

# The Seven Habits of a Highly Effective High Court <sup>1</sup>

by Michael Coper <sup>2</sup>

Professor Williams has asked me to address the smallish topic of the successes and failures of the High Court over the past 100 years, but I want to begin by talking about a couple of things of particular interest to me that will have no apparent relevance to the topic. The first is the city of New York and the second is the game of golf.

Here are two alternative ways of describing New York. First description:

New York is a Catherine wheel of a city, revolving and sparking with the ebb and flow of life itself, humming and throbbing with the energy of an over-confident and brash young adult, a cosmopolitan mix of a hundred different nations, wonderfully rich in history and totally stimulating to the senses.<sup>3</sup>

Here is an alternative view:

New York is the sewer of the world: loud, aggressive and vulgar; rude, unpleasant and crass—a manic and lawless free-for-all that could easily be the empirical basis for Hobbes' observation that life in the state of nature is nasty, brutish, and short.

Incidentally, both of those descriptions were written before September 11, 2001, but the question of which is the more apt remains an interesting one.

Here are two alternative perspectives on the game of golf. First perspective:

Golf is a magnificent test of character—a noble contest of skill and imagination which demands the virtues of patience, honesty, integrity, and determination. Success is exhilarating, failure humbling, the line between them tantalisingly fickle, and the transition from one to the other alarmingly sudden. Golf encapsulates all the struggles of the inner self.

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<sup>1</sup>Paper given at the UNSW 2003 Constitutional Law Conference, Parliament House, Sydney, 21 February 2003. As to the title of the paper, apologies to Stephen R Covey's *The 7 Habits of Highly Effective People* (Simon & Schuster, 1990) and *The 7 Habits of Highly Effective Families* (Allen & Unwin, 1997), the latter of which is referred to later in the paper.

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<sup>3</sup> I can cite no source for this and the three succeeding quotations, as I borrowed from many sources to write them myself, for pedagogical purposes, for a colloquium in 1997 with the ANU political science honours students enrolled in Professor John Warhurst's seminar course on 'The Ten Best Books on Australian Politics'.

Now here is an alternative perspective:

Golf is a silly, trivial game, in which otherwise intelligent people chase a little white ball into a hole and then take it out and do it again. It has no socially or intellectually redeeming value, and is a self-indulgent distraction from higher and more worthwhile pursuits.

Which of these perspectives is the more apt?

The answer, I think, is that both, or all of the above, are apposite. It all depends on your point of view, your frame of reference. Descriptions like these, especially of things that might be understood in a physical or a metaphysical sense, are really just a part of a reductionist paradigm. They are models, ideal types, even caricatures, rather than realities. Complex phenomena, like our own personalities and characters, have many and often conflicting strands, the sum of which can never quite explain the elusive nature of the whole. And this is so even in relation to essentially descriptive tasks, let alone in relation to those more obviously involving patently subjective value judgments.

Yet, of course, value judgments underlie the most seemingly innocuous of descriptive tasks. Although neither example is innocuous, I chose the city of New York and the game of golf almost at random. I could have chosen judicial decision-making in the High Court. One description might emphasise the formal elements, the model of legalism, and the notion of the objective application or, in some cases, incremental extension, of pre-existing rules. Another description might emphasise the gaps in the rules, the role of judicial discretion, and the impact of values and policy considerations. Neither is true, and both are true.<sup>4</sup> In a swirling morass of legalism and realism, a whirlpool of formalism and pragmatism, all of the elements of judicial decision-making are sucked into the vortex of objective truth where they disappear without trace.

So it is with the notion of success and failure in the High Court. One person's success is another person's failure. To some, the cross-vesting cases<sup>5</sup> represent a bewildering

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<sup>4</sup> These cognate and mutually illuminating concepts are usefully elaborated in Tony Blackshield, Michael Coper, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001) by various authors: see, for example, Stephen Gageler, 'Legalism' (pp 429-430); Tony Blackshield, 'Realism' (pp 582-585); Gerard Brennan, 'Values' (pp 695-696); Anthony Mason, 'Policy considerations' (pp 535-536); Anthony Mason, 'Law-making role: reflections' (pp 423-424); Harry Gibbs, 'Law-making role: further reflections' (pp 424-425); Murray Gleeson, 'Role of Court' (pp 609-610); Michael Coper, 'Political institution, Court as' (pp 539-541).

<sup>5</sup> *Gould v Brown* (1998) 193 CLR 346, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

determination by the Court to put artificial barriers in the path of cooperative federalism.<sup>6</sup> To others, they epitomise the Court's admirable refusal to allow considerations of expedience and convenience to trump the higher mandate of the Constitution.<sup>7</sup> To some, the *Engineers Case*<sup>8</sup> represents an outstanding, almost sacrosanct, contribution by the High Court to the growth of Australian nationhood.<sup>9</sup> To others, its iconic status is responsible for the grossest of distortions to the balance of the Australian federal system, and its approach to constitutional interpretation represents a caricature of judicial method.<sup>10</sup> To some, *Cole v Whitfield*<sup>11</sup> boldly corrected the egregious errors of the past.<sup>12</sup> Yet even here there is no unanimity; indeed, Sir Garfield Barwick, for one, may reasonably be thought to be spinning in his grave.<sup>13</sup>

I could go on. But I doubt that would be profitable. The more I weigh myself down with oppressive evenhandedness, the more it seems like a miserable cop-out and the more I fail to quench your thirst for controversy and a good argument. So, where to from here?

Well, I have consulted many books on success and failure. Two of my favourites are Stephen Pile's *The Book of Heroic Failures*<sup>14</sup> and Hugh Vickers' *Great Operatic Disasters*,<sup>15</sup> neither is of particular relevance to the High Court, although I cannot help thinking that, had Stephen Pile known the story of the Piddington appointment in 1913, he would have been seriously tempted to include it.<sup>16</sup> But the 'self-help' section of most bookstores is full of useful guides to success and failure. My eye lighted upon a book that I thought might be of particular assistance: Stephen R Covey's *The Seven Habits of Highly Effective Families*.<sup>17</sup> The reference to seven habits of course

<sup>6</sup> Dennis Rose, 'The Bizarre Destruction of Cross-Vesting' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads* (The Federation Press, 2000) 186.

<sup>7</sup> See especially the majority judgments in *Re Wakim*, above n5.

<sup>8</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

<sup>9</sup> See the various contributions in Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (The Federation Press, 1997), especially Keven Booker and Arthur Glass, 'What Makes the Engineers Case a Classic?', pp 45-71.

<sup>10</sup> Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Engineers Case and Federalism' (2002) 76 *Australian Law Journal* 678.

<sup>11</sup> (1988) 165 CLR 360.

<sup>12</sup> Michael Coper, 'Section 92 of the Australian Constitution Since *Cole v Whitfield*' in HP Lee and George Winterton, *Australian Constitutional Perspectives* (Law Book Co Ltd, 1992) 129.

<sup>13</sup> For Barwick's astonished reaction to *Cole v Whitfield*, see *Bar News* (NSW), Summer 1989, p 17.

<sup>14</sup> Stephen Pile, *The Book of Heroic Failures* (Routledge & Kegan Paul, 1979). See also Stephen Pile, *The Return of Heroic Failures* (Martin Secker & Warburg Ltd, 1988).

<sup>15</sup> Hugh Vickers, *Great Operatic Disasters* (Macmillan, 1979).

<sup>16</sup> See Morris Graham, 'Piddington, Albert Bathurst' in *The Oxford Companion to the High Court of Australia*, above n4, pp 533-535.

<sup>17</sup> Above n1.

resonated with the number of justices on the High Court, and what is the Court if it is not a family? A family that has, admittedly, been thrown together with a lesser degree of choice than the average family, but a family nevertheless—a family that lives and works together; a family that sometimes achieves consensus but often has to live with dissent, if not recalcitrance; a family that in many ways perpetuates itself, its habits, its mores, its ways of thinking, and its approach to solving problems. So I took the book down from the shelf and decided to test the success or failure of the High Court by reference to the seven habits its respected author recommended.

The first habit urged by Stephen Covey in order, to use the words of his own sub-title, to ‘build a beautiful family culture in a turbulent world’, is ‘be proactive’. Here, one would have to judge the Court not to be a great success. Most of the time it just sits back and lets the cases come to it. There are, of course, some striking exceptions, such as Sir Garfield Barwick’s encouragement to the losing parties in the *First Territory Senators Case*<sup>18</sup> to relitigate the issues in that case when the composition of the bench changed following the retirement of Justice McTiernan,<sup>19</sup> and occasionally members of the Court have put themselves in a position to make a personal contribution to the Court’s own caseload, such as the aforementioned Piddington’s contribution to the law of evidence<sup>20</sup> and Lionel Murphy’s jurisdictional challenge to the jury verdict against him at his first trial on charges of attempting to pervert the course of justice.<sup>21</sup> Generally speaking, however, the Court just takes the cases that happen to come along.

At least the Court can now pick and choose amongst those cases and thus entirely determine its own docket, so I suppose we should congratulate the Court both on its behind-the-scenes lobbying that led to the 1984 amendments to the special leave provisions in the Judiciary Act and on its perhaps correspondingly unsurprising decision in 1991 upholding the validity of those amendments.<sup>22</sup> But this is only the first step in any proactive plan to shape the law in Australia—the next is to use the selected cases not merely to resolve the disputes between the parties but also to lay down sweeping propositions of law to govern future disputes. On this score, in the view of some the Court has been altogether too successful, and I refer you in particular to the rather sharp and much-noticed views of rookie Justice Dyson Heydon

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<sup>18</sup> *Western Australia v Commonwealth* (1975) 134 CLR 201.

<sup>19</sup> See *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 525, 532.

<sup>20</sup> *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533.

<sup>21</sup> *R v Murphy* (1985) 158 CLR 596.

<sup>22</sup> *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth, Carson v John Fairfax & Sons* (1991) 173 CLR 194.

published in the January–February 2003 issue of *Quadrant*.<sup>23</sup> So the Court has either been insufficiently proactive or, if Justice Heydon is to be believed, inappropriately so—not a good start to qualify on the Covey test as a functional family in a turbulent world.

The second habit that Stephen Covey urges should be cultivated is ‘begin with the end in mind’. Now, admittedly sometimes the High Court approaches cases in this way, and perhaps we all have our own favourite examples, but more often the Court appears to listen impartially to the arguments on each side, weighs them dispassionately and with care and attention, and then decides between them on their merits according to well-established criteria. I am sure that Stephen Covey would be horrified by this fixation with process and the relegation of outcomes to accidental, if not random, by-products. So it is heartening to see that the Court does sometimes at least test the force of an argument by reference to the robustness, commonsense or effectiveness of the conclusion to which the argument leads.

Stephen Covey’s third recommended habit for a highly effective family is ‘put first things first’. In essence, this means not letting work demands overshadow the importance of family. In particular, Covey recommends weekly family times and regular one-on-one bonding times. I am not in a position to make any comment on the one-on-one bonding, but I can say that clearly the United States Supreme Court has read Covey’s book, as the nine Justices not only have a weekly conference but do so in private to the exclusion of all others. The High Court’s record is more patchy, and is detailed in Troy Simpson’s excellent account of it in the acclaimed *Oxford Companion to the High Court of Australia*.<sup>24</sup> The Court itself has conceded the connection between conferencing and collegiality,<sup>25</sup> and there are connections between the degree of collegiality and the efficacy of the Court’s decision-making processes. The entry in *The Oxford Companion* on personal relations amongst the Justices has attracted, I suppose inevitably, some prurient interest, but we went to some lengths to make it clear that it was not written to titillate; it was rather an initial exploration of the various connections between the Justices’ personal relations and the

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<sup>23</sup> Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’, *Quadrant* January-February 2003, p 9. For the much anticipated reply, see Anthony Mason, ‘The Centenary of the High Court’, speech given at the UNSW 2003 Constitutional Law Conference Dinner, Parliament House, Sydney, 21 February 2003.

<sup>24</sup> Above n4, pp 130-133.

<sup>25</sup> *Annual Report* 1998-1999, cited *ibid*.

Court's work, a two-way relationship which the authors of that entry noted 'awaits serious study'.<sup>26</sup>

Habit number four is 'think "win-win"'. One would have to say here that the High Court has been a hopeless failure. One of the parties to cases before the Court always loses. Sometimes the Court uses its power to award costs to soften the impact of the loss, as in some classes of public interest litigation.<sup>27</sup> And sometimes, as in the test case of *Cole v Whitfield*, the loser in a challenge to the validity of legislation may be shielded from the logical consequence of the loss by the agreement of the other party not to prosecute should the challenge fail. But that stands outside the Court's own processes, which are irretrievably locked into the mentality of 'win-lose'.

Habit number five is an interesting one: 'seek first to understand...then to be understood'. The Court's performance in relation to the first part of this injunction is quite impressive, especially when you consider that the United States Supreme Court allows only one hour of oral argument per case whereas the High Court in the *Bank Nationalisation Case*<sup>28</sup> let the argument run for 39 days. The Justices also ask lots of helpful questions, even if at one point Sir Owen Dixon expressed his regret that 'arguments were torn to shreds before they were fully admitted to the mind'.<sup>29</sup> But how well does the Court make itself understood?

For this, we have of course to look at its judgments, given that the Court does not hold press conferences or issue media releases, although the recent employment of a media liaison officer may presage an improvement in accessibility for the general public. Generally speaking, the judgment writing genre in the High Court has presented challenges to a ready or easy understanding; Enid Campbell's article in the most recent issue of the *Australian Law Journal* is only the latest in a long line of criticism of the undue length and multiplicity of individual judgments.<sup>30</sup> Yet this is a complex question, with good arguments on both sides,<sup>31</sup> so let us skip over it to the question of the clarity and accessibility of individual judgments.

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<sup>26</sup> Amelia Simpson and Troy Simpson, 'Personal relations', in *The Oxford Companion to the High Court of Australia*, above n4, pp 528-531, at p 531. See also Anthony Mason, 'Personal relations: a personal reflection' (pp 531-533).

<sup>27</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72.

<sup>28</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

<sup>29</sup> Cited by David Bennett, 'Argument before the Court', in *The Oxford Companion to the High Court of Australia*, above n4, pp 31-32, at p 31.

<sup>30</sup> Enid Campbell, 'Reasons for Judgment: Some Consumer Perspectives' (2003) 77 *Australian Law Journal* 62.

<sup>31</sup> See Michael Coper, 'Joint judgments and separate judgments', in *The Oxford Companion to the High Court of Australia*, above n4, pp 367-369.

Here, again, the record is patchy. At one extreme, we have the shining example of our esteemed Chairman for this session, Sir Harry Gibbs, whose judgments were always a model of clarity (although I have to say that I have always thought that this made him rather more vulnerable to criticism than the average judge, as you could always understand what he was saying).<sup>32</sup> At the other extreme? Well, there are so many examples to choose from, and we all will have our own favourite examples, so let me quickly mention one of mine, though with the greatest of respect to the complexity and subtlety of the thought processes and products of one of the Court's most powerful and original minds. My award for the best effort in the ongoing struggle against the tyranny of lucidity<sup>33</sup> goes to Justice Ken Jacobs for his judgment in the *AAP Case*,<sup>34</sup> the rich opacity of which is matched only by the gentle homage to it in Gertrude Gerard's famous epic poem 'A Reply to the AAP Case', published in the *UNSW Law Journal* in 1977.<sup>35</sup>

Stephen Covey's sixth recommended habit is 'synergise'. Families should, he says, 'thrive on individual and family strengths so that, by respecting and valuing one another's differences, the whole becomes greater than the sum of the parts'.<sup>36</sup> I am a bit baffled by this one, but I suppose I should concede that the institution transcends its transient membership from time to time, so that in that sense the whole is certainly greater than the sum of the parts. And the respect for difference is clearly demonstrated, if not rather overdone sometimes, by the care and attention and effort put into distinguishing other cases in which contrary views are expressed. On the other hand, not a lot of respect is shown by Justice Heydon in his *Quadrant* article for alternative models of judicial decision-making. Perhaps, for the family, there are hard times ahead.

Lest I give too high a mark for the High Court's overall compliance with this sixth criterion for success, let me move immediately to the seventh and last such criterion, which Stephen Covey describes as 'sharpen the saw'. This is evidently a metaphor for renewal, for revisiting and reinforcing basic skills and underlying values, so naturally I thought of the National Judicial College of Australia, which opened its doors late

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<sup>32</sup> The same point is made by David Jackson and Joan Priest in 'Gibbs, Harry Talbot' in *The Oxford Companion to the High Court of Australia*, above n4, pp 300-303, at p 302.

<sup>33</sup> I am indebted to Tony Blackshield for drawing this delightful phrase to my attention: for the source, see Catherine Belsey, *Critical Practice* (Methuen, 1980) pp 4-5, where the author asserts that the language used in postmodern critical theory must be obscure in order to avoid the tyranny of lucidity.

<sup>34</sup> *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338.

<sup>35</sup> Gertrude Gerard, 'A Reply to the AAP Case' (1977) 2 *University of New South Wales Law Journal* 105.

<sup>36</sup> Covey, above n1, p 390.

last year and which my law school has the privilege to host. Regrettably, however, no High Court justice has yet enrolled in any of the College's courses, not even the popular course on the Untapped Potential of the Separation of Powers, nor the rather less popular but equally important course on Learning to Love Litigants in Person.

Apart from suggesting that Australia's number one legal family, the High Court of Australia, is almost entirely dysfunctional, where does this leave us? Can I salvage anything serious from the wreckage of Stephen Covey's principles as applied to the High Court?

Probably not. But I do want to make the serious point that, when judging the relative success or failure of the High Court, it all depends on the criteria you employ. No doubt Stephen Covey's criteria for a 'beautiful family culture in a turbulent world' are not entirely apposite. What, then, are the relevant criteria?

There are two ways of approaching this question. The first approximates the method of inductive reasoning in the natural sciences. One might compile a list of recognised successes and recognised failures and extrapolate from that the general criteria for success or failure that these examples disclose or appear to assume. Indeed, it would be interesting to construct an empirical research project that employed sound survey techniques to poll the opinion of a wide cross-section of those whose opinion it was appropriate to poll. I use that deliberate circularity in order to duck the question of whose opinion counts, but the question is not as hard as it looks. One would identify target groups that could reasonably be assumed to meet a certain threshold in relation to their level of knowledge about the High Court—practitioners, academics, other judges—and, to the extent necessary, qualify the results of the survey by reference to the nature of the target group or groups.

Interestingly, when planning the entries for *The Oxford Companion to the High Court*, we intended originally to have a discrete entry on the successes and failures of the Court, partly inspired by (or irresistibly drawn to) the late Bernard Schwartz's *A Book of Legal Lists*,<sup>37</sup> in which the learned professor from Tulsa, Oklahoma, identifies his choice of the ten best and ten worst judges, and the ten best and worst decisions, of the United States Supreme Court. As we explain in our preface, ultimately we abandoned this exercise (and a retired Justice wrote to me to say how relieved he was that we had), for two reasons: first, precisely because of the elusiveness of the criteria,

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<sup>37</sup> Bernard Schwartz, *A Book of Legal Lists: The Best and Worst in American Law* (OUP, 1997). See also Roy M Mersky and Gary R Hartman, 'Rating the Justices' (1992) 84 *Law Library Journal* 113.

to which I return in a moment, and, secondly, because the entire book is an evaluation of the performance of the Court and its justices across most areas of importance as well as across the years.<sup>38</sup>

One could, however, do a mini-survey of the kind I have suggested by thumbing through the book and ascertaining what the learned authors perceived to be successes and failures. One would discover on this approach, narrow and selective as it is, not to mention subjective, that the overall record of the High Court has been regarded by those learned authors as successful in the areas of, for example, administrative law,<sup>39</sup> commercial law,<sup>40</sup> environmental law,<sup>41</sup> equity<sup>42</sup> and trusts,<sup>43</sup> evidence law,<sup>44</sup> and many issues involving indigenous Australians,<sup>45</sup> but less than successful in, for example, the application of criminological theory,<sup>46</sup> the law of excise duties,<sup>47</sup> many aspects of jury trial,<sup>48</sup> the principles of statutory interpretation,<sup>49</sup> and the law of taxation.<sup>50</sup> But, of course, these are the opinions of individuals rather than the consensus of a group, and within each area there are successes and failures. So there are many layers and many levels at which the question of success and failure may be posed.

Moving on from the quasi-inductive approach to identifying the criteria for success and failure, the alternative approach is to attempt to frame those criteria in the abstract, and then apply them deductively to draw conclusions about particular successes and particular failures. This approach brings the issue of layers and levels into sharp relief. Are we talking about individual judges or the Court as an institution? Are we taking a snapshot at a particular point in time, or considering a course of development over many years? Indeed, are we making a judgment in the context of a

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<sup>38</sup> *The Oxford Companion to the High Court of Australia*, above n4, p viii.

<sup>39</sup> *Ibid* pp 8-11 (John McMillan).

<sup>40</sup> *Ibid* pp 115-117 (Simon Fisher).

<sup>41</sup> *Ibid* pp 238-241 (Judith Jones).

<sup>42</sup> *Ibid* pp 243-246 (Patrick Parkinson).

<sup>43</sup> *Ibid* pp 684-686 (Donald Chalmers and Gino Dal Pont).

<sup>44</sup> *Ibid* pp 254-256 (Dyson Heydon).

<sup>45</sup> *Ibid* pp 2-3 (John Toohey), 110-113 (Francesca Dominello), 443-444 (Tony Blackshield, Graham Fricke and Amelia Simpson), 446-448 (Garth Nettheim), 576-579 (Frank Brennan and Francesca Dominello). However, for developments since these entries were written, see Sean Brennan, 'Ward, Wilson and Yorta Yorta: The High Court, Native Title and the Constitution a Decade after Mabo', UNSW 2003 Constitutional Law Conference, Parliament House, Sydney, 21 February 2003.

<sup>46</sup> *The Oxford Companion to the High Court of Australia*, above n4, pp 181-184 (Mark Findlay and Stanley Yeo).

<sup>47</sup> *Ibid* pp 256-258 (Michael Coper).

<sup>48</sup> *Ibid* pp 388-391 (David Brown).

<sup>49</sup> *Ibid* pp 641-643 (Dennis Pearce).

<sup>50</sup> *Ibid* pp 659-661 (Michael Kobetsky and Rick Krever).

particular time, or looking back in the light of later development?<sup>51</sup> Are we looking at particular decisions, lines of decisions, or broad areas of law? Are we looking at process or outcomes? Do we think of a decision as a good one because its reasoning is elegant or because its result is socially or politically desirable? If the latter, how do we judge that? Is a decision a good one because it follows precedent or because it departs from precedent? And so on.

Like the centipede who never walked again after it started to think about how it managed to move so many legs at once, we do not want to be paralytically introspective or to refine or qualify the question of success or failure out of existence. So let me briefly mention the criteria that inevitably leap to mind when we start to think about judicial performance evaluation in general<sup>52</sup> and about evaluating the High Court and its justices in particular. Some of the criteria apply primarily to the justices, some to the courts as institutions, and some to both.

These criteria include efficiency; integrity, including independence and impartiality; enjoyment of public confidence; and calibre or capacity, temperament, and other desirable personal qualities. Yet each of these is a can of worms. Efficiency must accommodate giving the parties a fair hearing.<sup>53</sup> How is public confidence to be gauged, and to what extent can it accommodate criticism? And what is calibre or capacity? To sense the controversy surrounding the last question, we only have to recall the kind of debate that occurs on the occasion of every judicial appointment: is there an abstract concept of 'merit' that trumps considerations of geography and gender?<sup>54</sup>

Whatever their difficulties, in conception or application, these criteria are, in the main, applicable to courts generally. Without entirely brushing them aside on that score, I think that, in evaluating the High Court, one really has to focus on what is unique about the role of the High Court at the apex of the Australian judicial system.

This brings me back, fairly and squarely, to the controversy generated by Justice Heydon's *Quadrant* article. Should the High Court, as Justice Heydon urges, generally seek to take the narrowest ground available to resolve the dispute between

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<sup>51</sup> Evaluating the *Engineers Case*, above n8, particularly raises this issue: cf Windeyer J in *Victoria v Commonwealth (The Payroll Tax Case)* (1971) 122 CLR 353, 395-397.

<sup>52</sup> See, for example, Stephen Colbran, 'Judicial Performance Evaluation: Accountability Without Compliance' (2002) 76 *Australian Law Journal* 235 and the literature cited therein.

<sup>53</sup> Arguably, fairness is necessary rather than antithetical to efficiency, but that is another debate.

<sup>54</sup> See, for example, Simon Evans, 'Appointment of Justices' in *The Oxford Companion to the High Court*, above n4, pp 19-23.

the parties, or should it, as Justice Heydon strongly opposes, take the dispute between the parties as the opportunity to lay down sweeping propositions of law for the future? And further, although Justice Heydon excluded constitutional law from his purview,<sup>55</sup> how should the Court approach its special responsibility for deciding constitutional questions, an arena in which legislative reform is not an option?

These are large and contested questions. They have also acquired a much sharper edge since the powerful combination of the final abolition of Privy Council appeals and the introduction of the necessity in all cases for special leave to appeal accentuated the High Court's law-making responsibility. There are no simple answers. Indeed, the questions, and the whole exercise of identifying criteria for making informed judgments about success and failure, are themselves but a gateway to the long-standing and never-ending debate about the nature of the judicial process in a final appellate court, particularly one that exercises the power of judicial review under a written constitution. In this debate, there is, as we know, an unresolved and never-to-be-resolved tension between individualised justice and general law-making, between judicial activism and judicial restraint, between constancy and change, between legalism and pragmatism, between dogmatism and doubt, between scepticism and faith.<sup>56</sup>

In my view, the highest court in the land has a role and responsibility for a degree of generalised law-making that Justice Heydon's advocacy of incremental development, purportedly of the Dixonian kind, rather tends to understate. This does not open the door to rampant activism, and indeed the label of activism, as Justice Sackville has pointed out,<sup>57</sup> is an unhelpful barrier to understanding and illuminating the unavoidable legal and policy choices judges have to make at the highest level.<sup>58</sup> But precisely where you locate the proper law-making role of the Court on the spectrum between extreme caution and unrestrained adventurism will obviously influence whether you evaluate its record in terms of failure or success.

If we really are to identify the criteria for success and failure in any serious way, I think we need to combine the two approaches I have outlined, the inductive and the deductive.<sup>59</sup> One's extrapolation from concrete examples does inform one's thinking

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<sup>55</sup> Heydon, above n23, p 10.

<sup>56</sup> Cf Michael Coper, *Encounters with the Australian Constitution* (CCH, 1987) p 419.

<sup>57</sup> Ronald Sackville, 'Activism' in *The Oxford Companion to the High Court of Australia*, above n4, pp 6-7. See also Mason, above n23.

<sup>58</sup> Michael Coper, 'The Path of the Law' (2002) 76 *Australian Law Journal* 716, 723.

<sup>59</sup> Cf Tony Blackshield, 'Judicial Reasoning' in *The Oxford Companion to the High Court of Australia*, above n4, pp 373-376.

about the criteria for success and failure in the abstract, and one's more rigorous application of these criteria back to the concrete examples helps to expose any facile assumptions and to be more precise about the diverse meanings of success and failure in different contexts.

In the context of particular cases, many concrete examples spring to my mind, particularly as successes, and I ask myself, why these cases? Confining myself within the constitutional law boundaries of this conference, two prominent examples are the *Communist Party Case*<sup>60</sup> and *Cole v Whitfield*.<sup>61</sup> With impressive unanimity, *Cole v Whitfield* brought clarity and certainty to the law after a long period of turmoil, as well as stability if it is not drawing too much from the subsequent 15-year period of quiescence. And I like to think that it did so because, to use admittedly dangerous shorthand, it got the right result—right, in my view, because it was consistent with objective touchstones of constitutional interpretation (in this case, fidelity to history<sup>62</sup>), and because at the same time it carved out for the Court an institutionally appropriate role in the broader context of how, in the shadow of the Constitution, our federal system, and the various institutions that operate within it, might best strike the balance between national unity and local diversity.<sup>63</sup>

The *Community Party Case* contained an indignant dissent from Chief Justice Latham, but seems generally regarded as an icon of deep values at the core of our democratic freedoms: free speech, free association, judicial independence, and the rule of law. As with *Cole v Whitfield*, though perhaps fortified with the benefit of hindsight, it might also be thought to have achieved the right result, and even to draw strength from the curious combination of its ostensible grounds, rooted in the limits of Commonwealth legislative power, and its actual, civil libertarian outcome.

Thinking about these two prominent examples from the thousands of cases decided by the Court, it is hard to resist the conclusion that, instinctively, we are predominantly result-oriented when it comes to judging success and failure, though in the forefront of my mind also are institutional considerations concerning the proper role of the

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<sup>60</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

<sup>61</sup> Above n11.

<sup>62</sup> I would not want it to be thought that I am assuming that this criterion should be dispositive in every case. Even if the history were not disputed (to which it is always vulnerable), many would nominate in the 'failure' category *New South Wales v Commonwealth (The Incorporation Case)* (1990) 169 CLR 482, precisely because of its fidelity to history. On the place of history, see Coper, above n56, pp 408-418, and on consistency as a possible reconciliation, see Coper, 'Interpreting the Constitution: A Handbook for Judges and Commentators' in Tony Blackshield (ed), *Essays in Honour of Julius Stone* (Butterworths, 1983) pp 52-67.

<sup>63</sup> See further above n12.

Court. But proper process can obviously not be ignored, particularly the quality of the justification for the outcome given in the reasons for judgment, and I often think of the courageous decisions of Justices Gibbs and Stephen in the *Second Territory Senators Case*<sup>64</sup> to adhere to the decision in the *First Territory Senators Case*,<sup>65</sup> although they believed that decision to be plainly wrong.

The truth is that the question of success and failure in the High Court is such a large and diverse one, and such an invitation to knee-jerk reactions based on undisclosed or unarticulated or selective criteria, that there is not a lot of profit in pursuing it, unless the exercise contributes in some way to clarifying the criteria and the context, and thereby, as I have tried to indicate, becomes a gateway to plumbing the mysterious depths of the nature of the judicial process. I have focused just now on particular cases, but the twin concepts of success and failure can be applied to every aspect of the High Court's being, from the achievement of its very establishment<sup>66</sup>—undoubtedly a success in the face of considerable opposition—and of its early struggle against the Privy Council to be the final arbiter of constitutional questions<sup>67</sup>—to the calibre of its members, the integrity of its processes, the quality of its scholarship, the coherence of its doctrines, the aptness of its outcomes, and the robustness, the resonance, even the reverberation, of its reputation. There is, as I hinted earlier, only one way to take an all-embracing view of the success and failure in the High Court across all of these different perspectives, and that is to read from cover to cover *The Oxford Companion to the High Court of Australia*. I conclude my remarks here, but I seek leave, Mr Chairman, to incorporate that book in its entirety into the written record.

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<sup>64</sup> *Queensland v Commonwealth* (1977) 139 CLR 585.

<sup>65</sup> Above n18.

<sup>66</sup> JM Bennett, 'Establishment of Court' in *The Oxford Companion to the High Court of Australia*, above n4, pp 246-248; *Keystone of the Federal Arch* (AGPS, 1980).

<sup>67</sup> Tony Blackshield, Michael Coper and John Goldring, 'Privy Council' in *The Oxford Companion to the High Court of Australia*, above n4, pp 560-562; Coper, above n56, pp 104-109.