JUDGING THE JUDGES – OUTSIDE THE ROBING ROOM

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Inside the Robing Room, or informally in cafes, solicitors' offices' barristers' chambers and the like, stories are swapped about judges' eccentricities, foibles and qualities - often in frank and robust terms.

What is said in the Robing Room, usually stays in the Robing Room.

If a legal practitioner is appearing before a judge or magistrate for the first time, he or she will do a ring around, talk colleagues, to find out what the judicial officer is like in court.

But there is nowhere in Australia where judges are judged and that information and intelligence on judicial officers is collected in one easily accessible site.

There is in the United States. It is called The Robing Room: www.robingroom.com/where judges are judged on the internet. Check it out.

The Robing Room is a site by lawyers for lawyers. Its mission is to provide a forum for evaluating federal district court judges and magistrate-judges.

The Home page lists, by name, the top 10 judges and the bottom 10 judges – calculated on a minimum of five ratings.

The judges are rated on the following criteria using a scale of 1-10:

- Temperament
- Scholarship
- Industriousness
- Ability to handle complex litigation
- Punctuality
- Evenhandedness in Civil Litigation

- Evenhandedness in Criminal Litigation
- General Inclination Regarding Bail
- General Inclination in Criminal Cases, Pre-Trial
- Involvement in Civil Settlement Discussions
- General Inclination in Criminal Cases, Trial
- General Inclination in Criminal Cases, Sentencing
- Typical Discount Off Guidelines for Cooperators

You can try this in the privacy of your own rooms, judges and magistrates included. Compare your results with your friends – but you are not encouraged (at least by me) to post the results on the internet.

Here are some notable comments posted on The Robing Room website in June 2011

The Honourable Jed GSRakoff

District Judge,

New York Southern District Court

> Rakoff is a terrible combination of: (i) a publicity hound; (ii) starstruck; (iii) a jerk and (iv) interventionist. He will do anything to get a big case. If it has Ted Wells or David Boies in it he will ballwash them all day, but yell and scream at the no name lawyers who actually do the work. The worst thing, by far, however is the way Rakoff puts his thumb on the scale. He makes up his mind early and then intervenes to make sure the jury reaches the "right" result. He has a clever way of asking a "clarifying question" here or admonishing a witness or lawyer there that sends a very clear message to the jury. He is a disgrace to the system.

More comments on the same judge: short and to the point:

> Probably should not be a judge. He is intemperate, discourteous and inflexible with counsel. He is burdened by ego problems. Avoid this judge if at all possible.

Yet The Honourable Jed Rakoff didn't do badly enough to make the bottom 10.

The dubioushonour for the worst judge went to:

The Honourable Marcia S Krieger

Judge of the Colorado District Court

Here are some comments:

> One of the worst her profession has to offer. She is arrogant, condescending, placing herself in a position of superiority to all who appear in front of her. She is slow to rule on cases, letting those convicted in her court to languish in prison. When presented with exculpatory evidence, she sits on it without ruling. She encourages abuse of power by the federal prosecutors appearing in front of her as well as making overly broad interpretations of existing law as long as it favors the prosecution. One has to wonder how many innocent people are in prison because of her.

Another comment, short and sweet:

> An idiot who does not understand the law or her place as a jurist.

On the other hand, top of the list was:

Hon. Thomas P. Smith

Magistrate Judge – Connecticut District

> Judge Smith is an exemplary judge for several reasons--he has enormous wisdom and knowledge of the law, excellent judgment and common sense, and is always fair and evenhanded. His extensive trial experience (as a prosecutor and as a judge) comes shining through. Rarer still, he seems to genuinely care about giving the parties their day in court. Judge Smith is everything a judge should be.

And:

> The best all-around judge on the federal bench.Period.

So why don't we have an Australian Robing Room site in order to provide feedback to judges and magistrates on how they are judged by the profession and others?

The answer, I suggest, is because we do it differently in Australia.

One principal difference is that, unlike the United States, our judges are not elected.

…and ten more years because I'm running for election and we're on TV

In the United States, there are three options for judicial appointment:

- First, the Governor may elect the appointee, whom the legislature then confirms;
- Second, there is direct election from the people;
- Third, some judges receive appointment by the Governor, and are then confirmed by the people after some fixed term.

38/50 states in the US have a judicial election of some form.

This type of process can cause problems, including the possibility (or perception) of bias towards campaign donors, or away from rival donors.

Further, if judges must concern themselves with winning elections by populist means, then their judgments may sway towards popular, rather than legal opinion.

Australia has largely adhered to the model of unfettered Executive discretion for appointments to the judiciary, although this has been modified to some extent recently in some jurisdictions.

The modifications usually involve advertising for expressions of interest, publishing the personal and professional criteria candidates are expected to meet, in some cases interviewing by a panel and, in some instances, following a structured consultation process.

There has been a debate over recent years concerning the judicial appointments process in Australia, with support growing within the judiciary and the wider community for a system that curbs the unfettered discretion of the Executive to make judicial appointments.

The supporters of change argue that a reformed appointments process will maintain public confidence in the independence, competence and integrity of the judiciary.

Sir Gerard Brennan, in his 2007 paper, "The Selection of Judges for Commonwealth Courts", refers rather delicately to "an increase in the number of anecdotal reports of unmeritorious appointments".

This is indeed a delicate issue, which Justice Sackville, as he then was, (formerly Chairman of the Judicial Conference of Australia), addressed in a speech in 2007 entitled, "Three Issues facing the Australian judiciary".

In that speech, his Honour made the point, in respect of the three federal Courts (leaving aside the High Court) that the exercise of unfettered executive discretion has not ensured appointment of only the most qualified candidates for judicial office…leading him to comment that:

> The harsh reality is that the reputation of the federal judiciary has suffered some damage in recent times by reason of deficiencies on the appointments process.

Justice Sackville pointed out that the fundamental difficulty with the argument that the elected government should retain exclusive responsibility for judicial appointments because it is politically accountable for its decisions, is that it is the Court which inevitably suffers the opprobrium if a judicial appointee is not up to the job.

His Honour goes on to say:

> In those (fortunately rare) cases where judges and magistrates experience serious difficulties in performing their duties, the reputation of the court concerned – and indeed

> the judiciary as a whole – is diminished and of course litigants suffer. Political accountability may be present in theory, but the practice is largely illusory, since the effects of the sub-optimal appointment are usually not clear until the Attorney-General responsible has moved on or the Government has lost office.

Why, you may ask, am I talking about the judicial appointments process, when my topic is "Judging the Judges"?

It is because at the other extreme of the spectrum of issues relating to judges, is how judges are to be removed. If you get it wrong at one end, the more likelyyou will need to attend to the other end.

Between the judicial appointments process at one extreme, and the removal of judges at the other extreme, is the question of who judges the behaviour of a judicial officer for the purpose of determining if it has fallen below acceptable standards and if so, who determines what consequences should follow?

That is to say:Judicial appointment, complaint and removal systems are connected.

The stronger the appointment process the more reduced is the likelihood of behavioural error, misconduct or impropriety.

So let me move on to ask who judges the judges?

Some judges judge themselves: when they do, it can make international news.

A furious judge who demanded to know the name of the bleeding heart "idiot" who'd granted bail to a serial burglar was forced to back down after it was pointed out he was talking about himself, made the Weekly World News, 3 May 2004.It even made the television news internationally on the Naked News.

However, most judges leave it to others to do the judging.

In the performance of their judicial functions, judges are judged (in the loose sense of the word) by the **litigants**, directly as parties to the decision, and the**public**indirectly as parties affected by the precedent established. The general public are usually informed through reports of journalists.

Why do I refer to litigants and the general public first? It is because these two groups are the ultimate consumers of the "judicial product".

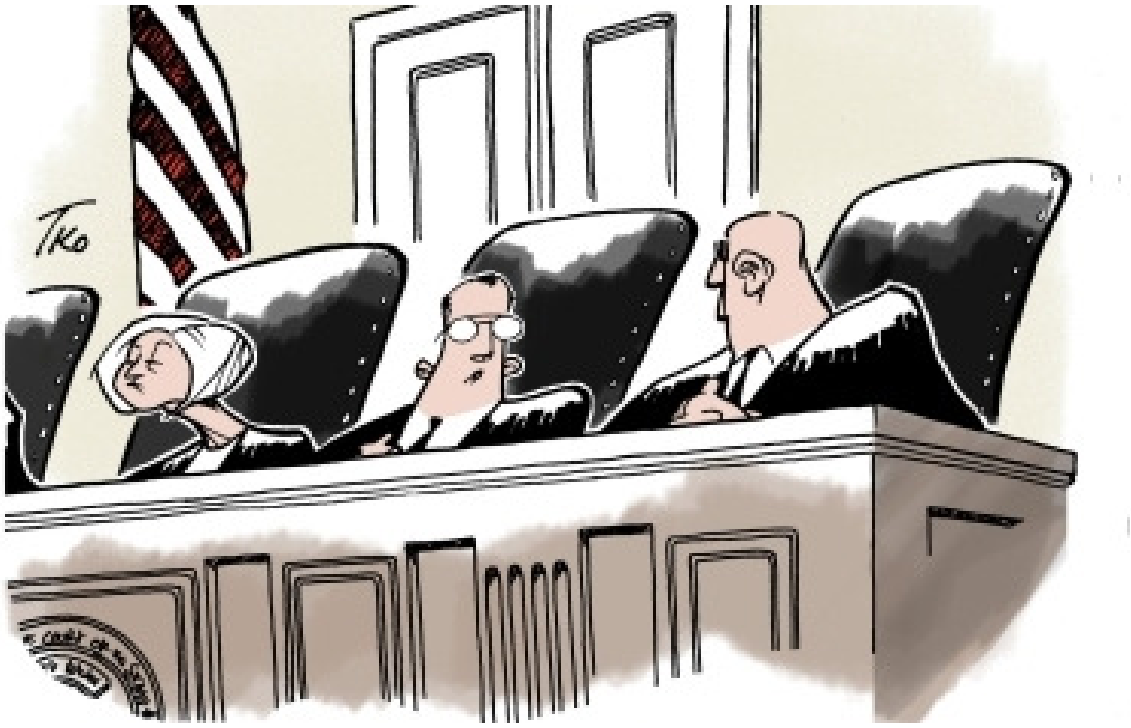
The **public reputation** of the individual judge rests on the judgment of these two groups over time.

The **public reputation** of the judiciary rests on the cumulative judgment (of these two groups) of all of the judges

Judges are also judged (again in the loose sense of the word) by the legal profession: the lawyers who practice in their courts and other judges who rely on the precedents established by their decision. Judges on appellate courts are also judged by law professors and students who study the written reasons for judicial decision.

The **professional reputation** of the judges depends on the judgments by the legal profession.

Judges are judged in a stricter sense by the **appellate judges**, who have the power to affirm or reverse the decision below.



Don't spread it around, but on the really tough ones, I just go with "eenie, meenie, minie, moe"

Occasionally appellate judges comment on the work of the lower court, expressing praise or blame.

The supervision of the appellate courts has been described as “like having a police car driving immediately behind you on the road; it is rare in those circumstances that the speed limit is exceeded”.

Decisions at the High Court level cannot be formally reviewed: it is the ultimate court of appeal. It could be said of the judges of High Court, as Justice Robert H Jackson observed of the judges of the United States Supreme Court (in *Brown v Allen*, 344 S 443, 540 (1953):

> We are not final because we are infallible, but we are infallible only because we are final.

However appellate correction of error is not, or should not be, an avenue for intemperate or unfair criticism by appellate courts directed to lower courts.

For an example of judicial flagellation see*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

Read also the heartfelt response by Justice Keith Mason, President of the New South Wales Court of Appeal and a member of the Court of Appeal in Say-Dee on the topic of offensive judgments in *“Throwing Stones: A Cost/Benefit Analysis of Judges Being Offensive to each Other”*– delivered at the Judicial Conference of Australia Colloquium on 6 October 2007:www.jca.asn.au/attachments/2007-KeithMason.doc

That paper deals primarily with the relationship between appellate and lower courts in the language of their public discourse. But it also addresses the impact and consequences of studied harshness by a judicial officer towards a party or a practitioner appearing before him or her.

I quote:

> The more strident a rebuke in a judgment the more likely it is to be picked up by the legal public, reported by the media (usually out of context), and viewed as a slight on the reputation of the person rebuked. The substance of the decision may be ignored. The media coverage of Sackville J’s recent ***C7*** judgment containing criticism of a lawyer associated with one of the winning parties is an example of what I am talking about.

> When a judge adopts strong language to condemn a party's criminal or corrupt conduct, a witness's perjured testimony, or a legal practitioner's incompetence there are well-established rules about procedural fairness and standards of proof that the judge is first expected to apply. And there are avenues of recourse for those affected or the parties associated with them.

Today I am not so much concerned with the most common form of judicial accountability, the appellate process. Rather I am concerned, as I said before, to analyse who judges the behaviour of a judicial officer, for the purposes of determining if it has fallen below acceptable standards.

As a former Chief Justice of the High Court, Sir Harry Gibbs, said, the question of who judges the judges "seeks to resolve fundamental issues regarding the position of the judiciary in a parliamentary democracy which attempts to live under the rule of the law".

The topic of "who judges the judges" has attracted considerable interest in the last few years. I have drawn heavily, in places, from the many papers written on this topic, but particularly from the writings of former Justice Alex Chernov (now Governor of Victoria); then Chief Justice Spigelman of the New South Wales Court of Appeal; and then Justice Ronald Sackville of the Federal Court, formerly Chairman of the Judicial Conference of Australia.

But the topic is not new. The question was posed in Juvenal, Satires VI at 347.

> QUIS CUSTODIET IPSOS CUSTODES?
> (But who will guard the guards themselves)

The renewed interest in the topic and the increased scrutiny of judges arises from a growing sense that judges should be more accountable for their conduct on and off the bench.

In the words of a long-serving Australian judge:

I want to be known as a good judge, as a fair judge, as a judge who is not rude.

Let that be the catch cry of all judges

Lets start with somefundamental assumptions**:**

As has been pointed out by then Chief Justice Spigelman of New South Wales, preservation of the rule of law is the basic reason for establishing mechanisms for dealing with judicial misconduct or incapacity.

The rule of law requires that laws are administered fairly, rationally, predictably, consistently and impartially.

Judicial misconduct and judicial incompetence are incompatible with each of these objectives.

- **Fairness** requires reasonable consideration of the rights and duties asserted.
- **Rationality** requires a reasoned relationship between the rights and duties and the outcome.
- **Predictability** requires a process by which the outcome is related to the original rights and duties.

- **Consistency** requires similar cases to lead to similar results.
- **Impartiality** requires the decision makers to be indifferent to the outcomes.

Judicial misconduct, particularly improper external influence, distorts all of these objectives.

The rule of law also contains the principle of a right of a fair trial – Judicial misconduct in the context of litigation denies that right.

Also, the rule of law is best served when there is a high level of public confidence in the judiciary. Judicial misconduct whether within or beyond the litigation context, adversely affects such public confidence.

Imprudent conduct by former judicial officers can reflect almost as poorly on the judiciary as that of serving judges.Marcus Einfeld is a case in point.

Another fundamental assumption is that the rule of law requires an independent judiciary; independent not only of the other two arms of government, but also individual judges should be independent of each other, including judges who have higher status or who have supervisory or administrative responsibilities within the same court, even of chief justices. The third type of judicial independence is from any interference in their judicial work, save the law and their conscience.

The next fundamental assumption is that formal, public disciplinary sanctions, short of dismissal should, where possible, be avoided.

As Justice Sopinkaof the Canadian Supreme Court said,

> A reprimanded judge is a weakened judge: such a judge will find it difficult to perform judicial duties and will be fixed with a loss of confidence on the part of the public and litigants.

[*Ruffo v Conseil de la Magistrature*(1995) 130 DLR 1 at 53 quoted in Drummond J *Do courts need a complaints department?* (2001) 21 Australian Bar Review 11 at 26.]

The Honourable Murray Gleeson AC, when Chief Justice of Australia, made the same point:

> There is something very awkward about the concept of having a judicial officer exercising judicial authority who is known to have a black mark against him or her. This would compromise their ability to administer justice and to punish people.

Finally, there is then an inevitable tension between the requirements of judicial independence, and any mechanism for dealing with judicial misconduct or incapacity.

The primacy of independence must be recognized.

Any system for dealing with complaints against judicial officers must have safeguards against the temptation to exploit such a system for improper ends.

As the Australian Bar Association has said:

> Proper vetting processes must be introduced to guard against action upon unjustifiable complaints from disgruntled litigants. These complaints, to the extent they are baseless, constitute a threat to the independence of the judiciary.

For a similar reason, a complaint should be confined to specific allegations. It would be unfair to a judge to be subjected to a roving complaint of unfitness.

Categories of complaint

In discussing a complaint system relating to judicial behaviour, the distinction needs to be made between serious complaints – that is, those complaints which, if made out, may lead to dismissal or removal from office and lower level complaints which involve claims of judicial misconduct which do not sensibly call for removal of a judge from office.

The type of conduct falling into the second category (lower level) includes off the bench behavioursuch as drink driving and the like:

It also consists of unacceptable behaviour in court, such as:

- Rudeness to witnesses and counsel
- Prejudice against certain categories of litigants and witnesses
- Use of intemperate or otherwise inappropriate language
- Personal denigration of others, including fellow judges

Do not under-emphasis the effect of such conduct on parties, witnesses and practitioners, who may not only lose confidence in the judiciary, but also in themselves.

Even if such misconduct is unintentional, it does not condone the behavior of the judicial officer.

This is an area where the profession plays an important role in judging the behaviour of judges, particularly on the Bench.

There have been occasions when complaints have been made by the relevant Bar to heads of jurisdiction about inappropriate judicial conduct in court.

Usually the matter has been resolved by the complaint being brought to the attention of the judge or magistrate, and more often than not it has come down to the judicial officer not having realized that his or her impugned behaviour was, or was perceived, to be below acceptable standards.

Reliance is placed on the Bar in each jurisdiction in that regard, and judges and magistrates expect to have brought to their notice, in the appropriate manner, properly particularized complaints about judicial conduct.

That judges and magistrates should conduct themselves in accordance with the appropriate standard of behaviour is a matter of justifiable public interest and the individual Bars are well placed, and I would argue, have a duty, to bring any perceived relevant judicial misconduct to the notice of the head of the jurisdiction.

It goes without saying,the Bar should do so responsibly.

The media also has a considerable influence in publicizing and analyzing the circumstances surrounding the alleged misconduct of judges, including in respect of conduct which would not warrant removal from office.

For example,a judge’s careless remarks that may be gender inappropriate or otherwise offensive are almost guaranteed to receive not insignificant publicity, not withstanding that no offence or other impropriety was intended by the remarks.

Although some media criticism is ill-informed, much of it serves as a reminder to the bench that carelessly formulated remarks can, and often do, cause offence, albeit unintentionally.

Cases of alleged judicial misconduct

To put the Australian experience in perspective, here are some examples of cases where judges have gone wrong elsewhere.

The “mooning” magistrate:

In England, a magistrate was dismissed in 1997 for misconduct after she was photographed exposing her bottom. She was told that “mooning” failed to uphold the “the dignity, standing and good reputation” of the magistracy.

…and what’s more, you have a complete disrespect for the law

The magistrate at the time had been collecting some property from some stables in Wilshire when she became involved in an argument with a man and dropped her breeches at him as she left. Unfortunately for her, the man had a camera with him.

The Lord Chancellor reportedly didn’t like what he saw.

The battery-operated dildo of Judge Geiler of the Los Angeles Municipal Court,

Judge Geiler was removed from the bench in 1973 on the basis of conduct prejudicial to the administration of justice in five instances and bringing the judicial office into disrepute.

One of those occasions, during a conference in his chambers one morning, the judge thrust a battery-operated dildo into a public defender's buttocks. Later that day the judge referred to this incident twice in open court "so as to curtail the victim's cross-examination of two witnesses. The transcript went like this:

> Defender: One or two questions, Your Honour, then I won't take any more of your time on this case.
>
> His Honour: Get the machine out.
>
> The Clerk: The battery?
>
> His Honour: The battery.
>
> Defender: I have no further questions Your Honour.

Judicial Don't: When attempting to influence counsel's behavior, don't brandish a dildo as your weapon of choice.

Judge Kennick of Los Angeles Municipal Court retirement without leave

In the summer of 1985, a police officer stopped Judge Kennick for drunk driving. The judge refused field-sobriety and blood-alcohol tests, and he was abusive to the arresting officers. The next day, he allegedly told a sergeant he "would like to make a deal or something," asking if the paperwork could get lost on the way to the court, or barring that, if something could be worked out with the captain. Instead, the charge went through and Judge Kennick was convicted of driving under the influence of alcohol with a plea of no contest.

Drunk driving and many other lapses by the Judge were "insufficient to warrant his removal". The same went for Judge Kennick's "abusive behavior toward a deputy district attorney; treating witnesses in a demeaning and discourteous manner; favoring two attorneys, one of whom he owned property with, in his appointments of counsel; and improperly suggesting to a waitress in a restaurant that she should not worry about her drunk driving arrest."

Judge Kennick's big mistake? He was asked to hang up his robes after he stopped showing up for court. Over a period of nearly two years the Judge was found AWOL for 96 days, and without explanation he stopped working entirely at the beginning of 1987.

He was removed from the bench in 1990 on the ground of persistent failure or inability to perform his judicial duties.

Judicial Don't: Even though you've had your hand slapped, don't forget to show up for work.

The *digitusimpudicus*of Californian Judge Spruance,

William D. Spruance had been practicing law for almost two decades when he was elected to the bench in January 1971. But then it took him just a few years to get into a variety of compromising situations and he was removed in 1975.

On one of those occasions, while the defendant was testifying, the judge gave him a "raspberry" to indicate his disbelief of the witness. And the state Supreme Court found that it was not Spruance's first such transgression: "Such derisive sounds had been made in open court on other occasions," it stated. He once made "a vulgar gesture (... *digitusimpudicus* – literally “impudent finger”) in reprimanding a defendant for coming in late in a traffic matter."

Judicial Don't: Avoid giving "raspberries" to witnesses when you don't believe their testimony.

The noise effects machine of Floridian Judge Sheldon Shapiro

Judge Sheldon Schapiro was fond of pushing the button on a gizmo that filled his courtroom with the sound of a flushing toilet when he didn't like an argument, including while defence counsel in a rape trial presented his argument.

He was also know for summoning lawyers to "the woodshed" behind his bench for a tongue-lashing.

He was removed from office in 2003.

If there was a prize for **judicial obstinacy,** perhaps it should be awarded to the judge from North Carolina who failed to disqualify himself on the grounds of bias in a case where he was the defendant. In this case, the Judge insisted on presiding at a session of court in which a traffic charge against the judge was on the docket.

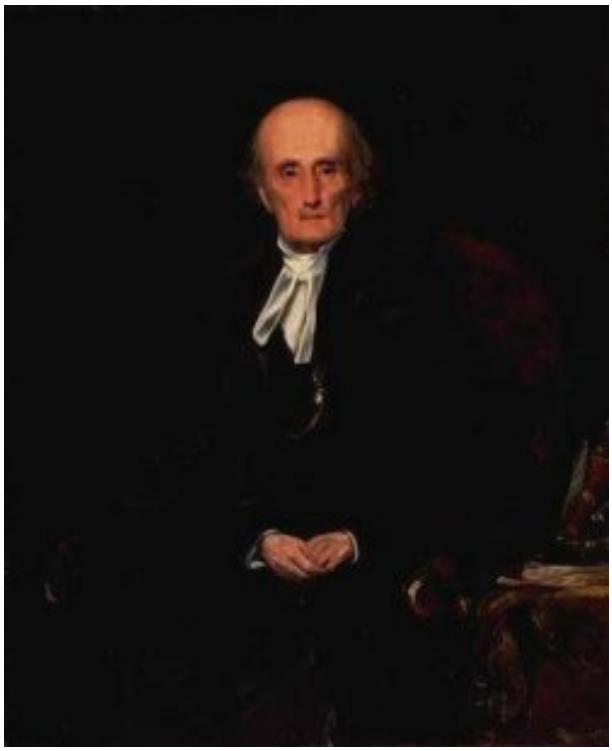
If you want to read more about it, see *Re Martin* 275 SE 2d 412 (NC, 1981).

The situation in Australia, at least since Federation, is far less colourful.

In colonial times, however, a number of judges lost their office.

Here a just a few examples:

Jeffrey Hart Bench was the first judge of the colony of New South Wales.



Chief Justice Gleeson described Bent as follows:

> He is generally regarded, not only as the first judge in New South Wales, but also as the worst. The one thing he had to recommend him was a spirit of independence. He gave an early display of his mettle upon his arrival in Sydney, by refusing to disembark from his ship until the Governor arranged for a proper battery of guns to salute him. He refused to pay the road toll levied on users of Sydney's main road. He said he would be damned if he would pay any illegal tax. He called the gatekeeper a scoundrel, and threatened to put him in gaol. As a result, he was charged with toll evasion, convicted by a magistrate and fined two pounds. There being no Judicial Commission in those days, the matter was left to rest there. The Court presided over by Judge Bent only ever sat to hear one item of civil business. That was an application by three ex-convict attorneys for admission to practice. The judge, who was at risk of being outvoted by the two magistrates with whom he sat, peremptorily announced that the application was refused, and that he would never preside in a court where ex-convicts were admitted to practice. Soon afterwards he was recalled to England.

Several years after his return to England, Bent was appointed Chief Justice of Grenada (where he was twice suspended).

The first judge of the Supreme Court of South Australia**, John Jeffcott,** had previously been removed from his office as Chief Justice of Sierra Leone after he killed a fellow Irishman in a duel.

The first Supreme Court judge sent to Melbourne, **John Walpole Willis,**had the distinction of being removed from judicial office twice: first while he served as a judge in Canada, although he was reinstated by the Privy Council, and secondly, from the bench in Melbourne in 1843 for misbehaviour, including abrasiveness to counsel, litigants and witnesses.

More recently Australia has had a number of high profile incidences of reported judicial misconduct.

There are, in fact, very few instances of actual removal from office – in some cases matters were resolved by resignation.

1985

- Former New South Wales Chief Magistrate Farquhar was convicted in 1985 and sentenced to four years' gaol for attempting to pervert the course of justice.
- High Court Justice Murphy was charged with two charges of attempting to pervert the course of justice and was acquitted of one charge in 1985 and the second charge at a retrial in April 1986.He returned to his duties on the High Court. But he faced a battle with cancer which he could not win. Justice

Murphyreturned to the Court to deliver his last judgments (including dissents) on the day before he died. His death occurred on 21 October 1986.

1989

A judge of the Supreme Court of Queensland was removed from office at the behest of parliament. He was the first judge since Federation to be dismissed.

The investigation into his conduct arose out of relevant disclosures that were made during the Fitzgerald Inquiry into corruption in Queensland; a Commission of Inquiry appointed by Parliament found that he was "not a fit and proper person to continue in office as a Judge of the Supreme Court of Queensland".

Broadly, the findings were that he had given false evidence to a defamation hearing, made and maintained allegations that the Attorney-General and the Chief Justice and Tony Fitzgerald had conspired against him, and made false statements, false claims and arranged sham transactions to his own taxation advantage.

The ex-judge continues to practice at the Bar in Queensland, as Queen's Counsel.

1998

There was an unsuccessful attempt to remove from office a judge of the Supreme Court of New South Wales on the ground that he was unfit to hold office given his failure to deliver judgments in several cases within an acceptable period. There were 29 complaints against the judge, all alleging undue delay – three of the cases ranged between 30-36 months delay.

When the dismissal motion came before Parliament in 1998, it failed pursuant to a conscience vote. At this stage, one of the outstanding judgments had not been delivered. Upon its delivery in February 1999, the judge immediately resigned his commission.

Also in 1998, there was considerable controversy concerning a recently appointed High Court judge (who coincidently had led the prosecution against Justice Lionel Murphy).

Shortly after his appointment to the High Court, advice given by the judge while he was counsel became the subject of a major Federal Court case, *White Industries (Qld) Pty*

Ltd v Flower & Hart (1998) 156 ALR 169, in which it was found that the advice given resulted in proceedings being filed that were an abuse of the Court's process. The judge was not a party to the proceeding, but was called as a witness. The trial judge (Goldberg J) made adverse findings against both the judge's instructing solicitors (who were the defendants to the proceeding) and the judge (who was not).

There was a call for a parliamentary inquiry into the conduct of the judge, but the then Attorney-General the Honourable Daryl Williams QC refused to recommend and inquiry.

The basis for that refusal was that any inquiry would inappropriately endanger the independence of the judiciary, damage the standing of the courts and do harm to the individual judge.

Bear in mind that there is considerable range of views among eminent constitutional lawyers as to the meaning of “proved misbehavior” in section 72 of the Constitution, and that the events took place 12 years before the judge was appointed; nor did the conduct relate to the discharge of judicial functions.

2000

There was an endeavour to dismiss the **Chief Magistrate of Victoria** for alleged misconduct. It had been public knowledge for some time that a number of magistrates and others were critical of his behaviour that was related to his office.

The alleged misconduct involved excessive drinking during working hours, sexually harassing female magistrates, defying a ban on smoking in the court building and engaging in crude and abusive behaviour principally towards fellow magistrates.

A no confidence motion was passed by a special meeting of magistrates in October 2000. Notwithstanding the Chief Magistrate at first refused to resign and it appeared that the Attorney-General would have to take proceedings to have him removed from office. After considerable publicity, the Chief Magistrate resigned on 30 October 2000.

None of the allegations against him were tested or established, and he was, in effect, hounded out of office, without there having been any transparency in the process.

But it was his choice to resign, and that was a course he must have favoured in preference to a likely examination of his conduct in open court.

2001

A judge of the Victorian County Court,who had been an eminent silk practicing criminal law at the Victorian Bar, and who had, at one stage been Chief Justice of Vanuatu, was faced with the possibility of steps being taken for his removal.

When at the bar he had failed to lodge tax returns and had effectively disregarded reminder notices from the Australian Taxation Office warning of possible prosecution.

He did not tell the Attorney-General of this before accepting his appointment. Shortly after his appointment, prosecution proceedings were issued against him.

At the hearing of the prosecution, the judge's counsel told the magistrate that if his Honour was convicted he would be compelled to resign his office.

The magistrate did not record a conviction, but the ATO successfully appealed to the County Court which duly convicted the judge.

Notwithstanding his conviction, and despite representations as to what he had told the lower court, the judge refused to resign. The Attorney-General then took preliminary steps to have the matter of his dismissal from office considered by Parliament. Before the matter progressed much further, the judge resigned – and regrettably died not long thereafter.

2002

Queensland's chief magistrate (Di Fingleton) was convicted of retaliating against a witness, but that was subsequently quashed by the High Court on the grounds that she had immunity from prosecution. She wasre-employed as a magistrate and retired in 2010.

2004

A New South Wales Supreme Court judge, resigned four weeks after he was involved in a drink-drive car accident near his home

2009

A former Federal court judgewas imprisoned. He was sentenced to three years in prison for perjury and for attempting to pervert the course of justice. By way of update, it

appears the former judge is again the focus of a police investigation into a car accident in June this year (after he was released from gaol) in which he is alleged to have left the scene.

2009

Victorian magistrates

- serial speedster who falsely blamed her father for her own traffic offences
- faced charges of criminal damage, stalking and interfering with witnesses - apparently arising out of a neighbourhood dispute over dog faeces

2009

A judicial inquiry was called into Chief Magistrate of ACT for allegedly provided material to a Victorian magistrate that could influence the outcome of a case he was presiding over.The Chief Magistrate resigned shortly after.

2011

Currently (June 2011) a Sydney magistratewho suffers from a bipolar disorder has been asked to show cause why the NSW parliament should not remove him from office.

So what does all this tell us?

First, the Australian judiciary, although not perfect, are far better behaved than the American judges.

This may well reflect the difficulties with the appointment process, which in many states of the United States, is by popular election. I go back to my previous refrain:

If you get it wrong at the “appointments” stage, then you will spend more time sorting it out at the “removal” stage.

Second, the apparent increase in cases of alleged judicial misconduct is likely a reflection of the increased scrutiny to which judges are subject today. Much of that scrutiny is undertaken publicly through the media.

There needs to be, throughout Australia, a structured system of dealing with complaints against judicial officers.

That is not to say that there should be only one national judicial complaints process; or that each jurisdiction should adopt the same model (most likely based upon the New South Wales Judicial Commission).

It should be a matter for each jurisdiction whether it adopts the NSW model, or establishes its own complaints body with like powers and procedures.

Such an independent complaints body needs to:

- be independent of the executive;
- have the confidence of the public; and
- have the confidence of the judges