THE JUDICIAL CONFERENCE OF AUSTRALIA

Colloquium on the Courts and the Future

Surfers Paradise

November 1998

SUPREME COURTS TRIAL COURTS AND THE RULE OF LAW

Justice T. H. Smith, Supreme Court of Victoria

INTRODUCTION

> "If we are to be governed by the rule of law, we must have a judicature to administer it. The characteristics of that judicature reflect the functions it is charged to perform."

Is it necessary however, that the judicature include Supreme Courts conducting trials if the rule of law is to govern us? In particular, in most States we find a three tiered system of trial courts comprising the Supreme Court, the County Court or District Court and the Magistrates' Court. Is there a particular function for Supreme Court trial courts under the rule of law? What is their future under the rule of law?

DEFINING TERMS

The rule of law

This is not the occasion to debate the scope of "the rule of law". It will suffice to refer first to Dicey's description of the rule of law in England, a description relevant to Australia today:

> "We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on an exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint . . .
>
> We mean in the second place, when we speak of the 'rule of law' as characteristic of our country, not only that with us no man is above the law but (what is a different thing) that here every man whatever be his rank or condition, is subject to the ordinary laws of realm and amenable to the jurisdiction of the ordinary tribunals.
>
> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limits. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority."

Dicey then went on to refer to the "third and different sense" in which the rule of law may be described as a special attribute of English institutions. He there stated his proposition that the general principles of the constitution (e.g. the right to personal liberty or the right to public meeting) were the result of judicial decisions whereas under many foreign constitutions such rights appear to result from the general principles of those constitutions.

In evidence to the Legal and Constitutional Committee of the Victorian Parliament the then Chief Justice,

Sir John Young, described his understanding of the "rule of law".

> "The phrase "the rule of law" has been explained in various ways. Essentially, however, it is a concept which implies that all authorities, legislative, executive and judicial and all persons in the State are subject to certain principles which are the same for everyone which are generally accepted as characteristic of law. These principles are the fundamental notions of fairness, morals, of justice and of due process. The rule of law involves equality before the law and it involves consistency and uniformity in the decision of disputes arrived at by the disinterested and impartial application of legal rules to ascertained facts not by giving effect to what may appear to be popular moods of the moment or individual predilections"

Thus it may be said that the rule of law requires at least that all authorities be subject to the law, that there be equality before the law and that disputes be determined by the impartial application of legal rules to ascertained facts.

The trial jurisdictions of the Supreme Courts.

Originally the trial jurisdictions of the Supreme Courts were defined in Supreme Court Acts by reference to the jurisdiction of the English Superior Courts as they existed, usually before the Judicature Act 1873. Thus typically reference was made to the jurisdictions such as those of the High Court of Chancery, the Court of Queens Bench, the Court of Common Pleas and the Court of Exchequer. More recently, in some jurisdictions, the relevant legislation has been changed to define jurisdiction but not by reference to that of the English Superior Courts. In Queensland, for example, the Supreme Court Act of Queensland 1991 provides

> "**Continuance**
>
> 7. Supreme Court of Queensland, as formerly established as the superior court of record in Queensland, is continued in existence.
>
> **Jurisdiction generally**
>
> 8.(1) The court has all jurisdiction that is necessary for the administration of justice in Queensland. .
>
> (2) without limiting s.s.(1), the court
>
> (a) is the supreme court of general jurisdiction in and for the State; and
>
> (b) has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise.

In Victoria, the provisions dealing with the Supreme Court and its jurisdiction are contained in the Constitution Act 1975, not the Supreme Court Act 1986.

The intention of the Constitution Act 1975 was to consolidate the law in relation to the Parliament, the Executive and the Supreme Court.

The provisions in the former Supreme Court Act 1958 which dealt with the constitution of the Court, the establishment of the Supreme Court as a court of record and the appointment, tenure and remuneration of judges were re-enacted in ss.75 to 84 of the Constitution Act 1975. Section 85 of that Act also simplified the previous provisions.

> "85. **Powers and Jurisdiction of the Court.**
>
> (1) Subject to this Act the Court shall have jurisdiction in or in relation to

> Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior court of Victoria with unlimited jurisdiction.
>
> .....
>
> (3) The Court has and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as it had immediately before the commencement of the Supreme Court Act 1986.
>
> (4) This Act does not limit or affect the power of Parliament to confer additional jurisdiction or powers on the Court."

The Supreme Court trial courts are thus courts of general jurisdiction. The other trial courts in the States and Territories are not.

THE PRESENT

Jurisdiction of Supreme Court trial courts and the rule of law

Consideration of the jurisdictions of the Supreme Courts identifies two aspects that are of particular significance for the rule of law.

Firstly, because Supreme Court trial courts are the only trial courts with general jurisdiction, they are the only trial courts to which all citizens can take any justiciable dispute for determination. Their existence is therefore, critical to the operation of the rule of law. To again quote Sir John Young,

> "It is because the Supreme Court has been able to fulfil its function as a superior court of general jurisdiction that citizens of Victoria are able to say, with truth and pride, that they live under the rule of law. Any depletion of that jurisdiction must impair or gravely strain the courts capacity to fulfil its function."

There is a second feature of great importance to the operation of the rule of law. The Supreme Courts are the only superior courts in each jurisdiction. Their trial courts exercise a supervisory jurisdiction through the pre-rogative writs, or their modern equivalents, over administrative action and over the other courts and over tribunals. Those exercising statutory powers, the other courts and tribunals are thus made subject to the rule of law. This supervisory jurisdiction is exercised initially by the trial courts of the Supreme Courts. The Victorian Supreme Court has commented on this aspect.

> "The judicial oath requires justice to be administered according to law which of course means that cases must be decided according to law, but the function of a superior court of general jurisdiction goes further than the deciding of individual cases. The Court has an important supervisory jurisdiction in the exercise of which it fulfils it function of guaranteeing that within the State justice is administered according to law..

The present Victorian Attorney General, The Honourable Jan Wade, has commented

> "The position of liberals that individual freedom should be maximised, and government interference kept to the minimum level required for good administration, is entirely supportive of the existence of the review jurisdiction of the Supreme Court. Such jurisdiction secures the right of the individual to challenge unlawful administrative interference. Judicial review and the policy of the government towards it therefore share a similar theoretical touchstone: individual liberty. By maintaining tight control over proposals to limit such jurisdiction, the government is ensuring that individual liberty to exercise such right is not unnecessarily compromised".

Having regard to the importance of this role of the Supreme Courts, it is a matter of concern that, in most States and Territories, they can be abolished or have jurisdiction and powers removed by Parliament by the vote of a simple majority, a majority that is in practice generally controlled by the executive.

Two States have attempted entrenchment of statutory provisions concerning Supreme Courts and their jurisdictions and powers.

Attempts at protection - entrenchment in New South Wales

In New South Wales entrenchment of an important kind has occurred. It gives protection to all courts. The Constitution Act 1902 was amended in 1992 by the addition of a new part - "Part 9 - The Judiciary". In this part, the Constitution Act 1902, deals inter alia, with removal, suspension and retirement from judicial office and sets out the rights of judicial officers when their offices have been abolished by the legislation. The amendment extends to all courts in the court hierarchy of New South Wales. The purpose of these provisions was to protect the independence of the judiciary. The legislation does not prevent the abolition by legislation of a judicial office but deals with the consequences in such a way as to protect the independence of the office holders. In particular, the legislation requires that where an office is abolished, the holder of that office is entitled to be appointed to another judicial office in the same court or a court of equivalent or higher status. The legislation defines the Supreme Court, the Industrial Court and the Land and Environment Court as courts of equivalent status and of higher status than the next level of courts referred to namely the District Court and the Compensation Court. Those provisions were entrenched by amendments which prohibit the repeal or amendment of Part 9 of the Constitution Act 1902 unless the repealing or amending Bill has been passed by both Houses of the legislature and then approved by a majority of electors.

I note that in the Parliamentary debates relating to this legislation there does not appear to have been any discussion invoking the rule of law. The arguments advanced to support the legislation focused on the importance of the independence of the judiciary as an aspect of the doctrine of the separation of powers. Sir Gerard Brennan in his analysis of the characteristics required of the Judicature under the rule of law advanced as his first characteristic that

> "It must be a judicature that is and seems to be impartial, independent of government and of any other centre of financial or social power, incorruptible by prospects of reward or personal advance and fearless in applying the law irrespective of popular claim or criticism."

Accepting those considerations, they are, of course, considerations that apply to all persons holding judicial office. Thus the entrenchment of judicial independence in New South Wales is of fundamental significance to the rule of law in that State. The issues raised, however, do not shed light on the special position of Supreme Court trial courts under the rule of law. Confirmation of that special role, is to be found, however, in the consideration that has occurred in Victoria of the provisions which attempt to entrench the jurisdiction and powers of the Victorian Supreme Court.

Attempts at protection - Victoria, the original attempt

The Victorian Parliament attempted to entrench the provisions of Part III of the Constitution Act, including s.85 (above) dealing with the jurisdiction and the powers of the Supreme Court. by the enactment of s.18 of the Constitution Act 1975. It provided as follows:

> "18(1) Subject to s.s.(2) the Parliament may by any Act repeal or alter or vary all or any of the provisions of this Act and substitute others in lieu thereof.
>
> (2) It shall not be lawful to present to the Governor for Her Majesty's assent any Bill -
>
> (a) by which an alteration in the Constitution of the Parliament, the

Council or the Assembly may be made; or

(b) by which this section, Part I, Part III, or Division 2 of Part V or any provision substituted for any provisions therein contained may be repealed or altered or varied - unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively.

(3) Any Bill dealing with any of the matters specified in paragraphs (a) and (b) of s.s.(2) which has not been passed with the concurrence of an absolute majority of the whole of the members of the Council and of the Assembly respectively shall be void."

These changes were made without fanfare or comment but plainly reflected a view that, of the three courts in the hierarchy of the State Judicature, the Supreme Court should be dealt with in a special way and steps taken to ensure that alterations to the jurisdiction and powers of the Supreme Court should only occur after an absolute majority of each House of Parliament had passed the Bill containing the provision on both the second and third readings of such Bill.

For many years it was believed that no problems had arisen as a result of the entrenching provisions. In the late 1980's, however, litigation arose which tested the validity of legislation which it was said had altered or varied the jurisdiction and powers of the Supreme Court.. Retrospective validating legislation was passed. At the same time, because of the difficulty of providing an appropriate set of provisions to deal with future legislation, a reference was made to a Parliamentary Committee - The Legal and Constitutional Committee.

Attempts at protection - Changes to the Victorian Entrenchment provisions

The Committee considered what should be done to address the problems that had been identified. Those problems were the difficulty of identifying what legislation was caught by the entrenchment provision, the uncertainty that flowed from that difficulty and the fact that the whole of any bill might be rendered void and not simply the provision diminishing the Supreme Court Jurisdiction. The Committee was also concerned that the absolute majority requirement, without more, might generate into a ritualistic mechanism and the purpose of entrenchment, namely, to draw Parliament's attention to the fundamental importance of the proposed amendments and, thus, to avoid any inadvertent diminution of the Supreme Court jurisdiction, would be lost. The Committee recommended inter alia,-

(a) That the Minister should provide the House with a statement of reasons for the proposed amendments in a particular time frame to ensure ample time for full debate.

(b) Any failure to comply with entrenchment procedures would not render the entire Bill void but only the offending provision. The remainder of the Bill would then be dealt with by applying the general rules of severance.

Following the publication of the Report, s.85 of the Constitution Act was amended. The new provision was as follows:

"85(5) A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal alter or vary the section unless -

(a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an

intention to repeal, alter or vary this section;

(b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires of the reasons for repealing, altering or varying the section; and

(c) the statement is so made -

(i) during the member's second reading speech;

(ii) after not less than twenty-four hours notice is given of the intention to make the statement but before the third reading of the Bill;

(iii) with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.

(6) A provision or a Bill which excludes or restricts, or purports to exclude or restrict, judicial review by the Court of a decision of another court, tribunal, body or person is to be taken to repeal, alter or vary this section and to be of no effect unless the requirements of s.s.(5) are satisfied.

(7) A provision of an Act which creates or purports to create a summary offence is not to be taken, on that account, to repeal, alter or vary this section.

(8) A provision of an Act that confers jurisdiction on a court, tribunal, body or person which would otherwise be exercisable by the Supreme Court which augments any such jurisdiction conferred on a court, tribunal, body or person, does not exclude the jurisdiction of the Supreme Court except as provided in s.s. (5)."

It will be noted that s.85(5) expressly exempted any legislation which directly amended or repealed any part of s.85. The then Attorney-General, Mr Kennan, explained this approach on the basis that there could be no possibility that Parliament could pass legislation without being fully aware of the nature of the proposed amendment in such a circumstance The then Shadow Attorney-General, Mrs Wade, took the view that direct amendments should also conform to the s.85(5) requirements - in particular that the Minister should give a statement of reasons for the amendment. It should also be noted s.18(2 A) was inserted also in the amending legislation. It read as follows:

"18 (2A) A provision of a Bill by which s.85 may be repealed, altered or varied is void if the Bill is not passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively."

As a result of this provision, it will suffice if an absolute majority is obtained for the provision at the third reading stage. Legislation was also passed at the time to validate any legislation enacted after 1 July 1989.

Thus the powers and jurisdiction conferred upon the Supreme Court by s.85 Constitution Act 1975 have been given special treatment by the combined operation of s.18 and s.85 of the Act. In particular, s.18(2A) renders void any provision of a Bill which repeals, alters or varies s.85 and renders such a provision void in the absence of an absolute majority of both Houses of Parliament. A provision which indirectly repeals or amends any part of s.85, for example, by removing jurisdiction or limiting powers, must also comply with the procedural requirements to achieve that result; namely, an express provision in the legislation stating the intention to repeal, alter or vary s.85 together with a statement of reasons by the person

presenting the Bill to Parliament within the times prescribed.

Another recommendation of the Legal and Constitutional Committee was that there should be a Scrutiny of Bills Committee which would be required to report to the Parliament in respect of any s.85 provisions in any bills. Effect was given to that proposal by an amendment enacted in 1992, adding s.4B to the Parliamentary Committee's Act 1968. It provided as follows:

> "4B Scrutiny of Acts and Regulations Committee
>
> The functions of the Committee are -
>
> (a) ...
>
> (b) to consider any Bill introduced into the House of the Parliament and to report to the Parliament;
>
> > (i) as to whether the Bill by express words or otherwise repeals, alters or varies s.85 of the Constitution Act 1975 or raises an issue as to the jurisdiction of the Supreme Court;
> >
> > (ii) where a Bill repeals, alters or varies s.85 of the Constitution Act 1975, whether this is in all the circumstances appropriate and desirable;
> >
> > (iii) where a Bill does not repeal, alter or vary s.85 of the Constitution Act 1975, but where an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue."

<u>The Victorian Entrenchment provisions serving the rule of law</u>

In its Report the Committee analysed the concept of entrenchment and its legitimacy. It commented

> "It sees the purpose of this entrenchment as being to provide a timely warning to the Parliament that it is dealing with a matter of grave importance."

It commented further that the requirement of the absolute majority involved "a very modest degree of entrenchment" and then directed its attention to the question of what "constitutional value" was sought to be protected by the entrenchment provision. It responded -

> "... the principle which lies at the heart of the section is that in any legal dispute, citizens are ultimately to have recourse to a court of law - the Supreme Court which will dispose of that dispute accordingly to the law. In granting to the Supreme Court jurisdiction in all cases whatsoever, the constitutional principle enshrined in s.85 , however, opaquely expressed, is that in Victoria there is to be "Rule of Law", enforced by a court of law."

It is to the Supreme Court trial courts that citizens can first have recourse "in all cases". The Committee also quoted comments from the then Mr Hayne Q.C. of the Victorian Bar who stated the following:

> "The function of the court quite simply is to apply the law and thus to ensure that all abide by the law of the land, including as need arises, the individual citizen, the corporation, and the executive government. If needs be it is for the court to stand between the citizen and the government and judge between them according to law."

The Committee commented that Mr Hayne, was raising one of the "most important perspectives" of the rule of law, namely, that it

> "is a bulwark of the liberties of the citizen. It guarantees the citizen that he or she will be dealt with according to law rather than executive whim."

Thus the Committee identified the two aspects of jurisdiction and powers which enable to serve the rule of law - general jurisdiction and the supervisory jurisdiction and powers.

The Committee then posed the question whether the rule of law was of sufficient importance to warrant an entrenchment provision. It had no hesitation in its response.

> "It is beyond all question or dispute that the rule of law is one of the most fundamental constitutional values of the State of Victoria, and for that matter of any civilised society. Without it, the Constitution itself is merely a piece of paper and the protections guaranteed by law to citizens are entirely worthless. It would indeed be difficult to conceive of a more fundamental constitutional principle".

Experience of the entrenching provisions in Victoria - response of Supreme Court

A result of the above changes has been that there is readily available information about attempts made by the Executive through the Parliament to change the powers and jurisdiction of the Supreme Court. This is not the case in other States or Territories. But New South Wales has experienced similar erosion. The probabilities are that other States and Territories are also experiencing a similar erosion. Another result is that the changes have indirectly entrenched the rights of citizens; for legislation removing the rights of citizens will usually involve the indirect removal of powers or jurisdiction of the Supreme Court. The entrenchment of the latter has indirectly entrenched the former.

It is not the purpose of this paper to analyse the strengths and weaknesses of the

scheme or the Victorian Supreme Court's consideration of it. In the context of the rule of law, however, it is relevant to identify the categories of legislation that can be identified as a result of the operation of the entrenchment provisions. The principle categories are:

> (a) provisions limiting the Supreme Courts jurisdiction to review administrative decisions and decisions of quasi-judicial bodies
>
> (b) legislation depriving people of common law rights to damages in respect of acts done under legislation;
>
> (c) legislation conferring immunity from suit upon those required by law to convey information to government needed for public purposes such as health;
>
> (d) legislation changing the status of reserved land with the extinguishment of leases or variations of interests rights or privileges or obligation over land. Rights to compensation were removed in such cases at least in 1994 and 1995. The practice has now been abandoned.
>
> (e) provisions limiting the jurisdiction of the Supreme Court by placing a procedural limit; for example, that a step be taken before a motion could be heard in the Supreme Court.

Many examples exist of legislation in the above categories enacted on behalf of governments of both the major political persuasions.

The Victorian Supreme Court has expressed its concern about such changes in several of its Annual Reports. In its 1994 Annual report, it acknowledged that it is for the Parliament to determine whether such changes should be made. It commented however,

> "When . . . . legislation of this kind is passed, without proper justification, the Parliament weakens the rule of law. Such legislation can create arbitrary power, inequality under the law and increase the risk of corruption. "

By way of example, it may be said that where unfettered and unreviewable power is given to a Minister, the Minister is free to act outside the law. This is not merely undesirable, it is potentially dangerous.

The Court focused on two particular areas of concern. The first concern was

> "The vesting of the power in ministers and others to make decisions which affect the rights of people and corporations in conjunction with the limitation or removal of the Court's jurisdiction to review such decisions"

The Court commented that, in a number of instances, legislation had been enacted which vested powers of a judicial nature in Ministers or others not independent of the executive and removed or limited the jurisdiction of the Supreme Court to review and, if necessary, quash their decisions. This was also a concern raised in the 1988 Annual Report of the Court. The Court then commented

> "To deprive the Court of jurisdiction in favour of others who do not have the independence of the judiciary must weaken the rule of law. It is to be remembered that the law truly rules only if there is an objective finding of the facts from the evidence and a correct application of the relevant principles of law.
>
> An inherent and necessary function of a superior court of law is to keep in check every activity that is subject to the rule of law.

The other area of concern raised in the 1994 Annual Report was legislation which "in a number of instances" had

> "conferred on government bodies, individuals and corporations immunity from the consequences of their actions, and as a consequence the jurisdiction and powers of the Supreme Court [were] removed or limited."

The Court referred in particular to some instances where by conferring complete immunity from suit and excluding or limiting the courts jurisdiction and powers, the legislation deprived citizens of the remedy of compensation and other remedies to which they would otherwise have been entitled under the law and conferred privileges on those protected which were not enjoyed by members of the community generally. The Court commented

> "This does not reflect equality. Arguably such legislation is contrary to our understanding the rule of law."

The actions of the Supreme Court in publicly raising these issues point to another role for Supreme Courts under the rule of law.

Another function - The Supreme Court as guardian of the rule of law?

In reporting its concerns to the Parliament, the Supreme Court has not been motivated by any sense of territorial imperative. It has commented on the actions of governments of both major political persuasions. It has taken upon itself the task because it sees itself as a guardian of the rule of law. Is it proper for the Supreme Courts to raise these matters?

The Judicature is generally referred to as the third arm of government. The Supreme Courts comprise the peak trial and appellate tribunals in the Judicature of each State and Territory and carry the ultimate responsibility to administer the rule of law at trial and appellate level. Issues relating to the rule of law

concern them. They have the status to speak for the Judicature of their States or Territories. I suggest, therefore, that the issues are proper matters for the Supreme Courts to raise and report to the Parliament. Further, there appears to be no other arm of government and no one else in government that accepts the duty or responsibility for addressing such issues. In Victoria the Scrutiny of Acts and Regulations Committee could analyse legislation by reference to the rule of law in its published reports, but has not as yet expressly done so. In the past, the Attorneys -General could have filled such a role, but Attorneys - General today are declining to treat their office as one different from that of any other Minister of the Crown - that is, that they are members of the Executive and their office does not stand above and apart from politics.

I am not aware of any public criticism of the Victorian Supreme Court for raising these concerns. The Victorian Supreme Court, however, has decided that it must do more than raise concerns in its Annual Report. It has invited the Judicial Conference of Australia to conduct a review of the operation of the Victorian scheme. The Judicial Conference has decided to take up the challenge.

The Judicial Conference can and should perform the role of a guardian of the rule of Law. It remains important for the Supreme Courts, however, to fearlessly and independently speak out when the rule of law is under threat.

Another function - Supreme Court trial courts as law makers?

I have focused up to this point on the role of Supreme Court trial courts as administrators and guardians of the rule of law. There is another significant function to consider.

It is the judgments of Supreme Court judges, given in the course of trial and appellate work, which provide legal precedent and thus play an important role in the development of the law and in its interpretation - the law to which all are subject, including the courts, under the rule of law, and which in turn guides and constrains the Supreme Court judges when performing this role.

Parliament, of course, is sovereign and can change the law developed by the Supreme Courts As Walker has pointed out, however,

> "Even if one accepts Dicey's theory of parliamentary sovereignty ..., it is a misconception to see the courts as wholly subservient to the will of parliament."

Professor Allan has commented:

> "Parliament is the supreme legislator, but from the moment Parliament has uttered its will as law giver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the houses were called upon to interpret their own enactments.

The Supreme Courts in the course of their trial and appellate work definitively interpret the text of legislation. That task is controlled in part, by the rules of interpretation that have been developed by the courts. Thus, for example, there is the presumption against retrospectivity, the strict construction of privative clauses and the approach taken to statutory provisions which provide that a decision is not to be subject to appeal or review. In that situation the courts have proceeded upon the basis that they

> " are entitled to assume that, absent very clear language to the contrary, Parliament, having passed legislation, does not intend to interfere with the responsibilities of the courts under the rule of law. Accordingly, when interpreting and applying legislation, the courts presume Parliament does not intend to interfere with the courts role of upholding the rule of law."

White the appellate courts play a more important role in developing and interpreting the law, none the less the trial courts of the Supreme Courts play a significant role under the rule of law, as part of the law making and interpreting system upon which the rule of law may function. It is in this context that the second characteristics of the Judicature under the rule of law described by Sir Gerard Brennan becomes particularly relevant. He stated:

> "It must be a competent Judicature; there must be Judges and practitioners who know the law and its purpose, who are alive to the connection between abstract legal principles and its practical effect, who accept and observe the limitations of judicial power and who, within those limitations develop or assist in developing the law to answer the needs of society from time to time."

The second characteristic defines qualities which are of primary importance for judges of the Supreme Courts for both their trial and appellate work. I refer in particular to his proposition that the judges must

> "be alive to the connection between abstract legal principle and its practical effect."

and his proposition that they must

> "observe and accept the limitations on judicial power and ..., within those limitations, develop or assist in developing the law to answer the needs of society from time to time."

I will return to these issues when considering the topic of merger of courts.

THE FUTURE

Future of the rule of law - extending of entrenchment?

A question for the State of Victoria is whether its entrenchment provisions have been successful and whether there are ways of improving the scheme. I suggest a question for all other States and Territories is whether to adopt similar or improved provisions.

It is not possible on information presently available to form a judgment about the success or failure of the Victorian scheme in ensuring that any change that is made to the jurisdiction and powers of the Supreme Court is properly considered and, if inconsistent with the rule of law, can be justified. A reading of Hansard and of the Reports of the Scrutiny of Acts and Regulations Committee does not encourage the reader to think that serious thought is given to the rule of law implications of changes that are approved and does not encourage the reader to think that those responsible for legislation are fully alive to such issues. Further, an adverse report from the Scrutiny of Acts and Regulations Committee carries no sanction. The Committee can report that the change is not "desirable or appropriate" or not report at all, but the legislation passes both houses without debate. Nonetheless, political realities may be very different. Those responsible for drafting legislation and for developing policy, and the relevant Ministers, may give anxious thought to the implications for the rule of law and may well be restrained by the presence of the entrenchment and manner and form provisions in many cases from advancing provisions which would reduce the jurisdiction and powers of the Supreme Court and thus the rule of law. Further, much valuable work may be done in the corridors of power or the party room by members of the Committee which is not mentioned in Hansard or in the Committee's reports. The Court is not in a position to investigate these aspects, and that is one of the reasons why it has invited the Judicial Conference of Australia to review the operation of these provisions. This review will have relevance to all courts and governments in this country.

A further important question for all States and Territories is, I suggest, whether to adopt the New South Wales approach to the entrenchment of the independence of the Judicature. The High Court decision in Kable v. Director of Public Prosecutions (N.S.W.) (1996) 189 CLR 51, if it stands the test of time, offers a basis for challenging any attempt by a parliament to abolish the Supreme Courts. It, however, does not

secure the independence of all other courts. The New South Wales Legislation does. At the same time, the New South Wales legislation, while extremely important from a rule of law perspective, is not a complete protection. The executive, if it controls the Parliament, can always whittle away at the powers and jurisdictions of the Supreme Court trial courts. Kable, also, cannot prevent this occurring and arguments based on the application of the doctrine of separation of powers or recourse to fundamental rights have not been successful. The Victorian legislation offers protection.

In combination, the adoption of the two statutory approaches in all States and Territories could greatly enhance the rule of law in this country.

The Future - Other challenges to the rule of law

The role of the Supreme Court trial courts under the Rule of Law, is affected not only by statutory enactments. There are, of course, indirect ways in which the functioning of the Supreme Court trial courts may be adversely affected.

The future of the rule of law - accessibility

In his paper, The State of the Judicature, Sir Gerard Brennan emphasised the importance of accessibility to justice if the rule of law is to operate. Referring to the fourth characteristic of the Judicature, he said

"It must be a Judicature that is reasonably accessible to those who have a genuine need for its remedies ."

Changes have occurred in recent years for which the Executive is responsible which have reduced accessibility to all courts. The Supreme Court of Victoria, in particular, has not escaped that process.

(a) User Pays I refer in particular to the development and application of user pays principles to all civil litigation and not just litigation receiving priority treatment. In Victoria, fees for the Supreme Court, for the 1992/93 year were increased 5% and, since then, have been increased annually by 5%. From 1992 - 3 to 1996-7, the CPI has averaged 2.3% in Australian capital cities and 2.1% in Melbourne . Australia wide, expenditure on court administration increased 4% in real terms between 1994-95 and 1996-97. Australia wide, the level of cost recovery through court fees for the civil jurisdiction has increased from 37% to 42% from in the same period.. Court fees (in dollars) charged per lodgement in 1996 - 1997 were as follows:

	NSW	VIC	QLD	WA	SA	Tas	ACT	NT	Cwlth	Total
Civil										
Magistrates' Court	126	63	85	82	59	na	68	36	-	93
District/County Court	804	515	265	363	176	-	-	-	-	504
Supreme/ Federal Court	977	1149	753	273	441	na	486	233	605	740
Family Court	-	-	-	112	-	-	-	-	123	121
All Courts	180	102	117	114	79	na	121	47	183	142

Probate										
Supreme Court	423	181	244	141	475	na	482	155	na	318

It will be noted that the Supreme Courts had the highest fees per lodgement and that Victoria had the highest level of fees per lodgement of all Supreme Courts.

I assume that the figures are arrived at by dividing the total amount of fees received by the number of lodgements. There will, however, be substantial variations. For example, applying the fees set in Victoria in November 1997, there are considerable internal variations. A civil case with one interlocutory application, one examination of the court file, a pre-trial conference and a five day hearing will incur fees totalling $2,617.00 ($1,427.00 in the County Court). On top of that, the parties pay for the transcript for the judge. The fee for filing a civil appeal to the Court of Appeal is $2,300.00. Entry into the Commercial or Building Lists incurs a fee of $1,730.00. I note that since 27 April 1995, the Prothonotary has been empowered to waive fees but only in cases of financial hardship of individuals. The loading of fees payable in Supreme court litigation must render Supreme Court trial courts less accessible.

(b) Legal Aid. Cut backs to Legal Aid have had a profound impact on the Courts. The Family Court probably has experienced the greatest impact with many more litigants being unrepresented because of extremely rigorous criteria. The Supreme Court of Victoria has not escaped this phenomenon. In the last twelve months I have tried more cases with unrepresented litigants than I have tried in my previous nine years on the bench. This phenomenon challenges the ability of judges to conduct civil or criminal trials of credibility and impartiality. I say credibility because of the importance for the credibility of any trial that there be a proper presentation and examination of the facts involved. To the extent that the judge feels obliged to pursue such an enquiry so there is the danger of the appearance, if not the reality, of impartiality being compromised. Whatever the trial judge does, he or she can rarely redress the imbalance where one party is represented and the other is not. The unrepresented party is denied access to the Judicature as surely as if he or she was denied the right to be heard. Such problems can also adversely affect the public confidence in the judiciary and therefore, the rule of law.

(c) Lawyer fees Accessibility is also compromised by the level of lawyers fees. They are at their highest level in the Supreme Courts. Litigation is, of course, labour intensive. The cost of that labour has been a problem for centuries. While the profession is highly competitive, legal fees remain at a high level. Market forces do not appear to operate in the classical way. Rather, what appears to happen is that the most sought after lawyers are able to name their fees and the fees of others fall in behind and rise to meet those expectations. No one seems to be able to come up with an acceptable solution to this problem. In fairness to the profession, I should acknowledge the extent to which the profession in recent years in Victoria and elsewhere has developed pro-bono schemes. The Victorian Bar scheme is one upon which I have drawn whenever I have thought it necessary in cases involving unrepresented litigants. The Bar has met those requests with speed, efficiency and competence.

It is essential, for the rule of law that accessibility to the Judicature be maintained as far as is possible. Lawyers fees, lack of legal aid and rising court fees are making accessibility more difficult. There is one aspect of the system, however, that can be used to ameliorate these problems. I refer to the hierarchy of

courts. This enables a division of litigation according to significance, complexity and amounts in dispute between the courts in that hierarchy. By fixing lesser court fees and lesser lawyers fees recoverable at lower levels in the hierarchy there is at least some capacity to match the expenditure of the parties to the significance and complexity of the case and the amounts in dispute and thus enhance accessibility to the Judicature. Legal Aid can go further. We must be vigilant to stop any worsening of the situation and continue to press for improvement.

Future of the Rule of Law - ill informed criticism

Referring to the third characteristic of the Judicature under the rule of law, Sir Gerard Brennan stated,

> "It must be a Judicature that has the confidence of the people, without which it loses its authority and thereby looses its ability to perform its functions."

On what does that depend? Sir Owen Dixon said

> "The respect for the courts must depend on the wisdom and discretion, the learning and ability, the dignity and restraint which the judges exhibit. But there are other factors which are not within the control of the judges."

As Walker points out, in discussing the "ingredients" of the rule of law,

> ". . . there is still one element missing, one that is difficult to articulate with precision. We caught a glimpse of it earlier in Justice Khanna's insistence that one of his three prime requisites of the rule of law is "an enlightened public opinion" and that it would decay in a society with "a choked or coarsened conscience". . Similarly, when beginning this definition we laid down the pre-condition that the standards listed had to be applied in spirit as well as in letter.
>
> This is to remind us that the health and strength of the rule of law does not ultimately depend on the efforts of lawyers, judges or police, but on the attitudes of the people. "

Community attitudes can be damaged when lawyers, particularly apparently eminent lawyers, engage in inaccurate, subjective and ill-informed criticism of the courts. Such criticism threatens the rule of law. Much of the criticism proceeds from ignorance. Some practitioners tend to forget that their case is not the only important case requiring the attention of the court. The courts have to try to meet the needs of all litigants with limited resources. Some practitioners assume that when a judge is not sitting in court he or she is resting. Would that were so. For practitioners, their task is done when the hearing finishes. For the judge, however, the all important judgment remains to be completed. Some practitioners assume that judges can sit in court everyday and at the same time produce timely judgments. This is impossible. Even with some time out of court, judges work nights and weekends to provide those all important judgments within a reasonable time.

A particular concern is that critics of delays in courts appear to place the blame upon the courts. It is not generally appreciated that Australian courts have been at the forefront of improvements in the efficiency of civil and criminal case management and continue to be so. The Woolf Report in England, for example, drew significantly on Australian innovations. Judges and Magistrates work prodigiously hard to deal with the increasing work load We have reached the point where problems that exist lie not with the courts' management but with the resourcing of the courts. That responsibility ultimately rests with government. Critics of what is happening in the courts, if they want further improvement, should be focusing their attention on those in government. To that end, we need to do more to educate the ill-informed and respond appropriately to criticism.

Future of the rule of law - merger of courts?

A final matter to which I wish to refer is the question of merger of courts in the individual hierarchies such as the Supreme Court trial courts and District and County Courts to create single Trial Courts.

Merger of courts is not a new idea and it has been considered and has occurred in the past Critical to its success is the identification in the State or Territory in question of the nature and scope of problems that might be addressed by merger and the identification of potential negative consequences. In the remainder of this paper, I will attempt to identify some of the issues that need to be addressed from a rule of law perspective when considering merger proposals.

Benefits of merger?

What beneficial impact might a merger of courts have on the Rule of Law? Carl Baar has argued that merger can enhance the rule of law. He makes the point that unification of local courts into "professional province - wide Provincial Courts" in Canada has given them independence and autonomy. He argues however that there are limits to that benefit:

> "At the same time, however, once a degree of autonomy has been achieved that reinforces the legal order, a sufficient degree of formal unification may have been achieved to satisfy Racz's criteria. Court unification by this definition does not necessarily require only one level of trial court. If two or three or even four levels of trial courts have achieved sufficient competence and autonomy to ensure that the rule of law is preserved and enhanced, they can function as legitimate elements of the legal order.

The idea of merger has been raised afresh in New South Wales and in Western Australia. In particular, in a Discussion Paper, "Access to Justice", published in September this year, the Law Society of New South Wales proposes the merger of the Supreme Court, Land and Environment Court, Industrial Court, District Court and Compensation Court - a combination of unification and consolidation. The argument advanced for merger by the Law Society makes the following points.

1. "Obvious" economies of scale

2. A means of addressing problems:

   • problems in allocating resources (court rooms, judges,

   administrative and registry staff) to meet demands;

   • separate country circuits which do not necessarily complement each other;

   • the need to start proceedings in more than one court or to transfer proceedings between courts particularly where a defendant relies upon a cross claim that cannot be raised;

   • reducing public confusion about the legal system, increase understanding in the court system and its accessibility of the public to that system.

3. A " seamless superior trial court" would have the advantage of being able to

   • deliver increased flexibility in both the deployment of judicial power and in the assignment of cases;

   • permit "more effective court administration" by rationalising administrative units, tending to eliminate duplication of effort and leading to better training and career prospects for staff;

   • permit streamlining of court procedures and practices (including forms).

In support of its argument, the Law Society referred to a passage from the Victorian Case Transfer Committee Report that "theoretically the best solution" to the difficulty of matching fluctuating civil case loads with the available resources of the court "would be to have one court". The complete passage from that Report reads as follows;

> "If the problem created by these fluctuations were simply one of optimising overall productivity, theoretically the best solution would be to have one court."

It is significant that the Case Transfer Committee did not recommend merger. It recommended a case transfer mechanism that can be initiated by the courts. That system has the potential to deliver the flexibility required to assign cases according to complexity and significance within a hierarchical court structure and to address problems of allocating resources to meet demand and the need for flexibility in the deployment of judicial power and the assignment of cases. It is in operation in Victoria.

I am not in a position to examine in detail the alleged economic and administrative benefits of merger in New South Wales. I would, however, question such benefits. If, for example, the District Court and Compensation Court and Supreme Court of New South Wales were merged to create a new Trial Court, the first question to be dealt with would be the salary structure. Would not all 78 District Court and Compensation Court Judges' salaries and pension entitlements have to be brought up to the level of that of the present Supreme Court Judges'? If this did not occur and instead two Divisions were created (as suggested by the Law Society) to accommodate different salary levels, would that not defeat the purpose of the exercise ? I question also the scope for more savings. As to savings in administration costs, any mega Trial Court would also need a head of administration on a salary matching the size of the new court and the increased demand of that position. Further, how would work be allocated between Judges? Would it be necessary to allocate cases according to competence and experience? Would this be practical in a court of more than 125 Judges? What administrative structure would be needed to manage such allocation? In particular, how many judges would be tied up in allocating cases? What internal political problems might arise?

I wish in this paper, however, to consider the possible impact of such a merger proposal on the rule of law; for the issues to be considered should not be confined to efficiency and cost benefits.

Merger and the rule of law - impact on accessibility and confidence?

Historically, the lower courts were developed as courts for quick and cheap resolutions of minor matters. They have tended to process more cases per judicial officer than have the higher courts because they dealt with less difficult and complex matters. Such considerations lie behind the Commonwealth Attorney-General's proposals for a Federal Magistrates' Court.

It is relevant to consider why hierarchical court structures continue to exist, as they do in many jurisdictions. The English Beeching Commission, which, inter alia, recommended the retention of the hierarchical structure of courts, wrote that the then court system attempted to match two pyramids - a pyramid of case seriousness and one of talent. As to the former it commented:

> "There is the concept of case seriousness, where seriousness is specified by categories of offence in the case of crime, and is largely measured in terms of money in civil cases. Almost from the nature of this, numbers of cases and seriousness vary inversely. "

It commented as to the talent pyramid that it derived

> "from the recognition that the higher the level of judicial talent which is sought the scarcer it will be."

The Commission went on to comment:

> "There can be no doubt about the practical need to match judicial quality against case quality, but there is reason to question the way in which it is done. At present, judicial quality is regarded not as forming a pyramid, but as being divided into three tiers, each roughly homogenous within itself. . . . The load of cases are similarly divided into three layers each of which is composed of ones deemed to be appropriate to the hearing before judges of the appropriate tier, in a way which is determined both by current views as to the fitness of things and, the need to match the volume of work to the availability of judges to the three levels."

The Commission added

> "... although the difference in general quality between one judicial tier and the next is marked, there is not necessarily any corresponding difference of ability between individuals who happen to be above or below the line at a particular moment in time. This is obviously true, and we make the point only to establish that a selective use of talent from, for example, the second tier, to deal with less serious or difficult cases provisionally allocated to the top tier, is not necessarily less satisfactory than allowing all judges in the top tier to deal with all cases which may come their way. In other words, any rigidity in the demarcation between tiers should be accepted only so far as it is practically necessary, and should not be regarded as justified by reality."

Subject to those comments, the Commission however, recognised:

> "The practical necessity for sub-dividing judge power into discrete layers "

It considered that the division in England into three tiers was probably the most appropriate. I note also that it saw the difficulty of cases rather than their seriousness as making demands upon judicial ability and thus

> "the difficulty should be a major determining factor in the matching of judicial quality to the case"

It also acknowledged, however, that there was a general tendency for "seriousness and difficulty" to go together, although there were, of course, exceptions to that rule. It went on to argue that the system would be better served with a more flexible system for allocating cases in which the assessment of "difficulty as well as the seriousness of the case would play a regular part".

The Beeching Commission went on to recommend the creation of the Crown Court for criminal work to be staffed by judges of the High Court and judges from the Courts of Assize, the Central Criminal Court, the Lancashire Crown Court and the Court of Sessions who would thereafter be called Circuit Judges. As to civil litigation it recommended an increase in the jurisdiction of the County Court and a flexible method "based on judicial decision" by which a limited number of circuit judges could help in the simpler High Court cases.. Thus in neither area was there a merger recommended and the hierarchical system was retained.

Similar thinking lay behind the decisions in 1990 of the Case Transfer Committee in Victoria. In considering the reasons for discrete layers, the Case Transfer Committee stated that the purpose was.

> "to relieve the higher court, or courts, of the burden of dealing with cases which do not justify the use of their resources and, thereby, ensure that those resources are reserved for the most serious cases. "

The other reason advanced was described

> "to create a forum, or forums, for cases which may not be satisfactorily dealt with in the higher court, or courts, because of the cost and delay involved."

The Committee referred to the fact that the Civil Justice Committee had considered the issue and rejected merger . The thinking behind the Case Transfer Report included the following

> "As a general principle, cases should be decided as expeditiously and cheaply as is consistent with their being decided by the appropriate level of court. It is a fact of practical experience that cases generally can be conducted at less expense and will be heard more quickly the lower they are placed in the court hierarchy. Nevertheless, everyone would agree, of some cases, that it would be inappropriate for them to be heard in a Magistrates' Court or perhaps, even the County Court. While speed and low cost are unassailable virtues they cannot be pursued at the expense of public confidence in justice. Cases should, according to their individual characteristics, be matched to the skill, experience and authority of the judges who decide them. It is this form of matching which is intended to be embraced in the ideal of an "appropriate " court."

The Report went on to identify criteria for the selection of cases for transfer from one court in the hierarchy to the other. The criteria were described as "gravity", "difficulty" and "importance". It was stated, that he

> "relate specifically to the task of matching individual cases to the skill, experience and authority of judges in the court hierarchy."

The statutory criteria are set out in s.16 of the Courts (Case Transfer) Act 1991. In particular, s.16(1)(b) requires that the designated judicial officer directing the transfer should form the opinion that

> "(b) the transferee court has the appropriate skill, experience and authority to hear and determine [the proceeding] having regard to its gravity, difficulty and importance."

This view of the differences between the courts in the hierarchy is I suggest, supported by the fact that it is perceived both within the legal profession and within the community that, as a general proposition, the Supreme Courts are functioning at a higher level and have more status or standing than the County Court or District Courts and the County Courts and District Courts are functioning at a higher level and have more status or standing than the Magistrates' Courts.

It is vital for the rule of law that we have a competent judicature which enjoys the confidence of the people. All judges and magistrates need to have the characteristics listed by Sir Gerard Brennan. All judicial officers also must have, in sufficient measure for the type of work that they are required to do, an ability to analyse legal and factual problems, practicality, common sense, patience, efficiency, decisiveness, a sound sense of justice and fairness, and "a good knowledge and understanding of the law" Judges and Magistrates possess these qualities in different proportions. It is possible to generalise, however, that as one goes through a hierarchy of the courts, these qualities tend to be required in different degrees and combinations. Challenging cases can occur at all levels, but as one rises through a hierarchical system each level of the courts, as a general proposition, deals with more cases of increasing factual and legal complexity and seriousness and less small and minor cases. The more serious the matter, be it civil or criminal, the more through and demanding the trial tends to be. Further, because the decisions of the Supreme Courts create legal precedent, legal skills are there more significant.

By appropriate selection of personnel for each level of the hierarchy , it is possible to ensure that judges and magistrates handle the business of the various levels with a high degree of competence. The hierarchical approach may therefore be said to serve the rule of law by its attempt to match judicial ability to difficulty and seriousness thus helping to ensure that community confidence will be maintained in the judiciary. Further, by its attempt to deal with less difficult and less serious matters in lower courts it enables them to be dealt with more cheaply and thus assists accessibility to the courts. Merger of courts presently on different levels in the hierarchy would put both these advantages at risk.

Merger and the rule of law - lowering of status?

In Victoria the Civil Justice Committee in 1984 considered the merger of courts and

raised another issue. It referred to the difference in "rank" or "status" being an obstacle to court merger commenting that

> "In England and Australia, the status of the judges of the superior courts has always been regarded, particularly by lawyers, as being significantly higher than that of the judges of the inferior courts".

It described the distinction as "marked". It recommended against the merger of the Supreme Court and County Court and in favour of the retention of "discrete layers" of "judge-power". At the same time it accepted that "the assignment of judges and the allocation of cases should be more flexible".

The significance of "status" and "rank" needs to be frankly addressed. To do so is difficult. In an egalitarian community, such as ours still aspires to be, status and rank are viewed as things that should not matter. Arguments to retain status and rank by those who possess it are easily dismissed as motivated by self-interest and over inflated self-importance.

Will the merger of Supreme Courts and County Courts or District Courts, into single Trial Courts, with or without divisions, affect the status of the Judicature? It may raise the status or rank of the judges of the lower courts concerned. It is likely, however, to diminish that of the judges of the Supreme Courts who join them and to create Trial Courts of lesser status than that of the previous Supreme Courts.

This is best explained by citing W. S. Gilbert and "The Gondoliers". He wrote of the King who promoted everybody to the "top of the tree". As a result "Lord Chancellors were cheap as sprats" and Bishops "plentiful as tabby cats'. He summed up his argument in the couplet.

> "When everyone is somebody
> Then no one's anybody."

The reverse situation also demonstrates the point. The creation of separate Courts of Appeal which sit in the hierarchy above the Supreme court trial courts has, I suggest, reduced somewhat the status of the Supreme Court trial judges not appointed to them and caused a palpable raising in status of those elevated to them.

Would a lowering of the status of the superior court harm the rule of law? In answering that question we must put to one side the question of any personal angst or pleasure that might be caused by merger of Supreme Courts and County Courts or District Courts, or, for that matter, by merger of the County Courts or District Courts with the Magistrates' Court. Further, the retention of status for status' sake cannot and should not be defended. The question to be addressed is whether a reduction in status of the superior courts would harm the rule of law. A strong argument can be put that it would.

It may be argued first, that the decisions of any mega Trial Court, as the new superior court, would be viewed with less respect and seen as less significant and more easily ignored and overcome by Government because of the reduction in status. For example, removing the right to judicial review of administrative action by such a court might be seen as no great loss in the community and thus more easily accomplished by government. It would also be easier to ignore attempts by the new court to raise concerns about the rule of law.

Further a loss of status will lead to greater difficulty in recruiting the best people for the superior court. Any reduction in status could not be quarantined. Once started it is likely to continue and compound; for it will not occur in a vacuum. At present the Supreme Courts and the District and County Courts compete with the Federal Court and Family Court for suitable judges. Some States are already under the difficulty, in recruiting judges, that the remuneration and working conditions, for judges in the Federal Court and

Family Court, including the opportunity to do both trial and appellate work, tend to be superior to those of the State Supreme Courts. In Victoria they are significantly superior. The rank or status of a court is something most potential judicial appointees will consider. Recruitment to new mega Trial Courts would in the long run, therefore, suffer further as a result of any loss of status particularly in comparison to Federal courts. If this occurred, the quality of decision making and performance of the Trial Court would suffer, leading to less confidence in and respect for decisions and further reductions in the status of the court. The Trial Court judges also may have less confidence and resolve as a result of loss of status. For these reasons, a reduction in status resulting from merger of Supreme Courts and County and District Courts into mega Trial Courts could seriously weaken the ability of any new Trial Court to stand between the citizen and executive whim and reduce the ability of such a court to ensure that the law and the rule of law is respected by the executive and other powerful forces in the community. Generally it could lead to a loss of respect in the community for the Judicature.

Merger by unification and the rule of law - questions to be answered.

Would then a merger by unification, for example, of the Supreme Court of New South Wales with the District Court of New South Wales damage the rule of law? In light of the foregoing discussion, the following questions would need to be answered.

1. Confidence in the Judicature. Would any of the following adversely affect community confidence in and support for the Judicature and so damage the rule of law?

(a) Would the members of the merged Trial Court possess the skills at the level required to handle with competence the trial work currently conducted by the Supreme Court? Would this affect the competence of its performance?

(b) Would the new Trial Court be seen to have lower status and thus have greater difficulty recruiting the best judges? It must be borne in mind that it will be competing with the federal system for judges.

(c) Would the creation of a Trial Court of 125 or more judges result in the profession and the community seeing the Federal Court to be of a higher standard? If so, would the State courts lose status and the confidence of the State community?

(d) Would Judges of the Trial Court be paid the same salary regardless of the burden that they bear? How would this affect recruitment, morale and, therefore, the performance of the Trial Court and confidence in it?

(e) How would scarce resources be allocated amongst the Judges of the mega Trial Court? Are there adequate secretarial services at present? Are there adequate transcription services for trials? Will the quality and efficiency of work, therefore, suffer and, so, confidence in the Trial Court?

2. The court as administrator of the rule of law. Would the status of the Trial Court be lower than the status of the present Supreme Court in the eyes of the others arms of government and the community? If so, would respect for its decisions be diminished. Would its ability to stand between the citizen and the executive be diminished? Would it be easier for Government to further limit its supervisory jurisdiction?

3. Accessability to the judicature. Would a merger make litigation presently dealt with in the District Court more expensive because court fees and legal fees would rise to match those charged in the old Supreme Court? Would the Trial Court, therefore, be less accessible than the present District court and thus the

rule of law diminished?

4. Law making and interpretive role. In a Trial Court of more than 125 judges, which would then be the superior court of record, would all judgments constitute binding precedents? Would the quality of judgments be maintained? Would there be too many judgments and conflicting judgments? Would this compromise the role of the Trial Court in its law making and interpretive role within the rule of law?

5. The court as guardian of the rule of law. If the status of the Trial Court is lowered, will its ability to defend the rule of law be reduced?

These issues might be met to a limited extent by the use of first and second divisions with the mega Trial Court. But if such divisions were to be so used, they would, in effect, preserve the present system and division of labour and no sensible purpose would be served by unification of the courts. Further there are potential problems and dangers in a two division approach.

1. Potential for further reduction in competence, status and community confidence

If a two division structure were used with different remuneration packages, would governments replace retiring judges in the first division or, by not replacing judges in the first division, pressure the Court to give more work to the judges in the lower division and appoint any replacement for higher division judges in the lower division? Would there not be a strong financial incentive for any government to reduce gradually the number of the more expensive judges in the higher division to the point where they would be so few in number that the divisions could be merged? What impact would such events have on the quality of the performance of the Court and community confidence in it?

2. Impact on judicial independence

Would there be a division structure according to competence? Would the remuneration be greater in the higher division? Would regular promotion from the lower to the higher division be contemplated? What impact would that have on the reality and the perception of judicial independence?

Merger by consolidation and the rule of law.

Consolidation of the Supreme Court, Land and Environment Court and Industrial Court and consolidation of the District Court and Compensation Court raise different issues. It would be necessary for example, to examine why it was that the individual courts were created. If they were created because it was perceived that there was a need for specialisation to ensure sufficient competence or a non-traditional approach to improve accessibility, and that this could only be achieved by separate courts, it may be that the rule of law is better served by maintaining their separate identities.

Merger and the rule of law.- Conclusion

The hierarchical approach to the allocation of work to courts is a practical way of matching the complexity and seriousness of most cases to the talents required. Like any structure it has the potential for inflexibility. If that inflexibility results in inappropriate judicial officers handling particular matters, it has the potential to affect adversely the confidence of the community in the courts and thus to harm the rule of law. Those issues, however, are best dealt with by the use of mechanisms such as court controlled case transfer mechanisms for civil and criminal business, to ensure that the few cases that do not match the paradigm for cases to be tried at a particular level of the Judicature are moved so they can be dealt with by

judges or magistrates with the appropriate talents and skills for the case in question. I suggest that time and energy would be best spent developing and improving such mechanisms and that they will best serve the rule of law.

We live in times where the focus of policy makers is on economic considerations. They must be considered but we must never lose sight of the fact, that there are other values to be considered. The rule of law is a fundamental value amongst those values. The Supreme Court trial courts have a key role to play under the rule of law. Any proposals, such as merger proposals, based on perceived economic considerations which could damage the rule of law should not be contemplated unless the economic factors sought to be addressed were themselves causing greater damage to the rule of law. We must closely watch events in New South Wales.

APPENDIX "A"

CASE TRANSFER STATISTICS UNDER THE COURTS (CASE TRANSFER ACT)

YEAR	To County Court From Supreme Court	To Magistrates' Court from Supreme Court	To Supreme Court from County Court	To Supreme Court from Magistrates' Court
	Total	**Total**	**Total**	**Total**
1995	92	8	36	6
1996	86	5	55	11
1997	79	17	44	16
1998 (to 30/9/98)	22	5	19	2