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THE STATE OF THE JUDICATURE
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A State of the Judicature address is normally given, every two years, at the Australian Legal Convention. This year, that Convention is being held in conjunction with the 19th Biennial Conference of LAWASIA and the 11th Conference of Chief Justices of Asia and the Pacific. On behalf of the Australian judiciary I welcome all our guests and visitors. In particular I renew my welcome to the Chief Justices who have assembled for the 11th Conference, and to the lawyers who are attending the LAWASIA Conference.

The Conference of Chief Justices provides a forum for the exchange of ideas and information on topics of common interest, and for the affirmation and re-invigoration of basic constitutional principles concerning the rule of law and the independence of the judiciary. The opportunity for leaders of the judiciary in Asia and the Pacific region to meet every two years, to establish and maintain personal contact and to discuss issues which affect the administration of justice is invaluable. Modern judiciaries do not operate in isolation. Government in the twenty-first century involves international communication at the highest level, and the judicial

branch of government, no less than the legislative and executive branches, works in a global environment.

Relations with judiciaries of the Asia Pacific region

The Australian judiciary takes an active part in judicial formation and development in the region. This work receives little public notice, but it is appropriate that on this occasion it be given some prominence.

The Federal Court of Australia and the Supreme Court of Indonesia, since 1999, have co-operated in the Indonesian Judicial Training Program. The program includes workshops in Indonesia conducted by Australian judges, and, in addition, more than 100 Indonesian judges have visited Australia for sessions organised by the Federal Court. In March 2004, a memorandum of understanding intended to be the basis for ongoing judicial co-operation and assistance was entered into.

Since 1999, the Federal Court has engaged in judicial exchange with Supreme Court of the Philippines, in cooperation with The Centre for Democratic Institutions at the Australian National University. That Centre, and the Centre for Asia and Pacific Law Studies at Sydney University, have also participated in judicial development programmes in conjunction with the Supreme People's Court of Vietnam. Australian judges have lectured at law schools in

Hanoi. The Federal Court has a long-standing relationship with the Thai judiciary, particularly the Intellectual Property and Tax Courts.

A number of Australian courts, including the Federal Court, the Supreme Court of New South Wales, and the Supreme Court of Queensland, have established relations and regular exchanges of visits with courts of the People's Republic of China.

Federal Court judges have undertaken judicial service in South Pacific jurisdictions for many years. These include the Court of Appeal of the Kingdom of Tonga, the Privy Council of the Kingdom of Tonga, the Supreme Court of Fiji, the High Court of Fiji, the Supreme Court of Vanuatu and the Supreme Court of Samoa. The Federal Court is presently providing governance and court administration technical assistance to the Supreme Court of Papua New Guinea, the High Court of Fiji and the Supreme Court of Tonga. The assistance involves visits by judges and registrars to the Pacific Courts and visits to courts in Australia by members of the judiciary of South Pacific island nations and by court staff. The Court, supported by AusAID, also operates programs of library assistance.

The Judicial Commission of New South Wales, which is Australia's best resourced and most experienced provider of judicial education, regularly receives visits from judges of countries in the region. In conjunction with the Australian Institute of Judicial Administration, and more recently with the National Judicial College,

for ten years the Judicial Commission has conducted an orientation course which has been attended, not only by Australian judicial officers, but also by judges from neighbouring countries.

Judicial development is a subject of worldwide interest. A high level of international engagement in that process is an important part of the work of the Australian judiciary. It is instructive for us, and it gives us an opportunity to make a contribution beyond our own boundaries.

The Australian judiciary

There are 956 judges, masters and magistrates in Australia, not including acting or reserve judicial officers. Of these, 134 are federal judges or magistrates, and the remainder are State or Territory judges or magistrates. The New South Wales Government appoints about one-third of Australia's judicial officers, followed, in terms of numbers, by the Victorian Government, the Queensland Government, the Commonwealth Government, and then Western Australia, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory.

In all States except Tasmania there is a Supreme Court, a District or County Court, and a magistracy. In Tasmania and in the Territories there is no intermediate court. The difference may be significant when comparing information about the work of the

various jurisdictions. For example, in Tasmania, and in the Territories, all indictable offences are tried in the Supreme Court. In the other States, most indictable offences are tried in the District or County Court, and only the most serious cases are tried in the Supreme Court.

The Federal Supreme Court is the High Court. For practical purposes it does no trial work. One of the reasons for the creation of the Federal Court was to enable the High Court to concentrate on appeals and constitutional cases. The Family Court, as its name implies, is a specialist federal court. The Federal magistracy, which now has 31 members, was recently created to take over part of the first instance work of the Federal Court and the Family Court.

Such devolution of jurisdiction is common throughout Australia. In most States, jurisdiction has been transferred from Supreme Courts to District or County Courts, and from District or County Courts to the magistracy. Sometimes this has been a response to problems of delay. Devolution is a time-honoured method of shifting a backlog, although, if it only shifts a backlog from one court to another, not much is achieved. Comparison of court statistics over different periods needs to take account of this process. The more important, and meritorious, reason for devolution is that the procedures of District Courts and magistrates' courts are less complex, and cases can be disposed of more quickly and less expensively. The point of having magistrates' courts is that they

exercise summary jurisdiction. Increasing the number of civil and criminal cases that may be dealt with summarily is a response to the two problems endemic in any court system: cost and delay. Similarly, District Courts exist for the purpose of providing a simpler and less expensive method of dealing with cases that do not warrant the procedural refinements often associated with litigation in a Supreme Court. The purpose of having a three-tiered court system would be defeated if District Courts followed in all respects the same procedures as Supreme Courts, or magistrates' courts became reluctant to exercise summary jurisdiction summarily. It is sometimes assumed that procedural uniformity is self-evidently desirable, especially if it enables practitioners to use common forms. There is a balance to be struck here. There is plenty of room for constructive change. However, complete procedural uniformity self-evidently would be a bad thing. The procedures that are appropriate to the resolution of a complex commercial dispute would be inappropriate to the resolution of a claim for the recovery of a small debt, or of a dispute involving straightforward factual and legal issues. The criminal justice system, I hope, will continue to deal differently with charges of homicide and minor theft. Of course, not all cases involving a lot of money are complex; and not all cases involving modest amounts are simple. But the justice system's capacity to make appropriate distinctions between the requirements of different classes of litigation is important to the reasonable accessibility of justice. Inappropriate uniformity is just as bad as inappropriate diversity.

The establishment in 1999 of the Federal Magistrates Court is an example of devolution and of the utility of summary disposition of suitable cases. The Court was set up to handle less complex cases in the areas of family law and general federal law. It shares jurisdiction with the Federal Court and the Family Court. It now handles nearly all bankruptcy work, over half of all migration matters, and almost half of family law applications concerning issues relating to children or property rights. If its procedures simply replicated those of the Federal Court or the Family Court, it would have no reason to exist.

National Judicial Associations

There is a Council of Chief Justices which meets twice a year. I am the Chairman. The other members are the Chief Justices of the Federal Court and the Family Court, and the Chief Justices of all the State and Territory Supreme Courts. The Chief Justice of New Zealand also regularly participates in meetings of the Council.

The Australian Institute of Judicial Administration exists to promote excellence in judicial administration. Its current President is Justice John Byrne of the Supreme Court of Queensland. The Institute is one of several organisations engaged in judicial education. Courts and tribunals also conduct "in house" courses.

This diversity of opportunities for judicial education has prompted the AIJA to reconsider its programs.

The Institute will continue to conduct courses and seminars concerned with case management, technology, cultural awareness, contemporary issues for tribunals, the cost of justice, and alternative dispute resolution for its broad membership of judicial officers, court administrators, tribunal members, practitioners and others. It will also target its activities towards particular groups such as appellate judges, masters, court administrators, and tribunal members. This year the AIJA will again organise an annual conference for tribunals, in recognition of their growing importance.

Many of the Institute's activities are held in conjunction with others. Seminars have been arranged with the Federal Court of Australia on self-represented litigants and best practice in case management. Soon the AIJA will convene a conference on domestic violence with the assistance of the Family Court of Australia. The Institute has worked closely with the Council of Australasian Tribunals and hopes to assist that body in developing a national bench book for tribunals.

The Institute's research program, which is devised to complement the education program, is extensive. Factors indicating whether a case is suitable for alternative dispute resolution were examined in Professor Mack's report, "Court Referral to ADR:

Criteria and Research". The Institute has also published the report of Dr John Alford, Mr Royston Gustavson, and Professor Philip Williams on "The Governance of Australia's Courts: A Managerial Perspective". Other research is in progress.

In the last year, the Executive Director has participated in delivering courses in Papua New Guinea Fiji and Samoa on alternative dispute resolution. The Institute assists in the Federal Court's annual program for Indonesian judges. Ties have been established with courts in the region, most recently in Brunei, and the Institute involves judges from overseas in its activities. Recently, for example, the Chief Justice of the Solomon Islands attended the case management seminar in Sydney. In the near future, the Institute's Executive Director will participate in the Federal Court's Pacific Judicial Education Program.

The Institute has a close relationship with New Zealand courts and tribunals which will be strengthened when the annual conference takes place in Wellington in early October.

The Judicial Conference of Australia is a professional association of judicial officers established in 1994. Its objects include maintaining a strong and independent judiciary in Australia and explaining to the public the concept of judicial independence and the reasons why its preservation is essential to the rule of law. The JCA is a self-funded body, reliant on subscriptions from its

members. Membership has now grown to approximately 500, with all Federal, State and Territory Courts represented.

The former Chairman of the JCA, the Hon Simon Sheller, of the Court of Appeal of the Supreme Court of New South Wales, resigned in October 2004 after four years of distinguished service. His successor is Justice Ronald Sackville of the Federal Court of Australia. The Deputy Chair is Justice Bruce Debelle of the Supreme Court of South Australia. The College of Law Alliance, based in Sydney, continues to act as the secretariat for the JCA.

The JCA has adopted a Program to be pursued over the next two to three years, subject to the availability of resources. The principal projects will include the following:

(i) The JCA, with the assistance of experts, will prepare a document, in both hard copy and electronic form, designed to provide members of the public with a better understanding of the role of judicial officers in sentencing. The project will address common misconceptions about the sentencing process and endeavour to dispel those misconceptions. A steering committee, the membership of which includes Professor Arie Freiberg of Monash University and Dr Don Weatherburn of the New South Wales Bureau of Crime Statistics and Research, has been established to oversee

the project. The Judicial Commission of New South Wales has agreed to collaborate.

(ii) The JCA will consider formulating a policy position concerning the process of appointing judicial officers. If such a policy is adopted, it will address such issues as advertising judicial vacancies, interviewing candidates for judicial office and the merits of creating a judicial appointments commission along the lines of those established elsewhere in the common law world. A discussion paper prepared for the JCA was published recently.

(iii) In conjunction with other interested bodies, the JCA will develop guidelines for legal representatives when commenting to the media on pending legislation or court decisions affecting their clients. This project follows concerns expressed by members of the JCA that there have been occasions when comments by legal practitioners to the media about cases have been inappropriate.

(iv) The JCA will pursue issues of special concern to Magistrates' Courts, particularly so far as judicial independence is concerned. This arises out of concerns that the magistracy, although exercising judicial power,

does not always enjoy the safeguards that apply to judges of superior courts.

(v) The JCA will endeavour to develop mechanisms to enable it to respond swiftly and appropriately to matters requiring public comment on behalf of judicial officers. This may involve responding when unjustifiable attacks are made on individual judicial officers.

The JCA's recent activities include the following:

(i) It has published a handbook for Australian Judicial Officers entitled "Working with the Media". This has been distributed to all members.

(ii) It prepared a paper explaining the rationale for and benefits of judicial pensions. This was prepared in response to proposals put forward by the then Federal Leader of the Opposition to modify significantly existing pension arrangements for Judges of federal courts.

(iii) Representations were made to a select Committee established by the Legislative Council of Western Australia in relation to provisions in what is now the *Magistrates Court Act* 2004 (WA).

(iv) Representations have been made to the Attorney-General of Victoria concerning the appropriateness of appointing acting Judges to the Supreme Court and to the County Court.

(v) The JCA has contributed to a project for the development of a national standard or benchmark for continuing professional development for judicial officers. The project was commenced on the initiative of the National Judicial College of Australia and is being conducted in conjunction with the Australian Institute of Judicial Administration.

(vi) The JCA held its annual Colloquium in Adelaide in October 2004.

Judicial Education

The National Judicial College of Australia was established in 2002. It is now a little over two years since the College appointed its first employee, took occupation of its premises and began to operate. It remains a relatively small organisation, with a staff of only three. It is not supported by all of the Australian States. It has an annual budget of only $325,600. Despite that, the College has made good progress. Its programs involve sharing and building on the experience of participating judicial officers. So far, the emphasis

has been on groups of about 25 to 30 judicial officers working together, including discussion of situations likely to arise in the courtroom, rather than on lectures and formal presentations. The emphasis is on helping judicial officers improve their practical skills. Programs are presented throughout Australia, and at the Australian National University in Canberra where the College is based. The College aims to mix judicial officers from different courts and places.

The College is presently developing two pilot programs, one on judgment writing, the other on disability awareness, for the provision of professional development by distance education, presented electronically. If the pilots are found acceptable and useful by judicial officers, the College will be able to reach many judicial officers at their place of work. In that event, further distance education programs will be developed.

Because of its limited funding, the College must operate on a cost recovery basis. Most Australian courts have limited funds available for professional development, and this, coupled with the difficulty that heads of jurisdiction have in releasing judicial officers from their judicial work, places constraints on what the College can do.

The College has invited the Judicial Conference of Australia and the Australian Institute of Judicial Administration to develop a written statement on the amount of time that judicial officers should

commit to their professional development, and the time that should be made available each year to a member of the judiciary for professional development, free from routine judicial duties. The statement is also intended to indicate the amount of funding that should be provided on an annual basis for professional development for judicial officers. "Benchmark statements" along these lines have been prepared in other countries. The College aims to use the statement to encourage Australian Governments to make an appropriate commitment to professional development for Australia's judiciary. It will also encourage heads of jurisdiction to release judicial officers for the required amount of time each year.

It is instructive to compare the size and funding of Australia's National Judicial College with that of the National Judicial Institute of Canada. That body, which provides education services to some 2000 judicial officers throughout Canada, receives direct and indirect funding of between $7 million and $8 million annually. The funding arrangements are complex, and depend in large part upon Federal legislation which provides for the cost of attendance at meetings for educational purposes and of the organization of those meetings and the provision of educational services at them as part of the same budget line item that covers the salaries of federally appointed judges. (In Canada, judges of Provincial superior courts are appointed by the Federal government). I hope that the time will come, and come soon, when our National Judicial College can provide Australian judicial officers with a level of support comparable

to that provided to Canadian judges. This will require cooperation with established State organizations, notably the Judicial Commission of New South Wales. That body, which enjoys an international reputation in the field, has already shown itself willing to cooperate in a national scheme of judicial formation and development.

Most States now have established arrangements for judicial education, either through formal bodies or through the State courts. The oldest and largest of the educational bodies is the Judicial Commission of New South Wales, a statutory corporation established in 1986. It has a staff of 35 and an annual budget which is about 12 times that of the National Judicial College. In conjunction with the education committees of each of the New South Wales courts it conducts programs tailored to the needs of those courts. It is a major provider of educational resources, not only to New South Wales judges and magistrates, but also, in cooperation with the National Judicial College and the Australian Institute of Judicial Administration, to judicial officers in other parts of the Commonwealth.

The Judicial College of Victoria was established in 2002. In other States and Territories, the courts conduct their own educational programs.

Judicial recruitment and appointment

One of the main differences between the judiciaries of countries, such as Australia, with a common law background, and those of countries in the civil law tradition, is in their professional background. In Australia, almost all judges, and an increasing number of magistrates, are appointed as judicial officers after a substantial time in professional practice, either as private practitioners or government lawyers. In countries with a civil law tradition, people normally enter the judiciary upon completion of their legal studies, and remain there for a professional lifetime. This, incidentally, explains why many common law countries, in the past, have had relatively undeveloped systems of judicial education. Governments have relied upon the legal profession to supply candidates for appointment who are sufficiently qualified by virtue of their professional experience. Some governments, accustomed to relying on the profession to train their judges, have been slow to accept a responsibility for judicial training and continuing education.

Furthermore, our system has taken for granted a regular supply of experienced lawyers willing to take on judicial office, even if that involves a substantial drop in income. While never strictly a professional obligation, the acceptance of an offer of judicial appointment was assumed to be a natural response of most appropriately qualified practitioners. There have always been successful advocates who were not interested in becoming judges,

or whose personal circumstances put it out of the question. However, there is a danger that the time may come, if it has not arrived already, when the willingness of successful practitioners to accept judicial appointment is exceptional rather than normal. The strength of the judiciary depends upon the existence of a skilled and independent legal profession, and upon the availability for appointment of experienced advocates, including a sufficient number of people regarded as leaders of the profession. The health of the adversarial system requires that, in terms of professional experience and ability, the Bench at least should be a match for the Bar. Professional associations ought to encourage their members to see judicial appointment as a natural and welcome step in a legal career. By the standards of successful practitioners, judicial office is not financially attractive. But many lawyers who have achieved professional eminence gain great satisfaction by putting something back into the law. Lawyers, in the words of Sir Francis Bacon, are debtors to their profession. It is to be hoped that judicial service will continue to be seen as an honourable method of repaying that debt.

Australian judges are appointed by the executive governments, State and Federal. They can be removed only upon an address of Parliament to the Governor-General or Governor. Their ages of compulsory retirement vary. In the case of most courts this is governed by statute. In the case of the High Court, however, the age is fixed by the Constitution, which is difficult to amend. It is 70, a number that will look curious in 30 years time - perhaps

sooner. The judiciary, and the profession, are becoming acquainted with a new kind of lawyer: the former judge who is too old for the bench, and too young for the retirement village. There have always been a few of these, but their numbers are increasing. Regulatory provisions cater for difficulties that can arise, but they involve fairly minimal restrictions. Interference with personal choice should not go beyond what is necessary to maintain professional standards both of the judiciary and of the legal profession.

The systems adopted by various governments for identifying and selecting judges are changing in some respects. To date, the changes have been modest, and aimed at ensuring equality of opportunity. No Australian government, I believe, has ever seriously contemplated the kind of radical change that occasionally attracts, or is claimed to attract, support, that is, election of judges. In the United States, Federal judges are appointed for life, but in some States the judges are elected. The few Australian enthusiasts for this idea rarely mention the specifics of what the process involves. In the Journal of the American Bar Association of 28 January 2005 there was an article entitled: "Mud and Money. Judicial Elections Turn to Big Bucks and Nasty Tactics". It contains some interesting information. For example, the supporters of two rival candidates for a vacancy on the Illinois Supreme Court were said to have spent $10 million on advertising. The total expenditure on campaigns for State Supreme Court seats in the United States in 2004 was expected to exceed $45 million. Issues such as tort law reform, capital

punishment, sentencing, and abortion divide candidates and their supporters. Participants in any kind of election have to offer reasons why people should vote for one candidate rather than another. That usually involves, directly or indirectly, making promises, and declaring policies. It is not difficult to imagine the kinds of judicial policy statements that would have electoral appeal, but I doubt that many Australians would be attracted to that as a method of selecting an independent and impartial judiciary. Since it is certain that politicians would be the last to want judges to turn to political campaigning, the idea is unlikely to gain any momentum.

Judicial procedures and work practices

Australian courts now routinely make available information which finds its way into public documents and the media, sometimes in an undigested form. It may help an understanding of that information, and explain the warnings that often accompany it, if reference is made to some background facts about the way courts and judges operate.

In the minds of many people, the definitive judicial exercise is to sit. From this they draw a number of conclusions: that judges are at work only when they are in court; that judicial work begins at the commencement of the hearing day and ends when the court adjourns; that judicial effort is measured by the number of hours spent in court; and that judicial productivity is measured by the

number of cases disposed of per unit of court sitting time. This may be called the sedentary theory of judicial activity. When the courtroom lights are on, and the judge is seated on the bench, quantifiers of judicial performance are content. Something is going on which they can measure. When the judge leaves the bench and returns to chambers, the quantifier becomes ill at ease. What is going on is difficult to observe, and impossible to measure.

Such observers must be confounded by the Supreme Court of the United States. According to that Court's calendar for its current term, it will sit to hear argument this year on 39 days, or, more accurately, 39 mornings. It is hard to know what would be made of that information by someone who did not realise that the Supreme Court carries a heavy workload, but that it transacts most of its business on the papers. No oral argument is heard on what we would call leave applications, and the time allowed for oral argument on appeals is strictly limited. There is, therefore, not much "sitting" involved in the work of that Court. Most of the work of the Justices is done in their chambers, and in conference.

In the Australian judiciary, the proportion of judicial work time spent sitting in court varies between, and within, courts. Although the High Court, reflecting our tradition of oral argument, sits on about twice as many days as the United States Supreme Court, most of the work of the Justices is done out of court. The same applies to every other final court of appeal in the common law world.

The Court's vacations are the periods during which it does not conduct any pre-arranged sittings (although, like other courts, it is always available to deal with urgent matters). They are not the Justices' holidays, and the members of the court work in chambers during, and in some cases throughout, those periods. Members of Parliament, no doubt, understand that the fact that an institution is in recess does not mean that its members are on holidays.

In different courts, and different parts of the same court, the proportion of judicial time required for in-court activity varies. Members of appellate courts ordinarily would be required to spend more of their time working on reserved judgments than members of trial courts, but that is not an inflexible rule. Furthermore, as between individual judges, different people devote different amounts of time to out-of-court work. It is to be hoped that all judges and magistrates take sufficient time for preparation and reflection. Judging is primarily an intellectual activity.

Productivity is not a meaningless concept when applied to the work of courts. Governments responsible for the allocation of scarce resources are entitled to know whether public money is being well spent. There is, however, a danger that superficial and inappropriate performance indicators will create an illusion of transparency, and distract attention from the real issues that determine the efficiency of courts and judges. Court management is a developing science, and modern judicial education programs devote

a good deal of attention to techniques of evaluating and improving judicial efficiency. Those regular court users, the lawyers, are also interested and astute observers of judicial performance. Many Australian courts have formal or informal users' committees, and they provide valuable input. The topic is complex and important, and receives serious attention from those involved in modern court leadership and administration.

The High Court

The High Court has now completed the revision and rewriting of its Rules of Court, a task last undertaken in the early 1950s. The new Rules, which took effect on 1 January 2005, reflect the significant changes in the work of the Court that have occurred since the making of the High Court Rules of 1952. In particular, they take account of the changes in the work in the Court's original jurisdiction, which now is largely confined to matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, and matters arising under the Constitution or involving its interpretation. Many of the provisions made by the former Rules for trial of actions found no application in the day-to-day business of the Court and therefore are not dealt with in the new Rules.

In the appellate jurisdiction of the Court, the new Rules introduced some changes to the procedures governing applications

for leave or special leave to appeal. These changes recognised the increase in the Court's workload in relation to applications to commence appeals. In the year ended 30 June 1998, 358 applications for leave or special leave to appeal were filed. By the year ended 30 June 2004, that number had doubled. Forty-eight percent of the applications were made by applicants who were not represented by a legal practitioner. In all applications for leave or special leave to appeal, both under the new Rules and under the former Rules, the written submissions of the applicant are the principal vehicle for demonstrating that the case is one in which leave should be given. In order to deal with the increasing number of applications by self-represented applicants, many of which are unmeritorious and put respondents to needless expense, new procedures are established by which the applications of self-represented applicants are first considered by reference to the documents filed by the applicant. If two Justices conclude that the application is without merit, it is dismissed without requiring the respondent to answer. In addition, any application for leave or special leave to appeal, whether the applicant is legally represented or self-represented, may be determined on the papers without oral hearing if two Justices consider it appropriate to do so.

The Court consulted the legal profession about the changes that were proposed to the Rules. The Australian Bar Association and the Law Council of Australia indicated that they supported the principles underlying the changes. The Court also had the benefit of

detailed commentary on the drafting of the new Rules from the Law Council and the Bar Association, and from a committee of Solicitors-General.

After the Rules had been made, but before they came into effect, the Court took a number of steps to bring them to the attention of members of the legal profession and those litigants having matters pending in the Court. Every litigant in a pending matter was told that the Rules were changing. In addition, Justice Hayne spoke to members of the legal profession about the new Rules at meetings held in Sydney, Melbourne, Brisbane and Adelaide and he spoke by video-link to meetings of members of the profession held in Canberra, Perth and Darwin.

Although it is early days, the new Rules appear to be operating successfully and to be well accepted.