

International Association for Court Administration Conference

The Judiciary in an Age of Global Interdependence

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Chief Justice Tumpa, Chief Justice of the Supreme Court of Indonesia, Mr Jeffrey Apperson, President of the International Association for Court Administration, Chief Justices, your Honours, ladies and gentlemen, thank you for inviting me to speak to you at this conference of the International Association for Court Administration. The conference is evidence of the increasing interaction of different legal traditions, legal systems and judiciaries in our region. I would like to acknowledge Australia's relationship with our host country, Indonesia, in the law and justice sector. Indonesia's National Long-term Development Plan 2005-2025 has as one of its goals to "entrench the rule of law and uphold human rights". The Australia Indonesia Partnership for Justice has been established as a means by which Australia can assist Indonesia in achieving its goal. The partnership will focus primarily on key law and justice institutions. Australian participation will be directed to issues which Indonesia has identified as being of critical importance to the sector where assistance is likely to bring about sustainable and meaningful impacts.

I am delighted that my country has made this ongoing commitment to participating with Indonesia in its development in this critically important area.

There are many other connections between the countries of our region in the law and justice sector and Australia plays a part in a number of them. Today, however, I do not want to dwell upon the particulars of our relationships. Rather, I want to speak more generally of things which those of us present at this conference might have in common as judges and court administrators. That is a task which has to be undertaken with modesty. The things which judges of one country might

regard as fundamental concerns of any judicial system may not be given the same emphasis in other countries. Each country in our region has its own distinctive history and culture and its own constitutional arrangements and political institutions. Those differences must be respected when we meet to discuss issues of common concern.

At the same time, we cannot escape the reality that different legal systems operate across national boundaries. In today's world, trade and commerce are global, the internet has become a marketplace, and crime knows no borders. Judges and lawyers of each country must be aware, at least in a general sense, of the different legal traditions and legal systems of the other countries of this region

In some places different legal traditions exist side-by-side. In Indonesia, national laws enacted by the Indonesian legislature sit alongside laws left over from the Dutch colonial period which derive from the civil tradition. The *ardat* or customary law is observed in local forms throughout the Indonesian Archipelago. Indonesia also has a system of religious courts administering family law for Muslims outside the system of family law administered by the general courts. This internal legal diversity poses a challenge for any national system of justice. A major legal challenge which Australia faced after 1992 was how to manage the process of recognising traditional land title of Aboriginal people. There the customary law of the Aboriginal people, stretching back 40,000 years, met the national common law and statute law.

The different legal systems in our region can affect our commercial and economic relations. There are some national laws which are international in character because of their subject matter. They raise the same or similar problems in each of our countries. Examples of such laws are found in the fields of intellectual property, competition policy, admiralty and organised crime, particularly drug-trafficking, people-trafficking and money laundering.

A good example is competition policy. The field of competition policy and law is a particular focus of Asia Pacific Economic Forum ("APEC"), whose members are the major economies bordering the Pacific Ocean. In 1994, here at

Bogor, APEC economic leaders made a Declaration of Common Resolve. It became known as the Bogor Declaration. It contained a commitment to chart a future course of economic cooperation. One of its objectives was the enhancement of trade and investment liberalisation in the Asia Pacific. Competition policy and deregulation were two areas particularly identified in the Action Plan which APEC subsequently drew up. In 1996, APEC established a Competition Policy and Law Group. It proposed a number of principles about competition law to guide the establishment of such laws in the member economies.

Indonesia enacted a Monopolistic Practices and Unfair Business Competition Law in 2000. It was described in 2004 by the Chairman of the Indonesian Anti-monopoly Authority as "a revolutionary business legal reform". Such a law, like recently enacted competition laws in other countries in the region, poses a challenge for the legal profession and, of course, for the judges who may be called upon to make decisions under it. It involves the interface of law and economics, and public policy. It must be met by appropriate standards of judicial appointments, competence, education and accountability. In Australia, it took a number of years for the judges entrusted with making decisions under our competition law to become comfortable with the economic terms used in that law. The concepts of a "market" and of "substantial lessening of competition in a market" are two examples of economic ideas at the heart of the legislation. The challenges for judges in hearing and evaluating conflicting expert evidence from economists and comparing that evidence with evidence from people actively engaged in the relevant marketplace, are considerable. This is a case in which exchange of ideas between judiciaries, practitioners, regulators and academics is likely to be fruitful. There will also inevitably be cases in which trans-national transactions engage the competition laws of more than one country. Understanding of and confidence in each other's court systems may be important in that context.

There are, of course, judges and administrators here from many different courts. Not all of you are worried about competition law. But one economic question that we can all agree on is the importance of a strong, competent, independent and impartial judiciary to national economic wellbeing. Respect for the rule of law at all levels of society underpins social stability and progress, the

development and growth of the domestic economy, and the confidence with which foreign investors can commit their own capital to projects which can aid in national development. The rule of law and the courts which support it are an indispensable part of social and economic infrastructure. Their development is a part of nation building.

Against that background, there are common issues which I think we can sensibly discuss in spite of the difference in our legal traditions and systems and the kinds of problems that the courts here have to face. I do not propose to deal specifically with access to justice. Access, in its many aspects, is considered in other papers being presented at this conference. Rather, I want to talk about justice and the things that we might regard as important common elements of any justice system. It is no good having access to the justice system, if the system doesn't deliver justice.

Independence of the judiciary

An independent and impartial judiciary is recognised internationally as indispensable to the rule of law and the protection of human rights. Article 10 of the 1948 Universal Declaration of Human Rights provides:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.

That standard is also reflected in Article 14 of the International Covenant on Civil and Political Rights.

There have been a number of international documents which have focussed specifically on the independence of the judiciary. The United Nations Basic Principles on the Independence of the Judiciary were endorsed by the General

Assembly in 1985. There are many other similar statements of principle.¹ One of those, which is important in our region, is the Beijing Statement of Principles of the Independence of the Judiciary. It was first adopted by the 1995 Conference of the Chief Justices of Asia and the Pacific in Beijing.

There are two important aspects of judicial independence. The primary aspect is the decisional independence of individual judges. The second, which is related to the first, is the independence of courts as institutions.

A judge must be able to make a decision without direction or influence from either government or private sources. That means that the judge should not have to fear adverse consequences to him or her personally from making a particular decision. Nor should the judge be able to expect or gain any benefit or advancement personally arising out of a particular decision. The judge should not fear public criticism nor hope for public praise. A judge acting independently will not be swayed in his or her decision-making by any personal feelings about the people who may be affected by the decision. These things are reflected in the judicial oath set out in the *Oaths Act 1868* of England, which required a person being sworn in as a judge to promise to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or illwill".

In any country where judicial independence exists, judges deciding cases cannot be directed by members of the Executive Government as to the decision that they are to make or the procedures which they are to apply.

¹ The Syracuse Draft Principles on the Independence of the Judiciary (25-29 May 1981); The International Bar Association Minimum Standards of Judicial Independence (1982); The Montreal Universal Declaration on the Independence of Justice (1983); The Singhvi Draft Universal Declaration on the Independence of Justice (1989); The Universal Charter of the Judge by the International Association of Judges (1999); Beijing Statement of Principles of the Independence of the Judiciary (1995).

The decisional independence of judges is supported in many countries by their protection from dismissal, other than for serious misbehaviour or incapacity, and the protection of their remuneration from any reduction during their term. That kind of protection dates back to the *Act of Settlement 1701* in England. Judges were given security of tenure during their good behaviour and the power of the King to remove a judge could only be exercised on a resolution of both Houses of Parliament.

The courts themselves require institutional independence. The courts are the third branch of government. The other two are the Legislature and the Executive. The courts are not, and should not, be regarded as an executive agency. Their funding arrangements should reflect their status as a separate branch of Government.

In a representative democracy with a written constitution which places limits on legislative and executive power, some institution must have the authority to police the limits of that power other than the Executive and the Legislature themselves. If limits on power cannot be policed and enforced then those limits become purely voluntary. If the Australian Parliament purports to pass a law which contravenes a constitutional guarantee then that law can be challenged in the courts and can be declared invalid. This is judicial review of legislation. The Constitutional Court of Indonesia, which was established in 2003 by the National Parliament of Indonesia, is the first court in Indonesia with the jurisdiction to decide whether legislation conforms to your Constitution. Such a court is of vital importance to the rule of law.

I have spoken about courts reviewing the validity of laws. An equally important area of judicial review relates to executive decision-making. Decisions by public officials involve the exercise of executive power. Under a written constitution there should be no such thing as unlimited executive power. The power that any official exercises must be derived from the constitution or from a statute and the statute itself must be authorised by the constitution. Sometimes a public official will exercise decision-making power in a way that travels beyond the limits defined by the constitution or by statute. In that event, the decision of the public official should be able to be challenged in the courts and the decision set aside and the public official directed to reconsider the decision. In Australia, the power of the High Court

to review official decisions by officers of the Commonwealth, including Ministers, is found in the Constitution itself and so cannot be taken away by a statute.

Judicial review of executive action in Australia covers a very wide variety of decisions made by government officials, including Ministers. It covers decisions made relating to asylum seekers and whether or not they should be granted protection visas. It may involve review of a decision that somebody should be extradited from Australia. It may involve review of decisions about the grant or refusal or cancellation of licenses of various kinds. There is a multitude of decisions which may be subject to judicial review by the courts in Australia. Such judicial review is generally limited to review for error of law or an error in procedure. If a public official makes a decision which is adverse to a person without giving that person an opportunity to be heard, whether orally or in writing, then the person may have been denied procedural fairness. In that case the decision may be set aside and sent back for reconsideration by the decision-maker. If the official has misinterpreted the law and so applied the wrong criteria to his or her decision, that misinterpretation of the law may lead to the decision being set aside. An official who refuses to make a decision which he or she is duty bound to make can be compelled to make the decision. If an official proposes to do something which is beyond his or her powers, then a writ of prohibition or an injunction may be issued by the court. In carrying out these functions the court does not interfere with an official decision because it thinks it is a bad decision. The role of the court is to ensure that the decision is lawful. It is not to take over the function of the Executive.

The role of the courts in reviewing both legislative and executive decisions highlights the need for their independence. When a court decides that an official has made a legally incorrect decision or when a court strikes down a law as invalid, it may be criticised by members of the government. The protection of the court's independence is essential to ensure that government disapproval of the court's decision does not deter the courts from making whatever decision the law demands. Ultimately, it is Parliament and the people who can change the Constitution or the law if the courts have interpreted them in a way that they regard as unsatisfactory.

A related topic is that of separation of the judicial power from the powers of the Legislature and the Executive. Under the Australian Constitution that separation of power means that federal courts cannot validly undertake executive functions which are not incidental to their judicial functions. Nor can members of the Executive or the Legislature exercise judicial power.

The idea of separation of powers has its origins in the thinking of Greek philosophers. It was Aristotle who identified the different elements of State power. The notion of separation of powers is reflected in the 1999 amendment to the Law No 14 of 1970 on Judicial Powers in Indonesia. It is said in this country to have "sparked a wholesale rethinking of the place of the judiciary in the State" by requiring the implementation of an institutional separation of powers.²

The role of the Constitutional Court in Indonesia highlights the importance of separation of powers which has been described as "[replacing] the executive-heavy sharing of powers" put in place by the Pre-amendment Constitution. The Constitutional Court's judicial review power provides a check on the Legislature, its impeachment power provides a check on the Executive; and its decisions on electoral results help ensure the integrity of the democratic process.³

A series of reforms in 2004 have also brought the administration, organisation and finances of the Supreme Court and General and Administrative Courts under the control of the Supreme Court. This is called the "one roof system". Previously, those functions were administered by the Justice Department.⁴ This is

² Lindsey T and Santosa AA, "The Trajectory of Law Reform in Indonesia: A short overview of legal systems and change in Indonesia" in Lindsey T (ed) *Indonesia: Law and Society*, 2nd ed (Federation Press, 2008) 2 at 13.

³ Butt, "The Constitutional Courts Decision in the dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?" in McLeod and MacIntyre (eds) *Indonesia: Democracy and the Promise of Governance* (Institute of South East Asian Studies, 2007) 178 at 182.

⁴ See Butt n 3 at 184.

said to have had the effect of reducing complaints of government interference in judicial matters.

The principle that the Legislature makes the laws, the Executive carries them into effect and the courts interpret them and resolve disputes relating to them, provides an important check and balance between different and powerful institutions in any society. It means also that domestic and international investors can be confident that the rule of law will be applied impartially in disputes however powerful the other party may be and whether or not the government is part of the dispute.

Against that general background of principle, I would like to consider the nature of the judicial function and, related to that, the question: how do we ensure our judges are competent and how do we measure the efficiency of courts without compromising judicial independence?

The nature of the judicial function

The core function of all courts is to hear and decide cases which come before them. The decision-making process involves the following basic steps:

1. The judge decides what are the legal rules or standards applicable to the case.
2. The judge considers the evidence and decides what the facts are.
3. The judge applies the legal rule or standard to the facts in order to determine the rights and liabilities of the parties and to award legal remedies or not as the case may be.

This simple model represents the core of the judicial function undertaken by most judges on a day-to-day basis.

Within that model the courts decide different classes of case. These may broadly be described as follows:

1. Private disputes between individuals and/or firms.

2. Disputes about compliance with regulatory laws. Such disputes will usually arise between a statutory regulator and a private individual or firm.
3. Prosecutions for offences against the criminal law.
4. Disputes about the validity of official decisions.
5. Disputes about the limits of legislative or executive power under the Constitution. In Australia, such disputes typically arise between the Commonwealth and the States or between the Commonwealth or a State and a private individual or firm.

Some cases may raise legal issues of general public importance. But even in the most routine of cases, in the lowest levels of the judicial system, the court always discharges a significant public function. For not only is it required to decide the dispute before it, but it is required to decide it in a principled manner. Doing that reaffirms the rule of law generally and of the particular legal rules and standards which govern the relationship between the parties and all parties in similar cases. The importance of this aspect of the courts' functions in a democracy was emphasised 25 years ago in a well-known article by Professor Owen Fiss in the *Yale Law Journal* entitled "Against Settlement":

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.⁵

⁵ Fiss OM, "Against Settlement" (1984) 93 *Yale Law Journal* 1073 at 1085.

There is, of course, today a strong emphasis on encouraging negotiated or mediated dispute resolution to reduce the burden on the courts. Professor Fiss' point about the essential character of the judicial function remains valid. I would add that it is important not to confuse the role of the courts with that of a dispute resolution service. The courts are more than a dispute resolution service. They are a branch of government with a distinctive function.

Judicial education

The core elements of the judicial task point to the competencies which judges must have. They include the following:

1. An understanding of the nature of the judicial role in the constitutional setting in which it is to be discharged and the relationship of the judiciary to the other branches of government.
2. Knowledge of the law and the techniques for identifying legal rules and standards.
3. Competencies relevant to fact finding including:
 - 3.1 The capacity to distinguish relevant from irrelevant evidence.
 - 3.2 The capacity to weigh evidence and to draw inferences from evidence.
 - 3.3 Where factual issues are to be determined in matters relating to the physical or life sciences, technology, economics or other disciplines outside the law, the judge needs an understanding, or the ability to acquire an understanding, of the underlying area of knowledge sufficient to enable the requisite findings to be made reliably.
 - 3.4 Where factual findings require partly qualitative judgments such as judgments about reasonableness in tort or good faith in contract law or market definition in competition law or inventiveness or novelty in intellectual property law – the judge needs an understanding of the nature of the qualitative judgment required and the purpose which it serves.

- 3.5 In cases raising cultural issues because of the involvement of indigenous people or members of particular ethnic or social groups the judge needs an awareness of cultural differences which may affect or explain behaviour or testimony which may be relevant to the fact-finding function.
4. Knowledge and experience of matters relevant to the judicial process including:
 - 4.1 How to manage the litigious process to avoid unnecessary cost, delay and stress on parties.
 - 4.2 The requirements of procedural fairness, including absence of actual and apparent bias, and the provision to any party of a proper opportunity to be heard before any decision adverse to the interest of that party is made.
 - 4.3 The nature of judicial independence from government and from any organisation, group or individual interested in the outcome of the case.
 - 4.4 The capacity to communicate clearly the reasons for any decision that is made.
5. Knowledge of the ethical requirements of judicial office and the capacity to make practical judgments about ethical issues.

There are no doubt other judicial competences that could be suggested. It may be that my selection is skewed by the traditions of the judicial systems of the common law world. Whatever its shortcomings, the list indicates the variety of matters that should be considered in ensuring that persons appointed to judicial office have, maintain and enhance the competencies necessary for its discharge.

The times are long gone when persons appointed to judicial office in the common law world were thought to ascend to the Bench on the date of their

appointment, fully equipped with all the knowledge and skills necessary for the judicial task. And even those in civil law countries who have been appointed after lengthy pre-appointment education and internships will still have a need for the lifelong learning that only experience and continuing education can bring. Judicial education and training upon appointment and during the tenure of judicial office is now a well-established feature of judicial systems around the world.

Culture and judicial education

One particular subject of judicial education important to many countries is awareness of cultural differences between different parts of society. These differences often form part of the context in which judicial fact finding has to be done. This is important for the way in which the justice system, if it is unaware of cultural differences, can affect people who are marginalised and who are not part of the dominant culture.

Cultural awareness education for judges can help to overcome the worst effects of the kind of ignorance which causes unfair discrimination in the application of the law. Such education, however, cannot be based upon simple assumptions that all members of a particular cultural group are the same. In any effort to take culture into account, it is necessary to ensure that diversity *within* a culture is acknowledged.

Consideration of cultural norms has sometimes been said to incorporate "discriminatory norms and behaviours" and, in the context of criminal justice, to contrast with the victim's interests in "obtaining protection and relief through a non-discriminatory application of the criminal law."⁶ On the other hand, it has been argued that to take in cultural evidence in the criminal law is to fragment that law so that a different set of rules applies to members of a particular cultural group. Concern has also been expressed that excessive deference to cultural difference in family law

⁶ Coleman DL, "Individualizing Justice Through Multiculturalism: the Liberals' Dilemma" (1996) 97 *Columbia L Rev* 1093 at 1097.

may threaten women's equality.⁷ In some cultural groups women may be subject to heightened control and rules that make them dependent and unequal.⁸

The interface between cultural diversity and the law is complex. This does not mean that cultural background may not be relevant to the judicial fact finding process. Judges may need to understand why particular testimony is given in the way that it is given and may need to understand why, and in what context, people have behaved in particular ways. This application of cultural awareness is well established in respect of Australian indigenous communities in relation to criminal justice and customary land claims. In Western Australia in particular, the Australian Institute of Judicial Administration ("AIJA"), in conjunction with the State Government, some years ago prepared a special Benchbook for the assistance of judges and magistrates dealing with indigenous parties and witnesses. Indigenous cultural awareness training has been the subject of specific funding directed to the National Judicial College by the federal government. Many programs have been delivered across Australia since funding was first provided to the AIJA a number of years ago.

I have spoken about the judicial function, the importance of judicial independence, judicial education generally and cultural awareness particularly. I would like to conclude with a few words about the question of the efficiency of courts and the accountability of courts for their use of public money. How do we measure that efficiency without compromising their independence?

Measuring the efficiency of courts

There has long been public discontent with delays and inefficiencies in the judicial process. There are many examples in world literature from civil and common law systems. Rabelais' character, Judge Bridlegoose, decided his cases by

⁷ Estin AL, "Embracing Tradition: Pluralism in American Family Law" (2004) 63 *Maryland Law Review* 540 at 551.

⁸ Estin AL n 7 at 551.

throw of dice and reserved for a long time before doing so. His impeachment proceedings related to a perverse judgment against a tax assessor. Defending the delay between commencement and disposition, he quoted a maxim:

"Time is the father of truth."

The example of Bridlegoose throws up nicely the tension between efficiency and quality. If it were not for his delay, his technique of deciding cases by throw of dice might be said to be highly efficient in terms of productivity and cost per case. However, the accuracy of the outcomes would be random. Nevertheless, the courts use public resources and the taxpayers who fund them are entitled to know that the courts are using those resources efficiently. That raises the important question: How do we measure efficiency in courts?

Efficiency has been defined as the "best use of resources". One measure of the efficiency of a court is the change in the number of cases which the court is able to finalise if it gets a one per cent increase in its funding. Another measure is clearance rates, the proportion of cases filed in a year that are disposed of in a year.

There are models in place and under development in Australia and around the world for the assessment of the performance of courts. We have heard of the Singapore Framework of Excellence in which a number of countries, including Australia and Indonesia, are involved. The Council of Europe has established a European Commission for the Efficiency of Justice. The aim of the Commission is the improvement of the efficiency and functioning of justice in the Member States. It was established on 18 September 2002. It comprises experts from all 47 Member States of the Council of Europe.

A familiar list of indicators of court efficiency, considered by the European Commission, consists of:

1. the caseload per judge;
2. (labour) productivity;
3. the duration of proceedings;
4. cost per case;

5. clearance rate;
6. the budget of the courts.⁹

These indicators have their own strengths and limitations.

Caseload per judge - The obvious difficulty with this measure is that the application of raw case figures divided by the number of judges makes no distinction between workload differences associated with different categories of cases and even cases within the one category. An uncontested application to wind up a company may be very briefly heard and disposed of. It could be classified as a corporate insolvency case. But a major piece of litigation which goes for many, many days involving an insolvent company may also be classed as a corporate insolvency case. The problem is true of many categories of case. Defining more precise categories is not necessarily the answer. There will always be overlaps and significant differences within categories. Case load measures are relevant. They can be refined by measures of complexity. However, as indicators of judicial workload, they should be treated cautiously and considered along with other measures of efficiency.

Labour productivity – This is calculated by dividing the total output of cases by the number of personnel engaged on them or the number of hours worked on them. Judge hours and support staff hours weighted by salaries might be another appropriate numerator. It is of interest to note that productivity studies conducted in the Netherlands in 2002 suggested that the largest courts were the least productive and that medium-sized courts appeared to be the most productive.

Length of proceedings – This is a measure which can be constructed in different ways. An Italian research centre, IRSIG-CNR, has defined it by reference to the

⁹ Albers P, Special Advisor of the CEPJ Council of Europe, "Performance indicators and evaluation for judges and courts"
http://www.coe.int/T/dghl/cooperation/cepej/events/OnEnParle/MoscowPA250507_en.ped at 15 May 2009.

duration of trials, the probability that a decision will be made within a given time and the average expected delay between the actual date of hearing and the announced date of a hearing. Obviously, such measures can vary significantly between judges.

The cost per case – Cost per case is calculated by taking the overall cost for a particular class of case and dividing it by the number of cases of that class disposed of in the year. The same problems arise in relation to the measure of cost per case as arise in relation to caseload per judge. The first is the variety of complexity in cases even within one category. The second is the overlap of categories.

Clearance rates – The number of outgoing cases as a percentage of incoming cases over a given period.

The use of performance indicators for courts is a way of trying to account for their use of public funds. It is not an infringement of the separation of powers or of judicial independence. As Chief Justice Spigelman of the Supreme Court of New South Wales said in a speech delivered in 2001, the judiciary cannot insulate itself from government requirements for accountability in the use of public funds.¹⁰

There is of course an important distinction between judicial accountability for judicial administration and accountability for judicial decisions. Judicial decision-making is where judicial independence is most important. Nevertheless, judicial decisions affect lives, liberty and fortunes. Accountability for such decisions is essential. They should be the most transparent decisions in the exercise of public power. Reasons accessible to all who want to read them based on evidence which was before the court are an important element of that accountability. The appeal process which makes the judge's decision open to scrutiny by other judges is

¹⁰ Spigelman J, "Judicial Accountability and Performance Indicators", 1761 Conference: The 300th Anniversary of the Act of Settlement, Canada, 10 May 2001.

also an important feature of judicial decision-making accountability. These things are necessary, in my opinion, for public confidence in the judiciary without which the survival of the institution is not guaranteed.

Conclusion

The judiciary of any country in today's world is a critical part of its economic and social infrastructure. The interdependence of nations also means that it is part of the infrastructure of dealings across national borders. Because of this more is demanded of us all as judges in our own societies and in the global community of which we are part. We all have a common vested interest in each other's success. Conferences like this help us all to make a contribution to that success.