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THE HIGH COURT OF AUSTRALIA: CHALLENGES FOR ITS NEW CENTURY

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An invitation to deal, in 20 minutes, at dinner, with the challenges facing the High Court in the 21st century, is itself a challenge. I will be highly selective in the issues I raise. I have only four and a half years before I become constitutionally unfit for office. It is something of a luxury to identify problems that other people will have to solve. But I accept that I cannot slip into a pre-retirement torpor. They are my problems too. I raise them in no particular order of importance.

1.The first issue is not peculiar to the High Court. It affects courts generally in an information age that demands transparency and accountability. I can illustrate the problem by an example. Shortly after I was appointed to the Supreme Court of New South Wales, in 1988, an executive officer of the Court came to see me. He had received, from a senior member of the State Public Service, who was evidently looking at court delays, a demand for some information, coupled with an instruction that he was to provide the specific information asked for: nothing more and nothing less. The government wanted to know the longest period of time that had elapsed since the date of committal for trial of someone who was still in custody, and had not yet come for trial. After we discussed the circumstances of the particular case, I told the court officer to write two letters. The first letter was to say: "X [the prisoner] was committed for trial on [a date more than 5 years earlier]. He was refused

bail. He is still in custody." On its face, the information looked bad; even scandalous. The second letter was to say: "In case anyone is interested to know why X has not yet been brought to trial, the facts are as follows. After he was committed for trial, he escaped from prison. He was at large for 3 years. He was re-captured in South Australia, where he had committed a further offence. He was tried and convicted in Adelaide, and sentenced to a short term of imprisonment. When he serves that sentence, he will be brought back to New South Wales, where he will stand trial on the original charge." As you see, something that bears the appearance of hard information may be very misleading.

I suspect that one of the reasons why, in the past, courts, hospitals, universities, and other public institutions have been reluctant to give out information has been a fear that it will be misused, either mischievously, or as a result of misunderstanding. Refusal to provide certain kinds of information is no longer an available option, but the possibility of misunderstanding and misuse remains, and has to be dealt with. People have recently taken to gathering information on judicial productivity. A newspaper identified an unfortunate judge in Western Australia as the nation's least productive judicial officer. He had spent more than a year presiding over a lengthy and complex criminal trial. No doubt he had been required to make a number of rulings each day on objections to evidence, points of procedure, and a host of other problems that arise in the course of a trial. But he had not decided a single case in an entire year. So he had the pleasure of seeing his name in the paper. Presumably, on the same approach to productivity, Australia's most productive judicial officer would be a magistrate presiding regularly over a list of summary offences in which most of the defendants plead guilty. The High Court would be unproductive when 7 Justices devote a day to hearing argument on an appeal, and productive when 3 Justices dispose of 12 special leave applications in a day.

Because the High Court deals with a relatively small number of cases, major statistical variations can result from random causes. I have pointed out to the other Justices that we could make large productivity gains by arranging that special leave applications or appeals that are now listed and heard together be listed and counted separately. A couple of years ago, one solicitor commenced proceedings in the original jurisdiction of the Court representing more than 1,000 people claiming refugee status. Two or three of those cases were decided as test cases, and, thereafter, the rest were either discontinued or remitted to the Federal Court. Those cases could have looked like a flood of litigation threatening to engulf the Court. Alternatively, the orders made disposing of them could have looked like a huge increase in productivity. Both appearances would have been spurious; but that would not be revealed by the raw numbers.

The High Court has for many years issued an Annual Report, and we now have a Public Information Officer. Like all courts, we have to guard against, and respond to, possible misunderstanding of information we provide. In the future, the pressure for information will grow, and so will the risk of its misuse. The quality of information is at least as important as its quantity, and the Court is as much caught up in this problem as other information providers.

2.One of the most important issues facing the Court concerns applications for special leave to appeal. This is a topic that is of keen interest to legal practitioners and other judges, but appears to be off the radar screen of most commentators. For most of the twentieth century, the High Court was not an ultimate court of appeal - there were still Australian appeals to the Privy Council. And, at the same time, civil litigants could appeal to the High Court virtually as of right, provided a relatively modest amount was at stake. That has changed. Parliament has taken the view that the Court's time and resources should be rationed to enable it to discharge its responsibilities as a constitutional court and a court of final appeal. The Judiciary Act was

amended 20 years ago to require that all appellants must have a grant of special leave to appeal.

The Court is at the apex of a judicial system whose base is constantly becoming broader. The number of constitutional cases, and civil and criminal appeals, with which the Court can deal is likely to remain fairly constant. It would not be altered by increasing the number of Justices say from 7 to 9. If that happened, it is virtually certain that a Chief Justice would propose that all available Justices sit on all cases, as in the Supreme Courts of the United States and Canada. If it were otherwise, too much would depend on the composition of the Court in a particular case. In about half of the cases heard by a Full Court, I propose a bench of 5 out of the 7. That is acceptable to the public and the profession, but I am not sure that proposals of 5 out of 9 would be acceptable. Sitting more Justices on a particular case does not make decision-making any quicker or easier.

While the number of appeals we hear is likely to remain fairly constant, the volume of litigation that gives rise to applications for leave to appeal is increasing.

Between 1983 and 2003, the population of Australia increased from about 15 million to about 20 million - an increase of 33%. Over the same period, the number of judges in the Supreme Courts of the States and Territories increased by 35%, but, at the same time, they shed a lot of jurisdiction to District Courts. Over that period the size of the District Court of New South Wales increased by 63%, and the size of the District Court of Queensland increased by 71%. There were 24 Federal Court judges in 1983, and 46 by 2003 - an increase of 92%. The size of the State magistracies grew substantially, and in recent years a new federal magistracy has been created.

The inevitable consequence of this expansion of the litigation base is pressure at the top. That pressure exerts itself at the point of special leave applications. In the year ended 30 June 1985, there were 138 applications for special leave

in civil cases, and 48 in criminal cases - a total of 186. By 1993, the numbers were 265 and 110, a total of 375. By 2000, the numbers were 394 and 125, a total of 519. For the year ended 30 June 2003, the total was 605; but that appears to include an aberrant increase in civil applications. Looking at the trend, the total number of filings rose from about 185 to about 530 over the 18 year period. The rate of increase is steady, and there is no doubt that it will continue. To the extent to which it reflects increases in the numbers of judicial decision-makers in other courts, it is entirely natural. Whether it also reflects an increase in litigiousness of the population, or sections of the population, is more difficult to tell.

With a fairly constant number of appeals and constitutional cases that can be heard, and a relentless growth in applications for special leave to appeal, the process by which those applications are determined is becoming an increasingly important aspect of the Court's business. It is inevitable that the percentage of leave applications that are granted will continuously decrease. The Court will be forced, by the weight of numbers, to be more and more selective.

Dealing with special leave applications is the most onerous part of the work of a Justice of the Court. The cases originate in all courts and cover the entire range of legal disputes. They have usually been through an intermediate Court of Appeal, and involve reviewing the work of some of the nation's most experienced and capable judges. The volume of paperwork is large, oral argument is limited, and we do not reserve our decisions. In the Supreme Courts of the United States and Canada, leave applications are decided, without oral argument, on the papers. This is not necessarily a more efficient way of doing it. Neither of those countries has the tradition of oral advocacy which we share with the United Kingdom. Hearing oral argument from competent counsel assists decision-making. Deciding applications without the benefit of argument from counsel usually requires a good deal more time and attention to detail. Counsel should be able to take the Court speedily to the

essential points. Presenting judges with bundles of papers, without any oral argument, usually makes their task more laborious.

Deciding which cases to accept is a vital part of the work of an ultimate court of appeal. Some leave applications may be better dealt with on the papers, especially if the outcome one way or the other is obvious, or if, for one reason or another, there is likely to be little assistance from oral argument. In other cases, a hearing in court under tightly controlled time limits, following a review of the papers, as at present, is more transparent, more efficient, and more likely to yield a just result. Assigning cases to one category or the other is itself a substantial task. The issue is under active consideration at the moment, and I expect certain changes in procedures this year.

3.This leads to consideration of a wider issue, that is to say, the Court's method of hearing and deciding appeals and constitutional cases.

If, as I have assumed, the number of constitutional cases, and matters in respect of which special leave to appeal is granted, remains fairly constant, then the Court will continue to have the same time to devote to them as at present, subject to any increase in the time required to devote to special leave applications. In that respect, we have, in recent years, increased the number of special leave hearing days at the expense of other hearing days, but the difference is only marginal.

For my part, I see no present need to alter our method of hearing appeals and constitutional cases.

4.Courts of final appeal have different methods for the preparation and production of judgments. It is an issue of interest to the profession, law teachers and students, and judges of other courts. If there is a challenge involved, it is not new, and the question is one about which opinions differ.

Just as the High Court, in its practice of hearing (relatively) extended oral argument, has followed the English rather than the Northern American

tradition, so also in the matter of the form of reasons for judgment the Court's approach has always been closer to that of the House of Lords than that of either the Supreme Court of the United States or the Supreme Court of Canada. One difference from the House of Lords is that the High Court has always delivered a significant number of joint judgments. In the House of Lords, instead of joint judgments, there are often one or two-line statements of agreement with another member of the court. That may be because, technically, their Lordships' opinions are delivered or published as speeches in Parliament.

The publication of joint judgments is common. In the calendar year 2003, 67 Full Court decisions were reported in the Australian Law Journal Reports. In 34 of the 67 cases, the reasons of at least a majority of the Court were expressed in a single judgment.

Of course, individual techniques of judgment writing vary, and this has a bearing on the possibility of a joint judgment. The greater the amount of extraneous material in a judgment, the less likely it is that other members of the Court will commit themselves to that material by joining in the judgment. The American and Canadian practice of having a single majority judgment, or alternatively one leading judgment which is structured so that others may adhere to selected portions, involves a formal discipline that has never been accepted in the High Court, or the House of Lords. There are strongly held views, on each side of the case, as to its desirability. One thing, however, is clear. Such an approach to judgment production requires a consensus. It is not something that a majority of the members of a Court can impose on a minority.

Questions of degree are involved. Although members of the High Court have never conformed to any rigid technique of judgment preparation, the prevalence of joint judgments has waxed and waned at different periods. My view is that they are to be encouraged, although not at the cost of suppression of legitimate and relevant differences of opinion. The extent of encouragement

that is possible, and appropriate, at any given time, of course, is affected by individual preferences and judicial techniques.

Preferences can be related to opinions on wider issues concerning the nature of judicial authority. The orthodox approach to legal precedent requires a search for the binding rule in a case, not a selection from a smorgasbord of dicta. A collection of essays on a legal topic may or may not contain persuasive ideas. But what is authoritative is the Court's decision. The search for a binding rule may be impeded by a multiplicity of separately reasoned judgments. That is why I think joint judgments are to be encouraged. A court of final appeal exercises its authority through the binding effect of what it decides, and the reasons that are essential for its decisions. Making those reasons plain will always be essential to the Court's authority.

5.So far, I have referred only to matters of administration and procedure. I have not interpreted the invitation to speak about future challenges as applying to issues of substantive law that might come up for decision.

There is, however, an issue concerning the way the Court goes about its business, and that affects its substantive decision-making, that should be mentioned. It is significant because it has implications concerning soundness of judgment, and procedural fairness, and also because it overlaps with wider questions as to the proper role of the Court. The issue recently gave rise to a debate between two members of the Court in a case about an injured cricketer. Another member of the Court has since referred to the matter extra-judicially, having previously had something to say about it as the author of a textbook on evidence. A number of commentators have written on the subject. I have in mind the capacity and willingness of the Court to take account of what are sometimes called legislative as distinct from adjudicative facts, that is to say, facts which, although not proved in evidence, are used in formulating legal policy. It is generally accepted that it is a function of the High Court, in a proper case, to consider whether a rule of the common law is suitably adapted to modern conditions, or whether it should be modified or abandoned. But how

far does that responsibility extend? The answer is surely related to the Court's technical capacity to discharge the responsibility in the circumstances of a particular issue or case. A conclusion that a rule of the common law is not suitable to modern conditions is not a proposition of law. It may be, or involve, a proposition of economics, or sociology, or science, or some other discipline. And it may also involve a substantial component of fact. In a given case, there may be a serious question about the completeness and reliability of the information base upon which such a conclusion rests. As Sir Anthony Mason pointed out in 1979, the Court is neither a legislature nor a law reform agency. Its facilities, techniques and procedures are ill-adapted in many cases to undertaking to decide whether common law rules are working well, or are suited to the needs of the community.

Questions about the role of the Court, and the facilities, techniques and procedures available to the Court, are closely inter-related. There is a limit to the distance that can develop between the Court's view of its responsibilities and the Court's techniques, upon where its capacity to discharge these responsibilities fairly and reliably must depend. That is the larger issue underlying the controversy about legislative facts.

6.The principal challenge facing the High Court in the 21st century will be the same as the principal challenge of the 20th century. It springs from the role of the Court in the Federation.

Alfred Deakin's famous description of the Court as "the keystone of the federal arch" was not original. In his speech on the Judiciary Bill in 1902, he placed the phrase in quotation marks, without identifying the source. The phrase was coined by Daniel Webster in a speech to the United States Senate in 1830. He used it to describe the power of the Supreme Court of the United States as the ultimate decision-maker on legal issues arising under the United States Constitution. Webster was arguing against a theory that the States had the capacity to nullify decisions of the Supreme Court. That theory persisted right up until the Civil War.

The acceptance by Federal and State governments, and the public generally, of the principle that the High Court possesses the ultimate power to decide legal issues arising under the Constitution of the Australian Federal Union has always depended, and will continue to depend, upon confidence in the Court's independence and impartiality, and in the legitimacy of its approach to the exercise of judicial power.

Many constitutional decisions of the Court over its first century have put public confidence to the test. Fortunately, however, our Federation has never had to suffer any seismic convulsion. The history of our Union has been mercifully stable. Large changes have occurred in aspects of the federal structure, but they have been gradual and peaceful. Confidence in the Court has never been put to the test in the face of a threat of constitutional disintegration. There is presently no reason to expect that it ever will. But the possibility cannot be ignored. It will always be the first responsibility of the members of the Court to protect the Court's reputation for legitimacy in the exercise of power.