Remarks of the Hon Marilyn Warren AC•,
Chief Justice of the Supreme Court of Victoria

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Reflections on the history of the Supreme Court after 175 years

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In 2016, the Supreme Court of Victoria marked 175 years since a resident judge of the Supreme Court of New South Wales arrived to administer justice in the Port Philip District. This anniversary has provided an opportunity to reflect on the evolution of the Supreme Court, before those years are greyed from memory. The development of the Court since its colonial beginnings has at times happened at great speed with the Court responding to the vexed social and economic issues of the day, from murder to fraud and insolvency. At other times, it seems the pace has been quite glacial. Before the introduction of Court Services Victoria in 2014, the Supreme Court had spent decades tussling with the executive for control over the administration of the courts. The executive would assert the need for accountability, the judiciary would respond emphasising the need for the Court's independence as the third arm of government. Inertia was the regular outcome. Too long coming can also describe the Court's efforts to acknowledge the indigenous owners of the land on which the Supreme Court rests and over which it wields the rule of law. Commemorating this anniversary ensures such shortcomings and the efforts to redress them are not left without comment to the confines of history.

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Introduction: a glimpse into history

The Supreme Court has always been both influenced by and an influence on its time. To appreciate the evolution of the Supreme Court of Victoria, it is useful to have a glimpse of the context (social and geographic) in which it came to be. Author James Boyce has described how Melbourne looked prior to white settlement:[1]

> *The [Yarra] River was tidal up to a rocky basalt ledge (where Queens Bridge now stands), at which point it was as much as 90 metres wide. What the British would call 'the falls' acted as a barrier to the saline tidal flows, ensuring that upstream of the rocks could be found a permanent source of fresh water.*
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> *This natural bridge, where salt water met fresh, was also where geology and botany divided in an apex of ecological encounter. Within an easy walk could be found grasslands, various woodlands, as well as, in almost every direction, mud. On the northern side of the river, stretching three kilometres to the north west, 'was a wide expanse of flat, boggy land, greater than a thousand acres ,.. in extent'. In the middle of this was a permanent lagoon which one early settler recalled as 'a beautiful blue lake ... intensely blue, nearly oval and full of the clearest salt water; but this by no means deep'. On the southern side of the Yarra, between the river and the edge of the bay, swampy land stretched for about six and a half kilometres and included a number of permanent lagoons, including what was to become ... Albert Park Lake. There were also extensive lagoons in the region of what is now Port Melbourne. By contrast, much of today's central business district was well drained grasslands, framed by gentle and lightly wooded hills, such as Batman's Hill, ... and the pastoral plains stretched far to the north and west.*
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> *This was Ku/in country, the home of the Wurundjeri people.*

James Boyce, *1835: The Founding of Melbourne and the Conquest of Australia,* (Black Inc., 2011). 3-4.

Recognition of the indigenous people

In the 175 years since the Supreme Court first sat in this district, little has been done to acknowledge and respect the indigenous peoples on whose land the Supreme Court buildings have been built. Some efforts were made by Judge Willis and later Sir Redmond Barry with respect to the recognition of the indigenous people, but their relevance to the courts was essentially disregarded. Rather history shows the interactions between the Court and indigenous people were far more malign. The first capital punishments ordered in the Supreme Court were in 1841 when two indigenous men were hanged for murder.[2] Their execution was cruel, inhumane and uncivilised.

It took from 1841 to 2015 for the Supreme Court of Victoria to welcome the original owners of the land to the court site. At a smoking ceremony on 20 May 2015 I said:

> *Justice is not new to this place. The Supreme Court is over 160 years old and has been on this site for 130 years delivering justice. Traditional justice is thousands of years old. Justice is based on the law of the people, so, for the traditional owners of the land, this place is very familiar.*
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> *This day has been a long time coming, I regret that. There have been 10 chief justices before me and over 140 Supreme Court justices. No real offer of welcome, acceptance; acknowledgment or friendship has been given.*
>
> *To the traditional owners I say: I stand here today on behalf of all the judges, associate judges, judicial registrars and staff of the Supreme Court of Victoria. I welcome and acknowledge you and I offer you our friendship.*
>
> *There is nowhere here I can pick up grains of sand and tip those grains into the hands of the elders. I ask instead that the elders press their hands against the sandstone when they come here and mark this place again as their place.*

In the Supreme Court Library the main room displays the portraits of the 11 Chief Justices. The room now includes a portrait of Barak, the respected last chief of the Wurundjeri people, with all the other court chiefs. He was there when Batman arrived in 1835. He would have been in the vicinity in 1841 when the Court first sat. His due acknowledgement is appropriate and welcome.

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2 Chief Justice Marilyn Warren, 'Early History of the Victorian Legal System' (Speech given to the Royal Historical Society of Victoria, Melbourne, 28 April 2011), 19-26.

The Supreme Court has now taken a leadership role through judicial education in Victoria as to indigenous culture and awareness. Justice Stephen Kaye, supported by the judges of the Court, has led many programs to ensure the Victorian judiciary understands the relevance, significance and importance of the original owners of the land on which the Victorian judiciary works and applies the rule of law. In one sense, it is a reflection back to the beginning that when Melbourne was established it was Kulin country, the home of the Wurundjeri people.

The social relevance of the Supreme Court

Apart from this fundamental gap in the Supreme Court's work, over its 175 year history, it has played a prominent role in the development of Victorian society. When significant moments in Port Phillip's and Victoria's history occurred the Supreme Court was often at the forefront, resolving disputes and punishing misconduct.

Reflecting on the Court, there is usually pre-occupation with its criminal work:.the trials of the notorious Ned Kelly,[3] of Colin Ross over the murder of a 12 year old schoolgirl,[4] of Squizzy Taylor and his criminal world,[5] and of Ronald Ryan over the shooting of a prison warder.[6] But the Supreme Court has also always been at the forefront of what was occurring in the local economy.

During the 1830s, the economy of Port Phillip had been buoyed by a land rush, commercial enterprise and speculation.[7] By the early 1840s, a depression started to set in.[8] The economic climate at this time has been described this way: [9]

> *The lines of credit, stretching from banks or merchants to other businessmen and settlers and supporled by wide use of bills of exchange, often with multiple endorsements, predictably crumbled.*

By the 1880s and 1890s there was considerable litigation and numerous prosecutions driven by the economic events of the time. Professor Graeme Davison noted that by the early 1880s, 'Melbourne was leaving its trading and primitive industrial stages behind and gradually

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3 See, eg, Shane Maloney and Chris Grosz, *Encounters: Redmond Barry* & *Edward Kelly* (November 2007) The Monthly <https://www.themonthly.com.au/issue/2007/november/1290559074/shane-maloney/redmond-barry-edward-kelly>.

4 See, eg, *Ross v The King* (1922] VLR 329.

5 See, eg, *R v Taylor* [1924] VLR 467.

6 See, eg, *R v Ryan and Walker* [1966] VR 553.

7 McLaren, above n 38, 177.

8 Ibid.

9 Ibid, citing Janine Rizzetti, 'Sifting to the Bottom of Financial Impropriety: Judge Willis and Insolvency in Port Philip' (2009) 2 *Journal of Historical and European Studies* 97, 100 and AGL Shaw, *A History of the Port Phillip District: Victoria before Separation* (Miegunyah, 1996), 144-69.

acquiring the broader functions of a fully-fledged metropolis'.[10] Between 1881 and 1891, the population increased from 268,000 to 473,000.[11] By the late 1880s, the crashes and the depression had truly arrived. The impact of this period on the law was significant. As Davison recounts:[12]

> *The bulk of legal work during the boom consisted of routine solicitors' transactions such as conveyances, contracts, deeds and wills. But in the early 1890s, as contract-making gave way to contract-breaking and the courts thronged with litigants, the bar began to claim the lion's share of work and public attention.*

Then there were the building society scandals. One speculator, John Bellin, had accumulated more than £70,000 in personal debts by mid-1890, most of which had been incurred in buying land in Melbourne. Out of a desperation to deal with his severe crisis with his creditors, Bellin, a director of building societies,[13] misappropriated thousands of pounds from clients. He was subjected to criminal charges. His defence counsel was a barrister, Dr Madden (later a Chief Justice of Victoria}. Hartley Williams J of the Supreme Court took a stern view of the case. He said 'It is unfortunately now public knowledge that crimes of this description have of late been committed by men holding high positions of trust with alarming frequency'.[14] The judge went on, 'Many blameless, honest and industrious persons have been ruined or have lost the result of years of toil by your criminal appropriations'.[15]

As the crisis increased in the 1890s, the Supreme Court was, in one sense, in the thick of it. The liquidators of all the failed companies and building societies were extremely active and must have occupied much commercial litigation time in the Suprenie Court, with applications to wind up companies and seek various aspects of corporate relief. With each fresh collapse, the Supreme Court was called to step into the fray. Michael Cannon describes how public disquiet multiplied with the suspension of the Commercial Bank in April 1893, following heavy withdrawals and a slump in the value of the Bank's shares;[16] An urgent application was brought in to the Supreme Court involving a reconstruction scheme for the Bank. It was approved by the then Chief Justice Madden. Three weeks later, on the weekend of 29-30 April, the National Bank informed the Premier that it intended to suspend business on the Monday. On Sunday 30 April, a proclamation was quickly prepared and rushed for the signature of the then Acting Governor, Chief Justice Madden.

When dealing with criminal prosecutions relating to the collapses, the Supreme Court judges were not reticent in expressing their views. In court proceedings to remove the liquidator of a bank amidst allegations of misconduct, there was an attempted defence of the transactions on the basis that no profits were made by the directors and that they had come out of the

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10 Graeme Davison, *The Rise and Fall of Marvellous Melbourne* (Melbourne University Press, 2nd ed, 2004), 7.

11 Ibid.

12 Ibid 133.

13 Marianne Rocke, *John Bellin* (1 April 2016) Residents cif Upper Beaconsfield <http://www.upperbeac.rocke.id.au/g4/p4574.htm>.

14 Ibid.

15 Ibid.

16 See Michael Cannon, *The Land Boomers* (Melbourne University Press, 1966), 109-14.

transactions badly.[17] The trial judge, Mr Justice Holroyd, said: 'The mischief of it is that the people whose money they took came out of it worse. They speculated with other people's money, and caused an enormous amount of misery. That is the real truth of it'.[18]

Another impugned speculator was Larkin.[19] He built a lavish house in Canterbury Road, Albert Park which he called 'Lake View' because Albert Park could be seen from the upper level. He engaged in a series of frauds on clients who used his estate agency. He made attempts to save the monies and avoid the consequences of the insolvency court by transferring assets. He was convicted of fraud charges and sentenced to six years' gaol with hard labour. Later, further charges of embezzlement were laid against him and he was given an extra five year sentence, that is, a total of 11 years' imprisonment with hard labour. The Chief Justice said, 'In the evil history of an evil time, your name and conduct stand as a monument of woe to multitudes of people'.[20]

Another celebrated banking scandal case was the Anglo-Australian Bank collapse.[21] All the bank's directors and chief officers were involved and charged with various counts, including issuing a false report and balance sheet with intent to defraud. The key player, Staples, was sentenced by Mr Justice Hood to the maximum of five years' imprisonment, adding that he would have increased the sentence if Parliament had made the offence a felony instead of a misdemeanour.

Insolvency and financial collapse continued to dominate Supreme Court business for decades after, through the 1930s, the 1960s and in the myriad of cases in the 1990s, such as Pyramid Building Society, Skase, Bond, Estate Mortgage and others. The Supreme Court in each case stepped forward to preside over and answer the tensions of the day.

Throughout this time, while the Court was performing its work and responding to the community's needs, it was also on a journey from colonial control and dependence to self-governance. This journey was a far less active one, slowed by tensions over administration that harked back to the earliest days of Melbourne's settlement. As this history is less well-known and is fundamental to the Court as an institution, it is important to record it on this anniversary.

Melbourne: the beginning

In 1788, on January 26, a new colony was established: the Colony of New South Wales under the governorship of Governor Arthur Phillip. The colony was a prison ruled by the Governor under the fear of the New South Wales Naval Corp and the lash. In 1823, the Supreme Court

17 Ibid 140.
18 Ibid 140-1.
19 Ibid 76-9.
20 Ibid 79.
21 Ibid 98-100.

of New South Wales was established[22] which exercised superior jurisdiction over the area to the south of New South Wales that came to be known as the Port Phillip District, as well as New South Wales with its shifting boundaries.

Significantly, Melbourne was not founded as a penal colony or prison. Nor was it founded by 'government-sanctioned settlement parties' sent from afar.[23] The Port Philip and Bass Strait region was first colonised by the British in 1798, a decade after the colony of New South Wales was established but some five years before the official settlement of Van Diemen's Land.[24] During this time, sealers and whalers hunted along Bass Strait and the shores of the Port Phillip District. It was necessary to bring the rule of law to counter the lawlessness in the area which included, tragically, attacks on the indigenous people and the abduction of indigenous women.[25] Indeed, one of the reasons for the official colonisation of Van Diemen's Land was to exercise authority over the activities of the sealers and whalers in Bass Strait.[26]

But it was not for over thirty years, until 1835, that the 'village' of Melbourne really began. As John Pascoe Fawkner put it, it was 'a land flowing with milk and honey'.[27] Melbourne provided a 'benign and familiar environment' that could be easily farmed and easily traversed.[28]

As the village expanded, inevitably an urgent need arose to establish law and order in the new settlement. Captain William Lonsdale was appointed to take charge of the settlement around Port Phillip in September 1836.[29] Lonsdale was appointed as Police Magistrate. As former Judge Mullaly recites, 'Lonsdale was given instructions which made it clear that the laws of England applied to both the colonists and the local indigenous people'.[30] At the start, justice in the colony of Port Phillip was administered in a tent and then in a wattle bark hut. It was all quite primitive, with minimal administration. The Police Magistrate and the later subordinate magistrates administered the rule of law. For the most part they were concerned with criminal matters. In 1839, Charles La Trobe was appointed as Superintendent and given the powers of a lieutenant governor but was subordinate to the Governor of New South Wales.

The first sittings of the Supreme Court

Of course, in such a flourishing place, civil, commercial and admiralty disputes broke out among the residents. It was necessary for the rule of law to be brought to the colony to decide *civil* disputes between citizens. As Paul Mullaly describes, the 'leading inhabitants of Port

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22 Supreme Court of New South Wales, *About the Supreme Court: History and Art* <http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_aboutus/sco2_history/sco2_history.aspx>.

23 Boyce, above n 1,16.

24 Ibid 9.

25 Ibid 13-14.

26 Ibid 10.

27 Ibid 85.

28 Ibid 85.

29 State Library of Victoria; *Victoria's early history, 1803-1851: Timeline* <http://guides.slv.vic.gov.auNictoriasearlyhistory/timeline>.

30 Paul R Mullaly, *Crime in the Port Phillip District 1835-51* (Hybrid Publishers, 2008) 13.

Phillip petitioned New South Wales Governor Gipps in May 1814 for the appointment of a Resident Judge and the establishment of a Supreme Court with civil, criminal and admiralty jurisdiction'.[31] Without a resident judge, it was necessary for the residents of Port Phillip to take their civil disputes to Sydney.

It was not until 1836 that John Walpole Willis, having been removed as a puisne judge of the province of Upper Canada, accepted an invitation from the Colonial Office to transfer to the Australian colony of New South Wales as an Associate Justice of its Supreme Court. Willis was appointed by New South Wales Governor Gipps to become the new Resident Judge in Port Phillip. Upon the decision being made, arrangements were to be set in train for the construction of a new courthouse (previously a store). The building, on the south-western corner of Bourke and King Streets, upon its completion, was a matter of interest in the flourishing colony. From the illustration of the building, it seems it was a modest one. However, when it is considered that the number of buildings in Melbourne constructed in six years were generally modest, the building may be regarded as a reasonable colonial construction in its time.

As recounted by Johr:i Leonard Forde in his work *The Story of the Bar in Victoria:* [32]

> *From the moment of Mi Willis' arrival in Melbourne till his departure from the shores of Port Phillip, he was continually before the small public of the settlement in some extraordinary way, now provoking amusement and surprise, and again exciting shame and resentment.*

Justice Willis' eccentricities were evident in several aspects of his courtroom behaviour. In the tradition of British judges of assize, Justice Willis provided regular addresses to juries prior to the commencement of criminal trials.[33] However, unlike the British judges, Justice Willis 'never confined his observations to the state of the calendar [the law list]'[34]; rather, the addresses touched on a vast range of matters including the (dismal) state of the economy,[35]

> *the Moral sin of gambling, the Evils of drinking, the Virtues of piety and good living, the Necessity .and value of religion, Prudence in business affairs, the Wickedness of the authorities in allowing convicts and ticket-of-leave men to come to Port Phillip and the inadequacy of the Supreme Court building.*[36]

After delivering these addresses, Willis' 'practice [was] to give the manuscript ... to the newspaper to be ... published after the sitting', in order to 'ensure that the colonial authorities would become aware of his concerns'.[37]

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31 Ibid 20.

32 John Leonard Forde, *The Story of the Bar in Victoria* (Whitcombe & Tombs, undated) 67.

33 Ibid 57.

34 Ibid. This was not uncommon amor\gstjudges sitting in Melbourne, who often addressed 'problem[s] then facing the local community' in their addresses: Mullaly, above n 30, 108.

35 Mullaly, above n 30, 9.

36 Ibid 127.

37 Ibid.

And so it was that Justice Willis sat. He did not last very long. As Professor John McLaren describes matters:[38]

> *In the new location, Willis's increasingly choleric disposition, his antipathy to those in authority in and the gentlemanly elite of the district, his perceived partiality in cases argued before him, and continued sniping at his colleagues in Sydney so severely tried [Governor Gipps1 patience that he gave the judge his marching orders in June 1843.*

· The arrival, then departure of Willis was part and parcel of the challenges for the Colonial Office in administering the Colonies.

The colonial context

It is worth now turning to set out the colonial, administrative and environmental context that acted as a backdrop to these early years of the court in Victoria.

Professor John McLaren noted: [39]

> *To understand the histories of judicial tenure and accountability in the British Empire in the 19th Century, it is important to have a sense of not only the struggle for judicial independence in England itself before 1701, but also of the status and exercise of control over colonial judges in the pre1800 empire.*

The development of the English Empire was not systematic. Colonies were established by commercial charters, by proprietary grants by the Royal Prerogative, and by religious covenant.[40] The settlers of the colony took with them English law, but substantial discretion remained vested in local officials to construct justice systems appropriate to colonial conditions:[41]

> *Because of distance, and political and constitutional turmoil in England itself, Imperial control was often weak, providing leeway to colonists to experiment.*[42]

In 1801, British responsibility for the colonies was transferred to the new Secretary of State for War and the Colonies. Henceforth, the Colonial Office exercised primary authority over the running of the Empire.[43] Things really took shape upon the appointment of James Stephen Jr as legal counsel to the Office for War and the Colonies in 1814, a position he held until 1836 when he became permanent Under Secretary. He was a dominant figure in the moulding of

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38 John McLaren, *Dewigged, Bothered, & Bewildered: British colonial judges on trial, 1800-1900* (The Osgoode Society, 2011) 4.

39 Ibid 10.

40 Ibid 14-15.

41 Ibid 14.

42 Ibid.

43 Ibid 34. It is to be noted that the authority was exercised over the Empire with the exception of India.

policies and administrative character for the colonies for the better part of 35 years.[44] The Colonial Office became the effective body for making judicial appointments to the colony, vetting judicial performance, and administering _judicial discipline, including exercising the power of removal.

It fell to the Colonial Office to arrange not only the appointments, but the physical environment in which the judges ·would sit and administer British justice to the colonies. Further, importantly, the Office was also responsible for judicial salaries and pensions. In 1825, the salaries and pensions were established in a scheme. The English judges were quite well paid: a puisne judge was paid £5,500. Court fees were paid to consolidated revenue to help cover the costs of running the courts.[45] However, outside England there was great disparity across the colonies in the payment of judicial salaries. The first Chief Justice of New South Wales, Francis Forbes, received a salary of £2,000 in 1822.

Perhaps unsurprisingly, McLaren observes that there were 'frequent complaints from colonial judges about arrears in their salaries and the stinginess of the colonial authorities in approving expenses.'[46] There were also physical problems:[47]

> *These included inadequate court facilities (including the judge's residence and the theatre) and domestic accommodation (draughty and leaky residences), diseases (a particular problem in colonies in the tropics), the rigors and privations of life on circuit (in territory ranging from desert, through jungle, to mountainous terrain and sub-zero temperatures in ice and snow), social ostracism if one fell out with the politically powerful or vocal and what must have seemed to some* a *cultural wasteland (a concern for those who pined for the glittering life of London, Dublin, or Edinburgh).*

Creation of the Supreme Court of Victoria

On 5 August 1850 the Imperial Parliament at Westminster passed an act: *An Act for the better Government of Her Majesty's Australian Colonies* ('the 1850 Act').[48] This Act provided for the creation of the Colony of Victoria and authorised Queen Victoria to establish by letters patent the Supreme Court of the Colony of Victoria. Section 28 read:

> *.. .Be it enacted, That it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, to erect and appoint* a *Court of Judicature in the said Colony of Victoria, which shall be styled "The Supreme Court of the Colony of Vic_toria;" and such'Court shall be holden by One or more Judge or Judges, and shall have such ministerial and other Officers as shall be necessary for the Administration of Justice in the said Court, and for the Execution of the Judgments, Decrees, Orders and Process thereof ...*

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44 Ibid 34-35.

45 Ibid 48.

46 Ibid 54.

47 Ibid.

48 See the scans kept by the Museum of Australian Democracy, *Australian Constitutions Act 1850 (UK)* Documenting a democracy <http://www.foundingdocs.gov.au/item-did-76.html>.

Section 28 went on to devolve the authorities, powers and jurisdiction of the Supreme Court of New South Wales to the Supreme Court of Victoria once the latter was established.

The Port Phillip District separated from New South Wales and became the colony of Victoria on 1 July 1851.

Although the 1850 Act foreshadowed the creation of the Supreme Court of Victoria by letters patent, the Court was not established in that manner. Rather, it was established by a Victorian Act exercising power under s 29 of the 1850 Act. In 1852 the Legislative Council of Victoria passed legislation entitled *An Act to make provision for the better Administration of Justice in the Colony of Victoria* (the '1852 Act'). Section 1 of that Act noted that no letters patent had been received and that the exigencies of the Colony of Victoria 'rendered it necessary to make provision for the better administration of Justice therein'. So, not waiting for the Crown to act, the Victorian Legislative Council took the initiative.

Section 2 of the 1852 Act then established the Supreme Court of the Colony of Victoria.

Section 3 provided that the Supreme Court would 'consist of and be holden by and before a Judge or Judges not exceeding three in number', and then set out qualification requirements for the judges. Judges were to be appointed by letters patent, or by the Lieutenant-Governor[49] of Victoria until 'the pleasure of Her Majesty be known'.

Under s 4, one of the judges was to be styled 'The Chief Justice of the Supreme Court of the Colony of Victoria', who would 'have rank and precedence above and before all persons whomsoever in the said Colony of Victoria excepting the Governor and Lieutenant Governor thereof and except all such persons as by law or usage take place in England before the Lord Chief Justice of the Court of Queen's Bench'.

Lieutenant-Governor Charles La Trobe appointed two judges to the Supreme Court: Justice William a'Beckett as Chief Justice and Mr Redmond Barry as puisne judge. Their salaries were included in the Civil List. Chief Justice a'Beckett was previously the resident judge of the Supreme Court of New South Wales for the District of Port Phillip. Justice Barry had previously been the Solicitor-General of Victoria and a nominee member of the Legislative Council.

Before moving to Melbourne, a'Beckett was an acting judge on the New South Wales Supreme Court. He moved down to Port Phillip and was confirmed as p rmanent Resident Judge in

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[49] In Victoria, the position of Lieutenant Governor is presently held by the Chief Justice. Originally, however, the Lieutenant Governor was Victoria's most senior representative of the Crown, and sat under the Governor of New South Wales, who was at that time known as the Governor-General of New South Wales. The Lieutenant Governor of Victoria was made Governor of Victoria in 1855, when responsible government came to Victoria. From that time the Governor of Victoria ranked as equal as to the Governor of New South Wales.

1846. And so began his battles with officialdom. The government demanded the return of £100 it had advanced towards a'Beckett's removal expenses, making him the first resident judge who had to pay his own way to get to Melbourne. This just added to his frustration after he had to sell items of furniture to reduce the voyage cost to Melbourne. The Colonial Office refused to budge, and a'Beckett paid back the £100.

Professor Scott notes that: [50]

> *It is obvious that the intention was that the Supreme Court of Victoria should be* a *colonial version of the English central royal courts and that its position in the overall constitutional arrangements should be similar to that of the royal courts in Britain. The Supreme Court was not created in* a *vacuum. It was the product and beneficiary of several hundreds of years of English constitutional history. In the minds of colonial lawyers and judges constitutional convention filled what the legislation left out.*

So it was that the Supreme Court of the Colony of Victoria, with its two judges, was created.

Administration in the early days: creation to 1890

The 1852 Act establishing the Supreme Court was the product of a report commissioned by Lieutenant-Governor La Trobe and prepared by Redmond Barry as Solicitor-General and William Stawell as Attorney-General, regarding the administration of justice at 'separation'.[51] The 1852 Act established the Supreme Court according to Barry and Stawell's vision.[52]

The establishing act also gave the Supreme Court wide rule making powers under s 32.

Essentially, the 1852 Act did not deal with the financing, staffing or administration of the Supreme Court. Much of the Court's administration was left to the rules of Court, made pursuant to s 32. Financing and staffing were principally left to the Crown and prerogative power.[53] A dependence on the executive was born. Before the coming of responsible government, several royal officers including the Governor, Chief Justice, Chief Secretary, Crown Solicitor and Attorney-General, were to an extent involved in the administration of justice and the courts.[54]

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1855 and the coming of responsible government

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50 Ian Richard Scott, *The Administration of the Supreme Court of Victoria: A Paper Prepared for the Civil Justice Committee* (Melbourne, 1983), 12.

51 Sue Reynolds, *Books for the Profession* (Australian Scholarly Publishing, 2012), 12-3.

52 Ibid 13.

53 Scott, above n 5017.

54 Ibid 15.

In 1855, Victoria was granted Westminster-style responsible government by the passing in Britain of *An Act to establish* a *constitution in and for the Colony of Victoria* ('the Victorian Constitution of 1855'). Victoria's Lieutenant-Governor became the Governor of Victoria, and a second house of parliament was created.

Professor Scott notes that the Victorian Constitution of 1855 did not suggest 'that any member of the government was responsible to the legislature for the administration of the Supreme Court'.[55] This mirrored the substantive position in England, where the administration of the courts was left to the courts, and the executive had very little responsibility for or control over administration.[56]

This meant there was an uncertain relationship between the executive and the Supreme Court in this period in part enhanced by the different attitudes of Lieutenant-Governor La Trobe and his successor Lieutenant-Governor Hotham (later Governor Hotham) towards the Court.

La Trobe was not one to keep a firm hand on the arms of government.[57] La Trobe was 'suspect of being rather pliant and indecisive', and 'gave little sense of leadership'.[58] His intervention in the Court administration was likely minimal. In June 1854, Charles Hotham took the reins and was alarmed at his inheritance; a colony facing ruin.[59]

With a 'domineering leadership' style, Hotham proceeded to take a firmer grip on government.[60] Historian Geoffrey Serie says Governor Hotham attempted to govern personally and without assistance from his own officers, which led to overwork, exhaustion and ultimately his demise.[61] He was reportedly 'obstinate and secretive with his councillors and... [was] unwilling to delegate matters to his officials'.[62] However, it was under this style of leadership that responsible government came to Victoria. After reviewing the financial state of the colony as left by La Trobe, Hotham 'introduc[ed] reform of government finance' and exercised strict scrutiny over appeals for funding.[63]

Redmond Barry's experience when he unsuccessfully sought funding for a librarian for the Supreme Court library seems symptomatic of this.[64] Redmond Barry was the Acting Chief Justice in 1853 and 1854 and was friends with Hotham's predecessor, Charles La Trobe, who

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55 Ibid -

56 Ibid 15.

57 Reynolds, above n 51, 24.

58 Geoffrey Serie, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Melbourne University Press, 1963), 7, 153-154.

59 Ibid 158.

60 Reynolds, above n 51, 25.

61 Serie, above n 58, 203.

62 B A Knox, *Hotham, Sir Charles (1806-1855)* (1972) Australian Dictionary of Biography <http://adb.anu.edu.au/biography/hotham-sir-charles-3803/text6027>.

63 Ibid.

64 Reynolds, above n 51, 24-26.

had resigned to return to England.[65] Like Hotham, Redmond Barry was said to demonstrate a 'controlling nature' and a 'proclivity for autonomous actions'.[66] Perhaps unsurprisingly, he was prepared to ask the executive to meet court needs. In 1854 he wrote to the colonial secretary, asking him to inform then Lieutenant-Governor La Trobe of the Court's urgent and pressing need for increased office accommodation and staff.[67] His repeated requests for the government to supply the Court with textbooks were consistently refused.[68]

Redmond Barry was subject too to the intervention of the Attorney-General Sir William Stawell. Stawell, with Barry, had been one of the architects of the Supreme Court system and played a leading part in preparing legislation and in appearing in court in proceedings involving crown interests. He took responsibility for even small matters of court administration.

Ironically, perhaps because Stawell played a leading role in the administration of the court system while Attorney-General, he found it difficult to allow a new Attorney-General to have the same involvement after he became Chief Justice in 1857.[69]

Matters of court administration which Stawell had previously managed personally as Attorney-General, he then left to Redmond Barry, a member of the Court. Barry took care of the routine running of the Court system so far as it affected the judges. He was also constantly seeking the government's attention to deficient court buildings. Barry and Stawell frequently discussed the circuit system and the possibility of saving money by discontinuing some circuits.. Barry also dealt with the Attorney-General in relation to legal education, judicial pensions and the Supreme Court Rules.

A tension formed between the desire to bring all government machinery within the clutches of responsible government, and the lack of any formal standing for a minister to be responsible to Parliament for the administration of the Supreme Court. As a result, the relationship betwe·en the Attorney-General and the judges of the Supreme Court was an uneasy one almost from its beginning. This was not made easier by the constant turnover in government ministries; for example, between 1868 and 1874, there were eight attorneys-general.[70]

The uneasiness is illustrated by a seemingly innocuous letter. On 4 January 1864 Justice Barry wrote directly to Governor Charles Darling to inform him that he was taking a holiday. This sparked a constitutional crisis.

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65 Jill Eastwood, *La Trobe, Charles Joseph (1801-1875)* (1967) Australian Dictionary of Biography <http://adb.anu.edu.au/biography/la-trobe-charles-joseph-2334/text3039>.

66 Reynolds, above n 51, 15, 64. Chief Justice a'Beckett took two years' sick leave from 1853, and returned to London.

67 Ibid 70.

68 Ibid 105-106.

69 Charles Francis, *Stawe/1, Sir William Foster (1815-1889)* (1976) Australian Dictionary of Biography <http://adb.anu.edu.au/biography/stawell-sir-wi11iam-foster-4635>.

70 Reynolds, above n 51, 102.

The Attorney-General George Higinbotham (who later became Chief Justice) wrote to the Governor disapproving of a judge communicating directly with the Governor. The Attorney-General referred to judges as 'officers of his department', and in order for judges to remain within the system of responsible government, required that they communicate with the Attorney-General. The Governor in Council then resolved that the correct procedure was for judges to address communications to the Attorney-General when wishing to bring any matter to the attention of the Governor, Government or Executive Council.

In a transformation a little like Sir William Stawell's, after Higinbotham became Chief Justice he recanted on his view that Supreme Court judges were officers of the Attorney-General's department, but the legislature was more steadfast.[71]

This incident demonstrates that in their first clash, Westminster responsible government prevailed over judicial independence.[72]

The politics of the new law courts: 1860s and 1870s

As the government's coffers started to fill with gold rush money and Victoria was transformed 'from a minor pastoral settlement to the most celebrated British colony',[73] demands for improvements to the Supreme Court or for a new court altogether were irresistible.[74]

Redmond Barry opposed the construction of a new court. He preferred for new accommodation to be added to the existing court at the corner of La Trobe and Russell streets.

In 1863 a parliamentary select committee was established to report on the state of the existing Supreme Court. At that time the existing Court was unable to accommodate various court officers, who instead worked from rented premises external to the Court. The judges were invited to comment on the adequacy and convenience of the existing court buildings. Only Stawell and Barry acted on the invitation. Neither supported moving the Court.

Throughout the 1860s Barry campaigned for improvements to the existing court rather than the construction of a new court. He did, however, express a preference for location in the event that the Court was moved. His view was to prove prescient.

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71 Scott, above n50, 61.

72 This is not to say that the judges of the Supreme Court of Victoria were not independent. Rather, the incident shows that judicial independence was not developed to its full extent due to the needs of responsible government.

73 Serie, above n 58, 369.

74 The following brief description of the move to 210 William Street is taken from Reynolds, above n 51, 77-82.

In 1870, despite the opinion of the judges, the select committee decided to move the Supreme Court to William Street, where it now sits. By this time, the western end of Melbourne had become the city's business hub, due in part to its proximity to the railway and the wharves. The 210 William Street locale was originally intended for the Victorian Parliament, so it is fitting that the third arm of government was moved to such a site. The chosen site was the site Redmond Barry had preferred if the court had to relocate.

Following the decision to build a new court, a Royal Commission was established to suggest, consider and select the plans for the new law courts. The commission comprised the Supreme Court judges, the attorney-general, the solicitor-general, some parliamentarians, and others. As with many other public buildings in Victoria, there was a public competition for the design of the new law courts, based on the brief from the Royal Commission.

The new law courts, which also housed the County Court, were completed in 1884.

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The *Judicature Act 1883* (Vic)

Several Acts passed in the second half of the 19th century increased the judges' power to regulate the operations of the Court, first among them the *Judicature Act 1883* (Vic) ('the 1883 Act').

The 1883 Act contained a schedule of 'Rules of Court' which came into operation on the commencement of the Act. Section 34 of the Act conferred rule-making power on the judges in the following terms:

> *From and after the passing of this Act, the Court may at any time, with the concurrence of* a *majority of the Judges thereof present at any meeting for that purpose held, alter and annul any Rules of Court for the time being in force, and make any further or additional Rules of Court for carrying this Act into effect ...*

In terms of administration, the most significant contribution of the 1883 Act was the creation of the Council of Judges. Section 54 said:

> *A Council of the Judges of the Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days* as *shall be fixed by the Chief Justice, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force ... Any Extraordinary Council of the said Judges may also at any time be convened by the Chief Justice.*

The Council of Judges continues to meet in accordance with its statutory obligations. The Council of Judges is the collegiate forum at which the policy making administrative powers of the judges are exercised or delegated. The meetings are chaired by the Chief Justice and business of the Court is attended to and policy decisions are made. These days the agendas are substantial. Mostly, the Council_ of Judges meets quarterly or more frequently as

necessary. In doing so, the current Judges of the Supreme Court of Victoria perpetuate an institution formed over 130 years ago.

In this institution, the Chief Justice of the Supreme Court is one among equals. The authority of the court and the power of controlling its affairs belong to all the judges collectively. [75] When not performing judicial duties, single judges revert to being a member of a court that consists of all the judges, and unless expressly delegated to a particular judge or committee of judges, administrative powers and court governance remain with the judges as a whole.[76]

The *Supreme Court Act 1890* (Vic)

The *Supreme Court Act 1890* (Vic) ('the 1890 Act') did not materially alter the administration of the Supreme Court. Rather, it was an Act to consolidate the law relating to the Supreme Court.

By s 10 of the 1890 Act, the number of judges of the Supreme Court was increased to six. The Civil List (the grant for the expenses of government) did not include the additional salaries needed. The balance was guaranteed bys 15 of the 1890 Act which appropriated any shortfall from the consolidated revenue of Victoria.

To this day the special appropriations component of the State budget meets the cost of judges, that is, judicial salaries. The ongoing costs of the Court are met through recurrent appropriations.

Public service legislation in 1883

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In 1883, the Victorian public service was overhauled, when the number of departments was reduced from the nearly 80 that had existed in 1886 to just 12. There was a Minister responsible for each. At this point, the Attorney-General became responsible for the Law Department. The administration of the courts thereafter became a matter for the Courts Branch of the Law Department,[77] which was to develop into a mega department.

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75 Justice 8 H McPherson, 'Structure and Government of Australian Courts' (1992) 1 *Journal of Judicial Administration* 166, 187.

76 Ibid, 171.

77 Scott, above n 50, 46.

This was the real transition away from autonomy to the executive model of court administration,[78] a model which persisted in Victoria until 30 June 2014, and a model which the executive inaccurately understood to be the 'traditional model'.[79]

Conclusions on the early days of the Court

Reflecting on the Court's administration in this period, and in particular the Supreme Court's rule-making powers, as consolidated by the 1890 Act, Professor Scott suggests that:[80]

> *...it is difficult to avoid drawing the conclusion that the judges were the persons upon whom responsibility fell for seeing that the Court was efficiently and effectively organised and that it was they who had the power to direct non-judic[al staff and, through the use of the rule-making power, the authority to make such changes to the organisation and administration of the Court as they thought necessary from time to time. Where legislative changes were required they had the power to draw this to the attention of the Governor.*

In effect, the judges were 'collectively the permanent heads of the Supreme Court department of government'.[81] The judges had power to make rules in relation to the functions of the few administrative officers attached to the Court, and in that way, could control them.[82] The English legislation on court officers inspired the Victorian provisions.[83]

The Council of Judges in this period was empowered to consider the working of the several offices and the arrangements relative to the duties of the officers of the Supreme Court, but, critically, Professor Scott says the 'judges rarely took seriously the invitation' to do so, and this might have been because they thought such matters were properly the responsibility of the Attorney-General and his department.[84] As such, the Council of Judges did not play its intended role.

The vigorous pursuit of responsible government and the consolidation in government administration then resulted in responsibility for the administration of the courts being assumed by the Courts Branch of the Law Department, for which the Attorney-General was responsible to Parliament. The Supreme Court may have had strong rule making powers and the ability

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78 The executive model has been the dominant approach in Australia to court administration. See Australian Institute of Judicial Administration, *Australian Courts: Serving Democracy and its Publics* {AIJA, 2013), 266.

79 Attorney-General Rob Hulls, *New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement* (Corporate Communications, Department of Justice, May 2004) 43.

80 Scott, above n 50, 34.

81 Ibid.

82 Besides the statutory rule making powers, the Supreme Court could exercise inherent jurisdiction to control its own officers, from solicitors to the Registrar and the humblest clerks. See McPherson, above n 75, 177-88.

83 Scott, above n 50, 30.

84 Scott, above n 50, 33.

to direct non-judicial staff,[85] but it had to rely on the executive for crucial elements such as finance and staffing.

100 years' vacuum: 1883 to 1983

The legislation in respect of the Supreme Court was consolidated in 1890, however, the administration of the Supreme Court did not materially change during the century following the 1883 Act.[86]

At the close of the 19th century, from 1897 to 1899, there was a Royal Commission for Inquiring as to the Means of Avoiding Unnecessary Delay and Expense and of Making Improvements in the Administration of Justice in Victoria. The Royal Commission's Report dealt mainly with procedural matters and only indirectly touched on court administration.[87]

The administration of the Supreme Court did not develop over the years pursuant to any logical process. Chief Justice of Victoria from 1974 to 1991, Sir John Young explained the haphazard development in the following terms:[88]

> *Measures were taken from time to time to meet what were perceived to be some pressing needs but, on the whole, things just drifted along. One of the reasons for that was that hitherto judges have taken no interest in the administration of the courts and indeed they have, in the past, generally regarded it as being rather beneath them.*

In his article, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence', Justice Richard McGarvie likened the judges of this period to a 'certain king of France' who roasted away in front of a fire because he did not deign to move his seat; a task which belonged to an absent functionary.[89]

Chief Justice Young said the judges in this period put themselves in the hands of the executive, and this created a vacuum in court administration. His Honour said that during this period, the attitude was that 'the public service, the executive branch, should provide what the courts

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85 Chief Justice John Young, 'Who Should Run the Courts?' (Speech delivered at the Sir Leo Cussen Memorial Lecture, 8 November 1991) <http://www.leocussen.edu.au/resources/Lecture%206%20Young%201991.pdf>.

86 A major event in the history of the Supreme Court of Victoria occurred in 1884. The Court moved from the corner of La Trobe and Russel streets to its current address at 210 William Street. A detailed account of the construction of the Court at 210 William Street and the move to it are, however, beyond the scope of this article.

87 Scott, above n 50, 16.

88 Chief Justice John Young, 'Opening Speech' (Speech delivered at the AIJA Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive, 10-11 August 1985) <http://www.aija.org.au/online/Pub%20no07.pdf>, 3.

89 Justice Richard E McGarvie, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) 1 *Journal of Judicial Administration* 236, 244.

needed to enable them to decide cases'.[90] It was for the judges 'to ask for what they wanted',[91] as they best knew what the courts needed, and it was considered that the judges were 'entitled to be very i:::ross'[92] if their requests were not met promptly. However, the judges were 'very modest in their demands'.[93]

The position boiled down to this: the Department thought it unnecessary to do anything unless asked, and the judges asked for little, so little was done. This produced a significant vacuum in Supreme Court administration.

There are several reasons why the judiciary did not step in and assume some responsibility for administration:

a) The relationship between the Attorney-General and the administration of the Supreme Court was unclear.

b) There was general resistance to change.

c) Many judges were not interested in court administration. They thought it beneath them and a waste of judicial time.

d) Some judges believed that being involved in administrative matters threatened their judicial independence and impartiality.

e) In common law jurisdictions, it has generally been assumed that a strict distinction can be drawn between judicial functions and non-judicial functions.[94] This was a significant hurdle to new thinking on court administration.

f) Some judges think that because they are not trained as administrators, they would be ineffective in administering the court.

g) Judges and lawyers tended to think that legislation, rules of court and rules of practice took care of the planning and organisation required in the Supreme Court, and no further attention was needed.[95]

However, there were some developments during this period that are worth noting here.

In 1968 the Supreme Court joined the County Court and Magistrates' Court in being administered by the Courts Administration Division of the Attorney-General's Department.[96]

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90 Chief Justice John Young, 'Opening Speech' (Speech delivered at the AIJA Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive, 10-11 August 1985) <http://www.aija.org.au/online/Pub%20no07.pdf>, 3.

91 Chief Justice John Young, 'Opening Speech' (Speech delivered at the AIJA Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive, 10-11 August 1985) <http://www.aija.org.au/online/Pub%20no07.pdf>, 3.

92 Chief Justice John Young, 'Opening Speech' (Speech delivered at the AIJA Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive, 10-11 August 1985) <http://www.aija.org.au/online/Pub%20no07.pdf>, 3.

93 Chief Justice John Young, 'Opening Speech' (Speech delivered at the AIJA Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive, 10-11 August 1985) <http://www.aija.org.au/online/Pub%20no07.pdf>, 3.

94 Scott, above n 50, 3.

95 Scott, above n 50, 106-7.

96 Alan Barnard and Glenn Withers, *Financing the Australian Courts* (The Australian Institute of Judicial Administration Incorporated, 1989) 32, 34.

This then turned into the Courts Management Division of the Law Department. Before 1968, the Supreme Court was administered through the Attorney-General's head office.[97] The Attorney-General's Department had a permanent secretary at its head, and a deputy secretary who was responsible for the Courts Management Division. The Courts Management Division depended on other divisions of the Department for support.

In this period the Supreme Court judges forgot and neglected the common law principle that the judges collectively are responsible for the administration and operation of the court.[98] The judicial arm of government 'failed to organise itself and failed to assert itself in the manner necessary for the preservation of judicial independence in the modern democratic world'.[99] Due to the political necessity of having operational courts,[100] the executive stepped in and assumed the relevant responsibilities.

In 1985 Chief Justice Young said it was time to remedy the vacuum that was created between 1883 and 1983. In the 1980s, that is precisely *What* the executive and the judiciary in partnership set out to achieve.

A decade of discussion, partnership and experimentation

Increased interest in judicial administration

A starting point for the increase in momentum for judicial court administration was the Coombs Report of 1976.

The Coombs Report was the product of the Royal Commission on Australian Government Administration. Commissioner Professor Enid Campbell said:[101]

> *It does not appear compatible with the constitutional status and responsibilities of the courts that they should be beholden in any way for their administrative support and servicing on* a *department of the executive branch, and especially* a *department whose minister happens to represent the Crown* as *litigant, and which is the general legal services department for the executive branch* as a *whole.*

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97 Ibid.

98 Richard E McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1 *Journal of Judicial Administration* 3, 22.

99 Justice Richard E McGarvie 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) 1 *Journal of Judicial Administration* 236, 243.

100 McGarvie, above n 98, 25. See also Lou Hill, *Constitutional and Managerial Principles of Judicial Court Governance: Implementation in the State of Victoria* (LLM Thesis, University of Melbourne, 1995) 43.

101 Royal Commission on Australian Government Administration, *Royal Commission on Australian Government Administration - Report* (Australian Government Publishing Service, 1976), Appendix Volume 3.G: The Administration of the Courts, 341 cited in Scott, above n 50, 94.

The major push for judicial court administration came in the 1980s. The Australian Institute of Judicial Administration (AIJA) became active in about 1982,[102] and this gave occasion for several influential judges to speak on the topic of judicial independence and judicial court administration.

Alongside this more complete understanding of judicial independence was a growing interest in the explosion of litigation in the 1980s.

This explosion put pressure on the courts and court systems. As a result, politicians and the executive started to put more pressure on the courts and judicial officers to be more efficient, to increase 'productivity', and to justify requests for extra funds and staff. This is in contrast to the previous situation, where if there were unacceptable delays in dealing with cases, the executive was expected to appoint more judges and support staff to fix the situation.[103]

In this era before case management hit Australian courts, courts had a laissez-faire approach to conducting court business.[104] They would only start to act once the parties to litigation indicated they were ready for the courts to act. The court relied on the parties' lawyers to ensure the case was disposed of as expeditiously as possible.

The introduction of case management meant the courts started to become more involved in management activity. To do this, judges needed the help of non-judicial court staff. The philosophy of case management involved the rejection of the traditional separation of the roles of judge and administrator. The judge was no longer seen as a passive referee. Case management brought the judiciary into administrative territory.[105]

1984: Civil Justice Committee Report

In December 1983, the Victorian Government established a Courts Administration Division as a separate division of the Law [?epartment with a new Deputy Secretary for Courts. The top end of the Courts Administration Division was reorganised.

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102 AIJA is a research and educative institute, similar to a university, which concentrates on judicial administration and improvement of practical judicial skills. The initial support for and momentum behind AIJA came from the 1973 Supreme Court and Federal Court Judges' Conference, and the judges there in attendance. AIJA's continued contribution to judicial administration was guaranteed in 1985 when all governments in Australia accepted the responsibility of making annual contributions to the AIJA to enable it to have a full-time secretariat run by an executive director and staff. See Justice Richard E McGarvie The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence' (1992) 1 *Journal of Judicial Administration* 236, 259, 264.

103 Thomas W Church and Peter A Sallmann, *Governing Australia's Courts* {The Australian Institute of Judicial Administration Incorporated, 1991) 2-3.

104 Peter A Sallmann, 'Managing the Business of Australian Higher Courts' (1992) 2 *Journal of Judicial Administration* 80, 80.

105 Church and Sallmann, above n 103, 4.

The most significant development since the 1883 Act was the Civil Justice Committee's *Report to the Attorney-General Concerning the Administration of Civil Justice in Victoria* ('the Report') published in September 1984.[106] The Civil Justice Committee was formed following a preliminary study prepared by Professor Ian Scott for the Victoria Law Foundation. The preliminary report suggested that a number of matters needed further investigation. The Civil Justice Committee was established as a joint Law DepartmenWictoria Law Foundation project.

The Civil Justice Committee's report recommended that the courts be administered by a partnership of the judiciary and the executive. The Committee was chaired by Chief Justice Young. Also on the Committee were Chief Judge Waldron of the County Court, the Acting Secretary to the Law Department, a barrister, a solicitor, and two non-lawyers experienced in management and administration theory.

The Report did not directly deal with the question of who should run the courts, as it considered that administration required a partnership between the judiciary and the executive. This makes sense because in the 1980s, the debate was still polarised in terms of responsible government and judicial independence. The judiciary argued that there could be no judicial independence without administrative independence, and the executive argued there could be no accountability or responsible government with administrative independence. There appeared to be no middle ground.

Accordingly, the Report focused on how to improve the partnership between judiciary and executive.[107] The partnership model was a mechanism of experimentation, with the finer details to be worked out progres-sively.[108]

The Committee recommended that the division of responsibility between the Council of Judges· and the Courts Administration Division of the Department be better defined to ensure judicial control of staff, case management and court records.[109] Its major recommendations in respect of the Supreme Court concerned the Council of Judges, a new Executive Committee, the Prothonotary, a new Chief Executive Officer, and a new Courts Advisory Council.

Following the recommendations in the Report, the role of the Coµncil of Judges was strengthened. The Report recommended the Council have primary responsibility for the operation and conduct of the Court. The Council started to meet more frequently. From 1983 the Council of Judges held the view that the Council of Judges was the ultimate authority responsible for the Supreme Court's administration and operation.[110]

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106 Victorian Civil Justice Committee, *Report to the Honourable the Attorney-General Concerning the Administration of Civil Justice in Victoria* (Government Printer, 1984).

107 Scott, above n 50, 74.

108 Ibid116-77.

109 Victorian Civil Justice Committee, above n 106, vol 1, 296-362

110 Church and Sallmann, above n 103, 19.

This strengthening of the role of the Council of Judges required the judges to accept responsibility for the operation of their court.[111] It required the judges to accept that aside from hearing cases, they must also spend time on the responsibilities for the administration and operation of the court.[112] The Report said the judiciary should be responsible for case management, listing, rules, and other matters intimately connected with the litigation process.

The Report recommended that, in addition to the Supreme Court's Council of Judges, there be an Executive Committee. An . Executive Committee was then established in 1985, comprising the Chief Justice and six other Supreme Court judges each serving for three year periods. The Executive Committee met weekly, and its decisions were usually affirmed at the monthly meetings of the Council of Judges. Minutes of meetings were circulated to all the judges of the Supreme Court. Each puisne judge on the Executive Committee was assigned a portfolio._Initially, the six portfolios were Judicial Administration, Staff, Buildings and Facilities, Legislation and Rules, Planning and Development, Court Records, and Computers. The Executive Committee decided on the implementation of Council decisions and made decisions on day-to-day administration matters.

Under the partnership model, the executive was to have responsibility for budget, staffing and accommodation. However, this did not fall to the Courts Administration Division of the Law Department. Rather, the budgeting, financial management, IT systems, HR and personnel functions were handled by a separate • section of the Law Department that provided management services to the entire Department.[113]

The budget was determined by the Department on a department-wide basis. The basic operating funds for each government department were based largely on a non-negotiable formula (last year's budget less a productivity bonus (which represents the saving of costs by virtue of an expected increase in efficiency} plus an adjustment for inflationary changes). Then there was an off budget competition process where government units fought for items on their wish list. The Attorney-General's Department would rank court-related budget proposals against each other, and then against other areas of department responsibility. Judicial participation in this process was limited. Many judges were not interested in budget matters; some because they thought it was not related to judicial tasks, and others because they thought judicial input was ignored in any case.[114]

The incumbent Attorney-General at the time of the 1984 Report, Mr Jim Kennan, had suggested a Courts Commission, but the Civil Justice Committee ultimately postponed consideration of such a structure. It was decided that the Committee could consider the idea furth.er in future. Under Attorney-General Kennan's proposal, the Courts Commission would

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111 Justice Richard E McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63 · *Australian Law Journal* 79, 90-91.

112 McGarvie, above n 98,, 40-41.

113 Church and Sallmann, above n 103, 18.

114 Ibid 23.

have representatives from the judiciary, the profession and the Department, and would be responsible for the administration of all courts in the judicial hierarchy. The Civil Justice Committee opted for the stepping stone solution of a partnership. It said that if its recommendations proved ineffective, a Courts Commission could still be considered.

I note that Justice McGarvie played an important role in the recasting of the administrative structure for the Supreme Court. In a now public letter to the Chief Justice, Justice McGarvie was trenchantly critical of the way Chief Justice Young administered the Supreme Court.[115] He called for reform but in doing so attacked the Chief Justice personally.[116] This has been discussed in some quarters such as the autobiography of Justice Ken Marks[117]. Marks described a letter sent by Justice McGarvie to the then Chief Justice Young as being very provocative. I am told by surviving judges from the time that the letter of Justice McGarvie shocked many of the judges, who were dismayed by the disrespect and discourtesy shown to the Chief Justice albeit some actually agreed with the substance of the letter At the end of the day it really does not matter save to note that at the time the letter was deeply divisive.

It certainly led to change, however what is not entirely clear is whether that letter was the sole impetus. There are indications, as already described, that Chief Justice Young was already working with the Victoria Law Foundation, particularly with the assistance of Professor Scott, to achieve a restructure and to garner greater power and authority for the Court itself. There is also socialcontext to the letter sent by Justice McGarvie to Chief Justice Young. In 1982, John Cain led the state Labor party to government after many years in opposition. Over its decade in power, the Labor government appointed individual judges who came from different backgrounds to the judges already appointed. Although he was appointed by a Coalition government, Justice McGarvie was a known associate of the Australian Labor Party prior to his appointment. Justice Nathan is another example, having worked for both Prime Minister Whitlam and then Premier Cain prior to his appointment, latterly as counsel assisting the Attorney-General. The presence of greater diversity in the backgrounds of judges no doubt contributed to a desire by some for change.

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And importantly, that change was achieved. In 1991, Justice McGarvie's view of Chief Justice Young's work was so altered that he stated 'Sir John Young has made a greater contribution to his community than any other Chief Justice of Victoria has made in that capacity'.[118]

1991: Judicial Council Steering Committee

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115 The McGarvie letter was not publicly revealed until the Hon Ken Marks AM published his biography, The author of this paper has been informed by a retired judge on the court at the time that Chief Justice Young answered Justice McGarvie's letter. However, a copy of the reply has not been located.

116 Justice Richard E McGarvie, *Letter to the Chief Justice John McIntosh Young* (30 April 1984), excerpted in Simon Smith (ed), *Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016* (Allen & Unwin, 2016), 151.

117 Ken Marks, *In Off the Red* (Black Inc, 2005), 281-5.

118 Simon Smith (ed), *Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016* (Allen & Unwin, 2016), 152.

Chief Justice Young, after experiencing the problems with the partnership model, with a government that put pressure on the court to change administration of the court, to reduce staff, to reduce or redeploy the meagre personal staff of judges, announced a project to look at the feasibility of an independent statutory body tentatively named the Victorian Judicial Council.

In 1991 a Judicial Steering Committee was established. It comprised the Chief Justice, three Supreme Court judges, three County Court judges, three Magistrates, the Chairman of the Bar Council, the President of the Law Institute, and the Secretary to the Attorney-General's Department. It was hoped this would lead to a Victorian Judicial Council, which would have virtually the sole responsibility for managing the courts, and would be accountable to the public for the conduct of the judicial system. The Steering Committee looked at the executive model, the autonomous model and the separate department model. It had its last meeting in May 1992 and was then disbanded. The different tiers of courts could not agree on the appropriate structure. The Supreme Court wanted each of the three tiers of courts to have its own one line budget administered by its own judges' council, but the County Court and Magistrates' Court wanted a single Judicial Council to oversee one common budget and one administrative structure. The Supreme Court judges were worried they could be outnumbered in an overall Council, and that they would lose resources to the other tiers. This was consistent with the Supreme Court's advice to the Civil Justice Committee in 1984 that the Supreme Court should be the ultimate authority responsible for its own administration.

Concession and new directions

On 12 September 1994, when delivering a lecture at the University of Melbourne entitled 'The Law, Lawyers and the Courts', incumbent Attorney-General Ms Jan Wade said the existing court management/administration system was not greatly changed from earlier times, despite the ten years of significant interest in court governance. She then outlined a new policy of self-governance for Victorian courts.[119] The Government proposed a new arrangement by the end of 1995, under which formal responsibility for court governance would be handed over to the courts.

In a separate discussion paper in 1994 the Attorney-General noted '[f]ew stakeholders have ever expressed much satisfaction with the Civil Justice Committee partnership proposal as it has worked in practice'.[120] It was thus acknowledged that it was time for the work done in the 1980s to be progressed to an autonomous model of judicial court administration.

The covering letter to the discussion paper stated directly that the divided management relationship between the executive government and the courts had never been very easy and

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119 The Hon Jan Wade **MP,** Attorney-General of Victoria, *The Law, the Lawyers and the Courts,* (Dean's Lecture on Law Reform, The University of Melbourne, 12 September 1994). The lecture is reproduced in Appendix B of Hill, above n 100.

120 Hill, above n 100, Appendix B.

remained that way.[121] Attorney-General Wade said that support for the judicial control of court administration had gradually grown due to the need for a responsive and accessible justice system, the view that competing priorities for expenditure of the courts' budget were best assessed by the courts themselves, and the split accountability of the Supreme Court's CEO being unsatisfactory to both the courts and the executive.

Ultimately, the efforts of the Attorney-General in 1994 and 1995 did not produce the desired reforms. In all likelihood this was due to the retirement of Chief Justice Young who, for years, had been the driving force pushing the courts into and the executive out of the administrative vacuum.

Consideration of the attempts made by Chief Justice Young for over a decade to lead not just the Supreme Court but all the Victorian courts, to a more acceptable and satisfactory level of independence from the executive impresses how demanding and difficult the task must have been. This is particularly so in the context of sitting regularly in Court as the Chief Justice did and iri overseeing the operation of the Supreme Court. On reflection, it might be said that Chief Justice Young was the father of the reform of court governance in Victoria.

In 2004, the issue of court governance was agitated again when then Attorney-General Rob Hulls and the Department of Justice identified court governance as an issue for attention in the ministerial statement *New Directions for the Victorian Justice System 2004-2014.* The government's objective was to map a ten year plan of potential developments in the judicial system from an executive point of view.[122] The judiciary set up a companion project called the Courts Strategic Directions Project.

In 2004 the Victorian courts and the Victorian Civil and Administrative Tribunal ('VCAT') published the *Courts Strategic Directions Statement.*[123] The development of appropriate governance arrangements was the first critical issue identified:[124]

> *Appropriate governance arrangements are essential to maintain the separation of powers, to protect the independence of judicial officers and their capacity to perform their duties. It is also vital in facilitating the effective co-ordination and administration of the Courts and VGAT and to enhance community confidence in the justice system.*

Thus the first recommendation of the statement was:[125]

> *Governance should be reviewed to design arrangements suitable for Victoria which strike a proper and practical balance between the need to maximise the independence and operational effectiveness of the Courts and VGAT and the*

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121 The Hon Jan Wade MP, Attorney-General of Victoria, *Reforming the Legal Profession: An Agenda for Change - Discussion Paper* (Victoria Department of Justice, 1994).

122 Australian Institute of Judicial Administration, above n 78, 273.

123 Courts Strategic Directions Working Group, *Courts Strategic Directions Project* (1 September 2004) 11.

124 Ibid

125 Ibid.

> *constitutional responsibilities of the Parliament and the Executive, combines authority with responsibility and facilitates appropriate co-ordination and integration within the Judicial branch. To that end, the new Canadian model should be considered.*

The State government failed, however, to enter into enduring discussions about court governance, and the judiciary's 2004 statement was not actioned.

This may be attributed to a number of reasons. First, disquiet and dissatisfaction on the part of the Attorney-General and the Department of Justice with the views expressed by the Victorian Courts as to the current status and operation of Court administration under the executive model. Secondly, a predisposition to the view that the Victorian courts and tribunal were not capable of self-administering and the arrangement would more likely than not lead to lack of reform, inefficiency and over-expenditure. So the statement fell into abeyance.

A further influential report looking at the governance of Australia's courts from a 'managerialist' perspective was published by the AIJA in 2004.[126] This report advocated a model which combined features of the South Australian Courts Administration Authority model and the Canadian Courts Administration Service model:

> *... vesting accountability for court administration in a chief administrator who is overseen by an entity, in which each of the courts is represented by its CJO [Chief Judicial Officer], which issues collectively determined directives to the CA (Chief Administrator).*[127]

The conclusion of the AIJA report was subject to the qualification that in the larger states, including Victoria, it was recommended that joint control be by two of the three courts rather than all courts.[128]

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Administration of the Supreme Court on the eve of Court Services Victoria

The general state of affairs

It was not until 2010 that genuine recognition was given to the need to implement some of the proposed changes. In the legd-up to the 2010 state election, the Victorian Coalition announced its policy that, if elected, it would take action on the reports.

By this point, the need for change had reached critical heights.

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126 John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerialist Perspective* (Australian Institute of Judicial Administration, 2004).

127 Ibid 93.

128 Ibid 87.

Although from 1984, the model of court administration in place in Victoria rriay have been promoted as a partnership model, it really fell within the definition of an executive model.

The Supreme Court was described in the State budget as a 'business unit' within the Department (along with corrections, emergency services, police, consumer affairs and other divisions).[129] It was treated as a 'unit or functionary within the Department of Justice',[130] rather than as the third arm of government.

There were very significant and invasive controls. The executive controlled court staff, buildings, IT systems and financial allocations. The judiciary had little or no control over those matters.[131] Court administrative staff were employees of the Department of Justice. Court officers and staff were employed under the *Public Administration Act 2004* (Vic). The Secretary of the Department of Justice, as the relevant public service body head, employed the Supreme Court's CEO. The CEO was accountable to the Secretary of the Department of Justice, though by convention the CEO was subject to the direction of the Chief Justice.

The judiciary had some involvement in court administration, but such involvement was based only in part on legislation, and mostly on convention, cooperative effort and negotiation.[132] For example, the court through the Chief Justice was responsible for the assignment of judicial workload, the organisation of sittings and lists, the allocation of court rooms and the immediate direction of administrative staff carrying out those functions. Further, the courts controlled access to and internal use of the buildings they used. The buildings occupied by the Supreme Court were owned by the Crown through the Department of Treasury and Finance. The sites were managed by the Department of Justice on behalf of the Crown. The quality of the facilities was subject to the funding decisions and the priorities of the Department.

In terms of spending, the executive determined priorities within the court, between the courts, and between the department and courts. When it came to funding, the Court was put in the position of having to compete with the executive's political priorities.[133]

The Department of Justice had as its stated vision 'One Justice'. This attitude prevented the Department from seeing the courts as the third arm of government. Justice Tim Smith noted

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129 Justice Bill Ormiston, 'Farewell of the Honourable Mr Justice Ormiston' (Speech delivered at the farewell ceremony for Justice Ormiston, 22 February 2006) quoted in Justice Anthony North, 'My Court Car is a Helicopter!' [2006) *Federal Judicial Scholarship* 14.

130 Justice J D Phillips, 'Farwell of the Honourable Mr Justice Phillips' (Speech delivered at the farewell ceremony for Justice Phillips, 17 March 2005) quoted in Justice Anthony North, 'My Court Car is a Helicopter!' [2006) *Federal Judicial Scholarship* 14

131 Justice Tim Smith, 'Court·Governance and the Executive Model' (Judicial Conference of Australia Colloquium, Canberra, 2006) 5.

132 Gary Brown, 'Court Governance: the Owl and the Bureaucrat' (1999) 8 *Journal of Judicial Administration* 142, 150.

133 See also Chief Justice Marilyn Warren, 'The Aspiration of Excellence' (Speech delivered at the Judiciary of the Future - International Conference on Court Excellence, Singapore, 28-9 January 2016).

that in the proper constitutional framework the only entities with which the courts are in 'partnership' are the executive and Parliament.[134]

As Justice Smith described it, the executive model produced quite a conundrum. Executive models rely on a cooperative relationship between court personnel and the administering department. But the very model threatened the relationship it relies on. Under the model, the Supreme Court had to decide whether to be 'difficult', or whether to put up with unsatisfactory situations (for example, inadequate data security) in order to maintain the relationship. When the judiciary did decide to be 'difficult', it had to spend time and energy negotiating with the executive. From the Department's perspective, judicial officers and court staff raised issues and expected the executive to respond, without knowing how difficult those demands may be to meet.[135]

The close of the chapter of executive model court administration in Victoria: separation of the courts

On 23 November 2010, just four days before the State election, the Victorian Coalition announced that it would

a) establish a new Courts Executive Service, independent of departmental or political control, which would provide the executive support for all Victorian courts and for VCAT; and
b) transfer the staffing and resources currently in the Courts Division of the Department of Justice to the new Courts Executive Service.

The then Leader of the Opposition Mr Baillieu said:

> *Department of Justice officers should not be able to access the email systems and computer files of judges, and court administrative staff should be appointed by and accountable to the courts, not the Department of Justice and the Attorney-General.*

The reforms were implemented under Act No 1 of 2014, the *Court Services Victoria Act* (Vic). The reform separated the Victorian courts, in particular for the present, from the executive arm. An independent statutory authority called Court Services Victoria commenced on 1 July 2014. On the launch of Court Services Victoria, I said:

> *By 1851, separation [from NSW] was announced and the Colony of Victoria came to be. Bonfires were lit and celebrations were held under the Separation Tree. In 1852 by an Act of the Legislative Council the Supreme Court of Victoria was established. Victorian history was made.*
>
> *In a sense, we should light bonfires_ and go to the Separation Tree in the Botanical Gardens and celebrate today.*

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134 Smith, above n 131, 9.
135 Smith, above n 131, 14.

Court Services Victoria has been in place now for almost two years. Its transfer of power to the Victorian Courts and judiciary has been seismic. The Supreme Court played a leadership role in establishing Court Services Victoria. The Victorian Chief Justice chairs a council that is constituted by the heads of jurisdiction and lay members whom the council appoints. This system of self-governance by the Victorian courts is a long way from the colonial administration of the 19th century and the executive controls of the 20th century. Through Courts Services Victoria the legacy of Chief Justice Young of court self-governance was fulfilled.

Conclusion

For 175 years, the Supreme Court has been an active and influential member of society. In Port Phillip and later across all of Victoria, it has been an institutional and social leader. It has dealt with the financial insolvencies and collapses as they arose, with the serious criminal cases and ensured the protection and safety of the community, it has provided jurisprudence on human rights (Victoria being the only state of the federation that has introduced a human rights charter), it has imposed and then later opposed capital punishment, led structural reform, and it has overseen the admission of all lawyers in the district and then the state (each year around 1,500 lawyers are admitted to practice in the Supreme Court of Victoria).

The Supreme Court has also, slowly but surely, helped to reframe the governance of all Victorian courts. Internally, it has not always operated smoothly. The relationship between the courts and the executive has been strained as each respectively jostled for autonomy or accountability. The introduction in 2015 of the self-governing model with Courts Services Victoria at its helm has been an historic step toward implementing a clear and effective line of management and in ensuring judicial independence.

Self-evidently, the Supreme Court has been an institution of constitutional and structural influence on the history of the colony and the state and will continue to be through Victoria's future.

There are three sig,nificant landmarks in Melbourne. The tower of Government House representing the executive arm, the dome of the Supreme Court of Victoria representing the judiciary and the (yet to be constructed) dome of the Victorian Parliament representing the legislature. These three landmarks are emblematic of the democratic structure of Victoria.