A NEW APPROACH TO CIVIL APPEALS

Address by Justice Chris Maxwell, President of the Court of Appeal,
to the Victorian Bar (Continuing Legal Education program), 23 October 2006

At my welcome in July 2005, I described the delays in the Court of Appeal as "clearly unacceptable". I said that reducing delays was my first and most urgent task.

I am pleased to report that we have made some progress. In the year ended 30 June 2005, the average delay in civil appeals (from filing the notice of appeal to delivery of judgment) was 14.7 months. In the year ended 30 June 2006, we reduced that delay to 12.0 months. That is an improvement of 18%. An average delay of a year is still much too long, but we appear to be heading in the right direction. (We also reduced the average delay in sentence appeals by almost 12% in the same period, from 7.7 months to 6.8 months).

It is significant that we have achieved this improvement with no additional resources. Like any publicly-funded institution, we have an obligation to spend public money efficiently. Our processes must be capable of withstanding external scrutiny. I wanted to be sure, before pressing our case for the additional resources we need, that we were making best use of what we had.

The reduction in delays reflects the tremendous support I have had from the Judges, and from everyone else in the court: Masters, registry staff, associates, tipstaves, secretaries and administrative staff.

It also reflects the fact that we have been experimenting with new ways of doing things. For example, I am insisting on shorter hearings. I often say at the beginning of a civil appeal: "We don't do two-day appeals any more". That is not, of course, an iron rule but it reflects my view that in most appeals one day (or less) will suffice. After all, we have the benefit of high-quality written submissions, and high-quality oral argument.

The Court which I joined has a well-established tradition of hard work and thorough preparation. By the time counsel stand up to begin an appeal, we have all read the papers, so I routinely advise counsel to go straight to the heart of the matter. For an appeal to go into a second day adds enormously to the cost burden for the parties, and to the work of the court. That additional cost and workload must be avoided, unless absolutely necessary.

We are trying to do *ex tempore* judgments as often as possible. In Bendigo a fortnight ago, for example, the Chief Justice, Buchanan, J.A. and I disposed of seven criminal appeals in three days (two full days and two half days). Six were *ex tempore* judgments. Obviously, not every appeal lends itself to disposal on the spot but, when it can be done, it has clear advantages for all concerned. In particular, the decision is given while the facts and the arguments are fresh in the minds of all three judges; the parties know immediately what the outcome is; and we do not have to add another reserved judgment to the list.

With funding from the Victoria Law Foundation, we have appointed an unrepresented litigants co-ordinator. The idea for this position was first raised by Rob Schade, a senior officer in the Court of Appeal Registry. The co-ordinator was appointed in May. Her work extends across the Supreme Court, but it has already been of great benefit to the Court of Appeal. (I have had at least 10 unrepresented appellants/respondents in my first 15 months.)

The co-ordinator provides confidential assistance, but not advice, to the litigant and, where appropriate, arranges a referral to PILCH and VBLAS. A crucial aspect of the co-ordinator's work is to assist the litigant to understand what can, and cannot, be achieved in the court process and in that way to develop more realistic expectations. Likewise, the provision of timely pro bono assistance is vital: in some instances, the litigant comes to see that the proceeding is without merit, and withdraws; in others, the merits will be argued much more effectively by the pro bono lawyer. Either way, both the court and the litigant benefit.

We have introduced appeal mediation. Justice Tony North of the Federal Court alerted me to the possibility soon after I was appointed, drawing my attention to a marvellous book describing the well-established practice of appeal mediation in the Federal Courts of Appeal in the United States.

We have had five appeal mediations already. All five appeals have settled. Three of the mediations followed from directions hearings which I convened, where I proposed mediation to the parties. In none was there any resistance to the idea. Another followed a referral to mediation by Chernov JA, after the hearing of the substantive appeal had had to be adjourned. Most recently, Master Cain settled a case where both appellants and respondents were unrepresented. Both sides were very unhappy with what had occurred at the trial, and the mediation went some way to restoring their faith in the justice system.

In one case, the appeal hearing was estimated to take three days. It was a large commercial matter, which had occupied 19 days before the trial judge. There was an appeal and a cross-appeal. It took just one full day's mediation to resolve all issues. The parties had a result they were evidently happy with, and I had nine additional judge sitting days to allocate to other pressing appeals.

I also referred in my welcome speech to the back-breaking workload of the Court of Appeal. Again we are making some inroads, although we will need additional resources before we can make a real impact on working hours.

I have experimented with different sitting schedules in order to break up the relentless grind. Traditionally, the practice in the Court of Appeal has been for a bench of three to sit for four days in a row (Monday to Thursday), typically hearing three or four civil appeals in succession or as many as seven or eight criminal appeals (conviction and sentence). You can probably imagine just how gruelling that is. Being sufficiently prepared for each successive appeal means plenty of work over the preceding weekend, and overnight between one appeal and the next. By the time Friday comes, even the most resilient are exhausted. What's more,

hearing appeals one after another effectively prevents anyone making a real start on the judgment writing. And, by the time the week is over, the details of Monday's and Tuesday's appeals are beginning to blur.

Since the start of this year, I have arranged the schedule differently whenever I have been presiding. I deliberately break up the sitting week so that we sit, for example, Monday/Wednesday/Friday or Tuesday/Wednesday and Friday, and so on. Apart from removing the sheer intensity of sitting on four (or more) appeals in a row, having non-sitting days during the week gives time both for starting to write the judgment for yesterday's case and for doing, or finishing, the preparation for tomorrow's case. And the fresher you are on the morning of a hearing, the more benefit you derive from the oral argument.

Those of you who are arithmetically astute will have detected that, in my experimental sitting week, we sit only three days instead of the traditional four. As the figures demonstrate, however, we have still managed to reduce delays. My own experience is that, if I can start writing the judgment from today's appeal first thing tomorrow morning, I am likely to complete the judgment much faster than if I have to put it aside and return to it days or weeks later. So having non-sitting days interspersed is likely to promote efficiency and reduce delays. And breaking up the sitting week should have longer-term benefits in reducing stress and exhaustion.

Another recent experiment was to have six judges sitting in rotation in civil appeals, over a two-week period. This enabled us to have a civil bench sitting every day of the week – that is, for 10 rather than the usual 8 days in the fortnight – but each individual judge was required only to sit on five, or at most six, days in the fortnight, meaning (say) three days one week and two the next. Again, this arrangement provided opportunities for work on judgments, and preparation for forthcoming appeals, on the non-sitting days.

With the unanimous support of the judges, all rosters for the first six months of 2007 will be based on these "experimental" approaches.

Speaking of workload, it is a matter of public record that earlier this year the Supreme Court engaged an experienced occupational health and safety consultant to do a risk assessment of workload and work stress amongst the judges of the court. For the first time in the history of the Supreme Court, the question of workload – and its health impacts – is being taken seriously.

The reviewer reported that the average workload was 60 hours per week per judge. (And that is 60 hours of mostly intense, difficult, demanding, decision-making work). She reported that this was a very high average compared to anything she had seen in her OHS work with senior executives in the public sector, in Victoria and elsewhere. After all, 60 hours per week equates to five ten-hour days, plus five hours on Saturday, and five hours on Sunday – or a sixth ten-hour day if you want one day off at the weekend.

It is no coincidence that judges have been taking early retirement. And what a loss of experience and expertise that represents.

Having had that risk assessment done, we can factor into the Court's current budget review the importance of a safe workplace and the need to moderate working hours.

For the first time, the Court's budget review is being undertaken by external consultants. They have wide experience in public sector reviews. They are building up an in-depth picture of how the court works, and what judges and their staff actually do, in order to present to Government, for the first time, a picture of what it really costs to run the kind of justice system the people of Victoria want and are entitled to expect. They are also forecasting future case flow, and consequent future resource needs.

These two examples help to demonstrate that the Chief Justice and I, with the Council of Judges, are fully in control of the court and the court's administration, and that we are receiving excellent support, assistance and guidance from the Department of Justice. Both the OHS survey and the current budget review were initiatives taken by the court itself, and they have been fully funded by the

Department. Whatever may have been true in the past, in 2006 we as Judges have the capacity, and the opportunity, to shape the future of the Supreme Court, in conjunction with the Department.

And what of the future? The real focus of the "New Approach" is the systematic reforms we are about to introduce in the management of civil appeals.

Front end management

Traditionally, there has been little case management of civil appeals. Once the notice of appeal is filed and the contents of the appeal book are settled, the appeal typically waits in the list for a hearing date. No more is known about the scope or nature of the appeal than appears from the grounds set out in the notice of appeal, and there has been no process for ascertaining anything about the scope, length, importance, or urgency of the appeal.

Nothing more is known until the weeks immediately preceding the hearing. Under Practice Statements 1 and 2 of 1995, the Summary of proceedings, issues and facts is due seven days before the hearing. Outlines of submissions are not required until five days before the hearing, in the case of the appellant, and three days in the case of the respondent.

That is all about to change. The court has been very fortunate to secure the services of Robyn Lansdowne as the new Master, to succeed Master Dowling who will be retiring in July 2007. Robyn has extensive and varied experience as an academic, as a legal policy officer, as a Registrar of the Family Court and, more recently, as a senior Member and Deputy President of NSW tribunals. She will be in charge of the implementation of the reforms I am about to mention. The readiness of the Department of Justice to support Master Lansdowne's early commencement, to allow for a substantial period for handover from Master Dowling, is yet another example of the supportive relationship between the Court and the Department.

With effect from the start of the 2007 legal year, we will be introducing as a pilot

program “front end management” of civil appeals. As the title suggests, this means case management, at the front end. The objective will be to ensure early identification of the scope and nature of the appeal, so that it can be appropriately managed. If the appeal is short and urgent, or if it raises a point of general importance affecting other proceedings, it will be listed at short notice. If it raises issues common to another appeal already set down, the later one will be accelerated so the two appeals can be heard together. In most cases, mediation will be considered.

To achieve this, what is at present an appointment with the Master to settle the contents of the appeal book will be converted into a directions hearing/case management conference, presided over by Master Lansdowne. At the hearing, both parties will need to be able to inform the Master of:

(a) the issues in the appeal;

(b) the estimated length of hearing;

(c) any reason why the appeal should be given priority;

(d) any reason why the appeal is unsuitable for mediation; and

(e) if a hearing date is to be fixed – the availability of counsel for the relevant period(s).

The representatives of the parties who appear at this hearing will be expected to be fully conversant with the details of the proceeding. Having heard from them, the Master will decide questions of urgency and will determine the length of the hearing. She will order mediation where appropriate; will give directions as to the contents of the appeal book and the time for filing of submissions; and where possible, will fix the hearing date.

It is likely that the Chief Justice and I will be issuing, on a provisional basis, a new practice note in December. For the duration of the pilot, that provisional note will

replace the existing practice notes dealing with civil appeals. To avoid any misunderstanding, following the filing of the notice of appeal the Registry will give written notice to the parties and their representatives of the date for the directions hearing and of the information which they will need to be ready to provide to the Master.

The timetable for submissions will be fixed by the Master, rather than by the practice notice, and will be measured in weeks forward from the directions hearing rather than in days back from the hearing date. In this respect, we will be following the lead set by the new Criminal Appeal Rules, which came into force from 1 July 2004. As we have found with criminal appeals, the great advantage of submissions being ready early is that an appeal can be brought on at short notice if a listed appeal is settled or discontinued.

There will obviously be a large measure of trial and error. We need to learn lessons from the trial of the new procedures, and modify them as required, before we commit to a final practice note, let alone to any formal rule change. We will want your feedback and suggestions. This is a joint project.

To that end, Master Cain and Master Lansdowne will be in contact with the Bar Council and the Law Institute to arrange discussions with small groups of barristers and solicitors about the new procedures. Those meetings are intended to take place in the course of November.

Front-end management of appeals is not new. We are simply catching up with best practice elsewhere in Australia and overseas. But I am optimistic that this new approach will significantly improve our responsiveness to the needs of parties to litigation. A speedy appeal is just as important as a speedy trial.

I have other reforms in mind. In New South Wales, an appellant can file a provisional notice of appeal, without fee. There is then a period of time within which the appellant can reflect on the risks and benefits of the proposed appeal, once the initial disappointment at the adverse decision below has passed. It is only

after this cooling-off period that the formal notice of appeal must be filed, and the full appeal fee paid. Under our system, the fee has been paid before the appellant cools down – and it is non-refundable, so the appellant has a financial incentive to press on.

We are also investigating the provision of authorities electronically. Under the new CEO of the Court, Michael McGarvie, planning has begun for a trial of appropriately-networked computers in court – one for each judge and one for the associate – on which the relevant page or paragraph from the authority relied on can be displayed. I for one would be very glad not to have to take home bags laden down with books of photocopy authorities, especially since in practice we are rarely taken to passages in more than one or two authorities, and quite often to none at all.

Improving the efficiency of civil applications

As you know, almost every Friday morning two Judges of Appeal sit together to hear civil applications. These applications seek many different kinds of relief, including:

- leave to appeal;
- security for costs;
- stay of execution;
- leave to cease to act;
- extension of time for appeal;
- an order that the appeal not be deemed abandoned.

The preparation for and hearing of civil applications is very time-consuming. I am convinced that we can use judges' time more effectively. To that end, I am looking:

- to widen the classes of applications which can be dealt with by the Masters;

- to facilitate applications being dealt with on the papers (a procedure which is currently available under rule 65.10(2), but rarely used); and

- to encourage parties to consider whether an application for leave to appeal could conveniently be dealt with as the hearing of the appeal itself.

As to the first of these, I see no need for judges to be concerned (for example) with whether an appellant should be relieved of the deemed abandonment of the appeal, that being the automatic consequence (by operation of the rules) of a failure to comply with certain time limits (r.64.16(1)).

I have had to deal with at least three of these applications this year, because the respondent would not consent. (Under 64.16(2)(b) the Registrar can order that the appeal not be taken to be abandoned, but only if the respondent consents.) Respondents seem to want to take the opportunity of these applications to argue the merits of the appeal. But an appellant should be relieved of the consequences of an administrative oversight by its legal representative except in the rare case where the appeal is manifestly hopeless. In one case, where there was no basis whatsoever for the respondent's refusal of consent, we granted the reinstatement and ordered the respondent to pay costs on an indemnity basis, on the ground that it had occasioned a wholly unnecessary hearing.[1]

I have had positive experiences of an application for leave to appeal being treated as the appeal itself. In *Navarolli*,[2] the applicant had given notice that it would ask the court hearing the leave application to treat it as the hearing of the appeal. Although the respondent opposed that course, Eames JA and I agreed, and judgment was delivered a few days later. This seemed to be in everybody's interests. We had to deal with the issues in detail in order to decide the question of leave, and it made sense to be able to deal with both the leave and the appeal at once.

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1 *Donis & Ors v Donis*, 16 June 2006.

2 [2005] VSCA 323.

More recently, Neave JA and I were hearing an application for leave to appeal from a decision of the judge in the Practice Court, on the reinstatement of a company. One of the threshold questions was whether any leave to appeal was required. There was also an issue about deemed abandonment, because of the rule I referred to. As argument on the interlocutory questions unfolded, I asked counsel for both sides whether they could be ready to deal with the appeal itself in 24 hours' time. After a short pause, they agreed. We started the following morning at 10:00, and the appeal was finished by lunchtime. Judgment should be handed down in the next few days.

We are trying to be as proactive as we can. But I want to send a clear message to practitioners that the Registry will be receptive to sensible proposals for the speedy disposition of matters. For example, there is a little-known provision in the rules (64.27(1)), which enables two Judges of Appeal to constitute the Court of Appeal in any appeal –

> *"where all the parties have before the hearing filed a consent to the hearing and determination of the appeal by two Judges of Appeal."*

In an appropriate case, consideration should be given to that course.

We are committed to delivering justice in a timely way. I look forward to working with you to achieve that.