

“SEPARATION OF POWERS: REALITY OR DESIRABLE FICTION?”

JCA COLLOQUIUM

THE HONOURABLE T F BATHURST

CHIEF JUSTICE OF NSW*

11 OCTOBER 2013

SYDNEY

1. The first question begged by a provocative title like the one I have chosen is *what is meant by the “separation of powers”?*
2. At the level of political principle, the doctrine of separation of powers of course provides that governmental power should be split between the Legislature, Executive and Judiciary. This is to ensure that power does not become too concentrated in any one arm of government and that the different branches of government can provide a check on one another. According to the doctrine, each of the arms of government has a separate sphere of activity into which the other arms are not to trespass, and power cannot be abdicated by one arm to another.
3. Two points can be made, even from this broad overview. First, the courts are an arm of government – not simply a justice provider, or a dispute resolution service. Second, as Justice Michael McHugh pointed out in a speech to the Australian Bar Association in 2002, “the premise of this construct is not a harmonious relationship but a checking and balancing of power, [that] inevitably... generates tension between the three arms of government”.¹

* I express my thanks to my Research Director, Ms Sienna Merope, for her assistance in the preparation of this paper.

¹ Michael McHugh, “Tensions between the Executive and the Judiciary” (ABA Conference, 2002, Paris) p 1.

Tensions between, for example, the courts and Executive should therefore not necessarily be seen as negative but rather as part of the intended operation of the separation of powers.

4. In Australia we have come to accept, for a number of reasons, a large degree of erosion in the separation of powers between Parliament and the Executive. However, the independence of the courts has always been vigorously protected. To an extent this has been facilitated by the protection of Federal Judicial Power in Chapter III of the Constitution, which has served to insulate the courts, particularly federal courts, from encroachments by the Legislature and Executive. The effect of *Kirk* has of course been that at least State Supreme Courts have similar protections.
5. The protections in Chapter III are themselves a reflection of the generally accepted proposition that an independent judiciary is an essential element of the rule of law and a fundamental condition of a stable, functioning democracy. That is an internationally accepted principle. As Chief Justice Gleeson noted in 2005, the right to a hearing before an independent and impartial tribunal is recognized as a fundamental human right. Judicial independence has been described by the Beijing Statement of Principles of the Independence of the Judiciary as “essential to the proper performance by the judiciary of its functions” and by the Privy Council as an “all but universally recognized...necessary feature of the rule of law”.²
6. The need for judicial independence is so generally accepted that at times we do not even articulate *why* it is important. The principles were well put by Justice McGarvie, in a 1991 paper, where he stated:

² The Hon. Murray Gleeson AC, “The Right to an Independent Judiciary” (2005, 14th Commonwealth Law Conference), p 2.

“In a democratic government...the law stands above and controls them all. The law is the mortar that holds the components of government together and keeps them in their proper places.

The judiciary of a democracy is not responsible to any governmental power. Its responsibility, owed to the whole community, is to apply the law and to apply it impartially....It is obvious that this system can only work effectively if those against whom the law is applied have confidence in the impartiality, fairness and ability of the judges in making their decisions”³

7. That is, independence is important so that the law is applied impartially to all and, equally importantly, so that the community will have confidence that the judiciary will apply the law fairly and impartially, and will hold other branches of government to account where necessary. In contemporary society, judicial independence from the Executive is particularly critical, because so many legal disputes pit citizens against the government; all criminal matters, environmental matters, challenges to administrative decision-making, and tax disputes, to name just a few.

8. The need to maintain community confidence in the judiciary raises another critical aspect of judicial independence. In order for the judiciary to play its role in maintaining the separation of powers, it is necessary that courts have, and are perceived to have, the institutional facilities and capabilities necessary to carry out their judicial functions. Being free from partiality or improper influence is of central importance, but the community must also be confident that the courts have the capacity to uphold their rights and interests if unlawfully infringed by the Executive, and that the other arms of government respect and are accountable to judicial decisions. If the community perceives the courts as impartial but largely powerless and able to be undermined by other branches of government, or if in fact the courts are weak, the important role of an independent judiciary in

³ The Hon. Justice R.E McGarvie, “The Foundations of Judicial Independence in a Modern Democracy” (1991) 1 *Journal of Judicial Administration* 3, p. 4.

upholding the rule of law is also compromised. To again quote Justice McGarvie's paper:

"It is not enough for courts to proceed on the assumption that if judicial work is done well a benevolent government will provide the funds and facilities necessary for effective operation and the organisational framework that will enhance judicial independence. The judiciary has the confidence and support of citizens because it is seen as the champion and protector of the rights the law gives them. In return the judiciary owes it to citizens not to become, through lack of application and self-organisation, a helpless giant, impotent to protect itself against assaults on its independence which reduce its capacity to protect the rights of citizens".⁴

9. A further corollary, and one that may seem a bit circular, is that because the judiciary has neither "the might of the sword or of the purse", as the old saying goes, the institutional strength of the courts necessary for judicial independence itself largely relies on community confidence. It is, at least in part, the community's confidence and support for the judiciary that serves to protect the courts from incursions by other arms of government. In other words, community confidence in the judiciary is both a goal, and an important element in maintaining, the separation of powers.

10. Now this may all seem very trite, and reminding a room of judges of the virtues of judicial independence is taking preaching to the choir to a whole new level. I do, however, think it is crucial to keep the reasons *why* independence is important in mind when considering this topic, in order to be able to properly assess when a less than perfect separation of powers in fact becomes a problem. Not everything that may in some way infringe on independence necessarily undermines the principles which the separation of powers is intended to protect.

⁴ Ibid, p. 21.

11. I say this because clearly, the reality of separation of powers in Australia is not and has never been that the courts operate entirely independently of the Executive and Parliament. For one thing, generally speaking, the role of the courts is to apply the law as made by Parliament. Leaving constitutional decisions to one side, if the Parliament – and often, parliamentary democracy being what it is, the Government of the day - is unhappy with the decision of a court, they are well within their rights to introduce new legislation to prevent a similar outcome in the future. The few of you who are as old as me will remember the time that judge made law operated relatively uncluttered by statute. The position is quite different today. This in one sense makes the independence of the judiciary all the more important. It is up to the courts to independently and objectively determine the intention of Parliament, rather than simply agreeing with what a particular minister thinks, or perhaps more accurately hopes, the relevant statute means at a particular time.

12. Second, of course, the Executive has the responsibility and power to appoint judges, and the power to remove a judge for serious misbehaviour or incapacity, on address from both houses of Parliament. The power of removal has seldom been utilized in Australian history, and appointments have very rarely been politicized.

13. Third, courts are not self-funding institutions and are therefore reliant on the Executive for funding - although there is an increasing trend by governments to institute a user pays system. The courts of course provide an unusual context for such a system because they do not control how much revenue is generated or where that revenue goes. That said, some form of user pays arrangement for the judiciary is not unknown in the history of the common law. There was a time for example, when judges topped up their salaries by selling the right to clerk and

court officer positions under their purview, and by taking a cut of court officer fees for the issuing of writs and other procedural tasks.⁵

14. Those days are long gone, perhaps unfortunately for me. The Chief Justice usually held rights to sell the choicest offices, so I imagine I would have done quite well out of the system. Seriously though, these days while courts compete, based on the quality and efficiency of their services, they are largely if not completely reliant on the Executive for funding.

15. These factors show how, to a certain extent, there is always an element of fiction in the idea of a strict separation of powers. What I want to talk about however, is the more realistic notion of separation of powers – and the threats that currently exist, as a matter of substance rather than merely form, to the judiciary’s independence.

16. My basic point is this. The most crucial threat to the separation of powers today is, I believe, the increasing trend by governments to treat the courts as service providers and judges as public servants. This tendency by the Executive undermines the reality and perception of the institutional independence and capacity of the courts and puts pressure on the judiciary to prioritise “efficiency” over other considerations equally important to the fair determination of disputes.

17. This is not a new complaint. When Jim Spigelman was Chief Justice he spoke often about the encroachment of a managerial ethic into the administration of justice, and the obsession with performance indicators and financial measurement.

18. Nor do I do want to overstate these issues. As Chief Justice Gleeson put it in an address in 1998:

⁵ The Right Hon Lord Justice Brooke, “Judicial Independence – Its History in England and Wales” in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, Education Monograph 1 (1991) Judicial Commission of New South Wales, 89.

“sometimes there is an unfortunate tendency to overstate the principle of independence and to invoke it in circumstances where it is not in truth under threat. There is a tendency in some people to turn every disagreement about the terms and conditions of judicial service, or the funding of the court system, into an issue of judicial independence. This creates a degree of cynicism. Such cynicism is not always unjustified. It debases the currency of principle if we overstate our case”.⁶

19. I do therefore want to make one thing clear at this stage. It might be thought from what I am about to say that relations between the NSW Executive and the judiciary have reached crisis point. Nothing could be further from the truth. On all major issues in recent years the Executive has displayed a willingness to consult. That consultation has enabled the Supreme Court to ensure that court fees have been kept at more or less manageable levels and that the impacts of so-called efficiency dividends have been minimized. However notwithstanding, the underlying issues I am about to discuss remain of concern. It is important that they be borne in mind by both the judiciary and the Executive in their dealings with each other.

20. In NSW, the courts are funded by the Department of Attorney General and Justice, which is known colloquially as the justice cluster. A considerable number of people in the Department concerned with administration of the courts are not lawyers. I would not ascribe any ill will towards the courts to them, nor any conscious intention to undermine judicial independence. However, some tend to consider separation of powers as, at best, empty words mouthed by judges and, at worst, as a way to immunize the courts from the constraints of public financing or public scrutiny. This attitude can lead to demands, often relating to efficiency and accountability, which may be incompatible with the separation of powers. In turn, this inevitably creates tensions between the judiciary and the executive, occasionally developing into outright hostility.

⁶ The Hon. Murray Gleeson AC, “The Role of the Judge and Becoming a Judge” (National Judicial Orientation Program, August 1998, Sydney).

21. Now, this is not to say that courts should not be accountable for the way they function. It is critical that they are. Judicial accountability is of course built into long established common law principles, notably the principle of open justice. Judges are required to conduct hearings in public except in exceptional circumstances, to accord procedural fairness and to publish reasons rather than merely providing them to the parties. The vast majority of judicial decisions are also subject to rights of appeal. These are the foundational mechanisms for ensuring judicial accountability to the public.

22. Accountability however goes further. The courts receive funds from the public purse. To my mind that carries with it an obligation of accountability, not only to deliver quality judgments, but to be able to demonstrate that money is being spent efficiently. Accountability promotes good decision-making and ensures that the power of courts to spend money is not uncontrolled. However, there is a difference between transparency and accountability on the one hand, and Executive interference on the other. That distinction is not always respected and it is this I would like to discuss in the time remaining.

23. In that context I want to focus on two of the issues that Chief Justice Gleeson warned against abusing – namely the conditions of judicial service and the funding of the court system. No doubt you will let me know if I have made you cynical.

Judicial Remuneration

24. First, consider judicial pay. As many of you know, pursuant to recent changes in NSW, the salaries of judges and magistrates have been brought under the State's public sector wages policy.

- 25.** This is a major change. Previously, salaries were set annually and independently by the relevant Tribunal. Under s 19A of the *Statutory and Other Offices Remuneration Act* either House of Parliament could pass a resolution disallowing any determination of the Tribunal. Such a process was transparent and would involve debate and consideration by the elected representatives of the community as to the appropriateness of passing such a motion. It provided some recognition of the courts as a separate institution standing apart from the public service.
- 26.** The new legislation in effect confers this power on the Executive. It can determine with regard to any policy it thinks fit, the appropriate level of judicial remuneration. In making determinations about judicial pay, the Act provides that the Tribunal must give effect to any government policy regarding remuneration.⁷ The position of judges is effectively equated to that of public servants under the control of the Executive.
- 27.** This is anathema to the separation of powers. The policy infringes one of the basic principles of judicial independence, namely that the terms of judicial tenure should not be in the hands of the Executive. As was noted by Russell Wheeler in his influential essay on Judicial Administration in the US in 1988, the traditional “constitutional means” of securing judicial independence “has been putting judges’ tenure and salaries beyond the grasp of the legislature or the executive – the agents of momentary public passions”.⁸
- 28.** The fact that the Act also provides that determinations cannot reduce the remuneration payable to judges does not take away from this incursion, at either the structural level or the practical level. It makes the unjustified assumption that the whole issue is about the level of pay. It is not. Judges are entitled to expect, consistent with the separation of powers, that their salaries will be set

⁷ *Statutory and Other Offices Remuneration Act* 1975 (1976 No 4) s 6AB

⁸ Russell Wheeler, *Judicial Administration: its Relation to Judicial Independence* (1988, The National Centre for State Courts) p. 10.

independently of those of the public service, and a remuneration decision need not lead to an absolute pay cut in order to operate in a way detrimental to the independent administration of justice.

29. In fact, the current government policy which must be “given effect to” by the Tribunal arguably provides such an example. That policy, set by regulation, is that judicial pay can be increased by more than 2.5% per annum only if “sufficient officer-related cost savings for the office holder have been achieved to fully offset the increased officer-related costs.”⁹ Officer related cost savings are savings resulting from changes in the work practices of the officer or in the work practices or structural arrangements of the officer’s “agency”. There are also other methods of achieving cost savings, but these are not relevant to the judiciary. In plain English therefore, a judge’s salary can only increase more than 2.5% a year if the judge has made sufficient cost savings to offset the increase, by altering their way of working or the structure of the court in which they operate.

30. As I have said, the problem with these changes is not that judges will be paid too little or even that the remuneration of judges serving in the State system may fall behind that of their federal counterparts. Judges, in my opinion, are well paid and commonly take an appointment recognizing that this will involve a substantial cut in salary. The worst judges are those who most frequently complain about that. The problem is the possible infringement of both the appearance and actuality of separation of powers implicit in this remuneration policy. The current regulation essentially provides a financial incentive to cut costs, in other words to be more financially efficient. Being financially efficient however, is not always consistent with the fair and impartial administration of justice.

⁹ Statutory and Other Officers Remuneration (Judicial and Other Office Holders) Regulation 2013 (NSW) cl 6(1)

- 31.** To take an extreme example, imagine if “officer-related cost savings” were deemed to have been achieved through an increase in the number of criminal convictions in a given year, or similarly, if the Government instituted a new policy, that salaries were to be indexed by reference to the number of criminal convictions in a given year. You scoff, and you should scoff. It is impossible to imagine any Australian government seeking to influence due process and the impartial determination of criminal proceedings in this way.
- 32.** But assume instead that a policy was instituted that indexed increases in judicial pay in accordance with efficiency, that efficiency being calculated based on cases completed in a year as distinct from caseload. You scoff, but perhaps not quite as much. After all, the courts’ “clearance rate” - that is, the number of cases finalized compared to the number of matters filed in a given year - is already something monitored, and in the past, the Executive has sought to assess the contribution of acting judges based on increases in the number of matters disposed of by the Court. Indeed the hypothetical scenario I have outlined is not so far off the current policy of rewarding more financially efficient “work practices”. Yet the effect in each case is the same – to create a conflict of interests between judges’ duty to do justice impartially according to law, and interest in fulfilling indicators of efficiency as determined by the Executive.
- 33.** That is not to say that such policies will improperly motivate judges, or indeed that it is the Executive’s intention to do so. The integrity of most judges and the vigilance against threats to independence ingrained in our judicial culture will likely prevent an actual subversion of impartiality. However, even if it does not alter behaviour, a remuneration structure whereby judges are paid based on efficiency criteria determined by the Executive gives an appearance of impinging on the separation of powers. It also weakens the organisational structures that promote separation of powers and instead puts the onus for maintaining judicial independence on individual members of the judiciary. That is undesirable. As noted by Justice McGarvie,

“So long as Benches are filled by humans, judicial impartiality has the best prospect of existing where judges work within an organizational setting which frees them from the recognized distorting pressures identified by history and modern experience and generates influences which encourage their impartiality”¹⁰

34. In my view, as soon as control of judicial salaries is taken away from an independent body or Parliament and instead is put in the hands of the Executive and made subject to certain conditions, there is a risk – whether deliberately or through a side-wind – of interference in the fair and impartial administration of justice, or at least the appearance of interference. It is a dangerous path and one to be avoided.

Efficiency Pressures

Performance Indicators

35. Bringing judicial remuneration under the public service wages policy is one example of the tendency to treat the courts as service providers. Perhaps the most significant area where this occurs however, is in the Executive’s approach to evaluating the courts’ work and financing of the judiciary. These two issues are of course closely interconnected, and considered together, they in my view pose the most substantial contemporary risk to the separation of powers.

36. As I know that these matters vary a little from State to State, let me briefly explain the position in NSW, regarding court performance. In NSW, both the Department of Attorney General and Justice and the Productivity Commission measure the Supreme Court’s performance. Most of the measurements by the Department relate to the performance of the registry and ancillary staff but they

¹⁰ The Hon. Justice R.E McGarvie, “The Foundations of Judicial Independence in a Modern Democracy”, p 7.

do consider what is described as “an efficient and equitable court system” measured by, you guessed it, clearance rates.

37. Annually, the Productivity Commission also publishes a “Report on Government Services” which measures and compares the performance of all courts and tribunals across Australia. Matters measured include the average dollar cost of finalizing a civil or criminal matter, backlog and – again - clearance rates.

38. The issue here is not that elements of the courts’ performance are measured. Indeed, the Supreme Court itself prepares an internal monthly to bi-monthly “Court Operations Report”, which reports on matters including the number of new filings, backlog, and timeliness at various stages of the determination process. That information is essential for the Court’s internal accountability and management, providing not only the capacity to explain court operations and expenditure, but also highlighting problem areas to be addressed.

39. Rather, the issue with external measurement is *how* the courts are measured, and the *use* made of these “performance indicators”. The problem with external performance measurement is, first, that the indicators used often do not reflect the reality of the courts’ operations. To give one example, the Productivity Commission measures the average number of attendances per finalization – in other words the number of times parties are required to be present in court before binding orders are made – as an indicator of efficiency. However, the number of attendances says nothing about either the financial efficiency or the quality of the courts’ management of cases. As the Commission itself acknowledges for example, a high number of attendances, due to intensive case management, may in fact result in more “financially efficient” outcomes for litigants. It is therefore concerning that such indicators may be used to measure court performance and in turn judicial funding.

40. More fundamentally, by judging court performance based primarily on financial efficiency and timeliness to the exclusion of other factors, external performance reviews miss the fundamental point that not everything that is important to the administration of justice can be measured, let alone quantified in dollar terms. In other words, as former Chief Justice Spigelman has put it, “not everything that counts can be counted”.¹¹

41. Efficiency is undoubtedly important, but it does not *necessarily* tell us anything about the quality of justice. There are any numbers of ways to make a court efficient. For example, the Supreme Court could institute a system where cases had no discovery, no oral argument, a maximum of five pages of written submissions and judgment would be delivered with no reasons. Our performance indicators would be through the roof. Such a situation would also fundamentally undermine essential aspects of the administration of justice, including procedural fairness, and rightly erode community confidence that the judiciary was fairly and impartially making decisions according to law.

42. This is where a focus on treating the courts as a part of the public service, complete with government wide performance indicators, starts becoming a problem for separation of powers. The more courts are treated as just another government department, to be judged primarily against how efficient they are, the more pressure there is on court staff and in turn judges to prioritise the “measurable criteria of time and money” at the expense of other factors. This pressure may be subtle and it may be resisted. However, this does not change the fact that structurally what is occurring is that external bodies, including agencies of the Executive, are putting pressure on the judiciary to conduct its operations in a way that may not necessarily advance the interests of justice. The threat to separation of powers here is clear.

¹¹ The Hon JJ Spigelman AC, “Measuring Court Performance”, (2006, Australian Institute of Judicial Administration), p. 2.

Court Financing

43. That threat becomes all the more acute if performance indicators, a perspective that the courts are service providers, and an obsession with a form of efficiency perhaps appropriate to industries whose performance can be measured by a clear cost/benefit analysis are allowed to come to dictate the financing of the judiciary.
44. Arguably, such an approach has already begun to influence court budgets, both in NSW and in other jurisdictions. There is at present in NSW, a consistent demand put on the courts to find “efficiency dividends”, which as you know is a treasury department euphemism for budget cuts. Currently the requirement is a 1.5% efficiency dividend each year. That is a demand made of each of the Department of Attorney General and Justice’s “business centres”, with the starting point being that the courts, each of which is its own “business centre” are to be treated just like any other “justice service provider”.
45. The reality of that cost cutting exercise is much more severe than it first sounds. To take the Supreme Court as an illustration, the vast majority of the Court’s budget is made up of salaries. It is simply not possible to make cuts there, particularly in regards to judicial salaries. That leaves a very small proportion of the overall budget – that allocated to Registry services – from which quite deep cost cuts have to be made. The other option of course is to leave judicial positions unfilled upon the retirement of a judge.
46. In addition there is the demand that any new investment into the Court carry a “benefit realization”. This is management speak for a requirement that the investment translate into a financial saving further down the track – a clear example of the consequences of the managerial approach of quantifying everything. The requirement for a benefit realization carries two consequences. First, it means that if the benefit of a reform cannot be quantified in dollar terms it

will not receive support unless the cost of the reform is minimal. Second, anything that is changed, for example reforms to court or IT operating systems carries with it a corresponding future budget cut at the point when the Department deems that the financial benefit will have been “realized”.

47.I should add that one problem is that the Court’s budget is not drawn up in consultation with either the judges or the Court’s managers. Rather the budget is determined by the Department, as a proportion of the overall funding it receives for its various “business centres”. An annual budget is then allocated to the Supreme Court, with separate budget line items for the Court’s various costs. Usually, the annual budget’s arrival is greeted with a perplexed “how on earth did you get to these numbers?” Well, that’s the polite version anyway. To be fair, the Executive is willing to negotiate to move the money allocated between different line items to respond to the Court’s actual needs in a given year. However, the process of budget allocation and the monitoring of spending which follows obviously curtails the Court’s freedom to independently organize its administration, in line with present needs, which adds pressure in the context of budget cuts.

48.A further pressure is that these budget constraints are taking place in an environment where new resource pressures are also being brought to bear from other sources. Cases are ever more complex and appeals longer, requiring more judicial time and attention. Active case management, which unequivocally has made an important contribution to cutting the cost of litigation and therefore improving access to justice, also means more judge time with concomitant time by support staff and therefore overall costs.

49.Legal aid is also being cut. For example, due to budget cuts, Legal Aid NSW has recently adopted a policy of restricting representation in Local Court defended matters, to cases where there is a “real possibility a conviction would result in a

gaol sentence”.¹² The significance of such cuts for the courts was well explained by Lord Neuberger in a speech earlier this year, when he noted that “less legal aid means more unrepresented litigants and worse lawyers, which will lead to longer hearings and more judge time”.¹³ He could have added, and therefore increased court costs. Incidentally, Lord Neuberger’s speech had him trending on Twitter in the UK. Some of you may not immediately grasp the significance of this achievement. It means that a significant proportion of social media users found a speech by a judge more interesting than the latest celebrity baby gossip. Naturally, this was reported by the media with due amazement.

Risks to the Separation of Powers

50. Now, some may respond to the concerns I have raised about the financial pressures being put on the administration of justice by saying, well the courts are still independent, just more efficient. That is no answer. Separation of powers and the rule of law are based on public confidence in each arm of government as a stand-alone institution and on each arm’s ability to act independently of one another, within the constitutional constraints underpinning our system of government. Pressures by the Executive of the type I have just outlined risk undermining that confidence and with it judicial independence. That is for three reasons.

51. First, pressures on the judiciary to be more efficient at the expense of other factors risks undermining the delivery of high quality judgments. As Russell Wheeler explains, “executive branch authority to control a court’s budget is rather like external authority to control tenure or salaries: it poses a threat that courts will be compromised in their decision making because of their need for necessary resources”.¹⁴ Pressure to hear more cases, because there is a

¹² Legal Aid News July 2013, available at

<http://news.legalaid.nsw.gov.au/link/id/z51d358029b022901/page.html#z51d3548e26ac8631>

¹³ Lord Neuberger, “Judges and Policy: A Delicate Balance” (2013, Institute for Government).

¹⁴ Russell Wheeler, *Judicial Administration: its Relation to Judicial Independence*, p. 40.

shortage of judicial officers for example, or cuts to library or research assistance services can all risk compromising the quality and thoroughness of judgments.

52. There is, I think, a tendency to believe that the high quality of the judiciary is indestructible, and that the courts will continue to resolve disputes with current levels of care and intellectual rigour no matter what pressures are brought to bear on them. That is a dangerous assumption. While judges are by and large extraordinarily dedicated and hardworking, we are human, and there must of course come a point where the same cannot be done with less, notwithstanding the efforts of the judges. In turn, if budget cuts and demands for greater efficiency lead to a “worsening” in the quality of justice, so to speak, there will undoubtedly be diminishing public confidence in the judiciary.

53. Second, harsh budget cuts risk undermining community confidence by limiting access to justice. Recent budget cuts in NSW have, for example, forced the Local Court to consider leaving judicial seats unfilled and not sitting in smaller centres. Such measures force the courts to operate in a way they consider contrary to the effective administration of justice, and weaken the judiciary’s practical capacity to uphold the legal rights of individuals, particularly through longer delays. Increased barriers to access to justice self-evidently pose a risk to community confidence in and support for the courts. That risk is likely to be particularly acute in rural areas, if courts become unable to sit and therefore lack any visible presence in those areas. Such pressures also undermine the perceived and actual capacity of the judiciary to fulfill its constitutional role of holding the other branches of government to account, undermining the practical content of the separation of powers.

54. Third, budgetary constraints risk undermining the integrity of the courts at an institutional and administrative level. To the extent that pressures as to efficiency and funding give the appearance that the Executive is directing the manner in which the judiciary is conducting its operations, a perception will arise that the

courts are unable to operate independently. In some ways this may be true. Lack of funding for example limits the extent to which courts can engage in forward planning, or invest in reforms that will strengthen them organizationally and allow them to better fulfill their functions into the future. This is not consistent with the impression of impartiality or with community confidence that the courts as an institution have the capability and power to resist incursions into their territory and to hold other branches of government to account consistently with the rule of law.

55. Each of these issues poses a threat to the separation of powers, not because it make it difficult for judges to deliver *impartial* judgments, but because it undermines the other aspects of judicial independence that I mentioned earlier in this speech; namely the *capacity* of the courts to fulfill their constitutional role, and the community confidence that lies at the heart of the separation of powers.

56. As I have already indicated, I do not believe that these threats are the result of any conscious campaign on the part of the Executive to undermine judicial independence. Certainly, that is not the case in NSW. Productive relationships with the NSW government have in fact enabled the Supreme Court to minimize the effects of the pressures I have discussed.

57. However, we all know that in our current political environment, the judiciary is an easy target. There are no votes in funding the courts, at least until a point of crisis is reached. What this means is that while no Australian government has an intention to undermine judicial independence, nor do they have a direct vested interest in protecting it. It is the courts that must protect their own independence. This requires more than the judges who currently have a leadership role in the courts enjoying a good relationship with the current members of the Executive branch responsible for the courts. A robust separation of powers requires that the courts, as an institution, have the autonomy and power to create organisational arrangements that safeguard judicial independence, and that the

community has sufficient confidence in the judiciary not to simply acquiesce to incursions on that independence. Current approaches to court evaluation and financing do not facilitate that situation.

Alternative Approaches

58. So, where does this leave us? It is not my intention to simply spend an hour complaining. Nor do I subscribe to the view that courts are a protected species, in the sense that they should be immunized from the overall constraints caused for example, by declines in government revenue. Judges must appreciate the position of the Executive, and economic reality. It is simply not enough for us to say, in this day and age, that the courts should be entitled to unlimited public resources, without justifying the need for them.

59. Ultimately, it must be accepted that it is a matter for Parliament, through its elected representatives, to determine where the trade off between taxation and social infrastructure should lie. I also recognize that there are competing demands on the public purse, which of itself limits the availability of revenue to the courts. The judiciary must be able to accommodate these realities.

60. Nor should reforms aimed at increasing efficiency necessarily be treated with suspicion. Courts must ensure that they are as efficient as possible, in order to maximize access to justice. There is always a risk of institutional blindness - that judges sitting on a court will not be able to see flaws in process in the same way an outsider may be able to. Constructive discussions about reform should be part of a continuous process of assessment and improvement in the courts' operations.

61. What is essential however, is that in considering the appropriate allocation of resources, the qualitative factors inherent in the administration of justice, including the quality of judgments and fairness of process are taken into account.

Critically, the importance of the courts as an independent arm of government essential to our stable and democratic society must also be appropriately considered.

62. A few shifts in approach and assumptions could go a long way towards meeting these imperatives. Fundamentally, it must be recognized that the courts are not part of the public service and cannot be judged purely based on efficiency indicators of the nature to which I have referred.

63. This involves accepting that courts will generally operate at a loss. In this respect they are not unique. Other public necessities such as public hospitals are in a similar position. They are not user-pays institutions and nor should they be. As Chief Justice Gleeson has put it:

“The concept of “user-pays” has only limited relevance to access to justice. When a court resolves a dispute between two private litigants it does so in the interests of the entire community and in the exercise of governmental power. Courts are not merely publicly funded dispute resolution facilities. It is difficult to know who might be regarded as the users of the services of a criminal court. Most courts cannot be fully independent financially. They must obtain their resources from the other branches of government.”¹⁵

64. In this context, rather than merely financial efficiency, what all arms of government should be aiming to achieve is for the courts to operate at “peak efficiency”. Peak efficiency, in my view, occurs when courts have the resources to maintain their institutional independence and to perform their work fairly, quickly, and in a way that gives litigants a fair trial, at a minimum cost to the taxpayer. Courts should endeavour to achieve that ideal and they should be allowed to do so by the Executive.

¹⁵ The Hon. Murray Gleeson AC, “The Right to an Independent Judiciary”, p. 5.

65. A focus on peak efficiency rather than efficiency dividends would, I believe, point away from blunt budget cuts. Cuts of this nature can in fact be inefficient. If budget cuts skew away from the efficiency peak I just mentioned by undermining the courts' ability to fulfill their functions, this creates an intangible inefficiency that is far more harmful than the savings that have apparently been made. I have spoken previously about the economic value of our effective system of administration of justice.¹⁶ That value is often overlooked, but it is real. More tangibly, a situation where the funding necessary for the courts to conduct their essential operations is continuously at risk cripples constructive and candid discussions about budgetary reforms. Rather, feeling under attack, the judiciary is likely to try and hang onto every dollar in every budget line possible, knowing that if a cut is made, it will only be cut further the following year. Again, that is inefficient. Reforms should be pursued, but in a more nuanced manner than at present.

66. Critically, a more consultative approach to measuring court performance and allocating budgets should also be adopted. In the absence of such consultation, there is always a risk of inadequate, or just as bad, misallocation of resources, leading to both tangible and intangible inefficiencies. I should again stress that currently the Supreme Court of NSW does have the opportunity to consult and negotiate with the Executive, at least on more significant matters. However, in my view, consultation should be more proactive and widespread.

67. To facilitate this engagement, courts must be able to justify the funding they require, demonstrate that resources are being used efficiently and show that in circumstances where their resources are diminished, the inevitable prospect will be both a decline in access to, and quality of, justice. As a corollary, courts should ensure that they have an internal ability to rigorously analyse raw data

¹⁶ The Hon TF Bathurst "Lawyers and Commercialism: Help or Hindrance?" (2013, Rotary Club of Australia Luncheon).

and explain their operations. In those circumstances, courts can justifiably make the case that performance indicators by the Executive are not necessary.

68. Consultations and decisions about financing should also in my view be based on protocols that recognize the position of the courts as an arm of government. It is not the occasion to spell out precise details of these protocols. However, they should address the issues which I have raised in general terms in this speech, aiming to facilitate the attainment of peak efficiency and the maintenance of constructive relations between the Executive and an institutionally independent judiciary.

69. This is by no means a comprehensive outline of suggestions. Nor are the issues I have raised unique to NSW. These matters should be dealt with at a National level and the incentive for dealing with them must come from the judiciary. It is important that an organization such as this one take a lead role in these areas and that each of us continue discussing these matters, and thereby contribute to the maintenance of a real and robust separation of powers in this country.

70. Thank you for your attention.