Dinner Address

Hit and Myth in the Law Courts

S E K Hulme, AM, QC

Not unexpectedly, in this company, I will talk tonight about only one court; the one on your left as you cross the bridge over the lake. I want to do two things.

I want firstly to consider a belief and a practice and a proposal concerning the High Court, in terms of the Court as it is, rather than in terms of the Court as it was. In doing that I want to say something of who used to come to the Court, and how; and who come to the Court now, and how.

And secondly I want to share with you some reflections on statements made in recent months by the Chief Justice of the High Court.

Where High Court Judges Come From,
and Certain Implications of That

I turn to the belief and the practice and the proposal I mentioned. I remind you of three things.

The first is that one still finds supposedly intelligent commentators making disapproving references to the practical monopoly which the practising Bar has over appointments to the High Court, and suggesting that the field of appointees ought to be extended to include solicitors and academics.

The second is that, in line with the constitutional principle that a judge ought to have nothing to fear and nothing to hope for from the government which appointed him, there long existed a general practice of not promoting judges, within a system of courts run by the same government, either from court to court, or within a court, as by promotion to Chief Justice.

The third is that in recent years there have been several political calls for appointments to the High Court to be made conditional upon the appointee passing scrutiny by a politically based committee (probably a Senate committee). The origin of the idea lies of course in the United States Constitution, which requires that all federal appointments be made "by and with the advice and consent of the Senate". Where a proposed appointment is the subject of dispute, inquiry is made by a Senate committee whose hearings can, by courtesy of television, stop the nation.

Keeping those matters in mind, I turn to consider how we select our High Court judges, and who gets selected.

At the outset I should express without satisfaction my firm belief that there is no good system for selecting judges. At any rate no good system has to my knowledge been found. Probably some systems are less bad than others, but which those are is not easy to tell either.

So far as the High Court is concerned, the situation which in practice produced the best result was one where the incumbent Prime Minister happened to be closely acquainted with the incumbent Chief Justice of the High Court, the Prime Minister happened to be acquainted with the relevant people and their skills, the Prime Minister dominated his Cabinet, there was no formal process of consultation with other governments, and politicians generally and the media and the general community took no great interest in the matter. In that situation, from 1950 to 1958 R G Menzies as Prime Minister — certainly without much discussion with anyone else save perhaps Sir Owen Dixon — selected successively Mr Wilfred Fullagar, Mr Frank Kitto, Mr Alan Taylor, Mr D I Menzies, and Mr Victor Windeyer. Led by Sir Owen Dixon, whom Menzies

paused to select in 1952 as Chief Justice, the diverse talents of the group produced a Court without parallel in the English- speaking world. The players were there, and one by one the selector picked them. With speed and certainty, block by block Menzies put together a High Court such as this country had not seen. As with much else that he did, there was little drama. It all just seemed to happen, as if the world is like that, and no one could ever have dreamed of appointing anyone else. It was in fact a very great achievement.

To say that is to say that the 1950s presented a particular situation which the right person could and did utilise to the advantage of the Court and the nation. Nothing in what happened represented a system capable of permanent application.

Several developments have taken place. Many factors, a few of which are the increasing size of Australian cities, the increasing shielding of Ministers behind security guards and minders, and the increasing range of matters with which Ministers and Prime Ministers find it necessary to concern themselves, have steadily reduced the extent to which a Prime Minister or Attorney General or any other Minister is likely to have effective knowledge of the field of likely appointees, still less personal acquaintance with them. At the same time, especially since the High Court moved to Canberra and entered the Press Gallery beat, though the change began earlier, the media have taken a very close interest in the High Court. That interest obviously extends to the appointment of new judges. There has developed a strong political and party interest. And although the general community seems to remain firmly less than excited, community pressure groups are beginning to show interest, though so far not to the extent evident with the State courts. One waits to see the pressure which the next six months brings for the appointment of a woman as Chief Justice.

The combination of less knowledge among those ultimately responsible, and considerably more party and media interest, has produced an increase in the extent to which information and advice is sought from officials within the bureaucracy. Further, the Commonwealth government has established a formal system of consultation with State governments as to all new appointments.

It seems likely that these developments have played a substantial part in contributing to clear changes in the pattern of appointments.

Let us go back to the years before Menzies, treating his 1950s period as a watershed.

The persons appointed to the High Court before the 1950s can be grouped as follows:

Members of the Bar who had had parliamentary careers (Founding Fathers Barton and O'Connor in 1903, and Isaacs and Higgins in 1906; Evatt and McTiernan in 1930; Latham in 1935).

Members of the Bar who had not had parliamentary careers (Gavan Duffy, 1913; Starke, 1920; Dixon, 1929). Knox is in spirit in this team, though in his youth he did have four years (1894-98) as member for Woollahra, in the State house.

Judges promoted from State courts. It is hardly necessary to stand in the streets of Brisbane and remind an audience that the High Court's first Chief Justice, Sir Samuel Griffith, had been Chief Justice of Queensland for ten years. Later there came two appointments of State judges newly-enough appointed to still be in close touch with High Court work, namely Rich in 1913 and Williams in 1940. Chifley's appointment of Webb in 1946, after a long State appointment, was seen as unusual, and it came as a surprise. It has often been said that its cause was Chifley's impatience when vociferous colleagues remained firmly deadlocked between two more likely candidates (J V Barry, from Victoria, and Harry Alderman, from South Australia).

One was a Commonwealth Crown Solicitor (Powers 1913, who was a solicitor and had in much earlier days (1888-94) had a short parliamentary career in Queensland).

Of the High Court's five Chief Justices up to the 1950s, three came new to the Court as Chief Justice (Griffith, 1903; Knox, 1919; and Latham, 1935). Two were promoted from within the Court, both by the rather lost Scullin government (Isaacs, 1930; and Gavan Duffy, 1931).

Menzies' 1950s appointments demonstrated his views. No appointee had had a parliamentary career. Three (Kitto, Menzies, Windeyer) came direct from the Bar. Two were State judges recently appointed (Fullagar, Taylor).

In the 1960s Menzies made two appointments of different type. One (Owen, in 1961) was a long-serving State judge, appointed after Fullagar's early death. The appointment was made in particular circumstances. It does not fit the pattern of Menzies' other appointments, and it cannot be said to reflect a determination to put the claims of the Court first. The final appointment was of Barwick, as Chief Justice following the retirement of Sir Owen Dixon in 1964. Barwick had of course had an active if short parliamentary career, during which he had managed to frighten the life out of the two perceived successors to Menzies, Holt and McMahon.

Menzies selected two Chief Justices. The first was by promotion from within the Court. The appointment was of Sir Owen Dixon. In a sense Menzies had little choice but to promote. No one who knew him would doubt that Dixon would have served most loyally, had a new Chief Justice been brought in. But the position would have been ludicrous. In sheer shame it was not easy to bring someone in to preside over one of the common law's great judges, a figure of world fame.

Some indeed had seen one possibility. If there happened to be available someone who at the age of twenty-three had won what remains Australia's greatest constitutional case, someone who by the age of thirty-five had been pre-eminent at the Australian Bar, someone who had been since 1935 a Bencher of Gray's Inn, someone who would bring to the position the prestige of having twice become Prime Minister of Australia, someone whose heart was still believed to be in the law rather than in politics, then it just might seem permissible to put that person to preside over a Court which included the nonpareil. Not altogether surprisingly there was publicly aired the question whether Menzies would consider it appropriate to appoint himself.

Whether Menzies was tempted I know not. Certainly he did not appoint himself, and he did appoint Dixon.

Menzies' second appointment of a Chief Justice was of Barwick. This time a newcomer was brought in. It was certainly a political appointment in the sense that Barwick was at the time a politician. But it was an appointment which would have been justified had Barwick never gone near politics. For throughout the 1940s and 1950s, before his entry into politics, Barwick had reigned with unchallenged eminence at the Australian Bar.

Such, briefly, was the history of appointments to the High Court, before and under Menzies. In the years since, much has changed.

In the 36 years since the appointment of Sir Victor Windeyer in 1958, there has been appointed to the High Court one barrister in general practice; just one. That was Mr K A Aickin, in 1976. I record that he had not had a parliamentary career.

Five judges have been promoted from a State court: Sir Cyril Walsh, promoted from the Supreme Court of New South Wales in 1969, Sir Ninian Stephen, promoted from the Supreme Court of Victoria in 1972, the present Chief Justice, Sir Anthony Mason, promoted from the New South Wales Court of Appeal in 1972, Sir Kenneth Jacobs, promoted from the New South Wales Court of Appeal in 1974, and Justice McHugh, promoted from the New South Wales Court of Appeal in 1989. Sir Kenneth Jacobs and Justice McHugh had both reached the Court of Appeal by promotion from the Supreme Court of New South Wales.

Three judges have been promoted from the Commonwealth Government's own Federal Court: Sir Gerard Brennan in 1981, Sir William Deane in 1982, and Justice Toohey in 1987. Sir Gerard Brennan had reached the Federal Court from the former Commonwealth Industrial Court, and Sir William Deane by promotion from the Supreme Court of New South Wales.

Sir Harry Gibbs was promoted from the Commonwealth's own Federal Court of Bankruptcy, in 1970. Sir Harry had reached that court by translation from the Supreme Court of Queensland.

There have been appointed as judges three State Solicitors-General, Sir Ronald Wilson in 1979, Sir Daryl Dawson in 1982, and Justice Mary Gaudron in 1987. A fourth judge, Sir Anthony Mason, had been a Commonwealth Solicitor-General prior to his appointment to the New South Wales Court of Appeal.

There has been appointed as a judge one Commonwealth Attorney-General, Justice Murphy.

Of the two Chief Justices appointed since Barwick, Sir Harry Gibbs was promoted from within the Court in 1981, and Sir Anthony Mason was promoted from within the Court in 1987.

The result is that the present High Court consists entirely of promoted judges or promoted Solicitors- General. Of the seven present judges, two were appointed while Solicitors-General, three were promoted from the Federal Court, and two (one of them also a former Solicitor-General) were promoted from the New South Wales Court of Appeal.

The change has no doubt several causes. One of them must be the more formal system of selection of which I spoke earlier. It is difficult to imagine an officer of the bureaucracy conceiving that a plain barrister could have a claim superior to or even the equal of someone already a judge or a Solicitor-General, or if he did conceive it, thinking it politic to make a recommendation accordingly. A recommendation of someone already a judge, or already the holder of a high government office, cannot but seem more respectable and safer than a recommendation of someone not so honoured, someone carrying out his activities for private and almost certainly excessive gain. The fact — as I understand it — that the system of consultation with States results in most States recommending their Solicitor-General, at any rate on the second vacancy occurring during his term, cannot but exacerbate this approach.

Whatever the causes, the pattern seems well-established, and it is I think likely to persist. Exceptions are likely to be very exceptional, and will probably have their roots in politics. (There are some signs that a politically-related appointment of a Chief Justice may be hatching now.) What is undeniable, and new, is the silent emergence at this level of a career judiciary in which promotion has become the accepted norm. In general, the usual path to the High Court will lie via the Federal Court, or via service as a Solicitor-General, or (less often, but sometimes) by way of promotion from a State Court of Appeal (which courts offer greater exposure and prestige than mere divisions of State Supreme Courts). And the principal way to become Chief Justice is likely to be by promotion from within the Court.

Several things follow.

One concerns the Federal Court. Unless you happen to be a Solicitor-General, your best way of reaching the High Court will be to take an appointment on the Federal Court, and once there to deliver judgments the thoughtfulness and scholarship of which cry aloud for your talents to be made available to the whole nation on the High Court. To a significant extent the High Court will be composed of judges whose performance in the Federal Court has commended itself to the Commonwealth. It is I think entirely unsatisfactory that a court should be staffed to any extent at all by judges who wish they weren't there, and who are there only because they see service on that court as offering their best chance of being put on another court, and who may slowly realise that they aren't going to be. It is doubly unsatisfactory when the Government which makes the decision whether to put the judge onto that other court is one of the litigating parties in a very high proportion of the cases coming before the court. How might a tax-evader have felt in recent years, if due to get a judgment from a Federal Court judge perceived as currently under consideration for a vacancy on the High Court?

Secondly, it will be apparent that the call for the claims of barristers to be put aside in order to allow the appointment of solicitors and academics is entirely misplaced. The fact is that barristers are not being appointed. You may of course wish to ask whether solicitors and

academics ought to be appointed rather than judges and Solicitors-General. Whatever your answer, that is and seems likely to remain the practical question.

Thirdly, it is small wonder indeed that judges have rejected suggestions that appointments to the High Court be made conditional on passing political scrutiny by way of public hearings.

A private citizen savaged and rejected in such a hearing can retreat and seek solace in the work and rewards of private practice. A very different scenario might be written for a potential appointee who already holds an honourable official position. What fate would await a judge of the Federal Court who was found by a Senate Committee to be unworthy, for some reason real or imagined, to sit on the High Court? What would be his position if, when opposition developed, the government chose not to go ahead with the appointment? Or if the candidate himself felt obliged to request that in the emerging circumstances the appointment not go ahead? Depending no doubt on the issues, one can imagine an honourable man deciding that he ought not to continue in his existing office. Given the right kind of dispute, one can imagine a judge being harassed until he did so. And he might not yet have served long enough to receive any superannuation.

In a world where the likelihood is that every potential appointee to the High Court will already hold an honourable official position, scrutiny by some form of political committee would offer hazard extending beyond what has been realised.

A final reflection in this area of judicial appointments. In 1929 more than sufficient difficulty was found in inducing Mr Owen Dixon to go to the High Court, even though he was to go straight there. Under the system now prevailing the odds are that Mr Dixon would have remained just that, and never become a judge at all.

Of Fairy Tales and Other Things

In this assembly one can say, without giving references, that in recent years the High Court has been the subject of some criticism for what the Court would call the boldness and critics might call the departure from principle of certain of its decisions, for the extent to which it is allowing the foreign affairs power to swallow up the rest of the Australian Constitution, and other such matters.

In November, 1993 the Chief Justice delivered an Oration entitled in some printings The Role of the Judge at the Turn of the Century and in other printings The Role of the Courts at the Turn of the Century. I observe that in relation to a number of matters, such as procedural problems in the courts, the Chief Justice's Oration contains much good sense. It says things which need saying. I am concerned tonight with certain more general aspects, where, as it seems to me, more needs to be said by others.

Criticism and Silence

I notice firstly that the Chief Justice says that the law of contempt forbidding what is misleadingly called "scandalizing the court" is not enforced today as strongly as it used to be. I cannot myself recall any instance of these laws being enforced at any time during my forty years at the Bar, but no doubt one can forget. I can say that I am aware that in the Mabo context critics have thought it desirable to seek advice as to how far their criticism can safely go, and I have never previously known respectable persons give such matters a thought.

I cannot forbear disclosing to you, and at the same time recording for posterity, quite irrelevantly, one comment concerning an instance of enforcement in 1935, in the presumably severe era. The case concerned an editorial in The Sun newspaper, of Sydney. The editorial noted that the Assistant Treasurer, Mr Casey (much later Lord Casey, KG, and Governor-General) had complained of the manner in which the High Court "knocked holes in the Federal laws". (Ironically, the reverse of the criticism made today.) The editorial went on to talk of laws

being "perforated by the keen legal intelligences of the High Court Bench". It queried whether "the ingenuity of five bewigged heads cannot discover another flaw", and went on in like vein. The Court decided that there was contempt, recorded a conviction, and imposed a fine of œ50 on the editor and œ200 on the company. Mr Justice Starke, who never wore a wig, dissented as to penalty, thinking that conviction and an order for the payment of costs were sufficient punishment, without a fine. When asked by his son why he had been so lenient, he replied, with some misstatement of the precise evidence, "My boy, if he'd referred to four bewigged old fools it wouldn't have been contempt at all." No wonder Starke's colleagues loved him.

At p.7 his Honour says that because there is today more criticism of courts, the policy of judges will be to speak back more. His Honour ventures the thought that in the long run the benefits of enhanced debate will promote better understanding of the law, and that this may outweigh the negative aspects of criticism of the judiciary.

Yes, and, er, No. One can easily see the need to provide factual information to the media, and the desirability of establishing some facility for doing so. The Supreme Courts of New South Wales and Victoria have appointed a Public Information Officer, with the function of keeping the media informed. The appointments are regarded as very successful. Again, one can see the benefits of judges joining in discussion on matters to do with the courts, so long, as Chief Justice Gleeson of New South Wales has said, as the subjects for discussion are carefully chosen. His Honour mentioned as totally unacceptable any discussion of particular cases. Entry by judges into that area seems inherently dangerous.

One has to start with the fact that judges never have been silent. The judge makes his prime statement of what he has to say when he publishes his reasons for judgment. In doing so he has total privilege, and he has the protection of the laws as to contempt of court. Where the judge has traditionally been silent, has been in relation to subsequent criticism. I agree, and regret, that there have been occasions when Attorneys- General have not answered criticisms of courts and judges in the manner which the very special nature of that office ought to have caused them to. Attorneys-General have of course a difficult role. Historically they have, and they are supposed still to have, a duty to the law, to the courts, and to the judges. They are also part of a Ministry, and they have a loyalty to the government. They are supposed to put their duty to the law first. They are the only ministers the subject of conflicting demands in this way. Not unexpectedly, the way we run things in this country, the claims of party have too often been seen as supreme, and Attorneys- General have failed in their supposedly paramount duty to the courts and judges. I add that Bar Councils likewise have been silent when they ought to have spoken. I can well understand courts, which would prefer to be silent, feeling unprotected and forced to speak.

But much will be lost, if there is entry by judges into heavy debate, especially debate as to specific decisions (as we have already seen, alas).

For a start, the judge must realise that while what he says in his court is the law, unless someone can and does overrule him, what he says elsewhere has no special force. The law, Oliver Wendell Holmes finely pointed out, has no mandamus to the logical faculty. Still less does the judge when acting privately.

Again, is the judge to bring with him into the lecture theatre and the intellectual magazines and the correspondence columns any vestige at all of the protection which the laws as to contempt of court give him when he sits and speaks in his court? Will he be content to argue with no more protection than any other citizen? Will he make that plain to the world in advance?

Is it good for the court and the prestige of its decisions, that in the public perception the judge has just lost the public debate?

These are matters which the High Court must consider, before going further down the path of speaking out in response to particular criticisms.

A Puzzling Passage

I turn next to an uncontroversial passage, because I find it a puzzlement.

At p.18 his Honour notes the approval which the High Court gave to the initiative taken by the New South Wales Court of Appeal in Trident General Insurance Co. Ltd. v McNiece Bros. Pty. Ltd. (1988) 165 C.L.R. 107. He notes that unspecified innovations by Lord Denning as Master of the Rolls did not receive from the House of Lords the approval which the New South Wales Court of Appeal's boldness received in Trident, and says "At that time the House of Lords took a more conservative view of the role of an appellate court." That might mean "a more conservative view of the role of an appellate court than it does now", but coming straight after the reference to the High Court's endorsement of Trident I think it means "a more conservative view of the role of an appellate court than the High Court does". But the very next sentence says that there is no parallel between the relationship between the House of Lords and the Court of Appeal, and that between the High Court and Australian intermediate courts. Question: What point is the Chief Justice making? And if some comparison is being made, what meaningful comparison emerges from showing what one ultimate court of appeal did in one case, and another ultimate court of appeal did in unspecified other cases?

The matter is a small one, but it is typical of several passages where the Oration clearly intends to say something, but does not make clear precisely what.

Fairy Tales and the Creation of Law

The final matter is more important. At pp.21ff the Chief Justice says that the incidental creation of law is implicit in the role of the judge, and that criticism of the Court for undertaking a legislative role seemed to imply that the Court exceeds its role if it makes law. "Only a person entirely ignorant of the history of the common law could make such a suggestion." At p.22 the Chief Justice says, "It is scarcely to be credited that anyone with any understanding of the judicial process now believes the fairy tale that judges `discover' the law and then declare it, without actually making it, as though the judges resembled the Delphic oracle in revealing the intention of the pagan gods."

Needless to say the passage got a good press, as Chief Justices are apt to do when they refer to fairy tales and the oracle at Delphi. Fairy tales were in vogue again, at p.8 of an address to the Sydney Institute in March, 1994:

"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."

Good flowing stuff, but far more impressive if not directed against a man of straw. When I read it, I wondered to whom the Chief Justice was referring. Immodestly, for one brief moment I wondered whether he was referring to me. That seemed unlikely, for various reasons,one of which is that I have never thought or said anything along the lines indicated in either passage. Was the reference to Sir Owen Dixon? Very unlikely. The Chief Justice has more than once made plain his great respect for Sir Owen Dixon, and again Sir Owen never, to my knowledge, said anything at all resembling the views criticised in those two passages. Who then has said anything like them? There I find myself bewildered, for I know of no one who denies, and I know of no one who has within the last hundred years denied, that in some sense judges, especially appellate judges, make law.

Certain things need of course to be added. Very shortly:

Judges make law in a very special way, under special conditions and within special parameters.

Telling a judge that what he says will be the law is no help to a judge who is trying to formulate what he is going to say.

The doctrine of the law is that the correctness or otherwise of what the judge says can be judged against the principles of legal reasoning. There is no exemption for the judge's own contribution. He may be able to point to it as his personal contribution. It will be right if, but only if, it is perceived as consistent with legal principle.

None of this is new. Almost forty years ago, Sir Owen Dixon received the Henry E Howland Memorial Prize, from Yale University. He was asked to honour the occasion by the delivery of a paper. The result was a paper Concerning Judicial Method, in which Dixon spelled out his views on certain matters very relevant today. You will find it reprinted in Jesting Pilate (Law Book Co., 1965). It was Lord Wilberforce who said, "There is no such thing as substandard Dixon, but from time to time there is Dixon at his superb best". This paper at Yale is Dixon at his superb best. It is not always easy, for thought packs on thought. Every word has been chosen carefully and needs to be read carefully. I quote several passages below, for they set out better and more authoritatively than I could ever hope to do the principles which underlie the concern which people feel as to the present High Court.

It is of course true that the law is not lying there waiting to be "discovered". But it is not true that judges can say whatever they like. Dixon speaks first of the doctrine that it is meaningful to say that what the court says, whatever its source, may be "right" or "wrong":

"Such courts (courts of ultimate resort) do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be `correct' or `incorrect', `right' or `wrong' as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption, but it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness."

That assumption underlies the whole process of argument conducted before the Court by highly-paid persons believed to be able to argue and persuade and convince:

"The argument is dialectical and the judges engage in the discussion. At every point in an argument the existence is assumed of a body of ascertained principles or doctrine which both counsel and judges know or ought to know, and there is a constant appeal to this body of knowledge. In the course of an argument there is usually a resort to case law, for one purpose or another. It may be for an illustration. It may be because there is a decided case to which the court will ascribe an imperative authority. But for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion."

When the court decides, no doubt what it has decided is, while it stands, the law. Yet lawyers will still stand aside and wonder whether it is good law or bad law. Academics and practitioners will write articles praising or criticising decisions as consistent with principle or inconsistent with principle. Mandamus will still not lie to the logical faculty. Whether the law as declared is good law or bad law is a decision which will ultimately be made not by the deciding judge, but by posterity.

Dixon was equally aware of the contribution of the judge, and of the proper limits of that contribution. He makes an interesting remark on it in a letter he wrote to his judicial friend the great Felix Frankfurter, of the Supreme Court of the United States. In picking up the letter and expressing the hope that someday Dixon's letters will be collected and published, I cannot forbear quoting another irrelevant remark about Sir Hayden Starke. Dixon writes, "It is true that

he did not die until he was over eighty-seven, and although I am beginning to regard that as premature it is not a widely held opinion".

Dixon was well aware of the judicial making of law. He says to Frankfurter:

"Denning has been in India to the meeting of the International Commission of Jurists. He is reported to have gone very far in his statement of the judicial function in making law. His statements are reported as if he treated it as an arbitrary act, which I find it hard to believe. On the whole controversy, which in England now seems to centre around him, I have felt that it is unwise for a judge to speak publicly. He ought to appear to believe that he has some external guidance even if in his ignorance he regards it as untrue. In the Darwinian processes of adaptation to environment such a bird as the honey-sucker ought not consciously to enlarge his bill by stretching it even if reaching for the honey causes him to do so. In any case law-making ought not to be regarded as honey."

In his Yale paper Dixon had given a more closely reasoned statement of his views:

"No doubt courts are much more conscious than of old of the formative process to which their judgments may contribute. They have listened, perhaps with profit, to the teachings concerning the social ends to which legal development is or ought to be directed. But in our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine. It is one thing for a court to seek to extend the application of accepted principles to new cases, or to reason from the more fundamental of settled legal principles to new conclusions, or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from long accepted legal principles, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change. The objection is that in truth the judge wrests the law to his authority. No doubt he supposes that it is to do a great right. And he may not acknowledge that for the purpose he must do more than a little wrong. Indeed there is a fundamental contradiction when such a course is taken. The purpose of the court which does it is to establish as law a better rule or doctrine. For this the court looks to the binding effect of its decision as precedents. Treating itself as possessed of a paramount authority over the law in virtue of the doctrine of judicial precedent, it sets at nought every relevant judicial precedent of the past. It is for this reason that it has been said that the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday."

There it is, enunciated once and for all. Read it, and read it again. There, nearly forty years before Mabo was decided, is the basis for the wide criticism of the decision in Mabo, and of the making of the decision in that case. There is all the difference in the world between the judge who is bound to take a step, in order to decide a case, and the judge who wishes to take a step because he thinks it a step which ought to be taken. If ever there was a situation which cried out for caution, for care, for proceeding with deliberation, step by step, it was the situation one part of which was brought to the Court in Mabo. Instead the whole thing was decided ahead of the necessity of the case, in a manner people can be forgiven for seeing as "abrupt and almost arbitrary".

Again, on the other great constitutional issue of the day. We have a Constitution which provides a particular balance between Commonwealth and State powers, and which prescribed a particular system for its own amendment, putting the decision as to amendment in the hands of the people the Constitution exists to serve. There now stands alongside all that a doctrine under which the

Executive Government of the Commonwealth can, without reference even to the Parliament of the Commonwealth, enter into a treaty, the mere entry into which changes the balance of power between Commonwealth and States, giving the Commonwealth power to enact laws which a moment before it could not.

The onlooker sees a Commonwealth Government using the foreign affairs power to control the activities of State governments which it has failed to induce to come into line with its wishes, and making open threats to make further use of that power for that reason. The onlooker sees a High Court, the protector of the Constitution, which has not found it possible to draw from the Constitution any implication limiting the destruction which the foreign affairs power is causing to the whole balance of power between Commonwealth and States. The onlooker remembers some final words of Dixon:

"Since the Engineers' Case, a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems to be the last to which it could be applied." (Essendon Corporation v Criterion Theatres.)

These are the things which worry. These are the things which cause concern. These are the things which call for answer. And if judges themselves do mean to answer the criticisms of many and respectable and responsible and respectful critics, they should deal with the criticisms quietly and thoughtfully and with respect. If not, it will be all too obvious who are talking fairy tales.