A CHANGING JUDICIARY

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A criticism that is sometimes made of institutions, and large organizations, public and private, is that they have lost their corporate memory. One consequence is waste of effort. A lot of time is spent addressing problems that have arisen, and been solved, before. And a sense of future direction can be difficult to maintain if people do not remember where they have come from. A particular danger to which some lawyers, including some judges, are exposed comes from their propensity to express their approval of a certain state of affairs by declaring it "essential" or "fundamental". Sometimes this is a reasoned opinion. Sometimes it is mere rhetoric. Declarations of this kind are often made without adequate knowledge of what has gone on in the past, or, what goes on in other places. People may be surprised to learn that what they regard as an indispensable part of the natural order of things is, in truth, a recent development, or may be quite different from the way things are done, by respectable people, elsewhere. They may be alarmed by aspects of current practice which are not really new, but are simply a response to problems that have been around for a long time. A corporate memory can be a useful safeguard against this kind of error. It helps to fill in the context in which changes in the judiciary may be foreseen and evaluated.

In 1963, when I entered the legal profession, as today, the judicial officers with whom lawyers and the public had most contact were magistrates. There were no Federal magistrates. State magistrates were members of the Public Service[i]. In New South Wales, they were appointed by the Public Service Board. Most of them had entered the public service at an early age, were appointed to the Bench as part of a career path, and remained there until retirement, at the age of 60 or earlier. In New South Wales, until 1955, newly appointed magistrates did not have to be qualified to practise as lawyers[ii]. Their remuneration and superannuation arrangements were the same as other public servants. Their salaries varied according to how they were graded, and they were graded by the executive government[iii]. They were part of the government bureaucracy. As a matter of history, magistrates had always performed many purely administrative functions in addition to their judicial duties[iv]. Technically, even the function of committal for trial in the case of indictable offences was regarded as executive or ministerial, and not judicial[v].

In New South Wales, magistrates achieved structural independence of the executive government with the enactment of the *Judicial Officers Act* 1986. They can now be removed from office only in the same manner as judges. However, their remuneration and superannuation arrangements still reflect the public service background which, in practice, many magistrates have.

Not only are all New South Wales magistrates today qualified lawyers; many of them are highly qualified. They have sophisticated programmes of orientation, training and continuing legal education. The quality of the modern magistracy is high. It owes a lot to the work of the Judicial Commission of New South Wales. The Chief Magistrate is a member of that Commission.

A Federal magistracy has recently been established. I expect that, within the next 20 years, it will become one of the largest courts in Australia. It is officially described by the government as the Federal Magistrates Service. That, I am sure, is intended to reflect its relationship to the public; not to the government. And the court is subject to Chapter III of the Commonwealth Constitution. But it is easy for modern judges to forget how recent are the developments in the independence of the State magistracy. Some of those developments are continuing to work themselves out.

It is important for the future strength and independence of the Australian justice system that the magistracy, State and Federal, should not be isolated from the rest of the judiciary. It ought to be the aim of judges to facilitate the full participation of the magistracy in the judicial branch of government. The Judicial Conference of Australia may be able to play a role in this.

In 1963, the Federal judiciary was very small. Apart from the High Court, it consisted of a small number of judges in specialist federal jurisdictions. In most States, there was a Supreme Court and a District or County Court. In those States in which there was a separate Bar, appointment to the Supreme Court, and the District or County Court, was confined almost exclusively to members of the Bar. They were assumed to have practical experience in trial work; and that, in turn, was assumed to provide them with all the training they needed to be judges. There were no orientation and training programmes, and there was no continuing legal education. The legal skills of these people varied. Some of them were amongst the finest lawyers in the land. Some were not. By professional training, background, and experience, they were individualistic, and most of them shared a strong spirit of independence. It was the combination of learning, courtroom experience, and a spirit of independence, that made some of them good, and the best of them great, judges. But those qualities were not evenly spread; and there were other qualities, valued in modern judges, that were not then regarded as important.

The relationship between Bench and Bar had a profound influence upon the character of both institutions. That relationship reflected the English origins of our judiciary, and of our legal profession. But the relationship has changed, here as in England. Some years ago a leading English barrister said to me: "For more than a century, the Establishment practised a confidence trick upon the Bar. English barristers were conditioned to believe that the ultimate mark of professional achievement was to be invited, at the height of their careers, to give up private practice, and take public office as a judge, at a salary that was a small fraction of their previous income". Modern barristers, he said, were not so easily tempted. Confidence trick is too harsh an expression. But the same ethos used to exist in Australia. It has gone now. Most successful modern barristers now do not aspire to become judges. Some do. But most are not interested. They have other goals. Having spent 10 years, in my capacity as Chief Justice of New South Wales, acting as a recruiting agent, I have had personal experience of the change. In some ways, I regret it; but we have come to terms with it.

There are positive aspects of this change. The relatively narrow professional base from which judges were drawn in the past produced a rather monochromatic judiciary. Of course, the judiciary was not representative of the broader community. How can it be, if judges are all lawyers? Most members of the community are not lawyers; at least, not yet. But there is a wider pool of legal talent than used to be drawn upon. Attorneys-General now look beyond the Bar, or particular sections of the Bar, when recruiting judges. In some cases they may be making a virtue out of necessity, but in recent years there have been a number of successful appointments from outside the ranks of the Bar.

Another benefit has been that governments, and courts, have been forced to face up to the need to undertake formal programmes of judicial training and continuing legal education. The assumption that a newly-appointed judge will have years of courtroom experience and will have learned by example all there is to know about how to be a good judge, never was realistic; and is now unacceptable. Most Australian courts now have programmes to meet this need. Organizations like the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration, have been active and successful in the field of judicial education. The establishment of a National Judicial College is currently under active consideration. The whole judiciary should take an interest in its formation and development.

Judicial appointment used to be like what matrimony and holy orders used to be like; something entered into upon the basis that, subject to the possibility of relaxation to meet special circumstances, it was intended to be permanent. The possibility that there might be active professional life after service as a judge was not ordinarily in contemplation. There were some cases where that happened, but they were exceptional. In 1963, Justices of the High Court, and other federal judges, were appointed for life. The age of compulsory retirement for most State judges was 70. It was assumed that, once appointed, save for unforeseen circumstances, judges would remain in office for the rest of their professional lives. The reason for that assumption was never clearly articulated; and it was never made a condition of appointment. The assumption never applied to magistrates. Magistrates were commonly appointed to the Bench at an earlier age than judges, and their superannuation arrangements were such that they had, and in many cases, still have, a financial incentive to retire at 60. Consequently, a significant number of magistrates used to pursue some professional activity after leaving the bench, but it was very unusual for judges to do so. Dr H V Evatt, after resigning from the High Court to go into politics, appeared in a small number of notable cases. Later still, he became Chief Justice of New South Wales. But moves like that were rare.

In the early 1980s, three judges of the Federal Court resigned and returned to the Bar. The time they had spent on the Bench had been fairly short, and none of them was anywhere near retiring age. This made it necessary for the New South Wales Bar to consider rules about appearances by former judicial officers in their old courts. Then, during the late 1980's and 1990's, a number of judges of the Supreme Court and District Court of New South Wales, some of them entitled to judicial pensions, and some not, resigned with the intention of continuing either a full-time or part-time working life. Some returned to the Bar. Some joined firms of solicitors. Some became engaged in alternative dispute resolution: arbitration or mediation. Fairly suddenly, it became clear that there was professional life after the Bench. Interestingly, the most common form of occupation for former judges became that of an acting judge. The largest user of the services of former judges in New South Wales was, and is, the New South Wales Government. According to the Supreme Court's Annual Review for 2000, there were seven acting judges of the Supreme Court of New South Wales, five of whom were former judges of that court, and two of whom were former judges of the Federal Court.

While New South Wales may be unusual among Australian States in this respect, similar developments have occurred in other common law jurisdictions. Retired judges are active in arbitration and mediation in most common law countries; notably the United States and the United Kingdom. The practice of using retired judges for part-time judicial work has been common in England for many years. I am not aware that former judges have ever returned to private practice in England. Former Federal judges have certainly done so in the United States, and, so, of course, have former State judges, most of whom are elected for fixed terms, and who might well return to private practice when their terms expire.

The developments in New South Wales were the result of a combination of three factors: the failure of judicial salaries to keep pace with inflation in the 1970's and 1980's, resulting in a widening gap between professional incomes and judicial salaries; increasing longevity, which meant that many people were reluctant to accept that their working lives would come to an end at 65 or 70; and a growth in demand for the services of people with judicial experience. That demand came from governments looking to appoint acting judges, and from lawyers and litigants, who, with the expansion of alternative dispute resolution, saw former judges as having a valuable contribution to make.

So far as I am aware, it has never been the practice of any Australian government to require persons offered judicial appointment to undertake that they would never return to legal practice after leaving office. I would not have given such an undertaking. I was appointed at the age of 50. If I had resigned at the age of 51, for some reason, I would have had no means of supporting my family other than by the practice of my profession. Some judges regret these developments, but they reflect changes which are irreversible. And they have the benefit that governments, and remuneration tribunals can no longer deal with judges on the basis that they have nowhere else to go.

It is not unusual for public servants to take advantage of their experience by obtaining employment in the private sector; sometimes at very high salaries. This has been done in the United States for many years, and is becoming increasingly common in Australia. Public sector experience can be a bankable asset. The number of judges who can do the same is comparatively small. There is a practical reason for this. Judges of superior courts are usually appointed at what is, by general employment standards, a mature age. And they must remain in office for a minimum term, usually ten years, before they become entitled to a judicial pension. The opportunities for commercial exploitation of judicial experience are therefore relatively limited. The number of former judges in legal practice is still small and, so long as most judges continue to be appointed judges in middle age, is likely to remain so. If, on the other hand, there were to be a significant trend towards appointing younger judges, then people would retire from the judiciary at an earlier age, and that, in turn, would mean more former judges in private practice.

The increasing size of the judiciary is itself a force for change. There are, today, 937 judicial officers in Australia. Of these, 513 are judges and 424 are magistrates. The more judicial officers there are, the greater will be the number who leave the Bench before the age of compulsory retirement, and the greater will be the number of people who, whether they have reached the age of compulsory retirement or not, wish to continue, on a full-time or part-time basis, active working lives. So we are going to have to get used to seeing some of our former judicial colleagues in a different capacity.

There is another side to the same coin. We are also going to get used to a greater number of temporary judicial colleagues. Not all acting judges are former judges. Acting judges include legal practitioners who, at the end of their terms of appointment, which may be quite brief, return to practice as barristers or solicitors. There is nothing new about this, except the scale on which it is now occurring. In one respect, it mirrors what has been going on in England for many years. The Recorder system has always involved the use, for temporary judicial purposes, of the services of barristers. In the High Court of Justice, for some years, it has been common practice for barristers to serve for brief terms as Deputy Judges; sometimes being called up, on quite short notice, from lists of available practitioners. There are currently 194 barristers on the list of people available for appointment as Deputy High Court Judges in England; about twice the number of "regular" judges. Most of them are senior counsel. I have seen figures which show that last year 20 per cent of the work of the Chancery Division was done by Deputy Judges.

Having lawyers in private practice who are former judges, and having people who move back and forth between the Bench and legal practice, has presented the judiciary, and the profession, with some issues that have had to be addressed. Those issues are not peculiar to Australia. Other common law jurisdictions have had to deal with them. It will be necessary for the judiciary and the profession to develop some common rules of professional conduct. To an extent, this process is already in train but more effective cooperation may be necessary.

Some of the assumptions we make as to essential conditions for judicial independence may reflect a lack of awareness of present and past practices, both in Australia, and in England and other common law jurisdictions. I am not recommending a relaxation of our standards, but they will rest upon a firmer foundation if they are based on a knowledge of our own history and of practice elsewhere. One example may help to make the point. Until the Australian Constitution was amended by referendum in 1977, Chapter III provided that Justices of the High Court, and of other federal courts, were to hold office for life. There were statements made at the Convention Debates that this tenure (which is still enjoyed by all federal judges in the United States) was necessary to preserve the independence of the High Court. Now we must retire at 70. A supposedly necessary condition of our independence has gone. If it had remained, it may be doubted that a Federal magistracy would have been created, or that the Federal Court would have expanded in size and importance. If the Federal Government were still obliged to appoint all members of federal courts for life, it is highly likely that most federal jurisdiction would still be exercised by State courts. And there would probably be some judges who would solemnly aver that appointment for life was an essential aspect of the independence of the High Court. Sometimes things seem essential and fundamental just because they are familiar.

Government use of the services of judges for non-judicial purposes is probably no greater, or less, now than it

was in the past. Sir Owen Dixon was Chief Justice of the High Court in 1963. From 1942 until 1944, while he was a Justice of the Court, he served as Ambassador to the United States. During World War II he also served as Chairman of the Central Wool Committee (1940-42), the Shipping Control Board (1941-42), the Commonwealth Marine War Risks Insurance Board (1941-42) the Salvage Board, (1941-42) and the Allied Consultative Shipping Council (1942) [vi]. In 1950, he undertook the role of mediator in the dispute between India and Pakistan, over Kashmir. There has been no greater judicial advocate of the principle of the separation of powers; but he evidently did not regard his own integrity as sullied by excursions into the world of practical affairs. Perhaps his judicial work was all the better for it. His predecessor, Sir John Latham, while Chief Justice was, for a time, Minister Plenipotentiary to Japan. Different Australian jurisdictions have different practices as to making judges available for Commissions of Inquiry and similar purposes. This is still an issue on which different people have different opinions, but there is nothing new about it.

Subject to the Commonwealth Constitution, and to any relevant provisions of State Constitutions, it is for the legislative and executive branches of government to determine the size, and structure, of the judiciary, and the incidents of judicial remuneration and tenure. Government policy as to age, experience, and professional background, of potential appointees can have a major effect on the character of the judiciary. Fortunately, since governments themselves are frequent litigants, they have reason to be cautious in these matters. The more adventurous suggestions for change in policy come from people who do not bear the responsibility of decision making, and are not likely to suffer the consequences of mistakes. In the case of federal judges, the Constitution imposes limits upon the capacity of the government to alter the terms of judicial service in the same way as the incidents of service of officers of the executive in the executive government have been altered in recent years. Chapter III would prevent the appointment of judges on fixed term contracts, and, since the salaries of judges may not be reduced during their terms of office, the introduction of remuneration packages including benefits could lead to unintended consequences if a later attempt were made to withdraw or modify those benefits.

Since remuneration packages are the subject of some current discussion, there is a point that deserves mention. The most substantial benefits that judges receive in addition to their salaries are pension entitlements. The difference between pensions and superannuation benefits is easily, and often, overlooked. Pensions involve no capital asset, and cannot be commuted to lump sums, in whole or in part. Their value varies from judge to judge. It varies according to age of appointment, age of retirement, longevity after retirement, and whether there is a surviving spouse. But there is another aspect, relevant to the packaging of remuneration. Most judges who remain in office after 10 years of service, and after reaching the age of 60, have fully vested pension entitlements. They are not adding to their entitlements by remaining in office. If they retire tomorrow, their pension rights will be the same as if they remain in office until the age of compulsory retirement. They receive no further pension benefits by continuing to serve as judges. In the case of judges in that situation, (and that includes me), there may be nothing to be added to any remuneration package on account of pensions, because they are not currently earning any reward, or compensation (to use the evocative American expression), by way of pension rights. The methodology of valuing pension rights is a complex issue, and it could become important. I trust the Judicial Conference of Australia has access to actuarial advice.

At almost all levels of the judiciary, recent years have seen major changes in the work practices and responsibilities of judges.

The pressure of business before the courts, and the necessity to respond to demands for judicial involvement in case management, has resulted in the acceptance by judges of responsibilities of a kind their predecessors never acknowledged. Forty, and even fifteen, years ago, it was not regarded as part of the role of a judge to manage the progress of cases towards readiness for trial, and judges were discouraged from undue intervention in the progress of cases during trial. As a rule, it was up to the parties and their lawyers to prepare cases for hearing, in such manner, and at such speed, as they desired. Interlocutory proceedings were available if one party sought judicial intervention for a special purpose. But, ordinarily, the role of a judge was to deal with cases once they had reached the head of a queue. And in dealing with a case which came on for trial, the judge assumed a relatively passive role. Things are different now. Courts are expected to manage their lists actively, and trial judges are expected to adopt a role most of their predecessors would have regarded as inappropriately interventionist.

The decreasing orality of the court process, and the increasing reliance on written material, both for evidence and argument, has also increased the pressure on judges. The orality of the common law trial process was largely related to the system of trial by jury. Jury trials have all but disappeared in most forms of civil action, and even in the criminal law there is a trend towards summary proceedings, or trial of indictable offences by judges alone. Presiding over a jury trial often requires great skill, but it produces no reserved judgments. In many modern courts, especially in civil cases, the pressure of business, and the increased reliance on written material, means that judges are required to assimilate substantial amounts of such material, assisted by some compressed oral argument, and then to reserve their decisions, and move directly on to the next case in the list, writing judgments in such spare time as becomes available to them. To add insult to injury, there is the maddening tendency to assume that judges are only at work when they are sitting in court. People who make that assumption have probably never read a judgment, and have no idea of the work that goes into a reserved decision. If judges had the luxury of being able to devote whatever time was

necessary to decide one case before moving on to the next, there would be few complaints about delays in reserved judgments. But there would be very long backlogs of cases. The pressure under which most judges now operate greatly exceeds that under which judges worked when I entered the legal profession. I have no doubt that this is a factor in early retirements. (Since, by Constitutional amendment, Justices of the High Court became compelled to retire at 70, no Justice of the Court, other than a Chief Justice, has remained in office until the age of 70).

Australian courts have embraced developments in information technology. In many respects the technology has assisted their capacity to cope with increasing workloads. Evidence can now be taken from absent witnesses by video-link; complex information can be processed, assimilated and recorded more rapidly; electronic filing of court documents assists solicitors and litigants; judgments are published on the Internet; many courts, including the High Court, have their own website. The High Court now routinely deals with special leave applications from Brisbane, Perth, Adelaide, and Hobart by video-link, with the Justices in Canberra, and counsel in one or more of those cities. In fact, the technology now available would permit the Justices of the High Court to do all their work from home. Members of the Court could communicate electronically with each other, and with lawyers and litigants. This is not a change I would recommend. The public are entitled to watch courts, and lawyers and litigants are entitled to argue their cases in public. That is why courts "sit", and why judges do not deal with cases in the manner of clerks processing files. However, there is a negative aspect of this technology, which, in my recollection, commenced with the photocopier. Courts have become victims of information overload. They are not alone in this, but it is a major problem. An essential skill required of modern judges is the capacity to analyse voluminous information, and to recognise and discard junk.

The work of the High Court has altered in character in the last 40 years. When I commenced practice, the High Court was not the apex court in the Australian judicial system. There were still appeals to the Privy Council, both from the High Court, and from the State Supreme Courts. It was only with the abolition of appeals to the Privy Council, in the 1980's, that the Court became in all respects the ultimate of appeal. And the introduction of the requirement of special leave to appeal, so that no civil or criminal appeals come to the Court as of right, meant that the Court, as a rule, now only deals with cases of sufficient difficulty and importance to warrant special leave. In the days when appeals could come as of right, the Court used to get a reasonable number of easy cases. That no longer applies.

Courts are now much more active in promoting mediation, conciliation, and other forms of alternative dispute resolution. Judicial policy as to the appropriate role of judges in this area is still being worked out, but ADR is a prominent feature of the modern judicial landscape and, as was noted earlier, it is an area of activity which has attracted a number of former judges.

One of the most notable differences between the present-day judiciary and that of 40 years ago is the development of a concern about public opinion. By comparison with our predecessors, modern judges might appear anxious to please. Sometimes we seem a little unclear as to exactly who we want to please, or what it is that might please them; and there are still some among us who have difficulty in regarding the justice system as a service industry. The judiciary has responded to the demands of consumerism. That we should value public confidence is beyond doubt. But our thinking about what public confidence means, and how it is to be maintained, requires some clarification. The civil justice system is not simply a government-funded dispute resolution service which has as its object the satisfaction of parties to disputes. Its object is to administer justice according to law, and if that means forcing someone to pay his debts, or honour her contractual obligations, or declaring that a litigant has been guilty of fraud, or that one spouse, however unwillingly, must share matrimonial property with another spouse, or concluding that a witness is not telling the truth, then that is what must be done, even though it will cause dissatisfaction. The criminal justice system is an even more unlikely subject of universal approval. Many people who come into contact with the sharp end of it are likely to be distinctly unappreciative. In current jargon, various groups, some of them with conflicting aims and interests, are identified as "stakeholders". That expression is sometimes calculated to conceal as much as it reveals. What exactly the interests of some stakeholders might be, and how the judiciary might, with propriety, serve those interests, is often left unexplained. Perhaps stakeholders should be required to explain the nature of their respective stakes. We have a service charter. It is to do right by all manner of people, without fear or favour, affection or ill will. The confidence we seek from the public is confidence that we will pursue that objective with fidelity and integrity, even if to do so makes us unpopular, or causes dissatisfaction in some quarters. That confidence is not secured by seeking popular acclaim for our decisions, or by appearing to be responsive to threats. The public will never have confidence in judges who can be bullied. And there should be no misunderstanding about it: if the idea gets around that judges can be intimidated, there are plenty of people who would be anxious to try.

One unchanging feature of the judiciary is the value we place upon our independence.

It would be naïve to assume that judicial independence is valued by everybody, either in governments or in the community. Those who demand accountability by all holders of public office are frustrated by the existence of a class of office holders who appear to insist upon special treatment. This frustration may be attributable in part to a lack of appreciation of the level of accountability which already applies to judges, but it is a significant force, and judges need to respond to it with tact as well as firmness. Procedures of formal accountability vary between Australian

jurisdictions, and the issue is one of ongoing debate.

We should aim to ensure that the public understands, and values, judicial independence. In a democracy, public sentiment is the ultimate check upon legislative and executive power. We need to explain to the public the difference between judges and public servants, and the role of the courts in the scheme of checks and balances by which government power is constrained.

There are aspects of the work of modern courts which underscore the need for impartiality and independence. The growing importance of judicial review of administrative action, and the related development of a public consciousness of human rights issues, are extending the areas in which there is judicial scrutiny of executive conduct affecting citizens. This emphasises the need for separateness between the executive and the judicial powers. One form of governmental response to the extension of judicial review is the creation of decision-making tribunals which do not share the independence of the judiciary, and whose conduct, by the use of privative clauses, may be immunised against judicial review. Whether the legislature can confer upon an administrative tribunal an effective capacity to determine its own jurisdiction erroneously, without the possibility of judicial intervention, is a contentious legal question. But it might be hoped that it would also be a question in which the public would have an interest. The rule of law is usually taken to require that administrators cannot be the final judges of the extent of their own powers. Their obedience to the law, and the capacity of the courts to enforce the law, is what is at stake. This is a point that can be explained to the public. Respect for the rule of law runs deep. The Judicial Conference of Australia should make it its business to explain to the public what the rule of law entails. It is not a mere slogan. Many people are genuinely interested in it. This organization should encourage that interest.

What threatens judicial independence, by eroding public understanding and confidence, is the idea that this is a contest for power, in which the judicial branch of government pursues a role that is self-aggrandising and illegitimate. When we confront this argument on its merits, our position is strong. We are supported by history and by reason. What undermines our position is judicial self-indulgence, which can be represented as triumphalism and illegitimacy. Despite all the changes we are living through, we have a common purpose. We all want to leave the judiciary at least as strong as we found it. What makes a judiciary strong is a clear and accurate understanding of its goals. If we are seen to pursue justice, the public will have confidence in us. If we are seen to pursue popularity, or territorial gain, it will not.

I referred earlier to the increasing size of the Australian judiciary and, in a different context, to the emphasis that is placed upon accountability of public officials. There is a relationship between these two subjects. There is a danger that the judiciary itself may become bureaucratized. In our enthusiasm to respond to various pressures, including those that come from increasing numbers, and the complexity of court structures, we may risk losing some the vitality that comes from our individual independence of one another. Leaders of the judiciary, and organizations such as the Judicial Conference, need to take care not to stifle this individual independence. They need to strike a balance between institutional goals which include efficiency, appropriate accountability, and education and the preservation of personal independence. Judges can be led, but they are not amenable to command and direction in the same manner as employees or subordinates. Courts, and their members, are awkward to manage. I prefer it that way. The day the judiciary becomes easy to manage is the day it will have changed beyond my recognition.

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[i] For a history of the New South Wales magistracy, see Hilary Golder*, High and Responsible Office,* 1991.

[ii] Golder, above, p 175.

[iii] Golder, above, p 179.

[iv] Golder, above, p 8.

[v] *Ammann v Wegener* (1972) 129 CLR 415

[vi] Australian Dictionary of Biography, 1940-1980