Judicial Independence and the High Court

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Recently, some highly contentious decisions of the High Court of Australia have highlighted to the public how important the role of the Court is. In this paper the Commonwealth Attorney-General seeks to explain the role of the Court, and the process of appointing justices to it, as well as offering some comment on notions of judicial independence as they relate to the High Court.

AUSTRALIAN judges are currently under the community microscope and the justices of the High Court are under the most intense scrutiny. I genuinely welcome public interest in the judiciary and in the role of the courts. Public debate of an appropriate kind will, I believe, lead to a better community understanding of the role of the third arm of government in the democratic system enshrined in our 98 year old Constitution.

A PROFILE OF THE HIGH COURT*

During the 95 years since its establishment in 1903 the High Court has remained relatively stable in its membership. There were three original members[1] and this remained the case until 1906 when the number of justices was increased to

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* See the Table at pp 142-143 for details of the Chief Justices and Justices appointed to the High Court since 1903.

1. S Griffith (Chief Justice), E Barton and RE O'Connor.

five. Then, in 1912, the Court was expanded to seven. It would probably have remained at this number but for the Depression. That prompted Parliament to amend the Judiciary Act 1903 to reduce the Court to six members. In 1946 the membership was restored to seven.[2] Despite sporadic suggestions that the strength of the High Court be expanded to nine, it continues to comprise seven justices.[3]

There have been 11 Chief Justices, including the present Chief, Murray Gleeson. The average term of office of the Chief Justices is about nine years. Of the 11 Chief Justices, six were members of the Court at the time of appointment. The longest serving Chief Justices have been, in order, Sir Garfield Barwick, Sir John Latham and Sir Samuel Griffith, each of whom served over 16 years.

A total of 43 justices, including Chief Justices, have served on the High Court. Of that number the higher proportion has been appointed by non-Labor governments,[4] a total of 29. Labor governments have been responsible for appointing the remainder of 14. The only female to be appointed has been Justice Mary Gaudron, appointed in 1987.

The average age on initial appointment has been 53 years and the average age on ceasing to be a justice has been 69 years, giving an average length of service overall of about 16 years. The longest serving justice has been Sir Edward McTiernan, who sat for more than 45 years. He is followed by Sir George Rich, who sat for 37 years. Probably the most eminent member of the High Court, Sir Owen Dixon, sat for more than 35 years — 23 years as a justice and 12 years as Chief. Since the constitutional amendments in 1977 which require terms of office to expire at 70 years,[5] it is most improbable that future members of the Court will serve for such long periods.

In the approximately 50 years since the end of World War II, there have been 28 appointments to the High Court.[6] Of that number, 20 have been appointed by Coalition governments and eight by Labor governments. Of those appointed since 1945, the average age at appointment has been 54 years. In this group the average age at the time of ceasing to hold office has been 68 years, seven having died in office. All except one of the most recent 28 appointees to the Court were born in Australia. The exception, Sir Ninian Stephen, was born in the United Kingdom and came to Australia at the age of 17 years.

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2. Judiciary Act 1946 (Cth).
3. Currently AM Gleeson (Chief Justice), MG Gaudron, MH McHugh, WMC Gummow, MD Kirby, KM Hayne and IDF Callinan.
4. Protectionist 5, Nationalist 3, United Australia Party 2, Liberal Coalition 19.
5. Constitution Act 1901 (Cth) s 72.
6. This includes Dixon CJ appointed as Chief Justice in 1952, although he joined the Court as a justice in 1929.

CHIEF JUSTICES AND JUSTICES OF THE HIGH COURT: 1903-1998

Name (bold indicates Chief Justice)	Born (year)	Died (year)	Period in office	Age on appointment	Age on retirement	Govt at time of appointment	Prior judicial experience	State of residence
Aickin, Sir Keith	1916	1982	1976-1982	60	66	Liberal Coalition		Vic
Barton, Sir Edmund	1849	1920	1903-1920	54	71	Protectionist		NSW
Barwick, Sir Garfield	**1903**	**1997**	**1964-1981**	**61**	**78**	**Liberal Coalition**		**NSW**
Brennan, Sir Gerard	**1928**		**1981-95; CJ 1995-98**	**53**	**70**	**Liberal Coalition**	**ACT Sup Ct/Fed Ct**	**Qld**
Callinan, Ian David Francis	1937		1998	60		Liberal Coalition		Qld
Dawson, Sir Daryl	1933		1982-1997	49	64	Liberal Coalition		Vic
Deane, Sir William	1931		1982-1995	51	64	Liberal Coalition	NSW Sup Ct/Fed Ct	NSW
Dixon, Sir Owen	**1886**	**1972**	**1929-52; CJ 1952-64**	**43**	**78**	**Nationalist**	**Vic Sup Ct**	**Vic**
Duffy, Sir Frank Gavan	**1852**	**1936**	**1913-21; CJ 1931-35**	**61**	**73**	**Labor**		**Vic**
Evatt, Herbert Vere	1894	1965	1930-1940	36	46	Labor		NSW
Fullagar, Sir Wilfred	1892	1961	1950-1961	58	69	Liberal Coalition	Vic Sup Ct	Vic
Gaudron, Mary Genevieve	1943		1987	43		Labor		NSW
Gibbs, Sir Harry	**1917**		**1970-81; CJ 1981-87**	**53**	**70**	**Liberal Coalition**	**Qld & ACT Sup Cts**	**Qld**
Gleeson, Anthony Murray	**1938**		**1998**	**59**		**Liberal Coalition**	**NSW Sup Ct**	**NSW**
Griffith, Sir Samuel	**1845**	**1920**	**1903-1919**	**58**	**74**	**Protectionist**	**Qld Sup Ct**	**Qld**
Gummow, William Montague Charles	1942		1995	52		Labor	Fed Ct	NSW
Hayne, Kenneth Madison	1945		1997	52		Liberal Coalition	Vic Sup Ct	Vic
Higgins, Henry Bournes	1851	1929	1906-1929	55	78	Protectionist		Vic
Isaacs, Sir Isaac	**1855**	**1948**	**1906-30; CJ 1930-31**	**51**	**76**	**Protectionist**		**Vic**
Jacobs, Sir Kenneth	1917		1974-1979	57	62	Labor	NSW Sup Ct	NSW
Kirby, Michael Donald	1939		1996	56		Labor	NSW Sup Ct/Fed Ct	NSW

Kitto, Sir Frank	1903	1994	1950-1970	47	67	Liberal Coalition		NSW
Knox, Sir Adrian	**1863**	**1932**	**1919-1930**	**56**	**67**	**Nationalist**		**NSW**
Latham, Sir John	**1877**	**1964**	**1935-1952**	**58**	**75**	**United Aust Party**		**Vic**
Mason, Sir Anthony	**1925**		**1972-87; CJ 1987-95**	**47**	**70**	**Liberal Coalition**	**NSW Sup Ct**	**NSW**
McHugh, Michael Hudson	1935		1989	53		Labor	NSW Sup Ct	NSW
McTiernan, Sir Edward	1892	1990	1930-1976	38	84	Labor		NSW
Menzies, Sir Douglas	1907	1974	1958-1974	51	67	Liberal Coalition		Vic
Murphy, Lionel Keith	1922	1986	1975-1986	53	64	Labor		NSW
O'Connor, Richard Edward	1851	1912	1903-1912	52	61	Protectionist		NSW
Owen, Sir William	1899	1972	1961-1972	62	73	Liberal Coalition	NSW Sup Ct	NSW
Piddington, Albert Bathurst	1862	1945	6 Mar-5 Apr 1913	51	51	Labor		NSW
Powers, Sir Charles	1853	1939	1913-1929	60	76	Labor		Qld
Rich, Sir George	1863	1956	1913-1950	50	87	Labor	NSW Sup Ct	NSW
Starke, Sir Hayden	1871	1958	1920-1950	49	79	Nationalist		Vic
Stephen, Sir Ninian	1923		1972-1982	49	59	Liberal Coalition	Vic Sup Ct	Vic
Taylor, Sir Alan	1901	1969	1952-1969	51	68	Liberal Coalition	NSW Sup Ct	NSW
Toohey, John Leslie	1930		1987-1998	57	68	Labor	NT Sup Ct/Fed Ct	WA
Walsh, Sir Cyril	1909	1973	1969-1973	60	64	Liberal Coalition	NSW Sup Ct	NSW
Webb, Sir William	1887	1972	1946-1958	59	71	Labor	Qld Sup Ct	Qld
Williams, Sir Dudley	1889	1963	1940-1958	51	69	United Aust Party	NSW Sup Ct	NSW
Wilson, Sir Ronald	1922		1979-1989	57	67	Liberal Coalition		WA
Windeyer, Sir Victor	1900	1987	1958-1972	58	72	Liberal Coalition		NSW

Although the High Court is a Federal court, it could not be said that its membership has been representative of the federation. Of the 43 persons appointed to it, 23 have been residents of New South Wales, 12 residents of Victoria and six (including the first Chief Justice, Sir Samuel Griffiths) have been residents of Queensland. There have been two appointments from Western Australia, the first being Sir Ronald Wilson, who was appointed in 1979, and the second being John Toohey, who was appointed in 1987. There has yet to be appointed a resident of South Australia, Tasmania, the Australian Capital Territory or the Northern Territory.

In the years since the end of World War II the picture has not been significantly different, except for the two appointments from Western Australia. Of the other 26 appointments since 1945, 15 have been from New South Wales, seven have been of Victorian origin, and four have been residents of Queensland. During the period from 1964 to 1970, six of the seven members of the Court were from New South Wales. Of the current membership, five justices are of New South Wales origin.

Of the 28 most recent appointments, 12 were judges of State and Territory courts at the time of appointment to the High Court. Since the establishment of the Federal Court in 1977, there have been 12 appointments to the High Court, of whom four were judges of the Federal Court when appointed. The 28 appointees in the last 53 years include two former Commonwealth Attorneys-General (Chief Justice Sir Garfield Barwick and Justice Lionel Murphy), a former Commonwealth Solicitor-General (Chief Justice Sir Anthony Mason) and three former State Solicitors-General (Justices Sir Ronald Wilson, Sir Daryl Dawson and Mary Gaudron).

APPOINTMENT PROCEDURE

Legal requirements

Under Chapter III of the Constitution, which creates the High Court of Australia,[7] it is provided that the justices of the Court shall be appointed by the Governor-General in Council.[8] The High Court of Australia Act 1979 requires that the Commonwealth Attorney-General consult with the Attorneys-General of the States in relation to appointments to the Court.[9] When the High Court of Australia Bill was introduced into Parliament in 1978 it was said of the proposed requirement for consultation:

7. S 71.
8. S 72.
9. S 6.

> By requiring the process to be undertaken whenever a vacancy on the High Court occurs, this provision should do much to ensure that the Court continues to be truly national in character and fully equipped to discharge its constitutional functions as a federal Supreme Court.[10]

As appointments to the High Court are made by the Governor-General in Council, the practice is that an appointment first be considered by Cabinet. The practice then is that after Cabinet has agreed on its nominee, the Attorney-General formally recommends the appointment to the Governor-General. After the Governor-General has made the appointment the nominee, by oath or affirmation of office, assumes the duties of a justice of the Court.

On assuming office, the justice is a member of the third arm of government and is obliged to act independently of the Executive in the exercise of judicial functions. From that time a justice may be removed from the office by Parliament for proved misbehaviour or incapacity.[11] This is one of the so-called twin pillars supporting the independence of the judiciary.[12] The other pillar is the constitutional provision which prevents reduction of the remuneration of a judge during his or her term of office.[13]

Criticisms

Recently there has been public criticism of the procedures for appointment of High Court judges. In particular criticisms have been offered by State leaders, who have gone on to suggest amendment of the procedures. One suggestion, which has not infrequently been made, is to have Parliamentary supervision of High Court appointments, such as applies in relation to appointments to the US Supreme Court.

I am quite opposed to any such proposal for several reasons which need not be canvassed in detail. An observer of the US Senate confirmation hearings conducted in respect of recent nominations to the Supreme Court can see that it is manifestly a political process. The widely-ranging inquisition is likely to deter qualified candidates from allowing themselves to be nominated. Apart from the politicisation, the process is otherwise flawed. In order to ascertain a candidate's approach to significant issues, the candidate would be expected to give answers, in the abstract, to the very questions which might arise for consideration on the bench in a factual

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10. The Hon Mr RI Viner QC, Minister for Employment and Youth Affairs *Hansard* (HR) 25 Oct 1979, 2500.
11. S 72.
12. G Brennan 'Court for the People — Not People's Courts' (1995) 2 Deakin LR 1, 10.
13. S 72(iii).

context. That is likely to undermine in advance public confidence in an independent and impartial judiciary.

There have been proposals for a High Court nominee either to be confirmed by a majority vote of all Australians in a referendum or to be elected. Apart from being potentially very expensive and time consuming, it would be very difficult for the community to make an appropriate decision as to who should be appointed a judge. Again, that would be designed to politicise the selection process. The probable result would be that those selected would have popular appeal without necessarily having the qualities required to fulfil judicial functions to an adequate standard.

Another current suggestion is that in order to achieve more accountability from judges, appointments to the High Court should be for a fixed term of, say, 10 years. A practical difficulty with this is that the more appropriate candidates may not be willing to interrupt other careers for a limited term. Another significant issue in relation to the proposal is one of perception. A judicial office on a fixed-term contract does not have the same appearance of independence from the Executive and impartiality as one whose term encompasses a working life. Public confidence in the judiciary, which is an important component of the system of representative democracy under the Australian Constitution, cannot be maintained if there is any suggestion of lack of independence or objectivity on the part of judges.

The system of appointment of High Court judges employed since federation has served the nation well. Australia has had a national supreme court whose standards are as high as those of any equivalent court in the common law world. It is nevertheless pertinent to ask whether the appointment procedures could be improved. I suggest that two improvements could be made to the appointment process. One is that a better explanation could be offered to the public as to the nature of the selection process. In other words, it could be made more 'transparent'. The second is that the consultations could be more extensive. However, in relation to this the consultations should not, in any way, detract from the responsibility for the selection of High Court judges remaining with the Commonwealth. The High Court is a national court performing national functions. Its membership should be decided by the national government.

ROLE OF THE HIGH COURT

The High Court is not just a constitutional court. Nor is it limited to dealing with national or federal cases. Its judges are called upon to decide a broad range of cases, both constitutional and non-constitutional, and involving issues of both public law and private law, federal law and State law. Sir Robert Menzies, writing in 1967, offered the view that 'the great bulk of the work before the High Court

is not constitutional, attracts no headlines, and calls for the very highest kind of general learning and equipment'.[14] High technical skills and extensive legal knowledge are therefore required of a High Court justice. In consequence, Sir Zelman Cowen asserted in 1965: 'It is not surprising that in making appointments to the High Court the government should seek out men skilled through success in the practice of the law'.[15]

It is not easy to determine whether the mix of constitutional and non-constitutional cases dealt with by the Court has changed over the decades. A rough analysis comparing the numbers of the two types of cases dealt with in one year, taking the period from 1920 to 1995 at intervals of five years, suggests the mix has not changed significantly. Excluding applications for special leave to appeal, the High Court has, in broad terms, dealt with on an annual average basis between five and 10 constitutional cases out of a total of 60-70 cases. The number of cases dealt with in any given year in the two categories can vary enormously compared to another year.

It is clear that there have been significant changes in relation to the types of non-constitutional cases dealt with by the Court. The Court once dealt with a range of cases in its original jurisdiction — for example, those relating to intellectual property and taxation. There are now virtually no cases tried at first instance. With the amendments to the Judiciary Act 1903 in relation to special leave to appeal in civil cases made in 1984, the types of civil appeals heard by the Court have varied.

The Court now spends a great part of its time dealing with applications for special leave to appeal both in civil and criminal cases. Fewer cases relating to State legislation are heard, the Court taking the view that the appellate courts of the States should ordinarily be the ultimate arbiter dealing with such cases. Former Chief Justice Sir Anthony Mason, in an essay in the book *Fragile Bastion*, suggests that it is likely that 'the High Court will find it necessary to devote an increasing proportion of its time to constitutional and public law issues'.[16] The Court's principal preoccupation with constitutional and public law requires, in any event, Sir Anthony believes, 'an understanding of government in the widest sense of that term'.[17]

The demands of the office of justice of the High Court suggest the type of person who should be sought for appointment. There have been numerous attempts

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14. R Menzies *Afternoon Light: Some Memories of Men and Events* (Melbourne: Cassell, 1967) 320.
15. Z Cowen *Sir John Latham and Other Papers* (Melbourne: Oxford UP, 1965) 36.
16. A Mason 'The Appointment and Removal of Judges' in H Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Sydney: NSW Judicial Commission, 1997) 6.
17. Ibid.

THE HIGH COURT OF AUSTRALIA - JULY 1998

Back (L-R): Michael Kirby, Ian Callinan, Kenneth Hayne, Michael McHugh, Mary Gaudron.
Front (L-R): Murray Gleeson (Chief Justice), William Gummow.

to catalogue the attributes required of judges. I do not intend to add to those attempts. It is enough to say that outstanding professional skills and personal qualities, such as integrity and industry, are required, together with a proper appreciation of the role of the Court. Sir Anthony Mason, in the essay referred to earlier, offered the advice that what should be sought is not so much the ideal of a High Court justice so much as a court with a balanced composition. This is desirable, he considers, because of the continuing division of opinion on some of the great issues of federation.[18]

Successive governments have espoused the principle that an appointment to the High Court should be on merit and the best person for the office should be appointed. The reference to a balanced composition does not, I believe, negate or qualify that principle if it is recognised in its proper context. It is essential that there be public confidence in the judiciary and the High Court in particular. In considering who is the best person for appointment it needs to be taken into account that the best person will be identified having regard not only to professional skills and personal qualities in the abstract. Such attributes must be considered in the context of ensuring that appointments to the Court maintain or enhance public confidence in the institution and the independence and impartiality of its members.

CRITICISM OF THE HIGH COURT

This leads me to the second matter: criticism of the High Court. That the Court has been under increased scrutiny over the last few years would be acknowledged by many.

In the past, public confidence in and support for the judiciary was reflected by a general absence of public criticism of judges. But the judiciary is no longer insulated from public scrutiny and public criticism. Indeed, there is a greater readiness on the part of the public to criticise a range of once sacrosanct institutions. Although there is general acceptance of the principle of judicial independence, especially from executive interference, we are seeing today increasing levels of public criticism directed at the way in which the judiciary goes about its business.

Judicial independence

Under the Australian Constitution, the judiciary is independent of the legislative and Executive arms of government. The interlocking relationships of the three arms of government form the foundations of our parliamentary democracy.

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18. Ibid, 11.

An independent judiciary serves democracy by acting as a check on possible excesses of the other branches of government. Courts are often required to determine matters between government and individuals. For that reason it is important that the judiciary is not only independent of the government, but perceived to be so.

I have mentioned the constitutional protection afforded judicial office and remuneration. These protections allow judges to deal with all cases that come before them without having to worry about the security of their office, or having their pay reduced, if decisions unfavourable to the government are made. However, the independence of the judiciary does not rest solely on those constitutional provisions. It also relies to a large extent on the goodwill of the political branches of government. Any intervention by one branch of government in the functions of another is capable of undermining public confidence in that other branch.

Public criticism

This does not mean that courts and judges should not be criticised. But it does mean that care needs to be taken as to the nature and focus of such criticism. Media commentators and legal academics have a legitimate role to play in critically examining and commenting on the substance of particular judgments. This is one of the necessary checks and balances in a democratic society.

I encourage judges to take more responsibility for defending themselves and their courts against criticism. I acknowledge that the judiciary may well have doubts about when it is appropriate for courts or individual judges to respond to public criticism.

In some contexts, certain judges have, on occasion, been prepared to respond publicly to criticisms and to take the opportunity to explain the context or the law underlying matters that have become the subject of public debate. Criticism of a court's administrative processes, at least under the federal system of judicial self-administration, seems to be a clear example of a situation in which the courts can and should respond in their own defence. Where criticism is directed at a particular decision, one response is to point out that the parties have rights of appeal to superior courts if they consider a decision is incorrect or has been influenced by inappropriate judicial direction. Where criticism is based on a misunderstanding of the law or on inaccurate reporting of a case, there may well be a role for judges or court-based media officers to correct public misunderstanding. Such occasions can be a valuable opportunity to raise community awareness about legal issues and the functioning of the court system.

Of course, any response from a court must be compatible with judicial independence, objectivity and the maintenance of confidence by the community in the judicial system. The community must be confident that they will get a fair, impartial and objective hearing and a just result. Often there will be constraints on

chief justices responding to criticism about particular cases. This is particularly so in relation to superior courts where appeals are taken within the courts themselves.

Political criticism

Another constraint is an inability to respond when a court or the judiciary becomes the subject of political debate. The substance of individual judgments may fairly be commented on, and within the limits of the Constitution, the federal and State Parliaments may negate by legislation any principle contained in a judgment with which they disagree.

The ability of the Parliaments to respond to judicial decisions through the legislative process is one reason that the political branches of government should not recklessly enter into attacks on the courts. It is not necessary.

Moreover, political criticism of an individual judgment should not form part of a campaign to undermine the integrity of a court or any of its judges. Personal attacks against individual judges are likely to undermine public confidence in the judiciary and thereby damage the legitimacy necessary to its effective functioning as the third arm of government. The former Chief Justice, Sir Gerard Brennan, has said that the judiciary has public confidence as its necessary power base.[19] He has also said that the judiciary has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom the judiciary serve have confidence in its exercise of the power of judgment.

Real difficulties arise when a court becomes the subject of debate or attack in the political arena. This is an arena in which the judiciary and the courts are unable to defend themselves. This aloofness from the dust of political debate has been seen as necessary to retain judicial separation from the proper roles of parliamentarians and the Executive.

Public comment by judges has been seen by many as possibly compromising the independence and impartiality of the judiciary. The political arena, however, is one where circumstances will dictate that a defence of the judiciary must, on occasion, be mounted. Sustained political attacks capable of undermining public confidence in the judiciary may call for defence by the Attorney-General.

In recent criticism of the judiciary there has been a lot of attention paid to so-called judicial law-making by the courts. This is not the occasion to comment on the merits of any of the particular decisions which are cited as examples of this. However, the fact that judges 'make law' should not be a shock to any of us who have studied the law and know of the incremental evolution of the common law

19. G Brennan 'Justice Resides in the Courts' *The Australian* 8 Nov 1996, 15.

over many hundreds of years. Moreover, due to its status as the final court of appeal for Australia, the High Court's decisions are particularly powerful. It should be remembered that the Court can neither make law on issues which are not before it nor can it refuse to deal with a matter because, for example, in the Court's view, Parliament ought to legislate on it. The justices have no choice but to play the hand that they dealt, deciding on the constitutional or legal merits. What has led to some of the recent criticisms is that the Court has had before it several matters requiring it to deal with issues with profound social repercussions.

Decisions of the High Court

As mentioned, the debate over the proper role of the High Court has recently achieved some prominence. As an indication of increased public interest in the Court's role in Australia's system of government, this should be welcomed. However, there is a real risk that this discussion will lead to misunderstanding and unwarranted mistrust of the Court if it prevents a proper public analysis of the Court's role.

Every effort must be made to ensure that the public discussion does not actually obscure the legitimacy of the Court's role in Australian government. It must not be forgotten that the Australian Constitution provides for the High Court's role as Constitutional guardian. The Constitution provides for the establishment of the Court and gives the Commonwealth Parliament power to confer jurisdiction on the Court in matters arising under the Constitution and under federal laws.[20]

One of the Court's main functions is thus to settle disputes about the meaning of the Constitution.[21] Nor should it be overlooked that the Constitution establishes the other main function of the Court — that is, to act as the final court of appeal within Australia in all other types of cases.[22] The Court is therefore charged with two particularly important duties:

- First, it has a duty to decide, where it agrees to consider a Constitutional question, what the Constitutional dictates are; and
- secondly, it has a duty to accept responsibility for interpreting and developing the common law of Australia.

Obviously, it must perform these duties no matter how complex the social or political issues surrounding the central legal and constitutional questions are.

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20. S 76.
21. S 30 of the Judiciary Act 1903 (Cth) confers jurisdiction on the Court in matters covered by s 76(i) of the Constitution.
22. S 73.

Indeed some of the most memorable High Court cases have arisen out of very public political controversies which have served to focus competing and conflicting views on matters social, legal and political. Many examples come to mind: the Bank Nationalisation case,[23] the Tasmanian Dam case,[24] *Mabo*[25] and *Wik*.[26]

Often the Constitutional points decided in these cases are not the sole cause of the surrounding controversies. It is often unrealistic in such cases to expect the decision of the Court to completely resolve the controversy. Despite this, it is generally conceded that the High Court has played a crucial role in developing and sustaining the political and legal stability that has been the hallmark of Australian society in the twentieth century.[27] Since federation, the Court has proved to be a bulwark against governments and others who have sought to avoid or circumvent the requirements established by the Australian Constitution.[28]

The High Court has for the most part performed its role as guardian of the Constitution without calling a great deal of attention to itself. Inevitably, however, decisions such as those I have mentioned will attract attention and criticism. And this in itself is no bad thing. It is undoubtedly a good thing that the decisions of the High Court receive the most detailed and searching public examination. This is implicitly acknowledged in the conventional understanding that judges must give reasons for their decisions, and in so doing rebut contrary arguments.

However, we must not allow personal criticism of the justices of the High Court, or criticism of the Court as an institution, to be confused with a perfectly legitimate, even desirable, public discourse about particular judgments. One is free to disagree with a judgment of the High Court. And the fact of the matter is that views will sometimes differ — even among the justices of the High Court — on the answers to the legal questions which come before it.

No one should be surprised that members of the Court, not to mention those outside the Court, sometimes disagree over how the common law principles — that is, judge-made law — should be applied and developed in the light of changing circumstances and attitudes.

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23. *Bank of NSW v Cth* (1949) 79 CLR 497.
24. *Cth v Tasmania* (1983) 158 CLR 1.
25. *Mabo v Qld [No 2]* (1992) 175 CLR 1.
26. *Wik Peoples v Qld* (1996) 187 CLR 1.
27. The 'stabilising' role of the High Court is not seriously questioned: see eg B Galligan *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (St Lucia: Qld UP, 1987) 6.
28. Professor Zines observes that the Court has at one time or another frustrated important policies of each of the political parties that has been in government: see L Zines *The High Court and the Constitution* 4th edn (Sydney: Butterworths, 1997) 482.

In the constitutional sphere, the Court is often presented with problems which require fine or difficult distinctions to be drawn between legal and political issues. As Sir Owen Dixon observed, the Constitution is a political instrument which deals with government and governmental powers. Nearly every consideration arising from the Constitution can be described as a 'political' consideration, although, as he said, the issue is whether the considerations are compelling.[29]

Indeed, it may be argued that this very potential for divergence of opinion among its membership is one of the strengths of the High Court.[30] Certainly, it fosters robust legal argument and militates against any tendency for the Court to become the captive of any particular legal or political ideology. However, this does not mean that the actions of the Court or its membership in making a particular decision are open to valid criticism simply because the decision is perceived as socially or politically inconvenient.

As the final arbiter on questions of constitutional law, the Court can and does make decisions that restrict the law-making powers of Parliament. It can and does make decisions which prevent governments and others from implementing what they regard as good policy. And there is no doubt that the High Court has made many decisions having profound ramifications for Australian society. The Chifley government's attempts to nationalise interstate air services and banking were struck down by the Court as unconstitutional.[31] The Menzies government's attempts to outlaw the Communist Party were likewise struck down.[32] In its decision in *Breen v Williams*,[33] the High Court held that a patient has no general right of access to his or her medical records in the possession of a doctor.

These decisions, and many others, have been seen in various quarters to involve a high degree of political or social inconvenience. That is understandable — perhaps even a correct assessment of the practical consequence of a particular decision. But perceived inconvenience is not of itself a legitimate reason to criticise the decisions of the High Court, or the judges who make them. Rather, the legal and constitutional arguments must be considered on their merits. Where criticism of a decision of the Court is based not on an analysis of the legal argument supporting that decision, but on other personal or political considerations, the criticism is likely to be unfair. And criticism of the Court may affect its public standing, even where it is patently unfair. We must therefore do our best to ensure that the High Court is not unfairly criticised.

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29. *Melbourne Corp v Cth* (1947) 74 CLR 31, 82.
30. See eg M Coper *Encounters with the Australian Constitution* (Sydney: CCH, 1987) 421.
31. *Aust National Airways v Cth* (1945) 71 CLR 29; *Bank of NSW v Cth* supra n 23.
32. *Aust Communist Party v Cth* (1951) 83 CLR 1.
33. (1995) 186 CLR 71.

CONCLUSION

Legal practitioners and educators have an important role to play in the maintenance of an independent judiciary. As well as defending the principle of an independent judiciary we have an educative role to play. The role of the judiciary and its importance to our system of democratic government is not as widely understood as it should be. It is important for all concerned that any debate about the role of the courts or the judiciary be informed and be undertaken in a climate of goodwill. I urge those contributing to the debate to do so on this basis.