague of every other judge in the nation. The Local Courts are a far cry form the Police Courts and the prevailing culture which existed when I was appointed to judicial office a quarter of a century ago.

Changes in the Legal Profession

The Australian legal profession has also undergone enormous changes in the past quarter century. In 1974 dock briefs and Bar Association assignments were still the means by which, prior to *Dietrich*[29], many criminal accused received legal representation at the hands of the most fresh and inexperienced members of the junior Bar. Back in those days, *pro bono* work was often described as a "spec brief". Before substantial organised legal aid changed the scene, many civil cases only came to court because lawyers accepted instructions on the footing that they would not be paid if they did not win. It was not perfect. It did tend to concentrate the mind. But it put enormous pressures on the parties when offers of settlement were made. Just prior to my appointment to the bench, the Federal Attorney-General, Lionel Murphy, had established the Australian Legal Aid Office. It revolutionised the provision of publicly funded legal assistance. Its impact had not really been felt outside a few areas of federal law in 1974.

The Bar has changed in the intervening period. The office of Queen's Counsel has been abolished in New South Wales, Queensland and the Australian Capital Territory. It was abolished in the Northern Territory; but then restored. In the abolitionist jurisdictions, leading counsel have not disappeared. They have simply been renamed "Senior Counsel". The proud old title, it seems, will gradually die out there. Now appointees are often reputed by the number of trolleys of books and exhibits which follow them, and their silken robes, into court. Somehow the retinue which gathers around the advocate seems to have expanded. The facilities in which barristers are housed have certainly become more grand, and therefore presumably more expensive to rent. It may not be unconnected, but there has been a large increase in the number of litigants in person appearing in the courts. This phenomenon, which has reached the High Court itself, imposes great strains on the court system and on the judges who preside in it. Courts of our tradition do not work efficiently where those arguing before them lack the knowledge and discernment that comes from legal training and court experience.

The work of the advocate has changed in twenty-five years. An increasing proportion of that work is now performed in writing. Because documents can be read five times more quickly than the equivalent words can be spoken, there has been a trend away from persuasion performed in public in an open court to that written down for absorption in the judicial officer's private chambers. The merits of public

29 *Dietrich v The Queen* (1992) 177 CLR 292.

argument and decision have had to give way to the pressures of court business. A price must be paid for this. The daily demonstration in public of the manifest fairness of the court's proceedings was a great merit of the old system.

The work of solicitors has also changed in twenty-five years. There has been a growth of the mega-firms; the development of a national and even international profession; and the decline of the monopoly in land title conveyancing which had always been the staple of the practising solicitor in Australia. The introduction of time charging has altered radically the way many lawyers now go about their work. It promises to alter the relationship between the lawyer and the client. As Chief Justice Gleeson has pointed out, it can sometimes amount to a reward for the slow thinking practitioner who lacks basic knowledge in the field of law in question[30].

The Engine of Technology

Although social change, the media, higher levels of community education and expectations and other forces have altered the world of the judiciary and of the legal profession from that which we inhabited a quarter of a century ago, technology is certainly one of the most powerful engines of change. The use of video links for court and tribunal hearings is specially suitable for a country the size of Australia. In 1974 telephones would occasionally be used to secure immediate injunctions from a judge, but the use of telecommunications in the business of the courts was rare indeed.

Our offices have been revolutionised by photocopying machines, facsimile, mobile phones and word processors. I remember the first time we introduced word processors at the Australian Law Reform Commission in the late 1970s. One of our newly appointed Commissioners was Mr John Ewens, long-time First Parliamentary Counsel of the Commonwealth. When his eyes fell upon the miracle of word processing, I saw a look of anguish. He was thinking: if only he had had such a facility in the years of statutory drafting it would have avoided the repetitive retyping of corrected text which, with carbon paper and consequent delay, was the feature of legal drafting twenty-five years ago.

The Internet has liberated us, giving us access to a vast range of legal data from many sources. We are no longer prisoners of our colonial legal origins. Voice recognition machines are being perfected. Within a decade such machines will be available to respond to oral commands to provide legal data. Like mobile telephones, they will become the companions of the judges and lawyers of the years ahead. Whether this makes judges even more depersonalised than their contemporary equivalents and whether it helps in the essential functions of judgment discernment and evaluation for relevancy, remain to be seen. When we reflect upon the technology which is now at our fingertips and where we have come from in so short a time, we can only begin to imagine what will be possible in an equivalent interval in the

30 *NSW Crimes Commission v Fleming & Heal* (1991) 24 NSWLR 116 at 126-127.

future. The technology advances at a dazzling pace. With its changes come new perceptions of the function of law and of the role of the courts in which, ultimately, the law is administered.

Continuity

Yet there are some things in the Australian judiciary which are much the same today as they were a quarter of a century ago. Almost all appointees suffer a drop in salary when they leave private legal practice to take judicial appointment. This is not, in my experience, a major concern to the kinds of people who are attracted to the judicial life. But the facilities, particularly in many State courts, are often shabby, overcrowded and neglected. The relentless grind of judicial work is much the same. Indeed, the workload has increased. The courts generally enjoy a low priority amongst politicians because, of their nature, they are peopled by discreet and generally reticent people, unwilling to make a fuss even about the intolerable.

With these abiding burdens come the continuities of the judicial life which represent the undoubted attractions to those summoned to its service. The judicial office is a noble calling. Judicial officers are committed to the search for justice under law. That is a highly moral, and even at times an inspiring, vocation.

Judicial independence is still generally respected in Australia. I commonly tell law students, and foreign visitors, that one of my proudest boasts after a quarter of a century in judicial office is that, in all of that time, I have never had a single instance of improper pressure to reach, or change, a decision to favour a particular outcome. In Australia, no Minister telephones judicial officers. No rich corporation or individual would dare to do so. No political party, trade union or other lobby group seeks to exert pressure, except in court by public argument presented in public proceedings. Newspaper editorials occasionally thunder their advice and demands. But even there, limits are generally observed. Corruption, which is such a feature of judicial service in other lands, is wholly absent from ours. The choice of judicial officers from people of middle years who have, for the most part, already established a reputation in the private legal profession is a sure means of maintaining a bench of people with an independence of mind. It is a powerful reason for adhering to our current procedures for appointing judges from the leaders of the private legal profession. That is, I believe, a reason why the judicial officers of common law countries which follow this tradition generally enjoy a higher respect (and greater power) than is enjoyed by the career judges of the civil law tradition.

In this regard, the judiciary today remains substantially as it was when I was appointed: a serious minded, hard working, earnest group of people who realise the privilege and responsibilities of the offices they hold. Not only because of judicial education, the judicial officers of today, like most citizens, are more open and knowledgeable about questions which were never, or rarely, spoken of, a quarter of a century back. About the sometimes unfair impact of the law on women and children. Of its impact on ethnic and other minorities. Of the deservedly critical perceptions of the law held by refugees, by homosexuals, by prisoners and by the ordinary citizen for whom a day in court is commonly a most stressful, expensive

and unpleasant experience. Judges are, at last, speaking more openly about issues such as judicial stress[31]. They are much more involved in the efficient management of their work, realising that access to justice depends upon the efficient throughput of court business and is concerned with the expenditure of public as well as private funds[32].

A Troika of Virtues

Recently I visited the Supreme Court of Japan in Tokyo. My last visit there was in 1986, when I was President of the Court of Appeal of New South Wales. On that occasion I was told that Sir Garfield Barwick had been the last Australian judge who had visited the court, and that in 1970. Few are our judicial links with a country with whose economic future and social fortunes Australia is so closely bound.

The Supreme Court building in Tokyo is a mighty fortress. It abuts the Imperial Palace in the centre of the city. It was built to impress, even perhaps to hold the visitor in awe. There is a great entrance hall, not dissimilar to that of the High Court building in Canberra. Indeed, the thought crossed my mind that Sir Garfield Barwick may have derived some of his ideas for the style of blanched concrete modern from the building he saw planned for Tokyo when his creation on the edge of Lake Burley Griffin was formulating in his imagination. Chief Justice Yamaguchi and I exchanged thoughts about the well guarded buildings in which we worked. His background was substantially in family law. In Japan, as in Australia, litigants in person present particular challenges to the proper performance of the judicial function, particularly in family courts. Each of us agreed that a great building, and even wonderful facilities, were not the essence of the judicial role. That essence lay somewhere deeper in the mind and in the heart of the judge.

That essence has not changed at all in twenty-five years. It remains the same. In the *International Covenant on Civil and Political Rights,* the drafters suggest that the essence is to be found in the performance of the judicial function in a fair and public trial by competent, impartial and independent persons[33]. I have sometimes thought that those three words - a verbal *troika* - should appear above the door through which each judicial officer enters to perform his or her work. To strive to be competent. To insist on independence. To aspire, always, to neutrality.

My visit to the Supreme Court in Tokyo culminated with an inspection of the Library, at the heart of the building, where are displayed three massive portraits of a great Crown Prince of the fourteenth century who is remembered as an important law giver. One portrait shows the Prince as a baby, surrounded by his mother and women of the Imperial household. "That shows benevolence", I was told. A second portrait shows the Prince, seated on a throne, giving out decisions and handing down the law. "That shows wisdom". The third portrait shows the Prince on horse-

---

31 M D Kirby, "Judicial Stress - An Update" (1997) 71 ALJ 774; J B Thomas, "Get up off the Ground" (1997) 71 ALJ 785.

32 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 141 at 166.

33 Art 14.1.

back travelling to the far reaches of the Empire. He was armed with a sword and his retinue brandished spears. "That shows courage and resolution".

As I flew back to Australia, my mind played on the tripartite concepts of the Anglo-American draft which became the *International Covenant* and the notions inherent in the painted illustrations of judicial virtues displayed in the Supreme Court in Tokyo. Competence, neutrality and independence. These are the requirements *for* the performance of the judicial office. Wisdom, benevolence, courage and resolution. These are the requirements *of* the judicial office. The *Covenant* appears to look to the outward manifestations whereas the Japanese portraits search for the inner qualities that are needed. All of the virtues and necessities must be found, however imperfectly, in each lawyer who assumes the judicial mantle.

Ours is a tradition of the common law which stretches back to a time even before that of the benevolent, wise and resolute Crown Prince of Japan in the fourteenth century. Ours is a tradition virtually of a millennium. In twenty-five years much has changed. But much has also stayed the same. And doubtless will continue to do so.