Just, Quick and Cheap - A Standard for Civil Justice

The Honourable J.J. Spigelman, Chief Justice of NSW

Transcript of Address for the Opening of the Law Term
Parliament House, Sydney, 31 January 2000

I GREW UP IN A COUNTRY IN WHICH the Prime Minister was able to travel to England for six weeks by boat with the Australian cricket team, stay for a month or so watching cricket and then return by boat, taking another six weeks to do so. Things have speeded up since then. Not all of the change has been an improvement.

Sir Robert Menzies would never have approved of one-day cricket: a game with special rules designed to speed things up, including penalising a team for a slow over rate. Most other changes in sports have been in the same direction. Tie breakers in tennis. Olympic sports like luge, cycling and canoeing are now measured in milli-seconds.

Of course, there have been many improvements associated with increased speed. Indeed, if there were a competition to build a statue for the one person who has most improved the Australian standard of living in the twentieth century, I would nominate the Chief Engineer on the Boeing 747 project. Nevertheless, as a nation we have substituted the tyranny of distance, with a tyranny of immediacy which, at least, we share with everyone else.

TYRANNY OF IMMEDIACY

The process of acceleration is unremitting. In the United States, it took 46 years for 25% of the population to be connected to electricity. It took 35 years for that proportion to get the telephone, 16 years for that proportion to take up personal computers and 7 years for that proportion to be connected to the World Wide Web. Anyone using contemporary telecommunications or computer technology has experienced a curious phenomenon: the sense that a particular delay in some processing function was quite intolerable, even though that length of delay was perfectly acceptable only six months or one year before. Where we once spoke of words per minute, we now speak of characters per second. One can buy telephone answering machines with a quick replay button – in a digital format, so that the replay is accelerated without the high pitch of a Disney-fied chipmunk. Similarly, one can buy music CD players with an option that lets the user close the one or two second gap between tracks.

Time is more important than ever. In Tokyo one restaurant charges by time: at the rate of ¥35 per minute. You clock in, you clock out and your bill is computed on the time difference. Indeed, it is necessary for us to create the illusion that we are saving time, even when we cannot do so. On many elevators, the 'door close' button is in fact a placebo. It has no function, other than to placate those who measure their life in seconds. Perhaps we need more time because there is more to absorb. On one recent calculation, a search on the subject "Information Overload" on the World Wide Web hits twenty thousand different sites (*refer* James Gleick *Faster: The Acceleration of Just About Everything*, 1999 p88). Information overload indeed.

THE SPEED/JUSTICE PARADOX

Two things, however, have not speeded up during the period since Sir Robert Menzies travelled to England with the First XI. One is city traffic. The other is litigation. In this regard, traffic and litigation share another characteristic. There are significant limits as to the desirable speed with which either should be conducted. Some things take time. Justice is one of them. In the course of my address to this dinner last year, I indicated my commitment to the maintenance of the quality of justice. Speed is like light: if you have too much, it will obscure not illuminate. There is a limit to the extent to which litigation can be hastened. We are not yet close to that limit.

Delay is not only a quantitative factor. It is also of significance in terms of the quality

of justice. Most significantly, delay in the litigation process does add to the costs which that process imposes on litigants. Parkinson's law operates: work expands to fill the time available. Perhaps the greatest challenge facing all of us involved in the litigation process is the restoration of a rational relationship between the cost of litigation and the subject matter in dispute. Psychologists tell us that a normal fast talker speaks at up to 150 words a minute. Listeners, however, can process speech reaching the ear at 500 or 600 words a minute. Any judge will tell you that one of the technical facilities he or she would most like to have is a fast forward button for advocates – in digital form for the reason I have already mentioned. This would enable an oral hearing to take only one third or one quarter of the time that it now takes. Of course, any such process of acceleration would prevent a judge thinking about what was being said. This would stop a judge formulating and putting questions to the advocate about the submissions being made. Any advocate would tell you that the absence of questions from the bench would speed things up even more. Accordingly, the technical innovation many advocates would want is a stop – or at least a pause – button directed at the judge.

'Two things have not speeded up during the period since Sir Robert Menzies traveled to England with the First XI. One is city traffic. The other is litigation'.

While we wait for these inventions we will have to do the best we can. It is incumbent upon all of us as participants in the administration of justice to ensure that litigation is conducted as efficiently and expeditiously as possible. For centuries, indeed it was only abolished in the late eighteenth century, the common law had a mechanism known as *peine forte et dure*, a form of torture inflicted upon a prisoner indicted for felony who refused to plead and to submit to the jurisdiction of the court. Heavy weights were applied to his body until he consented to be tried by either pleading 'guilty' or 'not guilty', or until he died. This was an early form of case management. It remains a model for some contemporary practices.

THE RISE OF CASE MANAGEMENT

The extension and elaboration of case management has been a feature of judicial administration over a period of two decades. The courts are not immune to the change in public expectations with regard to accountability for public funds that has affected the entire gamut of governmental institutions. Nor are they immune to the restrictions on availability of resources to which all areas of government are subject. Furthermore, the courts, like all areas of the government over recent decades, have been subject to assessment in terms of the extent to which performance of their functions imposes avoidable costs – relevantly on litigants and third parties. The last two decades have witnessed very substantial changes in many areas of public administration, with a view to improving the efficiency of their operation. Almost invariably such changes have involved alteration of long existing practices. The emergence of case management in place of the traditional hands-off approach to the conduct of litigation, has been the judicial response to these new expectations.

NEW SUPREME COURT POLICY

The time has now arrived for the Supreme Court to further develop its case management by accepting responsibility for the progress of cases before the Court. In this state, the acceptance of this responsibility has been pioneered by the District Court and I acknowledge the significant role that Justice Blanch, the Chief Judge of that Court, has played in this regard. Of course, the caseload and the functions of the Supreme Court differ in significant respects from those in the District Court. Accordingly, practices adopted in one court for the conduct of proceedings efficiently and expeditiously, yet in compliance with the dictates of justice, may not be appropriate in the other. Nevertheless, the acceptance of responsibility by the adoption of a comprehensive system of case management from the commencement of proceedings to their disposition is the same in both courts.

ADVOCATES' DUTIES TO THE COURT

The judges of the Supreme Court have decided to adopt time standards for the conduct of proceedings within the Court. This decision necessarily involves an acceptance of responsibility for the progress of such

proceedings from their commencement to their disposal. Over the course of the last year, the Court has engaged in a number of reviews of practice and procedure, particularly with respect to civil justice. These have included a dialogue between myself and representatives of the Law Society and of the Bar Association, as anticipated in my speech on being sworn in as Chief Justice, when I emphasised the central importance of the performance by practitioners of duties to the Court. The Bar Association, with my active encouragement during this dialogue, has recently incorporated a number of these duties to the Court into its professional ethical rules. These rules now emphasise:

- the importance of confining a case to issues genuinely in dispute
- refraining from making allegations of fact without a proper basis
- complying with orders, directions, rules and practices of the Court
- preparing a case for hearing as soon as practicable
- presenting issues clearly and succinctly being as brief as is reasonably necessary.

The Law Society has in the past adopted the Bar's Advocacy Rules without amendment. I assume it will do so with respect to these recent amendments. It may also be desirable to reflect some of these principles in the obligations of instructing solicitors, not merely those of solicitor advocates. Other reforms to which I will shortly refer have involved consultations within the Court. I also appointed a Rules Review Committee, on which both professional associations are represented, as they are on the Rule Committee of the Court, which finalised most of the reforms, to which I will presently refer. In all of this, the representatives of the Law Society played a positive and creative role, although not all the submissions that they made on behalf of the Society were accepted.

PRACTICAL REFORMS

Despite some differences, I believe that the reforms represent a broad consensus of judicial and of professional opinion, as expressed in these consultations and committee deliberations. Indeed, if there had been unanimity, I would be convinced that we had not tried hard enough. The package of reforms is designed to improve the administration of justice by changing practices and adopting realistic costs sanctions. The principle changes are:

- The Court has adopted a new *statement of overriding purpose*, inserted at the commencement of the Supreme Court Rules: that the objective of the Rules is to facilitate the just, quick and cheap resolution of the real issues in civil proceedings.
- The Court has adopted *specific time targets* for the disposal of cases, together with a plan for the progressive reduction of delays.
- The Rules will impose on all parties an obligation to *refrain from making allegations, or maintaining issues, unless it is reasonable to do so*. A new summary procedure is created for the payment of costs on an indemnity basis by parties who breach this obligation.
- The Rules will now identify a range of specific directions which the Court may make in the course of managing cases, including the *imposition of time limits* on the evidence of witnesses, or on submissions, or on the whole, or part, of a case.
- The Rules will now empower the Court to direct a legal practitioner to give a party a memorandum providing an *estimate of the length of the trial, of the costs and disbursements* of that practitioner, and of the estimated costs that would be payable by the party to another party, if the party were unsuccessful.
- The Rules will now empower the Court to *specify the maximum costs* that may be recovered by one party from another, to avoid the injustices that can occur when one party has 'deep pockets'.
- The Rules will empower the Court to order that *costs be payable forthwith*, in any case in which a party has been subject to unreasonable delay or default, or the proceedings are unreasonably protracted, or justice otherwise demands such an order.
- The Rules will expressly empower the Court to *order a person to pay the costs* occasioned by the failure of that person to comply with a direction of the Court.
- There are amendments to the existing Rules which identify circumstances in which a *legal practitioner can be ordered to pay costs*. By means of a Practice Note, a new procedure for the making of such orders is established. Breach of duties to the Court – duties now reflected in the Bar Rules themselves – may lead to a practitioner being ordered to pay costs occasioned by the breach.
- The Rules promulgate a *Code of Conduct for expert witnesses*. The Code establishes that an expert witness has an overriding duty to assist the Court impartially.

It specifies that an expert witness's paramount duty is to the Court. He or she is not an advocate for a party to the proceedings.

- The new Code establishes a system by which experts make *full disclosure of relevant matters* in their reports and, upon direction by the Court, confer with other expert witnesses in an endeavour to reach agreement on material matters. An expert is obliged to state any qualification without which, in his or her opinion, a report may be incomplete or inaccurate. Furthermore, where the expert has insufficient data or research to state a concluded opinion, he or she must say so.

INPUT FROM THE PROFESSION

A number of these measures replicate or adapt rules and practices that already exist in other courts, specifically the Supreme Courts of Western Australia and Queensland and the Federal Court. Some of the reforms are novel. These reforms will enable judges to ensure that cases in the Court are dealt with in a just, quick and cheap manner. Some new cost sanctions have been adopted. However, the reforms will not work without the active collaboration of the profession, including by enforcement of the new Bar Rules.

'Under the mechanism known as *peine forte et dure* heavy weights were applied to the body until the prisoner pleaded 'guilty' or 'not guilty', or until he died.

This was an early form of case management. It remains a model for some contemporary practices'.

The new overriding purpose of the Rules is stated in plain English: to facilitate the just, quick and cheap resolution of the real issues in litigation. This formulation has long been found in the directions making power in Part 26, Rule 1. It will now serve as an objective for the conduct of proceedings. While the requirements of justice and those of speed do not always point in the same direction they are often inter-related. The new Rules identify:

- An obligation on the Court to give effect to the overriding purpose when it exercises any of its powers.
- An obligation on a party to civil proceedings to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
- An obligation on legal practitioners to refrain from engaging in conduct which causes his or her client to be put in breach of this duty.
- A power in the Court when exercising the Court's discretion to award costs to take into account any failure to comply with these duties by a party or a legal practitioner.

NEW TIME STANDARDS

I wish to make a few additional observations on the Court's time standards. The time standards that have been adopted for the Supreme Court are intended to be achievable, incorporating gradual but attainable improvement. Accordingly, the Court has adopted standards for both calendar year 2000 and calendar year 2001. With respect to criminal proceedings on indictment – which in the Supreme Court are primarily trials for murder – the Court aims in 2000 to dispose of 75% of cases within nine months of the date of committal; 85% within twelve months and 100% within fifteen months. In 2001, the Court aims to dispose of 75% within six months, 85% within nine months and 100% within twelve months. In the Court of Appeal, the Court aims to dispose of 50% of cases within six months of the filing of initiating process in both 2000 and 2001; 80% within twelve months in 2000 rising to 85% in 2001; 90% within eighteen months in 2000, rising to 100% in 2001; with 100% within twenty-four months in 2000. In the Court of Criminal Appeal, the Court aims to dispose of 40% of appeals from the date of filing of initiating process within six months in the year 2000, rising to 50% within six months in the year 2001; 80% within twelve months in 2000, rising to 90% in 2001 and of 100% of cases within eighteen months in both years.

CIVIL DIVISIONS

The Court has internal targets for civil trial work in the Common Law and Equity Divisions. However, until improvements are made to the computer-based case management systems available to the Court, which enable it to monitor and measure the case

management process with a degree of speed and precision not presently available, it is not appropriate to commit the Court publicly to such targets. Further work needs to be done in this respect. In due course these targets will be finalised and made public. I do, however, indicate that the Court plans to dispose of over 50% of all civil cases instituted in the Court within 6 months of the filing of process.

'An expert witness has an overriding duty to assist the Court impartially.

He or she is not an advocate for a party to the proceedings'.

In order to achieve those objectives, the Court's practices will need to change. Specifically, no matter will be stood over generally and no case will be permitted to lie dormant for more than 6 months without being listed in the Court. These time standards are not, or are not only, measurements of the Court's delivery of justice. Rather, they measure the delivery of justice by all those associated with the process, including the profession. There has in the past been a tendency on the part of different participants in the administration of justice to blame others for what is universally accepted to be excessive delay. I have not thought it appropriate to adopt for the Court a time standard based on aspects of the process for which the Court alone bears primary responsibility (eg. by identifying a standard for the disposal of cases from the point at which a case is ready for trial).

COURT'S NEED TO DELIVER JUSTICE EQUITABLY *AND* EXPEDITIOUSLY

The entire thrust of the development of case management over recent decades has been for the Court to accept increased responsibility for ensuring that matters are made ready for trial and that trials focus on the real issues and are conducted expeditiously. The time standards I have announced tonight are for the process as a whole, a process in which the profession and the judiciary have, at times, separate but interdependent responsibilities. These standards can only be attained by cooperation between the profession and the judiciary.

PRO BONO INNOVATIONS

An indication of that cooperation is the response of both professional associations, which I announce tonight, to a new *pro bono* scheme to be created by the Court. This Court has experienced an increase in the number of unrepresented litigants. This significantly slows down the Court, adversely affecting its ability to deliver 'just, quick and cheap' decision-making. More significantly, the unavailability of professional assistance can lead to injustices. The new Supreme Court Legal Assistance Scheme will operate on the basis of referrals by a judge of the Court. The Bar Association has agreed to provide a list of counsel who are prepared to serve on a *pro bono* panel. The Law Society has agreed to extend the Law Society *Pro Bono* Scheme to incorporate referrals from the Court. I look forward to the implementation of this scheme and to further close collaboration to achieve the overriding purpose which the Court has now adopted. I am confident that that will occur. ■

The full text of Justice Spigelman's address appears here for the first time and is published with kind permission.