THE HON. MURRAY GLEESON AC QC

Edited transcript of a three-part interview with Juliette Brodsky for the NSW Bar Association August - September 2018

Part 1 14 August 2018

Q *Juliette Brodsky interviewing Mr Murray Gleeson for the NSW Bar Association oral history – thank you very much for making time to speak with me today.*

A You're welcome.

Q *It's the eve of your 80th birthday at the time of this recording, and it's been ten years since you concluded your time as Chief Justice of the High Court of Australia. Can I just ask a quick question for my own curiosity – what activities are you currently involved in?*

A If you mean professional activities –

Q *Yes.*

A I'm a non-permanent Judge of the Hong Kong Court of Final Appeal which means that for most years I spend one month sitting on that court. In addition, I am often invited to make speeches to judges and barristers and people of that kind, and I do some commercial arbitrations, international and domestic.

Q *You're patron of the Chartered Institute of Arbitrators Australia*.

A Yes, I have been for many years. It's quite likely that I became patron of that body before it took on its current corporate form. The organisation would know that better than I do. But I think I have had a connection with that body, or its predecessor, since I was Chief Justice of NSW.

Q *Your views about (arbitration) as a form of alternative dispute resolution? There are some who believe ADR should just be called "dispute resolution".*

A I'm talking about arbitration as distinct from mediation; I don't do mediations. Arbitration, as a matter of history, is a very old and widely accepted form of commercial dispute resolution and I'm not talking about industrial arbitration or international arbitration. Commercial arbitration was common in London before the establishment of the Commercial Court at the end of the nineteenth century, and indeed in one sense, the Commercial Court in London was established in response to the success or popularity of arbitration. The main reason people might choose arbitration, in my experience, is because of privacy considerations. Generally, arbitration is not open to the public

and many people for various reasons would prefer to have their commercial disputes resolved privately, rather than in public. Court proceedings, subject to some special qualifications, are generally conducted in public because court proceedings involve the exercise of the judicial power of government. Arbitration involves private dispute resolution, pursuant to a contract that the parties have made to abide by the decision of a person chosen as arbitrator. As I say, the arbitrations are usually conducted in private, and that is why people who go to arbitrations prefer that method of dispute resolution.

Q *(Arbitrations) also have the advantage, I believe, of being relatively swift, which would appeal to you, I imagine?*

A Personally, I don't believe that they are relatively swift, nor do I believe that they are relatively inexpensive. Maybe some of them are, but large commercial disputes that go to arbitration are dealt with in terms of time and expense in a manner that's probably not very different to commercial disputes that go to court.

Q *I'd like to turn to your early years. Looking back to your boyhood in Wingham, there was an uncle who foretold even then that you weren't going to follow your father into his line of business.*

A I don't remember that prediction, but I don't think it was ever likely that I would have gone into my father's business, for a number of reasons. I didn't actually decide to study law until after I'd left school, I did an Arts-Law course at Sydney University. Until I'd finished my Arts course, I wasn't finally committed to law. I might have preferred to stay on with the Arts course – I had a particular interest in history – but I don't think I had a commitment to law probably until I was aged 19-20.

Q *Despite the fact that when you were at school at St Joseph's (or "Joeys"), you were heralded for your debating and public speaking abilities - surely even then, people were saying, "There's a future lawyer".*

A Perhaps that's true. There were no lawyers in my family. They used to have people called careers advisors at school – maybe they still do – they would always put law at the top of the list of suggested careers I might follow.

Q *Did you feel comfortable, in your element, when you got up to speak? You did address a number of topics at eisteddfods.*

A Yes, I felt comfortable with public speaking. I received plenty of encouragement at school from the people who were in charge of public speaking and debating. I seemed to do well at it and it seemed to suit me.

Q *An interesting person for you at that time was the chaplain, Monsignor Cornelius Duffy who didn't think there was such a thing as dyslexia. Is that true?*

A Apart from being the chaplain at St Joseph's College, he was the inspector of Catholic schools. Precisely what his job was in that regard, I can't tell you – but certainly it involved some kind of supervision of the curriculum and teaching methods. He had a particular interest in the topic of remedial reading, not that that had anything to do with me, but that was an area of interest. I think at the time he would have regarded as faddish some of the discussion around dyslexia. It didn't fit in with his theories – I can't explain to you exactly why – about remedial reading, but yes, he was in the anti-dyslexia camp.

Q *Joey's was known in those days as a sporting school, but I believe you did a lot to turn around that reputation during the times when you competed against other schools in debates.*

A It did have a reputation, particularly for rugby football. I think it's probably the case that I was the first for a long time, who had had much success at inter-school debating, although six or seven years before I was in the school debating team, Bill Deane had done very well in that area, and a man called Tony Gallagher who's long since dead. He was very successful in that area also.

Q *You entered the Sydney Eisteddfod in 1951 and you made a speech, "If I were prime minister". I know you never considered politics - Robert Menzies was prime minister at that time and would remain so until 1966. Was there something about his style as Prime Minister that you aspired towards?*

A No, my recollection at that time was that you were given quite a narrow choice of topics, possibly three, and I chose that one. I forget what the other topics were, but I don't think I thought of that topic for myself.

Q *I was amused by the fact that you occasionally slipped up. You referred in one of your debates to the Greek philosopher "Pluto" and your opponent wanted to know what relevance the mythical god of the underworld or Walt Disney's cartoon dog had to the topic, but you didn't lose your cool.*

A I was told that that happened, but I have no present recollection of it.

Q *James Dibble, the well-known newsreader, was apparently such a good newsreader that whenever he mispronounced a word or thought he might, he would say "wheelbarrow". He said it so well that nobody noticed.*

A I remember James Dibble very well. What I particularly remember about him and newsreaders of his time, was that they were encouraged, perhaps even required, to use a Southern English accent –

Q *R.P – received pronunciation.*

A Received pronunciation – interesting to contrast that with current newsreaders.

Q *You never aspired to a career in the media, did you? You could have been a newsreader.*

A No, I didn't ever think about that. In fact, I wouldn't even be able to tell how I could have had access to a job like that.

Q *It would have been through friends of friends – that's how it used to work in newspapers and television.*

A I should think so.

Q *Your parents thought at the age of 15, you were too young for Sydney University – I believe that you did a repeat year, which was not unusual, at Joey's. You debated the late Robert Hughes, brother of Tom Hughes QC.*

A Yes, Bob Hughes was in the Riverview debating team in 1955, which was my last year at school. He may have been in it in 1954, also. I remember other people in that team: Tony Macken who's a well-known Melbourne lawyer at the moment, Jon North, Vincent John Flynn. One or two of them I still see from time to time.

Q *Do you remember Robert Hughes' (debating) style?*

A I do.

Q *Was it flamboyant?*

A It was. He and I debated together at the university also. He studied architecture, as I recall. He wrote a book, "The Shock of the New" and that may have been the name of his television series also –

Q *Yes, it was.*

A Well, his style on that television series was very much like his public speaking or debating style.

Q *Clive James described him in his book "Unreliable Memoirs" as being so handsome, he was like a cartoon.*

A I never thought of him in those terms – I do remember a cartoon that he published, however. It was the first cartoon on the cover of *Honi Soit,* which was the Sydney University magazine, and he was the student editor. The cartoon depicted a scene in a maternity hospital. A monster – a pear-shaped being with horns and a tail – was standing in the maternity waiting room of the hospital and a nurse brought, wrapped, a baby monster with a pear-shaped body, horns and a tail. And the father monster said to the nurse, "Don't bother to wrap it up – I'll eat it on the way home!" (LAUGHTER)

Q *Oh, that's delightful. Did you wish you'd gone to Riverview yourself? Were you interested in the Jesuit approach to education?*

A No, that wasn't a matter that ever occurred to me.

Q *I'm interested because you were the product of cross-sectarian parents – you had a Catholic father and a Presbyterian mother.*

A Yes, I was the child of a mixed marriage. Most of my relatives where I grew up were on the Murray side of the family and they were Protestant, although the most famous member of that family, Les Murray became a Catholic.

Q *You're related to Les Murray, the poet? I did wonder when I saw that Murray was a family name.*

A Yes, I've never met him. He was related to my mother; she knew him personally. He and I are both descendants of a woman called Isabella Murray who came to the Manning River in 1851 as a widow with a number of children. The oldest boys in the family had come out from Scotland two or three years before them, and worked for the Australian Agricultural Company, which is still in existence, and had taken up selections of land in Manning. She brought the other children out and that's where she'd brought them up.

Q *Your father, Leo, took the oath of temperance – I believe there was a strain of alcoholism in his family.*

A Well, my father's parents both died long before I was born but he told me his father was an alcoholic and that's why he took that temperance oath. He never drank at all or smoked during his life.

Q *He sounded a bit of a dynamo, from what I've read.*

A Yes, he was, by the standards of the people who lived in that country area.

Q *He was a busy man: he became mayor eventually and did a lot to employ returned servicemen and was very entrepreneurial with scrap equipment.*

A His most extensive business interest related to trucks and tractors and spare parts for trucks and tractors. Much of what he dealt in was war surplus equipment, some of which came from the islands to the north of Australia.

Q *He also encouraged your interest in politics and current affairs as a boy.*

A He was a supporter of the Country Party, and yes, he was interested in politics and current affairs. I can remember that he actually took me to the Sydney Airport to watch the removal of Mrs Petrov at the time of that famous difficulty in Australia's relations with Russia.

Q *The photos of the scuffle that took place – were you actually nearby?*

A Yes.

Q *That must have made quite an impression on you. You would have been how old?*

A Probably about ten, I'm not sure. For some reason, he'd had contact with Billy Wentworth in connection with some business that my father had in Wollongong – it's quite likely that Wentworth had told him to be there or suggested that he might go.

Q *Your father also encouraged you to attend the Labor Party split debate at Sydney Town Hall.*

A That's right. A good friend of my father was a man called the Apprenticeship Commissioner whose responsibility was to supervise industrial relations involving apprentices. His name was Ted Boland. I don't know how my father came to meet him. He would often come and stay at our place in Wingham when he was doing his circuit. My father employed a number of apprentices. Ted Boland was closely associated with the Labor Party – whether he was formally a member of it, I don't know but he arranged for me to attend this event in the Town Hall as a spectator in the public gallery. I can remember seeing some of the leading figures of the Labor Party making speeches on that occasion. I must have been in about third or fourth year of (high) school.

Q *Dr Lloyd Ross was one of the speakers. You were apparently quite impressed with him – he had crutches but spoke in an electrifying way.*

A Yes, that's true.

Q *But he'd been a member of the Communist Party – there was a streak of anti-communism in your household at that time?*

A There was a strong streak of anti-communism. Lloyd Ross had been a member of the Communist Party, but he was an anti-communist by the time I saw him.

Q *He'd been expelled from the Communist Party, for some of his writings.*

A You have to remember it was the height of the Cold War.

Q *Do you think with the benefit of hindsight, that some of the anti-communist feeling in Australia in the 1950s was ill-judged?*

A No. I think it was a major issue in Australia's international relations and there's no doubt that communism dominated some trade unions particularly the Waterside Workers Federation. There was seen at the time a risk of communist expansion in south-east Asia which could have had consequences for Australia. No, I don't think it was exaggerated. There isn't any doubt, I think, that a lot of Marxist ideology was expansionist and proselytising. Whether it had any real prospect of becoming a dominant element in Australian politics, I can't say.

Q *You commenced at Sydney University in 1956 on a scholarship and you were billeted at your aunt Peg's house in Rose Bay. There's this*

photo of you at that time, smoking a pipe. You developed a smoking habit.

A Yes, I did. I didn't smoke a pipe very much, but I smoked cigarettes from the time I left school until I was about 26-27 years old.

Q *One of your university confreres remembers you saying when asked how you saw the future, it was yourself "sitting by the fire having a learned conversation with a judge".*

A That might be right. It doesn't surprise me if it would be right. If it's right, it would have been after I started studying law, rather than when I was doing Arts.

Q *You mentioned at the beginning an interest in history – were you contemplating becoming a historian?*

A When I was in second year Arts at Sydney University, the lecturer suggested that I might care to stay on and do history, I think with a view to my becoming a lecturer in history.

Q *But of course you made the decision to go into law. There was an interesting man at the campus at that time, John Anderson who was Challis professor of philosophy.*

A Yes, I remember John Anderson when I was in first year Arts. He was Professor in Philosophy.

Q *He passed away in 1958. What was he like? He was a larger than life figure at the university.*

A Yes, he was. He was regarded as a libertarian, a free thinker. John Anderson, when he gave lectures, he required his lectures to be taken down word for word. There was no discussion in the class, and in examinations he expected his lectures to be repeated back to him by way of answers. Perhaps he encouraged a spirit of free-thinking in his students at a later stage of their development.

Q *Did that rub off on you?*

A I don't know. He was a very good lecturer. Nothing that he had to teach us was very controversial. He taught us about Socrates and the Platonic dialogues. What he taught us best was logic, a topic which had formal rules that he expounded very clearly. His method of teaching logic made a big impression on me.

Q *Did you carry forward something of his approach into your practice?*

A I can't say. I found him a very good teacher of formal logic and I also found his method of providing an introduction to Greek philosophy very interesting.

Q *One of your contemporaries was David Hargraves Hodgson –*

A Yes.

Q *Who became a Rhodes scholar, went to the Bar and in due course chief judge in equity on the NSW Court of Appeal. I believe he wrote some books on philosophy.*

A Yes, he did – almost up until the time of his death.

Q *You used to have discussions with him about philosophy.*

A Yes, he did extremely well at university in the UK. I forget the name of the last book he wrote – I read it – I found I could understand what was in the first chapter and what was in the last chapter, but what was in the middle was beyond my comprehension because there was a lot about mathematics in it. He was an excellent mathematician and a lot of his philosophy was based on mathematics.

Q *I never thought to ask – were you much into mathematics?*

A No, I did it for the Leaving Certificate but I wasn't particularly good at it – didn't particularly like it.

Q *The biography written about you – "The Smiler" by Michael Pelly – mentions that you weren't terribly interested in Julius Stone, the late Challis Professor of Jurisprudence. You were talking before of John Anderson who encouraged free thinking. Julius Stone also encouraged free thinking in his approach.*

A Julius Stone was fairly marginal to the subjects that I was concerned with, particularly at law school. He lectured in public international law and in jurisprudence. I have no recollection now whether those subjects were compulsory or elective – I assume they were compulsory – because I have no memory contrary to that – but he wasn't the dean of the law school and his area gave the impression of being a kind of satellite area. There were particular adherents of his at the law school, but in the way the law was presented to us, Julius Stone always seemed to be slightly marginal. Now, he'd written a great book called "The Province and Function of Law" which was a very important work of jurisprudence, but I think it's probably only after I left law school that I really developed any particular interest in him and his work. I can't explain why that happened, but that's just the way it seemed to be when I was at law school.

Q *A lecturer I believe who left more of an impression was Richard Bentham in equity.*

A He was an excellent lecturer – he' was a man from Northern Ireland, I think – but he'd come to Sydney from Tasmania in consequence, as I recall, of the scandal in relation to Professor (Sydney Sparkes) Orr – and the way the University of Tasmania had dealt with Professor Orr. But I always remember Professor Bentham as a model lecturer. It's important to keep in mind that in those days, most of the lecturers were judges or legal practitioners. Bentham was one of the relatively few

full-time teaching academics at the law school. Other people in that category were Ross Parsons and Professor Morison, the professor of tort law. There weren't many other full-time teachers. That was slightly to our disadvantage, because although it was very useful to have lectures from judges and practising barristers – they weren't professional teachers.

Q *You were to do some teaching yourself later –*

A Yes, in company law, for ten years.

Q *It's a whole different discipline and the ability to communicate is paramount. I imagine nevertheless some of the practitioners would have been very interesting to hear in terms of their direct experience. Maybe they might not have been good with students?*

A I think the replacement of part-time lecturers who were practitioners by full-time teachers meant that the university lost something, but it gained more instead. I think it's to the benefit of the university now that most of the teaching is done by professional, full-time teachers, although I think it's important they keep their links with the practising profession.

Q *Did you ever write for Honi Soit, the university magazine, while you were there?*

A Not that I can recall, no.

Q *Ken Handley, who I interviewed, wrote on liberal values for Honi Soit.*

A I think what Ken Handley means by liberal would not be the same as what they would have meant by liberal.

Q *He said he mostly wrote it to counter the predominant points of view then, politically speaking, at the university at the time.*

A I had no connection with *Honi Soit* at the university. I didn't then know Ken personally or that he was connected with *Honi Soit*, but I wouldn't have classified him as a libertarian.

Q *Yours was from the beginning a very serious work ethic and you did very well at university – you just missed out, I believe, on the Sydney University law medal.*

A Yes, I had good results all the way through university and I did work hard. The sport that I played most when I was at university was squash because you could play it quickly.

Q *And it's intense.*

A It is, but I was in a Sydney University badge tennis team with David Hodgson when he and I were in Arts. He and I were in one of the university's badge tennis teams and that's where I first met him.

Q *How long did you keep up your tennis playing?*

A Not after Arts. I took tennis up in middle age after I couldn't keep playing squash. I kept up squash playing until I was in my 40s and the reason I gave squash up was because I had to wear glasses – although theoretically I know you could wear glasses and play squash, I didn't find that comfortable. So I returned to tennis.

Q *You also had the makings of a promising cricketer.*

A I was in the school first eleven for two years, but I didn't play cricket after I left school. I played golf for three or four years after I finished at university, but I gave up golf after I got married. Then I took it up again when I retired from the High Court and I now play it regularly.

Q *While you were editing the Sydney University Law Review, I believe you had a rather interesting encounter with Doc Evatt who was at that time Chief Justice of the Supreme Court of NSW. He was past his political days – I believe he was pushing for you to write an article that would favour his approach in a case that had to do with a woman whose son was drowned in a ditch. She was suing the council who'd dug the ditch.*

A Yes, there was a famous tort case: *Chester v The Waverley Corporation* in which a woman sued for nervous shock, following some injury to a child in a drain for which the Waverley Council was responsible. Evatt wrote a famous judgment in that case in relation to the law for recovering damages in relation to nervous shock. But it wasn't a judgment that compelled majority acceptance. While Evatt was Chief Justice of NSW and while I was an articled clerk at the firm of Murphy and Moloney, the Privy Council gave a decision in a case called The Wagon Mound, about duty of care in tort.

The lady who was a telephonist at Murphy and Moloney said to me one day, "There's a very strange man who's been ringing up for you on the telephone and he wants you to contact him". She gave me the telephone number and it turned out to be the Chief Justice. He said, "I'd like you to come up and have morning or afternoon tea with me". So I went up to his chambers to have tea with him, and he told me that he'd like me to write an article in the Sydney Law Review saying that his dissenting judgment in Chester and the Waverley Corporation had been vindicated by the decision of the Privy Council in The Wagon Mound. He expressed himself on the subject at length and very loudly. As I was leaving his chambers, he called out to me, "Don't let the conservative bastards run away with this point!" I said, "No, no, I won't let them do that".

I went back to the office and the next day I spoke to Professor Morison who was the professor of torts at the law school and told him what had happened. He said, "What he's saying to you about his decision being vindicated is wrong, but in any event, do nothing. Just do nothing." So, I did nothing, but the Chief Justice kept ringing up Murphy and Moloney and wanting to speak to me. The lady on the switch kept saying, "That strange man's on the telephone again". Finally, my master solicitor

went up to see the Chief Justice and told him to stop telephoning the articled clerk. And that was the end of it. I don't think Dr Evatt lasted much longer as Chief Justice after that.

Q *Did you feel sorry for Doc Evatt?*

A Well, yes, I think that it was pretty apparent that he was not in full command of his situation at that time. There were some fairly strange stories circulating about him in the profession at the time. It turned out that his problem was quite physical – I forget -

Q *Arteriosclerosis.*

A Right, it was quite a physical problem.

Q *It may have been the reason he'd been having outbursts.*

A Well, yes, but he'd been having outbursts long before he went onto the Court. He was having outbursts in politics after the Petrov Case. The suggestion is that (Robert) Menzies goaded him – I don't know if that's a fair statement of what happened, but er….

Q *Doc Evatt made a strange comment to you: "I keep seeing that dead baby in the ditch".*

A He did - yes.

Q *I'm interested – although you do say that long before your encounter, he was known to be pretty passionate – do you think certain things were catching up with him, or do you think it was ultimately a physical cause that led to his mental demise?*

A I can only recount gossip about him, but a lot of barristers that I later practised with remembered him when he was in practice at the Bar and he certainly did some very unusual things, even when he was a practising barrister.

Q *Perhaps his temperament was in some ways not suited to law? His was a fine mind, though – he wrote a number of interesting books.*

A Perhaps he was a square peg in a round hole.

Q *Perhaps.*

A For example, after he'd left the High Court and been in politics, as a barrister he argued the banking case against Barwick in the Privy Council. He read the Law Lords long slabs of passages from his own judgments that he had written. That's not very orthodox advocacy and is inviting trouble, for obvious reasons.

Q *Yes.*

A He seems to have been eccentric for a long time before he became Chief Justice and it was said at the time that the Attorney General at

the time, Reg Downing strongly resisted his appointment as Chief Justice, but that he was appointed because people wanted to get him out of the Labor side of politics where he wasn't being an asset to the party.

Q *You mentioned your master solicitor –*

A Gerald Wells.

Q *It wasn't necessarily difficult for you, but at that time, you were juggling doing articles (with) editing the Sydney University Law Review*. You only spent a year at Murphy and Moloney -

A I spent a year (at Murphy and Moloney) after I finished law school as an employed solicitor. I think I was three years as an articled clerk. I would have gone to Murphy and Moloney when I was in my second year of law. I was an articled clerk there while I was in second, third and fourth year law. Then I was admitted to practice at the end of my law course. I practised for a year as an employed solicitor at Murphy and Moloney and then went to the Bar.

Q *You were not attracted, then, by the idea of becoming a solicitor?*

A No, I wanted to go to the Bar.

Q *They were briefing some very interesting junior barristers at that time: Laurence Street, Anthony Mason, Bill Deane, who you've mentioned - later to become Governor-General. I read about them – the quality they had in common was discipline, and I imagine that made a lot of impact on you?*

A Murphy and Moloney made it very clear to me early on in my time there that they only briefed barristers whom they regarded as reliable. That is, you wanted to be sure that the barrister would do the work promptly and would turn up for the court case. It wasn't something that could be said of all the members of the Bar at the time. They had a very high opinion of people of the kind you've just mentioned. For senior counsel work, they briefed J.W. Smyth QC and Bill Ash. They had a very close connection with the Seventh Floor at Wentworth Chambers where the clerk was Fred de Saxe. They took very seriously the question of whom they briefed because they took the view that it was the client who had to ultimately bear the consequences if they briefed someone unreliable.

Q *Absolutely.*

A And they wanted to brief someone of the top drawer; they didn't want their client represented by the second-best barristers in the court.

Q *When you made the decision to go to the Bar, I believe they were quite generous about it although they were hoping to keep you*.

A Yes, they said that if I stayed with them, they would expect to offer me a partnership, but they understood that my objective was to go to the Bar and they promised that they would support me when I went to the Bar. In other words, I went to the Bar knowing they were going to brief me.

Q *Yes, which was for a young barrister at that time a rather unusual situation to be in. Turning to Bill Deane, he was responsible for introducing you to your first master at the Bar, Laurence Street who later became Sir Laurence Street –*

A Ah, I'd met Laurence Street when I was at Murphy and Moloney – they briefed him a lot. It was Bill Deane however who contacted Laurence Street and asked him if he would take me on as a reader.

Q *You couldn't read with Bill Deane, because he hadn't been a junior (barrister) long enough.*

A He hadn't been seven years at the Bar – that was the rule.

Q *So with Sir Laurence Street, I'm interested in your impressions of him, having met him myself. He was a very fluent and charming human being.*

A He was a hugely successful barrister and full of charm. For example, whenever anybody went to Laurence's chambers to have a conference with him, he'd walk you out at the end to the lift and wait with you until it came. That was everybody. He also of course exercised his charm to great effect with judges; they liked him and trusted him. He was an excellent advocate. He understood that the objective of advocacy is to be persuasive. He was quite the opposite of some barristers who used to appear to revel in contradicting judges or taking points in an abrasive fashion.

Q *Are you thinking of anyone in particular?*

A Yes, I am but I wouldn't name them. He had a great contempt for the kind of barrister who would get into a fight with a judge the moment he got in the judge's court. And he always knew how to goad those people into getting into a fight with a judge. He had a huge following among solicitors; there can never have been a barrister who had such a following among law firms as Laurence Street.

Q *He was known as "Lorenzo the Magnificent".*

A Not then he wasn't. I don't particularly like that description of him. He wasn't really like that at all. He was very subtle. He was very adept at tactical manoeuvres. But above all, he was knowledgeable and charming. He had a very practical bent in the way he advised people and the way he practised the law. It's important to keep in mind when talking of barristers of that vintage, or a little earlier when you talk about somebody like Barwick for example, that those people did a lot of their work giving advice in chambers. While they had a great deal of

litigious activity that they were engaged in, people used to just come and see them to get their advice about legal problems. They were expected to deal with those problems quickly and effectively and in a practical fashion.

Q *Has that gone somewhat out of fashion?*

A I suspect that the large law firms don't come to the Bar for that kind of work now – I suspect they do that work in-house.

Q *Is that something that we've lost?*

A Yes. A lot of law firms now regard the Bar as their competitors, for financial reasons. Whereas in those days, the law firms were a lot smaller; even the largest law firm only had about a dozen partners. They were very dependent upon the advice of people like Barwick, Mason, Street or Deane. The personal relations that developed between those barristers and leading solicitors were very important on both sides.

Q *The qualities you mentioned as admiring in Sir Laurence Street – were they qualities that rubbed off on you, or did you prefer to follow and develop your own style?*

A I wouldn't think in terms of those qualities "rubbing off". It would be more accurate to say I observed and admired the qualities that made them successful and took that into account in my own behaviour. But that goes on through the whole of your time in the profession. When you're appearing before judges, you see some judges that are good and some that are bad, and you avoid doing what the bad ones do, and attempt to do the same as the ones you admire. Same with other members of the Bar – you see what contributes to success, and at the other extreme, you see those barristers of whom Laurence Street used to say, "They could always snatch defeat from the jaws of victory". You'd see people do that time and time again and know what to avoid.

Q *Yours was a good relationship with him – I believe he liked what he called your "textured sense of humour".*

A Is that right? Well, he gave me a number of pieces of advice but two I remember particularly when I took over from him as Chief Justice (of the NSW Supreme Court). He said to me, "Never let anybody take a photo of you with a drink in your hand" which is a good sensible piece of advice for anybody in public life. He also said, "Don't tell any jokes when you make speeches. It wouldn't be a good idea to let the public know what kind of things you think are funny".

Q *You were admitted to practice in 1963 and your admission was moved by Bill Deane. Who was in your intake that year?*

A I think Roger Gyles was a couple of years later, and Andrew Rogers was a couple of years earlier. David Hodgson was certainly some

years later because he went and studied in England. David Hunt was slightly earlier than me –

Q *Though you ended up sharing a room with him on the Seventh Floor.*

A Yes. Brian Tamberlin was a little later. Brian Beaumont was around at that time, perhaps one year later than me. That's the best I can do at the moment.

Q *There were very few women at the Bar at that time.*

A There were not many women at the law school in my day. Janet Coombs would have been a bit ahead of me. Jane Mathews was in my year at the law school.

Q *But admitted to practise later – 1969 in her case.*

A Cecily Backhouse came to the Bar –

Q *In 1964.*

A Right.

Q *There were four women admitted to practise that year: Nora Taylor, Lyndal Prott, Anna Frenkel (and Cecily Backhouse).*

A Don't forget that in those days there was a class of person known as "non-practising barristers". There were quite a number of people admitted to practise at the Bar, who never intended to practise.

Q *True. I interviewed Priscilla Flemming (QC) –*

A She was after my time – her father was a very well-known barrister –

Q *- who mentioned her father saying to her, "Oh, Priscilla, the rough and tumble of the Bar is no place for a woman", which might have been one of the reasons why so many women were non-practising at that time?*

A Yes, I think that's true. I think the first woman practising silk was in South Australia –

Q *Roma.*

A Roma Mitchell.

Q *"Roma the Great".*

A You know the story about Roma Mitchell? When Roma Mitchell was on the court of South Australia, the newspapers were speculating whether the next High Court appointee might be a woman. The editor of one of the tabloid newspapers wanted to check up on Roma because he'd never heard of her and had heard a story that her age might have disqualified her. Telegrams in those days were often expressed in very curt language, to save money.

Q *Rather like Twitter today.*

A Right. Well, he sent a telegram to Bray, who was the Chief Justice (of South Australia), and the telegram said, "How old Roma Mitchell?" And the Chief Justice sent him a telegram back saying, "Roma fine – how you?" (LAUGHTER)

Q Talking about your early cases, your first brief was known as a "dock brief" I believe –

A First criminal brief.

Q *Yes, that was when an accused had the right to select a barrister from those they saw in court?*

A No, that was formerly the way the procedure worked in theory, but in fact, the secretary, or manager, of the Bar Association, Bill Cook –

Q *"Captain" Bill Cook.*

A In all events, whoever the person was who was running the Bar Association selected your name from a list of barristers. The origin of the expression "dock brief" was that in the old days, it would all be done in court. The accused from the dock would say, "I like the look of him". But by my time, this was done administratively by the secretary of the Bar Association. It was still called a dock brief.

Q *And worth about 3 guineas.*

A Something like that. Yes, I remember that case well. It wasn't the first criminal case I'd had – I'd done a number of appearances in magistrates' courts for people who were charged with criminal offences - but this was the first jury trial I did as a barrister.

Q *It was to do with the "Witch of Kings Cross", wasn't it?*

A Like most barristers, I remember the cases I'd won. I was given the papers in this case and a man was charged with breaking, entering and stealing. He had a long criminal history and had been committed for trial but the only evidence against him was two alleged verbal admissions he'd made to police officers. There was no other evidence at all. He had not signed any written confession. Allegedly, he'd confessed his guilt verbally to these policemen, but refused to sign a confession, which was itself a fairly suspicious circumstance. No doubt, in truth, what had happened was that some police informant had told them this man had committed the robbery, which was probably quite true.

Anyway, having been given the papers from the committal proceedings, which told you what the prosecution evidence was, I went up to see a friend of mine at the Crown Law Office, Hugh Roberts who later became the state Crown solicitor. I said, "I've got this brief – what do I do?" So, Hugh advised me how to handle it. He said, "You've got a

good chance of getting this bloke off because the only evidence is verbal admissions to police officers, and if you can trip them up on their stories, get them contradicting one another, for example – the jury won't like that at all."

So, I went to interview this chap in his cell. I'd never been in prison cells before. I was there alone with him. He had the right to make an unsworn statement from the dock. So, he could give his version of events if he wanted to, without being cross-examined. There was a limit to the extent to which a barrister could assist a person to prepare his unsworn statement. In all events, I said to him, "What were you doing on the occasion when this burglary took place?" He said, "I was with Rosaleen Norton, up at the Cross!" Well, Rosaleen Norton was a famous witch, and I thought that would go down like a lead balloon in front of any jury. So, I suggested to him that another way of putting the same thing might be to say, "I was with a lady whose name I don't want to bring into this court". And that's what he did, and he sounded very chivalrous. In all events, as my friend Hugh Roberts had predicted, the police contradicted one another, gave different versions of the circumstances in which these admissions had been made, and sounded thoroughly unconvincing. The client sounded chivalrous and he was acquitted by the jury. He never said "Thank you" – he took off and I never saw him again.

Q *I think you were hoping he was nowhere near the vicinity of your house*.

A When he was next in need of money, yes, that's right.

Q *Yours was primarily a commercial and constitutional practice in those early years.*

A Equity and commercial, yes.

Q *Did you have any hankering for criminal law?*

A I enjoyed the criminal cases that I did, but one of the practical problems was that most criminal work that was going around at the Bar wasn't very well paid. You had problems collecting your money. That didn't apply to the criminal cases that I did.

Q *What was it like at the Bar in those days? You were sharing a small room on the Seventh (Floor) with David Hunt. Many young barristers then were "floaters" – they didn't even have a desk.*

A True.

Q *You were one of the lucky ones.*

A Yes. I got a lot of work from the time I started at the Bar and that of course was a big help, although at the time I started at the Bar, I didn't have a wife or family to support. I got married after I'd been in practice for more than a year.

Q *In 1965.*

A But there was never a time at the Bar when I didn't earn more money than I'd been earning as a solicitor.

Q *One of your notable early cases was Dr Louis Wald when he was one of a few doctors in 1971 charged with conspiring to procure the unlawful miscarriage of women -*

A It wasn't that all that early. That was the abortion clinic, the Heatherbrae abortion clinic (case).

Q *It was very well-known in its day, and well-known also because it was one of the few clinics that wasn't paying bribes to police.*

A Was it?

Q *Yes. I believe there was a lot of pressure on the then premier, Robert Askin, to make more of this issue because of pressure from conservative elements in his party (wanting) to penalise doctors carrying out unlawful abortions.*

A I don't remember that part of the background. I think Heatherbrae Clinic was contrasted in a lot of people's minds with what used to be called backyard operations. It would have been regarded as the other end of the economic spectrum. Heatherbrae had skilled, experienced doctors.

Q *But they were interrupted, I believe, by a number of police while Dr Wald was conducting a procedure. You and Sir Jack Cassidy QC ran Dr Wald's defence.*

A At the committal proceedings, I was briefed to junior to Jack Smyth and my instructing solicitor was Bob Nichol from Nichol and Nichol. I did a lot of work for him in other cases – shipping and commercial cases. He briefed Jack Smyth to lead me at the committal proceedings and then at the trial, he briefed Sir Jack Cassidy.

Q *What was it like working with Sir Jack Cassidy?*

A Sir Jack Cassidy was probably younger then than I am now, but I regarded him as a very old man. One of his characteristics was that he used to drink champagne for morning tea and at lunchtime. He was very successful in jury work. He obviously appealed to the jurors in that case because I remember one of them coming up to him afterwards and telling him how wonderful he was.

Q *A woman?*

A Yes.

Q *Well, a lot of women would have taken interest in that case. That wasn't what ultimately got it over the line, though. You ran a very particular line of defence.*

A We ran a very orthodox line of defence. There had been a Victorian ruling –

Q *The Menhennitt ruling –*

A To the effect that you could raise a defence of necessity. That word can be slightly misleading – you don't have to be trying to save the woman's life – medical or mental harm would suffice. So, the defence we ran was along very orthodox lines. There were people who wanted some of the defendants in that case to run a more aggressive line of defence, which was "if these women wanted to have an abortion, they had the human right to have one". Well, we didn't do that – it would have been very risky in my estimation. Our line of defence was orthodox but successful. Now if there had been members of the jury who thought along the lines that I've just mentioned, jolly good luck to them. But we wanted to show people the way legally they could find in favour of our clients, within the existing lines of the law.

Q *Even though you had Judge Aaron Levine, who was known to be a progressive (judge) at that time? You still felt that was the best way to go?*

A No, there was on my part a big resistance to taking it further. It would quite likely have led to a hung jury.

Q That's interesting. *Dr Wald felt his case was a gamechanger, which it was, for many women. Given that you're Catholic and you did that case – I have interviewed other Catholic barristers who turned down work because it conflicted with their (religious) principles.*

A I've never turned down any work. I've never been offered any work that conflicted with my principles and running that case, as I say, according to orthodox legal principles didn't conflict with any principles that I had. (Dr Wald) was entitled to a defence. There was a cab rank rule, as you know, at the Bar. It was not my business to say to somebody like Dr Wald, "go and look for some other barrister because I don't happen to approve morally of what's going on". Don't forget that there's a major question – there always was and there still is – as to the extent a moral law should be reflected in criminal law. Let me take the most obvious example. Adultery is regarded by most people as immoral, although many people celebrate it. But it's certainly not criminal anymore.

Q *Yes, the mores of the times change. Your son being born around that time was never at the back of your mind when all this was going on*?

A No.

Q *You talked a while ago about the admiralty bar – when I talked to Sir Laurence Street, he said it was a very small bar in those days. You did some work in that area, too. I believe one of your favourite cases was a stevedoring case - Port Jackson Stevedoring. Why was that a favourite?*

A Well, that's the last case that ever went on appeal from the High Court to the Privy Council. I've actually just written a paper about that case and delivered a lecture to the commercial bar association which will contain the answer to your question. But that was a case after I took silk and Brian Rayment was my junior in the Privy Council. I hadn't appeared in the case in the High Court but it was a case in which the majority in the High Court, with Sir Garfield Barwick dissenting, had declined to follow a decision of the Privy Council in relation to the application of a standard form of provision in a shipping contract.

In the course of the case in the High Court, the barrister who had appeared for the client for whom I ultimately appeared had started to put together an argument on the point that was decisive, and the Court had said it didn't need to hear it and stopped him. (He'd won on that point in the courts below.) So he didn't get an opportunity to put his argument. The Court then later decided the case against him on that point. So Brian Rayment and I were asked to advise the clients whether they could expect to succeed if they appealed to the Privy Council. To appeal to the Privy Council, they needed special leave to appeal. Appeals to the Privy Council from the High Court had been abolished many years previously, but the abolition provision was grandfathered to admit of the possibility of appeals in cases that had been started a long time before. We advised that the decision of Barwick was correct – that if the appeal got to the Privy Council, the appeal would succeed, but that the hard thing would be to get special leave to appeal. We went to London on the special leave application and the Lord Chancellor was presiding. One of the law lords on the panel was the one who'd written the judgment on the decision the High Court had refused to follow.

Q *Which lord was that?*

A Wilberforce. Lord Hailsham was strongly resisting giving leave. It of course stuck in their throats that the High Court hadn't heard argument on the point on which the case was ultimately to be decided. Lord Hailsham said to me, "You're inviting us to chastise the High Court". I said, "What my client wants is that before it loses its case, it will be given an opportunity to put its argument". They had no answer to that, so we got special leave to appeal and then when it came to the appeal, it was fairly easygoing. But one of the law lords sitting on the appeal, Lord Roskill had been involved in an earlier English case, in consequence of which the standard provision in the contract on which I was relying had been drafted. My opponent in the Privy Council, who later became Lord Hobhouse, was married to a relative of Lord Roskill. Very early on, he pointed out that in an earlier case, Lord Roskill had been unsuccessful in arguing the same point I was contending. Lord Roskill said "Yes, but I didn't have a proper contract to rely on then". (LAUGHTER). So, we comfortably won the appeal.

Q *And it remained your favourite case.*

A It was a nice commercial case with no human interest involved at all!

Q *You appeared before the Privy Council a great many times as a junior barrister.*

A I did. I think I appeared before them fourteen or fifteen times.

Q *So you must have got to know their ways, as it were*.

A Well, it was a very good experience for a youngish Australian barrister to argue a case in front of the leading English judges and often against the leading English barristers.

Q *Given, too, that we'd inherited so much of their common law tradition, did you ever imagine that there would be a time when we would be in turn providing common law examples or approaches that the English would benefit from?*

A I didn't think of it in those terms, no.

Q *Are there any other early cases you'd like to talk about? You did so many.*

A I can remember the first case I did after I'd been admitted to the Bar. I was appearing before a magistrate and I was appearing for a man who had a fairly hopeless case. He'd been charged about failing to provide information to the police about who was driving his car at the time of an accident. It was at the Auburn Magistrates Court and I was briefed by a solicitor called Mick Love. The case started at 10, the evidence was over by 20 to 11, I stood up then to make my submission to the magistrate, who said "Make it snappy – I want to catch the 11 o'clock train back to Sydney". (LAUGHTER)

Q *Did that ever inform something of your own approach when you were later Chief Justice of the NSW Supreme Court? I know you set out to improve case management.*

A No, I never set out to emulate that magistrate.

Q *But you did learn to be fairly snappy.*

A I hope I was.

Q *Jack Smyth was the leader on your floor at Seven Wentworth. He said nice things about you – that you had more ability than half the senior bar. His approach to case preparation was legendary. Most barristers at the NSW Bar know about his 1961 notes on cross-examination – he talked in those notes about the need for diligence, common sense, having worldly experience and being observant. I'm interested that he talked of the need for developing a sixth sense "which will tell you when danger lurks in pursuing a particular line of cross-examination" or in the asking of a particular question. When did you develop that sixth sense*?

A Well, you develop it by watching good cross-examiners who in my experience and in my observation would always prefer to ask one question too few rather than one question too many. Smyth was like that. You would see bad cross-examiners ask a question of a witness and you'd think, "Don't ask that – you're going to regret the answer". That would happen time and time again. I actually came to think that the hallmark of a bad barrister was conducting a cross-examination as though he or she was a member of the junior league of truth seekers. As though the object of the exercise was to ask every intelligent question that a curious observer might want the answer to. That's not the object at all: the object is to ask questions that will cut down the case of your opponent or advance your own case. But Smyth was a very economical cross-examiner.

Q *You developed and were known for an equally economical style*.

A Yes. The case that I remember best with Smyth was the case of Meyer Heine Ltd against one of the shipping conferences. It was a very big case for me to get as a very junior barrister, and I think I got it mainly because I was on the Seventh Floor and known to the firm of solicitors in it. The Australia and New Zealand shipping conference was alleged to have engaged in monopolistic practices contrary to the *Australian Industries Preservation Act*. They were shipowners who had a conference agreement which was anti-competitive - there's no doubt about that - and they were sued for treble damages which was one of the remedies available under the old *Australian Industries Preservation Act* which was the precursor to the *Trade Practices Act*. The statement of claim alleged that they'd entered a monopolistic agreement in the form of their conference agreement. Proceedings commenced in the High Court and Tony Mason had been the junior counsel to appear in the case, but he left the Bar to become solicitor general in the Commonwealth, so the shipowners' lawyers Ebsworth and Ebsworth briefed Jack Smyth as the leading counsel, and then in place of Tony Mason, they briefed Russell Fox and me. Russell Fox was a recently-appointed silk and I was still fairly junior.

The point that was the principal ground of defence was that the conference agreement had been entered into outside Australia, and that on the true construction of the *Australian Industries Preservation Act*, it only applied to contracts made within Australia. So we demurred to the statement of claim, which was a technical procedure that was adopted when you said, "the facts alleged in the statement of claim don't make out a cause of action". The ground of the demurrer was that they hadn't alleged in the statement of claim that the conference agreement was entered into in Australia – it couldn't allege it because it was entered into in Japan. The issue the court had to decide was whether that was a cast-iron defence. The demurrer was set down for a hearing of the High Court of Australia and the Chief Justice was Sir Garfield Barwick. Our instructing solicitor, John Bowen on the instructions of the client and after conferring with counsel, went to visit Barwick and asked him to disqualify himself because as Attorney-

General, he had authorised a raid on the offices of the members of the shipping conference. Barwick said to Bowen (the solicitor from Ebsworth), “It ill becomes your British clients to suggest that I might be affected by bias, but I won’t sit in this case, because it’s not convenient”. And he didn’t sit. So, Sir Edward McTiernan was presiding. I had read the legislation for the purpose of preparing for a conference with the other barristers. I’d noticed in the legislation a provision that was expressed in terms that appeared to assume that conduct in contravention of the Act must have taken place in Australia, which of course is an orthodox assumption, because passing legislation rendering criminal acts that happened in Japan or other parts of the world would be an unusual thing to do at that time. And that was one of the points that was important in the outcome of that case. Ultimately the High Court held - with Douglas Menzies dissenting – that on its true construction, the *Australian Industries Preservation Act* didn’t apply to agreements that were entered into outside Australia. So, the shipowners won. That was a big win; a big win.

Q *Putting on your arbitrator’s hat, how do you think that would go down now?*

A Well, of course the legislation has changed since then. If you look at the *Trade Practices Act* – or whatever the Act’s now called – it does cover conduct that takes place outside Australia, but it was a very touchy subject in the 1960s because the American Sherman Act contained what they used to call a long arm provision that purported to attach American legal consequences to conduct in Europe or in Asia or outside the United States, and British interests particularly were very strongly opposed to that assumption of long arm jurisdiction by America. I can remember Sir Edward McTiernan remarking in the course of that case to counsel who were appearing for the plaintiffs who were suing us, “If this act means what you say it means (and it was an act that was enacted in the early part of the 20th century), the Australian government would have been guilty of a very serious act of international indiscretion”. I can also remember in the course of argument in that case, our opponent who was Lush QC from Victoria –

Q *He became a judge.*

A He did. He put a particular argument about the meaning of various provisions – one section means this, and another means that - and then he said to the court, “I apologise, your Honours, if my argument seems geometrical”. And Sir Frank Kitto said, “Well, at least it’s tangential – I’ll give you that”.

Q *Sir Frank Kitto – wasn’t he fairly brutal in his approach to counsel?*

A He was. I was sitting in the High Court once waiting for my case to come on. A very senior common law barrister from Sydney was arguing in front of him and he was asked a question by a member of the bench. The barrister paused before answering the question and

smiled nervously. Sir Frank Kitto said, "There's nothing to laugh about – for all the assistance you're giving the court, you might as well sit down".

Q *Oooh.*

A In another case, Sir Frank Kitto was sitting in the court, and Sir Douglas Menzies was also there, a very polite charming man. A barrister had been putting a long, long argument and Menzies tried to shut him up but very politely. He said, "Mr So-and-So, you've said everything that could possibly be said in support of your client", and Kitto said, "And a great deal more besides".

<u>Part 2 28 August 2018</u>

Q *Juliette Brodsky with Mr Gleeson, part 2 of our interview for the NSW Bar Association oral history. Thank you very much. We were last talking about Sir Frank Kitto's brutal approach to counsel.*

A I would describe Sir Frank Kitto's approach to counsel as sharp rather than brutal.

Q *Sharp*.

A I know that he lived in Killara or Gordon or one of those suburbs; the reason I know it is because a friend of mine was one of his next door neighbours, and remembers Sir Frank Kitto on Sundays chasing chooks around the yard for the purpose of decapitating them and ultimately turning them into food.

Q *Now, that reminds me – it was said of your chambers in Seven Wentworth that there was a painting of swordsmen slashing at each other*.

A It looked as though they were intending to slash at each other, yes.

Q *There was some comment that this had some bearing on your advocacy style.*

A No, it was purely coincidental.

Q *Before we go into some of your cases in the 70s and 80s, you did some lecturing and tutoring at Sydney University in company law. Would you have liked to be an academic?*

A No. I lectured in company law part time for ten years and I was also tutor in company law for St Paul's College for some years. I think I took that position over from Roddy Meagher.

Q *Who later sat with you on the (NSW) Supreme Court bench. Speaking of Roddy Meagher – you were friends over a long period. I believe he had a dog that you were not fond of.*

A I'd never met anybody who was fond of that dog. The dog's name was Didier. The only relevance of that dog to my life was that while I was Chief Justice of the Supreme Court of NSW, a number of the judges of the court including Roddy Meagher had an arrangement with the NSW Government, or specifically I suppose the Attorney General's department, under which they were provided with what was called a salary-sacrificed motor vehicle. That is to say, the government provided them with a motor vehicle and deducted some amount from their salaries. Needless to say, they were obliged to take good care of these motor vehicles. Roddy Meagher's dog ate most of the upholstery in his motor vehicle and we had a fairly tense period in our relations with the Attorney General's department, trying to work out what to do about that activity.

Q *Was the dog attacking the upholstery out of frustration?*

A I can't psychoanalyse the dog, but I can also remember, to indicate the nature of his character, visiting Roddy Meagher and his wife in the country on one occasion, and being told that when his wife Penny went out to hang out or bring in the washing, the dog then guarded the house against her and prevented her getting back in. I don't think it was a very nice dog.

Q *I believe Roddy Meagher was the only one of your confreres on the bench who was allowed to get away with humorous remarks?*

A No, some of the others made humorous remarks from time to time. When Roddy Meagher came onto the Court not long after I'd been appointed Chief Justice, we sat together on the Court of Criminal Appeal on one occasion. When we took our place on the bench, Roddy looked around the court, fixed his eyes on a particular person, leaned across to me and said, "You only have to look at him to see that he's guilty". I said to Roddy, "That's the sheriff's officer you're looking at," and then later they called the case and the prisoner came up from the cells. He had a very acute sense of humour; probably he would be regarded these days as a model of political incorrectness.

Q *He prided himself on it, didn't he?*

A I'm sure he did.

Q *Do you miss him?*

A Yes. He was good fun; I found him a very good companion. It's several years now since he died – his last years were quite difficult. His wife died some years before he did, and he was living alone.

Q *You took silk in 1974 when you were 36. You only had one reader before that.*

A Tony Whealy, yes.

Q *Was that because you were too busy to take on more*?

A Well, I wasn't really entitled to have readers until I was seven years in practice. So, at most, I think I could have had three.

Q *Tony Whealy – what was your relationship with him like? I know he sat later (with you) on the bench.*

A Tony Whealy had been an articled clerk at Murphy and Moloney, a little after my time, I think, but that's how I came to know him. His practice was mainly in the liquor area. I don't know whether these days there's much legal activity of that kind. In those days, in the late 60s and early 70s, there was a lot of work done particularly in relation to hotels and restaurants in the liquor licensing area. The body had a curiously old-fashioned name – it was called the Licences Reduction Board. That was no doubt to appease people who, while they didn't support outright prohibition, had an attitude toward the consumption of alcohol that was less than favourable. Tony did a lot of work in that area, and that was partly I think because he had connections in the liquor industry. I think his father was involved in hotels. That industry changed greatly as the result of the introduction of trade practices legislation, because there were hotels tied to breweries. I think the expression "Tied Houses" was an English expression originally, but the system under which breweries controlled many liquor outlets couldn't withstand the effect of the trade practices legislation and that led to a lot of changes in the industry, as did the enlargement of the activities of registered clubs.

Q *There was a litany of cases that you became well-known for in the 1970s and 80s. There was the Paddington Bear case, the Fine Cotton horse ring-in, acting for former Nationals leader Ian Sinclair when he was accused of forging his father's signature – that one was interesting was because you went to considerable lengths to find a handwriting expert in England.*

A Yes, this is actually recorded in the history of Ebsworth and Ebsworth, which was published some years ago. What happened was that the prosecuting authorities retained the services of the only major Australian handwriting experts who were available to give evidence. I make no comment on how that came about, but my response to that situation was that we should find and retain the services of the best handwriting expert in the world. Ebsworth and Ebsworth made some inquiries, particularly among their shipping clients and they were told that the leading handwriting expert in the English-speaking world was a man named Mr Frydd. I was going to London to appear in a case, not long after I had this discussion with these solicitors, and it was arranged that I would meet Mr Frydd there and have a conference with him.

We sent Mr Frydd in advance of that meeting the reports of the handwriting experts who were to give evidence at the committal proceedings for the prosecution. Mr Frydd, when I met him in London, told me that he was not impressed by those reports. He said "I haven't seen the original signature, or the signature that's alleged to have been

forged, and I can't express my own opinion on the subject unless and until I see that. But I've read the reports of these experts and their reasoning contains serious deficiencies." He made some suggestions as to lines of questioning that could be pursued and were later pursued, but in particular he said, "Both of these experts have concluded that the signature of the deceased, George Sinclair, was forged because it was tremulous. It had a tremor – it was shaky". It was what they called a tremor of forgery, a tremor often associated with an attempt to simulate somebody else's signature and do it slowly. They had attached a lot of importance to the fact that there were cheques that had been signed by George Sinclair in a firm hand, bearing dates just before he died, which was about the time the disputed signature was made. Mr Frydd said, "It shows a great want of professionalism that they haven't checked to ensure that those cheques were signed on the dates which they bore". (George Sinclair) was a man dying of a serious illness and if he'd signed those cheques anytime previously, then you couldn't draw any conclusions from the firmness of those signatures. The solicitors made some inquiries and found that in fact the cheques had not been signed on the dates they bore, but some weeks before he died, his employee had arranged for him to sign a number of cheques because it was known they would be needed. But they weren't to be used for some weeks. His physical condition made it desirable to get him to sign them in advance.

So Mr Frydd pointed out that very significant hole in the evidence. But he said, "Before I reach a conclusion myself, I'll need to look at the document that bears the disputed signature and I'd also like you to get hold of the oldest known signature still in existence of George Sinclair." He said that people on their deathbeds often revert to a signature similar to that they used in their younger years. Well, as it happened, among the papers of George Sinclair, there was a very old document bearing his signature, which was strikingly similar to the disputed signature. Mr Frydd came out to Australia, looked at the disputed signature, looked at this old example of his handwriting and said, "That suggests to me very strongly that this isn't a forgery at all". So he not only blew a large hole in the reasoning of the prosecution witnesses, but he then came up with a strong positive case in support of the defence.

Q *Yes. There was a rather sad story behind this, wasn't there, and it had to with the fact that Ian Sinclair's father had misappropriated clients' funds and he was in some state of agitation about this before he passed away?*

A The father? Presumably he was - yes.

Q *Did counsel for the other side raise this as a possibility as to why there might have been a tremor in the handwriting?*

A Not that I recall, no.

Q *It was certainly a very interesting case. It's said that barristers must expect to lose about half their cases.*

A I never kept a count like that, but you would certainly expect to lose a number of cases because there is a cab rank rule. You don't get to choose what side of the case you're on. You have a professional obligation to take cases that are within your area of practice, and the consequence of that is that sometimes you're going to be briefed to do losers.

Q *You're always direct with clients, I understand, about their expectations. In the Raw Prawn defamation case –*

A The Kate Fitzpatrick case.

Q *You gave her a very bare-bones assessment of her chances of succeeding. She was suing for defamation.*

A I don't remember what I advised her about that – she's written about that and maybe has her own recollections. Her solicitor was an old friend, Michael Delaney – I'd done a lot of work for him and for his firm, and that's really how I came to be in the case. I'm sure it was a case that was very stressful for her because…

Q *It had to do with her supposed appearance at a television awards night, the Raw Prawn awards.*

A Like many defamations, it was the result of a mistake on the part of the newspaper, the publisher. People discuss the law of defamation in terms that often overlook the fact that most defamatory statements that are made in newspapers, are made as the result of errors. This was a classic example, but I'll give you another example in a moment.

Kate Fitzpatrick was appearing in a play. Because of an illness, the performance of the play was cancelled and the newspaper reported that she had appeared that night at a social function. It would have been a most unprofessional thing for her to do – that is, to feign illness and then attend a social function. Just imagine the consequences it would have had on her employers and on her co-workers.

She hadn't in fact been at the social function at all, and it ultimately turned out that the reason the newspaper had printed the story was that the journalist had asked for a guest list from the people who were conducting the social function and had taken her name from the guest list – not checking with anybody as to whether she was in fact there. She complained about this, and the newspapers wouldn't publish a retraction or a correction. So she was in a situation where her employers and her co-workers had this information from the newspaper that on the occasion when she'd had to cancel a performance because she said she was sick, she'd (instead) gone off to a party somewhere. The manner in which they sought to defend their action was fairly brutal and aimed at taking advantage of the circumstance that they could out-gun her financially.

The other example I was going to mention of a defamation case, which was again a clear result of a mistake, concerned a defamation of a young woman who had achieved prominence because she'd won a beauty contest. She then had an altercation, in the course of a television program where she was being interviewed live, with somebody from one of the media outlets. There was some bad blood, some hostility towards her. Some time later, an unfortunate young woman overdosed on drugs in a motel room in Western Australia and had checked herself into the motel under the name of my client. The media all rushed to publish this story: that my client had died of an overdose of drugs. They hadn't checked with her, they could have telephoned her or members of her family. Because of the rush to publish what was a good story, they published this manifestly false statement, and then again refused to apologise. Ultimately the case was settled, and they did retract and apologise. If you look at the facts of many of the leading defamation cases, you'll find that they're just the consequence of error, not the consequence of some determined exercise of a right of free speech.

Q *What about now? You must be contrasting those cases with developments more recently where people often stand behind deliberate campaigns. Imagine if you were practising in the field of defamation now. Would you still be thinking "error"? Or more in terms of malice?*

A You mean fake news?

Q *Yes.*

A Well, I would still expect that while fake news might play a role in some of the cases that come to court, the majority of them are the result of error. The point that strikes me about it is that cases where defamatory statements are published, in consequence of a mistake somebody's made, aren't really cases that raise large questions about right of free speech.

Q *A defamation lawyer I interviewed a few years ago mentioned the rise of the "hurt feelings" aspect in defamation cases. He said this is much worse now than it used to be. Would you agree?*

A That's probably a particular example of a more general phenomenon. I'm sure you've seen, time and again on television, people expressing shock, horror, grievance or amazement – and you think to yourself, "Why are you telling us that?" Nine times out of ten, it's because the interviewer said, "How did you feel?" That of course is cut out when the program goes to air. I suspect that a journalist's work is that somebody tells them that the question to ask is, "How did you feel?" because then you will elicit marketable responses.

I come from a time when telling people how you feel was regarded as bad manners. You didn't force on people statements about your emotional condition, unless the circumstances were fairly extreme.

These days, not constantly telling people how you feel is regarded as some kind of pathology. I come from a generation of people who went out of their way not to foist their feelings on others, not to expose their emotions. So I think a difference now is that you have a generation of people who are encouraged to be very expressive of their feelings and are very anxious to tell everybody how they feel about everything.

Q *In light of what you've just described, is there any advantage when dealing with clients to talk of the need to discharge their emotions?*

A I can assure you that I never invited any client of mine to discharge his or her emotions. But that was probably because I was in practice a good time ago. Maybe today, barristers who appear for clients do encourage them to behave that way.

Q *I have talked to people who've said that they found it useful in mediations because releasing their emotion then enables them to get at the facts.*

A May I say that I've never been involved as a barrister in a mediation.

Q *So, you wouldn't see it as a constructive way to build a case*.

A It was off my radar screen.

Q *You appeared for a law school friend of yours, Charles Curran, who was a stock and share broker. This was one of your last cases before the High Court before you took silk.*

A Most likely.

Q *Your victory for Charles Curran had a somewhat unfortunate sequel – his name became associated with bottom of the harbour tax avoidance schemes.*

A That's not quite right. I was junior counsel for Charles, Bill Deane was the senior counsel in the case. (The Charles Curran scheme) was an arrangement - a perfectly legitimate arrangement – nobody suggested that it was in breach of the law. It was an arrangement that was aimed at, as I recollect it, securing allowable deductions that could be set off against taxable income. In all events, the High Court decided in the case of Charles Curran that the arrangement was effective, but some years later in the case of *John v The Commissioner of Taxation*, a differently constituted High Court held that the decision of the original High Court was wrong, and that the scheme wasn't effective. In the meantime, they had changed the legislation in order to ensure that the scheme didn't work any longer.

Q *Actually, that makes me think –*

A Curran schemes weren't bottom of the harbour schemes. This is the important distinction – it's the distinction you often hear between tax avoidance and tax evasion. Bottom of the harbour schemes were tax

evasion, they were in breach of the law – they involved people not paying tax that they owed to the tax department. Tax avoidance schemes were schemes that involved people arranging their affairs so as to ensure that their liability to tax didn't arise.

Q *The Kerry Packer distinction, if you like, for the latter.*

A Kerry Packer?

Q *The famous statement he made to a Senate hearing that a man would be crazy not to arrange his affairs so as to pay a minimal amount of tax.*

A I remember that occasion, yes. The rates of income tax at that time were very high – I forget what they were – but when Kerry Packer was interviewed before a Senate select committee as I recollect it, he was criticised for arranging his affairs so as to minimise his liability to income tax. My recollection is that the substance of his response to that criticism was first of all to say, "Can you tell me any sensible person who doesn't arrange his affairs so as to minimise his liability to income tax?" He then went on to say, "Why should people pay more tax than they're in fact they're liable to, when all that happens to the money is that people like you spend it?" There were a lot of tax avoidance schemes around in those days, probably still are by the way. I'm not *au fait* with that area of practice anymore. There was also tax evasion activity, of which the bottom of the harbour schemes were a good example. I appeared for the Commission of Taxation in cases against people who had engaged in bottom of the harbour schemes.

Q *When you first became Chief Justice of the NSW Supreme Court, did you give a speech on tax evasion?*

A I don't remember ever giving a speech on tax evasion, but I gave a speech on tax avoidance.

Q *Ok.*

A My recollection is it was a speech at the university law school (I may be wrong about that), but it was a speech that criticised the hypocrisy of some of the commentary on tax avoidance. By tax avoidance, I mean conduct that is perfectly legal.

Q *Sir Garfield Barwick's name became synonymous with tax avoidance*.

A Which was in many respects quite unfair. The high water mark of a line of authority in the High Court that diminished the effectiveness of the anti-avoidance provisions of the *Income Tax Assessment Act* – in those days, section 260 – was a case called *Cridland v The Commissioner of Taxation*, in which the High Court said that the anti-avoidance provision, section 260, didn't strike down a tax scheme under which university students, by subscribing a couple of dollars to a trust, could qualify for treatment as primary producers under *The Income Tax Assessment Act*. Now Sir Garfield Barwick didn't sit in that case – Sir Anthony Mason, as I recollect it, wrote the leading judgment

in that case. But that case was the high-water mark of the line of authority that people criticised, or to put it another way, the low water mark of section 260. I was one of the people who was consulted by the Commonwealth Government to draft a new anti-avoidance provision which became Part 4a of the *Income Tax Assessment Act*. I did that with Graham Hill as my junior.

Q *Speaking of Sir Anthony Mason, it was revealed that he'd given advice to the then Governor-General Sir John Kerr (during the time of the Dismissal).*

A Yes.

Q *You co-authored an advice with Sir Keith Aickin.*

A That was an advice to the Liberal Party.

Q *I was very struck by your use of the words that this advice to the Liberal Party was "strong on the existence of power, and weak on the exercise of power".*

A That was a quotation from a commentary that you'll find in the *Australian Law Journal* by J. G. Starke who was then the editor of the *Australian Law Journal* and who had access to that opinion sometime later and was commenting on it. What Starke said, and this is a fair statement, is that the opinion was strong on the existence of power (strong in the sense of being clear that such a power did exist) and weak on the exercise of power (weak in the sense of being very cautious and conservative about the circumstances in which the power should be exercised). (GETS UP TO FIND BOOK) Anne Twomey has recently published a book about the reserve powers (*The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems*), and I wrote a review of her book for the *Australian Bar Review*, which was published a few weeks ago –

Q *I'd be interested to see it.*

A Her book is very well worth reading – it must be at home.

Q *I'd like to briefly ask you about the reserve powers. The former Governor of Victoria, the late Richard E. McGarvie spoke of the exercise of the reserve powers during the time of that constitutional crisis. He advanced a view on what he saw of the disregarding of the conventions that exist in our constitution. He had the view there was a lack of appreciation of how they worked. Malcolm Turnbull when he was leader of the Australian Republican Movement described them as the "murky" world of conventions.*

A Richard McGarvie was very prominent in the republican debate when it took place – he advanced the McGarvie (head of state) model, the detail of which I can't recall.

Q *Which advocated making a minor modification to the constitution so that the Governor General becomes the actual rather than nominative head of state.*

A Just to get our terminology straight, the reserve powers simply means powers that a vice-regal representative in Australia has that might be exercised without formal advice to the responsible minister. It's important to distinguish between two different questions. One question is, does such a power exist? And the other question is, what are the circumstances in which such a power is available to be exercised and what are the procedures that ought to be followed in the case of the exercise of the power? The question of conventions is most likely to come in at that latter stage. You might ask, for example, should Sir John Kerr have warned the prime minister that he was considering dismissing him? Sir John Kerr answers that question, "No, because if I had done that, the prime minister would have then advised the Queen to dismiss me, and that would have led to (a) a prolongation of the crisis, and (b) it would have involved the Queen in the issue."

Whether you agree or disagree with what Sir John Kerr said about that, the question whether he should have warned the prime minister he was contemplating the exercise of his reserve power of dismissal is a quite different question from the question of whether there existed the reserve power of dismissal. I'm still unable to understand what the argument might be in support of the proposition that there is no reserve power of dismissal. You've only got to look at the historical examples given by Anne Twomey in her book of cases in which it has been necessary either to exercise the power or to warn of the possibility of the exercise of the power, to see that plainly there are circumstances where upholding the constitution may require a governor-general or a governor to dismiss the prime minister without acting on the advice of the prime minister. I don't think there's any example in history of a prime minister advising a governor-general to dismiss him.

Q *What is your view about conventions, that they act as a kind of sanction to bind the players to a code of proper behaviour?*

A There's a very comprehensive chapter in Anne Twomey's book where she talks about "caretaker conventions" and the conventions that apply to caretaker governments. For example, when Sir John Kerr dismissed Prime Minister Whitlam, he appointed as prime minister Malcolm Fraser, but it was on the undertaking that Malcolm Fraser would be a caretaker prime minister only. That has a whole lot of conventions attached to it, including for example not making appointments of public officials unless necessary. Calling an election as soon as possible, all for the purpose of securing supply. Because the crisis arose out of the fact that the prime minister couldn't obtain supply, because of a hostile Senate. And of course, what the prime minister could have done, but was unwilling to do, was call a general election – have a general election, a double dissolution. The prime minister knew that he was going to lose that election and that was why he didn't have the election.

Sir John Kerr appointed Fraser on the basis that he would be a caretaker prime minister only and would call an election. In other words, Sir John Kerr set out to resolve the crisis by having a general election, which is not normally regarded as an undemocratic thing to do.

Q *Did you have occasion to meet much subsequently with Sir John Kerr?*

A Not much. I'd met him, but he was a much senior barrister to me. I had met him from time to time in connection with the affairs of the Law Council of Australia – not that he was on the Law Council at the time when I was involved in its affairs, but he had been instrumental in setting it up. And I met him on a few occasions after I was appointed Chief Justice of NSW because he was then an ex-Chief Justice of NSW. He offered me some advice about things relating to the court and the management of the court.

Q *What was the advice?*

A Well, he advised me – and I took this advice – to establish a Chief Justice's advisory committee of a number of selected senior members of the court, whose function it would be to advise me on any major issues of policy that arose. Sir John Kerr pointed out to me that there were two reasons for doing that: first of all, getting the benefit of the advice of these experienced people would help me to make better decisions, but he also pointed out to me that it would be like a Cabinet, in the sense that they would be committed to decisions that I'd made. There's nothing that a Chief Justice of the Supreme Court has to do that requires anybody else's agreement. The powers of the Chief Justice of the Supreme Court are there, and there's no power of the Chief Justice that requires him to get the agreement of anybody else. But obviously in terms of running the Court, it's very useful to have the assent, particularly of the people who could turn out to be the biggest troublemakers if they didn't agree with you. So Sir John Kerr said to me, "Get these people to act as an advisory committee – that will then in effect bind them to your decision-making and make it very difficult for them to complain about it". This was against a background where there had been a very turbulent period in the affairs of the Supreme Court, and a great deal of internal dissension that had been made embarrassingly public.

Q *It's the old saying: "keep your enemies close".*

A Keep them within the tent, yes.

Q *So you had in effect a kitchen cabinet.*

A Yes.

Q *Is it possible to find out who was on your "kitchen cabinet"?*

A They were the obvious people – they were the heads of the various divisions of court, and about two or three others who I wanted there because I regarded them as the best people for this purpose.

Q *This somewhat goes against what I read in "The Smiler" book which said you were a delegator during that time – it sounds from what you've just said that you had in fact a collaborative style.*

A I wouldn't use either of those adjectives, but in all events, what happened was that following the advice of Sir John Kerr, when I arrived on the Court, I established what was called the Chief Justice's Policy and Planning Committee. Whether it still exists, I have no idea, but I established that committee and to that committee, I appointed the President of the Court of Appeal and the heads of the various divisions of the Court and two or three others that I particularly wanted on that committee. I think we used to meet once a month and discuss issues of policy. That, as Sir John Kerr predicted, turned out to be an effective way of binding other members of the Court to what I ultimately decided to do.

Q *It sounds as though Sir John Kerr had an excellent understanding of conventions.*

A Yes, I'm sure he did. Sir John Kerr (and this was a little before my time) after World War II had become extensively involved in administrative structures that were set up within and around the legal profession. I mentioned the Law Council of Australia a little earlier. I'm not saying that he established the Law Council of Australia, but he was very important in setting up the role of the Law Council of Australia as a point of contact between the legal sector and the various levels of government. He was also very interested in external affairs and my recollection is that he was on some body that had been set up immediately after the war by the Commonwealth Government, that had an important role in Australia's foreign policy. But as I say, that was before my time.

Q *I'm glad that you're painting a picture of Sir John Kerr that not many might otherwise have appreciated, in the wake of his role in the Dismissal.*

A He was the first Chief Justice of NSW to put what would now be described as the topic of judicial management on the agenda. Perhaps because courts in the past had been so small, this wasn't a subject that had really preoccupied his predecessors. But when he became Chief Justice, he didn't sit very much at all; he devoted himself almost entirely to managerial arrangements within the Court. Sir John Kerr told me that when he was appointed Chief Justice of NSW, he said to the chief executive of the Court (I forget that person's title now), "Please get me the files" and the response was: "What files?" It turned out there weren't any files relating to the management of the Court. So, he set out to devise some managerial structures for the Court. He once told my wife that he was just about to start sitting regularly as Chief Justice when he was appointed Governor-General.

Now, Sir Laurence Street had a very personal managerial style –

Q *He liked to pick the phone up and ring people.*

A Somebody once described it to me as the same style as adopted by the captain of a ship. He was the only decision-maker and he expected from everybody else support and loyalty.

Q *He did have a naval background of course, which would explain that.*

A Yes. Well, that was not the way Sir John Kerr suggested I do it, and as I say, there had been a great deal of internal dissension that became public. Particularly in relation to the establishment of the Judicial Commission of NSW, which was set up in 1986.

Q *Why was there dissension?*

A I can describe to you what the dissension was; I can't comment on the motivation of the people who were involved in it. When the government announced that it proposed to establish a body in NSW to deal with complaints against judges, in other words a formal complaints mechanism for judges, which was previously unheard of in Australia, a number of judges regarded this as an invasion of judicial independence, and there was bitter public debate about that. Sir Laurence Street persuaded the government to make some adjustments to their proposals in that regard, but that didn't satisfy some of the judges who went public in their criticisms of the government and of Sir Laurence.

In what I would regard as a very adroit move, Sir Laurence Street and the government added to the role of the Judicial Commission (that is, added to the role of dealing with complaints against judges) an educational role, which was supportive of judges and magistrates. Part of the reason for setting up the Judicial Commission was that the magistracy moved into the judicial branch of government – an important aspect of independence. But Sir Laurence Street was then able to present to the judiciary what he described to me as a sugar-coating on the pill. The pill was the complaints mechanism, the sugar-coating was the educational function. In other words, he was able to say, "This body isn't just against judges, this body is going to do something for judges". And it provided a very important resource for what was a new area.

When I took over as Chief Justice of NSW, judicial education was something new – the whole idea of it. To give you an example of that, when I first proposed, after having discussed it with the policy and planning committee, that the Supreme Court of NSW judges should have regular educational conferences to which they should invite outside speakers, the judges insisted that those conferences be held on a Saturday because they thought it was embarrassing that they should be seen taking time off from their work to deal with that matter. But I said to them, "No, I want it to be seen as part of the job. I want you to have these conferences on ordinary working days so that everyone will see that an ordinary part of being a judge is engaging in continuing judicial education." And ultimately, they came to accept that.

But that's how new the idea of judicial education was in those days. One of Sir Laurence Street's greatest contributions to the structure of the judiciary was to secure that combination of functions in the Judicial Commission, which I think is unique in the world. I know of no other place where the body that deals with complaints against judges is the same as the body that deals with judicial education. It's counterintuitive – there's no reason why it should be the same body: well, that as a matter of history is how those two functions come to be combined in the Judicial Commission of NSW. But the time of setting up the Judicial Commission was a very turbulent time in the history of the NSW judiciary.

Q *Adroit is the only way you can describe that.*

A It took several years to settle down as a source of dissension in the Supreme Court because there was still bitterness resulting from the establishment of the Court of Appeal. The establishment of the Court of Appeal had resulted in a rearrangement of the seniority within the judiciary and there was a lot of lingering resentment. It was only after I had been on the Court for some years that the last surviving member of the Court from the time of the setting up of the Court of Appeal went.

Q And thereafter it was smoother sailing.

A Yes.

Q I'm curious about this climate of hostility at the time – there was also a fair amount of hostility when you were president of the Bar Association, from government. This was prior to your time in the Supreme Court. There seems to have been a whole decade of it.

A When I was president of the Bar, the Attorney General of the day, Paul Landa who was actually a former client of mine, we'd had very friendly relations – I'd known him from law school days – Paul decided that he would "fuse" the two branches of the profession: barristers and solicitors. In most states of Australia, in the past there had been no separate bar. In the so-called independent bars (an expression I regard as a tautology), that grew up in the smaller states (small in population, not area), the NSW government supported by the NSW Law Society came up with a proposal to fuse the two branches of the profession. Well, of course, that went over like a lead balloon with the Bar. As it happened, the premier of the day was a former barrister, Neville Wran, who had no enthusiasm for this proposal at all. As a result of some communications I had with some people who had access to the Premier, there was a meeting arranged between the Premier, the Attorney General and me, and -

Q A robust discussion took place?

A No, a very brief discussion took place. Wran said to the Attorney General, "What's all this about?" The Attorney General said, "Well, I'm proposing to fuse the two branches of the legal profession". Wran said

to him, “What do you expect to achieve by that?” The Attorney General said “Flexibility”. It was an answer that conveyed no information at all. The Premier gave him about thirty seconds’ opportunity to explain what exactly he was trying to achieve by this proposal and the meeting then ended. The Premier gave instructions that the topic was never to appear on the agenda of Cabinet, unless and until the proposal had the agreement of the President of the Bar.

Q *Paul Landa passed away at a young age.*

A He died of a heart attack while he was playing tennis.

Q *You said you were on very friendly terms (with him). Why do you think he was so dedicated to this idea?*

A I’m sure there were people who regarded themselves as reformers, who thought that this was an ideal subject to pursue. It was a hot topic at the time, and it was a very fashionable topic among people who regarded themselves as progressive elements in academe and in the profession, but they picked the wrong time to bring it to a head.

Q *When you were president of the Bar Association, you instigated a number of things – Bar News was one.*

A Yes. That was mine and I got Ruth McColl to be the first editor of that. I think Ruth was on the Bar Council at the time. I think she was the secretary of the Bar Council; in all events, she became the first editor of the Bar News and did an excellent job for many years.

Q *There was one thing you never asked her to do, though, and that was make coffee.*

A Ruth and I were on the same floor. I think it’s necessary to point out, so that I don’t outrage the #MeToo movement, members of the Seventh Floor, including Ruth, tended to be people who had a sense of humour. We decided to have regular floor lunches on Fridays and that was catered for. After, the caterers would leave a coffee machine ready. At the first of these luncheons, we’d had the food and I said to Ruth, “Would you mind switching on the coffee percolator, please?” Ruth of course realised what was going on and she said to me, “Why should I do that?” I said, “Because it’s your sex role”, and she then, in less than completely polite terms, declined. So, I said “Alright, I’ll do it myself” and as a result, I always switched on the coffee percolator at our lunches.

Q *Just returning to your time on the Supreme Court, when I interviewed Sir Laurence Street, he told me that when one is on the bench, “You’re conscious that too slavish an adherence to precedent or the letter of the law quite often will work injustice. You try to find a way to work around it. That’s the origins of chancery, of equity law.” Do you agree?*

A That's part of the truth. There's another part of it that ought to be mentioned. Equity law was originally aimed at relieving the inflexibility and consequent injustice of some aspects of the common law, but over the years, equity itself became extremely technical. Now, this was remedied ultimately in the United Kingdom by the *Judicature Act* – we were a lot later getting that in NSW. What Sir Laurence Street said presents the good side of equity, but he didn't mention the other side of it, which was the technicality that came to surround some of its doctrines. But in substance, what he said is absolutely correct and that is that the original purpose of equity was to relieve the harshness and injustice of some aspects of the common law.

Q *That's very interesting. When you were appointed (to the Supreme Court of NSW), one of your objectives was to reduce the time spent hearing cases. You adopted case management strategies - you did try streamlining (judges') caseload.*

A It's worse than that. When I was appointed Chief Justice of the Supreme Court of NSW, there was enormous delay in the hearing of common law cases. There was also a very long delay in the hearing of criminal trials.

Let me deal with the matter of criminal trials first. I was struck by the fact that complaints about the delays in criminal trials were coming from a number of quarters, but there were no complaints from one particular quarter. There were no complaints from the alleged criminals and there were no complaints from the lawyers who were acting for them. So I made an inquiry, and I said, "What is the conviction rate of people who are brought to trial in the Supreme Court of NSW?" The answer was more than 90%. That, I thought, was the explanation of why they weren't complaining about delays, because delays could only operate in their favour. In all events, I decided that whether they were complaining or not, we were going to get criminal cases on a lot faster.

In relation to common law cases, the delays were enormous. There was a delay reduction program that had been introduced shortly before I was appointed. Jim Wood was in charge of it and Warwick Soden who was the chief executive officer of the Court at the time was also very important in it. After I was appointed Chief Justice, and I underline the word "after", I was told that unless the situation was turned around very quickly and very sharply, within five years, the time between commencing a case in the common law division and getting it on for hearing would be about twenty years. In other words, it was a critical situation. This wasn't just a problem; this was a major crisis.

So we introduced a variety of techniques – this was one of the functions of the Chief Justice's policy and planning committee – that was a major policy issue we had to deal with: the so-called common law delay reduction program. And we used a variety of techniques to deal with it – one of which was that we had for years a series of what might be described as "crash-through special sittings" when all the

judges of the court for a certain number of weeks sat on common law cases. What had been learned from other countries was that this wasn't a problem unique to NSW. There was quite a body of study elsewhere, including in the United States, of techniques of delay reduction. What had been the consistent finding was that most of these cases would settle if you only brought them on for hearing. Confronted with the prospect of an actual hearing, most of them would disappear. But of course, for one reason or another, unless and until you confronted them with an imminent hearing, they would just linger on in the list.

So the main technique of dealing with these cases was to confront them with the prospect that they were going to be brought on for hearing in short order. That usually led to them settling.

Q *Sounds like a bit of a "stick" approach that you needed to use.*

A It was a heavy stick approach.

Q *Did it bring a sense of relief to your colleagues that something at last was being done? Or was there a bit of protest?*

A There was no protest. A delay reduction program had been set up some months before I was appointed. I can remember as a barrister attending meetings of the profession about this problem, about this issue, but it was only in its formative stages. The person who was the big expert on this subject is Jim Wood.

Q *It was said that the Berk case in 1996 was one of your finest judgments. It was where you ordered the re-trial of an accused, due to the incompetence of the man's barrister.*

A Yes, I remember that case. There was very little law in those days on the way in which the Court of Criminal Appeal ought to deal with the situation where a mis-trial has occurred as a result of an acknowledged mistake on the part of counsel. It's still an area where the courts have difficulty: the issue was when and in what circumstances you identify a miscarriage of justice. After all, the adversarial system of justice operates on the basis that people are bound by the conduct of their counsel, and more often than not, you never really can find out why barristers acted the way that they did in conducting a case. The circumstances in which a Court of Criminal Appeal can feel comfortably satisfied that a miscarriage of justice has occurred because of a mistake on the part of a barrister are fairly rare. But it was a case in which it was known exactly what had happened and why the barrister had done what he did.

Q *There was a little criticism around that time in Bar News of the way some barristers were conducting themselves. Do you know whether that led to any changes in terms of codes of conduct, or rules generally?*

A I'm not aware of any.

Q *It seemed to follow almost from your judgment. I'm wondering if there's some link there?*

A I don't now recall whether there was alteration in the system of what used to be called dock briefs. I think I previously mentioned that to you.

Q *You did.*

A It's a slightly misleading term. Whether they tightened up the process by which inexperienced counsel became assigned to cases, I don't now remember.

Q *You spoke before about judicial education – there is also –*

A Continuing legal education.

Q *During your time on the NSW Supreme Court, you were also president of the NSW Judicial Commission – did you oversee any innovations?*

A That was a very busy period. The Judicial Commission was just getting started when I came along, and I became its president for ten years. In terms of legal education, yes, there were a lot of developments, only because the body was brand new by the time I came along. For example, we established regular conferences for each of the courts.

It's worth recording that I was told by Ernie Schmatt who's the chief executive of the Judicial Commission, that shortly before I was appointed, the Commission made a survey of magistrates to see what they wanted, what could be done to help them, by way of resources. I can't think of anything that better illustrates the lack of resources available to magistrates and to some extent judges in terms of support and education than the fact that Ernie Schmatt told me that what magistrates most wanted was their own personal copy of the *Crimes Act*. That was the principal request of NSW magistrates to the Judicial Commission. "We would like our own personal copy of the *Crimes Act*, please." What a state of affairs – that magistrates didn't have their own personal copy of the Crimes Act. They would have to travel from place to place, depending on the resources that were available. The Judicial Commission did enormously important work in providing resources for magistrates and for judges.

Q *You actually got around (NSW) a fair bit yourself on circuit, while you were president of the Judicial Commission, to see the conditions in which people were operating?*

A I took the view that I should sit from time to time at first instance. Sir Laurence had sat at first instance as an equity judge for many years, so the issue didn't arise with him. There were one or two other judges who strongly took the view I shouldn't sit –

Q *Shouldn't sit?*

A Yes.

Q *Why?*

A I suspect it's because they themselves hadn't sat at first instance. At all events, I decided that I would sit at first instance. I wasn't really interested in anybody else's views on that subject. It was a view I'd formed while I was still a barrister, that all judges should have trial experience. And I was able to do that because of the practice I'd had as a barrister. So I did it – I sat in some murder cases, I sat in a lot of common law cases that were brought in for special hearings, and commercial cases. And I went on circuit. The reason I went on circuit was to have a look around at what was going on. It was very interesting, and I did it because I enjoyed it.

Q *You mentioned the magistrates who had not their own copy of the Crimes Act – you were able to see for yourself what they were missing in terms of their personal arsenal of materials. That must have struck you as a pretty bad state of affairs.*

A Don't forget, the magistracy had only recently emerged as an arm of the judiciary. The magistrates throughout the entire history of NSW up until 1986 were part of the executive branch of government. Magistrates were promoted upon recommendations made within the Attorney General's department and their salaries were fixed as salaries of people within the Attorney General's department, and yet they were the people hearing cases between the government, including the Attorney General's department, and the citizens.

Q *In Victoria, there was a similar development, whereby magistrates became an arm of the judiciary. They had arisen out of initially being police magistrates. Was it quite the same in NSW?*

A Much the same. I don't want to say anything politically incorrect, but Victoria was originally part of NSW.

Q *One big colony!*

A So was part of New Zealand, by the way. We never had in Australia an institution comparable to the magistracy of the United Kingdom where most of the magistrates are unpaid, prominent citizens of the area. That was partly because of our convict origins. That's still the position in the United Kingdom today. Almost all of our magistrates were stipendiary – that is, paid a salary. Many of them were police magistrates. Magistrates also had important administrative duties to perform on behalf of the government, especially in rural areas. It wasn't until the 1980s in NSW – I don't know what the dates are in Victoria - that there was the move to take the magistracy out of the executive arm of government and put it in the judicial branch of the government. That of course is the origin of the famous expression, "Now what about my little mate?" It was after having heard representations from Clarrie Briese, the chief magistrate, to Lionel

Murphy to use his influence within the Labor Party to get the Labor government to support that move for independence, that it is alleged that Murphy then said to Clarrie Briese, "And now, what about my little mate?" That move for the independence of the magistracy was the background to the Lionel Murphy affair. The history of this is written in a book called *High and Responsible Office* by Hilary Golder – that's the most useful source of information I know about that aspect of NSW history, but it's very important when this was all coming to a head in the latter part of the 1980s.

Q *You must think sometimes that was a very volatile period to be working in the law. You were there right in the middle of it all - you must have been almost relieved to go to the bench!*

A It was a very difficult period in NSW. The existing Chief Justice who was only aged 61 resigned. I think there were good reasons why he didn't want to continue being Chief Justice.

Q *Would you care to describe those?*

A Well, I think he had been through a very difficult period in the court.

Q *The pressures on judges are something the public generally don't tend to understand. I like the way you described before how you had a kitchen cabinet. Did you ever feel under tremendous pressure during that time as Chief Justice? Yes, it was a volatile time, politically, and you also had a great deal of work to do, bringing the managerial approach you instigated.*

A No, I never felt under pressure.

Q *You are a very orderly person.*

A I think that's probably right, but I never felt under enormous pressure.

Q *I notice that you weren't much interested in dealing with the media during your time on the Bar Association – it was a "no news is good news" approach – but you did bring about the Supreme Court's first press information officer.*

A Yes, the way that came about was that the Chief Justice's policy and planning committee considered whether we should have a full-time media relations officer. Ultimately, it was decided "yes". That was not a very controversial decision; it was a big novelty – other courts didn't have them. Maybe one or two judges had some reservations about it but I don't recall any serious opposition to it. So, then the question arose as to how we would go about selecting. Well, the answer to the question was that I would select. I established a selection committee that included one or two outside people, but ultimately, I would make the selection – they were there to advise me. As I said, the Chief Justice of the Supreme Court of NSW has many decisions to make but none that require anybody else's agreement.

So we had some interviews and one of the applicants happened to be the wife of the president of the Law Society. She was a former journalist herself, Jan Nelson. Her husband John was the president of the Law Society. She appeared to me to be the best candidate. Well, a couple of the judges said, "Hang on – taking on the wife of the president of the Law Society is going to cause some hackles to rise because people will think she's an 'insider' and she won't be trusted by journalists perhaps". I said, "She seems to me to be the best person and the fact that she's wife of the president of the Law Society can't be a disqualification." Furthermore - although I didn't say this to people that this was a consideration - because she was the wife of the president of the Law Society, she happened to be friendly personally with some of the judges, and that was a good thing because I wanted the judges to be accessible to her. She was, for example, very friendly with Roddy Meagher. You wouldn't want to reflect too carefully on what would happen to a media officer who wasn't friendly with Roddy Meagher - that person could have had some awkward moments. She was well-experienced as a journalist; it was an argument in her favour – not against – that her husband was president of the Law Society; but it also had the advantage of meaning that many of the judges who could otherwise have been awkward knew her personally and related well to her. So she was a great success. Unfortunately, she died of cancer after a few years, but she was extremely successful in that position.

Q *Do you think she contributed in particular ways towards helping the public to understand more of the role of the Court?*

A I'm sure she did.

Q *Because there wasn't always a great understanding of the Court in the media, for example.*

A She did a great job because the journalists trusted her; they knew she was straight with them. Don't forget that she had that job at a very difficult time. I presume the name Franca Arena means something to you.

Q *Yes, because of the allegations she raised about (Justice) David Yeldham.*

A And other judges, very importantly. I can remember coming to work one morning when there had been a headline in the paper over the weekend saying a Supreme Court judge had been murdered in Lane Cove National Park as the result of some orgy that was going on there. So we got Jan to ring around all the judges and find out that they were all still alive. I then got her to contact the newspaper people. She said, "I've personally checked and I can assure you they are all present, if not correct, and there's none of them lying dead in the Lane Cove National Park". That was the sort of thing that was going on in the media. Various allegations made in parliament by Franca Arena –

Q *Under parliamentary privilege -*

A - were a cause of enormous trouble, and the awful fact is that (Justice) David Yeldham committed suicide in the middle of all this. Then Jim Wood's commission of inquiry into paedophilia was established. So, Jan Nelson had at times –

Q *A delicate and difficult role –*

A But one that she discharged very, very well. We called it a "public information officer" rather than "public relations" – the term "public relations" carries connotations that we didn't want. There was a lot of information that she had to provide, particularly to journalists who would ring her up and say for example "What is an interlocutory injunction? What's the nature of these proceedings?" So she would tell them, she would explain. Her experience and my experience dealing with journalists at the time was that more often than not, they really did want to know information. They weren't, as it were, to be regarded as hostile agents or enemies. They wanted to do their job well; they didn't want to make silly mistakes when they wrote articles about court cases and about judges.

Q *Someone was suggesting to me that the demise in good legal reporting was in part because of the demise of afternoon newspapers.*

A There was a class of journalist who used to follow cases in magistrates' courts and also criminal cases, who got a lot of background experience and who wrote for those afternoon newspapers, yes.

Q *Were you yourself an avid devourer of newspapers, or did you try in some respects to keep a certain distance from that?*

A For twenty years, as Chief Justice in Sydney and in Canberra, I had to read six newspapers a day, and that was enough for me. So, I wasn't an enthusiastic consumer of the output of newspapers, but I was obliged to do it. In the old days, I used to read those afternoon newspapers too, but I'm not the sort of person as some politicians are, for example, who head for the newspapers first thing in the morning. However, I felt obliged to. Because so many people think that the Chief Justice is responsible for everything that is said by any judicial officer throughout Australia, I had to read what was going on in the papers.

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Q *Just before we move to your period on the High Court, I want to ask you about a speech you made in 2014 where you said "the law is orthodoxy and judges commit themselves to justice according to law, not according to their personal preferences". You went on to say, "Even so, someone who has judged at the highest level for 17 years is likely to develop certain themes or emphasise certain ideas, often*

building on views formed in earlier encounters as an advocate or legal advisor". I'd be interested to know, Mr Gleeson, the themes and ideas that mattered most to you as a judge.

A Yes, I'm not sure I remember precisely the context – what speech was that?

Q *I'll get the title for you.*[1]

A I'm trying to think of what themes I was talking about - was that a reference to themes in speeches or themes in judgments?

Q *Themes in judgments.*

A Well, some recurring themes in judgments that I wrote would have been to do with the interpretation of the constitution, or legislation or contracts. My recollection is that there would have been a number of references to the consideration that interpretation is text-based. What you're doing is interpreting language that has been written by somebody and I think I would have made the point on several occasions that the purpose is not an exercise in psychoanalysis, it's an exercise in giving meaning to a text. For example, parliament exercises its legislative power by making statutes. You often hear people refer to what the legislators meant or the legislators intended, but that's just a shorthand and conventional way for referring to the meaning of the text that they have produced. Because what operates in law is not their state of mind, it's what they've declared in the legislative text.

It's the same with a contract. People often, after extensive negotiation, agree upon the terms of the written contract, and what the law enforces is the written terms that they have expressed their contract in. It doesn't seek out their individual intentions. Indeed, just as an act of parliament is the product of the work of many different people - some inside parliament and some outside parliament – an extensive commercial contract is likely to be the work of a substantial number of people – usually people who don't have the capacity to bind the contracting parties to their own decision.

Q *So, with that in mind, what do you make (and I'm paraphrasing him here), of the quote by American judge Oliver Wendell Holmes when he said that laws – the express intentions - are the "skin of a living thought"? Does that come close to what you're describing?*

A I'll tell you something about what Oliver Wendell Holmes actually said (GETS UP TO LOCATE BOOK). I'm going to quote him, since you've raised him, because I was reading him before you came into the room.

Q *That's a coincidence.*

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[1] It was the annual Sir Garfield Barwick Address, given by the Hon Murray Gleeson AC QC, 20 August 2014.

A One of the things Oliver Wendell Holmes said was, "Great cases like hard cases make bad law".

Q *Interesting. What is the title of the book you have there?*

A It's a recent biography of Antonin Scalia – it was sent to me as a gift by a group of barristers who are in some chambers in Queensland that bear my name. (PAUSE, LEAFING THROUGH BOOK) 'Justice Holmes said, "Only a day or two ago when counsel talked of the intention of a legislature, I was indiscreet enough to say, 'I don't care what their intention was, I only want to know what the words mean'. Justice Holmes also said, 'We do not inquire what the legislature meant, we ask only what the statute means'". Those two quotations are on page 237 of a recently published biography of Justice Scalia of the United States Supreme Court.

Q *So, in a way, you're saying to your mind, that better sums up what you're describing rather than the notion of a "skin of a living thought".*

A What I'm saying is that interpretation is text-based. You're interpreting words on a piece of paper.

Q *And it's too esoteric to think of it as the" skin of a living thought"?*

A Well, that's a metaphor – I'm not entirely sure what the author of the metaphor (Justice Wendell Holmes) had in mind.

Q *In 1992, you were made a Companion of the Order of Australia in recognition of your services to the law. That came as a pleasant surprise?*

A Yes.

Q *That year, 1992, were you at any stage thinking of how your career might progress from the NSW Supreme Court?*

A It wasn't something that I thought about – I just took it as it came.

Q *You were appointed Chief Justice of the High Court of Australia in 1998. There has only been one other time when a sitting chief justice of a state court was appointed to be Chief Justice of the High Court – that was Samuel Griffith?*

A Yes, Sir Samuel Griffith was the first Chief Justice of the High Court. He was chief justice of Queensland at the time he was appointed.

Q *What's your view of that style of appointment, as compared to being a puisne judge, first on the bench, as for example, your predecessor (was)?*

A The first point that I'd make is that at the time, Griffith was appointed Chief Justice of the High Court, I doubt that the Chief Justice of NSW would have regarded it as a promotion to be appointed Chief Justice of the High Court. (The High Court) was a small controversial court,

consisting of only three members. It was described by one of the founders of Federation as like “the fifth wheel on a cart”. There was at the time speculation as to whether the Court would be a full-time court or not; whether it would consist perhaps of part-time judges recruited from other places. I would have thought that in 1904, the Chief Justice of NSW would be regarded as a considerably more important person than the Chief Justice of the High Court of Australia.

Now, the relations between the various courts in the judicial hierarchy developed over the course of the century. Why it was that no other state chief justice was appointed Chief Justice of the High Court, I can’t explain. I can’t imagine the Chief Justice of NSW being interested in an appointment as one of the associate judges (as the Americans call them) of the High Court. There was a speech made by Sir Owen Dixon after his retirement, I think, about notable or obvious people who hadn’t been appointed to the High Court and one of them was Sir Frederick Jordan. How it came about that Jordan was not appointed to the High Court, I don’t know.

Q *You don’t have any theories?*

A No, I think Dixon had some theories about it – I can’t remember now exactly what they were. He made a remark that I always thought was rather puzzling – he said of Sir Frederick Jordan that he had some “queer ideas” about federalism.

Q *What were the “queer ideas”?*

A I don’t know, but I do know there had been a number of decisions of the NSW Supreme Court, written by Jordan, which had disallowed various commonwealth laws and regulations. Maybe that was what Sir Owen Dixon was talking about.

Q *Maybe they’d gone against the earlier precedents set by the Engineers case? Maybe that’s what Sir Owen Dixon was thinking?*

A Maybe, maybe.

Q *That might well have influenced the decision not to appoint him. Do you think that was the High Court’s loss, not having Sir Frederick Jordan there?*

A Oh, undoubtedly. He was a towering figure and would have made an enormous contribution to the court.

Q *He never expressed personal disappointment to your knowledge?*

A Not so far as I’m aware. I’m aware there’s a collection of his writings, currently being prepared by Keith Mason and I’ve had a look at them, but I don’t remember seeing anything about that in those writings.

Q *Moving to your period on the High Court, the fact that there’s only seven judges in Australia whose decisions are not potentially subject to*

appeal - the first constraint on a judge is appeal – that's your own quotation. With the seven of you where there's an institution of reasoning based on precedent - what else, if anything, acted as a constraint?

A Well, the Court operates in a collegiate fashion. Let me give you an obvious example of a well-recognised constraint that operates both here and in the United States Supreme Court, which is that the Court doesn't pass up on constitutional issues unless it's necessary to resolve them for the particular decision. That's what might be called a "self-denying ordinance". It has a foundation in United States jurisprudence going right back to the origin of the Supreme Court, and it's also important here. One of the things it means is that the present judges of the Court are not constrained or affected in their decision-making by unnecessary chatter on the part of their predecessors. So that's one example of a constraint. Another example of a constraint is that courts including the High Court have to respect previous decisions, because if they don't respect previous decisions, they undermine their own authority. If it's all perpetually up for grabs, then the authority of the current Court diminishes.

Q *Did you see it as your mission, when you were appointed, to bring or restore a certain sense of calm? There had been some turbulence in the years prior to your appointment.*

A I didn't see that as a mission; yes, there had been some turbulence and I hope that there was later some calm. But I certainly didn't go on the Court with some sort of program of restoring calm.

Q *There was a perception at the time of your appointment that it was "Howard's Court". That inferred the appointment of people whose political sympathies might be said to coincide with that of John Howard.*

A Might I point out to you something that has been overlooked in commentary on the time I was on the Court – you can check up the details of the arithmetic on this – but I think it's the case that for almost half of my period on the Court, the majority of the members of the Court were people who'd been appointed by Labor governments. How could it be possibly "Howard's Court" when the majority of the members of the court had been appointed by Labor governments? I think one of the things that perhaps caused people to overlook that circumstance is that a lot of people have forgotten that Bill Gummow was appointed by a Labor government.

Q *Even though you knew John Howard at university, you had very little to do with him subsequently.*

A That's correct. The first appointees to the court by his government were Ian Callinan and Ken Hayne. I was the third, but as I say, but for half the time I was on the Court, the majority of members of the Court were Labor appointees. I might say – and I think I've said this in a number of speeches I've made – there's only one decision in my time

on the Court where the judges divided or split, according to the political colour of the party that appointed them. And that was a decision in a case that had nothing even remotely to do with politics. It was a decision in a case about the obligations of local councils to keep bridges in repair. That's the only case during my time on the Court where the Court divided along party-political lines according to the government that appointed it.

Q *Can you explain how that actually transpired?*

A In that case? It was pure chance – it had nothing even remotely to do with party politics. It was a case to do with the obligations of local councils to people who were injured as a result of roads or bridges being in disrepair.

Q *So where was the partisan flavour?*

A There was none – that's my point. It was the only case in which the judges divided along lines where Labor judges went one way and the Coalition-appointed judges went the other way had nothing to do with party politics! The division can't be explained on the basis of the parties that appointed them. It's only another way of saying the judges never differed along party-political lines.

Q *I would be interested to know, nevertheless, where the differences of opinion actually fell, (with regard) to the responsibilities of councils.*

A I'll try and remember the name of the case if I can – I can't think of it offhand at the moment. But that's only an oversimplified way of saying I would challenge anybody to show me any politically significant decision of the High Court while I was there, where the Court divided along the lines of the party political preferences of the government that appointed them.

Q *What's your own view, Mr Gleeson, about the need for unanimity on the bench? I do know that you actively encouraged consensus among your fellow judges during your time on the High Court.*

A Amongst other things, that's of course, a function of personalities. The independence of judiciary includes the independence of judges from one another. There are some judges who by nature or personality, intellectual or personal inclination, are more inclined to fall in with a majority view than others. I think what the profession is impatient of, and is entitled to be impatient of, is judges who write separate judgments when there's no real reason for it. Especially in cases where you get a number of judgments which repeat the facts in ways that are not materially different from one another. So, you'd have to ask yourself, "Why? Why are you saying that?"

Q *I believe you were particularly keen during your time not to do that – you were well-known for that*.

A Yes. Judgments have to recite the facts and they have to recite the issues and then they go on to reason about the conclusions to be drawn in relation to those matters. Now, however individualistic a person may be in the way his or her reasons are expressed, there's no possible explanation for repeating the facts again. Some judges are reluctant to join in judgments of other judges because of an apprehension that things will be expressed in a particular way that will come back to haunt them in the future. Dixon actually said that he never joined in somebody else's judgment without later regretting it.

Q *Why did he say that? That's quite curious, actually*.

A I think what he actually meant by that was that he regretted ever being bound by way of expressing reasons that came from somebody else rather than himself. Which is only another way of saying he preferred to speak for himself, and he regretted it when he didn't speak for himself.

Q *I do recall the former (federal) Attorney-General Daryl Williams – while he acknowledged the importance of separate judgments – he suggested that joint judgments can encourage the development of legal principle by stating the law more clearly, as he put it, than separate judgments can. What do you think about that?*

A Well, I think this is a never-ending argument. That's a relevant and appropriate consideration, but there are other considerations that have to be taken into account, too. There is a real limit to the extent to which a chief justice or any other judge can lean on judges to join in joint judgments.

Q *The Pelly biography of you did talk about Justice Gummow playing a sheepdog role (on the High Court) with regard to consensus or majority decisions?*

A I don't recollect what he said in that regard but let me give you a practical example of what can affect the willingness of people to join in other people's judgments. The more elaborate the reasons given for a judgment and the more excursions that are undertaken in the course of the reasoning for a judgment, the less likely other people are to join in it. If a particular judge, for instance, has a writing style that involves straying from the central point or elaborating in respect of issues that don't necessarily arise for decision in the case, the more likely – indeed the more certain it is – that nobody else is going to join in that judgment, even if they agree in the ultimate result.

Q *I believe you were well-regarded for the fact that you had the ability to be succinct.*

A Well, the less succinct you are, the less likely it is that anybody else is going to join in your judgment.

Q *Your influence, it was said, was greatest when it came to constitutional law, administrative law and negligence. With regard to negligence, I*

believe a high-water mark of your time as Chief Justice was the case known as Cole v South Tweed Heads (2004). It was a rather humorous case – a woman who was ejected from a club.

A She was very drunk and sued the club for not refusing to serve her liquor. I think that case appeared to me to be an example of a case where plaintiffs suffering from personal injuries could in their arguments press the law of negligence to the point where it disregarded personal responsibility. During the time I was on the Court, there had been a lot of dissatisfaction with some developments in the law of negligence. For example, some cases that made it appear that national parks should be full of warning signs – every rock and every harbour should have a notice on it, saying "don't dive here" and things of that kind. There was a very humorous speech made by the late Jerrold Cripps while he was the head of the Land and Environment Court about some of those developments in the law of negligence. I can remember making a point in a case that if snowfields were as equipped with warning signs as some plaintiffs' lawyers seemed to suggest, the greatest hazard of skiing would be impaling yourself on a warning sign.

Q *The Howard Government's Work Choices case was described as one of the landmark decisions of the Gleeson Court – it built on earlier precedents in recognising the broad scope of the corporations power to regulate labour relations. It was said to open the door for the Commonwealth to enter areas like education and health. There has been over the years a gradually bigger role played by the Commonwealth in relation to the states.*

A Some of the most important judgments about that expansion of the role of the Commonwealth over the history of the 20th century and into the 21st century were written by Sir Victor Windeyer; one of them in the Payroll Tax Case. The decision in the Work Choices case seemed to me to be a logical development of the decision in the Concrete Pipes case which is the case that established the power of the Commonwealth to legislate with respect to trade practices engaged in by trading corporations. It was the Concrete Pipes case, or the reasoning in the Concrete Pipes case, that established the validity of anti-trust legislation - the *Trade Practices Act*. I would defy anybody to tell me how, on the minority view in the Work Choices case, the *Trade Practices Act* is valid. The basis of the legislation in the *Trade Practices Act* is that the Commonwealth has the power to control the trading activities of trading corporations. And included in trading activities was restrictive practices they engage in. If you took the narrow view of the corporations power, and it's never been very clear what the narrow view of the corporations power actually is, then you would undermine the trade practices legislation.

A possible view of the corporations power which was expressed in the course of argument in a very early case in the High Court is one that has never been taken up by anybody. And that is, that the power to make laws with respect to corporations is in effect, the power to make a

company law - the power to make a law like the *Companies Act*. You can well understand how that might have been a view taken early on. It was Justice O'Connor who suggested in argument that that's what it means. If it does mean that, it's logical and sensible, but appallingly narrow. And nobody in the High Court has ever taken that up as a possible meaning of the power to make laws with respect to corporations – that is, the power to make a *Companies Act*. In fact, a later decision of the High Court, before I was there, held that it was the very opposite: it didn't confer that kind of power. So, once you put to one side the possibility that the power to make laws with respect to corporations is the power to make a kind of *Companies Act*, then you ask, what does it mean if it doesn't mean a power to make laws about things that corporations do?

Q *So, but why do you think that it wasn't taken up?*

A Because it produced consequences that are so narrow.

Q *You say "narrow", but then you also mentioned before that it hadn't itself been adequately defined. How in your view was that not done?*

A When I started off in practice and for a long time after that, each state had its own *Companies Act*. It was only as a result of the enactment of a uniform *Companies Act* by the various states that you ultimately got a corporations law. When I went into practice in NSW, the *Companies Act* was the *Companies Act* 1936. For ten years, I lectured in company law at Sydney University and books that were written about the Companies Act were concerned with state legislation. Nowadays, people demand uniformity in that regard. Let me give you another example: currently, there's occurring a Royal Commission into financial institutions. What do you think the public response would be if somebody said, "We should leave that to the various states to deal with"?

Q *It would be highly negative*.

A That's right. People now assume that the Commonwealth will deal with economic subjects because they want a uniform approach to those economic subjects. That's one of the big developments that's occurred - the demand for uniformity in economic regulation. The idea of what the government's main job is has changed since Federation. Now its central job is controlling the economy. And the demand for uniformity in economic control has developed since Federation.

Q *I suppose with hindsight that seems inevitable*, doesn't it?

A Well, Sir Victor Windeyer pointed out that it's largely a result of the First World War, and of the change in the role of government and the role of Australia since WWI, and there's another aspect that people sometimes overlook. In 1901, when you were talking about division of powers, it would have been incomplete to talk about division of powers between the Commonwealth Government and the state governments –

there was an elephant in the room: Westminster, the United Kingdom. They controlled our defence; they controlled our foreign policy. We were a British colony; we were part of the British empire. That's all gone. It's all changed. But nature abhors a vacuum, in particular a power vacuum. When the tide of empire – if you want to be poetical about it – receded, when step by step Australia removed itself from the power of the United Kingdom government, where did that power go? It didn't go to the states, it went to the Commonwealth.

Q *I would like to ask you about the Al Khateb case which dealt with a fundamental question of liberty and indefinite detention. It was about whether Australian law permitted an asylum seeker to be detained indefinitely in a situation where that person was stateless and could not be deported to any nation. The High Court held that it is possible for someone who had committed no crime and who has not been tried, that they can be held indefinitely. As you would well remember, that was a decision that did attract a lot of comment.*

A Well, it also attracted legislation; it attracted legislative amendment to in effect reverse the consequences of the decision of the majority in that case.

Q *You were in the minority in that decision.*

A Yes. What that case was about, as I saw it, was the principle of legality, and the way that applied in relation to the interpretation of some legislation. Whether the High Court will ever have another look at that issue, I don't know, but as I say, in relation to the specific statutory question that arose for decision in that case - following the decision, the government amended the legislation to reverse the effect of the majority decision.

Q *This was a very rare dissenting judgment by yourself. It's been suggested that you were unable to persuade one of your fellow judges to join you in your position. If you'd been able to, the decision might have gone the other way and ultimately impacted detainees' rights?*

A That's only a matter of numbers – I can't imagine that I would have tried to persuade anybody of anything. I was never interested in trying to persuade anybody.

Q *Another important case that you presided over – and this was not long before your tenure as Chief Justice concluded – concerned sexual slavery.*

A I remember that.

Q *The case of a woman brothel owner in Melbourne*.

A It was a jury trial, as I recollect.

Q *That's right. The woman brothel owner employed several women, Thai nationals, who were required to work six days a week in order to pay*

off debts of $45,000 each. I believe the brothel owner argued that this was just an employment arrangement, analogous to students repaying HECS debts.

A Yes, but my recollection is that the facts showed that these people were kept in very confined circumstances and their freedom of movement was greatly restricted.

Q *You were satisfied that it was slavery, for that reason.*

A The substance of the argument on the other side, as I recollect it, was that these were adult women who took on a job knowing what was involved in it, and even if the conditions of work were harsh, it didn't make it slavery. But I thought the facts went a lot further than that.

Q *I'd really like to know this, Mr Gleeson - what was the judgment you feel you achieved the most in?*

A (PAUSE) I didn't really think of my judgments in terms of achievement. So, I've never set out to make any kind of measure in that regard. It's really a very unreliable assessment for anybody to make about his own work. I've always had a great suspicion of judges who mark their own report cards.

Q *I know what you're saying with regard to one's own report card, but when I say "achievement", a sense of something shifting for the better?*

A (PAUSE) I think there was a shift in approach throughout the judiciary generally as a result of some judgments to which I was a party, emphasising the necessity for the law of negligence to play proper regard to individual responsibility. You do see references in judgments and in commentary to "incremental" changes in the law of negligence. Those remarks always mask an assumption that every increment will be in the direction towards expanding the entitlements of plaintiffs. Nobody seems to take notice of the fact that an expansion of an entitlement of a plaintiff usually involves some increase in the responsibility of a defendant. That's because of the fairly light assumption that's made that everybody can get insurance.

Now, the developments in the law of negligence towards constant increase in the entitlements of plaintiffs occurred as the result of compulsory third party motor vehicle insurance. But everybody, as I say, cheerfully assumed or perhaps thoughtlessly assumed, that in an action for damage or personal injuries of almost any kind, you could assume that behind the defendant, there is a well-furnished insurer who'll pick up the bill. Well, that's not always the case. There are some forms of insurance that are very difficult to get, and some forms of insurance that are impossible to get.

Consider, for example, the capacity of people who conduct a small kindergarten to get insurance for negligent acts on behalf of their employees. How do you get insurance for possibly injuring babies in a kindergarten - inflicting on them injuries that might last an entire

lifetime? How much does it cost? Where do you get it from? The assumption is that it's readily available. Same with insurance against damage that might be caused to somebody who comes onto your property. Policies of household insurance cover property owners against third party liability but that's subject to a lot of conditions. So, the commentary and sometimes the judicial approach that comes to the law of negligence with a presupposition that there'll always be a defendant with deep pockets is something that always seemed to me required a little more consideration.

Q *Ultimately, you're talking of the importance of bringing a much more nuanced approach to the consideration of these concerns – it's what you feel you've contributed.*

A Yes. As Jerrold Cripps pointed out in the speech I mentioned earlier, the consequence of some judicial decisions about the responsibility of councils and other public authorities with respect to public safety in parks and leisure areas has been that a lot of parks have been closed down. A lot of leisure areas are no longer accessible to the public.

Q *Wasn't there an incident recently concerning some rocks in a national park down south?*

A My wife is a very keen horsewoman. When she competes in events, sometimes she shows me the documents, the releases that she has to sign. That deters a lot of people from competing in things like that at all, from enjoying that particular sport. I can remember a case we had about somebody who was injured in a game of indoor cricket. There was quite a sharp division within the Court in relation to that issue, but when you consider the ways in which people can be injured in a cricket match, the requirement that was suggested in that case as to the protective gear that ought to be applied to people who played indoor cricket struck me as quite unrealistic.

Q *I was talking to someone only this morning about American footballers adopting the AFL approach, of less padding.*

A I've seen commentaries that suggest that boxing where competitors wear padded gloves produce more deaths and serious injuries than bare-knuckled boxing. The theory is that the time for which you pound another person on the head is extended if you give them gloves to wear.

Q *You're a tennis player – are you taking an interest in tennis at the moment?*

A Do you mean, did I watch Serena Williams? Yes.

Q W*ould you ever, in another life, be interested in umpiring?*

A Not that kind of umpiring. My wife made a suggestion to me this morning that she heard on some news broadcaster about the amount of money that umpire made when he was abused by Serena Williams –

it was a trivial amount compared to the amount that was being paid to Serena Williams and the girl who won the game. I thought the most amusing aspect of that performance was the display of identity politics that was put on when Serena Williams in effect said to the umpire, "You're doing this to me because I am a woman. And I'm a mother – I have a newly-born daughter".

Q *She wouldn't get very far as counsel, would she?*

A No. I would hope she wouldn't have got very far in Australia either. I think it's fair to say that American crowds have something of a reputation for abusing umpires.

Q *We do, too, though – there's a bit of that with junior football, which has been an unfortunate development in recent years.*

A Well, I agree with the comment Margaret Court made with what happened, that you've got to respect the umpire's decision. I notice that somebody from Tennis Australia remarked that he thought the umpire's decision was quite appropriate.

Q *In your years after the High Court, you mentioned at the beginning of our interview that you were made a non-permanent judge on the Hong Kong Court of Appeal*.

A I still am. I was recently re-appointed.

Q *You mentioned you'd been given a Chinese name. What is the name, translated into English?*

A It depends whether you translate it into Cantonese or Putonghua, which is Mandarin. When I was appointed, the authorities in Hong Kong said the Cantonese translation of this name is something that indicates high respect, something to do with integrity. But then somebody who speaks Mandarin (I think an ambassador) later told me that if you pronounce the word in Mandarin, it comes out as a sound that is very like "Gleeson".

Q *So that works either way!*

A So, I don't set much store by the translation.

Q *Does that work occupy a great deal of your time?*

A It doesn't occupy a lot of my time – when I go to Hong Kong, I go there for a month. I'm going next May, for example. Probably in the ten years since I've retired, I've spent seven or eight months in Hong Kong.

Q *You have kept quite busy. Quite a number of people I've interviewed all say they wish the (judicial) retiring age of 70 could be raised?*

A Well, that is a matter I've looked at a great deal over the years. First of all, as you know, until 1977, federal judges were appointed for life, as they still are in the United States. I've just finished reading a book,

written three or four years ago, *Supreme Power: Franklin Roosevelt versus the Supreme Court* about Franklin Roosevelt's attempt to pack the Supreme Court in 1937, because he didn't like a series of decisions that frustrated his legislation. He introduced legislation to change the number of judges of the Supreme Court from nine to thirteen and thereby confer on those who were voting in support of the legislation a majority. He failed, as he thoroughly deserved to.

Like the United States, in Australia, for most of the 20th century, federal judges were appointed for life, which is why the federal courts were never very large. If the government had to appoint judges for life, then they were reluctant to appoint judges – they let the state courts do most of the work. So, the amendment of the Constitution to require federal judges to retire at 70 permitted the expansion of the federal court system. The number 70 was itself outdated at the time it was introduced. In fact, by the time I left the Supreme Court of NSW, the number was 72.

Q *The "Ken Handley amendment"?*

A That's a later one, a different number and a higher number. But until about the 1930s, NSW judges were also appointed for life. The legislation was amended in NSW to compel judges to retire at 70, and that was in the 1930s. I think you need to keep in mind that in the 1930s, there would have been very few people who would have contemplated the possibility of working on after the age of 70. The only time in my life I ever came face to face with Sir Owen Dixon was shortly before his retirement when I had brief to appear as a junior to Bill Deane in a matter before him in private chambers. He was 77 at the time and he was a very old and frail man. I can remember my grandfather when he was 70 and he was a lot less physically fit than I am now at 80. So, life expectancy has changed. When the number 70 was originally introduced in NSW, there were very few people who would have contemplated that a person over 70 might continue to work. On the other hand – you can check this for yourself – I think that Chief Justice (Frank) Gavan Duffy was appointed chief justice of the High Court when he was 78.

The number 70 dates from the 1930s. When it was put into the Constitution in 1977, it was already out of date. My own view is that I think there should be a compulsory retiring age for judges, but it shouldn't be in the Constitution. It would have been better put in an act of parliament so that it could be amended from time to time. Nobody is ever going to be able to change that number 70 to some other number and in 50 years' time, it's going to look absolutely absurd.

Q *They'd have to have a referendum.*

A Yes. I voted in favour of that change to the referendum; I regret now that it wasn't done by way of legislative amendment. Of course, if parliament changed the age, they couldn't make the change apply to serving judges, but they could change it for the future. If you look at

the retirement ages of serving judges of Supreme Courts around the Commonwealth, I think most of them are 72 or 75. And the consequence of that is you're going to have increasingly active ex-judges around the place.

Q *Many of them are going back into practice as counsel.*

A Not as counsel, I hope.

Q *There are a few.*

A I know, I know. I'm not in favour of that, but if you look at the people who've retired from the bench since I was appointed to the High Court, I have difficulty of thinking of any of them who haven't pursued some form of active legal work, following their retirement.

Q *You spoke at the beginning of our interview about the Chartered Institute of Arbitrators (Australia) – you're its patron.*

A I've been patron for a long time. I was on the Supreme Court of NSW when I was made patron of that.

Q *Do you see a growing inclination towards arbitration, from the point of view of companies?*

A There's been a big change in the nature of arbitration in Australia. When I was a barrister, all the arbitrations I did were related to building and construction work. The biggest arbitration I did, which I was engaged in up until the time of my appointment to the Supreme Court was an international arbitration, in which the three arbitrators were a retired law lord, a retired US federal judge and a retired Australian judge. It involved a large amount of money and was an oil and gas arbitration.

The first construction arbitration I did when I was a junior was typical of the time. Most of the arbitration work that barristers did was buildings and construction contracts. That of course was because arbitration clauses were built into those contracts. The Master Builders Association, for example, produced a typical form of building contract and that contained an arbitration provision. The typical arbitrators in those disputes were not lawyers at all –

Q *That's right, yes.*

A They were architects, engineers and builders. The arbitration I did right at the end – the oil and gas arbitration – as I said, the arbitrators were all lawyers, distinguished former judges. I can't explain how that change happened – I didn't observe it happening. It's just something that had changed in between the time when I started at the Bar and the time when I finished at the Bar, but it reflected what had been going on in England for more than a hundred years.

The reason I became patron of the Chartered Institute of Arbitrators (Australia) was because James Creer asked me to take that on while I was on the Supreme Court of NSW. I'm sure that James, who's now dead, was involved in a push to increase commercial arbitration. I think there has been a substantial increase in commercial arbitration since about the mid or the late 1980s, partly in the form of competition between Sydney and other places like London or Singapore or Hong Kong. My own experience in relation to the kinds of commercial arbitration that I've been involved in is that there's not a lot of practical difference between the ultimate outcome that you get in an arbitration or from litigation before a commercial judge, which leads me to believe that the reason those people who choose arbitration do so is that they want privacy. They don't want their disputes to be aired in public. Sometimes when I've been involved in arbitrations, I've thought to myself, "I can't understand why you're arbitrating this matter rather than litigating in the commercial court". On the other hand, there have been other occasions when I've thought to myself, "I know very well why you're arbitrating this!"

Q *More recently, you were on the Referendum Council along with Noel Pearson, Amanda Vanstone and others. The task you had was to advise the Prime Minister and the Leader of the Opposition on progress and next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. Last year (2017), the final report was handed down, and the now-former Prime Minister Malcolm Turnbull then went on to disappoint many indigenous people and their supporters because he said, "The Government does not believe such a radical change to our Constitution's representative institutions has any realistic prospect of being supported by a majority of Australians in a majority of states". Did that decision of Mr Turnbull's surprise you?*

A No, because he had given forewarning of that decision in a series of meetings with the Council. He explained his reason for that decision which was that he thought that it was contrary to principle, and he thought a majority of Australians would regard it as contrary to principle for any particular group of people to be subject to special and different treatment in the Constitution. My personal opinion is that it is a general principle, but it's not an absolute principle, and my personal opinion is that indigenous people constitute a legitimate exception to that general principle.

Q *(The Government's decision) was described by Pat Dodson as a "kick in the guts". With another referendum on that matter looking unlikely, are there other ways for indigenous people to achieve that special recognition that you speak of?*

A Well, one way to do it is just by legislation. There's nothing terribly radical about the idea of legislating for a representative body to have a voice to parliament about indigenous matters. There's been legislation about that in the past.

Q *It would be debated pretty fiercely.*

A It would have to be done by constitutional amendment. The indigenous people who support the proposal for constitutional amendment, as I understand it, fear that if it's merely done by legislation, it could be undone.

Q *Exactly - yes.*

A But if it's impossible to do it by way of constitutional amendment, then I think it should be done by legislation. It seems to me to be a legitimate idea.

Q *Associate Professor Rosalind Dixon from the University of NSW – she's a former associate of yours, I believe – made an interesting comment on the "Uluru: From the Heart" statement in the NSW Bar News autumn edition this year. She wrote about the concept of deferral; that is, when a constitution is first drawn up, it keeps key decisions but leaves the critical details of those decisions to the future.*

A I think she's written about that.

Q *What do you make of that avenue – is there hope?*

A It's possible. She comes from South Africa and she's had particular interest in that topic over the years. I think it's a very interesting idea.

Q *In the fifth annual Sir Garfield Barwick speech that you delivered to the Bar, I like this quote: "An unorthodox lawyer is a contradiction in terms" and to "beware judges who think they are not orthodox". Now, some people are probably going to argue that the latter can occasionally be good for public policy, if not the law, but with change and unpredictability so much a part of the political and policy landscape here at the moment, how do you feel, Mr Gleeson, that law and justice can continue to be ever-changing while never-changing?*

A At the risk of stating the obvious, the law is meant to be the law. That might not satisfy the aspirations of some people, but that's what it is and that's part of its nature. Nobody seriously suggests that the law should be treated as written on tablets of stone, completely and unalterably. There are a lot of things that have to change in order to remain the same. The most obvious is people; otherwise they'd remain infants. Institutions which don't change in response to the circumstances in which they exist, become different institutions. How could the law be unchangeable when the subject matter that it has to deal with is constantly changing? Its aspirations are meant to be consistent over time.

There was a time when adultery was a crime, and then when I was a practitioner, it was called a matrimonial offence and it was a ground for divorce. When I started in legal practice, there was no such thing as divorce by consent, although there was a rather phony process called "failure to comply with an order for restitution of conjugal rights". An

order that was usually made in circumstances where the last thing that anybody wanted was a restitution of conjugal rights. That was used as a practical means of obtaining what was in effect divorce by consent, but the laws with respect to marriage and divorce have changed enormously during my time in legal practice. That's an example of the law accommodating radical changes in social circumstances, but it's also an example of social circumstances being changed by the law. There are a whole lot of other examples at least as obvious as that, that could be given.

Laurence Street once pointed out to me that if you look at a set of law reports and go to the index of the reports in the first half of the twentieth century, you'll find that most of the leading cases were concerned with issues of property. If you did the same thing towards the end of the twentieth century or the beginning of the twenty-first century, you'd find that most of the leading cases are concerned with human rights. That has been an enormous change in the subject matter of litigation since I started in practice in the law. So, as I said, in some respects the law has to change, in order to remain the same.

Q *So with that in mind, and with respect to the "unorthodox lawyer being a contradiction in terms", where do you personally draw the line?*

A Do you mean, what do I mean by "unorthodox lawyer"?

Q *Yes. I have a suspicion you do mean something very particular.*

A There's a letter that Sir Owen Dixon wrote to Justice Felix Frankfurter, in which, I'm sure, commenting on the decisions of Lord Denning in the UK, he said, "A judge ought to at least pretend he thinks that he's applying some standard of conduct external to himself". That's what I was talking about.

Q *Looking back over the years, for yourself, when you started out and where you stand now, where have you personally changed?*

A At the risk of stating the obvious, I've got older and that brings about a whole variety of changes, intellectual as well as physical.

Q *Intellectually in what way, for you?*

A Well, I hope that intellectually I'm different to what I was when I was 17. I know there are some 17 year-old people who think they know everything, but as you get older, you find out more and you get an opportunity to engage in more comparative exercises, as it were. I've just, as I may have mentioned, finished reading a book, by an American author about Franklin D. Roosevelt's attempt to pack the Supreme Court of the United States. The information in that book about the political context in which the Supreme Court of the United States operates was very enlightening and –

Q *Disturbing?*

A Disturbing in one way and encouraging in another. I wish a whole lot of Australians would read that book and then see how much better it is to have a system where a court is detached from the day-to-day political struggle. I hadn't realised until I read that book that in the time of Franklin D. Roosevelt, most of the members of the Supreme Court of the United States were former, very active politicians who were all branded by their political allegiances. I hadn't realised, until I read that book, that contention in the United States between states-righters on the one hand and what we would call centralists or what they would called federalists on the other hand was hugely influenced in its emotional impact by the legacy of the Civil War. One of the things that they meant when they were talking about states' rights, was segregation of schools.

Q *We're touching here on the topic of federalism. I remember reading - this might have been in Geoffrey Sawer's book – that Australia's "Washminster" system was meant to be the best of what we understood to be the best about the (United) States, Canada and England. It was our "little brown bird" of a constitution. Is that how you see our constitution? Are we the best of all the others?*

A No. For a start, we have different circumstances. A.V. Dicey writing in the nineteenth century said, "Federal government is weak government". He was no fan of federal government – he was opposed to home rule for Ireland, for example, which was a big issue at that time. He was, in a sense, warning people in Britain against federalism – and there weren't many examples of federalism around at the time he was writing. But I shocked a room full of Chinese law students about fifteen years ago in Beijing by quoting that to them, and by saying that's one reason why in Australia we like federalism, because we like weak government. Just try and explain that to a Chinese person.

Q *Well, with such a totally different tradition and with all that they've experienced in the last hundred years alone –*

A They look to government to protect them, to secure them. We tend to look to government to keep out of the way.

Q *That's true. So with the book you were just describing, the Franklin Roosevelt book, do you see Australia heading down that path – towards the American federalist approach?*

A No, I don't see that. That's what people who support the inclusion of human rights in the Constitution would like. People who support bills of rights would like that, but the decisions committed to by our High Court tend to be fairly dry compared to what they have to deal with in the United States.

Q *You mention a bill of rights. A person I interviewed recently expressed the view that he would never see one in his lifetime – a constitutional bill of rights. Do you agree?*

A I do. But then my lifetime might be a lot shorter than his!

Q *But do you see one eventually?*

A No, I don't see one eventually – I don't think that within the foreseeable future, Australians relish the idea of judges undertaking that role. Now, what constitutes the foreseeable future, is something I can't put a time limit on.

Q *I'm interested in the concept of having a voice, in the law. When there is talk about a bill of rights, it's the enunciating of something they feel isn't being enunciated or vocalised elsewhere. Do you see that as something that we need?*

A If there's one thing that there's no shortage of, it's a vocalisation of rights. When Serena Williams went to confront the umpire yesterday, she said "The reason you're doing this to me is because I'm a woman". That was obvious rubbish, but she felt the entitlement and the need to express herself in human rights terms.

Q *Maybe it's something I'm picking up on something you said a few minutes ago with regard to indigenous people, when you said there could be a case to be made for special treatment.*

A There is a case for special treatment.

Q *So with that, a voice?*

A One of the practical problems that indigenous people have is that they seem to be a constantly diminishing proportion of the population. The reasons for that are too obvious to require explanation. I doubt that at the moment, it could be fairly be said that there are any legitimate human rights issues that are being overlooked in relation to the community generally –

Q *What about people who are stateless?*

A Well, the problem with indigenous people is to arouse community interest in their very existence and their condition.

As to people who are stateless, the immigration debate is one of the central political issues in the western world at the moment and they are part of the immigration debate. I doubt that they are overlooked, although I also doubt that at the time, the legislation that was the subject of Al Khateb was enacted – that there were many people in parliament who'd thought about the possibility of a stateless person in that connection. The later amendment to that legislation rather tends to support that. The people who are at risk are people who are invisible. There's a risk that indigenous people could fall into that category.

Q *Do you have thoughts about legal remedies – in the context of the saying, "When there are no remedies, there are no rights"?*

A That saying derives from the time when the substance of law was, as somebody famously said, "secreted through the interstices of procedure". In other words, it was the procedure that in the end defined what your rights were. No remedy, no right. However, I don't accept that the only or even the primary remedy for most evils is legal, and equipping people with legal rights and remedies often creates a false illusion that something is being done for them.

Q *By way of conclusion, Mr Gleeson, do you have any thoughts about practising at the Bar now, or even advice perhaps for counsel who are starting out? You have a daughter of course who's on the bench.*

A I'm rather out of touch in a lot of ways. Of course, I have plenty of friends and a daughter who's only fairly recently ceased to be a barrister. Most of my friends at the Bar tend to be of the older group. From time to time, some young people ask me for advice; I hear from my former associates who've gone to the Bar and tell me about their experiences there, so I keep in touch to that extent. Litigation these days seems to be conducted with a degree of ferocity that didn't exist in earlier times.

Q *You mean it's become more adversarial?*

A One of the first pieces of litigation I was ever concerned with when I was a clerk at Murphy and Moloney – my master solicitor Gerald Wells had the conduct of a large commercial action, and the solicitors on the other side were Minter Simpson. The chief executive of our client was a very tough and experienced businessman. That case, I might say, was ultimately settled. In the course of the case, the solicitors on the other side wrote to Murphy and Moloney and they said, "Something unfortunate has happened at our end – we were instructed by our client to make a payment into court, and the young woman who was in charge of making the deliveries mislaid the document and so she didn't get to the court on time, and we haven't been able to make the payment into court. Will you consent to an extension of the time?" Gerald Wells needed instructions from the client, and he explained the tactical advantage or disadvantage resulting of this. He said to the client, who was a very good and valuable client for the firm, "You can instruct me not to consent to this extension of time". But he said, "We at this firm don't take advantage of slips like this. So if you instruct me not to consent to an extension of time, you'll need to get another lawyer". Now, I doubt that's the sort of thing that you would find going on these days.

Q *Do you attribute the change to greater impatience brought about perhaps by technological advances? People are more anxious, impatient, angry – it would be unusual to find a tempered approach.*

A I'll finish the interview with an indirect answer – a story that I want to get on record.

Q *Of course.*

A Because it applies to my situation anyway, observing the current practices of lawyers. There's a great statement by Sir Donald Bradman – do you know who he is?

Q *I certainly do*.

A Well, when Bradman turned 80, as I've recently done, he was being interviewed on television. He had a rather difficult relationship with the media. But the interviewer kept pressing him to make comparisons between cricketers of his time and current cricketers. Bradman kept resisting that.

At the end of the interview, the interviewer said to him, "You have a phenomenal test match average – it was 99 – nobody's ever come near that since. If you were playing cricket today, what do you think your average would be?" Bradman said, "About 50". The interviewer apparently thought he was onto something and he said "Well, 50 is an excellent average, but it's only about half of what your average was. Why is that? Is that because now the bowlers are more hostile? Is it because now the fielders are more skillful? Is it because now the game's played under greater pressure?" Bradman said, "No, it's because now I am 80".

Q *That is the perfect conclusion. Mr Gleeson, I appreciate your time – thank you very much.*

A You're welcome.

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