# Litigation at Sunrise Breakfast
## Australian Plaintiff Lawyers Association
## Wednesday 1 December 1999

The Honourable Paul de Jersey, Chief Justice of Queensland

You have been invited on the basis I will address you on the Green Paper on Reform of the Legal Profession. I have already spoken extensively on this: maybe too much! My contributions are recorded on the Internet and in the latest "Proctor". The Proctor interview post-dated the setting of my topic for today. May I now have your indulgence to speak on other matters? I apologise to those who have not already heard enough about the Green Paper and came along especially to hear more. I will endeavour now to say something perhaps a little more interesting and not already published, but there will be time for questions later.

The Green Paper concerns change. For a profession regularly said to be slow itself to change, and slow to adapt to changes elsewhere in society, it is diverting to compare lawyers today with the profession of, say, 60 years ago, at the outbreak of World War II. Our Supreme Court in 1939 comprised only 7 judges, all of them males. Now we have as many as 24 judges, four of them female. There is no doubt that the judicial office was then attended by a degree of grandeur long since gone. There were, in 1939, only about 60 practicing barristers in Brisbane, compared with 498 State wide now; State wide there were then about 450 solicitors, now as many as 4,990. Also interestingly, there were then only 2 senior counsel in practice, now there are 94. Queensland then had no District Court it had been abolished in 1921 : now it comprises 35 judges spread over the State. The profession was comparatively miniscule, but publicly prominent, six decades ago.

Generally speaking, and most interestingly, many of the issues now confronting lawyers for presentation, and the judges for decision, are much more socially significant than the questions thrown up by the more black letter law on which six decades ago we were all asked to focus. The judges now, notably, resolve issues of human rights and high social policy, the rights of Aborigines especially, and courts have taken on the large and challenging burden of reviewing administrative decisions of the executive organs of government. As an interesting particular example, courts may now even be called on to review decisions concerning the treatment and management of prisoners. There has been a huge leap in the scope of litigation : cases take longer and are of wider general proportions, by contrast with what I understand to have been the fairly condensed scenarios of the 30s. The technological component is obviously new. And judges now participate in arenas which attract great public scrutiny : people are intrigued now, more than ever, with the administration of the criminal justice system, especially as we know with sentencing levels, and the decision whether or not to prosecute as with

Senator Mal Colston. Six decades have witnessed, not surprisingly, enormous changes in what we do, and the public perception of what we do.

Now these changes have had consequences. Notably, with the sorts of issues the judges now determine, the public is expressing much more interest in who we are: there is growing interest in the blend of gender, background and ethnic origin on the bench, expressed as recently as a fortnight ago; and of course especially at the level of the High Court, in the question of where judges may be expected to stand on issues of the day  conservatively or liberally? Assessments on these matters are not necessarily reliable, and it is I often think good for judges to disappoint expectations: their honest independence must prevail.

Judges are subjected now to unprecedented scrutiny in the way they actually carry out their work. The charge that they are "out of touch" is frequently leveled but rarely justified. No doubt judges sometimes incautiously lay themselves open to the charge, as with the notorious question during the hearing of a case in England: "Who is Bruce Springsteen?" (Harman J  *the Times*, 4 July 1965). We Judges all have upon appointment resolved to present ourselves as models of consideration and diligence, alive to the advice of Francis Bacon that: "Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well tuned cymbal" (On Judicature). One of the Theo Matthews  forensic fables describes the lawyer who resolved that should he be appointed to the Bench he would "avoid the errors and failings of some of his predecessors. In particular he would not indulge in foolish jokes, give vent to irrelevant observations about men and things, or hint that the Bar had sadly deteriorated since he had ceased to adorn its ranks". Later he became a judge. "Before the year was out the reporters in his court had recorded that a married woman was either a slave or a tyrant, ) and that the moral standards of artists and literary men were extremely low". (Forensic Fables by O, as quoted by Lord Cullen, Lord Justice Clerk, "The Judge and the Public" 5 July 1999, Third World Wide Common Law Judiciary Conference).

In adopting our modern approach, which is more forthcoming and accessible, we must ultimately be careful however not to undermine this basic premise: we are, like it or not, authority figures who "lay down the law". There is a subtle and difficult balance to be struck between the so called "ivory tower" and becoming "one of the pack". And even the essence of our court room approach is subject to continual re-examination : is the community best served by the so-called adversarial process? Is adjudication  as opposed to ADR  necessarily the bast avenue to follow? Is too much of our work presented in writing, with practical limitation on the capacity of an interested public to follow proceedings?

The last few decades have witnessed great change. We as a profession have accommodated it. More is to come, substantially more.

This morning I speak to "plaintiff lawyers". I hope I do not presume in listing some

of the concerns of plaintiff lawyers. If so, I presume only insofar as they appear reflected in your publication, *Plaintiff*. Your focus is of course litigation-based, and by necessity predominantly on outcomes. Concerns are the cost of bringing claims to trial, and proceeding through trial, the availability of remedies or compensation, and overall efficiency. These broad concerns are shared by both the judiciary and the legislature, and the current environment in which you plaintiff lawyers litigate is dramatically different from that of the past. Schemes such as the Compulsory Third Party Insurance Scheme have increased the availability of compensation for your clients, and the courts adoption of such processes as case management and alternative dispute resolution has substantially increased the efficiency of preparation and hearing.

The history of the Queensland Supreme Court s encouragement of ADR may be well known to you. The amendment of the *Supreme Court of Queensland Act* in 1991, formally to enshrine the applicability of ADR processes to our regime, was a product of Queensland Judges concern in the late 1980s about stagnating civil litigation. Cases often took years to progress from commencement to conclusion. So called case management was in its infancy, and the philosophical changes necessary to ensure its effectiveness were yet in a state of gestation. For years the rules of court had obliged the parties to personal injuries litigation in particular, to conduct what were called "compulsory conferences". By the late 80s, those conferences had become perfunctory, rarely occurring in any meaningful sense. In the result, cases frequently settled at the court door, with inexcusable dislocation of hearing lists and waste of judge time. Changing this attitude to ensure that only those cases which could not settle be brought to trial necessitated a cultural shift, for to that point opening negotiation was still regarded by many as implying that the client had a weak case. And so in the commercial court, we restored a focus on negotiation. The commercial cases judge would direct the parties to discuss their differences, face to face, and when I held that position, I frequently went myself into the well of the court and led the discussion. The success rate was surprisingly high, including often the settlement of major complex litigation. My own conclusion was clear: restoring a proper focus upon the negotiation of differences could substantially help litigants, saving time and money and angst; and incidentally substantially reducing the congestion of court lists. From your points of view, we see statutory support for this philosophy in the WorkCover and Motor Accident Acts with their focus on negotiation.

The provisions introduced into the *Supreme Court of Queensland Act* had these stated objectives: to provide an opportunity for litigants to participate in ADR processes in order to achieve negotiated settlements and satisfactory resolutions of disputes; to introduce ADR processes into the court system to improve access to justice for litigants and to reduce cost and delay; to provide a legislative framework allowing ADR processes to be conducted as quickly, and with as little formality and technicality, as possible; and to safeguard ADR processes, by ensuring that they remain confidential, and by extending the same protection to participants in an ADR process as they would have if the dispute were before the

Supreme Court. The provisions are no doubt familiar to you. They are now substantially replicated in the *Uniform Civil Procedure Rules.* They provide a framework for the process of mediation, a completely consensual process, and case appraisal, involving provisional adjudication of disputes which the parties may or may not accept. Provision is made for the Court to refer a dispute of its own motion, although of course a party may apply for an order or the parties may agree to refer off their own bat. You will be aware that the Court has proactively required mediation or case appraisal in all personal injuries actions, upon entry for trial; in addition this has been required for all cases transferred to our supervised case list broadly speaking, covering cases likely to require a trial or hearing of more than five days duration; and in all cases transferred to the Supreme Court from the District Court.

Last year, that is to 30 June 1999, a total of 11,406 initiating documents were filed in the Supreme Court at Brisbane. Of that total, 3,149 were writs. Referral notices were sent in 79 cases. Objection to ADR was lodged in only 12 of those cases. Orders referring to mediation were made in a total of 304 cases, and of those, 198 were by consent and 106 otherwise by court order. Of the 304 mediations, about half, 142, were certified as settled. Orders for case appraisal were made in 44 cases, and of those 44, 23 by consent and 21 otherwise by court order. 29 were certified as settled. In 9 cases, a party elected to go to trial. Many more cases were mediated without court order. There is no doubt that our enthusiastic use of ADR in the Supreme Court has led to a clearing of the lists to the point where we can now offer trial dates at a very early stage following readiness for trial. By the end of October 1999, there were only 100 cases on the civil callover list awaiting the allotment of trial dates, by contrast with as many as 300 only three years earlier; and now parties ready for trial can expect the allotment of dates within approximately three months.

I betray some latent concern about whether it is right that we expect litigants engaging in ADR at court direction to do so effectively at their own expense: there is a peculiarity about that process those disputants pay the mediator, whereas the State pays the judge. There may be a question whether we are thereby properly fulfilling our Charter. I have not yet formed a definite view on that matter, but raise it as a query.

It is also suggested from time to time that courts should run these systems fully in-house. If we are obliged to provide a full on-line dispute resolution service within the court, then it follows that we might be criticised for embracing this external facility. I was interested to observe during my visit to Japan a fortnight ago, that their in-house system of mediation involves a judge sitting with two relevant experts, for example doctors or engineers, to assist the parties to a negotiated settlement. I am not convinced that our own internal approach is inferior or unjustified. This extra judicial process may fairly be characterised as something appropriately complementary to the Court s traditional approach.

There would, further, be considerable practical difficulty were we to seek this adjunct entirely within the court system, comparably with, for example, the Industrial Relations Commission, where the commissioners carry out settlement conferences as well as the final hearings. On orthodox theory, judges could not properly conduct conferences and then go on to conduct any necessary trials, allowing that that would be inconsistent, ultimately, with the need to encourage settlements through frank exchanges. I am also not sure that conducting mediation on that regular basis would be consistent with a proper appreciation for the judicial role, and the need to preserve the authority of the office. Also, as has often been said, good judges do not necessarily make good mediators.

The judicial embrace of ADR, and the melding of those mechanisms into the traditional court processes is but one example in defense of this State s system against recent criticism of the "adversarial system". I personally baulk at readily embracing these days what has become the perjorative description of our system as "adversarial". The classical adversarial model involves minimal intervention by the decision-maker; the absence of fact-finding commissioned independently of the parties; party control of the proceedings, in defining issues and so on; an emphasis on winning contested issues, with an outcome favourable to one party, rather than securing an outcome justified by reference to some external factor; and an emphasis on a single determinative hearing, usually oral ("The Adversarial Model and the Administrative Tribunal", A Rose, *The Judicial Review*, 1999, vol 4, p 103).

Our system has, not only in Queensland but throughout the nation, been renovated to the point where it is quite different from that classical model. As well as the embrace of ADR, a development in this State quite inconsistent with a traditional adversarial characterisation, is the courts effective declaration that they will take the initiative to manage cases, so far as resources allow, and that they will not tolerate unremitting devotion to established traditional procedures which produce injustice. Those declarations may be drawn other matters aside from the *Uniform Civil Procedure Rules*: a ground-breaking compilation of modern procedural rules applicable to diverse courts, in the preparation of which this State s judiciary has frankly led the nation. As to changes in judicial roles, the Uniform Rules confirm the Judge s discretion to give directions which would ten years ago have been thought entirely out of the question: limiting the number of witnesses a party may call, limiting the time to be allowed for the examination, cross-examination and re-examination of witnesses, limiting oral submissions, requiring the exchange of witness statements prior to hearings. The written component of hearings is now much larger, encouraging a disciplined approach to the presentation of cases, and a more predictable, and reliable, outcome. And as an equally startling departure from the traditional adversarial model, we see confirmation of the Court s right to appoint its own experts, regardless of the consent of the parties. In short the courts of this country, and particularly of this State, have produced a hybrid interestingly different from the adversarial model, and I believe of infinitely greater utility to parties in dispute.

Finally I note one further recent concern of plaintiff lawyers: public image. Your state President lists in his 1999 Branch Report (*Plaintiff*, October 1999, p 43) an "adverse media bite accusing lawyers of ambulance chasing " as a cause of the recent review of the Compulsory Third Party Insurance Scheme, chaired by Mr Bernard Rowley. I was interested also by a recent article on "How to get noticed without "chasing ambulances"!" (J Fenton, *Plaintiff*, February 1999, p 6). Aside from the questions of whether or not to advertise, the many positive aspects of the conduct of the legal profession these days for example, the extent of pro bono work, the willingness of practitioners to carry clients financially through speculative arrangements, even the articles recently telling plaintiff lawyers how to advise successful clients to manage compensation payouts ("Don t spend it all at once", M Fitzpatrick & J Wakim, *Plaintiff*, February 1999, p 10; "Coping with compensation", *Plaintiff*, October 1999, p 31) are unfortunately not well enough known. It may be, as some claim, that the media is simply uninterested in informing the public about those positive aspects of a profession said not to be generally liked. I do question however whether the profession does itself sufficiently promote the reality of what it effectively does achieve in the public interest.

Nonetheless, even if we have to operate in a sceptical environment, we remember our fundamental concern, which does *not* change over time providing the most efficient and effective service to the litigating and negotiating public, and above all ensuring maximum access to justice according to law. And reverting to my theme: let us not overlook that we not only as a profession embrace change more often than not we initiate it.