**Chapter Four**

**An Over-Mighty Court?**

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The title of this paper, which was suggested to me and which I was content to adopt, An Over-Mighty Court?, conveys to me the notion of a powerful, and almost omnipotent institution, different in kind from a mere court.

To what extent, I ask myself, do the High Court and its contemporary judgments conform with the constitutional role that the Founders visualised for the Court? If there is little conformity, the question must be asked whether this is a good or a bad thing, indeed perhaps whether it is even a relevant thing today.

It is presently futile to ask the question whether the departures from the vision that the Founders had for the Court are lawful, for that question has, conclusively, and perhaps for those who live in the real world, not surprisingly been answered affirmatively by the High Court in a case in 1991, Smith Kline and French Laboratories (Aust.) Ltd. v The Commonwealth .

In order to answer the questions that I have posed for myself, I propose first to examine what truly was the vision that the Founders had for the Court. Secondly, I intend to make reference to some of the changes which have been made by both legislative and judicial means, not only to the substantive role, but also to the procedural processes of the Court. Thirdly, I foreshadow a discussion about the consequences that have flowed and will flow from these changes. Next, I will compare some aspects of the workings and decisions of the Court with the United States and the United Kingdom. And finally, I will state some of my own opinions about these matters and answer, I hope, the questions that I have asked.

It cannot be doubted that the constitutional establishment of the Court grew out of both nationalistic aspirations for a "home ground" and a sense of dissatisfaction with the Privy Council as a final Court of Appeal, particularly for constitutional matters. In the first session of the Convention debates at Sydney in 1891, Edmund Barton urged the abolition of the Privy Council as a final Court of Appeal for Australia.

"It was well pointed out by the mover of the resolutions that the endeavour to get rid of the jurisdiction of the Privy Council for the Dominion of Canada was a fruitless one, because the Imperial Government refused to assent to such a transfer of power. Whether they would assent to such a transfer of power now seems very doubtful. By precedent they would not; but I do hope that the mere fact that the action of the Imperial Government has in a previous case been against the granting of any such power will not deter the framers of this Constitution from inserting provisions which will claim the power. It may be refused and, if it is refused, the refusal may be provocative of more or less dissatisfaction; but that it is a power to ask for, and a power which will be beneficial when gained, I have not the remotest doubt. Of course there may be exceptions, as the hon. member, Mr Deakin, has so well pointed out, in cases where imperial interests are concerned, or in cases – but I am more doubtful as regards following his argument in this part of it – in cases where the stability and uniformity of interpretation in matters of common law may be endangered by not resorting to the Privy Council. In the first case there may be an exception, but with regard to all other cases, I trust that this Convention, and the Parliaments to whom its conclusions are to be presented, will use their utmost efforts to secure

the abolition of the jurisdiction of the Privy Council and the transfer of supreme authority to the colonial judiciary, which I am sure will be beneficial to the whole of the colonies. I say this without attempting to derogate from the authority of the Privy Council, but those who have watched the course of its decisions are aware that that tribunal is not always constituted in its best aspect; that there are occasions when that board – because it is a board – is presided over by judges who, whether as regards their past judicial career or, at any rate in some cases, as regards their existing capacity, would not be one whit superior, but – I almost tremble to say it – are not equal to the class of judges to be found in this continent to constitute a federal supreme court."

The same speaker, at Adelaide in 1897, reiterated those sentiments. He there spoke of the savings to litigants "from being dragged thousands and thousands of miles to a distant tribunal."

Whatever else may have been in doubt, the Founders when they discussed the jurisdiction of the Court that they were shaping, contemplated a Court with an extensive dual role which would be fully exercised. The first of these roles was clear enough, as the interpreter of the Constitution, the arbiter of constitutional disputes between the States and between a State or States and the Commonwealth, and secondly, as a final Court of Appeal that would be accessible to all litigants in a broad range of cases, subject only to a limited number of exceptions to be prescribed by the Parliament.

Once again, I turn to a speech of Edmund Barton, this time in Melbourne in 1898. Then he said this, in moving that the words in Section 74 (as it then was) of the Constitution, "with such exceptions and subject to such regulations" be omitted and the words, "subject to such conditions" be substituted.

"Honourable members will see that this provision gives the High Court jurisdiction to hear and determine appeals, `with such exceptions and subject to such regulations as the Parliament may from time to time prescribe.' The difficulty about the clause as it stands is this: that it allows the Parliament to legislate in reference to the jurisdiction of the High Court in regard to appeals in such a way that, little by little, the High Court may become the mere shadow of a Court of Appeal. That position arises because we have placed in a parenthetical part of the clause words which appear to be too strong. For these words I therefore propose to substitute the words mentioned in the amendment. The Parliament will still be able to prescribe regulations for the hearing of these appeals, but it will be unable to take away the appellate power of the court."

But more illuminating I think was an answer by Mr Barton during those debates to a question by Mr Higgins, whether the amendment would mean that a man would be able to appeal even in a case concerning ten shillings. Mr Barton replied that the exclusions ought relate only to minor or trumpery cases. Later he made this statement:

"..... We are afraid that if we say `with such exceptions and subject to such regulations', it will be in the power of Parliament by successive regulations to `cut down' the right of appeal." (My emphasis.)

What emerged out of the debates on this issue was Chapter III of the Constitution, The Judicature. I have never found any indication in the Chapter that it would be for the High Court exclusively to determine for itself what its jurisdiction should be. (The only exception is Section 74, which empowered the Court to restrict appeals from it on inter se questions to the Privy Council.)

Section 71 contemplates the possibility of Federal Courts other than the High Court, but significantly it is the jurisdiction only of the latter that is defined.

Section 73 is worth repeating here:

"73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences -

(i) Of any Justice or Justices exercising the original jurisdiction of the High Court:
(ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
(iii) Of the Inter-State Commission, but as to questions of law only:
and the judgment of the High Court in all such cases shall
be final and conclusive.
But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.
Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."
In defining the jurisdiction of the Court it is highly unlikely that the Founders would have imagined that the Court would in its unfettered discretion ever be permitted to pick and choose the cases that it might put aside or hear. These debates to which I have referred assumed that there would be appeals as of right, and the language of Section 73 plainly embraces the notion that such rights of appeal would be at least as ample as those then available to the Privy Council.
Nor could the Founders have been unaware of the desirability of ensuring that the jurisdiction of such a final powerful Court be carefully defined and be exercised as a matter of strict obligation. Some may have been aware, for example, of the seriousness with which the United States Supreme Court had much earlier viewed its obligations to exercise its jurisdiction, so much so that Marshall CJ in delivering an opinion of that Court in 1821 in Cohens v Virginia, had said this:
"It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."
It is easy to see how, with the passage of time, it may become prudent for Parliament to prescribe different or new exceptions as to the cases that the Court should hear. It is an altogether different thing to say that all rights of appeal are abolished, and that only certain exceptional cases to be determined by the Court itself will be heard by the Court. But that is precisely what Section 35A of the Judiciary Act introduced in 1984 does in fact provide.
What may be regarded as a case sufficiently exceptional to attract the interest, and therefore the jurisdiction of the Court is stated in the broadest, most imprecise, indeed woolly terms imaginable:
"35A In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to -

(a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law -
(i) that is of public importance, whether because of its general application or otherwise; or
(ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
(b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates."

By the time of the passage of this legislation, the exercise of a similar discretionary jurisdiction had already become a matter of some controversy in the United States. In an article in the February part of the 1985 volume of the American Bar Journal, David O Stewart wrote:

"As each term of the Supreme Court begins, many lawyers look over the Court's schedule of arguments and ask, `Why did they grant cert to so many dogs?' That sometimes prompts a follow-up question. Why did the justices refuse to hear other cases of at least equal importance?

"Because the Supreme Court largely controls how many and what kinds of cases it hears, its certiorari decisions are undeniably significant.

"As Hugo Black Jr wrote about his father, who served as a justice for 34 years, `My father recognised the process of selecting cases as the heart of a Justice's job, for he believed that whoever has the power to decide what cases will be heard has the power of the Court.'"

Not unexpectedly, a number of practitioners shared the view that Section 35A of the Judiciary Act was unconstitutional. In a paper which I gave to the Australian Bar Conference at Alice Springs in 1986, I questioned the legality of the Section. I said then:

"It seems to me that it might be argued that Section 35A of the Judiciary Act is in fact an exception prescribed by the Parliament and preventing the High Court from hearing and determining appeals from the Supreme Courts of the States in matters in respect of which an appeal did lie to the Privy Council at the establishment of the Commonwealth. Indeed, I would suggest that a provision of the kind which appears in Section 35A of the Judiciary Act and other sections of the Act bearing upon appeals to the High Court do not even amount to exceptions: the overall scheme is to prohibit all appeals unless the Court, in its virtually unfettered discretion, considers that such appeals may be brought.

"There is a further question, and that is, whether, in any event, to confer upon the High Court such a virtually unfettered power, is to delegate to the Court something that the Parliament is not empowered to delegate, that is the prescription of the relevant exceptions. I would argue that the words of Gibbs J. as he then was, in Racecourse Co-Operative Sugar Association Limited and Others v Attorney-General of the State of Queensland (1979) 142 CLR 460 at Page 481, might appropriately be applied to a construction of Section 73 of the Constitution."

These and other formidable arguments were marshalled and put by a former Solicitor-General, Mr Ellicott QC, and summarily rejected by the High Court in Smith Kline & French Laboratories (Australia) Ltd and Others v The Commonwealth of Australia and Others [supra] which thought so little of them that none of the eight Counsel representing the respondents was even called upon to present arguments to the Court.

Another consequence has been that there has been introduced into the legal system an even greater element of uncertainty than had previously existed. "Will this case or that case be granted special leave, and if so why?" For example, in Brisbane, in two special leave sittings of the High Court before last, one only of thirteen or so applications was deemed worthy of a grant of special leave by the Court.

I am no mathematician, but the statistical validity of such a result seems to me to be improbable.

Practically any point of law may attract the curiosity of one out of three judges – the "special leave Court" usually being so constituted. However, for my own part I would not have thought that the interesting point decided, for example, in Baltic Shipping Co. v Dillon, a case relevantly involving about $6,500, more interesting or more important than many others which have been refused special leave by the Court.

The Court has adopted a practice of giving reasons for the refusal of special leave, but the reasons are usually as inscrutable as the statutory discretionary grounds which may attract special leave. Formulae, they are little more than those, in broad terms, are often pronounced:

"The decision of the Court below is not attended with sufficient doubt to warrant the grant of special leave."

or:

"The Court does not regard this case as an appropriate vehicle for a determination of the point of law said by the applicant to arise."

or:

"The Court would prefer to have the advantage of the decision of an intermediate Court before deciding whether to grant special leave."

More depressing still for the litigant is the addendum that the Court sometimes attaches to its reasons, namely:

"The refusal of a grant of special leave in this case does not mean that the Court is affirming the correctness of the decision of the Court below."

There have been other legislative provisions. Tribunals not constituted by judges exercising judicial power have been amenable to prerogative writs issued pursuant to the Constitution, by the High Court. This, many would think a highly important jurisdiction, and one of significance to the country as a whole. However, by virtue of the Industrial Relations Reform Act 1993, an important aspect of this jurisdiction has now effectively been conferred upon the recently created Industrial Relations Court of Australia. Section 412 of that Act prescribes the original jurisdiction of the Industrial Relations Court, and includes in Subsection 2 those matters remitted to it by the High Court pursuant to Section 44 of the Judiciary Act 1903, "in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth holding office under this act or the Coal Industry Act 1946"; which, for the specific purposes of the Industrial Relations sector, is a mirroring of the constitutional jurisdiction of the High Court. Of most importance however is the reality stemming from the High Court direction on this issue, which makes clear that matters without "constitutional significance" will, in practice, be remitted directly to the Industrial Relations Court. This is an interesting concept, because the jurisdiction derives wholly from the Constitution itself. The Constitution has spoken, and in so doing expressly states these matters to be constitutional matters.

It may be hoped that the new Court will examine very carefully, in these times, when Courts claim to look to the substance rather than form, whether purportedly interstate industrial disputes triggered by the formal delivery of fabulously unreal claims are truly of an interstate kind. Perhaps the new Court will treat the artificial doctrine of "an interstate paper dispute", long accepted by the High Court, as exactly what it usually is, a dispute that is artificial, and on paper only.

Such a formal, paper, dispute might even come to attract the same sort of language as Deane J used to criticise previous Section 92 decisions in Street v Queensland Bar Association, as "a triumph of form over substance."

In the United States, as I have said, by the time of the enactment of Section 35A of the Judiciary Act, the way in which the United States Supreme Court granted or withheld the United States

equivalent of special leave (certiorari) had become a source of considerable dissatisfaction. There, commentators had criticised the idiosyncratic tendencies of various judges in exercising the jurisdiction. Stories abounded, unable to be confirmed, of judges acting the role of advocates to urge the hearing of cases raising issues which, in truth, particular judges had prejudged, and upon which they wished the settlement or resolution of the law in terms of that prejudgment. Although the popular book The Brethren, which claimed to reveal some of those mysteries, has been heavily criticised, there is much of it that has the ring of truth.

We are all familiar with the Senatorial process of approval of justices of that Court, in the course of which they are invited to take their stand on issues of the day such as abortion, the death penalty, free speech and the nature of conflicts, as to whether they should be regarded as wars or not. At least one commentator has written that Reagan's nominee Bork was rejected by the United States Senate precisely because he held, and was interrogated on, his strong views on constitutional and related issues. Indeed, in the last fortnight there, the Senate Judiciary Committee has been holding confirmation hearings in respect of President Clinton's nominee Judge Bryer. It was interesting to note the wide ranging nature of the "friendly" – by comparison with that endured by Bork – interrogation to which he was subjected, including his view of the Korean War, "police action", or "war". (cf. Sir John Latham CJ in the Communist Party Case, infra.)

Do we want that, or would we prefer that judges decide those sorts of burning issues after hearing, and on, the legal arguments? The current Chief Justice has certainly no affection for such a system.

When the changes to the Judiciary Act were first mooted, some predicted that they would become a rod for the Court's own back: that the impossibility of stating clear and universal criteria would introduce a great deal of uncertainty into the legal system and would encourage, rather than deter, the making of applications, with the result that instead of hearing appeals, the work of the Court would consist in large part of dealing with applications for special leave. There were also some who thought that this inevitable consequence would ultimately push the High Court towards the cessation of oral hearings and their replacement with written applications, a process long in operation in the United States Supreme Court, but even there a source of debate and perplexed criticism.

It was not surprising therefore to hear the Honourable Sir Anthony Mason, the Chief Justice of the High Court, say at the last legal convention, in a speech reproduced in the Australian Law Journal, that applications for special leave in the current year would be likely to exceed by a significant number 250. His Honour questioned the reasons for this increase, but I believe that these were identified, in the ways in which I have suggested, at the time of the changes to the Judiciary Act. Time limits upon these applications will be imposed, and his Honour foreshadowed at the Convention the replacement of any form of oral hearing by written applications, courses now adopted in England and Canada, as well as the United States. It is to be hoped that such written applications and the determination of them, not in an open forum, will not engender the same concern and criticism as in the United States, where the roles of the Justices' clerks and researchers are ambiguous and concealed.

There is another passage from an earlier interview with the Chief Justice that I find a little worrying (if his Honour is correctly reported), and which I set out below:

"So the application which has the best prospect of success is one distinctly raising an important point of principle, which is strongly arguable and is a suitable vehicle for the ventilation of that question; in other words, it's not encumbered with issues of fact or other complications."

This, it seems to me with respect, goes too far. Assume two cases, each raising an equally important point of law. In one, the facts are simple. In the other, there are issues of fact or "other

complications", whatever they may be. I cannot accept with equanimity that the former will be granted, and the latter denied, a hearing by the Court.

No informed person, of course, doubts for one moment the integrity and conscientious application by the Court to the performance of its duties, including the disposition of special leave applications. It is the necessity to make them, and the great uncertainty attached to their fate, that are the matters of complaint.

Judges are now coming out of the "judicial closet", speaking openly about their appreciation of their roles. The Chief Justice of Australia has given interviews, and has expressed an intention to make the members of the Court personally somewhat more accessible.

The theme that the role of the Court will henceforth be an active one was again stated by the Chief Justice in an article entitled Changing the Law in a Changing Society, published in the 67th Volume of The Australian Law Journal. Among other things his Honour then said this about statutory interpretation:

"No one would suggest nowadays that statutory interpretation is merely an exercise in ascertaining the literal meaning of words. Statutory interpretation calls for reference not only to the context, scope and purpose of the statute but also to antecedent history and policy as well as community values."

This forthright acknowledgment that the Court regards itself as free, indeed obliged to look to and adopt its own view of contemporary community perceptions and values assumes of course that the Court is uniquely well placed to do this – a proposition which some might challenge – and also stands in stark contrast with, for example, the generally accepted and in my view valid criticism that was made of an earlier Chief Justice, Sir John Latham, when, in stating his dissenting opinion in the Communist Party Case, he appealed to his personal understanding of contemporary geopolitics. His Honour wrote this:

"Actual fighting in the Second World War ended in 1945, but only few peace treaties have been made. The Court may, I think, allow itself to be sufficiently informed of affairs to be aware that any peace which now exists is uneasy and is considered by many informed people to be very precarious, and that many of the nations of the world (whether rightly or wrongly) are highly apprehensive. To say that the present condition of the world is one of `peace' may not unfairly be described as unreal application of what has become an outmoded category. The phrases now used are `incidents', `affairs', `police action', `cold war'."

The criticism, it must be conceded, was not all one way. In Essays on the Australian Constitution, Derham pointed out that the dissent of Latham CJ could be grounded upon the inferior position of the Court so far as awareness of the pertinent facts was concerned. The author said this:

"The potentially acute problem which is raised by the difference between the majority judgments and the judgment of Latham CJ is, in a situation short of actual war, how the Court can estimate the urgency of any emergency, particularly if it is confined to matters of which it can take judicial notice. The Government may have information which cannot be disclosed and the validity of legislative action taken upon that information would then have to be determined on the footing that there was no situation such as the Government's information disclosed. For instance, if the Government in a time of ostensible peace were to base its action on reliable but `top secret' information that some other power planned to start war at some particular future time, the application of the principles adopted by the High Court in the Communist Party Case would, in the case of a challenge to the validity of the Government's measures, be likely to result in the invalidity of measures which the situation would unquestionably demand."

The passage is instructive in that it points up the dilemma in which any Court choosing judicial activism will place itself. In reaching decisions based upon the Court's perception of the

changing world rather than the proved facts and the existing law, its members can never be sure that their perception is either accurate or complete. Ironically then, and in a curious way in reaching a conclusion much, and I believe rightly, criticised in the Communist Party Case, Latham CJ affirmed well the distinction between the roles of the executive and legislature, and the Courts.

In a speech recently given by the Chief Justice, his Honour spoke again of the activist role of the Court by reference to the expanding role of the judge:

"Just as the judge is becoming more of a manager of the litigation, so the judge is also likely to become more of a constructive interpreter of legislation. That will happen as the so-called `plain English' reforms in legislative drafting find their way into the statute book. The movement away from detailed regulation, which reached its apogee in the Income Tax Assessment Act and the Corporations Law, to the broader statements of principle characteristic of United States legislation and, to a lesser extent, of United Kingdom legislation, will leave the courts with more to do. The judges will be called upon to spell out the interstices of the legislative provisions. In doing so, they must resolve questions of interpretation by reference to the policies and purposes which are reflected in the legislation.

"What I have just said may not be welcome news to those who believe that the Courts do no more than apply precedents and look up dictionaries to ascertain what the words used in a statute mean. No doubt to those who believe in fairy tales that is a comforting belief. But it is a belief that is contradicted by the long history of the common law. That history is one of judicial law-making which shows no signs of unaccountably coming to an end. However, a distinction must be made between appellate judges and primary or trial judges who, generally speaking, are confined to applying settled principles of law to the facts as they are found.

"Changes in the principles of substantive law attract criticism in varying degrees. But, interpretations of the Constitution apart, although it is always open to the legislature to repeal or amend the common law as the courts declare it or the interpretation which the courts give to a statute, legislative overruling or amendment of a judicial ruling is a relatively rare occurrence.

"Sometimes judicial initiative is inevitable. That was the case when the High Court decided two years ago that the common law did not entitle a husband to sexual intercourse with his wife against her will despite old authorities which suggested otherwise. It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature. There is a growing expectation that courts will apply rules that are just, equitable and soundly based except in so far as the courts are constrained by statute to act otherwise. Nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes."

Whilst it is unlikely that even the most conservative would complain about a Court that condemned the use of force against an unwilling wife notwithstanding judicial precedent to the contrary, it is not possible to be confident that the disposition to change the law in other cases will always be so socially and broadly acceptable.

It is difficult to avoid the impression that this is a Court which is anxious to make its mark as an innovator. What I have quoted from the current Chief Justice's own words conveys this. This anxiety can also however be readily discerned from some recent decisions of the Court itself which display, among other things, a disconcerting tendency towards finding an implied "Bill of Rights" in the Constitution.

There can be no doubt that, being well aware of those express provisions in the First Amendment to the United States Constitution, which had been in force for more than a century before the

adoption of the Australian Constitution, the draftsmen of the latter must have made a definite decision against a Bill of Rights for this country.

What, it may fairly be asked, has changed? Even accepting, for present purposes, that the High Court might be entitled to "mould the law" to make it accord with the Court's awareness of the existing extra-curial world, it is difficult to find circumstances that have arisen in 1994 that justify a de facto, indeed de jure (if the Court has its way) Bill of Rights which were not either present or foreseen in 1900.

Whilst such cases as the Commonwealth v Tasmania and Mabo v Queensland [No.2] have attracted wide interest, and both approbation and criticism in the legal and lay worlds, the implications of two other cases have not been fully appreciated. These, Nationwide News Pty Ltd v Wills and Australian Capital Television Pty Ltd v Commonwealth, are cases in which, unnecessarily for their decisions in my view, the Court held that there existed in Australia an implied constitutional freedom of speech. In the former the Court had to decide whether a Section of the Industrial Relations Act which defined contempt of the Commission in very wide terms was valid. The Court held that, because of the excessive nature of the protection sought to be conferred upon the Commission, the provision was not a law reasonably incidental to the industrial power bestowed by placitum 51 (xxxx) of the Constitution. That, I would submit, would have been sufficient to dispose of the case.

But the Chief Justice referred to the materiality of the consideration whether the adverse consequences [of the legislation] resulted in any infringement of fundamental values protected by the common law such as freedom of speech. After some other references to cases in Australia and the United Kingdom, his Honour quoted a passage from a United States case extolling the virtues of free speech.

Free speech has so often been used as an excuse for the sensational, the uninformed, and the prejudiced. In the United States, the Founders there deemed it necessary to give it statutory, indeed entrenched constitutional recognition. The common law has never, so far as I am aware, accorded absolute leave to free speech. It has always been hedged around by statutory and common law constraints designed to ensure that that freedom does not invade others, such as a right to live as one sees fit in private, or a right to resist malicious or unfair criticism.

I fear that an enlarged "constitutional" right of freedom of speech has the potential simply to produce an oppressive, even more powerful media, unlikely to lead to the sort of better informed society that the High Court may be contemplating.

The concept which was conceived in Wills was delivered in Australian Capital Television Pty Ltd [supra]. This was one of the cases which angered the Federal Parliament, because the High Court held that so much of the Broadcasting Act as restricted or prohibited political advertising during periods before elections was invalid: the provisions severely impaired the freedom of debate, of speech about political affairs, a freedom embodied in a constitutional implication to that effect. Once again, the same result in the case may have been reached on another ground, but the Court was seemingly determined to give voice to the recently discovered constitutional implication, which had apparently been either overlooked or not required to be invoked in the last ninety years.

Objectively viewed, the provisions struck down in the latter case are not I think unreasonable ones. But if they were, they seem hardly worthy of the attraction of this new doctrine. What will happen of course is that the High Court will now be plagued by a multitude of lobbies and causes seeking the protection of this new amorphous constitutional right. I say amorphous because in the end, just as the Court has "found" the right, it will now have to define and shape it in a variety of situations. What about tobacco and alcohol advertisements? What about flag burners?

Will the proscription of the advertising of these be invalidated or not? How far will the Court go? What the Court decides will be entirely judge–made law.

The prospect that, for example, the Court might, like the United States Supreme Court, invent a public figure defence I find very worrying. Contrary to the self-interested protestations of the media, the defamation laws in this country operate reasonably satisfactorily. The High Court has criticised juries for awarding large sums of money in damages, but this may be one of those instances in which the High Court's perception of community values is in fact at odds with the values and perceptions of the community. Certainly the assessment by a second jury in Carson's Case of damages of $1.3 million, after the High Court had held $600,000 to be excessive, would suggest this.

Whether the Court likes them or not, the verdicts must be regarded as some indication of the views of the community. The strident criticism of both verdicts came, predictably, principally from the media, who of course had an enormous self-interest in attacking them. Lewis, in his book in defence of New York Times v Sullivan and its progeny, accepted that the public holds a considerable distrust for the media:

"Television is even more of an oracle. Its pervasive reach has made national eminences of the network anchor men and women and the top reporters. To the public, that looks like power – and power sometimes exercised in an unaccountable, even arrogant way. The networks, big newspapers and magazines ask questions and demand answers, but when anyone wants to know about their business, they wrap themselves in the First Amendment and refuse to answer. So it often appears to the public."

Not only have the various product lobbies and advertisers been heartened by the decision in Wills and Capital Television [supra] but so too have the media. Naturally they are anxious to avail themselves of this new freedom. There are two cases now reserved in the High Court in which the media have sought to do so. It is to be hoped that the High Court does not adopt the doctrine expressed by the United States Supreme Court in Sullivan [supra], which has produced four remarkable, and I think deplorable consequences: that "public figures" may only recover damages for defamation if the defendant be guilty of actual malice; that if, whether intentionally or by accident, people have found themselves in some way in the public domain, they automatically become public figures; and, unlike other people, public figures are not to enjoy the presumption available to others, that damage as a result of defamation has been sustained; and, they are required to prove their cases according to a somewhat higher standard of proof than the orthodox civil standard. The unsatisfactory rationale for much of this is said to be that inaccuracy will both be commonplace and inevitable in a discussion of the conduct of public figures.

I am however not alone in holding the opinion that the discovery in the Constitution, some ninety years or so after its adoption, of this new right or freedom is another instance of injection into the law of an unnecessary uncertainty. Both the common and statutory laws of contempt and defamation in this country are the product of hundreds of years of careful development and reflection. I venture to suggest that there has never been in history since the invention of the printing press such a concentration of power and influence in the hands of so few of the purveyors of the news. I respectfully suggest that it is naive in those circumstances to do anything that might have the effect of making this fourth estate less accountable. Moreover, it will take decades of litigation (as Sullivan's Case in the United States has shown) to draw, or expand the perimeter of this right. One article I read in the course of this paper stated the extraordinary statistic that 71 per cent of the decisions of juries in "actual malice cases" are overturned by appellate courts in the United States. If that does not demonstrate a different community perception from that of the Courts, or perhaps that the Courts have fashioned a doctrine not readily capable of application by juries, it is hard to understand what other

explanation there might be. Indeed, some might even suggest that, if anything, the law both statutory and otherwise, of qualified privilege (except perhaps for New South Wales where, to coin a phrase, not unreasonably the statute requires a defaming defendant to act reasonably) should perhaps be re- examined to impose some discipline upon a rampant press and electronic media.

I will mention at this stage another case recently decided by the High Court, Burnie Port Authority v General Jones Pty Ltd. In that case five of the justices abolished the rule in Rylands v Fletcher, which as you know stated the law regarding damage caused as a result of the conduct of dangerous activities or the accumulation of dangerous substances on land. There is of course much to be said for the view of the majority that the principle or rule should be abolished, as events of the kind covered by the rule may adequately be dealt with within the existing framework of the law of negligence. But the dissenting views of Brennan and McHugh JJ sound an important caution to which the majority were not attracted. Brennan J expressed concern that to depart from the rule would be to reduce the duty imposed on occupiers of land and correspondingly to diminish the security that the rule conferred on neighbours. McHugh J held that to depart now would be a far reaching step, going even beyond the process of development of the common law by the Court: it is a fixed rule of law, his Honour said, applied for more than a hundred years. Its abolition now could well abolish existing and potential rights.

In Capital Duplicators Pty Ltd and Another v Australian Capital Territory and Another (No 2), the High Court decided not to overrule previous decisions of the Court holding franchise charges on alcohol, tobacco and petrol imposed by the States to be valid. This was of course a matter of great relief to the States, and perhaps a rare victory for them. However, the particular interest in the decision lies in the judicial conservatism of the majority's pronouncement in these terms:

"In refusing to reconsider the franchise decisions relating to liquor and tobacco, the Court has recognised the fact that the States (and the Territories) have relied upon the decisions in imposing licence fees upon vendors of liquor and tobacco in order to finance the operations of government. Financial arrangements of great importance to the governments of the States have been made for a long time on the faith of these decisions. If the decisions were to be overruled, the States and the Territories would be confronted with claims by the vendors of liquor and tobacco for the recoupment of licence fees already paid. That would certainly be the case if the Court were to hold that such licence fees could not properly be characterised as no more than the imposition of a licence fee for the privilege of engaging in the relevant activity. Hence, considerations of certainty and the ability of legislatures and governments to make arrangements on the faith of the Court's interpretation of the Constitution are formidable arguments against a reconsideration of Dennis Hotels and Dickenson's Arcade."

The States and others had of course made settled arrangements on the basis of a common understanding of the law of real property. The States exercised, they believed, domain over all land within their boundaries. The fact that the Court's decision in Mabo [supra] would cause the States (and others) to be confronted with claims for land still to be, and in some cases already, alienated, and that settled arrangements would be disturbed, did not inhibit the Court in the same way in reaching the decision that it did in Mabo.

In this paper I have looked at a variety of decisions of the Court in recent times, decisions in areas other than the Constitution. It is, I believe, appropriate to do so because it is sometimes overlooked that the final and awesome powers of the Court are frequently exercised in non–constitutional cases with a very real potential to affect a large number of the people in the community. Let me take as an example Carson's Case [supra]. The decision in that case you might think of little significance except to the parties to it. But such a decision has a real impact in two respects. It must encourage media defendants to be bolder and to take their chances in

defamation litigation. However, more subtly, the decision provides the media with, I think, a one– sided argument in favour of changes (for the benefit of the media) in the defamation laws. The statements of some members of the Court, taken with the statements in Wills and Capital Television [supra] will be exploited by the media to achieve their desired changes. So too the decisions may have a large impact on State powers. I venture to suggest that no one in the last decade of the last century, or indeed anyone other than the ingenious lawyers and their clients in the last mentioned two cases, ever imagined that the Constitution might be a source of power to strike down State defamation laws.

The High Court takes pride in the way in which many of its recent cases have been decided, and takes comfort in the fact that, as the Chief Justice put it [supra], although it is always open to the legislature to repeal or amend the Crown laws as the Courts declare it, legislation overruling an amendment of a judicial ruling is a relatively rare occurrence. With respect, this is not a satisfactory answer, because the judicial activism to which I have referred is equally a relatively recent occurrence. In practical and political terms it will never be an easy matter for any government of the day to repeal by legislation decisions of such an august body as the High Court. And of course no legislature has the power to legislate away the Holy Writ of the decisions of the Court on constitutional matters, whether they arise out of the express language of that document or some implication to be found in it.

Are we going down the American path of critical and searching examination of the views and philosophies of any potential candidate for appointment to the Court?

For myself I doubt very much whether these sorts of processes further the interests of justice. Instead of learning from gentle post-mortem vignettes of the judges, of their foibles such as, for example, an excessive sensitivity on the part of Griffith CJ to slights; or that Rich J would seek to avoid his obligations to travel with the Court because he had to steer his "boy", a final year law student, through his supplementary examination in conflict on laws; or that Starke J would urge Latham CJ to impose the burden of travel upon the "Sydney men" (Evatt and McTiernan JJ), we may well bring down upon ourselves the unedifying spectacle of blatant politicisation of the Court. One commentator in the United States describes what has happened in this way:

"Appointments to the U.S. Supreme Court (and to the lower federal courts as well) have become increasingly driven by ideology. There are many reasons for this. First, there is no doubt that the U.S. Supreme Court is a policy making court, and that the justices make law. Second, the Supreme Court increasingly deals with extremely sensitive issues which arouse many groups of Americans – abortion, minority and women's rights, personal political freedom and civil liberties, the death penalty and rights of criminal defendants, environmental protection, and many, many more. There are now many more interest groups – liberal and conservative alike – which have become alerted to the crucial role of the federal courts in making civil rights, civil liberties, and other policies.

"Third, and perhaps most important, the U.S. Supreme Court recently has undergone a major partisan and ideological shift that has generated intense political conflict. With the exception of the single term of President Jimmy Carter – who had no Supreme Court vacancies to fill – conservative Republican Presidents have been elected since 1968, and President Richard Nixon, but especially Presidents Ronald Reagan and George Bush, have appointed new conservatives to replace retiring liberals."

One modern casualty of the United States system has written a book about the process which defeated his appointment. The author, Robert Bork there defined "judicial politics" as "the Court's assertion of its own values to declare legislation unconstitutional when the Constitution has not spoken."

We do not, I think, want a situation in the future about which people may legitimately make the same claims of the High Court, no matter how attractive, at the time, a piece of judicial activism may appear.

In addition to saying something about the final appellate system here, and in the United States, I undertook to say something about that in the United Kingdom. There has in recent times been complaint within all branches of the profession, judicial, academic, and practitioners on both sides, of the multiplicity of reasons for judgment in some cases. It has been contended that the Court should strive for unanimity more, and that two opinions only, a majority and a dissenting one, should generally be given. The response is often made that each Justice has a constitutional obligation to express his view of a case and to decide it according to his legal convictions. Excessive zeal and industry can produce disadvantage; and I think they have, in that they have led the High Court to a proliferation of reasons, producing difficulty in ascertaining a clear ratio in some cases.

It is interesting that, in the United Kingdom, notwithstanding that the House of Lords has not the same rigid structure as the High Court, because it may be constituted not only from the Law Lords in Ordinary, but also from the Lord Chancellor and other members of the House with substantial legal experience, there is a greater degree of uniformity and caution in the reasoning of that Court. In answer to suggestions that the Court should perhaps be enlarged in order to hear more appeals, and that in any event fewer lengthy reasons should be written, apologists for the Court answer by saying that separate and extensive reasons reaching the same conclusion are often necessary, and that an increase in the numbers of the High Court so that it might sit in separate divisions to hear more appeals, would create uncertainty and intellectual division in the Court. It is a matter for the reader to assess the validity of these propositions, particularly the latter, in light of the multiplicity and length of reasons for decisions published by the Court.

It seems a long time now since the Chief Justice was quoted as saying on his appointment to that office that the Constitution was framed with a close eye to the doctrine of parliamentary supremacy, and that the High Court did not have to contend with the litigation created by a constitutionally entrenched Bill of Rights that came before the United States Supreme Court.

What if anything has changed since 1987 when the Chief Justice said those words?

I will now bring together some of the disparate threads that have run through this paper. There is some basis, I believe, for describing today the High Court as a "Mighty High Court". Some of the decisions to which I have referred lend some support to this conclusion. The Chief Justice, Sir Anthony Mason's own words, in describing the role of the Court in enforcing and indeed finding fundamental new rights, in a sense would place the Court above Parliament unless and until the latter acts. But of course it is only the Court who can act decisively in constitutional matters.

The Court is a mighty court in the sense that it sets its own agenda. If war is too important to be left to the generals, should the definition of a Court's jurisdiction be left effectively exclusively to the Court? I would have thought not.

If the Court is not yet an "Over Mighty Court", and if progression to that position is, as I think it to be, undesirable, is it too late to ring the appropriate changes to prevent that result? One measure that I would introduce is the restoration, as the Founders envisaged, of rights of appeal. After all, the Court no longer exercises any diversity, or, henceforth, industrial, or other original jurisdiction. It no longer undertakes the slow and burdensome journeys of the past. Special leave should be still available, but only rarely granted. The Court would thereby be enabled, particularly if there be a willingness to co-operate in more single decisions and sets of reasons, to hear more appeals instead of sorting through 200 or so special leave applications with which it has been pressed in each of the years since 1987. One might well question the relative costs and

benefits of 38 appeals heard to 232 applications for special leave (1988) or 39 appeals to 226 such applications (1991). The restoration of those rights of appeal would probably obviate the need for hearings on the papers of special leave applications, as foreshadowed by the Chief Justice, because the number of these would be much reduced. It has been suggested that there are problems in defining the criterion for rights of appeal. I do not accept this. There is no perfect criterion, but the financial one was satisfactory for decades and is the jurisdictional criterion for very many Courts in Australia anyway. It is not hard to define other criteria such as, for example, in criminal cases, ones attracting certain severe penalties. It would always be open for the Court to take hold of other important or exceptional cases not meeting the criteria, as it did for more than seventy years. By these means the Parliament and not the Court will set the Court's agenda.
Only Brennan and McHugh JJ seem to have given close attention (in Burnie Port Authority Ltd, supra) to the consequences of the fiction, that, because courts only declare and not make the law, a new and radical decision has the capacity to affect, and will affect, vested rights retrospectively. At least legislators almost always formulate appropriate transitional provisions.
The Courts will also avoid much of the controversy and criticism to which the United States Supreme Court has been subjected in relation to its selection of cases. Moreover any suspicion, however unjustified, that the intramural selection of cases might in truth be the selection of the associates and researchers would be dispelled. Anything involving clear criteria would, in my view, be better than the lottery which I, and I know others, at the Bar believe to be a not inapt description of the present system of grants of special leave.
It is probably too late for a complete retreat from judicial activism, although there are cycles in most forms of human endeavour. But it is not too late for Parliament to regain some of its authority in the ways that I have suggested. I am sceptical about whether this will occur. My theory is that governments, indeed most politicians of all colours, have consistently underestimated the power and importance in all senses, legally, socially, and now, critically, politically, of the High Court. The people, the Parliament, I would somewhat optimistically propose, ought to regain power by legislating for the Court's jurisdiction in express terms.
A Court that reserves the right to pick and choose upon wholly unpredictable bases those settled arrangements which it would, and others that it would not disturb, to treat some matters as acceptable matters of form and reject others, to define its own jurisdiction exclusively, to intervene because in its assessment Parliament should but has failed to do so, and a Court that says it knows best how the community perceives issues is, on any view, a body of enormous, indeed unparalleled power in society.
Endnotes: