ADDRESS

BAR ASSOCIATION OF QUEENSLAND ANNUAL CONFERENCE

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PERSPECTIVES ON RETIREMENT FROM THE BENCH

(The Hon Justice John Dowsett AM)

My topic today is "Perspectives on Retirement from the Bench". It is tempting to treat the topic as an invitation to regale you with war stories, those which demonstrate one's own great successes, and perhaps one's failures, or more likely, demonstrate the foibles of others, named or unnamed. In the first category, I might tell you about the occasion on which I was appearing for a man accused of unlawful carnal knowledge of a girl under the statutory age. It was in Maryborough. I was cross-examining the girl's mother about a lengthy delay in complaining about the alleged offence. In those days, nobody told us that it was a bad idea to ask a question to which one did not know the answer. The mother showed great reluctance about answering questions concerning the reasons for the delay. However under sustained and ill-advised pressure from me, she eventually blurted out "Because he did the same thing to me, a couple of weeks later, and against my will". Fortunately, in those days, it was generally thought that if counsel did something stupid, it might justify a new trial, and in fact, the Judge discharged the jury. Perhaps miraculously, I again appeared for him, and he was acquitted.

An example of the foibles of others might be the occasion on which a very senior, and highly respected judge was told that the application before him involved Gold Coast solicitors. He immediately threw the Supreme Court Rules over his shoulder, saying, "We won't be needing these." Out of fairness to

Gold Coast practitioners, I should point out that the incident occurred a long time ago, and even then it was unfair.

Notwithstanding that deviation, I do not propose to reminisce at large and/or to relate war stories which may or may not be true and may or may not be amusing. The word "perspective" suggests something a little more precise.

The *New Shorter Oxford Dictionary* defines the word to mean:

> *A mental view of the relative importance of the relationships or aspects of a subject or matter; a point of view, a way of regarding a matter*.

This definition suggests that the word "perspective" may either describe a view formed about something, or the position from which one considers something. I have assumed that the topic invites me to speak, from the perspective of a retiring judge, about other matters, presumably not about my views concerning retirement. Rather, I assume that I am to speak, from the perspective of a retiring judge, about the law and the profession.

At gatherings such as this, we frequently discuss the law as we see it, and apply it in practice. We look at particular factual situations concerning identified parties, choose the relevant law, and then apply it to the facts. Rarely do we, as practitioners or judges, stand back and look at the law as a whole, and the context in which it exists and operates. However, that exercise has become part of the work which we do in the Federal Court in connection with native title. In native title applications we must identify indigenous societies and their historical and current connections to land. In so doing, we consider the traditional laws and customs of the relevant society, in order to identify the members of that society and its connection to claimed areas of land. We

frequently refer to a passage to be found in the High Court's decision in *Yorta Yorta People v State of Victoria* (2002) 214 CLR 422. When I first read it, it amazed me. I thought then, and believe now, that it is one of the most profound statements ever made by the High Court about the law as an institution. At 445, Gleeson CJ, Gummow and Hayne JJ discussed the "inextricable link between a society and its laws and customs". At [49] their Honours said:

> *Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, "socially derivative and non-autonomous". As Professor Honoré has pointed out, it is axiomatic that "all laws are laws of a society or group". Or as was said earlier, in Paton's Jurisprudence, "law is but a result of all the forces that go to make society". Law and custom arise out of and, in important respects, go to define a particular society. In this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs.*

At [50] their Honours continued:

> *To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and*

> *observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.*

Prior to reading that passage, I had never appreciated that "inextricable link" – that without laws and customs there was no society, and that without society there could be no operative laws and customs. However, a short period of reflection demonstrates the undoubted truth of both propositions. To my mind that link means that the existence of laws and customs which are recognized and, I would interpolate, to a certain extent enforced, is fundamental to the existence of a society.

It is not necessary, in this company, that I explain the meaning of the word "law". But "custom" is a more difficult concept for us to understand or define. Some customs become embedded in law. Public holidays such as Christmas, Good Friday and Easter Day were, by custom, treated as holy days, but the law now recognizes such custom by legislating that they be holidays. Many of our customs involve social values derived from the Ten Commandments, some of which are recognized by the law, whilst some are not. In our largely secular society the Sabbath (or rather Sunday) is still treated by some as being holy, and by others as being a day upon which they should not have to work, unless, of course, they are well paid for doing so. The prohibitions upon adultery, stealing, lying and covetousness are still deeply embedded social values although they are not generally dealt with by the law. Recent weeks have demonstrated that ancient customs concerning adultery are not yet dead.

St Paul's identification of faith, hope and charity as cardinal qualities, and his emphasis upon charity continue to guide much of our moral and ethical thinking, although the religious significance of those qualities may have, for many, faded. In religious usage, the word "charity" is now frequently displaced

by the word “love”. We generally have faith that others will act in good faith, and, at least ideally, we, ourselves try so to act. Hope for a better world is a strong aspect of our civilization. In particular, we look to a better world for future generations. The word “charity” really describes the way in which we should treat others.

Western societies, like our indigenous societies have many customs which we may not always recognize as such, but they more or less guide our lives. Religion is not the only source of custom, but it is a major source, as is necessity. Our Australian indigenous societies were, until recently, hunter-gatherer societies. Some indigenous societies still demonstrate characteristics of such societies. Necessity has influenced the development of their laws and customs and, of course, they are generally unwritten. Such laws and customs may be different from those of western European societies and societies derived from them, but very often, a little imagination will demonstrate parallels, and like most, if not all other societies, some of their laws and customs were, and are based in religion. Religion is, after all, the product of attempts by societies to explain the universe, its origins, purpose and future.

I have perhaps spent too much time speaking about a society’s customs. However, my purpose is to encourage you to develop a “perspective” about the concept of society – about how we understand that word as it applies to our nation. It seems to me that the better we understand the concept of society, the better we will understand the law as it is, and as it should be. For example, a custom may become so universally recognized in a society, that there will be a question as to whether it should become part of the law. In some cases, such a step may be highly desirable. In others, it may be deeply divisive.

I want to say a little about change, both in society and in the law. I expect that most of you are thoroughly sick of being told about the rate and extent of change in modern society. However, I shall try to focus on particular changes, and the ways in which changes in society have been reflected in the law, and the practice of the law.

When I first studied modern history at Brisbane Grammar School, we were told that there was debate as to the point at which modern history commenced. Was it the fall of Constantinople in 1453, or the defeat of Napoleon at Waterloo in 1815? I opt for the latter, largely because it was shortly after the beginning of the Industrial Revolution in the 18th Century. That revolution led to the information and technology revolutions of which we are part.

Revolutions are about change, often violent change. There is general agreement that the world has never before changed as quickly, or as comprehensively as it has in our combined lifetimes. Such revolutions are the products of existing societies, but the forces which they generate inevitably change the societies themselves. If we accept that this state of affairs will continue into the foreseeable future, if rapid change is, as I would argue, the most significant characteristic of our society, then it follows that the law must accommodate and even facilitate such change. Indeed, I suggest that judges, practitioners and legal academics should see it as their duty to try to predict how the law should change to reflect current and future changes in society. Yet it is by no means uncommon for scientists, entrepreneurs, social scientists and others to complain that the law and lawyers are not keeping up with change and are, in fact, impeding it.

If we do not find a way in which the law can deal with change in a timely way, then the law may become irrelevant to the way in which technology progresses and business is done.

Before looking at changes in the law in my professional lifetime, I want to say a little about social change during a rather longer period. Of necessity, and as directed by the topic, I shall do so from my perspective. You may well disagree with my views, but you have asked for them. For the moment, it's all about me, or at least my perceptions.

Three great, world-shaping events of the 20th century were the First World War, the Depression and the Second World War. Those events, occurring over a period of only 31 years, and others, led to a post-1945 world in which the rights of individual men and women were much more important than they had previously been. Privileges associated with rank and wealth tended to disappear. Although it is dangerous to generalize, the people who inhabited this new world were, at least as I came to know them, disciplined, cautious, altruistic and, to a large extent, frugal, at least as compared to the following generations. These tendencies were, in my view, the product of the inevitable deprivation, dislocation and the need for discipline which are the hallmarks of war and economic disaster, and by the need to deal with such catastrophes as a society. That generation comprised the parents, and to some extent, the grandparents of my generation. There was, I think, in that generation, a determination that the world would be a better place for their children and grandchildren. This determination manifested itself in improved social welfare, improved educational opportunities and generally, greater and more widely distributed wealth. The real beneficiaries were the members of my generation. However, as an old friend of mine frequently says, today's favour is tomorrow's

duty, and so it has been with my generation and perhaps the generation and a half that have followed us. Let me explain, starting with education.

Menzies and Whitlam both had progressive views about education, especially tertiary education. Menzies introduced a comprehensive scholarship system. Whitlam took the matter further. Both were, I think, determined that those young people who had the qualities necessary to undertake the rigorous discipline of tertiary education should be assisted in doing so. The systems which they introduced went a long way in that direction. However, those who followed them have not really been true to their ideals. We now have a system in which graduates start their careers with quite large debts. Another example of the less generous attitudes of the post-war generations is retirement ages. Until about 15 years ago retirement ages were being brought forward, ostensibly to allow the enjoyment of longer retirements. Perhaps coincidentally, this allowed us baby boomers to succeed the preceding generation at an earlier point than would otherwise have been the case. Now we are pushing back retirement, at least partly because we want to stay at work, thus keeping young people from enjoying the opportunities that we had. The judiciary, of course, was just about the last group to have a retirement age imposed upon it, except in Queensland. It will probably be the last to see retirement ages abolished. My point is that an aspect of change has been a movement away from generational altruism. I have heard so many of my parents' generation say that their goal in life was to ensure that their children had better starts in life than they had enjoyed. It is not a sentiment heard regularly today. I am, of course, speaking of generational attitudes, not the way in which parents care for their own children.

I have previously referred to an enhanced focus on individual rights. That enhanced focus has been particularly evident and welcome in areas such as the status of women and indigenous peoples. In the 1950s, 1960s and perhaps later,

a female teacher in the State education system who married would be dismissed and possibly re-hired as a temporary employee. In that case she would not be paid over the December-January period, and this when the vast majority of primary school teachers were women. It is hard to imagine a greater change than that which has occurred in that respect. Similarly, at that time, it seems to me in retrospect, that there was an unexpressed expectation, on the part of non-indigenous Australians, that the future of our indigenous peoples was total assimilation into the European community. Again, nobody could imagine a greater change in attitudes in a relatively short time. Changes such as these have significantly affected the substance of the law and the way we apply it. An associated change has been the identification of multi-culturalism as a national goal.

The focus on individual rights was an inevitable consequence of the tragedy of the two World Wars. It was, to some extent, reflected in the democratic constitutions forced on the Axis powers, particularly Germany and Japan, after the Second World War. It also has been reflected in various international arrangements such as the Refugees Convention and other declarations as to human rights. I suspect, however, that the idealism which underlies these instruments is somewhat naïve. Such naivety, combined with the imprecise language traditionally used in international agreements, has, I fear, allowed exploitation of the products of good intentions for the benefit of special interest groups, both benevolent and otherwise.

For my generation a remarkable change has been the decline in the influence of organized religion, particularly the influence of the Christian churches, with consequential questioning, indeed challenging of social and moral norms which previously lay close to the roots of our society. The link between social norms and the law is vital. If the law does not reflect widely observed norms of

behaviour, then both the law and the norms will be discredited. If the religious bases of our social contract have gone, on what basis are we to amend existing social norms and develop new norms? In particular, how do we strike a balance between the majority view and the conscientious moral or religious views of individual citizens. Some very contentious issues reflect this problem. One is abortion. Another is the legalization of homosexual acts. A third is euthanasia. Same sex marriage falls into the same category. Some of these, and similar questions, have been at least partially resolved. However, there can be little doubt that there are still significant numbers in our society who do not accept such resolutions, usually because they are inconsistent with 2,000 years of Christian teaching, of Jewish teaching before that and, for that matter Islamic teaching.

There have been many other dramatic changes. Globalization as a concept has significantly affected the law and will continue to do so. To a great extent, it has been facilitated by ease of travel and by advances in communications technology. But the concept itself is much more than the product of those facilitating features. People are thinking differently about the world, the nation states, the cities, the countryside and themselves. Globalization is producing a demand for legal reform, but the necessary reform is unlikely to be successfully achieved by changes to the laws of nation states. Business is increasingly demanding a degree of predictability as to outcomes and enforceability, which demands can only be satisfied by an international approach to the law. Such an approach must, in turn, lead to globalization of the law, the profession and the way in which we resolve disputes.

I could say much more about these considerations, but I am sure that you are as aware of these trends as am I. Let me turn now to the way in which the law, the courts and the practice of the law have changed during my career.

The extent of the change in the profession was brought home to me recently in Melbourne. In the course of an immigration case, apparently competent junior counsel was making submissions as to how the relevant appellant, a native of Pakistan, would have understood a particular provision in the *Migration Act* and Regulations. I said something like "They speak of little else in the taverns of Karachi". I expected at least a polite "Of course Your Honour" and a snicker, but there was absolutely no response. When I tried to explain this old advocate's quip, I was taken seriously. Counsel said that he would certainly look it up. It reminded me of my early days at the Bar when classically trained judges would correct one's Latin pronunciation or reprimand barristers for wearing buckled shoes - a complete generational disconnect.

Returning to my topic, it is difficult to know where to start in discussing changes in the law. Perhaps I could start with the advent of the loose-leaf services with which we are now very familiar, and upon which we rely, whether in electronic form or hard copy. Lest you think that I am addressing a trivial matter, I should say that I am using the loose-leaf service as a metaphor. The first loose-leaf service, I think, was the CCH Tax Service. I first encountered it as a university student. The one copy in the law library was in great demand. Students found it very helpful because the relevant sections and references to the relevant cases could be found in the same place, a revolutionary idea at that stage. Further, the statutory text and the information concerning relevant cases were very much up to date, again revolutionary. The profession also appreciated this convenience. The loose-leaf combination of text and commentary, including cases, is now a feature of almost every aspect of the law. The only trouble is that I, for one, have found such services, in their current forms, almost impossible to use, particularly in a Courtroom setting. In hard copy, the volumes are too big to handle easily, and the sections in the Act are

separated by so many pages of commentary that the sections themselves are almost impossible to find. I have taken to having both the loose-leaf service and the pamphlet copy of the legislation in Court with me, rather detracting from the original purpose. It is a little easier online, but for those of us who are only semi-literate in online usage, not much easier.

All of this is an annoyance, but its importance lies in its cause. The CCH service started because the tax system had become increasingly complex, but it had not yet got out of control. Since then, however, especially at Commonwealth level, the volume of legislation in tax and other areas, the frequency of amendment and the voluminous regulations and other statutory instruments, have created a situation in which it is difficult for lawyers, let alone lay people to identify the law concerning a particular matter with any degree of certainty.

At a recent Judges' conference, a senior member of the New South Wales Bar, in speaking about statutory interpretation, said that he always started by ensuring that he had the correct version of the relevant statute as at the relevant date, having regard to the facts of the case. A number of my colleagues from the State Supreme Courts were a little taken aback by this advice, considering it to be too basic for our consideration. However, those of us on the Federal Court understood entirely. The difficulties posed by the undisciplined approach by the Commonwealth government to legislation has led to errors in judgments and the need for considerable efforts in order to avoid such errors. Whilst judges may, in theory, rely on counsel to provide references to the applicable law at a particular date, this does not always happen and, in many cases, it is the fault of the system, not the practitioners. The problem is not so bad at State level, but the position is getting worse.

This problem is, in part, the product of the need to draft laws which deal with an increasingly complex world. We cannot avoid a degree of complexity. However, there are other forces at work, in particular government attitudes, political and journalistic point-scoring and public reaction to those matters. Particularly in the area of taxation, Parliament enacts laws which apply in some situations, but not others, usually for good reasons. However, the legislation is then criticized because it does not have a wider application, and governments are too easily persuaded to depart from the reasoned approach which informed the drafting of the original legislation, for no good reason except misconceived or confected public pressure.

In my view, it is time that lawyers and judges asserted our position as the primary consumers of parliamentary drafting. It is absurd to pretend that legislation, especially Commonwealth legislation is directed towards lay people. Further, governments should accept that no legislation can be totally unambiguous, and that there will always be some transactions or events which might have been caught by legislation but were not. As lawyers, we should be insisting that Parliaments pass legislation that lawyers can readily understand. Perhaps it is not too late to expect that lay people's needs might also be taken into consideration.

In the end, I hold CCH responsible for all of this. If the Government Printer had to keep the profession up to date by speedy delivery of statutory consolidations, there would be a blowout in the relevant budget and an inevitable reaction. It is the easy access which the loose-leaf system originally provided which has led us to this parlous state. But the real problem lies in the lack of clarity in the statutes, not the way in which they are presented. That lack of clarity is the product of a belief that if one uses enough words, in enough different ways, it is

possible to forecast and deal with every possible attempt to escape the operation of the legislation. That belief is absurd.

I want to say something about education and training of the profession, both before and after admission. It is, I think, important to distinguish between education and training, although the distinction is not always easily identified. The distinction is between preparation for life, including life in the legal profession and training in the skills which are necessary for the performance of the tasks associated with practice. When I was a student, the university course lasted for 5 or 6 years, depending on whether one took the combined Arts/Law or later, Commerce/Law course or the straight Bachelor of Laws degree. For admission as a solicitor 2 years' service in articles was generally compulsory. Good articles prepared one well for practice at the Bar or as a solicitor. Barristers had only to report proceedings in 10 cases in order to satisfy the practical requirements for admission.

In the case of solicitors, articles have been abandoned in favour of so-called Practical Legal Training courses. With the amalgamation of the two branches of the profession, it became necessary that all intending practitioners undertake PLT. Although I have a connection to one of the bodies providing PLT, I have been aware of a certain dissatisfaction with the courses on offer in this area, both as to their content and methods, and their cost. There seems to be some support amongst the larger firms for a system rather like articles. Of course, the Bar also offers its own pre-admission training in the Bar Practice Course. In the past I have had some association with that course. I am glad to say that it seems to be rather more satisfactory from its students' point of view, than are the PLT courses.

I have also been involved over the years with both the Law Society and the Bar's CPD programmes. During my time in practice, there were no CPD requirements for barristers, and I think that the Law society was only starting to introduce CPD requirements.

This relatively gradual recognition of the need for training in professional skills is curious, particularly if one considers the long history of the medical profession's use of hospital residency and the specialist colleges. To some extent, the Bar's reticence seemed to be, in part, attributable to a belief that the right of audience should not be made unduly restrictive by providing high bars to admission. Of course, that is not an acceptable approach, from the consumer's point of view, at least to the extent that he or she expects quality advice and representation. Oddly enough, the opposition to higher hurdles has frequently come from the Australian Competition and Consumer Commission. It has, from time to time, preferred a lower bar to entry, to use an economist's term, rather than attempts to ensure the quality of the service provided. However, that problem seems not as acute as it once was.

Clearly, our society now demands more of all professionals than it once did. The days of the godlike lawyer or doctor are long gone. Further, it is much easier now to sue a professional person for professional negligence than was the case when I was in practice. I only had professional indemnity insurance for the last year or two of my time in practice. Societal pressure has compelled change in our education and training regimes, and in practice, but I fear that we have not yet gone as far as we must in that regard.

In my view, both the profession and the superior courts must become much more closely involved in the content of the university courses. One particular theme which the Judges have been advancing in recent times is recognition of

the importance of statutory construction in the areas of substantive law. Particularly at Commonwealth level, statutory construction is now much more important than the doctrine of precedent. The states are going the same way. A focus on statutory construction may tend to undermine fashionable boutique courses in relatively narrow, statute-based subjects such as mining law or town planning. Those areas are heavily dependent on statutes, and therefore on statutory construction.

It may also be that somebody must take serious responsibility for the objective assessment of the skills, personality and intellect of a potential practitioner, in order to determine whether he or she should be let loose on the public. We have come a long way in this regard, but we will have to go further. Ongoing monitoring of skills whilst in practice will also be necessary.

One major problem facing the Bar is the absence of high volume work which will provide both experience and income for new practitioners. I have told many of you of my experience in that regard. When I was at primary school, the State government distributed a quite comprehensive careers handbook. At that stage, aged 10 or 11, I was already interested in the Bar. Concerning practice at the Bar, this government publication said that generally, a new barrister could not make a living until he (not “or she” as I recall), had been about five years in practice and that, unless one had independent means, one should not consider the Bar as a profession. In those days, virtually nobody in Queensland had independent means. However, by the time I started in practice, the volume of work for new barristers was enormous. Unfortunately times have changed.

There are three other points that I want to make about the profession. The first is that like Winter in Game of Thrones, specialization is coming, and you will

have to be ready. I have always favoured general practice over specialization, but I have had to concede that the complexity of the law is now such that in many areas, if one is not practising there regularly, re-education is necessary every time one becomes involved with them. In Sydney and Melbourne, there is a high degree of specialization, in intellectual property, competition law, taxation, judicial review, admiralty, corporations and other areas, including native title. With national firms attracting so much of that work, it has become easy for them to keep it in one office or another, and that office is frequently in Sydney or Melbourne. If the Queensland Bar wants to do such work, it will have to demonstrate its capacity to do so. That will probably involve a system of national accreditation, a significant core of barristers in each specialist area, specialist organizations and active involvement in the development of specialist law.

Secondly, barristers must be proactive in keeping litigation within manageable proportions. There is a tendency now to run too many points or variations on themes that have little or no merit. There must be a point at which a barrister should advise that the prospects of success on a particular point do not justify the cost of running it. A barrister also has a duty to keep costs to a minimum by minimizing the number of interlocutory applications, the amount of paperwork involved in the trial and the length of time consumed in running it. We have all heard the aphorism which takes many forms and has been attributed to many people. It is, “I have written you a long letter because I did not have time to write a short one”. The point is that with time for preparation, a proposition can be refined so as to make lengthy explanation unnecessary. The better prepared you are, the briefer you will usually be. In particular, make judicious use of written and oral submissions. Identify the parts of your submission which can safely be done in writing and the parts which should be presented orally. Do not confuse outlines of argument with written argument. They are

different animals. Do not spend time repeating orally the content of your written submissions or outline.

Finally, maintain the collegiate life of the Bar. If opposing counsel keep in mind their shared membership of a great learned profession, they will not lose sight of their duty to the Court and to one another.

Let me give you a short anecdote about a great Queensland judge. It is about determination to make a difference in the profession. The Judge in question was Sir George Kneipp who was the Northern Judge from 1969 until 1992. For many years, he was Chancellor of the James Cook University. In the late 1980s that University offered first year law courses, but not courses in subsequent years, for which courses the students had to come to Brisbane or enrol externally. Generally, the Supreme Court had to approve university courses for admission purposes. At a Judges' meeting, we were unexpectedly asked to approve the James Cook University law degree as a qualification for admission to practise. We were completely taken aback by this. We had never been told that James Cook granted a degree in law. However, investigations demonstrated that Sir George had decided that it was about time that Townsville had its own law school and went about establishing it. The Court had not been told about his plans, and nor had the Commonwealth Government, which had to fund it. But it happened. It happened because he was determined that it would.

Judges and lawyers have much more prestige in the community than we believe. Sometimes we have to use up a little of that prestige in doing what has to be done.

When I started at the Bar many, perhaps most of the judges had war service. I have already mentioned the effects that such experience had on many of them.

They had very firm views as to how courts should be run and how people should behave. They were hard, but generally fair. They tolerated no nonsense. They moved large volumes of criminal work, quite efficiently. There was a lot of personal injury work, only a small part of which would ever come to trial. They heard a large number of undefended divorces, and they, too, were done efficiently. If the case was outside of this staple work, fewer of the Judges were able to cope easily with it. In all of the work there was a firm, common-sense approach, tempered by a deep-seated sense of fairness.

I need not proclaim the virtues of more recent appointments. You all, no doubt, have your own views. I think that we have tried hard to maintain some of the qualities of those men, but it is not easy. Courts are bigger and society is more diverse. In many ways, that is a good thing. However, I believe that it has made outcomes more unpredictable. Judges are appointed earlier and generally have longer judicial careers. Frequently, they are trying to develop expertise in particular areas in ways which were unheard of in the 1970s. Judges are also more likely to move between courts.

The pressure of judicial work in the 1970s was quite different from today's pressure. Judgments are expected to be more thorough. They are therefore frequently longer. Cases are longer, perhaps because the reduced number of cases means that those that go to trial are more complex. The profession sometimes seems not to be willing to identify and abandon bad points. I suspect, too, that solicitors are more concerned with keeping the clients happy than giving sound advice as to prospects, and that barristers sometimes indulge the solicitors. These trends inevitably mean more work for the judges in hearing and deciding the cases.

On the positive side, there is now a recognizable Australian judiciary. Judges identify as belonging to a national group rather than to a geographically based court. Members of Commonwealth and State Courts know one another, recognize common problems and deal with them, having regard to one another's experiences. This collegiality will inevitably strengthen the judiciary as against the legislative and executive branches. Indeed, in my view, this tendency is already obvious. We can reasonably expect that neither the legislative branch nor the executive will be pleased by this trend, but it is the inevitable consequence of the increasing extent of judicial review of administrative action, constitutional limits upon legislative power and the High Court's insistence upon the strict application of Chapter III of the Constitution. It is, I think, likely that the courts will increasingly need the assistance of the profession in defending judicial independence in the widest sense, in the face of legislative and executive discontent with judicial action.

It has been a great privilege to indulge myself in these rather undisciplined reflections. I hope that I have not been too boring. I would like to leave you with two thoughts. The first is about the inevitability of change in the longer term. The palaeontologist Stephen Jay Gould, quoting a geologist, John McPhee, once said that the inevitability of change was best described by the statement: "The summit of Mt Everest is marine limestone". Like the observations in *Yorta Yorta*, the perception is worth considering.

My final point is really a summary of the things which I have said. Amongst the learned professions, the legal profession is one of the most ancient. The law is the essential foundation of our society and the adhesive which holds it together. Our custody of the law imposes upon us a great responsibility to the society to which it relates – our society. That responsibility is not discharged simply by conducting one's private practice. More is required of us. The law

needs to be applied, but it must also be protected and assisted to develop. We all have a duty to participate in that broader process.