AIJA TRIBUNALS CONFERENCE DINNER

Chifley at Lennons, Thursday 10 June 2004, 7:30pm

Chief Justice, Paul de Jersey AC

I am very pleased to add my welcome to all of you who are visitors to this jurisdiction, and of course to my fellow Queenslanders. Needless to say, this office attracts many speaking engagements, and this one I treasure, not the least for the identity of our host the AIJA, certainly one of the great success stories in judicial support, not only within this country but internationally. It was vaguely suggested I should speak for 20 minutes on the theme of the conference: maybe, however, I may touch on it for 10! I'm not sure the conference theme readily lends itself to an after dinner speech. I was inclined to consult my Federal colleague Justice Spender. He took the prize for the plum after dinner speaking role of recent years, when he spoke at a conference dinner for the nation's…coroners. No doubt he regaled their doleful worships in immutable style.

In this jurisdiction we have, as you may know, recently experienced an attempt to improve access to justice through the creation of a so-called super tribunal, the Commercial and Consumer Tribunal, which the government intends to expand over time to embrace more and more roles through empowering legislation. We all hope it does lead to more accessible, quicker and less expensive dispute resolution. We all fear the "undisciplined proliferation of tribunals" (Hon Jan Wade MP, Attorney-General of Victoria in

her 1996 discussion paper), and the collection of many within a single overarching structure or umbrella does seem sensible. I notice there is increasing sharing of resources among tribunals at the federal level.

The great ultimate challenge for tribunals, I think, is, while ensuring just results under law, that they should not ape courts. Much as the courts have achieved good things in reducing the bewilderment factor, the expectation, with tribunals, is even stronger, that they be relatively informal, quick, cheap and comprehensible – as well as specialist and expert: quite an expectation!

Of course you face many problems similar to ours in the courts, and perhaps even more accentuated with that of self-represented parties. Self-represented litigants continue to develop and refine Judges' capacities for patience and understanding and that extended to a recently retired member of my court, though he would pardon my recalling one arguable lapse. To a self-represented garrulous prisoner who sought to press on though his time was up and his merit wrung out, His Honour said, with but a trace of abruptness: "Go away. Your case is over!" I am not sure the overweening patience expected of tribunal members would allow for that.

But none of us is expected to endure the unnecessary. Former English Court of Appeal Judge Sir Michael Kerr, who headed the International Court of Arbitration, once wrote of the way his colleague Sir Frederick Lawton would

shorten hopeless appeals. He would come into the court, having read all the papers, as he always did, and if it was a case with a number of arguments by the appellant, he would engagingly say to counsel: "Now, Mr Sprocket, your best point is surely…" "Exactly, my Lord." "Well, I don't think much of it." Alternatively, if it raised a question on the interpretation of a statute or contract, which he felt was clear, he would say: "When I read your very helpful submission last night I felt that the answer is really a matter of first impression." "I entirely agree with Your Lordship." "Well, mine was that you're wrong." But, observed Sir Michael Kerr, he always did it in such a way that no one seemed to mind. (The Times, 8 February 2001, p 23.)
That's the challenge!

This jurisdiction, and most around the world, has experienced over recent years a substantial decline in the number of civil cases going to trial. I was interested to see the results of some research from the USA, where the American Bar Association has established that the percentage of federal civil cases going to trial dropped from 11.8% in 1962 to 1.8% in 2002, a trend also appearing in the State courts. Now the cases from the courts are obviously not all going to the tribunals, but for all that, I expect your optimal use of mediation and alternative approaches is meaning that hearings proper are in decline. If so, that is an undoubtedly good thing.

Where a hearing occurs, and where there is an obligation to give reasons, that obligation is one of prime importance, as you would accept. No doubt the contemporary practice of delivering comprehensive reasons for decisions has fed the appetite for appeal – along, that is, with the creativity of legal minds able to find egregious error in something which appears beyond criticism. There is, though, no turning back from the current practice, which is an important avenue of accountability. Judicial officers could not these days follow the advice given by Lord Mansfield to an army general appointed Governor of an island in the West Indies, and finding himself obliged therefore to sit also as a Judge. It is said Mansfield told him: "Be of good cheer – take my advice and you will be reckoned a great Judge as well as a great Commander-in-Chief. Nothing is more easy: only hear both sides patiently, then consider what you think justice requires and decide accordingly. But never give your reasons – for your judgment will probably be right, but your reasons will certainly be wrong."

And when reasons are given, they must be clear. But then care should characterize a decision-maker at every level in the expression of language. What we say must be quintessentially comprehensible. Not like this direction to the jury on the onus of proof in a criminal case which I encountered some time ago:

> "You might think, and as to what you think it is a matter for you, that to act in the way contended for by the accused is not unreasonable or at least not unintentionally unreasonable. But as I have said and I repeat it again because it is so important

> and fundamental that the defence don't have to prove anything, the prosecution have to negative any defence beyond a reasonable doubt: that is fundamental and it is a matter for you as the judges of the facts and as to that anything that you think I might think or indeed if you think that I have formed an opinion the said opinion is irrelevant unless you also so think…I think."

I have probably consumed more than the 10 minutes I allotted myself, and I will conclude shortly lest this address come to resemble a long-playing record of Scottish dance or the piano rags of Scott Joplin (P Bowler: The Superior Persons Book of Words, p 68).

I want to take the unusual after dinner course, however, of concluding briefly with a serious observation. Last year I visited in Paris the Consiel d'Etat, the institution which stands at the apex of those bodies which determine challenges to administrative decisions. As Professor Robin Creyke records in a recent article ("Tribunals and Access to Justice", QUT Law and Justice Journal (2002) vol 2, no 1) "historical antipathy between the (French) parliament and the courts resulted in post 1789 Revolution times in a decree forbidding the courts from exercising jurisdiction over administrative matters. The decree created the Consiel d'Etat…the council being at the apex of administrative bodies responsible for deciding complaints about matters of administration." Under the French system, unlike ours, there is rigid separation between the judiciary and the bodies determining administrative appeals. The Consiel d'Etat is a highly effective and respected institution. It enjoys enormous prestige within the French governmental system, partly

because of an unabashedly elite approach to its membership. The members of its organs are the absolute cream of the universities and the Ecole Nationale d'Administration. As that commentator Mrs Creyke suggests, "Australian jurisdictions could emulate the French experience by imposing educational qualifications which will enhance the skill level of tribunal members". I am sure, ladies and gentlemen, that you all display high expertise borne of appropriately high qualifications. That that continue is essential, if tribunals are to continue to fulfil the expectations of the governments which have established them, and thereby the people whose interests they serve.