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JUDICIAL APPOINTMENTS IN THE UNITED STATES AND AUSTRALIA – A COMPARISON

MURRAY TOBIAS QC *

I INTRODUCTION

The issue of judicial appointments is particularly topical in the United States at the present time as President Trump seeks to nominate to the Supreme Court of the United States a replacement for Justice Anthony Kennedy who retired on 31 July last. Justice Kennedy was regarded as a “swinger” in that, notwithstanding that he was appointed by a Republican president and, therefore, was assumed to be conservative, he nevertheless voted on important occasions with the four liberal members of the Court to create the necessary five/four majority. In this respect he followed upon the voting pattern of Justice Sandra Day O’Connor, also a Republican presidential appointment, but also a Justice who voted with the liberal members of the Court from time to time on substantial social issues. In this regard it is to be remembered that, generally unlike the position in Australia, all of the Supreme Court’s work involves, directly or indirectly, the interpretation of the United States Constitution. A typical example is the issue of Second Amendment

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rights relating to gun ownership in the context of the gun-related mass shootings that occur in the United States on a seemingly regular basis.

As an aside, those who are interested, an examination of the 2008 decision of the Supreme Court in *District of Columbia v Heller*¹ on Second Amendment rights is worth careful reading as to the not unlimited reach of that provision; it is a judgment that seems to have been studiously overlooked by the pro-gun lobby.

President Trump has nominated Judge Brett Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit as Kennedy's replacement. He is yet to be confirmed by the Senate. He is regarded as a leading conservative judge. He is the second justice of the Court nominated by President Trump, the first being Judge Neil Gorsuch who took his seat on 10 April 2017. He replaced Justice Antonin Scalia who died in office on 13 February 2016. As will be appreciated from the dates referred to, the Court was without its ninth justice for nearly fourteen months. Why was that so?

When Scalia died President Obama still had eleven months of his second term to run. As Scalia's replacement Obama nominated Judge Merrick Garland, a Clinton appointment to the DC Circuit Court of Appeals and currently that Court's Chief Judge. Garland was not only regarded as a highly skilled and competent lawyer but also was considered a centrist – a middle of the road judge without any obvious prejudicial bent to one side of politics or the other. However, he has also been described in one article as the most blandly inoffensive left of centre jurist that Obama could find. Obama avoided choosing a left leaning liberal or a socially progressive judge as he obviously knew that such a nominee would not be confirmed by a Republican dominated Senate. So he chose, appropriately in the circumstances, a judge who he considered would pass muster with the conservative

¹*District of Columbia v Heller*, 554 US 570 (2008)

majority in the Senate.

He was wrong. The Republican majority leader in the Senate, Mitch McConnell, refused to bring Garland's nomination before the Judiciary Committee of the Senate as he considered that any appointment to fill the vacancy caused by Scalia's death should await the Presidential election in the following November. McConnell was undoubtedly hoping that that election would result in a Republican victory: he was right. In the meantime the Court was hamstrung in those cases which resulted in a four:four vote: four conservatives against four liberals with the result that the decision of the lower court was upheld, the Supreme Court being evenly divided. But nominations to the Supreme Court are the conservative movement's most prized possession and there was no way Senator McConnell and his caucus was going to reward President Obama's forbearance on compromise in the last year of his term of office. They were and are committed, as is President Trump, to preserving and maintaining a reactionary Federal judiciary.

On the other hand McConnell has made it clear that he wants the Kavanaugh nomination to be confirmed before the November mid-term election, no doubt concerned that that might result in a Democrat controlled Senate which would inevitably reject Kavanaugh's nomination.

Of course the Republicans are not alone in blockading a Democrat Presidents' nominations to the Supreme Court or a Federal Circuit Court of Appeal. The Democrats in the Senate sought to frustrate the Gorsuch nomination by use of the filibuster. The Republican response was to change its centuries old procedural rule for approving nominees – from the requirement for 60 senators in favour of confirmation by a simple majority. The politicisation of the process is manifest. To many, the process is broken.

This is further exemplified by the fact that President Trump nominated Kavanaugh from a list of 25 persons, mainly but not exclusively current Federal judicial officers. This list was provided to him by the Federalist Society during his campaign, a hard right-leaning, pro-life, pro-gun lobby group. Trump campaigned on an anti-abortion pro-gun platform and, in particular, promised that he would only appoint judges to the Supreme Court who would overrule the 1973 decision of that Court in *Roe v Wade*.² He indicated that, in interviewing prospective nominees for Kennedy's seat on the Court, he would not seek their views on the issue of abortion or on the correctness of *Roe v Wade*. But the President must have been well aware of the views of the aspirants on that issue simply by virtue of the fact that he or she was on the Federalist Society's list of potential nominees from which Trump, in his campaign, had promised to choose to fill any vacancy which might occur in the Court's personnel during the term of his Presidency.

Theoretically, therefore, and assuming that Judge Kavanaugh is confirmed which appears likely, the Court will appear to have a solid five:four conservative majority. But is there a chance that a swinger might still arise? I think there is a chance that Chief Justice John Roberts may, at least on some issues, take the place of Justice Kennedy. After all, much to everyone's surprise, he upheld the constitutionality of the Affordable Care Act (Obamacare) albeit to much criticism. Furthermore, the impression one gets is that the Chief Justice has a high regard for precedent and, in particular, precedent that has lasted, notwithstanding various challenges, for many years. That is not to say that simply because a decision is of some antiquity that the present Court will not overrule it. But in my untutored view there would need to be extremely persuasive grounds to do so.

Even if the Chief Justice "swings" from time to time, there is a distinct possibility

²*Roe v Wade*, 410 US 113 (1970)

that President Trump will have the opportunity to make two further appointments to the Supreme Court. Justice Ruth Bader Ginsburg is 85 and Justice Stephen Breyer is 79. It is rumoured that both wish to retire but are reluctant to do so while there is a Republican president and a Republican controlled Senate. Strategic retirement is just one of the problems of the interaction of life tenure with partisan politics.³

It is thus apparent that nominations to the Supreme Court to fill a vacancy very much depends upon the politics of the presidential incumbent at the time. Generally speaking, Republican presidents have appointed conservative judges to Federal judicial office whereas Democrat presidents have tended to appoint more liberal judges. There seems to be no proven method to eliminate this politicisation of the selection process as long as Federal judges in the US are appointed for life. Nevertheless, it is always dangerous for politicians to assume that because a particular nominee is perceived to be liberal or conservative, that they will necessarily vote accordingly. There are many judges who belie their perceived political bias and do exactly the opposite of what was anticipated on their appointment. As far as the US Supreme Court is concerned, the swing justices to whom I have referred fall into that category. They determine, as they should, important constitutional issues not so much in accordance with the politics of who appointed them or their own ideology (if any), but in accordance with the merits or demerits of the issues which they are called upon to determine based on the strength or weakness of the arguments in favour or against the relevant issue being litigated.

Thus, given that Federal judicial officers in the United States are appointed for life, then so long as there is a conservative majority on the Supreme Court, conservative

³Since writing the above Justice Ginsburg has celebrated 25 years on the Supreme Court bench. She has now been reported as saying that she intends to remain on the Court for at least a further five years – until she is 90. Her strong distaste for President Trump is common knowledge.

outcomes will prevail for the indeterminate future. Of course, as I have noted, one must accept that if the position were reversed and there was a liberal majority on the Court then the same complaint could be made. The alleged evils of a judicial activist majority are well documented as are the evils of a reactionary majority. All of this points to the necessity in terms of judicial appointments, especially to those courts in the United States which deal with constitutional issues, that those appointed should not have previously indicated their predilection to being either on the right or the left of the political divide. Regrettably, partisan appointments or court stacking will inevitably continue. A single President can therefore impact the law for several generations. No individual person should be able to wield that level of power in a modern social democracy.

I think the problem could at least be somewhat modified if, like our High Court, Federal judges in the United States were required to retire at, say, 75 years of age, the current 70 being too young. This would then give the incumbent President the chance to even the balance on the court from time to time. An alternative solution proposed by some American commentators is for the appointment of Federal judges (like US State judges), including appointments to the Supreme Court, to be for fixed terms. Professor Roosevelt of the University of Pennsylvania School of Law suggests eighteen years. Fixed terms, he says, will achieve three things. First, it will eliminate the incentive for a President to pick someone young rather than the best candidate available. Second, it will reduce the problem of justices staying longer than they should in order to strategically time their retirement. Third, fixed terms will reduce the danger that the Court will represent a political or constitutional consensus that the American people have long rejected. The Professor notes that, if the reform is carefully managed legislatively, it will provide every President with up to two appointments per four year presidential term.

To conclude this section of this talk, I and many others do not believe it is in the national interest of the United States for a Supreme Court justice to be appointed at a young age with life tenure as a consequence of which the appointing President is able to control the decisions of the Court for decades. That is simply not healthy in a liberal democracy.

Let me now say something about judicial appointments in the United States at a State level. The major difference between judicial appointments in the American States and Australian State judicial appointments is that across the United States some 87 per cent of all State court judges face elections and 39 States elect at least some of their judges. In the rest of the world, with the exception of smaller Swiss cantons that elect judges; and appointed justices on the Japanese Supreme Court who must sometimes face what are referred to as retention elections; the usual appointment methods emphasise technical skill and competency and insulate judges from the popular will, tilting in the direction of independence.

The question of how best to select judges has baffled lawyers and political scientists for centuries, but in the United States most States have made their choice in favour of popular election in one form or another. The judge who makes a series of unpopular decisions can thus be challenged in an election and removed from office. One commentator has opined that there is greater transparency in the American system of elected judges whereas the selection of appointed judges by the Executive (as in Australia) can be influenced by political considerations that are hidden from public view. At least so far as the Australian States are concerned, and I leave to one side for the moment the High Court of Australia, I do not believe that in this day and age judicial appointments at the State level are unduly influenced to any degree, if at all, by political considerations of any type. This is not to say that there have not been political appointments in the past, there have; but they

were rare and in my view are now non-existent. One reason for this may be that Australian State courts rarely deal with issues that attract political interest. An exception is the emotive issue of sentencing but even so, I have never heard of an appointment to either the Supreme or District Courts in New South Wales, and I imagine in other States as well, that has been influenced by some perception that the appointee will either be hard or soft on crime.

In any event, appointments to Australian State courts are generally, though not exclusively, made from the Bar, and even politicians appreciate that barristers tend to be briefed to appear on both sides of the record. True it is that from time to time barristers who are prosecutors and public defenders are appointed to the District or Supreme Court, but I do not believe that they are appointed because they are likely to be heavy or light on sentencing.

Returning to the American State courts, they generally comprise a Supreme Court, a Court of Appeal and a Circuit or Trial Court. Almost no two States are alike. In about half the States judges are appointed to the Supreme Court and Court of Appeal by the State Governor on the recommendation of a nominating commission. They are appointed for a specific term at the expiration of which they have to stand for re-election, or what is called a retention election. Generally speaking, retention elections for senior judges are non-partisan in that the ballot paper simply states the name of the judge but makes no mention of their political affiliation. The sole question on which the electorate votes is “Shall Judge X be retained in office?”. A judge must win the majority of the vote in order to serve his or her full term.

The majority of the States appoint District, Circuit or trial judges by election, some of which are partisan and some of which are non-partisan. Again terms vary from two to twelve years but at the end of their term they must stand for re-election. A handful of States have legislative involvement either at the level of

the State Senate or some other form of legislative confirmation. Almost all States have nominating commissions to assist the Governor in appointing senior judges for their initial term of office. According to one article published in 2010, eight States elect all of their judges in partisan elections and seven States use partisan elections to elect some of their judges. Thirteen States use non-partisan elections to select all of their judges. An additional eight States use non-partisan elections to select some of their judges. In total 36 States choose some, most, or all of their judges using some form of contestable popular election.

The practical problems of electing judicial officers, and especially trial judges, is that many are forced into the position of having to campaign at vast expense to convey to their electorate their views on, for instance, sentencing or even on gun control. The down side of such a system is that many top-class lawyers either are not prepared to stand for election as they do not wish to semaphore their views on any issue which may come before them or are forced, in order to get themselves elected or re-elected, to express views which they do not necessarily hold but which are popular with the electorate. Any right-minded lawyer prepared to take on judicial office does so, or at least should do so, on the basis of the oath that they are required to take which, in New South Wales, is “to do right to all manner of people according to law without fear or favour, affection or ill-will”. Political ideology is irrelevant.

Let me give you two examples of the worst of the American election system of appointment. In 2008 in Wisconsin the only black justice on the State Supreme Court was challenged. The vote came after a bitter five million dollar campaign in which a small-town trial judge with thin credentials ran a television advertisement falsely suggesting that the justice had helped free a black rapist. The challenger unseated the justice with 51 per cent of the vote. This new justice on the Wis-

consin Supreme Court had been the only judge on the Burnett County Circuit Court in Siren, a job he got in 2002 when he was appointed to fill a vacancy by the Governor, a Republican. The latter, who had received two \$1,250 campaign contributions from this new justice, chose him over the two candidates proposed by his advisory council on judicial selection. The justice was a graduate of Hamline University School of Law in St Paul, Minnesota, an institution not to be confused with Harvard or, for that matter, the Notre Dame Law School in Indiana. As noted, this gentleman had thin credentials to say the least.

In 2010 three Iowa Supreme Court justices who joined the 2009 pro-gay marriage ruling of their Court were voted out of office. Opponents of gay marriage celebrated, confident that a miscarriage of justice had been corrected at the ballot box, but they were wrong. The removal of these three judges –all highly respected jurists appointed by both Republican and Democratic governors –sent a shiver down the spine of those who cared about the American system of justice.

In Iowa, Supreme Court justices are nominated to the Bench by the Governor in a merit-based system, but the voters get a chance to decide to keep them on for their first term and later for any additional terms. As I have observed, the three justices who were removed were targeted because in 2009 they joined a unanimous Iowa Supreme Court in ruling that the State constitution required Iowa to recognise same sex marriages. It was a legal decision based on pure constitutional interpretation. To the opponents of gay marriage however, the ruling meant war. Anti-gay marriage activists in Iowa and across the country poured as much as \$800,000 into the State to attack the three judges, the only ones up for a retention vote in 2010. Those justices, not surprisingly, did not raise a similar war chest or respond in kind.

One American commentator has expressed the view that the Iowa vote was just

the latest evidence that elections are a terrible way of choosing judges whether the decision is putting them in office or removing them. He referred to the framers of the US Constitution who had a very different idea about judicial selection. They decided that Federal judges should be appointed by the President and confirmed by the Senate with the people having no say of any kind. Federal judges would then have lifetime tenure insulating the third and equal branch of government from the pressures of the political majority. That comment would apply whether the judges have lifetime tenure or are required to retire at a particular age. The principle in question has, I believe, equal applicability to the US State judicial system.

The commentator noted that the Federal system may sound undemocratic but that is because it is, and intentionally so. Judges decide what peoples' fundamental rights are and the founders of the US Constitution understood that fundamental rights must not be put up for popular vote. Judges are also responsible for protecting minority groups which they might not be able to do if they had to answer to the will of the majority. The civil rights litigation in the US in the 1950s and 1960s is a good example of this.

The commentator to whom I refer had noted that judicial elections at the State level were once generally fairly high minded but that in the past few years they had become bare knuckle political brawls. More and more money was being spent on campaigns, the money being almost always intended to buy justice in one way or another. Business groups funnel contributions to candidates who will let businesses trample on the rights of workers and consumers. Plaintiffs' lawyers on the other hand want judges who will uphold sky high damage awards – and large attorneys' fees. The solution to this disturbing trend, it is said, is appointing judges on merit. This cause has been taken up in particular by Sandra Day O'Connor, the retired

Supreme Court Justice. However O'Connor has been bitterly attacked by allies of big business who accuse her, wrongly, of misusing her position. They attack her because they are afraid that, in time, she may persuade enough people that the States will be better off with the kind of judges the founders envisioned – ones who cannot be intimidated, who aren't subject to political whim and, most importantly, who are not for sale.

In Australia our judges at all levels are appointed by the Executive Government. They do not stand for election. From time to time there has been a push for elected judges which, so far, has not been met with any significant support.

In New South Wales, vacancies for judges of the District Court and Local Court magistrates are advertised. Expressions of interest are called for. The appointment of judges to the Supreme Court, and other higher courts such as the Land and Environment Court, continue to be made traditionally following consultation with the head of jurisdiction and relevant legal professional bodies. The overriding principle of selection is one based on merit. However, according to the NSW Justice Department's website there is a commitment to actively promote diversity in the judiciary; and, consideration is given to all legal experiences including that outside mainstream legal practice. Both professional and personal qualities are relevant. The former includes a high level of professional expertise; intellectual and analytical ability; ability to discharge one's duties promptly; ability to maintain authority and inspire respect; and, ability to use or willingness to learn modern information technology. Personal qualities include integrity; independence and impartiality; common sense and good judgment; courtesy and patience; and, importantly, social awareness.

For the District and Local Courts, a panel comprising the relevant head of jurisdiction, the Secretary of the Department of Justice, a leading member of the legal

profession and a prominent community member, is convened from time to time to review expressions of interest against the selection criteria. The panel then reports to the Attorney-General. The Attorney is not bound by the recommendations of the panel. Yet the Executive Government has not always been trusted to make appointments purely on their “merits” . In the early part of the last century this occurred in relation to some High Court appointments. I am confident that none of the High Court appointments that have occurred in the last fifty years, with possibly one exception, has been based on the Executive’s perceived ideological position of the appointee. Nevertheless, the reality is that the Executive, of both political stripes, generally avoids the appointment of what it perceives to be an “activist” judge. The High Court has the task, in appropriate cases, of striking down Federal legislation as being beyond the power of the Federal Government. Government is therefore unlikely to appoint judges who it perceives to be too progressive on that front.

Thus, as Professor Thompson has informed me, he has educated his constitutional law class along the lines that no judge that believes overtly and publicly in more implied rights and freedoms in the Constitution is likely to come to the top of the High Court appointment shortlist; and nor is any established judge that constantly decides against Government, or expresses himself or herself that way in obiter remarks, likely to achieve promotion to the High Court.

Unless one is coming to the High Court directly from the Bar, the moral of the story is if that if you are a judge and have aspirations to the High Court, you should be careful of what you say in the public arena, including in your judgments. Once you commit yourself publicly, you have “form” . This of course is unfortunate for, consistent with the Judicial Oath, judges should have no aspirations to higher office and should express themselves in accordance with what they regard to be

the proper determination of the issues argued before them. In other words, it is quite impermissible to tailor one's judgment in a manner that one might think will attract those in the Executive Government who are charged with nominating an appointee to the High Court. Nevertheless, it is not unknown for some judges to be perceived by their colleagues as "writing" for the High Court. I do not suggest that these judges necessarily do so consciously, but that is the effect of what they do. It rarely ever works.

As regards the High Court, as I have indicated it is not unknown for there to have been appointments which have been regarded as political. If you ask the Attorney-General of the day what criteria he or she applies in nominating to Cabinet an appointment to the High Court, the reply will be that the nomination is purely 'on merit'. Before his own appointment to the High Court, Stephen Gageler said that it was 'naïve' to believe that appointments are made on 'merit' alone. Gageler surmised that at any time there would be fifty people in Australia quite capable of performing the role of a High Court justice. In order to select amongst them, he argued that "wider considerations can and ought legitimately to be brought to bear. Considerations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance".

Professor George Williams et al have commented that there has been a marked reluctance amongst politicians to acknowledge the relevance of such considerations to judicial selection.⁴ Diversity is either denied absolutely as a legitimate factor in selecting judges, or its significance is appreciated exclusively as a matter of symbolism. Despite this continued political reticence, the High Court is more diverse now than it has ever been in that of its seven justices, two are from New South Wales, two from Victoria, two from Queensland and one from Western

⁴George Williams, 'High Court Appointments: The Need for Reform' (2008) 301*Sydney Law Review* 161.

Australia. What is more, there are now three out of the seven justices who are women, including the Chief Justice. Things are clearly changing for the better.

Nevertheless, reform has been called for with respect to High Court appointments. As noted above, advertisements are now placed calling for expressions of interest for certain judicial positions; and, as well as a person's legal knowledge and experience, personal qualities such as integrity, understanding of people and society, courtesy and humanity have a part to play. So far as the High Court is concerned, Professor Williams has suggested that the four broad categories being legal knowledge and experience; professional qualities; personal qualities and diversity in the judiciary, should be applied by a new judicial appointments commission established for all Federal judicial appointments including the High Court. Potential candidates should be identified by the commission through wide consultation, including the encouragement of expressions of interest; and information on candidates should be sought from referees as well as from professional bodies and members of the profession. This list is not intended to be exhaustive.

Professor Williams concludes that justices of the High Court should in future be appointed by the Executive with the benefit of advice from a judicial appointments commission applying accepted and known criteria.⁵ As I have indicated, those criteria apply in New South Wales with respect to appointments to the District and Local Courts. Although not publicly asserted, I would like to believe that they are also applied by the Attorney with respect to appointments to the higher courts of the State, albeit without formality. From my own experience, I consider that the heads of jurisdiction of those courts and in particular the Chief Justice, would be unlikely to endorse a nominating or appointments commission of the type advocated by Professor Williams.

⁵Ibid.

This could well change in the future as the Bar grows and the heads of jurisdiction have less personal knowledge of those who would be suitable for appointment. When I was called to the Bar in 1964 there were approximately 450 barristers. Everyone knew everyone else and, in particular, the Chief Justice was well aware of the talents of what was a relatively confined number of potential candidates. The Bar now has a population of 2,365 of which 375 are Senior Counsel. In 1964 there were about 40 Queens Counsel from which appointments to the Supreme Court were generally made. It is becoming difficult, if not impossible, for the Chief Justice to have the relatively intimate knowledge of the talent of potential appointees as was the case fifty or sixty years ago. Although the appointing authority is the Attorney-General, generally speaking the Attorney is not a practising member of the Bar, the present New South Wales Attorney excepted. He or she is therefore dependent upon others, including the heads of jurisdiction, for the necessary information from which to make an appropriate decision to appoint a particular individual to the higher State courts.

Finally, I wish to say a few words about the appointment of acting judges.

Permanent judges, both of the Supreme and District Courts, must retire on their 72nd birthday. Many do not wish to retire at that age so they seek appointment as an Acting Judge. The practice in New South Wales is to appoint retired judges as acting judges for renewable one-year terms. That is appropriate for it gives the Executive and, relevantly, the Attorney-General and the Chief Justice, the opportunity to not renew an individual's commission. This can occur either because of funding issues, lack of sufficient work requiring the services of acting judges or the impression that a particular acting judge is, one might say, slowing down with age.

As far as New South Wales is concerned, it is generally a matter for the Chief

Justice whether any retiring Supreme Court judge should be appointed an acting judge. I am not aware of any case where the Attorney-General has overridden the views of the Chief Justice on whether a particular individual should be granted a twelve month commission or not. Importantly, a retiring judge, that is, a judge who has reached the age of 72, has extensive experience which, providing otherwise they still have the necessary intellectual capacity, can and should be put to good use. The Chief Justice knows whether they are good, bad or indifferent so as to guide his decision whether to appoint a particular individual as an acting judge.

It has been suggested that a permanent judge, in their last years before they turn 72, and who may wish to continue to work as an acting judge, may be tempted, either consciously or subconsciously, to give decisions which might, where the State or its agencies is a party, tend to favour those bodies. Although this is a theoretical possibility, I do not believe that it is a practical reality. The judiciary today is simply too busy for individuals to involve themselves in any Machiavellian type manipulations for the purpose of furthering their career after retirement.

Of greater concern is the appointment of acting judges from the Bar on a temporary commission. This happened many years ago when the backlog of cases, and in particular motor vehicle accident cases, in the Common Law Division of the Supreme Court blew out to several years. The same thing happened where there was an unacceptable delay in the hearing of undefended divorce cases when the Supreme Court had jurisdiction in relation to such matters before the coming of the Family Court of Australia. Senior members of the Bar were appointed as acting judges for the purpose of what was referred to as a delay reduction programme. It generally worked and the backlog was duly cleaned up.

However, there were some unintended consequences. One of those related to a senior member of the Common Law Bar, a Queen's Counsel, who accepted an

appointment as an acting judge to assist in reducing the backlog of motor vehicle accident cases. The person concerned had a very large insurance practice including insurers that provided insurance for motor vehicle accidents. He thus appeared mainly for defendants. However, in accordance with his judicial oath, in hearing the cases allotted to him he found in many cases for the injured plaintiff. Regrettably when he returned to the Bar his insurer clients withdrew their support for his practice. Presumably they thought that, given the nature of his practice, he would do the right thing by them and find generally for the defendant. As this did not happen he was required to pay the price. The disappointing thing about this example is the fact that the insurers, or at least their claims managers, actually thought or expected that the Queen's Counsel in question, when acting as a judge in accordance with his judicial oath, would necessarily find in favour of his former clients irrespective of the merits of the case. Why they would consider that the barrister in question would be recreant to his judicial oath is difficult to fathom. But whether this particular experience is the cause or not, temporary appointments of acting judges from the Bar has dropped out of favour and the only acting judges who are appointed today are those who have otherwise reached the retiring age as a permanent judge but who wish to continue to serve the public in a judicial role.

As Professor Thompson has also pointed out to his constitutional law students, there are risks associated with acting appointments that can reflect upon the independence of the judiciary. By this I think is meant that barristers who are appointed as acting judges may be said to lack the necessary appearance of impartiality, especially if they are hoping for a permanent appointment. But as I have observed, the appointment of barristers as acting judges is now out of favour.

I do not think that, at least in New South Wales, the Executive Government is

addicted to acting appointments: there are relatively few of them for any number of reasons including that judges who have spent in excess of ten years on the Bench and have reached the age of 72 do not necessarily wish to continue working. Obviously some do. But such appointments are useful particularly where there is a backlog of cases in a particular jurisdiction which require temporary appointments of experienced former judges to reduce the backlog to a level that can be managed by the permanent judiciary. The typical example at present is the delay in the hearing of criminal cases in the District Court: where justice delayed is justice denied!

I hope the foregoing remarks excite a degree of interest in many of you on the issue of judicial appointments. The contrast between the United States and Australia is manifest. The initial election, let alone the retention election, of judges in the US, particularly if it is partisan, can only reflect adversely on that fundamental criterion of a liberal democracy, the independence of the judiciary. Justice cannot be bought –it is not for sale to the highest bidder. The US system for the appointment of judges is regrettably politicised and thereby flawed. We in this country are indeed fortunate, for I believe that our appointment process, though not beyond criticism and some reform, retains that fundamental independence from the Executive which the judiciary guards jealously in the public interest.