Remarks made by Chief Justice Marilyn Warren

at the launch of "Class Action Law and Practice"

by Dr Peter Cashman

21 November 2007

Thank you Professor Rees.

Judges, Masters, Chief Magistrate, ladies and gentlemen

I am pleased to be here tonight to launch Class Action Law and Practice.

Peter Cashman has had a long history of involvement with class action litigation as a lawyer, law reformer and academic.

This book covers a great deal of ground; from the legislation and procedural rules governing all forms of class actions, to the practical and ethical issues of fees and funding, …from areas where class actions have been utilised such as toxic

torts and shareholder litigation, to comparative international law.

It is a valuable contribution to the field.

Group proceedings in the Supreme Court have been the subject of a recent academic study which has revealed the breadth of the proceedings before the Court, from small scale food poisoning incidents to large and complicated economic loss claims.

Peter returned to Melbourne to once again take up a role as a law reform commissioner heading up the VLRC's Civil Justice Reference. Whilst this has allowed Peter to revisit class action law reform, this reference is a much more ambitious undertaking tackling the full range of issues from photocopying to the establishment of a Civil Justice Council.

The Supreme Court has been keenly involved in this reference. Earlier this year Peter took part in a session at the Court's annual conference.

This reference represents a significant opportunity to devise new means of tackling the challenges which face the civil justice system.

Significant strides in civil justice reform have been achieved over the past few decades, from the case management revolution and the rise of ADR to innovative approaches to dealing with evidence and e-trials.

Yet, we remain unsatisfied with our progress. The time has come to take bold steps, to test the possibilities of reform rather than dismiss them.

I am pleased to see that Peter and his fellow Commissioners have not shied away from difficult and controversial issues and have been prepared to challenge conservative attitudes.

The Commission has put forward proposals to articulate, and in some cases extend, the obligations of lawyers and parties to legal proceedings in their conduct and use of the legal system. Many, including members of the Court, have engaged with the Commission in discussing how those obligations might be articulated and enforced. Others have opposed any suggestion that such reforms could have a positive impact on the functioning of the legal system.

The purpose of articulating and enshrining the obligations of parties and lawyers in their conduct of legal proceedings is not to reign in a rampant adversarial litigation culture, it is to set for ourselves as a community a standard. The Court sets for itself high standard: fairness, independence, industry and

excellence. Those coming before the Courts seeking justice must commit to upholding certain standards as well.

There are remedies within the Court's rules and the standards of the profession to curb excess. The Commission's proposals go further and put forward aspirational standards, not just stating what must not be done, but positive obligations as to what should be done including the minimisation of costs and delay, and reasonable endeavours to resolve disputes by agreement.

Good lawyers and model litigants already embrace these obligations. There is, however, more to be gained in placing such obligations on a binding footing: to correct those that fall short, and to raise the confidence of the community in the justice system.

The Commission have also taken a lead from civil justice reforms in the United Kingdom following Lord Woolf's report,

and put forward proposals for the introduction of pre-action protocols.

The one point on which there should be universal agreement is that litigation should be avoided where possible. The vast majority of cases before the Court settle without trial. Appropriate pre-action protocols have the potential to bring forward the time for settlement.

The best practitioners already employ informal pre-action protocols in an attempt to avoid litigation. The aim of pre-action protocols is the adoption of best practice throughout the profession.

The Commission has also devoted considerable time and effort to exploring issues of legal costs.

Modern law is at times complex, labour intensive and requires skilled professionals. This comes at a cost, and that must be

acknowledged as inevitable. What the law can do is devise mechanisms for the burden of those costs to be borne equitably and to reduce instances of waste and excess. Costs are reaching unsustainable levels in many areas. There is now, I believe, an imperative to try new approaches to reduce waste and excess and ensure an equitable distribution of the costs burden.

In addition to the big picture issues, the Supreme Court has encouraged the Commission to tackle difficult issues of a more technical nature. While they do not grab the headlines, these types of issues can consume inordinate amounts of court

This includes the perennial question of the final/interlocutory distinction in relation to the requirement for leave to appeal, and the emerging complex issues arising from apportionment legislation.

Through its own resources the Supreme Court has devised and implemented a number of civil justice initiatives.

From 1 January 2007 the Supreme Court introduced new procedures aimed at minimising the late vacation of trial dates (Practice Note No 4 of 2006). The new procedures place greater responsibility on the profession to ensure that a matter is fully prepared before a trial date is given and to provide trial estimates with the greatest precision possible.

The Court is unapologetic about placing high expectations on the profession in relation to case management and preparation. The burdens and expectations the Court places on the profession are no greater than those the Court has for many years placed on itself in attempts to reduce cost and delay. There is now a realisation that ultimately the burden must be shared.

The experience of the Court since the introduction of the Practice Note has been very positive and demonstrates that the profession is up to the task of meeting high expectations.

Fewer trial dates are being vacated due to under-preparation. The new practice is also creating an environment conducive to earlier settlements. Parties are being more responsible about providing accurate trial estimates and notifying the Court where those estimates need to be adjusted. This allows the Court to list with greater certainty and reduces the risk of judges being unavailable for new trials. Ultimately the practice is allowing the Court to offer earlier trial dates, with trials currently being listed for April and May next year.

In 2005 the Court commenced a new initiative of mediation conducted by Masters. With limited resources, orders for mediation by a Master have been targeted to urgent cases, cases of apparent financial hardship and cases where previous mediation attempts have not resolved the proceeding, but

where there is reason to believe further mediation before a Master would be beneficial.

Masters of the Court have conducted over 95 mediations, over half of which resulted in settlement saving an estimated 311 trial days.

From 1 January 2007 the Court of Appeal introduced front end management of civil appeals. This has involved more active management of appeals through directions hearings at an early stage to identify issues, bring forward the preparation of cases and encourage early resolution.

The directions hearings have been useful in identifying cases which need expedition and related appeals which can be heard together. There has been a focus on limiting the contents of the appeal book to essential documents and identifying cases which may be amenable the mediation. A number of successful mediations have occurred as a result.

The earlier exchange of submissions has also led to a number of settlements. The Court has developed techniques for the listing of appeals on short notice where another settles, to maximise available court time.

With funding and assistance from the Victoria Law Foundation in 2006/2007 the Court established the position of self-represented litigants co-ordinator. In less than one year, the co-ordinator had contact with 366 self-represented litigants, 106 of those litigants were seen on more than one occasion. The work of the co-ordinator in providing information and referrals has made a valuable contribution to improving access to justice and in assisting the Court.

While the Court is proud of what it has been able to achieve through these measures, courts in general are beginning to exhaust the possibilities of incremental reform. The Commission's report will be timely in providing new ideas and giving impetus to the kind of far reaching reforms which I

believe are necessary to meet the challenges facing the civil justice system.

I congratulate Peter on the launch of this book and look forward with great anticipation to his next publication to follow not long after.