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Australian Corporate Lawyers Association
Queensland Corporate Counsel Day

Hilton Hotel, Brisbane
Thursday 7 March 2012, 8:35am
"Thriving on challenge"

"Contemporary lawyers: some contemporary challenges"

The Hon Paul de Jersey AC
Chief Justice

I am very pleased, as Patron of the Association in Queensland, to have the opportunity to contribute in this way this morning.

Practitioners in situations of employment by corporations account for a substantial proportion of the legal profession. To the best of my recollection, this dates back to the 1960's and 1970's. Before then, the legal profession as such was fairly rigidly limited to barristers and solicitors in private practice and the Crown Law Office servicing the executive government. When companies needed legal advice, they would commission it from the private profession. Last year at the seminar I attempted a brief history of subsequent trends, and if you will excuse me, I will cover that territory again.

As corporations proliferated and grew, concomitantly with a burgeoning State and Commonwealth economy, corporations came to recognize the convenience of having legal expertise directly on hand. There was another factor. Necessarily or not, the developing economy brought with it an increasing governmental penchant for regulation. Commanding those fields, or some of them, became easier given day to day involvement.

I saw this phenomenon during my own practice at the bar during the 1970's. Contrary to previous expectations that a barrister was an expert, or could become an expert, in all legal fields, some became particularly specialized. High level financing, for example, became abstruse to the point where solicitors would rely primarily on their own opinion drawn from day to day experience, seeking Counsel's opinion only on rather confined,

particularly discrete points of law. That day to day familiarity gave the specialist solicitor an across the field command which a barrister could not readily draw together.

The extent of the infusion of practitioners into the corporate world is inferentially apparent to me at every admissions ceremony. Last year, the Supreme Court admitted as many as 947 practitioners. Private practice could not possibly accommodate even a majority of such cohorts: there are presently 1,070 barristers in private practice in this State and 9,400 solicitors with current practising certificates. The inference is clear that many newly-admitted practitioners enter the corporate world. What distinguishes that field of practice?

There you encounter, I believe, a working situation and culture quite different from those which characterize the privately practising profession. As an employee, you owe the duty of an employee, and you are in continual contact with your client. You will, much more frequently than a private practitioner, be called upon to give advice which is not strictly legal advice, and in the event of litigation, that may raise unusual questions about the application of legal professional privilege.

The point I emphasize this morning, as I did last year, is that these sorts of unique features notwithstanding, you remain lawyers, you owe your professional lineage to the Supreme Court, and your professionalism is subject to the constraint which distinguishes the legal profession from others, being the duty to the court and the administration of the law which surpasses even the duty to the client. When I regularly express these sentiments at admissions ceremonies, I am acutely conscious that many of those being admitted may never enter the courtroom again. But living professionally within these principles does not depend on proximity to the courtroom.

It is your day by day proximity to your sole client which I think ultimately distinguishes your practices. That can involve pressures which much less frequently arise in the private practise of the law, where contact between lawyer and client is much more limited. Some employers will find it difficult to understand that legal ethics constrain an in-house

practitioner to an extent quite alien within the business world, where fairness depends on simple morality by and large, apart from basic regularity frameworks.

In the practice of the law, fairness is assured by rigid ethical obligation, and that is consistent with the essence of our professionalism, which is public service. Whenever a lawyer practises, he or she advances the public interest by providing expert legal services to those needing them. If problems arise, the court is there ultimately to determine any issue. The legitimacy of the judicial process, and public confidence in it, depend on its being a fair process, where a practitioner must for example inform the court of any legal authority contrary to the client's case. It is the ethical framework which largely contributes to ensuring the fairness thence the authority and legitimacy of the process.

Acknowledging the pressures to which in-house practitioners may be subject, I suggest this morning that quite apart from rigid ethical constraint, in-house practitioners, perhaps more than their external colleagues, must exhibit an appropriate level of restraint.

Last year I spoke a little at this opening session about the need for restraint in the disclosure of documents. May I speak now a little more broadly about the civil side of the courts' jurisdiction, and that is of course the area in which, if you are involved in litigation in the course of your employment, you will be engaged.

Since last August, the Supreme and District Courts have exercised their jurisdiction in Brisbane from the Queen Elizabeth II Courts of Law. Sitting in that brilliant new modern complex, I ask myself from time to time whether our processes are as up-to-date as they should be. We continually hone those processes, through rules of court, practice directions and the like. Their implementation will not ensure expeditious litigation without undue expense absent the full, progressive cooperation of practitioners.

Let us all recall some of the history on the civil side.

By the 1980s, the cost of litigation in the Supreme Court had become prohibitive. A person of ordinary means would have to mortgage the family home to pay for it. That is regrettably still the case. The worthy pro bono thrusts aside, it was largely that concern which gave impetus to mediation, now so wide-spread.

Has mediation really proved to be a less expensive option? I have reservations about that: and when mediation fails, I imagine potentially worthy claims run the risk of collapse where the additional costs of a trial simply cannot be borne.

I have been an enthusiastic proponent of mediation over many years. It has done wonders for court lists. But I must say I have come to experience some regret over a downside.

I fear, for example, that some settlements which result from mediations may reflect a level of palm tree justice: of course, the process being private, one could not definitely say one way or the other. I am also conscious that mediation has become so much the norm, that court advocacy skills are leeching away. And if no settlement results from a mediation, how well equipped are practitioners to implement the processes of litigation these days, especially in relation to the disclosure of documents? Young practitioners especially, may flounder when confronting the direct relevance test.

The disclosure of documents remains the albatross of the civil justice system. Its exorbitant cost, in major cases especially, is simply unsustainable. I am confident that document management will have been an issue for many of you.

That consideration, the cost of disclosure, may, I believe, be pressuring claimants into the arena of mediation. That is not necessarily a bad thing, but it may be a bad thing where the mediation does not exhibit the traditionally paraded advantages, as a relatively inexpensive, expeditious process likely to lead to a just and mutually satisfactory

resolution. I think we should draw back a little from the robust view that mediation is always potentially worthwhile: most often, it may be, but not always.

As to disclosure, the direct relevance regime for the pre-trial disclosure of documents has worked much more efficiently than its predecessor under *Peruvian Guano*. Its continuing success depends on practitioners implementing the requirement with appropriate rigour.

Over the last couple of years, the Supreme Court has worked closely with the practising profession to refine our process for supervised cases. The result should see more focus on limiting disclosure of documents and their efficient electronic management, as well as the traditional goal of limiting and defining the scope of any trial by reference the real issues, and avoiding surprise.

From what I am told and observe, the profession is alive to its responsibility to craft an economically manageable landscape in civil. I look forward to a continuation of that in implementing this new civil initiative.

More robust regimes are mooted from time to time, such as imposing finite limits on the documents to be disclosed, numbers of witnesses, oral evidence, and length of hearings. Legislative backing would be needed for those things, absent the agreement of the parties. The prospect of parties agreeing on a strictly abbreviated process leading to a swift definitive result (excluding appeal for example), is an interesting one which I would be keen for us to trial. The Bar Association and the Law Society have evinced some interest in a pilot scheme.

My having said these things, I believe our present civil approach works reasonably well, but we are heavily dependent on the cooperation of practitioners. I am confident it will continue, and embrace the changes which will inevitably ensue on the civil side.

We must be prepared to embrace desirable change, and not mindlessly shelter behind tradition, however time-hallowed, or pretend that long-standing practices must therefore be the best. The pace of change is extraordinary, and I am qualified as a lawyer of 42 years' standing to say that: my professional history stretches back to the days of carbon paper. The best lawyers will exhibit the capacity to adapt, and if you do, your employer clients will reap the benefit.

The theme of the conference is "Thriving on challenge". There is great satisfaction in successfully rising to a serious challenge, and there are many of them in the contemporary practice of the law, whatever one's workplace.

I wish you well as you both identify the challenges relevant to you, and also, as you beneficially exploit them. And I wish you well for a productive day, as I now formally open these 2013 proceedings.