STATE OF THE VICTORIAN JUDICATURE

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PART 1

INTRODUCTION

This is the first time in the history of the courts of Victoria that the Chief Justice has delivered a state of the judicature address. It is an event that now occurs, it seems, almost annually, across Australia and overseas in the common law world. Usually, on those occasions, the address focuses on important matters of principle, such as the application of the rule of law and judicial independence. Invariably, there are occasions when the addresses focus on providing an overview of the state of the judicature in the relevant jurisdiction. It is the latter that I will particularly focus on this evening given as it is the first time such an address has been given in Victoria.

In the address, I will focus on the following areas:

First, judge time and the value of that commodity to the governmental structure of modern society.

Secondly, the judicial role, including the impact of court governance structures and public expectation and perception of the role.

Thirdly, an overview of Victorian courts and tribunals.

Fourthly, the future for the Victorian judicature, in particular, the role of the Supreme Court, the changing roles of other jurisdictions in the State,

the impact of technology and the role of judicial leadership in the future of the Victorian judicature.

PART 2

JUDGE TIME

The most precious commodity any court has is judge time. By judge time, I do not simply mean the time a judge sits in court. Judge time is made up of many components.

1. ***The time spent on court preparation:*** the reading of the papers of the file, the written submissions, the witness statements or depositions, the Law Reports that apply, the applicable Act or Acts of Parliament and, sometimes, Hansard, to understand what was intended when the law was introduced. Sometimes, such preparation can be done quickly, one hour, two hours a day. Sometimes days or, in a big case, weeks. Barristers and solicitors put in hours, days, even weeks, sometimes months to prepare their clients' case.

   If you cumulate that time, let us say three days' preparation for a two party case, it leads to a two party preparation time of six days. Generally, by comparison, judges try to pull together sufficient time

for a day's preparation. It has been said that the Bench should always be a step ahead of the Bar.

In addition to this snapshot of court preparation, there needs to be time for judicial reflection: what is the issue in the case? What are the problems faced by either side? Is there something that the parties have overlooked or made a mistake on?

Sometimes a judge will be assisted by high calibre, very experienced legal representatives. Sometimes the parties will only be able to afford a very junior barrister. Sometimes the parties have to represent themselves. This creates a pressure for judges who must see that justice is rendered "without fear, favour or affection". In the Supreme Court we now have an Unrepresented Litigants' Co-ordinator who saw 385 individuals in her first year. We are now working with the Victorian Bar to develop a no cost, volunteer duty barrister service for the higher courts in Victoria.

2. ***The next component of judge time is time in court.*** Generally judges, as former busy barristers, are skilled at moving things along. They do not receive training on courtroom time and motion, but based on experience and instinct most judges are pretty good at it, certainly so far as the Supreme Court is concerned, and I would expect other courts. Judges do not like to see public money wasted

because parties are unprepared, not ready or technology lets us down. When that happens, judges, in my experience, will usually move things along and not stand for any prevarication, procrastination, obfuscation or incompetence. However, there are constraints imposed on judges by rulings of the High Court and appellate courts. Ultimately, a judge must see that justice is done. There are times when cases take longer than expected. For example, the *Pong Su* drug trafficking case took 135 court days over its original estimate, the *Salt Nightclub* case took 132 court days over its estimate, the *Strawhorn* police corruption case involved, in effect, three trials, a total of 244 court days**.** Recently, *Premier Building Services. v. Spotless Group & Ors* ran for 71 days**.** Of course, these overruns have a ripple effect across the Court because the Court engine has to keep running, a bit faster and harder, up hill with the same amount of fuel – judge time.

The Supreme Court has led the way in Victoria in judicial management with the Commercial List and other specialist lists. Since 2004, criminal trials have been more intensively judge managed and that has been accelerated since January 2007 with matters coming before a judge within 14 days of the end of the committal hearing. Since January 2007 much stricter requirements are made of civil parties before a trial date is allocated. In

summary, first, each party knows what the other party's evidence will be, secondly, the case will have undergone at least one round of mediation and, thirdly, a certified trial estimate from counsel retained in the case will have been given. Without the evidence, mediation or a certified estimate being on the table, a trial date will not be given (except in very unusual circumstances).

It has not stopped with trials. Equally, there is much more intensive judicial intervention and management of both criminal and civil appeals. Listing has intensified, particularly in sentence and accident compensation hearings. A new master has been appointed to manage and direct civil appeals. A new practice direction has been applied to civil appeals essentially to strip appeals down to their bare issues and to identify matters that warrant a fast track approach.

3. ***The third component of judge time is the after court process of writing the judgment.*** Sometimes it is possible to deliver judgment on the spot. Certainly that is encouraged and if there is enough preparation time for a judge, it is more likely. Now for those who may not understand, the judgment is the explanation for the outcomes. Judges are not allowed to say "you win, you lose" they are required by law to explain their reasons for their decision. In a

criminal trial a jury is able to say “guilty” or “not guilty” without explaining why, but for every decision the judge makes before the verdict and later, when deciding the sentence, the judge has to explain how the decision was reached. This requirement, to give reasons for the decision, is imposed on judges in all trials and appeals, both criminal and civil. The reasons cannot be written by someone else perhaps the way a report or memorandum might in government or private enterprise. The reasons must be those of the judge and no one else. They must be set out logically, find and state the facts, the issues, the law and how and why the judge reaches a particular conclusion. Deciding the case and preparing the reasoned analysis is the hardest thing a judge does. It is our fundamental role. Our judgments are our “product”. They fill the Victorian Reports and occupy the judgment websites.

4. ***Lastly, in the overview of judge time, there is what I will call “other” time.*** It is made up of involvement in court management and administration, court committees (both internal and external) law reform processes and general extra-curricular work such as speaking to the Bar, the profession, other courts, universities, professional groups and the public generally. Judges are very much in demand. Included in the “other time” is judicial education.

Judges recognise that they must keep up to date with the law, remain in touch with the community and its expectations and mix with their colleagues from other courts so as to share ideas and innovations. Most judicial education in the Supreme Court is done in judges' own time (on leave, at lunchtime or before or after court). Roughly, based on internal surveys, I would estimate that most judges spend over 20 per cent of their time on the "other" category.

Before that estimate is leapt upon to suggest that if judges drop the "other" time category of the work there would be a 20 percent increase in the available judge time, that is simply not so. The "other" category is important and in some aspects, compulsory. Let me give a few examples: the Adult Parole Board, the Forensic Leave Panel, the Council of Legal Education, the Council of Judges, the Judicial College of Victoria, the Victorian Law Reform Commission, internal management committees, various user and consultative committees, extensive advisory committees, working parties and steering groups established with government with respect to court funding and resources.

Judges do not clock on at 9.00am, take lunch between 1.00 and 1.30pm and then clock off at 5.30pm. Unfortunately, judges work

very, very long hours. Their work practices are not ideal but it is the only way they can get through their work, render justice according to law and keep their court going.

The work practices of judges provides the context for judge time. In the last year the Supreme Court conducted an internal occupational health and safety survey of its judges. It is completing another on the masters. Such survey work is probably the first of its kind in the world, certainly in Australia. We, at this Court, have begun an important process.

In summary, the survey revealed that all judges work long hours, some far too long, that judges' workloads are unsustainable for health reasons and that steps ought be taken to reduce the strain. Significantly, the survey disclosed that the situation is not simply one of working long hours (many people in modern society have to do that), but it was the dangerous level at which judges are working on a sustained basis that was of concern. This reality is borne out by retirements of judges before the compulsory age and often after the minimum service. This has particularly been the experience with appellate judges.

The Court has set about internal steps to improve the quality of judicial life and, importantly, to ease the judicial burden by allocating reasonable time to write the judgment straight after the case finishes. This is proving possible by the new practice directions that demand responsible time estimates from parties. The benefit to the community is that judgments are starting to be delivered in a timely way: for example, in commercial cases within six weeks, in the Practice Court either immediately, or within a week. One phenomenon is apparent. The Court is shifting responsibility for the conduct of cases more towards the profession rather than the focus being entirely upon the judge and his or her capacity to conduct the trial or preside over the appeal. One of the worst strains that a judge faces is the outstanding judgment. We are looking at all avenues to ameliorate that strain, but it is difficult without additional judges. Recently, the State Government announced funding for two additional judges and one additional master for the Supreme Court. There was also an announcement for two additional judges for the County Court. The funding is the beginning of the recognition by government of the importance of cases being heard, managed and decided as quickly as possible. Victoria must be able to match up with its interstate and interjurisdictional comparators. Victorian citizens should be confident the serious criminal trials and appeals will be disposed of by prompt, energetic and sharp judges - not slow, tired and worn out judges.

Equally, Victorian business and litigators should be able to bring their cases to Victorian courts to be disposed of in the same way. There should be no need to resort to other jurisdictions save for jurisdictional reasons.

As a further measure to support and assist judges, the Supreme Court is developing, for consideration by government, a new status of senior judge whereby judges will not simply retire at 70, but subject to agreement by the Attorney General and the discretion of the Chief Justice be able to stay on a part time basis as is now commonplace in North America.

The judges of the Supreme Court are very pleased at the recent State Budget announcements and its marking for the first time in the history of the Court the assessment and analysis of the true numbers of judges needed to meet the litigation needs and expectations of the Victorian community.

I have spoken of judge time and placed it in the context of judicial health. Judge time must also be placed in the context of court delays. Internal research conducted by the Court in the last 12 months disclosed that there is general agreement between the Victorian legal profession

(barristers and solicitors) and the judges of the Supreme Court that acceptable delay times in the Supreme Court ought be:

Criminal Trials – six to eight months

Civil Trials – four to six months (with judgment within one to three months)

Appeals – six to twelve months.

We do not meet expectations across the board yet, although the increase in judge numbers will be invaluable in achieving that goal. Indeed the period 2000 – 2006 was difficult for the Supreme Court and, indeed, other jurisdictions. At one point, criminal lodgements increased by 50 per cent. This was partly due to the policy implemented by the Court from February 2004 that the Supreme Court would return to hearing major criminal trials not only homicide cases. As a result, the Court heard and will continue to hear appropriate cases such as major drug trafficking, police corruption and terrorism matters and, in due course, major and complex corporate matters, sexual offences and other criminal cases. At the same time the policy decision as to non homicide cases was implemented a long series of underworld cases came into the Court that increased judges' workload. For some time, the number of outstanding criminal trials in the Supreme Court has stood around 80, it used to be about 50 and rarely over that number. Currently, the figure of 80 is constant. The Court is taking all

steps to reduce that number including the allocation of additional judges from civil to crime and early and ongoing pre-trial judge intervention and management. However, there will always be circumstances beyond the control of the Court: surges in criminal activity, improved police investigation, technological advances in forensic science, the quality of counsel both for the prosecution and the defence and the ordering of re-trials by the Court of Appeal. Government increased judge numbers by three during 2004 – 2005 but the numbers will need to be reviewed and, if necessary, rejustified by the Court in 2008. I believe, at this point, those additional judge numbers will be required for the types of reasons I have canvassed: delays, work volume, timeliness and judge health.

I turn then to our civil trial workload. Internal research by the Court disclosed a 45 percent increase in civil matters initiated in the five year period 2002 – 2006. There was a commensurate 40 percent increase of matters finalised in that period (achieved, in part, by a clearing out of "old wood", redundant files not recorded). However, between 2002 – 2006 the clearance rate was consistently below 100 percent resulting in an increase in backlog. In the two years 2004 and 2005, no civil trial having been allocated a trial date was marked "not reached". However, in 2006, there were 14 instances. Cases that are unable to be given a judge on the fixed date are unacceptable. The cost to the parties is substantial

and it leads to injustice. The solutions lie in the justification to government of the need for greater judge numbers, better pre-trial management now achieved through the civil practice directions and expanded availability of court based alternative dispute resolution.

I would add one rider - the consequences of the *Charter of Human Rights and Responsibilities Act 2006*. It will commence a new jurisdiction for Victorian courts and tribunals, in particular, the Supreme Court and we are yet to know the impact on courts' workloads.

As for appeals, in civil matters the Court of Appeal has generally had a clearance rate of about 100 percent but the time for finalisation of the civil appeals is in the order of 12 months, well above the six to eight months acceptable to the legal community and judges. In criminal appeals the clearance rate has remained above 100 percent resulting in a reduced backlog. However, the impact of appeals from long criminal trials already determined will doubtless have an impact. We are yet to observe that impact.

Of course, there are always judicial management techniques available. The Victorian courts and tribunals have all embraced mediation, both external and court-based. There is mediation now offered by the Court of

Appeal. From top to bottom of the judicial hierarchy in Victoria, mediation is a primary judicial expectation. Indeed, it started in the County Court through Justice Kellam and expanded to the Supreme Court through Justice Smith many years ago, I daresay, as a national leader.

I hope to explore other ADR initiatives, including the effective Canadian technique of judicial dispute resolution at least on a pilot basis. We are also exploring other means of shortening cases: CHESS time, stripping to bare issues and joint expert positions. We have engaged with interest in the Victorian Law Reform Commission reference on civil procedure. The Supreme Court provided a detailed submission identifying the extensive arrangements already implemented by the Supreme Court that reflect the announced thinking of the review. In this regard, in many respects the courts are ahead of the reformers. Public statements are sometimes made to suggest that there is a lot more that could be done in courts to speed up court processes. The fact is, most Victorian courts by varying means have exhausted their presently available court tools: mediation, wider ADR, varying levels of judicial management – in effect a docket or quasi-docket system, the application of the "rocket docket" approach of the District Court of Columbia in the US. There is not much left. Indeed, before the Woolf reforms were introduced in England, a study was made of the Victorian Supreme Court Commercial List and Victorian measures were adapted for England. What we now have in Victorian courts is,

ultimately, a tough “rump” of cases, (about three percent of cases started) that are hard fought, tough to decide and take a deal of judge time whether they are trials or appeals. What is more, these cases, from judges’ viewpoint, are relentless.

Consideration of judge time also includes the changing nature of judge work both at this time and in the near future. We see a different type of criminal and civil trial these days (and inevitably, different issues arising on appeals). Criminal trials have become longer and more complicated. The English experience in the *Jubilee Line* case that fell away after almost two years and the *Blue Arrow* case which lasted 13 months demonstrate how challenging complex litigation will be in the future for Victoria. When we observe the federal experience of the *C7* case, we read that the length of these cases was the fault of the parties, their lawyers, the prosecution, the defence, indeed, anyone but the judge. Judges continue to voice frustration at lawyers’ behaviour. The Victorian Supreme Court recently completed the commercial trial in *Spotless* after 71 court days (judgment is reserved). Another commercial case, *BHP* is due to start in August 2007 estimated to last eight months. The Court has the *Benbrika* terrorism trial in hand with an estimate of twelve months preceded by about five months intensive pre-trial management. There are the two civil matters of *Gunns* and, also the *Biota*

pharmaceutical case. In *Biota* the parties cannot give an estimated duration except to say “a very long time”. *Gunns*, it is estimated will last more than twelve months.

Ultimately, there is a limit to judges’ capacities. The announcement by the VLRC of the endeavour to shift the burden, including the ethical responsibility, to the legal profession is welcome. That said, it will still fall on the judge to ultimately enforce the goal. Business interests, governments, treasury officials, the media and, most importantly the community, all express frustration sometimes at how long cases take. Their frustration should not be vented on judges. In our democratic society we have an adversarial system: the case must be proved by the accuser or the claimant; the case must be decided by an independent party, the judge. The privilege of that system comes at a cost. In the Supreme Court we have done almost everything we can within our power – as things stand the tool-box is exhausted and there is a limit to what can be asked of judges. To maintain and build a modern democratic society there are some basic prerequisites – the tangible essentials of adequate education, health, transport and economic infrastructure and, also, the provision of those intangible elements such as competent and timely justice for all citizens. In the latter case this prerequisite can only be delivered if there are sufficient judges to do the work.

Of course, if government commits to increased judges the courts must be accountable to the community. This does not mean some crude accounting or auditing method that interferes with judicial independence. It means at least two things: first, courts collecting detailed data as to what they do, how long things take, how many things and the types of things they do and then making that data publicly available; secondly, it means courts must demonstrate and engage in a dialogue with government and the community about what they do.

Let me give examples: at my invitation the highest levels of government are accepting my personal invitation to tour the court and talk to us about our work; all members of Parliament are shortly to be invited to do the same; earlier in Law Week 2007 judges took members of the public on "talking tours" of the Court.

Much of what I have said might sound as if Victorian courts and tribunals are gloomy places. Not so. All Victorian judicial officers are proud of their institution and honoured by the privilege given to them to serve the Victorian community. We are universally committed to achieving the highest quality of justice for the community we serve. Are there any obvious solutions to propose to government?

1. ***Expansion of the jurisdiction of VCAT*** but with security of tenure for all members to ensure judicial independence.
2. ***Legislative provision to shift more of the litigation burden to the lawyers***: to give judges expanded legislative power to compel expedition measures in both civil and criminal trials.

Combined with appropriately increased judge numbers these measures would see Victoria forge ahead in court systems.

Clearly linked to the timely dispatch of court business is the quality of judicial appointments made to the courts and tribunals and the quality of the advocates who run the cases before the courts.

It is essential that those appointed to busy trial jurisdictions bring the intellectual strength, experience, work capacity and personal commitment to fit in quickly and share the workload. Much is said these days about the importance of cultural, gender and social diversity in courts and tribunals. Of course, it is very important and our courts and institutions have progressed a long, long way in the last ten years. However, in a context of the limited commodity of judge time, all judicial appointees ought to be capable of quickly sharing the workload competently and responsibly – unless government compensates for diversity by funding

extra, more experienced appointments to meet the time needed for more diverse appointees to be able to reach their full potential. It is undesirable for the judge time of a competent, experienced judge to be further burdened or distracted by the training of an intellectually capable but inexperienced judge. Perhaps the solution lies in the appointment of part or full time retired judges to be on hand to provide advice, training and counselling to new appointees.

These comments should not be interpreted as indicating the courts are currently suffering from the appointment of judges requiring such assistance. However, if diversity rather than experience and immediate capability become the dominant factor in appointment considerations, extra judges would be required to maintain the existing work capacity of the courts.

However, even the most competent and experienced judges should be able to rely on the counsel before them. In cases, advocates owe a duty to the Court to assist it in doing justice, even if it means going against their clients' interests. Sometimes, this obligation needs to be reinforced. A little while ago, it was suggested that the Victorian commercial Bar (and the reputation of its commercial lawyers generally) had declined significantly because of the size of the profession, generational change,

the reduction of commercial litigation by alternative dispute resolution measures and, importantly, the erosion of the stature of the commercial Bar and legal profession, the latter for various reasons. From a judge's perspective, the highest quality counsel is important. The Court of Appeal has repeatedly commented on the problems arising where inexperienced prosecutors and defence counsel appear in trials. It has also insisted on counsel fulfilling a supportive role to the Court on appeals. The Office of Public Prosecutions and Victorian Legal Aid have responded at both trial and appellate levels to the call of the Court. Twenty years ago senior counsel generally appeared for both sides in major criminal trials, including homicide cases. Regrettably, that changed and seems now to be shifting back. This is partly reflected in the numbers of crown prosecutors who are senior counsel and, very importantly, the preparedness of senior members of the Victorian criminal Bar to accept the sometimes less well paid prosecution or defence brief because of their commitment to the administration of justice in this state. It is often insufficiently recognised just how much the Bar and the profession contribute to the system for limited or, even sometimes, no reward. If those barristers were not prepared to do so the system would break down. Equally, the Bar and the profession make a substantial contribution to the court system for no payment at all through what is called the *pro bono* system. Given the numbers of unrepresented

litigants in the Supreme Court alone, large slabs of judge time would be lost without the support of those barristers and lawyers. It is a benefit government reaps cost free because of lawyers' commitment to the legal system that the Victorian community expects to enjoy.

As for the Victorian commercial Bar and profession, the judges of the Supreme Court think they are pretty good and capable of matching it with the best. I expect with the widely consultative and intensive approach now taken to the appointment of senior counsel in the State an even stronger Bar will emerge who will impose higher standards on the legal profession and vice versa. They will also push judges that much further to stay one step ahead of those in front of them in court. My only suggestion to Victorian barristers and lawyers is that they should communicate more to each other, government, the community and the media about the good things they do and the human interest stories that usually lie behind those who have been helped.

PART 3

THE JUDICIAL ROLE

I turn next to the judicial role. Some of this topic I have covered in talking about judge time. I hope you have a better knowledge of what we do day in, day out. Now, I need to focus on some things the person in the street might regard as high sounding. These are called the rule of law and the independence of the judiciary. Lawyers use those terms often but usually do not explain them. I will try. The rule of law means that our society is not just governed by Parliament and politicians. It means that our society is controlled by the law. The law is made by Parliament and, often, by the courts under the Common Law system. The law is interpreted, applied and enforced by the courts. The Supreme Court can override everything, even what governments do. So, if a citizen thinks government has done something against or outside the law, that citizen has the right to go to the courts and the courts, generally speaking, have the power to do something about whatever has happened. The courts also play the same role in legal disputes between citizens. The courts are also the place where the criminal law is enforced by the prosecution. The independence of the judiciary means that whenever in court every citizen, government, institution or corporation is entitled to know that the judge will decide the

case independently, without any party feeling or sensing that the judge is biased or pressured to decide one way or the other.

In Victoria, the way judges work, judge time is affected by something called court governance. Across Australia and around the world there are three systems generally available. First, there is the executive system where the courts fall under a government department, which provides funding for judges' salaries, court staff, administration, computers and buildings and services, even the paper judges write on and the pens they write with. The judges are not employees of the government department, but everything else to do with judges and courts is fairly much provided by and under the control of that government department. The government department, in turn, is under the financial control of the Treasury and Premier's departments, which have to be persuaded as to how much funding to give to a court for its operations, judges and staff, computers, the building environment and all the things that make a court work. Before the government department and the Treasury and Premiers' departments will approve any funding they need to know that the courts are fitting in and performing in accordance with government policy. This is a very simple description but basically that is how the Executive Model of court governance works.

The second system is where the government gives a parcel of funding it thinks is enough directly to a court or a court authority that is not part of any government department. The individual court or the court authority then decides how the funding is to be spent. This system is called the Separate Executive Model.

The third system is called the Federal Model and provides for substantial administrative autonomy for federal courts.

The Executive Model of court governance applies in all Australian states except South Australia, although there are local variations to the model. The Separate Executive Model applies in South Australia. The Federal Model applies in the federal courts system. In Victoria, we have the Executive Model. What are the benefits and disadvantages of that model? That question cannot be answered exhaustively at this time but I will provide some comment on the Executive Model. Sometimes there are problems for courts where time is taken up persuading Justice, Treasury and Premier's Departments as to the needs of courts. It may be difficult in a competitive environment to persuade departmental officials why an item is important, more important and deserving of support than something else such as a new police building, hospital or educational institution. This means that courts have to spend a lot of time persuading and educating government departments and justifying their position. So,

a disadvantage of the Executive Model is the ***time*** required of courts to participate in that system. Another disadvantage is the jockeying for position that courts find themselves in; having to compete for resources and funding for something so fundamental as the ***rule of law***.

Perhaps the greatest disadvantage of the Executive Model is that it is at odds with ***judicial independence***. One of the main participants in litigation in Victorian courts is the State Government (through the State of Victoria, individual ministers, heads of government departments including the head of the Department of Justice and the Crown). The litigation includes challenges to ministerial and administrative decisions where citizens challenge the State, personal injury claims against government authorities, electoral challenges and naturally, criminal and summary prosecutions and appeals. Reverting back to my brief description of judicial independence, can Victorian citizens be satisfied that their judges are truly independent where one day they are meeting to persuade government officials why more funding is needed and then, the next day, hearing a case where the government is a party? I wish to say that in my experience of working in Government (which started in 1974) relations between the courts and the Department of Justice (and its predecessors) has never been better. Both the courts and the Department of Justice have worked hard to achieve a cooperative but as independent and

respectful arrangement as might be possible. Indeed, the Victorian example of the Executive Model is among the best of its type. The question is, can judicial independence be truly achieved under this model?

Are there any benefits of this system? Firstly, the courts do not have to be troubled by the minutiae of government structures; it is all provided for them. Secondly, via the departmental structure they have a voice within government that can be very effective. Thirdly, the community has the benefit of a very cost effective system that compares very favourably in economic terms with the other models.

There has been discussion raised again recently about court governance models. At some point it would be desirable to achieve uniformity, or at least consistency, between states so that state courts adequately reflect acceptable independence and standards alongside those courts within other systems. Perhaps it is a topic for the Standing Committee of Attorneys-General.

The last component of the judicial role I will address is public expectation and perception of the courts. The importance of the media to the courts cannot be overstated. The media provides the community with a window

into the courtroom. The media now involves the printed, filmed, electronic, digital and blogged forms. The community knows much more about courts than ever before. This is very good. Indeed, this morning, for the first time in Victorian legal history an admissions ceremony for new Australian lawyers in the Banco Court was prepared for a podcast. Generally, it is in the public interest to know what courts and tribunals do day in, day out. Sometimes the media leads a campaign of criticism of courts, and individual judges' performance. Provided the criticism is not personalised, pejorative, abusive or sexist then judges will generally accept robust criticism as part of the job. Yet, it should be remembered that judges do not answer back and that convention should not be disabused by the media. In Victoria it has rarely occurred. Sometimes, opinion polls are conducted by the media to test judges' community standing, performance rating or acceptability. Generally, those surveys are indicative of very little except how many took the time over breakfast, morning tea or lunch to view an item and then respond. Usually the numbers are modest and not scientifically sufficient to provide an accurate indication of the community's opinion. They convey a view and no more. Governments and courts should be circumspect in reacting to them. Nevertheless, they are often interesting and make interesting reading.

Central to public expectation and perception of the courts is the role of judicial education. Victoria is in a very advantageous position. It has the benefit of the Judicial College of Victoria to meet local education needs and the National Judicial College of Australia to meet needs that could only be met on a national scale. As a result, all judges, magistrates and tribunal members have the benefit of orientation and update programs, awareness and community relevance programs, as well as theoretical and practical legal training. There is an expectation by the heads of the Victorian courts and tribunals that all judges, magistrates and tribunal members will actively participate in ongoing judicial education. There is now broad acceptance that all judicial officers should have at least five days provided per year for judicial education. This time is over and above judge time and viewed as a minimum. The remaining aspect of judicial education is to observe that adequate provision comes at a cost which has been recognised by government. As judicial education expands in Victoria, in all likelihood so will its cost.

PART 4

THE VICTORIAN COURTS

Generally, across the board the Victorian courts are functioning well. Their detailed position, function and performance is well explained on the various websites of the courts including annual reports. However, it is appropriate to observe important changes in jurisdictions that have occurred in the last two years and which will continue into 2008.

First, the Magistrates' Court. Since 1 January 2006 it has exercised power in civil matters up to $100,000. In criminal matters the court has extensive summary jurisdiction including matters that not long ago were indictable offences heard in the County Court or, even still, are tried as indictable in some interstate jurisdictions. The right of appeal in criminal matters to the County Court remains. The right of review on error of law to the Supreme Court also remains. There has been a steady increase in those types of appeals to the Supreme Court.

The increase of power of the Magistrates' Court has raised its importance and status in the Victorian courts system. It has also added to the appellate work of the Supreme Court.

The Magistrates' Court has also embraced dramatic innovations with the Drug Court, the Koori Court and more recently the Neighbourhood Justice Centre. These problem-solving courts at the lower end of the court system have proved effective at overcoming recidivism and associated social problems elsewhere. Problem solving courts, nowadays called therapeutic justice, doubtlessly will help to redirect some individuals from what was previously inevitable journey to the higher courts – a very desirable outcome.

Since 1 January 2007 the County Court has exercised unlimited monetary jurisdiction in all civil matters. As yet there has not been an identifiable shift of civil litigation from the Supreme Court to the County Court. Patterns of forum of choice will be worked out by practitioners in time. The County Court is the main trial court of Victoria and it is appropriate that it exercises unlimited monetary jurisdiction. The Court also has the range of judge numbers and a built environment that reflects its busy trial volumes and status. The only observation to make is that it is generally desirable that the more complex and significant civil cases should be heard in the Trial Division of the Supreme Court to be determined at an authoritative level to obviate, where practicable, the need for a significant matter being determined authoritatively via a court of three judges on the Court of Appeal. One fact is evident; the criminal

and civil workload of the County Court, the main trial court in Victoria will remain constant for the foreseeable future.

Next, I turn to VCAT. Its workload has grown greatly, now hearing over 90,000 cases per year. It is efficient in terms of the dispatch of its business and its cost. While many of its disputes are small, each one is very important to the individual litigant. VCAT has proved to be a relief valve for the courts. The court system would have laboured without its existence. There are rights of review on an error of law to the Supreme Court from VCAT decisions. There has been a general increase in numbers of appeals, particularly planning appeals. One particular phenomenon of VCAT is its unlimited monetary jurisdiction in important areas, such as fair trading and domestic building contracts – in those areas it has what is known as exclusive jurisdiction. Cases that only a few years ago would have been heard in the Supreme Court are heard now in VCAT. This of itself demonstrates the need for security of tenure of tribunal members.

At this point, I have little more to say about the Supreme Court except that its work appears to continue to become more difficult and complex. This will continue as the Court hears more prosecutions by the Commonwealth Director of Public Prosecutions and enforcement

proceedings by the Australian Securities and Investments Commission. It should usually be the case that Victorian individuals and corporations are prosecuted when appropriate in the superior court of the state. The only other observation about the Supreme Court is that in all likelihood over time there will be an expansion of the appellate function of the Court commensurate with the expanded powers of the lower courts and tribunals. What would previously have been heard and decided at first instance before a Supreme Court judge will come before the Supreme Court exercising an appellate function, rather than a trial function.

So far as the overview of Victorian courts is addressed, I emphasise that judges, magistrates and tribunal members are under constant pressure to decide cases. The court system in Victoria is busy. Let us look at the finalisation numbers for 2005 – 2006:

<u>In criminal</u>

Supreme Court – Trials- 61 (including pleas 182)

Supreme Court – Appeals - 426

County Court – 450 (including pleas 2,294)

Magistrates' Court – 125,432 (including 24,705 crimes family violence matters)

<u>In civil</u>

Supreme Court – Trials – 227 (all cases finalised 5,296)

Supreme Court – Appeals - 362

County Court - 2,361 (all cases finalised 6,016)

Magistrates' Court – 9,234

VCAT – 89,475

These figures highlight the points: justice takes time and judge time is a commodity to be valued and used wisely.

PART 5

THE FUTURE

I have tried to provide a broad ranging overview of the courts and tribunals of Victoria from a perspective of the judicature. I wish to conclude on three topics: information technology, alternative dispute resolution and leadership.

1.*I T* – Victorian courts and tribunals have been transformed in technology uptake in the last three years. It is now expected that judges, staff and court users will have basic computer skills. Probably, the time is close when IT competence will be a pre-requisite for judicial appointment. Most courtrooms across the State now have computer access. The County Court has excellent facilities and the Supreme Court is undergoing an upgrade to expand its IT capacity. It also has a world

leading edge e-litigation practice direction. The Supreme Court even has an e-master. In March 2008 the roll out of the Department of Justice Integrated Court Management System (ICMS) will commence, starting with the Supreme Court. The facility will match the courts with the profession and provide one stop electronic filing, electronic file management and, most importantly, enable even better data collection to better explain the court story.

2.*ADR* – Mediation is now accepted as part of the court system in Victoria. It saves immeasurable judge time and provides extensive savings to government. Without mediation the court system would have collapsed. Given the success of mediation, the courts should have the confidence to pilot other methods of dispute resolution, in particular, in appropriate cases, judicial dispute resolution.

Given the impact of technology and IT on courts the challenge lies before us to find the next wave of innovation that will revolutionise the courts and tribunals as we know them.

3.*LEADERSHIP* – as courts and tribunals become larger the traditional structures of internal management and leadership become more cumbersome and provide a poor fit. If I take the Supreme Court, its original legislation contemplated a council of judges (made up of four)

who were responsible for administering the Court. The role of the Chief Justice was not defined and for over 150 years was traditionally regarded as the leader of all but one among equals. Contrast this with other jurisdictions where judicial roles, functions and governance are well defined. In Victoria, there have been additions to Supreme Court legislation to describe the role of offices such as the President of the appellate division of the Court, the Court of Appeal and, also, the Senior Master. The Chief Justice's function remains undefined. The Court will shortly expand to 37 judges and 9 masters (who, possibly, in due course will become associate judges) – very different from the four judges who constituted the Supreme Court in 1852. Further, the legislation does not recognise the modern internal structures of the Trial Division and the roles of the Principal Judges.

In the County Court there is a similar brevity in the legislation despite that there are soon to be 59 (together with 5 acting judges) constituting the court. By contrast, the legislation for the Magistrates' Court and VCAT is more reflective of the size and complexity of those institutions. There are also the related jurisdictions of the Children's Court and the Coroner's Court. In Victoria, unlike South Australia, each court is separate and functions entirely separately from other courts (other than on appeals or judicial reviews). It might be that

government would wish to overview and modernise court governing legislation. Such a project may tie in with any consideration of court governance models.

I raise these matters under the rubric of leadership. When it is thought about, generally, court leaders are not trained to be leaders. They come to lead significant institutions and are assumed to know instinctively how to perform. Judicial leadership in modern courts is challenging. Recently, the heads of Victorian courts (the Chief Judge, the Chief Magistrate and I as Chief Justice) participated in a National Judicial College programme for all Australian court heads. It included a senior judge from Canada and a leader of the corporate sector. The programme was inspiring and innovative. A few weeks ago, with the support of the Department of Justice, the group of five leaders of the Supreme Court commenced a training programme on leadership. It involved the President of the Court of Appeal, Justice Maxwell, the Principal Judge of the Criminal Division, Justice Teague, the Principal Judge of the Common Law Division, Justice Smith and the Principal Judge of the Commercial and Equity Division, Justice Byrne and myself as Chief Justice. The programme involves our meeting and learning from leaders in government, the military, private enterprise, the community and other sectors as to how to improve our leadership

roles and translate that improvement into the Court to facilitate the ongoing modernisation of the institution. It is, we believe, the first programme of its kind in any court, at least in Victoria.

The judiciary of the Victoria is one of which all Victorian citizens may be proud. I hope these remarks assist discussion in the future development and improvement of the state of the Victorian Judicature.

That is the completion of my remarks. I thank you for you attendance. A copy of this address is now available on the Supreme Court website: www.supremecourt.vic.gov.au.