A truly common law

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On 1 January 2001 Australia celebrated the centenary of the establishment of the Commonwealth of Australia.

The common law system, which was in existence in the Commonwealth at the inception of federation in 1901, had endured in substantially the same form for centuries although, in England, it had recently been the subject of substantial reform through the passing of the *Judicature Act* of 1873. As Chief Justice Gleeson remarked recently, we inherited the common law of Australia from the common law of England at the time of European settlement. 'The word 'common' was a reference to the rules that applied to all citizens, the laws all people had in common…' [1]

'Excessive reliance on ADR carries the further risk that the development of legal principle will be stultified.'

Recognition of the desirability of eliminating formal obstacles to the substantial delivery of justice to the greatest extent possible was a pervasive theme of twentieth century justice. Procedural reforms were made directed to the manifestly admirable principle of improving the efficient delivery of justice. The most significant of these in New South Wales was the passing of the *Supreme Court Act 1970*. That Act was the product of a work by the New South Wales Law Reform Commission directed to achieving:

- the simplification of court procedures;
- the reduction of technicalities
- eliminating unnecessary work in the conduct of proceedings in the court; and
- to have regard to the desirability of reducing the costs of court proceedings.[2]

One of the principal barriers to justice, which the new Act was intended to overcome, arose from the division of the civil jurisdiction of the Supreme Court into various 'sub-jurisdictions': common law, equity, matrimonial causes, probate, protective and admiralty. A plaintiff failed if proceedings were commenced in the wrong jurisdiction, could only obtain the relief which was available in that jurisdiction and could not obtain incidental relief outside the jurisdiction.[3] This technical obstacle to obtaining substantial justice was overcome by s51, s54 and s55.

Further recognition of the need to deliver substantial justice 'in one line' can be seen in s32 of the *Federal Court of Australia Act 1976* (Cth). It conferred jurisdiction on the Court 'in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked'.

Reforms which recognised the necessity to deliver substantive justice, unimpeded by formal obstacles, were an important step in ensuring public acceptance of the justice system. Litigation has increased, we are told, to an extent which is placing great strains on the justice system. No doubt that increase reflects a society which has becoming increasingly conscious of individual rights and their judicial enforcement. Reforms to minimize such strains have also been implemented: the substantial elimination of juries in civil cases and even some criminal cases (in the Supreme Court). In 1983 the *Arbitration (Civil Claims) Act* (NSW) was passed, empowering the Supreme, District and Local courts to appoint arbitrators who could hear matters referred under the legislation of each court. Last year the Supreme Court adopted an overriding purpose requiring litigation to be dealt with in a 'just, quick and cheap' manner. Case management has become a high priority: judges are charged with the responsibility of ensuring the expeditious dispatch of litigation.

With the exception of the introduction of the statutory arbitration procedure, the reforms which have been implemented have been effected within the court system. Although there have been complaints that case management increases the cost of litigation, there is no empirical evidence, as far as I am aware, of this assertion. Proponents of case management tend to the view that efficient case management ensures better definition of issues, fewer surprises in the conduct of cases and fewer

adjourned hearings. Properly administered, that is no doubt the case.

The introduction of the statutory arbitration system heralded the arrival of alternative dispute resolution – the buzzword of the nineteen nineties in particular. The objectives of ADR are commendable. The Bar has supported it. Each year the Bar Association nominates arbitrators and more recently mediators and early neutral evaluators to participate in such processes. The Association has taken the view that, within reasonable limits, the use of such processes enhances the courts' ability to administer justice efficiently.

At the same time, the Association is concerned that the development of such processes should not supplant the delivery of justice through the court system. The importance of a strong, independent and open court system cannot be under-estimated. To quote Chief Justice Gleeson again:

> The rule of law depends upon the impartial administration of justice according to law. Citizens, in the last resort, look to the courts to uphold their rights, and to enforce their lawful claims against other citizens, or against governments. Governments look to the courts to enforce the obligations of citizens and to restrain – and where necessary, punish – unlawful behaviour.[4]

Excessive reliance on ADR carries with it risks that the courts will only hear the largest cases and that the public will lose touch with the courts as a mechanism through which their rights can be vindicated. Cases disposed of through ADR take place in an environment far removed from modern demands of transparency and accountability. They take place in private. The arbitrators, mediators and evaluators are not subject to the *Judicial Officers Act 1986* nor, most probably, to Part 10 of the *Legal Profession Act 1987*. They also carry the risk of increasing the cost burden, because the first effective challenge to an arbitration is a rehearing which takes place on the assumption the arbitration did not happen. (That in itself would leave the more cynical gasping!)

Excessive reliance on ADR carries the further risk that the development of legal principle will be stultified.

While some may regard these risks as more apparent than real, or indeed as 'unreal', they pose challenges to a country which, since European settlement, has accepted the common law system as one of the cornerstones of society. That system of law depends upon the development of case-based precedent. Removing substantial numbers of cases from the system, particularly those which impact upon the lives of the average member of the community, carries the risk that their cases will be judged, as time passes, by potentially out-dated standards. This should be avoided.

It should not be necessary to refer cases to ADR excessively if courts engage in effective case management, if governments recognise their responsibility to fund the court system effectively and if the legal profession co-operates in abiding by the Supreme Court's 'just, quick and cheap' guideline.

In that way we can ensure, in the twenty-first century, that the common law is still something the people have in common.

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1 2000 Boyer Lecture one '*A Country Planted Thick with Laws.*'
2 Introduction, *Ritchie's Supreme Court Procedure* [1003].
3 Ibid, [1012]
4 2000 Boyer Lecture six - *The Judiciary*.