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THE STATE OF THE JUDICATURE

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In 1977, Chief Justice Barwick delivered the first address on the State of the Judicature in Australia. Since then, his successors have followed his example, usually at intervals of two years. In recent times, the address has been given to the Australian Legal Convention. The present occasion is a gathering of lawyers from all parts of the Commonwealth of Nations. On behalf of the Australian judiciary, I add my welcome to all our visitors, who include some of the most senior and distinguished judges in the Commonwealth. We are delighted and honoured by their presence. There is another significant feature of the occasion. This year, the High Court of Australia celebrates its Centenary. The Court first sat in Melbourne on 6 October 1903. It seems appropriate that I should explain to

our guests something of the structure of the Australian judicature, and that I should give particular emphasis to the role of the High Court.

The Australian Federal Union

The Australian Constitution, which took effect in 1901, brought into a federal union the people of a number of self-governing British colonies. The former colonies became States of the new Federal Commonwealth.

The first colonies established following European settlement were New South Wales and Tasmania. New South Wales originally comprised the whole of the eastern part of mainland Australia. In 1851, what had earlier been the Port Phillip District of New South Wales separated, and became the colony of Victoria. In 1859, the colony of Queensland separated from New South Wales. South Australia and Western Australia had distinctive histories. South Australia was founded in 1836, and was settled by private initiative fostered by the British Colonial Office. Western Australia was first settled in 1826, and a colony was proclaimed in 1829. What is now Australia was, at the time, the subject of exploration, and possible colonial attention, by other powers. It was considered important to inform the world, and in particular the French, that the entire continent was under British occupation[1]. The Northern Territory was at first a part of New South Wales, and later of South Australia. It

became a Federal Territory in 1911[2]. The Australian Capital Territory, which contains the seat of government, was formerly a part of New South Wales, required by the Constitution to be distant not less than 100 miles from Sydney.

The desire for federation reflected a number of forces, including considerations of defence and national security. The Imperial government fostered the move, but, subject to a couple of notable qualifications, left it to the colonists to work out the terms on which they would unite. Those terms were established through Constitutional Conventions, resolutions of the colonial parliaments, and referenda, over a period between 1891 and 1900. A draft constitution was submitted to the Imperial Parliament and, after certain amendments, was given legal effect by an Act of the Imperial Parliament. Since then, relations between Australia and the United Kingdom have altered, and the Australia Act of 1986 recognised that the United Kingdom Parliament has no capacity to make law for Australia. In 1999, the High Court held that, for the purposes of the Constitution, the United Kingdom is a foreign power[3]. Even so, we inherited our law, our judicial system, and our legal profession from the United Kingdom. That inheritance continues to have a profound influence in the life of our nation.

The Australian Judiciary

One of the defining characteristics of all aspects of Australian government, including the judiciary, is federalism.

At the end of the nineteenth century, each Australian colony had its own Supreme Court. The Supreme Courts of Tasmania and New South Wales were both established in 1824; those of the other colonies were established later. Each colony had its own judicial system, and a legal profession organised under the control of the Supreme Court. At the time of Federation, and for most of the twentieth century, appeals lay from colonial, later State, Supreme Courts to the Privy Council in London. Those appeals finally ended during the 1980s.

Section 71 of the Constitution vested the judicial power of the Commonwealth in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament should create. Further, and importantly, the Constitution provided for the Parliament to invest State Courts with federal jurisdiction.

For the greater part of the twentieth century, the Federal Parliament took advantage of the expedient of investing State courts with federal jurisdiction as the principal method of providing for the exercise of federal judicial power other than by the High Court. Until the 1970s, there were relatively few federal judges. This may have

been not unrelated to the fact that, until a constitutional amendment in 1977, federal judges had to be appointed for life. (In Australia, unlike Canada, all State judges are appointed by State governments). Two important new federal courts, the Federal Court of Australia, and the Family Court of Australia, were created in the 1970s. Their size has grown rapidly since then. In 2000, the Federal Magistrates Service was established. State courts continue to exercise federal jurisdiction, and three States have judiciaries larger than the federal judiciary, but the relatively recent growth in the number of federal judges is an important development.

Following the requirement of the Constitution, in 1903 the Federal Parliament legislated to set up the High Court of Australia. In addition to an original jurisdiction, the High Court was given jurisdiction to hear civil and criminal appeals from other federal courts, and from State Supreme Courts. This general appellate jurisdiction distinguishes the High Court from the Supreme Court of the United States. In his speech in support of the Bill for the *Judiciary Act* 1903 (Cth), Attorney-General Deakin described the High Court, in its sphere, and the Federal Parliament, in its sphere, as expressions of the union of the Australian people[4]. He stressed the role of the Court as the organ of government entrusted by the people with deciding issues that would arise under the division of powers and functions that is of the essence of a federal system. He identified three fundamental features of federalism: a supreme Constitution; a distribution of powers under the Constitution; and a

judiciary to interpret the Constitution and decide as to the precise distribution of powers[5]. He pointed out that the Australian colonies had been accustomed to legislatures with limited powers, and to the need for courts to resolve issues as to these limits[6]. There has never been, in Australia, a sovereign Parliament. The existence of a constitutional court with the capacity to decide the validity of the laws enacted by the Federal and State Parliaments, and the legality of executive action, was a necessity of federalism. This, in turn, required a separation of powers along the lines of the United States Constitution. The Attorney-General explained that it was not proposed that the High Court should, like the Supreme Court of Canada, have a jurisdiction to give advisory opinions. Rather, Australia would follow the United States model, which he regarded as involving a more strict form of federalism. He observed that, in Australia, as in the United States, the central Parliament had enumerated powers, the residue being with the States. On the other hand, in Canada, it was the Provinces whose powers were specified. Furthermore, at the time, the Federal Executive in Canada could veto Provincial legislation. He also noted the power of the Federal government in Canada to make appointments to the Provincial judiciary[7]. These considerations, he thought, made our federal system more like that of the United States. The great difference, and one which has always been difficult to accommodate to federalism, is responsible government. In that respect, like Canada, we followed the British precedent.

There are two essential features of the role of the High Court in the Australian judicature. First, it acts as the ultimate court of appeal in civil and criminal cases in federal and state jurisdiction. Nowadays, such appeals do not come to the Court as of right, but require a grant of special leave to appeal. Secondly, it performs the function described by Attorney-General Deakin as that of "an impartial independent tribunal to interpret the Constitution"[8].

Unlike the House of Lords in England, the Supreme Court of Canada, and the Supreme Court of the United States, at present the High Court, in addition to receiving written submissions from the parties, hears oral argument on all applications for special leave to appeal. Time for argument is strictly limited. Even so, the appropriateness of an inflexible requirement to hear oral argument in all applications is a matter that is presently under review. More than one-third of applications are made by self-represented litigants[9]. Their success rate is very low. The need to balance the requirements of reasonable access to the Court with the obligation to make the most efficient use of the Court's limited resources gives rise to difficulty. It may be that, at least in the clearest cases, the Court should have the capacity to dispense with the requirement of oral argument.

The High Court's original jurisdiction includes, but is not limited to, constitutional matters. One of the most important sources of its jurisdiction is s 75(v) of the Constitution which

confers original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. This grant of jurisdiction, unalterable by the Parliament, secures a basic element of the rule of law. As in other countries, judicial review of administrative action in relation to people seeking asylum on the basis of a claim that they are refugees is a source of much litigation. The High Court has recently had occasion to consider, once again, the effect of legislative provisions which seek to oust or limit the jurisdiction of courts in cases involving such review[10].

The principal changes affecting the High Court, and its work, over the last century include the following.

There were three original members of the Court. In 1906, the number was increased to five, and in 1913, to seven. In ordinary civil and criminal appeals, not involving a constitutional issue, or seeking departure from existing authority, five Justices sit. The Justices to sit are proposed by the Chief Justice. Any Justice is entitled to sit, even if not proposed, but the exercise of this entitlement is very rare. Members of the profession sometimes ask whether the workload of the Court would be reduced if the number of Justices were increased to nine. I believe it would not. It would probably mean, in practice, that a Chief Justice, conscious of the possibility that the outcome of an appeal could be too heavily influenced by the choice of the five out of nine Justices to sit, would

propose that the Court follow the Canadian and United States practice of sitting all available Justices on all appeals. That is what now happens in the High Court in all constitutional cases, and also in a substantial number of appeals. Increasing the number of Justices to sit on a particular case does not make it easier for any Justice to decide that case; and, as the profession is aware, Justices take their individual responsibilities very seriously when it comes to the preparation of judgments.

Until 1977, members of the Court were appointed for life. They must now retire at 70. Sir Owen Dixon and Sir Garfield Barwick both retired from the office of Chief Justice at the age of 77. Sir Frank Gavan Duffy assumed that office at the age of 78. Sir Edward McTiernan retired at 84. Sir Samuel Way, then Chief Justice of South Australia is said to have declined an offer of appointment to the Court at the age of 70.

Appeals to the Privy Council no longer exist. The Privy Council never had a jurisdiction to hear appeals in certain types of constitutional cases but, subject to that qualification, it was only in the 1980s that the High Court became the ultimate court of appeal for all Australian matters.

As mentioned above, appeals no longer come to the Court as of right. Special leave is required. The grounds for special leave are set out in the Judiciary Act. As a general rule, a grant of leave will

be made where a case involves a question of law of general importance, or where the Court is called upon to resolve differences between, or within, other Australian courts.

Judicial Numbers

There are, at present, 939 Australian judges and magistrates, not including acting judicial officers. Of these, 283, or approximately one-third, are appointed by the government of New South Wales. The next largest jurisdictions are Victoria (193) and Queensland (134). Then follows the Federal judiciary, which consists of 118 judges and magistrates. These include the seven Justices of the High Court.

The Federal Magistracy

There are now 19 Federal Magistrates. The Service deals with shorter and simpler matters in federal jurisdictions, and, in the short time since it was created, it has become even more apparent that there is a great deal of work suitable for its attention. The court now receives 40 per cent of all family law work, and most bankruptcy cases. It now deals with migration cases. In the eight months to the end of February 2003, 688 migration applications were filed in the court, and 410 matters were transferred from the Federal Court. The court has recently been invested with copyright jurisdiction.

I expect that, in time, it will become one of Australia's largest courts.

National Judicial Associations

The Council of Chief Justices of Australia and New Zealand continue to meet twice a year. Its origins and constitution were described in an earlier address of this kind[11]. The Council's work in the past year included production of the Guide to Judicial Conduct, and support for the establishment of the Australian National Judicial College, both of which are referred to below.

The Australian Institute of Judicial Administration (AIJA), established in 1986, is actively associated with this Conference. Its current President is Justice Underwood of the Supreme Court of Tasmania, and its Executive Director is Professor Reinhardt. It is based in Victoria. The Institute organised a Technology for Justice Conference in Sydney in October 2002, attended by 394 delegates including visitors from Canada, China, Israel, New Zealand, Papua New Guinea, the Philippines, Thailand, South Korea and the USA. In 2002 it also participated in a Judicial Forum in Beijing, and has been actively involved in providing training opportunities for Chinese procurators. Its work in relation to judicial orientation in Australia will be mentioned below. Four times a year the Institute publishes its Journal of Judicial Administration. Members of the Institute

include judges, court administrators, government officials, and members of the legal profession.

The Judicial Conference of Australia (JCA) was established in 1994 with the objects of maintaining in Australia a strong and independent judiciary and of explaining to the public what judicial independence means, and why its preservation is essential to the rule of law.

The JCA is self-funded. The 472 members, both judges and magistrates come from all parts of Australia. Currently, the JCA is undertaking a programme designed to correct misinformation and misunderstandings about the judiciary, and to make better known what judges and magistrates do. At last year's Colloquium in Launceston one topic for discussion was how the courts can work with the media. That discussion will continue at the planned Colloquium to be held in Darwin at the end of May this year.

The JCA has expressed the support of Australian judicial officers for those Zimbabwean judges who continue to perform their duties independently and despite persecution.

Since May 2000, the Chairman of the JCA has been Mr Justice Simon Sheller of the New South Wales Court of Appeal. Professor Christopher Roper is its secretary.

Judicial Education

The most important recent development in this area has been the establishment of the National Judicial College.

Formal judicial training and continuing education in Australia was first undertaken by the Judicial Commission of New South Wales, which was set up as an independent statutory corporation by legislation in 1986[12]. The Commission's six official members are the heads of jurisdiction of the State's six courts. Additional members, presently four in number, are appointed by the Governor. The President of the Commission is the Chief Justice of New South Wales. It has a staff of 35, headed by a Chief Executive. Its educational programmes are devised in consultation with the education committee of each of the State's courts. They include conferences and seminars which presently cover 28 programmes, including pre-bench training for newly appointed magistrates, and information technology training sessions. The Commission also publishes bench books, a monthly journal, and a regular collection of papers delivered at conferences and seminars.

For several years, in cooperation with the AIJA, the NSW Judicial Commission has devised a National Judicial Orientation Programme for newly appointed judges from across Australia. These have also been attended by judges from other countries.

There is also a Judicial College of Victoria, which was established as an independent statutory authority in 2002, and has an educational role similar to that of the Judicial Commission of New South Wales. Its chairman is the Chief Justice of Victoria.

In other States and Territories, the courts themselves conduct regular programmes of orientation and continuing education.

The National Judicial College was established, as a company limited by guarantee, in 2002. Its formation was supported by the Council of Chief Justices, and resulted from the recommendations of a working group set up by the Standing Committee of Attorneys-General. The governing body of the College is a Council, chaired by Chief Justice Doyle of South Australia. Membership of the Council is representative of all levels of the Australian judiciary. There are Regional Convenors for each State and Territory, whose functions include maintaining communication with the local judiciary. The Constitution of the College also provides for a Consultative Committee, consisting of the Regional Convenors, representatives of the AIJA, the Judicial Conference of Australia, the Association of Australian Magistrates, the Law Deans of Australian Universities, and three persons, not being judicial officers, appointed by the Standing Committee of Attorneys-General. In September 2002, the College appointed its first Director. In February 2003, the Council conducted a seminar at the Australian National University, about the

future of the College, for members of the Council, the Regional Convenors, and the Co-ordinating Committee.

The Judicial Commission of New South Wales, the Judicial College of Victoria, and the AIJA have all indicated that they are willing to co-operate with the National Judicial College, and to assist in its educational programmes.

The working group that reported to the Standing Committee of Attorneys-General proposed a modest annual budget of $430,000, to be shared between the Commonwealth and the States. After the Standing Committee gave its approval to the Report, the Attorneys-General of three States decided that their governments would not provide financial support to the College. This has reduced its annual budget to $318,000. This may be compared with the annual budget of the Judicial Commission of New South Wales, which is $4.2 million. It is true that the Judicial Commission has other functions, but the bulk of its budget is applied to judicial education and technical support.

I was President of the Judicial Commission of New South Wales from 1988 to 1998. I am closely familiar with the work that it performs, and with the value attached to that work by the judicial officers of the State. The same level of professional support should be available to all Australian judges and magistrates.

I have on other occasions explained the need for properly organised and funded facilities for judicial professional development. We now have a National Judicial College. It has the firm support of the Commonwealth government. It should be accepted that judicial training and education is a matter of both local and national concern. All judges and magistrates, and through them the public, throughout Australia will benefit from an effective and adequately funded National Judicial College. The College is headed by a State Chief Justice. State and Territory judiciaries are well represented in its structure. It has the support of the Judicial Commission of New South Wales which, in the past, has made its orientation programmes available to judicial officers from all parts of the nation. Of Australia's 939 judicial officers, 821 are appointed by State and Territory governments. All judicial officers will benefit from the work of the National Judicial College. I urge all State and Territory governments to get behind it.

I should refer also to the recently established Asia Pacific Judicial Educators Forum, which will have its headquarters in the Philippine Judiciary Academy in Manila. Membership is open to judicial education institutions and organisations in the Asia Pacific region. The Chief Executive of the Judicial Commission of New South Wales is a member of the Executive Committee of that Forum.

Guide to Judicial Conduct

In June 2002, the AIJA published for the Council of Chief Justices a Guide to Judicial Conduct. The purpose was to provide members of the judiciary with some practical guidance about conduct expected of them as holders of judicial office. The document was prepared after a process of consultation with members of the judiciary. It was originally drafted by three former senior judges, assisted by an Advisory Committee of the AIJA. It was settled by the Council of Chief Justices.

The Guide assumes a high level of understanding of basic principles of judicial conduct, and a knowledge of the rules of statute and common law which apply to courts and judges. It does not set out to instruct judges in the law; and it was not promulgated by any body which has law-making authority. It is not, in any sense of the word, a code. Rather, it addresses basic principles of judicial behaviour, identifies issues that, in the experience of members of the Council, are likely to be of concern to judicial officers, and sets out to give practical guidance in those areas.

Some members of the judiciary, especially those who work in a collegial environment, and who have ready access to consultation with their colleagues, may under-estimate the extent to which others, who are less experienced, or more isolated, benefit from assistance of this kind. No doubt, some judges who read the Guide

will conclude that it tells them nothing they did not already know. But others will find it a useful source of help, warning, or re-assurance. The judiciary is increasing in size and diversity. Just as it can no longer be assumed that all newly appointed judicial officers have sufficient practical experience of the courts to make it unnecessary that they be given educational assistance, so it cannot be assumed that they will all be fully aware of the issues as to conduct which they might encounter, and of the appropriate responses to those issues.

The Courts and Management

Judges accept that governments, and the public, have a legitimate interest in the efficient use by the courts of the resources made available to them. In all Australian jurisdictions, the pressure of business has made enormous demands upon the skills of judges and court administrators. Issues, such as case management, procedural reform, and the use of information technology, have been the subject of constant attention during the last 15 years. In all these areas, Australian courts have kept in close touch with international practice, and many of their innovations have been followed in overseas jurisdictions.

In the courts, as in all other aspects of public life, there is sometimes a tension between the demands of managerial efficiency and the core purpose of the institution: in our case, the

administration of justice. In the long run, better management is only useful to the extent to which it promotes justice. Management is a means, not an end. Judges are sometimes disconcerted by what they regard as an increased emphasis on means, rather than ends, but necessary improvements in efficiency do not require us to lose sight of the main reason for our existence. In particular, the application of appropriate techniques of performance analysis does not require that courts should succumb to what was recently called, in another country, "the commodification of the national culture"[13].

The Judiciary and Governments

The independence of the judiciary from the legislative and executive branches of government, important in any political society, and essential in one organised on federal lines, is largely taken for granted.

The fact that the personal independence of judges, and the institutional independence of courts, is simply assumed by most Australians is gratifying; but it is important that those involved in public life should be aware of the arrangements which secure that independence. It is unlikely ever to be the subject of frontal assault, but encroachments can occur in consequence of lack of knowledge of, or concern for, basic principles.

Upholding the rule of law involves, where necessary, enforcing observance of the law by governments. It involves deciding the limits of legislative and executive power. Judicial review of legislative or administrative action inevitably causes frustration and resentment. Checks and balances are not always appealing to those whose power is checked or balanced. Even so, governments in Australia understand that their powers are limited by the law and the Constitution, just as judges understand that judicial power is limited in the same way. The Constitution, the basic law, is the ultimate source of, and limitation upon, all governmental power. Judicial review is the rule of law in action.

Australian judicial officers have that tenure which is regarded throughout the common law world as an essential condition of independence. In the case of federal judges, the matter is governed by s 72 of the Constitution, which provides that judges shall not be removed except by the Governor-General, on an address from both Houses of Parliament, on the ground of proved misbehaviour or incapacity. This is not a personal privilege conferred upon judges as a beneficial term of employment. It is a constitutional guarantee, laid down, in the public interest, to ensure that the judicial power is exercised independently. Short of passing a resolution for removal, Parliament cannot punish a judge; and the Executive Government has no disciplinary power over judges. This can be a source of misunderstanding and frustration; but it is in aid of securing the independence of judges, who have the constitutional responsibility of

declaring the limits of the powers of the Parliament, and of deciding the lawfulness of actions of the Executive.

The Judiciary and the Community

Relations between the judiciary and the community are healthy. The area of judicial work that is the most common source of dissatisfaction is the sentencing of offenders. Unfortunately, such dissatisfaction is sometimes based upon an insufficient understanding of the facts of particular cases, or of the legal principles being applied by courts. On occasion, it is exploited for collateral purposes.

It is usually impossible for judges to respond, on a case by case basis, to criticism of individual sentences. Judges do not engage in public controversy about their decisions; to do so would compromise their impartiality. Chief Justices, who commonly preside in Courts of Criminal Appeal, cannot comment on the merits of cases that may come to them on appeal. Attorneys-General may find that the criticism comes from, or is supported by, a political colleague.

Most Australian courts now have Public Information Officers who seek to inform the public about sentencing practice and principles. Reasons for sentencing decisions are published, and in most jurisdictions there is ready electronic access to them. But

judges cannot compel people to read, or report, their reasons. In some jurisdictions, within such limits as are imposed by statute and legal principle, Courts of Criminal Appeal lay down sentencing guidelines for the benefit of primary judges. These also provide useful information to the profession and the public.

Discretionary sentencing is an important part of our system of criminal justice. The punishment should fit both the offence and the offender. Complaints of undue leniency are sometimes made, but I believe that there is a community awareness of the value of judicial discretion. Most people find it easier to identify with the victims, rather than the perpetrators, of crimes, especially when the offences involve violence or serious dishonesty. But there are exceptions to that rule. Driving offences, for example, which may involve death or serious injury, are often committed by people of otherwise unblemished character. And the prevalence of drug abuse means that no family is completely immune from the risk of a painful encounter with the criminal justice system. Everybody is at least indirectly touched by the manner in which society deals with delinquent behaviour. Australians value fairness as well as firmness; and in the administration of criminal justice, fairness requires a consideration of the circumstances of individual cases.

Historically, one of the means by which the administration of justice was kept in touch with the community has been trial by jury. The jury system has been one of the most important forms of

contact between the justice system and the public it seeks to serve. In many Australian jurisdictions, in the interests of cost and efficiency, trial by jury has practically disappeared from civil justice, and there has been a trend towards increasing the range of offences that are dealt with summarily. These developments may be necessary, but they involve a cost. That cost does not appear in any set of accounts, but it is real and substantial. Community participation in the administration of justice is good for the community, and good for justice. In Australia, we have never had the English system of involvement in the administration of criminal justice by lay magistrates. Juries are the principal, and in many parts of Australia, the only, form of lay involvement in the work of the courts. Decisions to reduce their role need to take due account of all the purposes they serve.

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1 Quick & Garran, *The Annotated C onstitution of the Australian Commonwealth*, 67.

2 For a brief history of the Territory's legal status set *Kruger v The Commonwealth* (1997) 190 CLR 1 at 49-50.

3 *Sue v Hill* (1999) 199 CLR 462

4 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902, 10964.

5 Ibid at 10966.

6 Ibid at 10969.

7 Ibid at 10971, 10980.

8 Ibid at 10974.

9 In 2001-2002 40 per cent of all applicants for special leave to appeal were self-represented.

10 *Plaintiff S157/2002 v The Commonwealth* (2003) 77 ALJR 454.

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[11] State of the Judicature Address, October 1999, 74 ALJ 147 at 150.

[12] *Judicial Officers Act* 1986 (NSW).

[13] Protherough and Pick *"Managing Britannia; Culture and Management in Modern Britain;* p. 19