SUPREME COURT OF QUEENSLAND

Address to the Commercial Bar, Melbourne

Thursday 23 July 2009, 5.15pm
Level 1, Owen Dixon Chambers East, 205 William Street, Melbourne
"Commercial litigation: meeting 21st century challenges"

The Hon Paul de Jersey AC
Chief Justice

I am grateful to David Denton for this opportunity, and to you, ladies and gentlemen for your attendance.

I last spoke at a legal seminar in Melbourne in September last year, at the invitation of the Law Institute, and I spoke on the topic of tort law reform: Chief Justices are expected to address a potentially broad canvas.

Speaking to members of the commercial bar this evening, I am of course conscious of some State rivalries, and I mentioned them when I edited an edition of the Australian Law Journal last year. The reality is that Australia can accommodate more than one vortex, in commercial dispute resolution: where they are will not be determined by bold claims, but by the excellence of the legal services available, and comparative economic conditions.

In that edition of the ALJ, I said something of the Queensland approach to commercial litigation, especially through our commercial list, which is well regarded particularly for the provision of early trials, expeditious resolution, expedited appeals, and the involvement of judges of substantial commercial experience. I will not say more about those matters, especially conscious, as I am, of current developments in Victoria, where the court, no doubt in consultation with the profession, is making a determined effort to streamline its approach to commercial litigation, with the introduction of "early neutral evaluations" and the special list for technical, engineering and construction cases – with a focus on the use of expert assessors and a range of procedural mechanisms. I have no doubt other Australian jurisdictions will derive considerable assistance from the accruing Victorian experience in these areas.

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I came to the Supreme Court of Queensland in 1985 from a predominately commercial practice at the bar. The intervening quarter century has witnessed quite remarkable changes in the litigation landscape in my State, such that I could not, I suspect, very easily return to practice: though I have nine years to run as Chief Justice, and no plans to return to the bar thereafter.

Let me mention, though, some of those changes: I imagine they will, in some degree or other, be reflected in the Victorian experience.

Major changes in Queensland, over even my last 11 years as Chief Justice, have been substantial, centring about the gender composition of the courts; the increasing incidence of litigants without legal representation; the introduction of broader technological support; the increasing embrace of mediation; and for those cases which must proceed to adjudication, an inexorable retreat from oral advocacy to written presentations.

This has meant some barristers have had to develop new skills: the capacity to persuade not a judge, but a fellow practitioner acting as mediator; the ability to promote your client's case while not being seen to exploit the other party's lack of representation; the capacity to argue persuasively through the written rather than oral word.

The most dramatic of those changes in Queensland dates back to the late 1980's, with the embrace of ADR. The judicial embrace of ADR was largely motivated then by a wish to unclog court lists and reduce delay: and those objectives were achieved.

Through rule amendment, the judges have worked a raft of additional important reforms in my State over the last one or two decades: we abandoned the Peruvian Guano disclosure test in favour of direct relevance; we introduced a system of active case management; we required leave for the administration of interrogatories; we introduced a "single expert" regime; the rules were amended to allow compulsory references to ADR, notwithstanding the dissent of the parties; we revamped our "offer to settle" processes; and in 1999 we

developed streamlined procedural rules applicable in a uniform way to all three State courts.

By and large, comparatively very early trial dates are available for commercial cases in Queensland, within a few weeks of readiness for trial. And we run two special lists to ensure active case management, the Commercial List run by Justices Dutney and Philip McMurdo and the Supervised Case List run by Justice Daubney.

But commercial litigation generally remains too cumbersome and too expensive. That is of course true of a lot of litigation. It led the Queensland government to enact legislation in the personal injuries areas to erect hurdles and barriers to litigation, maximizing the prospect of mediated resolutions. It has also led in Queensland to expansion of the purview of tribunals, based on an ideal of less expensive, less formal, more expeditious outcomes, sometimes with lawyers excluded from the process. Whether those objectives are being achieved is debatable, although a tribunal may develop a relevant expertise worth upholding.

On the other hand, the Queensland government has financially supported a citizens' advice bureau in the metropolitan courts, dispensing legal advice free of charge to unrepresented litigants and potential litigants. We have also introduced a court network of voluntary guides based on your very successful Victorian model.

Let me attempt to forecast probable litigation trends over forthcoming years. They will develop out of dissatisfaction with the length and consequent cost of litigation in particular.[1]

[1] What follows draws substantially on ideas expressed by my colleague the Hon Justice J H Byrne, SJA, Supreme Court of Queensland, in a paper "The future of litigation – a Queensland perspective", delivered at the Annual Conference of the Bar Association of Queensland on 7 March 2009.

The provision of independent court services is an established feature of western democracy. In Queensland, where judges order cases to be subjected to external mediation, that is at the cost of the parties. While that benefits the courts, by rendering limited judicial resources more accessible for claimants who must go to adjudication, it might be argued that in diverting work in that way, at the expense of the parties, the courts are not fulfilling their charter.

Ideally, courts should include in-house mediation facilities, and I believe they increasingly will. For the last 12 to 18 months, a registrar has been effectively mediating cases before the Planning and Environment Court, an arm of the District Court of Queensland. The Registrar has thereby freed up substantial tracts of calendar, leading to the earlier resolution of the cases which must run to a hearing. Registrars are less expensive to maintain than judges. I think it likely that governments will continue to shift the focus to alternatives to adjudication, for all the reasons traditionally advanced in support of ADR, but especially because that is an overall less expensive option.

Modern courthouse design should include facilities for mediations. Ideally, courtrooms should be capable of conversion into meeting rooms for that purpose as needed, although I am finding – with our $660 million metropolitan project in Brisbane – that achieving that flexibility is not necessarily inexpensive. I hope, by the way, that your State Government may be inspired, by what it sees going up in Brisbane, to implement Chief Justice Warren's plan for a long-overdue new Supreme Court facility here in Melbourne.

ADR aside, there are cases which must remain within the court system. There will be increasing attention to the cost and length of the proceeding. Technological support will be the subject of increasing attention. We have in Queensland developed an e-trial, computer-based model for the trial of complex litigation, although its future depends on financing out of an increasingly fraught State budget.

A good illustration of the utility of this process was provided by a recent fraud trial in the criminal court. All of the relevant documents, and there were thousands of them, were managed electronically. Every player in the courtroom had access to computers, including the jurors, and they were controlled by the witness or the Judge's Associate. The trial took about six weeks. The Trial Judge is confident that but for that technological support, the trial would have taken twice as long. That involved an immense saving of court resources. This initiative can be promoted to government on the basis that it generates more savings than it costs.

Speaking of the cost of litigation inevitably draws one to the disclosure or discovery of documents. Queensland's direct relevance test has worked apparently well in limiting disclosure, bringing it within manageable limits. But there remain cases where the scope of disclosure is still mammoth. That will lead to early judicial intervention to impose limits, and to supervise the presentation of the necessary documentation: filing the documents electronically, for example, and in a way which will facilitate rather than hinder their being analysed. The Federal Court Practice Note 17, issued in January this year, on "the use of technology in the management of discovery and conduct of litigation", illustrates means by which judges may limit disclosure.

Another likely trend is the expanded use of video links for the taking of evidence. This is especially relevant in Queensland, a geographically large State. With improvement in the definition of the images, this medium will, I believe, be utilized more and more.

In the early 1990's I heard a large Queensland commercial dispute over a fortnight in San Francisco, because of the frailty of a number of US witnesses unable to travel to Australia. It was a very enjoyable experience for me, but also very expensive for the parties – notwithstanding they had deep pockets. With 21st century technology, the US evidence in that case could practicably these days be taken by video link. More often than not, evidence could be presented these days quite satisfactorily by using high definition video links, without impairing any capacity the judge may have to determine issues of credibility

by reference to the demeanour of the witness. The judicial capacity to accomplish that reliably is increasingly questioned in any event.

Another approach to lengthy trials is for the judge to set a timetable to which the parties must adhere, possibly including the imposition of time limitations on cross examination and so on. It is crucially important, in particular, that trials are completed within the allocated time span. The resumption of trials previously adjourned part heard is plagued with potential problems, both for advocate and judge. It is generally said that the resumption takes twice as long as would have been consumed had the case proceeded without interruption in the first place.

More fundamentally, we have a joint obligation to keep litigation within manageable proportions. As my colleague Justice John Byrne points out, "there are many reasons why trials are taking longer, including legislation like section 52 of the *Trade Practices Act 1974* and its counterparts in Fair Trading Acts; proliferation of records available to be explored; and that quite a few barristers practise defensively, despite immunity from suit in the conduct of litigation, and without bearing in mind that, as Mason CJ has said:

> "The course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of a case."

I mentioned the setting of timetables, possibly limiting the time allocated for cross examination and the like. Other limitations might be contemplated, for example as to the number of witnesses who may be called on an issue. As time goes on, the rules of court

may well be amended to ensure the necessary backing for judges persuaded to follow such courses.

At the commencement of this address, I mentioned our Queensland "single expert" regime. This was introduced to address suggestions of partisanship, and to streamline judicial decision-making on the basis that in difficult areas, it is hindered rather than helped by a proliferation of competing expert views. I assert that the new system has worked comparatively well, although I acknowledge that the bar's initial attitude was one of considerable pessimism. I expect this trend will continue, and extend in Queensland to the taking of expert evidence concurrently, a feature which has apparently worked very well in the Supreme Court of New South Wales, but has not yet become common place in Queensland.

As we journey through this developing landscape, judges will be focusing more intently on how they can most efficiently utilize limited court time. Governments and the public will be watching to ensure they do. (Note the public interest in the annually published ROGS data, by the Productivity Commission.) Judges will be anxious to ensure that the cases which can settle are compromised early in the piece. They will be concerned to confine the trials which are necessary to issues of principal relevance. Increasingly, barristers will find themselves discarding the merely arguable, and confining themselves to what have traditionally been selected out as the "best" points.

You will need to maintain and probably enhance your mediation skills, and develop proficiency in the electronic management of documents. You will need to develop skills in the concurrent presentation of the evidence of experts.

In this context, Justice Byrne, who is the Senior Judge Administrator of the Supreme Court in Queensland, essentially the head of the trial division of the court, is convening a group, comprising mainly judicial officers, administrators and practitioners, committed to achieving better resolution of civil cases. Among the matters to be pursued by that group are

enhanced court supervised ADR, to facilitate earlier, informed compromises; a regime for cost effective management of disclosure, with particular attention to confining disclosure to records that actually matter, and developing protocols for e-disclosure; experts, including single experts, the determination of complex disagreements between experts by another expert in the discipline functioning as a special referee, and the taking of evidence of experts concurrently; timely judicial intervention, in those cases which need it, to narrow the issues in dispute, limit the work to be done in the interlocutory phase and reduce the court time taken if the case must be resolved by trial; and the use of technology to secure efficiencies through e-trials. You may expect to see refinements introduced over the next 12 to 18 months resulting from the work of that group.

We jointly participate in a regime available to litigants at the general expense of the taxpayer. While some of that expense is recouped through court fees, the majority is not. Hence the query increasingly voiced, why parties to especially lengthy proceedings should not contribute more substantially to the cost of running the court. A better way to approach this, I suggest, is to ensure that where a proceeding runs to trial, the trial is conducted with maximum efficiency, with the evidence limited to the immediately relevant issues, with the documentation confined and managed electronically, and with the exercise of economy in the selection of witnesses. Ensuring that sort of approach is a joint mission of counsel and judge, but if counsel pass up the opportunity to cooperate in that way, then it may be expected that judges will become more interventionist and controlling.