# A Voice for Judges: 30 Years on Truth to power in a post truth era

## Australian Judicial Officers Association – 30th Anniversary Lecture

The Hon Robert French AC
Banco Court, Sydney
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1. This evening we celebrate 30 years of the Australian Judicial Officers' Association (AJOA). There are better ways of celebrating such an anniversary than by listening to a 30 minute speech from a retired Chief Justice now well-established in the social category known as 'pale, stale and male'. But there are drinks afterwards. Congratulations to the AJOA on its 30th anniversary. These things celebrate the completion of a number of orbits of the earth around the sun and are of little cosmic significance. That said, however, an accumulation of orbits can be, and this case is, a powerful indicator of organisational utility.

2. In the case of the AJOA, its longevity has accommodated change and the evolution of its useful purposes. There has been change in our perception of the nature of the Australian judiciary, its constitutional character and its part in our representative democracy. There has been change in our perception of the need for judges to take collective responsibility for explaining to the wider community and, from time to time, to other branches of government, the role of the judicial branch. There has been change too in recognition of the need for continuing judicial education in societal and cultural issues which may inform the nature and content of matters which come before the courts. There is a changed understanding also of the need for judges to appreciate scientific and technical developments which often intersect with legal issues to be determined by the courts. There has also been an increasing awareness of the part to be played by the Australian judiciary in supporting the rule of law beyond our borders. Strong, independent judiciaries are part of the infrastructure of democracy governed by the rule of law and of democratic development. Democracy for all its faults and shortcomings, matters to us and to the world more now than ever before. The AJOA's longevity is a measure of its utility in discharging the functions of a public voice of the judiciary to the wider community and responding to the societal, cultural, scientific and

technological changes with which courts across Australia must engage. It has also allowed it to become a voice in the international community of judges.

3. The history of the AJOA is first and foremost a history of its people — its founders and leaders, councillors and members. Despite the ageing process, I find the memories of many of them still strong. Thirty-one years ago, at the 1992 Supreme and Federal Court Judges' conference I heard Justice Richard McGarvie of the Supreme Court of Victoria and my then colleague on the Federal Court, Justice Ian Sheppard, raising the possibility of a body to represent the common interests and concerns of judges.

4. McGarvie proposed the establishment of an Australian Judicial Conference with a mandate to be "constantly vigilant and committed to assuring the preservation of a strong and independent judiciary" and that it be open to all judges and magistrates.[1] It was a protective domestic objective but one which was to expand to larger proactive purposes. It was inclusive, recognising the societal importance of the judiciary at all levels — as it should in a system in which the highest volume of decision-making is in the Magistrates Courts and in which important questions of law, including constitutional questions, can be raised in any of our courts.

5. The Judicial Conference was established by a Steering Committee of the Supreme and Federal Court Judges' Conference and was incorporated on 16 December 1993. Ian Sheppard was its first Chair, as the leadership role was then designated, from 1994 to 1996. He was followed by another of my colleagues, John Lockhart of the Federal Court, who was succeeded by Bruce McPherson of the Supreme Court of Queensland from 1998 to 2000. Simon Sheller of the Supreme Court of New South Wales was President from 2000 to 2004 and Ronald Sackville of the Federal Court from 2004 to 2006. The names that followed will be familiar to many here: Debelle from South Australia, McColl from New South Wales, Harper from Victoria, McMurdo from Queensland, Rares from New South Wales, Beech-Jones from New South Wales, Kelly from the Northern Territory, Martin from Queensland and currently Justice Michael Walton of the Supreme Court of New South Wales.

6. The Judicial Conference of Australia (JCA) became the AJOA in March 2021.

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[1] The Hon Justice John Dowsett 'The Conference: 40 Years On' (Speech delivered at the Supreme and Federal Court Judges' Conference, Melbourne, 21-25 January 2012).

7. The emergence of the Judicial Conference coincided with a debate about who should speak for the judges when they were subject to public criticism. The debate seems to have been opened in an address which Daryl Williams QC delivered at a conference entitled 'Courts in a Representative Democracy' held in November 1994 in Canberra.[2]

8. Mr Williams, then a Member of the House of Representatives who became Attorney-General in 1996 and served until 2003, observed that a declining number of judges expected the Attorney-General to defend them publicly against attack or criticism. It had never been articulated or accepted that Attorneys-General in Australia had such a duty. There had even been cases of an Attorney-General attacking judges in the media. There was a risk of a conflict between the interests of the judiciary in a substantive reply on an issue and the political interests of the Attorney-General or the government in relation to the issue. The judiciary could no longer expect the Attorney-General to defend its reputation. I doubt that it did then. It certainly doesn't now. When the Member for Kalgoorlie described the Justices of the High Court as 'pissants' in the wake of the *Wik* judgment[3] in 1996, nobody expected the Attorney-General of the day to get up and say 'No they're not'. When the Justices of the High Court, in the wake of its *Zentai* decision[4] refusing the extradition of Charles Zentai to Hungary were described by a member of the Federal Parliament as 'blockheads', none of us expected the Attorney-General to say 'No they're not'.

9. Something of a counter-current appeared in a 1997 State of the Judicature Address, delivered by then Chief Justice, Sir Gerard Brennan, who observed that:

> The Courts do not need an Attorney-General to attempt to justify their reasons for decision. That is not the function of an Attorney-General. But why should an Attorney not defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law?[5]

10. The Chief Justice contended that "if the attack is from a political source, the response must be from a political identity." That approach gained some support in a short but

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2 Daryl R Williams, 'Who Speaks for the Courts?' in *Courts in a Representative Democracy* (Australian Institute of Judicial Administration, 1995) 183.

3 *Wik Peoples v Queensland* (1996) 187 CLR 1.

4 *Minister for Home Affairs v Zentai* (2012) 246 CLR 213

5 Sir Gerard Brennan, The State of the Judicature Address, 30th Australian Legal Convention, Melbourne, 19 September 1997, 30.

interesting comment by Associate Professor Gerard Carney, published in the *Bond Law Review* in 1997. He argued:

> This must be so in order for the judiciary to remain aloof from the political arena. That its decisions at times have political repercussions and attract political criticism does not mean that the judiciary is entering the political foray. Those consequences are merely the inevitable outcome at times of the exercise of the rule of law. Critically, the impartiality of the judiciary upon which the rule of law is built, precludes direct political involvement by judges or by any association of judges.[6]

He went on to suggest that legal professional bodies such as the Law Council of Australia and the Australian Bar Association and their State organisations were the only other bodies which might be in a position to assume the role of defending the judiciary. He observed:

> Yet they are not as well placed as the Attorney-General to respond appropriately and swiftly to political criticism. Moreover, a denial of this responsibility by the Attorney increases the likelihood of political attacks on the judiciary. It would therefore spell the end of the convention that politicians refrain from political attacks on the judiciary.[7]

11. However, as Williams' speech indicated, the tide had already moved against that position.

12. In his speech, Daryl Williams pointed to this body as a means by which the judiciary could respond to criticism and communicate with the public. If the JCA were able to attract as members a significant proportion of the judiciary and if it were able to organise mechanisms for wide consultation of its members on judicial issues, it could prove a potent political force for the judiciary.

13. Current political realities are illustrated by public criticism of the High Court in 2011. In that year, the Court decided the *Malaysian Declaration Case*.[8] This was a challenge to a ministerial decision to declare Malaysia a country which satisfied statutory criteria protective of human rights on the basis of which the Minister could remove unprocessed asylum seekers from Australia to Malaysia. The Declaration was made following an agreement between the Australian and Malaysian governments. The Court held that the Declaration was invalid — that the protective criteria were not satisfied or that the

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6 Gerard Carney, 'Comment: The Role of the Attorney-General' (1997) 9(1) *Bond Law Review* Article , 8–9. Available at: <http://epublications.bond.edu.au/blr/vol9/iss1/1>

7 Ibid 9.

8 *M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

Minister had misconstrued them — jurisdictional error vitiating the purported exercise of the statutory power. The decision was 6/1 against the Minister. The judgment had an embarrassing political impact for the government of the day. The Court and I were criticised by the then Prime Minister and Ministers of the Crown. The Court was said to have "missed an opportunity". My judgment in particular was said to be inconsistent with something I had written nearly a decade before, as a Federal Court Judge, in an application for an interlocutory injunction. I was described by one government minister of the day as having 'zero credibility', a term of rather uncertain meaning when applied to a judge exercising a judicial function.

14. Neither the Court nor I responded to those criticisms, which could be understood as a species of political damage control. To have done so would have engendered headlines such as 'Court Hits Back at Prime Minister' and the like. The Attorney-General of the day did not defend the Court from those political criticisms, merely observing that the Court was not above criticism. There were, however, many other responses. Some were political counter-attacks from Opposition Members and critics of the government. One response which did not fall into that category was that of the JCA, as this Association was then called. Justice Philip McMurdo, then the President of the JCA, observed that:

> To suggest that a court has missed an opportunity to achieve a certain policy outcome is a completely misguided comment about what courts do.
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> They do not look for opportunities to further matters of policy whether that be government policy or otherwise.[9]

This might be a message also sent to some academic critics of judicial decisions who not infrequently describe them as 'missed opportunities' — usually because they leave tantalisingly loose ends in areas of developing legal doctrine.

15. Outside the area of direct criticism from politicians, media criticism of the courts has been a feature of our democracy for a very long time. A recent example was seen in some media responses to the High Court's decision in *Love and Thoms v Commonwealth*.[10] The Court there held, 4/3, that non-citizens of Aboriginal descent were not 'aliens' under s 51 of the *Constitution* and so could not be deported under the

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9 <lsj.com.au/articles/opinions-on-high/>

10 (2020) 270 CLR 152.

*Migration Act 1958* (Cth). As Professor George Williams said at the time, Australian media criticism of the High Court is not new. When Sir Anthony Mason sat as Chief Justice between 1987 and 1995 the work of the Court was frequently the subject of critique on breakfast radio and the opinion sections of newspapers of the day. Today, there are many platforms involved in debate using social media and individual blogs. Professor Williams observed that there is a shortage of qualified legal voices in mainstream media to balance out the hot takes. The commercial realities of online news outlets are that editors want clicks. Journalists must report quickly and often without time to explore nuance. In the event, the public is provided with a poor understanding of legal issues and the independent role of the court, Williams said:

> When you look at a lot of the comments on social media, it can be totally uninformed by an understanding of what the court has to decide. The analysis of the court is usually through a political lens – without understanding the why and how of the court's decision. There is a tendency to assume the court is just a political actor for governments.[11]

16. The impact of that phenomenon is compounded by significant lack of public understanding of our constitutional and judicial systems. A study conducted by Monash University in 2017 involving a survey of 520 adults showed a significant lack of understanding among Australians about basic High Court facts. Some survey participants thought that Chief Justice Susan Kiefel was a former Prime Minister of New Zealand or a Victorian Member of Parliament. Three quarters of the participants were confused about whether the High Court had heard O.J. Simpson's appeal. Only 17.5% could say with certainty it had not.[12]

17. The AJOA has generally taken a disciplined approach to public statements in defence of the judiciary or judicial officers against misinformed, unfair or disingenuous criticism. Speaking to a conference of South Australian Magistrates in 2017, the then President of the JCA, Justice Robert Beech-Jones encapsulated the often ephemeral character of public criticism of the courts with his title 'The Dogs Bark but the Caravan Rolls On: Extra Judicial Responses to Criticism'. At the time the JCA was preparing a Policy Paper addressing the circumstances in which it would or might respond to commentary upon courts and judges. The practice, as described by Justice Beech-

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11 <lsj.com.au/articles/opinions-on-high/>

12 Ibid.

Jones, had not been to respond on every occasion that a media article was published critical of its court, judge or a judgment. He said:

> we must respect the right of citizens to comment and criticise judicial decisions. However, on many occasions the JCA has responded to unfair and unwarranted criticism of a judicial officer or a court.
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> …
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> [Its] responses have been prepared on the basis that its ultimate aim is to promote the respect for the judiciary and the rule of law. It has not sought to win points in a contest with anyone or to provide any opportunity to anyone to circumvent the *Guide*. In some cases … it has addressed clearly verifiable errors or misleading impressions. [13]

All of this is vastly preferable to judges making their own personal responses to criticism. One example of a poorly framed response was that of a part-time judge removed from judicial office by the United Kingdom Judicial Conduct Investigations Committee. As Justice Beech-Jones explained:

> According to a media report, after one of his decisions was reported and received adverse comment he posted online abuse about his critics in response. Apparently he stated "[a]re you too stupid to make a sensible comment" in one of his posts.[14]

18. It is not unusual for courts to be praised or criticised because of their decisions regardless of the integrity of the processes by which they were reached. This could be seen in some public responses to the decision of the High Court which allowed Cardinal Pell's appeal against the decision of the Victorian Court of Appeal. That Court had, by majority, dismissed Cardinal Pell's appeal against his conviction. There was some commentary in the press critical of the majority in the Victorian Court of Appeal. Justice Judith Kelly, then President of the AJOA, issued a robust response. Part of the problem in that case was that views for and against the Cardinal tended to align with conservative and progressive world views respectively to a degree that may have informed some responses to the decisions of the Courts at various levels.

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13 Justice Robert Beech-Jones, 'The Dogs Bark but the Caravan Rolls On: Extra Judicial Responses to Criticism' (Address presented to a conference of South Australian Magistrates, 8 May 2017) 19–20. <https://www.ajoa.asn.au/wp-content/uploads/2022/02/P83_02_02-Extra-Judicial-Responses-to-Criticism-for-publication.pdf>.

14 Ibid 21.

19. In answer to a newspaper article which suggested that the High Court had 'excoriated' the Victorian Court of Appeal, Justice Kelly said:

> The High Court did not excoriate anyone: … The High Court analysed the evidence and the applicable legal principles, found that on the whole of the evidence a jury, acting rationally, ought to have entertained a reasonable doubt as to Cardinal Pell's guilt and, with appropriate courtesy, allowed the appeal.[15]

And against the suggestion that there might have been some prejudice operating on the part of the majority judges in the Victorian Court of Appeal, Justice Kelly observed:

> The High Court found [the analysis of the Court of Appeal] to be mistaken. It did not hint, even obliquely, that the majority judges on the court may have been motivated by prejudice or any other improper motive or cast any doubt whatsoever on the honesty or integrity of the Appeal Court judges.[16]

And to another suggestion that the High Court in reality had saved our institutions from "the dishonourable way they discharged their duties", Justice Kelly observed "[i]t should not need saying that there is nothing dishonourable about being overturned on appeal."[17]

20. There has been something of a convergence between the role of the AJOA in this area and that of the Council of Chief Justices (CCJ), which in 2014 adopted a set of *Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches*. These were provided to the Commonwealth Attorney-General and the Attorneys-General of the States and Territories. They set out categories of legislative and executive action which might affect courts and upon which it would be appropriate for courts to be invited to offer their views. It was a kind of Voice to the Parliament and the Executive mechanism for the judiciary.

21. The CCJ in those Guidelines also addressed the topic of responses to criticisms of the judiciary. It was said to be an appropriate courtesy that if the Attorney-General becomes aware that a member of the Executive Government intends to voice a criticism of a court or of a particular decision or judge, the head of jurisdiction should, if

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15 Media Release by Justice Judith Kelly, the President of the Judicial Conference of Australia, 16 April 2020.

16 Ibid.

17 Ibid.

practicable, be notified in advance. The head of jurisdiction may decide that no response is appropriate or that information can be supplied particularly in relation to the function of the court which would correct factual errors upon which such criticism may be based. The Guidelines went on to say:

> It is generally undesirable for a head of jurisdiction to become involved in public exchanges with the members of the executive government or members of parliament in relation to criticism of the court or individual judges. Where a public response is necessary the preferable course is a formal statement by the head of jurisdiction on behalf of the court.[18]

The AJOA in this area has more room to move as a collective voice of the judiciary than heads of jurisdiction.

22. Commentary on the courts by the political class has sometimes ventured into predictions about their decisions — a hazardous exercise. In 2017, when Barnaby Joyce's qualification to sit in the Parliament was under challenge by reason of s 44 of the *Constitution*, the Prime Minister of the day declared that he was eligible and said "and the High Court will so hold". The High Court did not so hold. Failed predictions are not a problem however categorical statements about the outcome of a case from the executive branch might be seen by some as an attempt to put pressure on a court and, if only for that reason, should be avoided. In saying that, I am not suggesting that the AJOA should step into such debates and offer cautionary observations about the outcomes of High Court cases.

23. Beyond the negative function of defending the judiciary, the AJOA is a voice to the community at large for the judicial branch of government — to explain what it is and what it does and its significance to the rule of law and representative democracy.

24. The judiciary today expects, and is expected, to speak for itself as the third branch of government, distinctive and independent in its functions. That distinctiveness and independence is supported by the formal doctrine of separation of powers in relation to federal courts and the exercise of federal jurisdiction. It is supported by the conventional equivalent of separation of powers within the States and Territories. That conventional understanding is, in turn, supported by implications which have been

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[18] *Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches* adopted by the Council of Chief Justices of Australia and New Zealand on 23 April 2014, [19].

drawn by the High Court from Chapter III of the *Constitution* in relation to the institutional integrity of the courts of the States and the Territories at all levels. The AJOA, in its public advocacy role, plays an important part in maintaining awareness and acceptance of judicial independence and the institutional distinctiveness of courts. It can also serve to remind its member judges of what is and is not covered by the concepts of judicial independence and separation of powers. Sometimes even some judges have an exaggerated idea of what is encompassed by those concepts. There were valuable colloquium papers presented in October last year unpacking the concept of judicial independence and judicial legitimacy presented by Associate Professor Joe McIntyre, Justice Stephen Gageler and Chief Justice Chris Kourakis. The AJOA website which includes those papers and many others, is a rich resource for members seeking a deeper understanding of those concepts and a variety of other topics relating to the Australian judiciary.

25. The AJOA does not have a monopoly in public explanation of, and advocacy for, the judiciary. As I observed when addressing this body in 2016, the Australian judiciary communicates with government and the public in a variety of ways and at a variety of levels. There is the limited collective institutional communication undertaken by the CCJ. There is the collective voice of the AJOA. There are particular interventions by heads of jurisdiction on matters of local significance which do not require the engagement of national bodies.

26. There is a myriad of contributions by individual judges. There is a well-established tradition of judges delivering lectures, participating in seminars and speaking to a variety of groups in the wider community on a range of topics explaining the functions of courts, the idea of the rule of law, the nature of judicial work and the relationship between the judiciary and other branches of government.

27. Judges also enjoy the freedom of speech of all citizens, but that is a freedom which is constrained by judicial convention in order to protect public confidence in the judiciary. The most recent, 3rd edition, of the *Guide to Judicial Conduct*, published in October last year by the Australasian Institute of Judicial Administration upon the initiative of the CCJ, included the observation in its opening chapter that:

> The preferred position, which is supported by a clear majority of judges who responded to the survey undertaken for the purpose of the second edition of

> the Guide, is that judges – subject always to the priority to be given to judicial duties and other necessary restraints – should be, and be seen to be, involved in the community in which they live, and should enjoy the fundamental freedoms of other citizens.[19]

28. The Guide, dealing with public comment by judges and participation in public debate, accepts as appropriate judicial contributions to the public understanding of the administration of justice and the functioning of the judiciary. Constraints on those functions avoid involvement in areas of political controversy. Controversy affecting the operation of the courts, the independence of the judiciary and the administration of justice is best left to the collective voices of the CCJ, the AJOA and heads of jurisdictions. Judges should avoid expressions of opinion which may give rise to issues of bias or pre-judgment in cases that may later come before the judge, even in areas apparently unconnected with the original debate. That said, a judge subject to the constraints incidental to the nature of judicial office has the same rights as other citizens to participate in public debate. Importantly, however, the Guide offers the cautionary observation that a judge who joins in community debate cannot expect the respect that the judge would receive in court. To put these general guidelines into a contemporary context, the question may be asked: Should a serving judge contribute to debate on The Voice referendum?

29. The Voice Referendum is the subject of contentious political and community debate. For many, if not most, serving judges it is highly unlikely that their jurisdictions will confront cases involving decisions about The Voice or The Voice referendum. That said, public confidence in the judiciary does depend, to a degree, upon the expectation that judges will be detached from political or ideological perspectives when making judgments. There is a degree of continuing utility in the notion of judicial detachment which is reflected in the ancient oath: to do justice to all without fear or favour, affection or ill-will. That is to do justice to the obnoxious along with the saintly. It is perhaps most elegantly expressed by Thomas More's son-in-law, William Roper, who encapsulated More's understandings of the requirement of the judicial oath and foreshadowed the idea of the rule of law:

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[19] The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (3rd ed (Revised), December 2023) 1.

> were it my father stood on the one side, and the devil on the other side, his cause being good, the devil should have right.[20]

30. Justice must be justice according to law, not justice according to us, albeit values, individual and communal, play a role in the judgment process where value judgments are required — where terms such as 'unconscionable', 'unfair', 'undue' or 'reasonable' are used. If a judge by public comment on matters in which values are in tension or contest is able to be labelled as 'left' or 'right' or 'liberal' or 'progressive' or 'big C conservative', there is a risk that judgments which have a political or societal impact will be viewed through that prism and interpreted and reported on accordingly. This is not an injunction to timidity. Any public intervention on a matter of contending values requires a risk assessment and a prudential approach.

31. There is a legitimate role and perhaps even a social obligation upon judges individually and the AJOA collectively, to contribute to civics education about constitutional and legal arrangements and the role of the judicial branch. This is an area in which Australia's performance over the years has been patchy. The current Australian curriculum in civics and citizenship was framed by the Australian Curriculum Assessment and Reporting Authority (ACARA), a Commonwealth authority established by legislation in 2008. Surveys conducted by ACARA of the impact of the civics and citizenship curriculum on Years 6 and 9 were conducted in 2016 and 2019. They have not been encouraging. They showed a significant proportion of students failing to reach required proficiency standards. Nor surprisingly, the distribution of proficiency was skewed in favour of higher social economic groups and also against Indigenous students. This is an issue which goes not just to social justice but to the foundations of our representative democracy and societal stability.[21] Beyond the student population there is a not insignificant proportion of the Australian population who lack fundamental understanding of the workings of the *Constitution*.

32. In the years that have passed since the creation of the JCA and its becoming the AJOA there has been a heightened sense among Australian judges of the things they have in common and the importance of their role in our representative democracy and beyond.

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20 William Roper, *The Life of Sir Thomas More* (COSIOM Classics, 2009 [1822]) 33.

21 ACARA NAP Civics and Citizenship 2019: National Report, 16.

33. Our colonial heritage and federal system has given us six States and two Territory judicial systems, together with a system of federal courts. Those systems are in a constitutional sense united by the role of the High Court as the final court of appeal from all of the Australian courts and the determinant of the one common law of Australia. Inter-jurisdictional dialogue occurs through the many decisions on legal issues which are common across the continent. Parochial notions of an archipelago of distinct judiciaries are the vestiges of a vanished past. When the judges of Australia come together in conferences and colloquia and judicial further education, they are substantively a body whose members share the fundamental values which underpin our *Constitution* and the common law in which it is embedded.

34. In 2006 at the JCA colloquium that year, I delivered a paper proposing a system of judicial exchange between our courts.[22] The proposal included what I termed 'horizontal exchange' where trial or appeal judges from one jurisdiction could spend some time sitting in another. This was subject to constitutional constraints. It is relatively straight forward for Federal, State or Territory judges to be given temporary commissions on State or Territory courts. Constitutional constraints, however, do not allow temporary commissions for State or Territory judges or magistrates on Federal Courts.

35. I was inspired to make the suggestion because of my work as a Federal Court judge, which was much enriched by the opportunity to sit on appeals with colleagues from States or Territories other than my home State of Western Australia. It also gave me the opportunity to do trial work away from the home State. The experience strengthened my sense of membership of a national judiciary. The CCJ accepted a proposed Protocol for Exchange, which I think came up through the JCA.

36. The idea languished for a time because of cost and administrative issues. Now, however, it seems to be developing with exchanges occurring which involve at least Queensland, South Australia and Western Australia. I hope it goes wider. The AJOA might want to revisit the topic, although ultimately it depends upon the courts of the various jurisdictions to make such arrangements.

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[22] Justice Robert French, 'Judicial Exchange: Debalkanising the Courts' (2006) 15 *Journal of Judicial Administration* 142.

37. The proposal went further to suggest mixed jurisdictions intermediate appeal benches. As I understand it, that has happened at least once with a case involving a Full Court of the Federal Court and a State intermediate appeal court sitting concurrently.

38. The need for continuing explanation and exposition of the judicial institution and the judicial function is clear. Civil discourse today seems increasingly to be infected by ideological or partisan speech and the deployment of misinformation as a weapon of routine choice. Digital and print media play a variety of roles in that public discourse. Some elements will amplify and republish misinformation. Others will call it out. Sometimes protagonists take one or other role based upon their sympathy for or antipathy towards the propagators of misinformation. That said media retains a fundamentally important role in exposing truth and offering honest analysis. Good investigative journalism set upon finding the facts rather than confirming pre-determined narratives has a critically important role to play in our democracy. There have been some recent examples of that. Truth in the factual sense is still important in our discourse and is still valued.

39. Courts are generally seen as truth finders and truth tellers in the resolution of disputes. To that extent the importance of truth telling as a societal virtue and strength is supported and with it the rule of law. The truth finding function is, of course, qualified in the sense that a common law court hearing a dispute or a criminal prosecution does not have a roving commission to carry out its own investigations and determine factual matters to its own satisfaction. It is dependant upon the materials and the submissions put before it. This means that there are limits on the ability of courts to find what might be called 'the facts'. There may be asymmetries of resources and capacity between contesting parties such that the evidence presented to the court is not the whole evidence relevant to a fact to be determined. And the process of fact finding as truth finding may be compromised by statute law which imposes presumptions in favour of particular conclusions — for example the presumption that a person in possession of an amount of a prohibited drug in excess of a prescribed quantity intends to sell or supply it to another.

40. It is said of civil law countries that the parties leave their conflict to the judge's investigation. There is no doubt, however, that under either system, each of the parties would want the court to determine 'the truth' of the case as that party sees it.

41. All that being said, truth, as determined by a judicial process, however compromised by power imbalances and statutory constraints, is essential to the administration of justice according to law. It is the openness, independence and impartiality of the judicial process that will, it is to be hoped, attract and maintain public confidence in the process as a way of getting to the truth. It is perhaps a measure of political perception of that public confidence that serving or retired judicial officers are frequently called upon in Australia to conduct statutory inquiries or Royal Commissions involving fact-finding on matters of great public concern or political sensitivity. The credibility of the judicial fact-finding process as a truth-finding process is central to the use of those mechanisms.

42. The AJOA plays an important part in maintaining the status of the judicial system as a truth-finding institution in Australia. It has undertaken projects on topics including complaints against judicial officers, appointment processes, judicial retirement benefits, independence of the judiciary, judicial exchanges, judicial appointments, comparative study and temporary judicial officers. It has made representations to various governments and government bodies on a number of issues.

43. The AJOA also has importantly an international presence which brings it and its members into the international community of judges. It is a member of the International Association of Judges and of the Commonwealth Magistrates' and Judges' Association.

44. The importance of independent, impartial, competent and honest judiciaries as societal truth-finders and truth-tellers and as supportive of the values of truth finding and truth telling transcends national boundaries. The Australian national judiciary takes its place in various ways in supporting those values. It does so in a variety of ways. One of them is simply by international dialogue between judges of different countries. That kind of dialogue can and has led to the development of common standards of which there are many examples. At its 8th International Conference in 2017, the International Organisation for Judicial Training adopted a Declaration of Judicial Training Principles, which covered the institutional framework, training as part of the judicial role and training content and methodology.[23] The Declaration exemplifies the benefit

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[23] Judicial Commission of New South Wales: *Handbook for Judicial Officers* (2021) at <www.judcom.nsw.gov.au/judicial-officers/>

of international judicial cooperation supporting the acceptance and application of broadly stated common approaches.

45. There is also in existence an *International Framework for Court Excellence*, the third edition of which was published in May 2020.[24] It was developed by an International Consortium for Court Excellence, comprising courts and other organisations from Europe, Asia, Australia and the United States. It sets out universal core values, seven areas of court excellence aligned with those values and tools for the assessment and improvement of the quality of justice and court administration.

46. Australian judges participate in international judicial development programs. Beyond those programs there is a very large variety of regular meetings between judiciaries around the world, too many to list. As Chief Justice Bell, who chairs the Judicial Section of LawAsia, observed at its 2022 conference in Hong Kong, all countries whether in civil or common law traditions face common issues and challenges. A dynamic dialogue about those issues and challenges between judicial leaders in the Asia Pacific region is of great importance and value. The fact that that conference was located in Hong Kong might be thought to have sent an important signal about the Hong Kong's judiciary's own perception of its role and commitment to transnational values of independence in the common law tradition.

47. There are a number of examples of the AJOA's engagement with the transnational judiciary. On its website there may be found a document entitled 'Elements of Judicial Excellence – A Framework to Support the Professional Development of State Trial Court Judges'. This is a publication of the National Conference of State Courts in the United States. It is described as a resource for judges, mentors, educators and State court leaders who support and seek to enhance their State systems of judicial professional development. An inward benefit of transnational engagement is the access it gives to intellectual resources and cross fertilisation of ideas and approaches to common problems and challenges facing judicial systems around the world. The AJOA makes its own contribution to the maintenance of the essentials of judicial systems internationally. This was evidenced in recent times by its media releases on the so-

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[24] <https://www.courtexcellence.com/__data/assets/pdf_file/0015/53124/The-International-Framework-3E-2020-V2.pdf>

called judicial reform proposals in Israel — the treatment of ICC personnel by Russia and the dismantling of the judicial system in Kiribati.

**Conclusion**

48. The AJOA membership is voluntary. It started with a few. It now stands at over 800. It is an important and influential voice for the judiciary in Australia and beyond. It has a rich history. The years ahead will, I think, see more opportunities and demands for the discharge of its important functions within Australia, in the region and beyond. I wish it well.