Christmas breakfast with the Chief Justice
Hilton Hotel
Friday, 7 December 2007, 7:30am

The Hon P de Jersey AC
Chief Justice

Attorney-General, your Honours, Presidents, ladies and gentlemen

I am grateful to have the opportunity to speak briefly this morning, and I'll begin by wishing you all a restful and fulfilling festive season.

I am particularly struck by the diverse interests reflected in this morning's attendance. They illustrate the way the delivery of legal services depends on the cooperation of many agencies within the legal framework, but also, how it is affected by partnerships extending outside that legal world.

For example, we are all very pleased to note the presence of the Attorney-General, our first law officer, who is a member of the Executive Council and the legislature. Judges of the three State courts are present. I notice Ms Jenny Hardy the Chief Executive of Legal Aid Queensland, which so effectively ensures access for all to the criminal justice system. Then there is Mr Colin Strofield from the Queensland Police Service, which does its best to ensure reliable investigative work in the cases which must come before us. Mr John Briton, the Legal Services Commissioner, is here: he effectively oversees the investigation and pursuit of allegedly errant practitioners. Mrs Megan Mahon and Mr Hugh Fraser QC, who inspirationally lead our solicitors and barristers – whose efficiency is critical to the optimal operation of the courts, with many of their members present here this morning. One of our regular clients, WorkCover Queensland, is represented by Mrs Suzanne Wishart. And then we may go beyond the legal world and recognize important partnerships between the legal profession and, for example, the universities. We are joined today by representatives of both Griffith and UQ, including Vice-Chancellor Elect Professor Paul Greenfield and UQ Registrar Mr Douglas Porter.

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This is my opportunity warmly to thank all agencies and individuals who have contributed this last year to the delivery of legal services in this State.

At the risk of converting a Christmas function into a CPD event, I should with so many practitioners present take the opportunity to say something this morning about two matters of current interest: first, the new costs assessment regime; and second, unscrambling the diverse personal injury legislative regimes which beset Queensland practitioners.

But before doing that, I mention remarks attributed in last Friday's Financial Review to the incoming federal Attorney-General about increasing the Federal Court's involvement in corporations work. Mr McClelland reportedly referred to a goal of establishing Australia as "a commercial and legal hub for South-East Asia". He also referred to the need to "overcome" the High Court's decision in *Wakim*. I strongly support the federal Attorney's objective, that Australia should in that way serve the region. I am also proud to report that our Supreme Court is already a leader in this field.

Our Supreme Court runs a commercial list greatly appreciated and valued by the commercial community. With our State on track to secure significance nationally next after New South Wales, a State court system which effectively serves commercial interests should be maintained and enhanced.

We judges are always concerned, as I know is our Attorney, about suggestions of leakage of commercial work interstate, or from the State to the federal arena.

This is not a matter of competition between courts. The reality is our State's Supreme Court, of plenary jurisdiction, is the natural forum for the determination of State based litigation. We do it well. Our capacity in that regard should be fostered continually, and that pivotally involves always the appointment of appropriately highly qualified and experienced lawyers to the Supreme Court.

May I now pass to the two other subjects I wish to address, costs assessment, and our disparate personal injury regime?

As to the costs assessment regime, on one view one should not be talking about financial matters at Christmas, but the reality is the consumer should be the winner in this new scenario, so there is the justification.

This is an extremely important development of which all lawyers, litigants and clients should be aware. It was approved by the Governor-in-Council yesterday. The new rules commence on Monday.

The new system is comprehensive, and has a progressive complexion. It covers both solicitor and client, and party and party, assessments.

Although the capacity for assessment by a registrar of party and party costs remains, our expectation is that most assessments will be carried out by assessors accredited by the Director of Courts, Supreme and District Courts, who is the Principal Registrar. She will receive applications for accreditation by legal practitioners of at least five years standing. There is capacity for appeal to a single Supreme Court Judge against any refusal to accredit. Registrar roles previously allocated to costs work will be freed up for more general work, which will assist Registry operations.

The reason why the field has been confined to legal practitioners, and not extended to non-lawyer costs specialists, rests in two considerations: a lawyer's ethical commitment as an officer of the Supreme Court, and a lawyer's experience in litigation or in solicitors' work. The latter should produce well-informed and expeditious assessments. An alternative would have been to ramp up the court's capacity to deal with the matters in-house, as by the appointment of a raft of appropriately qualified judicial registrars. That would have necessitated substantial additional resourcing for the courts. Of course the bedding down of the new system will be very closely monitored, and I expect the Rules Committee will inevitably process refinements as time goes on. There will still be a wide

field of work available for costs specialists, in the preparation of cost statements and objections, and costs assessments for the purposes of applications for fixed costs.

We hope that where an assessment is necessary, the parties will be able to agree on the identity of the assessor. But in the absence of agreement, the court will appoint an assessor. The court will maintain and publish electronically the list of accredited assessors, which will include their nominated rates of charge. If necessary, in due course, I may publish a practice direction limiting the maximum rate of charge for assessments, but only if market forces do not ensure a reasonable level.

Prior to any appointment, however, the rules will operate to encourage parties to seek to agree on costs. For party and party costs, costs statements and objections will be exchanged. There will be incentives to encourage agreement. If an assessment nevertheless proves necessary, the assessor will proceed within the procedural framework prescribed by the new rules, but with a considerable overarching capacity to suit the manner of the assessment to the particular case. For example, actual in-person hearings may not be necessary. Also, where the objections relate to particular items, the assessor will be concerned only with those.

I expect many practitioners, currently in practice, or practising on a consultancy basis or even presently in retirement, will be interested in carrying out this work, and in all major court centres. Where an assessment comes from a smaller regional centre, video and telephone conferencing may be used as necessary. In short, this regime will cater for litigants and others seeking costs assessments from country centres.

The development of the new rules has consumed a lot of time over the last few months. That we were proceeding in this direction was well-publicized. The Rules Committee has consulted with representatives of the Law Society, the Bar Association and the Legal Services Commissioner. It has received submissions from a number of people presently involved in costs assessment work. The development of the rules has naturally proceeded

with substantial input from the Office of Parliamentary Counsel. The Rules Committee has greatly appreciated all this assistance, much of it provided at very short notice.

There are transitional provisions covering the application of the new rules to assessments currently underway.

Costs assessors have the requisite statutory immunities (already in place), and there is facility for review by the court.

I am on record as acknowledging the inadequacy of the practical working out of the former regime for the assessment of party and party costs in particular. It had become a real albatross for the system, producing results utterly unacceptable, with cost assessments, for example, sometimes taking longer than the primary trial or hearing, and spread over weeks if not months, because of limitations on Registry resources, and sometimes even costing more than the primary proceeding. I hope under our new system, costs assessors will approach the task with expedition, economy and general efficiency at the forefront.

The assessment of costs, while plainly important to the parties involved, should be an exercise very much subsidiary to the adjudication on the merits in court proceedings, or the discharge of the retainer by the practitioner.

We are hoping to restore that balance, and also to restore realism to the assessed amounts: the amount of 'indemnity' costs, for example, should warrant that epithet. That 'indemnity costs' were being assessed at but a fraction of actual costs incurred was unacceptable. It meant a successful party was left substantially out-of-pocket, with the unsuccessful party the beneficiary.

I am afraid the court assessment process was until recent times, with the advent of practice directions 3 ("agreed or fixed costs") and 7 ("cost assessment: interim arrangements") beset by an inappropriate parsimony. To give an example, I recently read cost assessor Mr Paul Garret's account of an assessment concerning a personal injuries

damages judgment, where the plaintiff had suffered brain damage. The defendant challenged the claim for three hours' spent in obtaining instructions from the plaintiff concerning a one and a half page set of interrogatories. The plaintiff's solicitor's diary note showed he spent three hours, and the solicitor, present at the assessment, explained that because of the plaintiff's condition, the plaintiff had difficulty understanding the questions put to him, and the solicitor had difficulty understanding the plaintiff's answers. The solicitor opposing the bill eventually conceded three hours was probably not unreasonable in those circumstances. Yet only half an hour was allowed. That is but one example of a system which attracted a welter of criticism, including from Judges. I mention, for example, Judge McGill's observations in *Hennessy Glass and Aluminium Pty Ltd v Watpac* (2007) QDC 57.

I mention finally on this subject the courts' willingness, indeed eagerness, to fix costs, in the absence of agreement. Courts are now with some regularity fixing costs, where under the applicable practice directions the parties have given the Judge the requisite information. In the interest of saving money and time, that is obviously a highly desirable course. I thank the profession for its cooperation in that direction.

Secondly, I wish briefly to revisit the position regarding personal injuries legislation in this State.[1]

As you know we have three Acts which establish "pre-court" procedures for personal injuries actions. As part of "tort reform" the Personal Injuries Proceedings Act 2002 (PIPA) was enacted For many years we have had motor vehicle and workplace injury legislation in the form of the Motor Accident Insurance Act 1994 (MAIA) and the Workers' Compensation and Rehabilitation Act 2003 (WCRA).

Recent trends suggest that despite the express intention to provide a procedure for the speedy resolution of claims, regular applications to court continue unabated. These are of course important, but they often have little to do with the resolution of substantive claims:

they concern merely procedural matters. It remains the case that different legislation will apply depending on whether a person is injured at work, in a motor vehicle accident or in some other way. There is potential for unnecessary expense and delay, or at worst injustice, if an injured person faces different procedural requirements or restrictions on damages based on how or where the injury occurs.

Quite apart from that, the relationship between the 3 pieces of legislation is often not clear. This has the potential to result in duplication of procedure for the defending of claims for procedural rather than substantive grounds. One wonders what the reasonable person on the "Clapham Omnibus" makes of this (assuming the bus arrives on time).

The procedural requirements set up by the Acts differ, particularly in relation to disclosure of documents. This of course has consequences in cases where more than one piece of legislation applies. The Court of Appeal has recently considered disclosure under the Acts, and has noted that the collection of legislation about personal injury proceedings leads to a multiplicity of proceedings in court, rather than reducing them.2

The number of recent applications for extension of limitation periods under the legislation in some cases illustrates the difficulty of negotiating legislation which has created a "labyrinth".3 Some of the legislative requirements are genuinely perplexing. For example, in both the PIPA and the MAIA, a party is required to certify the matter ready for trial before a compulsory conference. It is not clear how this can be done before pleadings have been delivered. The requirement to certify has been described as a "tantalising distraction" for practitioners.

I have said before that the result of limitations in relation to costs contained in the PIPA for claims under $50,000 works injustice.4 The result of the many different procedural issues

[1] I am indebted to Mr Ashley Jones, a partner of Deacons for his help in the preparation of what follows.
[2] *Haug v Jupiters Ltd trading as Conrad Treasury Brisbane* [2007] QCA 199 at 5, [16].
[3] *Kash v SM and TJ Cedergren Builders* [2004] 1 Qd R 643 at [2].
[4] "A Review of the Civil Liability Act and Tort Reform in Queensland Opening Plenary Forum Discussion". Queensland Law Society Personal Injuries Conference 2007 29 June 2007

under the legislation must mean that pursuing a personal injury claim becomes more uneconomical for the injured claimant.

It can reasonably be questioned whether the legislative changes have reduced insurance premiums or led to the speedy resolution of claims, as was hoped. What can be said, is that the complexities created by the legislation have increased litigation, contrary to the stated aims.

I have also previously suggested that a review and reconsideration of tort law reform in Queensland is warranted. Discussion of reform has tended to focus on the Civil Liability Act 2003 but it applies equally to the pre-court procedures legislation. If uniform personal injury legislation is a bridge too far, then perhaps a review of the legislation could lead to greater consistency among the three presently conflicting regimes.

Then perhaps the task of complying with the legislation would become less of a "tantalising distraction" for legal practitioners, and its accomplishment a matter of optimistic reassurance for clients.

Assuming I survive, I will next February have served a decade as Chief Justice of Queensland – an enormous privilege. Some commentators have recently asked me to nominate any of my achievements in that role. That is of course for others to assess. But I will say this: the productively cooperative relationship between the courts and the profession has never been better, and that is very much in the public interest. For that, the profession has my sincere gratitude.

Now, there was one other matter I had to mention: what was it? ….no, I need not mention a new Supreme and District Courthouse in Brisbane, because the government is irrevocably committed to it! - and how the work on the project is progressing! I again express my respectful commendation of the government for its visionary commitment in that regard in the interests of all Queenslanders.

Thank you for listening to me. I repeat my wish that you should all have a restful and fulfilling festive season.