

The 36th Australian Legal Convention

The State of the Australian Judicature

Chief Justice RS French

18 September 2009, Perth

In his State of the Judicature address to this Convention in 2007 the former Chief Justice, Murray Gleeson, observed, not without pleasurable anticipation¹:

Few things in life are certain, but one is that I will not be giving the next such address.

And so it came to pass. In quoting my predecessor, I would like to acknowledge his lifelong contribution and commitment to the rule of law and particularly his decade as Chief Justice of Australia. Assuming my continuing existence and that of the Australian Legal Convention, I expect to deliver three more such addresses as Chief Justice. It will be interesting on the occasion of the last of them to reflect on change in the legal

¹ Gleeson, M., 'The State of the Judicature' (2007) 14 *Australian Journal of Administrative Law* 118 at 118

landscape which will have come to pass then but still lies ahead of us today. For there has been much change since the first of these addresses. And prominent among life's few certainties is more of it.

The State of the Australian Judicature address given at the Australian Legal Convention is a task that each Chief Justice has accepted beginning with Sir Garfield Barwick in Sydney in July 1977. In his opening remarks he said he had agreed to give the address because, as he put it²:

... it seems to me that Australia is slowly developing a sense of unity in the administration of the law, as it is to be hoped it is developing a sense of unity in the legal profession.

He referred to:

... distinct tendencies towards the realisation that there should be uniformity both in the substance and in the administration of the law governing all Australian citizens, at least in many of their more fundamental relationships, be they personal, commercial or social.

² Barwick, Sir Garfield, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480.

The nature and length of the address has varied from Chief Justice to Chief Justice over the years. Sir Garfield Barwick viewed it expansively as an occasion for "indicating the state of the judicature, generalising in an Australian context and including some account of any distinctive situations or attitudes that have become apparent in the course of time, speaking both of improvement and of the need for correction or development"³. Sir Harry Gibbs on the other hand, modestly disclaimed the knowledge and experience to enable him to make a useful survey of the entire Australian judicature⁴. In his 1985 address he rejected the promotional metaphor in the Law Council's brochure which promised "a broad beam of light onto the Australian judicial scene". He would not compare himself to a torch bearer and said⁵:

... a better comparison might be to someone sitting in chilly isolation on the top of an iceberg, who is asked to describe the teeming life in the warm seas through which the berg is drifting.

³ Barwick, above n 2 at 480.

⁴ Gibbs, Sir Harry, 'The State of the Australian Judicature' (1981) 55 *Australian Law Journal* 677 at 677.

⁵ Gibbs, Sir Harry, 'The State of the Australian Judicature' (1985) 59 *Australian Law Journal* 522.

He confessed, in that context, his remoteness from much of the drama and many of the problems which daily confront trial courts⁶.

Sir Anthony Mason, in his first address, set out neither terms of reference nor metaphor but went straight to issues of the day relating to the operations of the High Court, intermediate courts of appeal, the investigation of complaints against judicial officers, the recruitment and resignation of judges and court delays. These comments he described in closing as "... directed at the structural issues relating to our judicial system because these issues, being the subject of current debate, may be resolved sooner rather than later". He added that what he had said largely reflected his own personal views and did not necessarily coincide with the viewpoint of the Australian judiciary, observing correctly that judges, especially Australian judges, are notoriously independent⁷. I join him in that sentiment, and apply it to my own remarks.

Sir Gerard Brennan in his 1997 address set out what he called the "reference points" for considering the state of the judicature. They were defined by its characteristics⁸:

⁶ Gibbs, above n 5 at 522.

⁷ Mason, Sir Anthony, 'The State of the Australian Judicature' (1987) 61 *Australian Law Journal* 681 at 687.

⁸ Brennan, Sir Gerard, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33 at 33-34.

1. A judicature that is and is seen to be impartial, independent of government and of any other centre of financial or social power, incorruptible by prospects of reward or personal advancement and fearless in applying the law irrespective of popular acclaim or criticism.
2. A competent judicature with judges and practitioners who know the law and its purpose, who are alive to the connection between abstract legal principle and its practical effect, who accept and observe the limitations on judicial power and who, within those limitations, develop or assist in developing the law to answer the needs of society from time to time.
3. A judicature that has the confidence of the people, without which it loses its authority and thereby loses its ability to perform its functions.
4. A judicature that is reasonably accessible to those who have a genuine need for its remedies.

Chief Justice Gleeson took the opportunity in his State of the Judicature addresses to consider current developments affecting the judiciary in the larger context of its history and its national role. That is an example which I would wish to emulate.

The "distinct tendencies" to which Chief Justice Barwick referred more than 30 years ago have evolved into a contemporary recognition of

the need for, and development of, national and cooperative approaches to important elements of our basic social and legal infrastructure. Australian federalism today operates within the framework of a nation which is one of the world's enduring democracies, small in terms of its population, increasingly ethnically diverse and unusually endowed with a wealth of natural and human resources. It is located in a global community which is interdependent and interactive. That interdependence and interaction extends to trade, commerce, communication, culture, the movement of peoples, the changing physical environment, crime and human conflict. The phenomena of the internet, climate change and international terrorism are leading examples of that interaction which have not left Australia and Australians untouched. All of these things have an effect upon the application of our laws, the development of new laws and the nature of the matters which arise for decision in our courts. They give rise to the need for new capacities and skills on the part of the judges and the resources necessary to acquire and maintain them. It is useful then to reflect on the state of Australia's judicature in today's changing world and in doing so to place our national legal system within its historical perspective which includes the constitutional development of Australian nationhood.

Our development to a fully independent nation in the community of nations has occurred step-wise since the coming into effect of the Commonwealth Constitution in 1901. Executive independence from the British Crown was achieved through resolutions passed at Imperial Conferences held in 1926 and 1930. Substantial legislative independence followed upon the adoption by the Commonwealth Parliament in 1942 of the Statute of Westminster 1931 (UK) retrospective to 1939. What many

regard as the final severance of legislative dependence on the United Kingdom occurred in 1986 with the passage of the *Australia Act 1986* (UK) and corresponding *Australia Acts* of the Commonwealth and the States.

Until 1986 a litigant could seek leave to appeal to the Privy Council in England from an appellate decision of the State Supreme Court, other than in matters arising under the Constitution or involving its interpretation. Two years before those Acts were passed and appeals to the Privy Council abolished, appeals to the High Court were restricted by statute to cases in which the Court granted special leave to appeal. In his State of the Australian Judicature address in August 1985, Sir Harry Gibbs observed that one consequence of the removal of the appeal as of right to the High Court from the judgments of the Supreme Courts was an increase in the number of appeals brought to the Privy Council. That situation created what he described as "obvious difficulties" for the doctrine of precedent since a Supreme Court could find itself faced with two conflicting authorities each of which were binding upon it. Indeed at that time, as he noted, New South Wales case law was growing relatively more quickly in London than in Canberra⁹.

By the time that Sir Anthony Mason delivered the next State of the Australian Judicature address in September 1987 in Perth the right of appeal from State courts to the Privy Council had been abolished. As Sir

⁹ Gibbs, above n 5 at 524-525.

Anthony observed, that development finally cemented the position of the High Court as the ultimate court of appeal for Australia. In that position it underpinned a conception of the Australian judiciary as national and as administering one system of jurisprudence.

The characterisation of Australia's common law as one body of law was foreshadowed at the time of federation by Quick and Garran who wrote of "a common law of the Commonwealth"¹⁰. The unqualified recognition of that principle appeared in the joint judgment of the High Court in *Lipohar* when it adopted the statement by McHugh J in *Kable's Case* that¹¹:

Unlike the United States of America where there is a common law of each State, Australia has a unified common law which applies in each State but is not itself the creature of any State.

The characterisation of all of Australia's laws as "the law of this country" was set out in *Lange's Case* when the Court said¹²:

¹⁰ Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, (1901) (1976 reprint) at 785.

¹¹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 112 adopted in *Lipohar v The Queen* (1999) 200 CLR 485 at 505 per Gaudron, Gummow and Hayne JJ.

¹² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form "one system of jurisprudence".

The Australian courts, Federal, State and Territory, which administer justice according to that one system of jurisprudence, reflect the federal character of our constitutional arrangements in their geographical locations and jurisdictions, and have continued to do so despite powerful arguments for their rationalisation and unification. One of the proponents of unification was Sir Owen Dixon who, in 1927, argued for one system of courts, neither federal nor state in character, and supported financially by all the governments of the federation. Such courts would have authority to deal with legal questions raised before them regardless of the source of the rights or obligations in dispute. Many proposals for rationalisation of the judicial system have followed over the years¹³. None have come to fruition in any formal sense. Nevertheless, there is today a substantial amount of personal and institutional interaction and even exchange between judges and their courts across Australia. Annual conferences of judges of like jurisdictions, the activities of the Australian Institute of Judicial Administration, the Judicial Conference of Australia, the National Judicial Conference and the Australian Court Administrators Group are all important parts of that interaction. The Council of Chief Justices meets

¹³ French, R, 'Judicial Exchange: Debalkanising the Courts' (2006) 16 *Journal of Judicial Administration* at 142.

twice yearly and is increasingly a point of reference for government on matters affecting the judiciary. It has recently developed a web portal to enable more efficient communication on matters that arise between meetings.

Broadly what has happened is the growth of a kind of extra-institutional judicial community and an institutional convergence supported by the activities to which I have referred. It is also supported by principles emanating from the High Court in relation to the unity of Australian law, the integration of our judicial institutions and the implications of those things for mutual respect and recognition accorded to decisions of courts across national, state and territory jurisdictions.

Recognition by the High Court of the national character of the Australian judicial system as a set of institutions was made explicit in *Kable's Case*, with references to an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power"¹⁴ and "an integrated national court system" which "ensures the unity of the common law of Australia"¹⁵.

This has implications for the way in which the intermediate appellate courts of the States and Territories and trial judges within those States and

¹⁴ (1996) 189 CLR 51 at 114-115 per McHugh J.

¹⁵ (1996) 189 CLR 51 at 138 per Gummow J. See also at 103 per Gaudron J.

Territories treat the decisions of intermediate appellate courts in other jurisdictions within Australia. In *Australian Securities Commission v Marlborough Gold Mines Ltd*¹⁶ which was decided in 1993, the High Court pointed to the necessity for the intermediate appellate court and trial judges within a particular State or Territory not to depart from the interpretation placed on uniform national legislation by another intermediate appellate court unless convinced that the interpretation is plainly wrong¹⁷. The generalisation of that proposition in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹⁸ followed logically:

Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.

¹⁶ (1993) 177 CLR 485.

¹⁷ (1993) 177 CLR 485 at 492.

¹⁸ (2007) 230 CLR 89 at 151-152 [135].

Australia has, in the sense I have been discussing, a national judiciary. It also has in substance a national legal profession. Their national character has brought both the judicature and the profession on to the agenda of Australian governments considering entry into cooperative intergovernmental arrangements in a variety of areas of national concern. These include such diverse subjects as health and aging, productivity, climate change and water, infrastructure, business regulation and competition, housing and indigenous reform.

The recent history of intergovernmental cooperation in Australia indicates a tendency to treat as national a range of issues which would not that long ago have been regarded as matters of state or territory concern. The cooperative drive is in part extra-constitutional but seeks results on a consensual basis between governments which go well beyond those achievable by the exercise of Commonwealth legislative power and the separate exercise by the states of their powers.

On 5 February this year, the Council of Australian Governments issued a communiqué under the heading "Microeconomic and regulatory reform" in which it said¹⁹:

¹⁹ Council of Australian Governments, Special Council of Australian Governments Meeting, Nation Building and Jobs Plan, Communiqué (5 February 2009) at 9-10 available at www.coag.gov.au/coag_meeting_outcomes/2009-02-05/docs/20090205_communique.pdf >

Leaders re-affirmed their strong commitment to micro economic and regulatory reform, recognising that better regulation enhances Australia's productivity and international competitiveness, deepening the supply potential of the economy, driving its ability to adapt faster and raising the potential growth rate. Further to its National Partnership Agreement on a Seamless National Economy, COAG recognised that despite recent valuable reform there remains considerable scope for further microeconomic reform in the following areas ...

Four areas were mentioned, the fourth of which was "reform of legal profession regulation". As a result the Commonwealth Attorney-General has established a taskforce to prepare draft legislation by April 2010 with a view to uniform regulation of the legal profession across Australia. The taskforce is headed by the Secretary of the Commonwealth Attorney-General's Department and supported by a consultative group chaired by Professor, the Honourable Michael Lavarch, a former Commonwealth Attorney-General and former Secretary-General of the Law Council of Australia.

The touchstone for judging any regulatory regime in relation to the legal profession must be its capacity to serve the public interest in maintaining a strong, independent, competent and ethical body of legal practitioners. The educational and practical qualifications and the requirements of character necessary to justify admission to the profession must figure prominently in the design of any national regulatory

framework. The maintenance of such standards by continuing legal education and effective complaints handling and disciplinary measures are also of great importance. And as anybody who has been involved in the regulation of the profession will know, a professional regulatory regime not closely connected to the community in which it carries out its regulatory activities, is at risk of missing that which is important and perhaps even overreacting to that which is not. Close connection here does not mean a relationship which is less than arms length. The historic responsibility of the Supreme Courts of the States and Territories in respect of those who are "officers of the Court" should not lightly be put to one side.

These remarks do not anticipate the emergence of any particular model of national regulation. They are merely intended to raise a caution about any model that does not take advantage of historically established and respected local institutions, knowledge and experience. On the other hand, there is much to be said for uniform standards across Australia for admission to practice, the right to continue practising, disciplinary processes and continuing education.

The intergovernmental gaze has also fallen upon the judiciary. The Standing Committee of Attorneys-General is considering the development of what is called a "National Judicial Framework"²⁰. Such a framework

²⁰ See Law Council of Australia, Standing Committee of Attorneys-General, National Judicial Framework, (April 2008) available at

may include provision for the harmonisation of federal, state and territory requirements and processes for judicial appointment, tenure and retirement. Judicial exchange arrangements between courts are under continuing consideration. So too is a national judicial complaints handling system. There are also ongoing endeavours involving the Productivity Commission and the Review of Government Service Provisions published on 30 January 2009 to develop effective court performance indicators²¹. General political interest in the judicial system at the national level has also been evidenced by the inquiry established by the Senate Legal and Constitutional Affairs Committee into Australia's Judicial System and the Role of Judges²².

Each of the questions under consideration by the Standing Committee of Attorneys-General and by the Senate Committee is large. Any consideration of a national judicial framework must necessarily bear in mind the nature of the judiciary, its core functions and the respective benefits of national and local approaches to those questions. Importantly, these developments do not appear to be informed by any general sense of crisis or dysfunction in the courts. Australia's courts maintain their general reputation for impartiality, independence, incorruptibility and competence

www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=CCBBAB9C-1E4F-17FA-D27B-31862BF830E4&siteName=lca

²¹ See Productivity Commission, *Report on Government Services*, (30 January 2009) available at www.pc.gov.au/gsp/reports/rogs/2009.

²² See Senate Legal and Constitutional Affairs Committee, *Inquiry into Australia's Judicial System and the Role of Judges* (details available at www.aph.gov.au/senate/committee/legco_ctte/judicial_system/index.htm).

in the terms set out by Sir Gerard Brennan in his speech on *The State of the Judicature* in 1997. That is not to say that there is not room for a degree of harmonisation in approaches to judicial appointment, terms and conditions, removal, retirement and the accountability of courts in relation to the efficient use of public resources, and the management and disposition of cases. Cost and delay in the litigious process and associated impacts on access to justice have been a matter of concern to judges and court administrators for many years. Case management procedures of general application, special lists and disposition standards are in place in most courts throughout Australia. The High Court in a recent decision reaffirmed the public interest in the expeditious management of litigation²³. Having said all that, the current intergovernmental consideration of the judicial system can be seen as part of the evolution of a national cooperative approach to a range of issues which are not solely within the constitutional competence of the Commonwealth, but are nevertheless of national significance.

The Law Council and other bodies have made comprehensive and thoughtful submissions to Government on a number of the matters to which I have referred. I do not propose to comment on them in any detail. I do wish, however, to draw attention to fundamental aspects of the judicial system which must not be compromised in any consideration of change. These are the constitutional characteristics of courts, the nature of their

²³ *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27.

functions and of their relationship to the legislature and the executive branches of government. These are the "boundary conditions" which properly frame any discussion about the resourcing and accountability of courts and the duties that may be imposed upon them²⁴.

The separation of powers, constitutionally entrenched for federal courts and conventionally respected for State and Territory courts, marks the Australian judicature out as the third branch of government. The courts are not executive agencies. Indeed, contrary to some current usage, it is inappropriate to regard them as "agencies" at all. They are not at the command of the Executive. It may be accepted that, in the area of public law, their institutional independence and the exercise of judicial review of administrative action can sometimes frustrate the implementation of a particular government policy. That is the price for the rule of law which binds government as much as it binds the subject.

The Commonwealth Constitution devotes separate chapters to the legislature, the executive and the judiciary. That textual separation supports the constitutional separation at the federal level. As was said in the *Boilermakers' Case* in 1956²⁵:

²⁴ French R, 'Boundary Conditions – The Funding of Courts within a Constitutional Framework' Australian Court Administrators' Group Conference, Melbourne, 15 May 2009.

²⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275 per Dixon CJ, McTiernan, Fullagher and Kitto JJ.

If you knew nothing of the history of the separation powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inference from Chaps I, II and III and the form and contents of ss 1, 61 and 71.

Because the Commonwealth Constitution contemplates the use of State courts as repositories for federal jurisdiction their institutional integrity is protected from laws that would compromise that constitutional scheme. It is not open for a State Parliament to confer powers or impose functions on State courts which are "repugnant to or incompatible with the exercise of the judicial power of the Commonwealth"²⁶.

What this means is that whether by constitutional rule or convention the courts that make up the Australian judicature have a distinctive role to play which is essential to the functioning of our representative democracy. They are not merely providers in a market for dispute resolution services. It is in that context that in July I offered some cautionary observations in relation to the development of what have been called "Multi-Door

²⁶ (1996) 189 CLR 51 at 103 per Gaudron J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J, Hayne J agreeing at 648 [198].

Courthouses"²⁷. That term describes a process whereby parties bringing a matter to court for decision are streamed into what is thought to be the most appropriate dispute resolution mechanism for that matter. The mechanism may be mediation or arbitration, or a hybrid of them, or the judicial process. Court-annexed non-judicial dispute resolution has, as we all know, been a familiar feature of the Australian court landscape since the 1990s, as it has in other countries in the common law world. The idea of court involvement in, and support for, the resolution of disputes without the need for a final hearing is not novel. It is plainly desirable that parties be afforded the opportunity to reach resolutions which preserve their relationships, be they personal or commercial, and avoid or reduce the costs and stresses associated with litigation.

My caution about the terminology of the "Multi-Door Courthouse" is that it raises the possibility that the judicial process can be viewed as one among a number of dispute resolution services. If the distinctiveness of the judicial function is blurred in that way, it is not too great a step to treating the courts as executive agencies. What Chief Justice Spigelman said ten years ago is still true today²⁸:

²⁷ French R, 'Perspectives on Court Annexed Alternative Dispute Resolution', Law Council of Australia – Multi-Door Symposium, Canberra, 27 July 2009.

²⁸ Address to the Compensation Court Annual Conference, May 1999 cited in Underwood, 'The Trial Process: Does one size fit all?' (2006) 15 *Journal of Judicial Administration* 165 at 169.

We must never lose sight of the fact that it is not appropriate to assess the judicial system as if it was merely a publicly funded provider of dispute resolution services. The judicial system is the exercise of a governmental function, not the provision of a service to litigants as consumers. The enforcement of legal rights and obligations is a core function of government.

Similar considerations require a degree of alertness about the maintenance of the distinctive character of the judicial function in the developing field of what is called "therapeutic jurisprudence". This arises in the context of specialist courts which have been set up to deal with those classes of case in which judicial dispositions interface with complex and chronic underlying problems which have to be dealt with if the court is not simply to be a revolving door. Specialist courts or divisions of courts have been established to deal with persons caught up in issues of substance abuse and family violence. These initiatives recognise that an holistic approach and, in some cases, ongoing supervision by the court is necessary in order to provide a framework within which underlying problems can properly be resolved. Such initiatives are positive and have generally been well received. They are the subject of ongoing evaluation and research in relation to their effectiveness. Again however, it is important to bear in mind in the design of the institutional arrangements in these cases that the judicial function is not confused with the provision of services by the executive branch of government. That having been said, cooperative approaches may yield positive results.

There is also a legitimate interest within government in ensuring that public resources allocated to the courts are used efficiently. Finding measures of efficiency in relation to the functioning of courts is not a trivial task and has been the subject of much consideration within Australia and in other countries. One leading commentator in the field, writing of ideas of efficiency and effectiveness applied to courts, has said²⁹:

When translated into the judicial arena, this means that courts should settle disputes in a "just, speedy and inexpensive manner", as a well known formula has it. However, trouble begins as soon as we attempt to define terms such as "dispute settlement", "just", "speedy" and "inexpensive" with more precision. And matters are further complicated by the realisation that the simultaneous fulfilment of these values requires trade-offs and compromises: "speediness" may come at the expense of "justice" ... unlimited access to the courts may result in considerable backlogs and delay; "justice" may demand the possibility of a slow, costly appeal process; while a court proceeding even if it is regarded as just, speedy and inexpensive, may not be able to "settle" the underlying dispute at all.

²⁹ Fix-Fierro, *Courts, Justice & Efficiency – A Socio-legal Study of Economic Rationality in Adjudication* (2003) at 8.

There are models in place and under development around the world for the assessment of the performance of courts. In 2002, the Council of Europe established a European Commission for the Efficiency of Justice. Its object is the improvement of the efficiency and functioning of justice in the Member States. A variety of indicators have been proposed including case load per judge, productivity, duration of proceedings, cost per case, clearance rates and the court's budget. Time does not permit an extended discussion of the issues raised by these and similar indicators which were referred to in the paper which I delivered earlier this year to the Australian Court Administrators' Group conference in Melbourne. However, as Chief Justice Spigelman said in a speech which I quoted on that occasion³⁰:

The value of efficiency – of getting "value for money" – has received a greater, and often dominant, salience in competition with other values of government activity such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. This change has affected all aspects of government including, inevitably, the courts. The judiciary cannot and should not, attempt to insulate itself from such changes. Courts have responded and must continue to do so.

³⁰ Spigelman J, 'Judicial Accountability and Performance Indicators', 1761 Conference: The 300th Anniversary of the Act of Settlement, Canada, 10 May 2001.

There is a distinction to be drawn between the administrative functions of the courts and their adjudicative functions. In the Report of Government Services published on 30 January 2009 and in particular Chapter 7 headed "Court administration" the focus was said to be on "administrative support functions for the courts, not on the judicial decisions made in the courts"³¹. But the judicial performance indicators discussed in the Review plainly had the potential to impact on the judicial function. A statement of objectives for court administration was set out which included:

1. Openness and accessibility.
2. Processing of matters in an expeditious and timely manner.
3. Provision of due process and equal protection before the law.
4. Independence with public accountability for performance.

Key performance indicators offered included:

1. Backlog as an indicator of case processing timeliness.
2. Judicial officers as an "indicator" of the availability of resources.
3. Attendances as a proxy for input costs.
4. Clearance rates matching the number of lodgments with the number of finalisations in a given period.

³¹ See Productivity Commission, *Report on Government Services*, above n 21, Ch 7.

5. Costs per finalisation.

These indicators are a work in progress. It is important, while accepting the legitimacy of such measures, that the limitations of quantitative indices of efficiency be acknowledged and that they not be used to intrude upon the essential features of the judicial function.

The question of funding for the courts and how it should be done has been the subject of public discussion by former Chief Justices of the High Court and Australian academics and in other jurisdictions. There has been a diversity of approaches some favouring funding directly by Parliament, others by the Executive³². It is unnecessary for present purposes to canvass the diversity of those views. However, whatever model is adopted, funding should be provided within a distinctive policy framework which respects the constitutional and functional characteristics of the courts. In this respect I would repeat what Chief Justice Brennan said in his State of the Judicature address in 1997³³:

In times of financial stringency, there is a risk that governments might regard the courts simply as another

³² Barwick, above n 2 at 492-493; Gibbs, Sir Harry, 'The High Court Today', (1983-1985) 10 *Sydney Law Review* 1 at 3-4; Mason, Sir Anthony, 'The State of the Judicature' (1994) 68 *Australian Law Journal* 125 at 128; Gleeson M, 'State of the Judicature' (2000) 74 *Australian Law Journal* 147 at 149.

³³ Brennan, above n 8 at 35.

Executive agency, to be trimmed in accordance with the Executive's discretion in the same way as the Executive is free to trim expenditure on the functions of its own agencies. It cannot be too firmly stated that the courts are not an Executive agency. The law ... goes unadministered if the courts are unable to deal with ordinary litigation.

...

The courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the rule of law would be immediately imperilled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide the dispute resolving mechanism that is the precondition of the rule of law. ... Constitutional convention, if not constitutional doctrine, requires the provision of adequate funds and services for the performance of curial functions.

I have endeavoured to bring together in this address some themes of which I have spoken over the last 12 months. These themes, although reflective of contemporary events, have their roots in the fundamentals of our judicial system. It is a system which, with the help of both internal and external drivers, maintains an encouraging degree of dynamism, self-

reflection and exploration of ways of doing things better. Provided that the fundamentals are respected, that dynamism is to be welcomed.