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THE JUDICIARY IN FEDERATION CENTENARY YEAR -

GOOD NEWS, BAD NEWS, NO NEWS

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THE ERMINE HAIR-SHIRT

John Mortimer, now happily Sir John, has spent a lifetime watching judges. His terribly unfair portrayal of those selfless servants of the law in England, in the megapopular *Rumpole of the Bailey*, has had people laughing at the judiciary and our tradition in the four corners of the world. Sir John is also a close observer of, and contributor to, the mass media. In a homely set of warnings for would-be judges, he declares¹:

* Justice of the High Court of Australia. The tables were prepared by Mr Tim Gordon, Legal Research Officer, High Court Library.

¹ J Mortimer, *Rumpole, The Age of Miracles (Rumpole and the Tap End)*, Penguin, 105.

"There is [a special] danger inherent in the judicial office: a judge, any judge, is always liable to say, in a moment of boredom or impatience, something downright silly. He is then denounced in the public prints, his resignation is called for, he is stigmatised as malicious or at least mad and his Bench becomes a bed of nails and his ermine a hair-shirt".

In these remarks, I will invite you to join me on the bed of nails. And could there be a more elegant judicial boudoir than the Banco Court of the Supreme Court of New South Wales? I used to sit in this beautiful courtroom, as President of the Court of Appeal. I did so whenever I could persuade the Chief Justice to go to an overseas conference. Sadly, neither Sir Laurence Street nor Murray Gleeson found quite the same interest in such events as I did. Now, my ermine is cast aside. The High Court's robes resemble the trifling garment that novitiate monks of Calabria wear in preparation for flagellation. For us, the gaudy garments are no more. We sit in front of television screens, linked to the far reaches of the Commonwealth, subjected to a verbal punishment that, mercifully, we ourselves can control by flashing lights. Every so often we dish out a little punishment ourselves. Mortimer could make a great series were he to migrate to Australia. He should be tempted by the promise of a lifetime's supply of the best champagne.

This day is full of portents. The 22nd of June is the day that both Napoleon and Hitler chose to begin their respective marches to Moscow. Each of them completed his march in utter ruin, exile or

death. I can only pray that these remarks of mine will have an impact falling slightly lower on the Richter scale of catastrophes.

I imagine that I was invited to give this oration out of recognition of the fact that, in little more than a month, I will achieve an ambition and become Australia's longest serving judicial officer. When that AIJA old faithful, Trevor Olsson, finally departs his seat on the Supreme Court of South Australia on 31 July 2001, I will ascend to the top of the ladder of judicial longevity. I pay tribute to Olsson J and to Heenan and Pidgeon JJ of the Supreme Court of Western Australia who retired a few months back. In my youth, such long service was the norm for judges in Australia. In the future, it may be less likely to be so². Already, the long lasters in the judiciary are a declining breed. Nowadays, many judges leave when they have had enough of the slings and arrows. They set up their shingles with Trevor Morling & Co³. Or they return as Acting Judges, electing when they will work or no.

Isaac Newton once said that each new generation of scientists stands on the shoulders of the generation before. So it is with

² cf *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collections Act 1997* (Cth).

³ Thirty judges have resigned from the federal judiciary in recent years before attaining the age of 70 but after reaching pensionable age: Remuneration Tribunal *Judicial and Related Offices' Remuneration 2001 Review* - Discussion Paper, 2001.

lawyers and judges. But the shoulders that I stand on are of judges of a very different time.

When I was first appointed in December 1974, the federation was a quarter century short of its centenary. Sir Garfield Barwick was Chief Justice of Australia. A week before I took my first judicial oath, Sir Douglas Menzies had died at the annual Bench and Bar Dinner in Sydney, two metres distant from me. The Bench of those days, federal and State, had not changed much during the century. The robes and wigs were uniform. The federal judiciary was very few in number. The State courts dominated the judicial stage. The High Court was itinerant: doomed to wander the face of the continent as the Flying Dutchmen did the seas. The Bar was small. Everyone knew each other. Only barristers were appointed to be judges. There was but one woman judge, Roma Mitchell, appointed in 1965. News coverage of the trial courts concentrated (as still it does) on the big murders and the cases having the odour of sex. Such coverage as there was of the appellate courts was small, factual and generally restrained. There was no vision of the judges as objects of infotainment. There was little media coverage, and virtually no media analysis, of the decisions of the High Court.

GOOD NEWS

Now we are in the centenary year of our federation. Many who have gone before have reflected on the good and the bad of the

federal Constitution⁴, on our debt to our British heritage⁵ and on the fundamental challenges that face the institutional arrangements that the Australian Constitution sets in place⁶. I do not want to repeat these themes.

Australians are not alone in reconsidering the needs to review their judicial arrangements and to renew those of them that are proved in need of improvement. In the United Kingdom, to whose legal traditions Australians are heirs, there are remarkable changes afoot, some of them already accomplished. In fact, the United Kingdom is in the process of creating a kind of federal system, though never to be called such. The Privy Council, that most ancient of judicial bodies which rescued Australian law in the early days from parochialism⁷, is about to metamorphise itself into a national supreme court in Britain. But it will be one operating under the eagle eyes of the European courts in Strasbourg and Luxembourg⁸. In the Netherlands⁹, and indeed everywhere else (as

⁴ A M Gleeson, "Celebrating a Historic Coming of Age", *Sydney Morning Herald*, 27 November 2000, 11.

⁵ Spigelman, "A Nation Wise beyond its Years", *Sydney Morning Herald*, 11 July 2000, 13.

⁶ G Williams, 'Out of Date Constitution will cost us Dearly', *Australian Financial Review*, 21 July 2000, 34.

⁷ F C Hutley, "The Legal Traditions of Australia as Contrasted with those of the United States" (1981) 55 ALJ 63 at 69.

⁸ R Hazel (ed) *Constitutional Future: A History of the Next Ten Years*, United Kingdom, School of Public Policy, University of London, the Constitutional Unit, What do Top Courts Do?, 19.

in Australia), the judiciary is under pressure for change. The sources of the pressure are similar. They include the asserted need for greater speed in the handling of cases; demands for greater real accountability to the public; and pressure to impose on the judiciary management efficiencies, performance indicators and standardisation that economists take for granted in other branches of government but which judges have somehow to reconcile with their abiding duties of professional autonomy and constitutional independence¹⁰.

In the light of what they read about cases in which they participate, it is natural that many Australian judges view the mass media as the purveyors of trivia and error about the courts. Yet not all the news of recent times has been bad. Every now and again there are little nuggets of good news that just cannot be suppressed:

- There is the report of the survey of the Courts' Administration Authority in South Australia in 2000 that showed that more than 80% of defendants considered that magistrates treated them fairly and 87% thought that the judicial officers were courteous. The figure rose to 94% in respect of court officials. The main

⁹ P Langbroek and M Okkerman, "Two Judicial systems under Pressure for Change: the judicial organisations of Australia and the Netherlands" (2000) 10 *Journal of Judicial Administration*, 77.

¹⁰ D Drummond, "Towards a More Compliant Judiciary?" (2001) 75 ALJ 304

complaints were the usual ones: inaudibility, lack of facilities for children, poor courthouse signage and no television to help while away the time whilst waiting for the case to be heard¹¹.

- Sometimes the media springs to the defence of the judges or, by an appropriate intervention, the judges are given a chance to explain their viewpoint. This happened in February 2001 with Chief Justice Phillips's letter to *The Age* that produced an editorial acknowledging "the Chief Justice is right to resist a State government plan for interchange [of] judges"¹² [between the trial division and the Court of Appeal].

- In between many articles criticising the small pool of lawyers from whom Australia's judiciary is chosen, comes a story that acknowledges the intellectual richness of that pool and the talent that is now being depleted by international law firms that are taking away "the cream of the crop"¹³ - a global feature missing in earlier times.

¹¹ K Wien, "Defendants get fair go", *The Advertiser*, 7 November 2000

¹² "No shortcuts to justice", *The Age* 23 February 2001, 16.

¹³ K Towers, "Who's gobbling up our legal talent?", *Australian Financial Review*, 12 July 2000, 15.

- Proposals to scrap wigs¹⁴ will always attract a favourable press for a day or two. It is as if journalists, and other professionals, feel a need to reduce judges and barristers from the status that somehow that little topping of horsehair is perceived to give them. In the High Court not only are the judges unwigged but now many of the advocates have taken the plunge to wiglessness. Last month even Lord Phillips, Master of the Rolls in England, called for the wig to be ditched in the United Kingdom¹⁵. His talk was illustrated in *The Times* by a cartoon showing a wigless old man in a cardigan arrested whilst entering Court No 1 protesting "I'm not the defendant - I'm the judge".

- The proposal to establish a Judicial College in Australia seems to have attracted a good press although the progress towards bricks and mortar seems slow¹⁶. Continuing education is another big change that has come over the judiciary during my service. Back in 1974, you were just expected to know what to do. You were thrown straight into the deep end. Now, mercifully, there is a little preparation for the judicial life in which the AIJA plays an important part, not only for Australia but for our region.

¹⁴ "Judges may scrap wigs", *West Australian*, 22 December 2000, 10.

¹⁵ F Gibb, "Top judge calls for compensation scheme", *The Times*, 21 May 2001.

¹⁶ *Herald Sun*, 20 February 2001, 20; "Educating judges a national obligation", *The Australian*, 28 July 2000.

- Outside the mass media, the Internet brings statutes, transcripts and court decisions into millions of Australian households and onto the desks of judges and lawyers. Videolinks challenge the tyranny of our distance. We have not quite solved the problem presented by litigants in person (although the AIJA is working on that too¹⁷). We still seem a long way from artificial intelligence replacing the judiciary. But with a fall-off in people willing to accept John Mortimer's ermine hair-shirt, it may be that for the judiciary AI - artificial intelligence, that is - will come not a moment too soon when at last it arrives.

- And in the international sphere, despite dissent in some quarters, the federal government is supporting the establishment of an International Criminal Court¹⁸. A trend for our future can be noted here too. Justice David Hunt, one of our country's most experienced judges, was elected (and this year re-elected) to the International Criminal Tribunal on the Former Yugoslavia. And Professor Ivan Shearer succeeded Justice Elizabeth Evatt on the United Nations Human Rights Committee. He did so at a time when the United States, for the first occasion, failed to secure election to the Committee.

¹⁷ Australian Institute of Judicial Administration, *Litigants in Person - Issues for Courts and Tribunals* (2001).

¹⁸ D Williams, "Judging the Perpetrators of Atrocities", *Daily Telegraph*, 24 April 2001, 19.

So there is good news in the law this year, including for the judiciary. And the best news of all is that, in Australia, judicial officers continue to uphold, every day, the three promises which the *International Covenant on Civil and Political Rights* demands of a judge: Competence. Independence. Impartiality. You can count on the fingers of your hands the number of countries in which these qualities are a commonplace. I tell visitors from overseas that my proudest boast in 27 years as a judge in Australia is this: I have never received a telephone call from a Minister about a pending case. I have never had a call from a general, a captain of industry or a trade union. Media can shout at us through their editorials. But in Australia, the judiciary has, with very rare exceptions, remained faithful, throughout the federation century, to its tripartite compact with the people. We must ensure that, whatever happens in the future, those promises are still kept.

BAD NEWS

In considering the bad news, it is necessary to get it in perspective. This requires consideration of the truly bad news from other lands. Even from countries with legal systems similar to our own.

At the beginning of the year, the United States was riven by a court case in its Supreme Court that effectively delivered the

presidency of that country to Mr George W Bush¹⁹. Justice Stevens was moved, in his dissent, to declare that the winner of the election might never be known but that the loser was "the public's confidence in the judge as an impartial guardian of the rule of law"²⁰.

Yet in the United States, where judges often labour under an unremitting media spotlight, there are many stories that must cause anxiety to citizens. The fierce campaigns in those States where judges are elected are reportedly "getting noisier, nastier and costlier"²¹. Judges who sleep even during cases involving capital crimes²². The American Bar Association has lost its role as adviser to the President in evaluating persons suitable for the federal judiciary²³. The political process has delayed, in a most worrying way, the filling of vacancies in the federal judiciary²⁴. A report of a task force examining the distinction between legitimate criticism of judges and intimidation has been published. Amongst other things,

¹⁹ *Bush v Gore* 69 USLW 4029 (2000).

²⁰ *Ibid*, per Stevens J at 4037.

²¹ W Glaverson, "Fierce campaigns signal a new era for State courts", *New York Times*, 5 June 2000, 1.

²² Reported *New York Times*, 5 November 2000, 7.

²³ A Goldstein, "ABA's role in better US judiciary is reviewed", *Washington Post*, 20 March 2001, 1.

²⁴ *Washington Post*, 24 March 2001, pa 20.

it has urged that a "counter-speech campaign" is necessary to respond to the huge increase in unjust and threatening criticisms of the judiciary in the United States. Furthermore, the report urges that the public must be educated in the actual role of the courts and about the independence of judges - subjects that have been shamefully neglected in the United States as in Australia²⁵.

Yet we have not reached the levels of difficulty that are faced in the United States. However, we have seen some shocking examples of calumny against judges in the Australian media²⁶. I refer to comments by some political leaders a few years back about some judicial decisions. Twenty-five years ago, when the law of scandalising the court was in full flight, comments might be critical, but they remained respectful of the institution. Nowadays, abuse and insult are not unknown. Every judge can accept criticism and acknowledge that sometimes it is warranted. But Australians must be careful to avoid the perils of damage to our institutions that the judiciary faces in the United States. We should not think that those perils are alien to our arrangements simply because we do not elect judges. As Justice Ruth Bader Ginsburg of the Supreme Court of the United States reminded an Australian audience earlier this year, the attacks extend in the United States to the federal judiciary, which is

²⁵ "A shadow over justice", *Trial*, April 2001, 20.

²⁶ M D Kirby, "Attacks on Justice - A Universal Phenomenon" (1998) 72 ALJ 559.

unelected, and right up to the Supreme Court²⁷. Often it is vicious and personal – because, increasingly, that is the standard of the times.

Nor should we think that we are immune because of our distinct British judicial traditions. Those traditions were also inherited in Zimbabwe. But anyone following the recent events in that country will know of the shocking assault on the judiciary that has happened there in recent months²⁸. Fortunately, it appears that President Mugabe has pulled back from the brink. Yet a Chief Justice was driven from office and an Acting Chief Justice has been appointed, evoking a strong message of criticism from lawyers of every ethnicity. Australian judges have responded to the troubling events in Zimbabwe by sending messages of support to the independent judges of that country. And, on occasion, to judges in Pakistan, Malaysia and other lands of our judicial tradition²⁹. Their predicament is a warning of what can happen when fundamentals about the judiciary are forgotten or undervalued.

²⁷ R B Ginsburg, "Remarks on Judicial Independence: The Situation of the US Federal Judiciary", unpublished paper for the University of Melbourne Law School, January 2001, 6.

²⁸ A R Gubbay, "Judicial Independence in Zimbabwe" (2001) 151 *New LJ* 357; R I Rotberg, "Zimbabwe's Spreading Misery", *New York Times*, 14 May 2001. Two hundred black lawyers in Zimbabwe have petitioned that the President's candidate for Chief Justice should not be appointed to replace Chief Justice Gubbay, who was hustled out of office before time.

²⁹ For the situation in Malaysia see Drummond, above n 10, 310-311.

Even in our own region there have recently been sad instances. Only last month in Fiji, a country with strong historical and institutional links with our judiciary, one judge publicly criticized his court as riddled with "back-biting, envy, hidden agendas, hypocrisy and disloyalty" that made "Hamlet's Denmark [look like] a holiday camp"³⁰. We have not seen anything quite like this in Australia; although in the 1930s Justice Starke must have made the High Court seem much the same to insiders. For the most part the public face of the Australian judiciary is placid and inscrutable.

Nevertheless, looking around the world at the bad news, we must acknowledge that we have also had our share of bad news.

- In May 2001, a story appeared that the District Court of New South Wales is "stretched to breaking point". Strangely enough, it was published with a lovely photograph of the television star Ally McBeal. Her flashing smile suggested that she, and the law, had not a care in the world. The "spin" was indicated by the headline: "How Ally is choking our court system". How could this attractive US soapie star be choking our court system, you might well ask? The explanation proffered by the Sydney *Daily*

³⁰ B Walkley, "Fijian judges at loggerheads", *Australian Financial Review*, 25 May 2001, 57.

*Telegraph*³¹ was that "more people than ever [are] resorting to US-style civil law suits to solve minor disputes". Into the mouth of a local professional representative was placed the assertion that "popular TV stars including Ally McBeal were glamourising litigation and the court process". It may seem a little far-fetched. Next, we will be told that "The Panel" or "The Fat", on popular television, represent the reason why fewer people go to church. Media moralising is now so much more available and entertaining.

- But there is seriously bad news. Sir James Gobbo, former judge and Governor, was reported as being concerned about repeated survey evidence of the "profound disenchantment" amongst young lawyers in Victoria, and he warned that the malaise "meant the profession was heading towards a crisis"³².

- Depending on your point of view, reports of the abolition of the advocate's traditional immunity from suit for negligence in respect of work done in court might be adding to the legal "crisis". Richard Ackland, always good for a well crafted shaft at the legal profession, declared that the House of Lords' judgment abolishing the advocate's immunity³³ had sent the "smell of cordite ...

³¹ 25 May 2001, 9.

³² Reported *Australian Financial Review*, 27 October 2000, 58.

³³ *Arthur J S Hall & Co (a firm) v Simos* [2000] 3 All ER 673; 3 WLR 543 (HL); cf *Boland v Yates* (2000) 74 ALJR 209. As to the liability of the judiciary see J D von Heulsen, "The Liability of

swirling around the corridors of Phillip Street [from] the fusillade which in time will unravel in the antipodes what many fine minds regard as one of the great structural pillars of civilised society"³⁴. Former Victorian Attorney-General Jan Wade, has suggested that it will not be a moment too soon. The byline given to her opinion was "End to ancient lurk in sight"³⁵. *The Australian* thundered "Barristers may face force of law"³⁶.

- Every now and again there is the sad spectacle of lawyers who do wrong. The Senate has launched an inquiry into a mortgage fund fiasco that has allegedly involved some of the leading legal firms in Tasmania³⁷. Often it is judges or retired judges who must ultimately uncover wrong-doing. Poor Justice Owen of the Supreme Court of Western Australia must labour for a year of his life in search of HIH skeletons³⁸. And the judiciary has not been exempt from the blow torch. The departure from the County Court of Victoria of Judge Kent was hastened by a flurry of

the Judiciary": The South African doctrine of 'leave to sue'" (2001) 117 SAFLJ 713.

³⁴ *Sydney Morning Herald* 28 July 2000, 17.

³⁵ *Australian Financial Review* 28 July 2000, 32.

³⁶ *The Australian*, 24 October 2000, 12.

³⁷ *Mercury*, 27 April 2001, 1.

³⁸ C Bolt, "Owen judge as an ideal choice to head inquiry", *Australian Financial Review*, 19 June 2001, 4.

impatient editorial opinions. The very serious business of removing a judge from office could not, it seems, delay the dailies. The fact that, in a century, in superior courts, this formal extreme disturbance of judicial independence had only occurred on one occasion³⁹ and had only proceeded far on two others⁴⁰ was not enough to slow the engine of expulsion to an orderly pace in keeping with due process and the serious constitutional principles at stake.

- On a less elevated plane, in May, 2001, the *Adelaide Advertiser* reported that security staff at city courts had seized "knives, knuckle dusters, replica pistols and sharpened screwdrivers"⁴¹ from sundry people entering the courts. Airport style metal detectors and scanning devices had been permanently installed. How, one wonders, did our courts manage for hundreds of years without such protections? An officer of the security staff stated that "the calmness at the counters has been a very positive outcome" of the enhanced security in Adelaide. The High Court persists without such metal detectors. The calm in our corridors must come from other, internal sources.

³⁹ Justice Vasta of the Supreme Court of Queensland.

⁴⁰ Justice Murphy (High Court) and Justice Bruce (Supreme Court of NSW). In neither case was the Judge removed from office.

⁴¹ V Oakley, "Weapons seized in court checks", *Advertiser*, 19 May 2001, 29.

- Chief Justice Gleeson has reportedly warned that "the public will never have confidence in judges that can be bullied"⁴². However, this message appeared wrapped in a byline "Top man sounds alarm. Warning on judges' pay". The correspondent viewed the warning as directed at the danger of bullying by interest groups of underpaid judge's. It attributed to the Chief Justice the statement that "the Bench was no longer the ultimate mark of professional achievement for lawyers" and that "most successful modern barristers no longer aspire to be judges"⁴³.

- And just when I was getting depressed at all this bad news, my eyes fell on Miranda Devine's recent column "Our justice system gets it right at last"⁴⁴. Praise, I thought to myself, is specifically precious when it is so rare. However, on closer reading the report was of a robust judicial refusal to redetermine a life sentence. The judge concerned was declared to be "a good judge". The commentator added, as if in astonishment, "even though he used to be a defence barrister he's the hardest sentencer we have". Victim support groups were quoted in praise of the judge's decision. They were unconnected with the

⁴² M Maddigan, "Warnings on judges pay", *Herald Sun*, 13 April 2001, 2.

⁴³ *Ibid.*

⁴⁴ *Sun Herald*, 27 May 2001, 13.

actual crime of the prisoner but joined together to empathise with his victims. This was not the whiff of cordite. It was reminiscent, rather, of the sounds of the tumbrels. "The prisoner cells are more secure now, their punishment crystal clear and their futures exactly as they should be", wrote Ms Devine⁴⁵. For judging in the future, according to this media opinion, only the "hardest sentencers" need apply. The judge of today, more than at any time in the past, must lie on their bed of nails, caned daily by talk back radio and syndicated columnists. No dissent from their noisy opinions is tolerated. Alternative points of view, for example the judges' reasons themselves, are all too rarely published.

NO NEWS

And this brings me to the need for the court system to provide, for itself, a better source of information to the people whom it serves.

In the past, it was the tradition in our system of government, for the Attorney-General to defend the judiciary and explain its decisions where they were criticised. This was the way in which that rather special Minister spoke in Parliament, and out, to explain

⁴⁵ *Ibid.*

the complexities of the law, of particular cases and of legal practice which were not always understood by politicians, broadcasters, columnists and the public.

The present Federal Attorney-General (Mr Daryl Williams) has made it clear that he will not do this⁴⁶. According to him, "judges must conduct their own defence". This is not a view that commands universal support amongst Attorneys-General in Australia (and less still amongst the judiciary itself). Mr Robert Debus, New South Wales Attorney-General, recently told a Bench and Bar Dinner in Sydney that he would maintain the old tradition whenever it was appropriate.

Judges are generally not well placed to "conduct their own defence". Most have little or no skill in dealing with the media. They have pressing duties and little spare time to enter public debate on equal terms. They can certainly not "mix it" with politicians, pundits or committed interest groups whose lives revolve around media exposure and, to an extent, media massage and manipulation. As well, judges have a natural, and prudent, concern that, engaging in such public debate, and answering criticism, will appear unseemly. It is not something that their predecessors have done, at least in

⁴⁶ D Williams, "Judges must put up their own defence", *Australian Financial Review*, 27 April 2001, 57.

Australia. There is a fear, probably justified, that those who go down to the media bearpit may end up with fleas.

Yet if judges and their decisions are not defended, the judicial institution not explained and the law they administer not clarified by the Minister of the Crown who traditionally performed this role (and if judges themselves are not able to take on the task) the real loser will be the public, not the judges or the media. Words will be spoken by others and taken as truth because they are unanswered. This is why, over the past decade, in many courts throughout Australia, public information officers have been appointed. Table 1 illustrates the position we have reached:

TABLE 1

Appointment of Media Related Officers by Australian Courts

Court	Position	Number	Date Office Commenced
Federal Court	Director Public Information	1	4 July 1994
	Director Community Relations	1	20 September 1999
Family Court	Director Public Affairs	1	Approx 1992/3
Federal Magistrates	Public Affairs	1	September

Court	Officer		2000
Supreme Court of ACT		0	
Supreme Court of New South Wales	Public Information Officer	1	Approx 1991
Supreme Court of the Northern Territory		0	
Supreme Court of Queensland		0	
Supreme Court of South Australia	Communications Branch	2	1 March 1994
Supreme Court of Tasmania		0	
Supreme Court of Victoria	Public Information Officer	1	31 August 1993
Supreme Court of Western Australia	Public Information Officer	1	1995

The Federal Attorney-General has said that he wants the High Court of Australia to employ a public information officer to help the media (and presumably the public) better to understand the Court's decisions. I support his desires. In the United States there is a team

of dedicated reporters for all major news outlets who record and analyse the workings of the Supreme Court of that country. Court officials facilitate their work. The same is true in Canada. The leading newspapers of the United Kingdom have dedicated legal correspondents who do nothing but cover the courts.

I know from my work in appellate courts in Australia over 17 years that their decisions are sometimes interesting, often newsworthy, occasionally entertaining and frequently important. Yet rarely are they reported properly. Usually they are not reported at all. The third branch of government in Australia, federal and State, goes largely by default in the news world. Save for a criminal sentence that gets up the nose of a journalist or a company director who lets down the shareholders and employees, comparatively few cases are properly covered. Virtually none in the courts of appeal. Intermittently only in the High Court. In our country the Rugby League "Judiciary" tends to get wider coverage in the print and electronic media than the judiciary established under the constitution.

Since 1998, in response to the Attorney-General's self-declared trappist vow, the High Court has been seeking appropriate funding from the federal Government for the engagement of a public information officer. The court has a small budget, many fixed costs and little flexibility in its allocations. The Chief Justice wrote to the Attorney-General in October 1998. No funds were forthcoming.

The Chief Justice later wrote to the Minister for Finance and Administration in February 2000. No funds were provided. He again wrote to the Attorney-General in October 2000 seeking his support for funds which the Minister had declined. No reply was received from the Attorney-General.

Recently, an article appeared in the legal affairs section of the *Australian Financial Review*⁴⁷. It attributed to an unnamed spokeswoman for the Attorney-General the statement that the federal Department of Finance and Administration could "direct the Court" to allocate money from its current budget to employ a public information officer. If this quote is accurate, the Attorney-General's spokeswoman appears to be under a fundamental misapprehension as to the power of the Department, or indeed of the Minister or the Attorney-General. There is no such capacity to "direct" the Court⁴⁸.

After so many requests, declined and unanswered, an inference is beginning to form in the minds of some who follow these things that funds will not be provided for the engagement of a

⁴⁷ "Native title and Federal Court secure more funds", *Australian Financial Review*, 25 May 2001.

⁴⁸ "Department can't dictate to High Court", letter by Chief Executive and Principal Registrar (CE & PR), *Australian Financial Review*, 1 June 2001, 79; J Koutsoukis, "No-one can cough up for High Court", *Australian Financial Review*, 1 June 2001, 56; "Why High Court can't find money to fund PR job" (second letter, CE & PR), *Australian Financial Review*, 8 June 2001, 79.

public information officer for the highest court in the land. In a decade when succeeding governments have found very large sums for advertising to inform some citizens of their legal rights, this seems truly puzzling. The amount at stake is modest: about \$100,000 for the first set-up year and thereafter about \$80,000 per year. The refusal is specially surprising in circumstances where the traditional guardian, defender and explainer has newly adopted a vow of silence, where other courts have long since been funded to engage such officers and where the other branches of Australian government are so richly served with media liaison people who bombard the public every day with information, occasionally of less significance than the cases decided in the nation's apex court.

The issue is much more important than neglect of a letter or refusals of repeated requests. It concerns the Australian public's right to have full and proper coverage of the work of the court that guards the Constitution, interprets the most important laws and expounds and develops the common law by which we live together.

Sadly, we cannot look to the general media, unaided, to fill this gap. Few media outlets in Australia now have dedicated legal correspondents. *The Australian*, which once boasted such a correspondent, employed to cover the High Court, has assigned him to other duties. Coverage of the High Court by that newspaper is now subsumed within coverage of politics in Canberra. Individual journalists struggle heroically, usually squeezing coverage of the

High Court within many other duties and not always helped by the mass of detail contained in the Court's opinions when judgments are handed down, often in large numbers and on the same day.

At the end of a recent sitting, the High Court handed down a number of decisions. Some of them were quite interesting. One concerned the legal obligation of the Refugee Review Tribunal to record its facts and reasons - a matter affecting thousands of vulnerable people⁴⁹. Another concerned a multi million dollar corporate collapse in Adelaide and the significant question of whether chartered accountants in Australia owed fiduciary duties to companies and shareholders whom they advised⁵⁰. A third related to the immunity of highway authorities and whether that "rule" of the common law should be treated as obsolete in the light of other developments and statutory provisions⁵¹. Yet another concerned the travails of Mr Kerry Packer's companies with the Tax Commissioner⁵².

The coverage of these and other judgments - except perhaps the last made specially newsworthy by the involvement of Mr

⁴⁹ *Re Minister; Ex parte Israelian* [2001] HCA 30.

⁵⁰ *Pilmer v The Duke Group Limited (In Liq)* [2001] HCA 31.

⁵¹ *Brodie v Singleton Shire Council* [2001] HCA 29.

⁵² *Commissioner of Taxation v Consolidated Press Holdings Ltd* [2001] HCA 32.

Packer, said to be Australia's richest man - delivered on that day was basically reduced to mostly small items without any substantial comment or analysis. Typically, the only news on the important refugee case that I saw appeared in a tiny item under the byline "Win for Ruddock"⁵³. Thus, an issue of principle for thousands was reduced to mere personality politics. In my view, the people of Australia deserve more information and scrutiny of what their highest court is doing. I do not know for sure, but I imagine the same is true in New Zealand which is our partner in AIJA. A void is there. Can it be filled? Does it matter?

During my years in the Australian Law Reform Commission I learned something of the way the public media operate. Their employees generally work under the most severe deadlines. Dense prose is uncongenial and off-putting. Complex issues have to be summarised, synthesised and, if possible, personalised. Those who do not play by these rules will have their stories spiked and ignored. That is just the way it is. This is why, on the day after our recent judgments, there was vastly more coverage in the newspapers concerning court proceedings in the United States about Timothy McVeigh than about all our Australian cases put together.

⁵³ A report by Roderick Campbell, "Tribunal decisions harder to challenge", *Canberra Times*, 1 June 2001, 4 was noticed later.

In the matter of courts and the law Australians have largely become the media backblocks of United States news. The coverage of the McVeigh case and of his execution last week was a mammoth media affair in Australia, most of it fed directly, and presumably cheaply, from United States outlets. On the day after Mr McVeigh was executed the Australian electronic media was bombarded and the print media also played along. Table 2 measures the space devoted to stories on this foreign criminal case half a world away, for which seemingly endless attention – and not a little commentary and analysis most of it imported - could be provided:

Table 2

**Coverage of the Execution of Timonthy McVeigh by Australian Print
Media on 12 June 2001**

Sydney Morning Herald
1265 cm sq; 170.4 inches sq; 3 articles
Pages 1 and 12

The Age
1874 cm sq; 301.1 inches sq; 3 articles
Pages 1, 2 and 12

Canberra Times
904 cm sq; 140.2 inches sq; 2 articles
Pages 1 and 8

The Australian
3087 cm sq; 493.9 inches sq; 6 articles
Pages 1, 10 and 15

The Daily Telegraph

1753.5 cm sq; 280.5 inches sq; 5 articles
Pages 7 and 23

Total
8883.5 cm sq; 1386 inches sq; 19 articles

I was in Paris for UNESCO on that day. The poor French people had to make do with comparatively minor items of news on Mr McVeigh. A small cartoon on page 1 of *Le Monde* and a story buried within. A modest item on p 4 of *Le Figaro* examining the topic in terms of the politics of capital punishment. Nothing at all in the popular *L'Equipe*, whose front page American story was on the Los Angeles Lakers, a basketball team. Mind you, *L'Equipe* is a sporting newspaper. But it makes one ask why the Australian media can spend so much space on a topic of such little relevance to our society which has long since abolished capital punishment? Yet so little space on issues that really do matter but require a serious commitment of time and effort to cover properly?

So these are the realities we live with. Unless the courts can provide summaries in suitable and interesting form and officers who can answer questions (and perhaps give sound bites if courts want to reach the outlets that give most Australians their news - popular television) - the work of the courts in this country, however admirable and objectively interesting, will just not be covered. Instead, the opinionated mix of facts and attitudes of bylined

journalists will dominate the impression that all but a few Australian citizens get about their courts, the judges and their cases.

It is no use judges and other lawyers complaining about poor, misleading, distorted coverage of their work if they do nothing to rectify this problem. They must realise the world of exploding information that has come with the Internet. Other professions have adapted. The courts have done so in part. But a revolution in information is occurring and the courts must boldly enter the new age.

FUTURE NEWS

I do not doubt that the day will come, when a court like the High Court of Australia, will have continuous television monitoring (as the Supreme Court of Canada has) and online coverage on the Internet, electronic summaries of all decisions, inhouse, skilled and trusted media officers who can interpret impartially what has happened and explain it to the public in simple and accurate terms. Perhaps one day the judges themselves will explain important decisions orally. There is no inherent reason why judge's should be fixed forever with the technology of communications of the printing press. Yet, in truth, as of now, Australia's judges have not even caught up the realities of the print media. If Guttenberg's printing press cannot be accommodated after six hundred years, I doubt that

I will live to see the Australian courts embrace effectively the electronic age. I am running out of time.

The dearth of accurate coverage and analysis of Australian court decisions is a pity. Nearly all of the cases that get to the High Court are important. Often they present some of the deepest and sharpest differences in values that the law has to accommodate. We are told that the old era of relying on the Attorney-General is over. It will be important that this is not followed by a new ice age of silence because the High Court cannot, or does not, explain its role and work to the community that it serves so faithfully.

So this is the position we have reached in the year of the centenary of the Australian Constitution. It is a time, virtually, of no news - or a trickle, and that selective, abbreviated with little analysis and less opinion. In two years time Australia will reach another historical milestone: the centenary of the High Court of Australia. By any account that will be a remarkable constitutional anniversary. In the media, there will still be a sprinkling of good news about the judiciary. There will still be bad news. I hope that by the High Court's centenary the cone of silence will be lifted and the court provided with the means to explain its decisions accurately to the community that those decisions affect.

There is a shocking ignorance about civics in Australia. It borders on a deep national malaise. It has taken the centenary of

our Constitution to demonstrate this most clearly. We must learn from our mistakes. A nation that does not know and cherish its institutions squanders its heritage. It lies vulnerable to ignorance and extremism, to prejudice and populist over-simplifications. The courts are still the guardians of the weak, the vulnerable and the unpopular in Australia. But they must secure the means to explain why this is so and why their work is so important to everyone. Ally McBeal and Timothy McVeigh are objectively far less important to Australia than news and analysis about the doings of our own courts expressed in their own terms. Especially about the work of our highest court - the third branch of national government. But when will our stories be told? We cannot just blame the media. Nor will blaming governments get us far. To a large extent the answer must lie in the action by the judiciary itself.