

Dinner Address

Sir Harry Gibbs Memorial Oration (2008) Superior Courts in the Republic of Australia

Hon Ian Callinan, AC

To be invited to give the Sir Harry Gibbs Memorial Oration is a very considerable honour. The whole of the Queensland legal profession, of which I was a member throughout Sir Harry's judicial career, took much pride in the recognition of his qualities by those who appointed him to the several offices he held, judge of the Supreme Court of Queensland, Bankruptcy judge, Justice of the High Court, and ultimately its Chief Justice.

I knew Sir Harry, not well, because of the difference in our ages and professional standing. As a student, I attended his lectures on Evidence in his barrister's chambers: as a young solicitor I instructed counsel appearing before him in the Supreme Court, and I appeared quite often before him as a barrister in the High Court. My recollections of him as a judge were of attentiveness, preparedness, knowledgeability, vast experience, and, as a consequence of all of these, efficiency. I have known many good lawyers, including judges, who possessed great virtues, but regrettably not all of them were efficient.

The sheer volume of material with which Justices of the High Court must grapple is not always apparent to people unfamiliar, happily so I might say, with the Courts. Cases in the High Court have usually had two earlier outings, at first instance, and then in an intermediate Appellate Court of three, very occasionally five, judges. They are rolling stones that have tended to gather rather a lot of moss. It is necessary for the Justices of the High Court to familiarize themselves with the full history and details of every case before them. I am unable to agree with a statement made by a former Chief Justice, that the ideal case for the Court to take and hear is one in which the facts are uncomplicated. The proposition that the highest court is in some way above the factual complexities of modern commerce and life is not one with which I agree. There is certainly no suggestion to that effect in the constitutional definition of the Court's jurisdiction. The disputes a complex society throws up will frequently be factually complex. The reason why I mention these matters is to make the point that Sir Harry Gibbs was always master of the facts of a case, as well as the law governing it.

May I also give you a further insight, again not an irrelevant one to the subject of my oration, into Sir Harry Gibbs's thinking? On an occasion after I had been on the Court for a few years, he and I fell into a discussion. It will not surprise you to hear that it was about the jurisprudence of the Court before my appointment to it. I will not tell you of which decision he most disapproved, but I can tell you that he expressed a very strong opinion about the *Tasmanian Dam Case*, in which he dissented. He made it unmistakably plain that he was in favour, neither of any extension of the external affairs power, which he thought should not be used for an expansion of central power within Australia, nor of novel, extravagant constitutional implications.

This Society is, I believe, strongly constitutionally monarchist in inclination. It is important, however, that constitutional monarchists have a clear view about the type of republic that we should have if Australia is to become one. If they do not, then they run the risk of irrelevance in the debate which will continue.

It is the year after the passing of the much mourned, longest serving British Monarch, Queen Elizabeth the Second. The Australian people have voted in a plebiscite in favour in principle of a republic. They remain divided however, on not just the details, but also the nature of the republic that they want. It is because there is an apprehension on the part of the politicians that the people would prefer an elected President, who might then have greater legitimacy than an elected Prime Minister closely tied to a party, that in formulating the question for the people they failed to have due regard to the structure of the judiciary.

But now, attention to those details can no longer be postponed. A special legal sub-committee has been established to write a new chapter in a republican constitution for a judicature. Everything is on the table. Many have urged that there should only be one hierarchy of courts: why have both Supreme Courts and

Federal superior courts? That is a good question, to which I think there is only one sensible answer. What we have is a relatively recent consequence of an expensive course of conduct indulged in by federal governments of both colours.

It was, in my view, a brilliant stroke on the part of our founders to allow, in the Constitution, for the investing of federal jurisdiction in such courts (State courts in practice) as the Parliament decides (s. 71). For more than seventy years, most federal cases, criminal or civil, were heard and determined by State courts. I have never heard of a decision of a State judge or magistrate of which it could fairly be said that it showed any predisposition against the Commonwealth because it was the Commonwealth. I wish I could say the same about the High Court's regular preference in constitutional matters of the Commonwealth over the States. On the other hand, I have heard it argued, in favour of a large and separate federal judiciary, that the Commonwealth needs its own courts to interpret and apply its own laws. That, I think, is a very suspicious argument. It raises the suspicion that the argument is made in order to ensure some preferment of the Commonwealth. It is an insult to both the States, and incidentally, federal judicial officers appointed by the Commonwealth. It says something about those who press it.

Even now, despite the creation of a Federal Magistracy and a Federal superior Court, almost all federal criminal work continues to be done by State courts. It is likely that Federal Courts will exercise, albeit in a very limited way, some criminal jurisdiction but, for the foreseeable future, the State courts will continue to bear the burden of dealing with crimes against Commonwealth law. If it were otherwise, the great expense and inconvenience of enlarging the second set of parallel courts, and the administrative machinery to operate them, would be compounded.

In a new Constitution, how would all of this be dealt with? With minimal change, that is on the minimalist model for a republic, some would answer, by maintaining the present system. But both prudent unaligned, and the aligned alike, would say that a new Constitution presented an opportunity to do away with the expanding duality of the courts. The logic of constitutional provision for one hierarchical judicial system is compelling. The only other argument I have heard against one judicial hierarchy is that two provide healthy competition for each other, a matter upon which I will touch later.

But as to the form, relationship between its components, jurisdiction and titles in one judicial system, those who will appoint its judges and those who fix their tenure and remuneration, there is unlikely to be any early consensus. The devil will not simply be in the detail. Matters of high constitutional, legal and democratic principle are involved. Inevitably the debate will be complicated by the wish of a substantial body of people for the entrenchment in the Constitution of a Bill of Rights, to be applied by all courts and ultimately interpreted by a final court. There will also be pressure in some quarters to confine the final court's jurisdiction to constitutional and rights cases, in the same way as the jurisdiction of the Supreme Court of the United States is confined. May I remind you, at this point, of what the High Court, the Supreme Court of Canada, the Privy Council and the House of Lords have in common – a final jurisdiction in all matters, criminal, civil and constitutional. Among other things, those who wish for a confined constitutional court will argue that a lower tier of a superior court could adequately deal with non-constitutional matters, and that the burden upon an unconfined High Court is increasing and will soon become unbearable, a matter which I personally dispute.

But before I further comment on those matters, I would remind you of the course that legal and political affairs can take in judicial systems as they are organised in the United States.

A Presidential election was held in that country on 7 November, 2000. The Florida Division of Elections reported that Mr George W Bush had received a narrow majority of votes in Florida over Mr Gore. Florida had its own Election Code, even though the election was for the highest federal, indeed the highest political office in the nation. That Code required, because the margin was so small, that there must be an automatic machine recount of votes. After it, Mr Bush remained ahead but by an even smaller margin.

Mr Gore then exercised his right, a right conferred by Florida law, to demand a manual recount. But his demand was made after the expiration of the 7 days allowed by that law to make such a demand – a mandatory deadline, as the Florida Supreme Court decided. None the less, the Secretary of State, not federal, but of the State of Florida, had a discretion to receive the amended returns of elections lodged within a county of the State after those 7 days. The Secretary exercised her discretion against reception. Mr Gore and his party then sought the intervention of the Federal Court. That Court certified, that is, referred Mr Gore's application to the Florida Supreme Court. That Supreme Court then found for Mr Gore, holding that the Secretary's discretion was not untrammelled, that enough had been shown to trigger a full manual recount (in some

counties). Unsurprisingly, Mr Bush was not happy with that decision. He then applied to the United States Supreme Court for an order quashing it.

The Supreme Court, after saying it would generally defer to a State Court's decision on a State statute – I interpolate, on a State statute in its application to a federal election – having regard to Act 11, 1, cl.2 of the Constitution, and because the Florida Court's reasons were uncertain, held that its orders should be vacated, and the case “remanded for further proceedings not inconsistent with this opinion”.¹

The Florida Supreme Court to which the case accordingly came back, was satisfied, for various reasons, that there should be a manual recount, again not of all, but of some of the votes, and so ordered. Mr Bush was dissatisfied. He was able to bring the matter back to the United States Supreme Court ten days after its earlier outing there. Essentially for the reason that the recount ordered by the Florida Court would necessarily be incomplete, and would involve therefore uneven treatment of voters in Florida, the United States Supreme Court, by majority, quashed the latest decision of the Florida Court. In consequence, Mr Bush was able to be inaugurated as President of the United States.

If, by now, you are not dazed by the convolutions of this litigation, the result of which has not escaped criticism – criticism that I need not explore – I will tell you why I have referred to it.

First, is it not astonishing to an Australian at least, that a federal election, indeed of a President, should be subject to a State electoral law? Secondly, is it not equally astonishing that each State of the Union has its own, often very different electoral laws? Thirdly, although the High Court of Australia does, from time to time, send cases back to State courts for decision, it would never have the occasion to do so in the circumstances of a federal election remotely like those that relevantly occurred in the United States in November and December, 2000. Fourthly, is it not also remarkable that the Supreme Court should defer, to the degree that it did, in relation to a federal election, to the Florida Court in the first episode that came before it? The various episodes of this litigation certainly brought home to me the disadvantages that can attach to a federation united by rebellion, as opposed to one that evolved from an orderly, aspirational, democratic and legitimate process.

However a judiciary may be reconstructed under a republican constitution, we should make sure that litigation of the kind that occurred between Bush and Gore, and rebounded between the federal Supreme Court and the Florida State Courts there, should never take place here.

We have not however been immune to federal and State legal demarcation problems. While I would not go so far as my former colleague Heydon J, as to describe the creation of a Federal Court as a blunder,² I have no doubt that its establishment has increased opportunities for demarcation disputes between it and the State courts. It is an irony that the party in government which created the Federal Court had repeatedly opposed it in Opposition – just as, I might say, when it came to government it embraced it.

A particular problem is that the Federal Executive is voracious when it comes to power. I have been told – I am unable to verify whether it is so – that there is within the federal Attorney-General's department, a section whose principal duty seems to be, whether stated or not, to enlarge federal power at the expense of the States. I might say that in the '70s the Premier of Queensland established a similar unit, a “think tank” as I recall it, whose function was to repel attempted federal incursions.

When the federal Parliament enacted the *Trade Practices Act* 1974, it then enacted, as part of it, s. 86 which conferred exclusive jurisdiction, relevantly for present purposes, upon the Federal Court, subject only to the constitutionally conferred jurisdiction of the High Court.

If ever there were a recipe for problems it was that section. They soon manifested themselves.

In *Fencott v. Muller*³ the applicants sued in the Federal Court for deceptive conduct contrary to s. 52 of the *Trade Practices Act*, attaching to that claim further claims for breach of fiduciary duty and breach of trust. There were many issues in that case, but the one of present interest was whether the Federal Court had jurisdiction to decide the non-federal claims.

It immediately strikes one as irrational and unbalanced that State courts, which had so long responsibly exercised federal jurisdiction, should at one fell swoop be deprived of it in relation to commercial affairs in which they were well experienced. It was equally irrational and unbalanced, and I might say foreseeable, that a question of the kind which did arise would arise. And, I might say, it was also foreseeable that all courts, especially new courts, of which the Federal Court was one, avid for power as they always seem to be, would seek to appropriate to themselves the power to decide every aspect of the case, including the non-federal claims.

Fencott v. Muller, which inevitably went to the High Court, was decided at a time when the High Court was as sympathetic as ever since 1920 to the expansion of federal power. Predictably it decided, albeit by a

narrow majority, that the Federal Court had full jurisdiction to decide the whole of the case, because all of the non-federal claims arose out of transactions and facts common to a federal claim, and all those claims were aspects of the matter constituting a single controversy. As the federal claim was a substantial part of the controversy, the Federal Court had jurisdiction over all the claims.

Gibbs CJ however had sought to hold the line. His Honour would go no further than to hold that the Federal Court's jurisdiction should be limited to claims for non-federal relief to the extent that the grounds were identical with the ground for federal relief, and that, in substance, if not in form, there was only one matter for determination. For completeness, I would point out that Wilson and Dawson JJ, in dissent, took an even more strict view, that the Federal Court did not have jurisdiction over any of the non-federal claims, because the facts on which the relief was sought were not identical with those upon which relief was sought in the federal claims.

It cannot be denied that an inability to prosecute all claims against the same party in the one court is inconvenient. But who caused the inconvenience? It was of course the Commonwealth, by choosing first to create an unnecessary court, the Federal Court, and then, by removing vested jurisdiction over the federal claims from the State courts, and giving it exclusively to the Federal Court.

I was in practice at the Bar at the time. There was a perception, no doubt entirely ill-founded, that in consequence, the Federal Court was the court in which to litigate because, first, it now had the jurisdiction to do just about anything; secondly, as a new court, it was not overburdened by work; and thirdly, it was very ready to display its wares by readily dispensing the very great jurisdiction conferred upon it by the *Trade Practices Act*, and confirmed by the High Court in *Fencott v. Muller* and a line of other cases.

The imbalance thereby created became too great for even the Commonwealth to disregard. The *Trade Practices Act* had to be, and was in due course, amended by altering s. 86 to restore vested jurisdiction in a number of matters under that Act to the State courts.

Be that as it may, the question that I ask tonight is how, in a republic, under a constitution reworked *de novo*, the judiciary should be organised, appointed and tenured?

I will no doubt be accused of conservatism in expressing my preference for a judiciary, and jurisdictions exercised by it, of the kind which served the country, and served it well, before 1976. I believe that already I have gone some way towards making a case for those. Let me now summarise and expand upon the case for one hierarchical judiciary without a separate federal court other than the High Court. It avoids forum shopping and jurisdictional disputes. It would eliminate the need for a separate Federal Court registry. It should on that account alone produce economies. It would better serve a highly developed, precedent based, common law system by ensuring one undivided line of legal authority. It would eliminate judicial salary leap-frogging. It would promote the more flexible deployment of judges by allowing them to move and sit where and when they are most needed, without concern about jurisdictional boundaries. It would simplify procedural and practical matters by providing for a unified set of practice rules, thereby again reducing expense and complexity. It would obviate the uncertainties attached to cross vesting by eliminating entirely the need for it. Arguments about *forum non conveniens*, and many difficult questions of conflict of laws, would disappear.

The only serious arguments I have heard against such a unified system is that there is nothing wrong with forum shopping, and that some competition between the courts, like competition in commerce, advances efficiency. Both are invalid. Why do you think people forum shop? They do it because they believe that they will gain an advantage in Court A that they would not have in Court B. That does not sound like even justice to me. As to the argument about greater efficiency, it is sufficient to say that the courts are not Adam Smith's free traders. As both a barrister and a judge throughout the period of the creation and expansion of the Federal Court, I have not seen the slightest evidence to suggest that its existence has in any way improved the performance of any other courts, or *vice versa*.

I see no reason why the States, assuming their continued existence, should not appoint all of the Magistrates and District Court judges, it being clear however that they are part of, and at the base of the one judicial hierarchy. The Commonwealth should continue to appoint the Justices of the High Court. It is the Constitutional Court, and, I would hope, would continue to be the final Court of Appeal for all matters. A democratic, prosperous, mercantile country can afford, and should enable, two appeals to be brought in important cases.

A far more vexed question would be, who is to appoint the judges of the superior Court, which should be divided into a trial division and a permanent appellate division. I myself think that rotating courts of appeal are undesirable. Too often appellate Courts constituted by trial judges defer, or certainly appear to defer, too

much to the judgment below: there but for the grace of God go I; my turn will come.

It would be resisted, but the Family Court should be part of the superior Court. Children and families are far too important to be entrusted to lesser judges. There could be further divisions within the trial division of the superior Court, but that should be a matter for legislation and regulation, and not a Constitution.

I have postponed until now the question of the means and makers of appointments of judges of the new, and fully empowered, superior Court. Politicians like the power of patronage, except of course when it is very risky. Even if it were agreed that a Judicial Appointments Commission should actually make the appointments, there would still be argument about who should appoint the Commission. I have reservations about Judicial Commissions, but that is a topic that I do not have time to pursue tonight.⁴ My preference would be that appointments to a new superior Court be made by a committee of seven, constituted by the federal Attorney-General and the Attorneys-General of all of the States. If that be unacceptable, the committee could consist of two Attorneys-General of the States (taking turns), and the federal Attorney-General. There is no reason why the federal Attorney-General should have the final say. No doubt there would be compromise appointments, but I would think that there always would be. If there were to be a Judicial Commission it could similarly be appointed, each State and the Commonwealth nominating a member of it.

Who should pay for the maintenance of the judiciary? In my view, it should undoubtedly be the Commonwealth. It is likely to control the purse strings in a republic and have the capacity to pay. It would, after all, be relieved of the expense of the maintenance of an expensive separate federal judiciary.

Other people have ideas about these matters. I do not advance mine dogmatically. I advance them in order to stimulate a debate. As content as I am with our present constitutional arrangements, it would be naive for me to assume that they are immutable. What I fear is that, not just in relation to the courts, but also in relation to all other matters of detail, the non-republicans may deal themselves out of the game. In this paper I have simply tried to lay some cards on the table.

Endnotes:

1. *Bush v. Palm Beach County Canvassing Board et al.*, November, 2000.
2. 81 (ALJ) 2007 577 at 583.
3. *Fencott v. Muller*, 152 CLR 710.
4. See I D F Callinan, *Responsible Government – In Dilution*, *Quadrant*, April, 2008.