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THE STATE OF THE JUDICATURE

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It has become customary for an address on the State of the Judiciary to be given at this Convention, which is held every two years. Few things in life are certain, but one is that I will not be giving the next such address. Since this is my last, I will take the occasion to make some comparisons, and identify some trends, covering a longer period than usual. This might give a better idea of future directions than can be gained from concentrating on recent events.

The size and structure of the Australian judiciary

When Sir Garfield Barwick delivered the first State of the Judicature address in 1977[1], the total number of judicial officers (judges and magistrates) was 587. Of those, 55 were Federal judges, 497 were State judges or magistrates, and 35 were Territory judges or magistrates. In December 2006, there were 957 judicial officers. Of those, 140 were Federal judges or magistrates. New South Wales (272) and Victoria (205) continue to appoint the most judicial officers, but the

Commonwealth Government has moved into third place. This is due mainly to the recent creation of the Federal Magistrates Court, which now has 48 members. That number is expected to increase further this year. The percentage increase in the number of judicial officers over the last 30 years (about 90%) was twice the percentage increase in population (about 45%)[2].

The Federal Magistrates Court was established under Ch III of the Constitution. Its members have the same constitutional guarantees of judicial independence as the Justices of the High Court and of the Federal Court and the Family Court. The Court was established for the purpose of exercising, in less complex cases, much of the jurisdiction previously, and still, exercised by those two Courts.

Since 1977, State magistrates, who for most of the 20th century were State public servants, have largely integrated with the judiciary, and now have the formal independence of judges. That happened in New South Wales, for example, under the *Judicial Officers Act* 1986 (NSW). The status of the magistracy in Australia is continuing to evolve[3]. The disposition of civil and criminal matters where appropriate by summary procedures, or by procedures suitably adapted to less complex cases, is a vital part of the system's response to the twin problems of cost and delay, and to the need to provide citizens with reasonable access to justice. Most justice systems throughout the world attempt to distinguish, in one way or another, between cases that require more complex procedures, and cases that do not. A civil case

about property damage resulting from a minor traffic collision in Macquarie Street is not likely to require, or justify, the same treatment as a case resulting from a major collision between two oil tankers in Sydney Harbour. An indictable criminal offence is ordinarily tried before a judge and jury; a minor offence is dealt with summarily by a magistrate. Without some capacity to differentiate, on a rational basis, between cases that require different forms of judicial process, the system would collapse under its own weight. That does not mean that cases dealt with by summary, or relatively uncomplicated, process are less important. On the contrary, for most people, this is the level at which any encounter with the courts is likely to occur.

International instruments, including instruments to which Australia is a party[4], declare that, in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The growth of a fully professional magistracy, supported by adequate programmes of formation and continuing education, organised in a manner that secures structural independence of the executive branch of government, and recruited according to procedures consistent with such professionalism and independence, is an expression of the rights of citizens. It is one of the two most important developments in the Australian judicature in the last 30 years. The development is continuing. It merits support from the profession and from governments. It would be a serious mistake for the legal

profession to overlook the importance of the professionalism and independence of the magistracy.

Since 1977, the judicature has become fully Australian. At the time of Sir Garfield Barwick's address, the High Court was not at the apex of the court system. Appeals still lay, both from State Supreme Courts and from the High Court itself, to the Privy Council. Such appeals disappeared by a gradual process. In 1980, I appeared as counsel for the appellant in the last appeal that went from the High Court to the Privy Council[5], but appeals to the Privy Council from State Supreme Courts continued for several years after that. The ending of appeals to the Privy Council reflected changes in Australia's relationship with the United Kingdom; changes exemplified by the High Court's decision in 1999[6] that the United Kingdom had become a foreign power within the meaning of s 44 of the Constitution. Plainly, it was not so regarded in 1901. The decision showed the Constitution's ability to respond to changed circumstances. In 1901, the Founders had a view of power in which Australia's place as part of the British Empire was central. Australia's foreign relations were largely conducted from London, the Australian States had recently been colonies, and the Judicial Committee of the Privy Council was the court of last resort. When Australia went to war in World War I and World War II it did so in consequence of decisions made in London, not in Sydney or Melbourne or Canberra. The Bank Nationalization case was finally decided, not by the High Court, but by the Privy Council[7], as were many other important constitutional cases. So long as appeals to the Privy Council subsisted,

there was no common law of Australia, capable of local change and development. Now Australian courts still receive valuable guidance from the decisions of the common law courts of other countries, including the United Kingdom, but there is a common law of Australia, and the High Court has the final responsibility of declaring its content, just as it has the final responsibility of deciding the meaning of the Constitution.

The last 30 years have seen the establishment and growth of the Federal Court of Australia; a court of extensive civil jurisdiction whose members are recruited from substantially the same professional base as the members of the State Supreme Courts, and who handle work that in many respects corresponds with the civil work of Supreme Court judges. To date, the Federal Government has continued the practice, which goes back to Federation, of relying largely on the State judiciaries to administer Federal criminal laws. Unlike the Federal Court of the United States, which does a lot of criminal trial work, our Federal Court's work is substantially civil. How long that will continue may be a question, especially in the light of greater Federal activity in criminal legislation resulting from drug trafficking and international terrorism. I understand it is proposed to give the Federal Court criminal jurisdiction in cartel prosecutions. This raises a practical issue. Section 80 of the Constitution, which provides that the trial on indictment of any federal offence shall be by jury, has been interpreted to mean that verdicts at such trials must be unanimous, and that an accused person cannot waive the right to a jury trial and agree to trial by judge alone[8]. In both

these respects, the law with respect to Federal offences is different from the law which applies in relation to most State offences.

As its name implies, the Family Court is a specialist court, and in certain respects its procedures are atypical, and tailored to its special role. In particular, disputes concerning children are dealt with in a fashion that is self-consciously less adversarial than the ordinary civil trial process. Counselling and mediation play an especially important part in the work of the Family court.

State and Territory courts still deal with most civil litigation and almost all criminal justice. In most States, there is a three-tier court structure consisting of a Supreme Court, a District or County Court, and a magistracy. In most States, within the Supreme Court there is an appellate court or division, which hears appeals from District or County Court judges, and from single judges of the Supreme Court. The judges of such division or court usually specialise in appellate work, although many of them have had previous experiences as trial judges.

In an earlier State of the Judicature address I discussed the question of a "national" or "integrated" court system[9]. Consideration of the creation of the Federal Court in the 1970's prompted some different proposals, such as an Australia-wide intermediate appellate court, but those proposals did not attract much interest outside, or even within, the legal profession. They were put up mainly as alternatives to the new Federal Court, and interest waned when it was established. Now that

most States have set up intermediate appeal structures within their own Supreme Courts, (a move that has not been followed in the Federal Court), the idea of an Australia-wide intermediate appeal court seems further away than ever. It is to be remembered that, in Australia, the States and Territory governments appoint their own judges and magistrates. This is unlike Canada, where the Federal government appoints not only the Federal judges but also the judges of the Provincial superior courts. The position is different again in the United States, where the judges of some State courts are elected by popular vote at a State level. Federal judges in the United States are all appointed (for life) by the Federal government. There is already a degree of movement in Australia between State and Federal courts. Four of the seven present members of the High Court were formerly members of State Supreme Courts. It is not unusual for a State Supreme Court judge to be appointed to the Federal Court, and vice versa. It has been common for Federal Court judges to hold commissions as judges of a Territory Supreme Court. It is not unusual for judges of a State or Territory Supreme Court to serve as acting judges of another State or Territory court. This is to be encouraged. In the past, it has been done largely as an expedient to solve short-term or transitional problems in particular courts, and its advantages as a form of judicial exchange were incidental. Properly done, it could become a routine method of creating more inter-action between different judiciaries, to the benefit of the court system generally.

Court process

It is true, but an over-simplification, to say that civil and criminal process in Australia, both at trial and appellate levels, adheres to the common law adversarial model. There are specialist jurisdictions, such as the Family Court, that seek to minimise the adversarial nature of litigation. Even within the mainstream jurisdictions, the adversarial model itself changes.

The traditional common law method of trying issues of fact, in both civil and criminal cases, was by jury. This is still true in the case of serious criminal charges, but it is no longer true of civil justice. In most Australia jurisdictions, trial by jury in civil cases is now the exception rather than the rule.

A feature of trial by jury is the orality of the process. A jury trial relies heavily on oral presentation of evidence and argument, and oral directions to jurors. It is a cumbersome procedure. Modern civil trials before judges sitting without juries rely much more on written presentation of evidence and argument. This does not mean that civil procedure is speeding up. On the contrary, most forms of trial seem to be lengthening. Trial judges place much emphasis on case management, both before and during hearings, but over-vigorous intervention can expose them to complaints of unfairness. Litigation is a perfect example of Parkinson's law: work expands to fill the available time. A capacity to exert firm control of counsel and witnesses without sacrificing fairness is necessary for a modern judge. It is one reason

why experience as a trial lawyer has always been regarded as a qualification for judicial appointment. It is not a sufficient qualification, but, if it is lacking, then the system of judicial training needs to find a way to make up for it. Appeal courts also seek to ensure that their limited time is used to best advantage. In Australia, we continue to employ, even at the highest level, appropriately directed oral argument in combination with written material, in the English tradition, rather than the North American practice of relying very largely on written presentations. Even so, in both civil trial and appeal courts, the use of written materials has increased greatly. Judges are now expected to do more and more of their work outside court sittings. The idea that the characteristic work of judge is sitting in a courtroom and listening was never accurate, but it is now completely out of date. In Australia, it is rare that a judge has the capacity to arrange his or her time so as to write a judgment in the last case before beginning to hear the next. Such a comfortable procedure would be beyond the expectations of most judges, who are obliged to balance their time in and out of court to cope with reserved judgments. Conducting a jury trial requires skill, but it produces no reserved judgments. The reduction in importance of civil jury trials, and the greatly increased use of written evidence and argument, combine to intensify the work of trial judges.

Jury trials continue to be important in criminal justice. They, also, are becoming longer. The increasing complexity of the criminal trial process is of concern within the judiciary and the profession. A topic of special concern is the length and complexity of directions to juries.

Assigning blame for this between trial judges and appeal courts is a popular judicial pastime, but I am not sure that it is fruitful. A summing-up to a jury is intended to be a form of communication, not a display of knowledge and certainly not an exercise in reputational self-preservation. A judge who directs a jury at a murder trial does not set out, and should not be expected by an appeal court to undertake, to deliver a lecture on the law of homicide. The object is to enable the jury to make such decisions about issues of fact as are necessary to pronounce a verdict. The aim should be to tell the jury only as much about the law as they need to know in order to carry out their task. The task of juries is to decide issues of fact and, under the legal guidance of the trial judge, find a verdict. Unnecessarily complex legal directions do not assist. Justice does not require that the criminal law, as enacted by Parliaments, or as formulated by appeal courts, should become more and more complicated.

Both within and outside the court system, there is increased emphasis on various forms of alternative dispute resolution. Arbitration has long been an important alternative to litigation, and has certain advantages, especially as a form of resolution of commercial disputes. Other procedures, such as mediation, conciliation, and early neutral evaluation, are also widely used. The courts have never had the capacity to resolve by judicial decision all, or even most, of the civil cases that are brought to them. Most legal disputes never come before courts; and most court cases are resolved by agreement between the

parties rather than judicial decision. The formal and informal procedures that facilitate such agreements are an essential part of the system.

Appointment and retention of judges

In Australia, judges are appointed by the Executive branch of government. It is not unusual for such appointment to be from one level or part of the judiciary to another. People who are under consideration for appointment to judicial office, especially to appellate courts, may be judges already. Even in the largest jurisdiction (New South Wales) the number of appointments to judicial office each year is relatively small. So far, Executive governments have not felt the need to share their power with some independent authority. In the case of the High Court, appointments are made only once every three years or so, and most potential appointees are already serving judges. They do not apply for promotion, and it is to be hoped they never will. If judicial promotion were to become the outcome of a competitive process the implications for independence would be obvious. It is one thing to permit, or invite, people to apply for judicial office; it is something altogether different to require them to make application. Furthermore, if an appointment process required choice between competing applicants, then, to be truly transparent, it would be necessary to reveal the identity of the applicants.

In some legal systems, especially in civil law systems, the judiciary itself has a formal role in the appointment of judges. That is

not the case in Australia. Judges, especially heads of jurisdiction, are commonly consulted about possible appointments, but they are not involved in decision-making. The views or wishes of a Chief Justice may or may not be influential with the government of the day. At the least, a Chief Justice is likely to be well informed about some relevant matters, and governments may value that information, but Attorneys General consult widely. Responsibility for making a bad or unpopular selection lies where the power lies: with the political arm of government. Whether that power ought to be shared, or its exercise controlled by formal inclusion in the decision-making process of people outside government, is political question. If that were to occur, the involvement of the judiciary itself in that process would become an issue.

The practising profession, especially the Bar, remains the primary source of potential candidates for appointment. In recent years, there has been a welcome interest by governments in widening the judicial gene pool. This has led to greater diversity in the judiciary. It has, however, made more obvious the importance of judicial training and development; a subject to which I will return.

A change that was probably not foreseen 30 years ago was the departure from the judiciary of a substantial number of men and women who do not regard themselves as having reached the end of their working lives. I am not referring to those (of whom there will always be a few) who, after perhaps a short time, find judicial work so uncongenial that they decide to give it up, or who may have other pressing reasons to

leave. When that happens, it is in nobody's interest that they should feel obliged to continue in office. Subject to appropriate rules designed to preserve the reality and appearance of impartiality (which now exist in most Australian jurisdictions) there is no reason to impede their return to professional practice. When governments in Australia appoint judges, they do not require an undertaking that the prospective appointee will never, in any circumstances, return to private practice. I would not have given such an undertaking. Judges are usually appointed in middle age, and if, for some reason, a judge resigns, that could occur well before the end of his or her working life. A more recent development is the departure from judicial office, perhaps when they have reached an age of compulsory retirement (commonly at 72 or 70), or perhaps earlier when their pension entitlements have accrued (commonly at 60), of people who do not intend to retire from all forms of gainful activity. Subject to the qualification I mentioned earlier, people in this position can continue to make a valuable contribution to the profession and the community. Furthermore, their right to work is not to be disregarded. In practice, the largest users of the services of ex-judges are the various governments themselves. The important thing is that there should be appropriate rules of professional conduct designed to ensure that post-retirement activity does not compromise the impartiality of the courts in which they used to sit.

Accountability

Australian courts now regularly publish Annual Reports or Reviews designed to provide governments, and the public, with information about their activities. That information is routinely analysed and publicly discussed. Sometimes there are attempts to use such information for inappropriate comparisons or conclusions; but that is to be expected. Nobody has yet devised a satisfactory indicator of judicial productivity, probably because the concept of productivity of judges is no more amenable to measurement than the productivity of parliamentarians. It is possible to measure some aspects of the performance of a judge or a court; and this may have utility. Justice, however, is more a matter of quality than quantity, and the desired judicial product is not a decision, but a just decision according to law. Measurements can be useful indicators of efficiency in the application of resources, and of the adequacy of resources. Governments are entitled, in fact bound, to seek a proper accounting for the use of public resources, and courts themselves need to know that their resources are being used to best advantage. The development of interest in this topic over the last 15 years is a good thing. How can courts expect governments to give them the necessary resources unless they are prepared to satisfy governments that their resources are being applied efficiently?

More controversial is the topic of that form of accountability involved in procedures for dealing with complaints. I was appointed Chief Justice of New South Wales not long after the creation of that State's Judicial Commission. For almost 10 years I was its President. I

remember, as a barrister, watching the controversy at the time of the creation of the Judicial Commission in 1986, and I remember, as a newly appointed Chief Justice in 1988, having to handle some of the continuing consequences of that controversy. A lot of that trouble has now been forgotten. At least in its present form, the Judicial Commission has come to be well accepted by the New South Wales judiciary. It relies heavily on the cooperation of the judiciary for its functioning. There are, however, two matters that were impressed on me by my experience. First, the existence of the Commission creates, in the minds of some people, an expectation that, for constitutional reasons, may be difficult or impossible to fulfil. It leads some people to believe that judges can be punished for behaviour that does not constitute a criminal offence; perhaps, even, that they can be punished for judicial error. In sufficiently serious cases, a judge may be removed from office, for incapacity or misbehaviour, by the Governor-General or Governor on an address of Parliament. Of course, if a judge is alleged to have committed a criminal offence, then he or she is amenable to the ordinary criminal justice system. But the Judicial Commission does not function as some kind of disciplinary tribunal, imposing lesser penalties for conduct that does not justify removal. And resignation from office is not a means of avoiding punishment; it brings about the very result that would follow from removal by the Governor. There is a related point: devising a procedure for dealing with complaints of serious misconduct (criminal offences or behaviour potentially justifying removal) is not difficult; the problem is devising a procedure to deal, to the satisfaction of all concerned, with complaints of conduct that is not a criminal offence and that could not

possibly justify removal. Complaints of that nature, and complaints about matters that can be dealt with by the ordinary appeal process, together constitute the great majority of complaints to the Judicial Commission. All complainants regard their complaints as serious, and satisfying complainants in a manner that respects the imperative of judicial independence is not easy. In the case of Federal judges of course, the requirements of the separation of powers inherent in the structure of the Constitution raise an additional consideration.

Judicial training and professional development

I said earlier that the achievement of the independent status of the magistracy was one of the two most important judicial changes of the last 30 years. The other is the recognition, by the judiciary, the legal profession, and by governments, of the importance of judicial formation and continuing education. The creation of the Australian Institute of Judicial Administration, the establishment in 1986 of the Judicial Commission of New South Wales, the setting up of formal educational programmes in other jurisdictions, and the creation in 2002 of the National Judicial College were all important steps in this development.

For most of the 20th century, it was assumed that practical experience in advocacy provided all the training that was needed for judicial office, and judges and magistrates, once appointed, were left to their own devices to keep up with changes in the law and with any other professional needs. In effect, governments relied on the Bar to train

judges, and relied on judges, once appointed, to maintain their own professional competence. Among many judges, there was a distrust of anything that suggested an attempt at pedagogical influence, and a reluctance to appear to devote any part of their working hours to anything other than judging. In 1988, there were judges who were concerned that judicial education would be used for inappropriate proselytisation, and would threaten independence. When the Supreme Court of New South Wales commenced to hold regular educational programmes, some judges were anxious that they take place at weekends so they would not appear to be cutting into court time. It required a cultural change for people to accept that judicial formation and continuing education ought to be regarded as part of the job. It required a similar cultural change for governments to accept that a properly funded judicial system must provide for this need.

Australian courts now have well-established, formal, programmes of training and continuing education for judges and magistrates. In funding, we still lag behind some comparable jurisdictions such as Canada, but good progress has been made. In particular, the National Judicial College has become a significant part of the legal landscape. One of the pragmatic considerations that appears to have influenced governments is their desire to widen the recruitment base for judicial officers. The Bar's virtual monopoly on judicial appointments was, in practice, closely related to the absence of any kind of formal training for new judges. The assumption that experience in advocacy was the best, and the only, training needed, meant that few people who were not

experienced advocates were willing to take on the responsibility. Governments have come to realise that if they want to be taken seriously when they say that judicial appointment should be open to a wider class, there must be educational arrangements that make that a practical possibility[10]. They have also come to realise that it is no longer acceptable to expect that, once appointed, judicial officers will be left to attend privately to their own professional development.

Judicial leadership

Federal in structure, and national in perspective, the judiciary's capacity to relate appropriately to the other branches of government, and to the public, depends upon effective organisation and leadership.

In 1962, the Chief Justices of the States met in Melbourne to discuss some topics of common interest. They met again in Hobart in 1963. Thereafter, State and Territory Chief Justices, sometimes joined by the Chief Justice of New Zealand, met approximately every two years. In 1982 they were joined by the Chief Justice of the Federal Court and in 1993 by the Chief Justice of the Family Court. In 1992, they began to meet annually and, from 1994, twice a year. In 1993, the Chief Justice of the High Court began to participate in these meetings as the permanent Chairman. The body was reconstituted as the Council of Chief Justices of Australia and New Zealand. In some respects, it is the judicial counterpart of the Council of Australian Governments or the Standing Committee of Attorneys General. It has no capacity to make

decisions binding on the courts of individual jurisdictions. Its influence and moral authority stem from the standing of its members. Any resolutions are based on consensus.

I have already mentioned the National Judicial College and the Australian Institute of Judicial Administration. Another important organization is the Judicial Conference of Australia, a professional association of judicial officers was established in 1994. Its members, more than 500 in number, include judicial officers from all Federal, State and Territory Courts.

International relations

Globalisation affects the work of the courts just as it affects all other areas of government and business. As to substantive law, the development of the common law is influenced by what goes on in other countries. Similar problems arise for solution in the legal systems of all liberal democracies, whether they be based on the common law or on civil law, and Australian courts are interested in the way others address those problems. The days when Australian courts looked only to the United Kingdom are gone. The decisions of English courts are still frequently referred to, but so are decisions from all other major common law jurisdictions, and, on occasions, decisions of civil law courts. International instruments are influential in domestic legal thinking, and legal issues with significance for human rights are necessarily affected by international developments. As to legal process, court management,

judicial formation and professional development, and issues concerning the role of the judiciary, there is substantial contact between Australian judges and their overseas counterparts.

In the Asia-Pacific region, Australian judges have been active in judicial studies programmes. I gave some examples of this in my 2005 address[11]. They include the work of the Federal Court in the Indonesian Judicial Training Program, the work of The Centre for Democratic Institutions at the Australian National University and the Centre for Asia and Pacific Law Studies at Sydney University, exchange visits with judges of the Peoples Republic of China, training programs conducted by the Judicial Commission of New south Wales and the AIJA, and judicial service by Australian judges in South Pacific jurisdictions. Australia plays a prominent role in LAWASIA. The Chief Justices of the apex courts in Asia-Pacific region (including, for example, the Chief Justices of the People Republic of China, Japan, India, Hong Kong, Russia, Thailand, Malaysia, Singapore, New Zealand and Australia) meet every two years. Those meetings are hosted by the Chief Justice of the country which is hosting the LAWASIA Conference. The conference programme is arranged by the Judicial section of LAWASIA which until recently was based in Western Australia, and is now based in Queensland.

The interaction that now takes place between the Australian judiciary and the courts and judges of many other countries, especially in

our own region, is something that has developed strongly over the last 15 years. It will continue and increase, to the benefit of the Australian judicature.

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[1] (1977) 51 ALJ 480.

[2] According to the Australian Bureau of Statistics, the population in 1977 was 14.3 million and in 2006 was 20.7 million.

[3] See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2003) 218 CLR 146 at 153 [4].

[4] See, eg The Universal Declaration of Human Rights, Art 10; the International Covenant on Civil and Political Rights, Art 14(1).

[5] *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300.

[6] *Sue v Hill* (1999) 199 CLR 462.

[7] (1949) 79 CLR 497.

[8] *Cheatle v The Queen* (1993) 160 CLR 171.

[9] (2000) 74 ALJ 147 at 148-150.

[10] "Judicial selection and training: Two sides of the one coin" (1995) 77 ALJ 591.

[11] State of the Judicature Address, 24 March, 2005.