

Remarks of Chief Justice Marilyn Warren AC to the combined
LIV, Vic Bar and Department of Justice conference on the
Civil Procedure Act, Melbourne, 30 November 2010

I see the new Civil Procedure Act as an extraordinary opportunity for us here in Victoria, those of us involved in litigation. My essential message is do not be afraid, rather, be excited.

At the outset I thought I would talk a little bit about how this came about and then why. Quite some years ago now the then law reform commissioner, Professor Marcia Neave, now a judge on our Court of Appeal in the Supreme Court, came to see me to say that she had a project she would like to pursue with my support reforming civil procedure in Victoria.

I have to confess that I was somewhat cynical as I thought, "Well we have our red volumes of Supreme Court practice. It is all there in Williams. Why change something that is now well established and working so well?" Justice Neave put to me that there was a desire, indeed, a goal we should have in simplifying civil procedure and also endeavouring to achieve uniformity across the jurisdictions.

I reflected privately, "All right as a step in leadership I will participate in this process. I'll remain somewhat cynical. But what is in this for the Supreme Court?" And it occurred to me as a former judge in charge of the Commercial List in the Supreme Court, there was one thing that I wanted to get out of these reforms and that was fixing up, dealing with that difficult case for judges, *JL Holdings*. And so I agreed to commit to the process.

A little further down the track, the then Attorney-General appointed Professor Peter Cashman to take the reference for the reform proposal. Professor Cashman came to see me and I gave him my full commitment to supporting the process.

How the Supreme Court supported it was this way. We invited the commissioner and those on the Law Reform Commission assisting him to come and meet with a group of judges and associate judges. The Commission had a list of topics they wanted

to cover and so I allocated a judicial author to each topic. So for example Justice Kim Hargrave was allocated expert evidence and witnesses and so on. Associate Justice Kathryn Kings was allocated discovery. We sat around the table over many sessions with the Law Reform Commission led by Professor Cashman and we worked very closely, chapter by chapter, as to the existing Supreme Court Rules and the existing Supreme Court processes.

Now you may say that's all very well, that's all very interesting but what was the point of that? The critical point was this: the Supreme Court, for many years through the Commercial List, had already been engaging in intensive case management. We also knew that other jurisdictions, the County Court through its Commercial List under Judge Graeme Anderson, the Federal Court through fast track list had been embracing many of these reforms. So essentially what we did through the Supreme Court was convey our current practice to manage litigation to the authors of the Cashman report.

This was very, very important. It also paired up with something that had happened about 20 years earlier and this fact is not widely known. Before the Woolf Reforms were introduced, the Lord Chief Justice travelled the common law world and, in particular, he came to Melbourne. At that time, the commercial list in the Supreme Court was the Rolls Royce, the rising star, the place everybody wanted to be in commercial litigation. As I look around the room, I think there are still some of us alive who lived through that process. And I say alive because if you think it's tough these days in the Commercial Court, you should have been around before the likes of Justice Ken Marks and Justice Barry Beach. Times were tough. And there was no messing about in those lists. Lord Chief Justice Woolf was informed by the fast tracked practices that were applied in the Commercial List. He took those practices back to England and adapted them to suit the English experience.

Those Woolf reforms in turn inspired and informed Professor Cashman in his authorship of the Law Reform Commission report. That was the background to the production of the report. The next step was how would the profession be engaged in the process of

the implementation of the reform. From my perspective, it seemed that the reforms would never work if they were simply imposed by government upon the litigators. There needed to be an embracing by all of us involved in litigation in their implementation.

The government established an advisory group. I was asked to chair that group. This came to be a unique experience for all of us involved. Critically the advisory group had representatives, very experienced in litigation management, from each of the jurisdictions including VCAT, Justice Ross now President of VCAT and Deputy President McNamara were there at the table. Significantly the Law Institute was represented together with the Victorian Bar and also the community legal centres. We worked very hard, very diligently supported by the Department of Justice. It was, in my experience, a unique outcome. It was a collaborative law reform exercise.

There were times in the development of the draft bill where government would push one way, the judiciary and the profession would pull back another. There are aspects of the legislation which are truly reflective of that. It is fair to say that the approach of government was to be very prescriptive, in some areas highly prescriptive. The judiciary, the Law Institute and the Bar resisted that push very strongly. Essentially what we put forward was the argument that the courts and the litigators have run these types of procedures so well now in Victoria for so many years, most of these practices are not novel. Secondly, those engaged in civil litigation, on the whole, are committed to doing things differently to achieving reform. We have all suffered the frustration of not being able to get a case on, not being able to push a case through as quickly as we might, not being able to have an unmeritorious case be dismissed that ought be dismissed because it is unmeritorious. As judges, we have faced the criticism that cases cannot get on because of delay. So, for all of us at the table in the advisory group, there was a benefit and hence we had a very, very high commitment.

A significant event occurred during the course of our deliberations. As I mentioned, for the judiciary the incentive to

participate in the process was to try to do something about *JL Holdings*. During the course of our deliberations, the High Court delivered the judgment in *AON*. I am sure that everyone in the room is familiar but if not, it is instructive reading and I would encourage everyone to be highly familiar with it. It is now informing the judgments of the Supreme Court.

And so that leaves me to put forward this proposition to you. There is nothing especially new in the *Civil Procedure Act*. Much of it has been in place in Victoria for a long time. If you sit down and analyse it, much of what is required has, on a day to day basis, been carried out by the legal profession in Victoria. Many of the Victorian offices of the larger law firms are well and truly on top of this. They have been conducting the types of procedures that are now required under the Act as part of the overarching obligations.

Let me give an example. Engaging in alternative dispute resolution before embarking on litigation is quite common place. There is much private mediation, private arbitration, early neutral evaluation, and other forms of ADR going on every day in our litigation community. We sometimes here in Victoria undersell what we do. We tend to just do it, get on with it and not laud what we do and how well we do it. Victoria has been an ADR leader for now almost 30 years. Other parts of Australia have only discovered, for example mediation, in the last ten years or so. If we think about the Victorian experience, if the litigators in the room reflect on your own private experience, hardly ever would you contemplate litigating without an attempt at mediation. If you have in the past issued, you have done so in anticipation that there will be at least one round of mediation fairly early on.

I have suggested to you that what the Act involves is not terribly different from what you already do. As part of our participation in the judiciary the Judicial College of Victoria has embarked upon intensive training for our judges and magistrates. This is an important piece of information, I would suggest, for you to know because the fact remains that in civil litigation, those appearing, issuing or otherwise conducting litigation in our Victorian courts, Magistrates' Court, County Court and Supreme Court come 1 January, will find that the judge that they appear before, will know

this legislation, will be on top of it. You could readily expect that there will be judges not only one step ahead, but very, very keen to implement the legislation.

I can give you a ready example. In one of the bushfire class actions in *Thomas v Powercor Australia Limited*, Justice Jack Forrest has been conducting pre-trial directions hearings. These are the cases coming out of the Black Saturday bushfires. His Honour in the particular case, put to the parties, "Well why should I not proactively apply the *Civil Procedure Act*?" The point was made to his Honour that the Act did not come into operation until 1 January. The upshot was that his Honour indicated orders would be made that he would authenticate on or after 1 January. An example of exquisite judicial enthusiasm. But it is an example of how the judiciary at all levels will embrace this Act.

I mentioned that judges have been undergoing training. Last Friday week the judges of the Supreme and County Courts met through the Judicial College of Victoria at an all day workshop on the implementation of the legislation. Almost all judges who sit in civil matters were present. It was a very large turn up. I think I can confess on behalf of my colleagues that many went into the room out of a sense of duty and probably because the Chief Justice asked them to attend. But as the day rolled out there was a growing level of enthusiasm for what the Act contains and what we will be able to do.

The highlights from a judicial point of view: an intensified level of ADR application; the prospect of being better able to manage, control and even, of the court's own motion, strike out unmeritorious claims.

Other highlights include changes with respect to discovery. Victoria has now fallen into line with the national approach. For those of you with national practices, you will find there is a seamless way of operating discovery now between Victoria and most of the nation, both state and federal.

But those sorts of things are highlights. Again I want to reiterate that there is not much difference between what you do now and

what you will do come 1 January. This was brought home in a paper presented by Justices Pagone and Judd at the judges' workshop I mentioned. Their Honours, of course, are two of the judges sitting in the Supreme Court Commercial Court. They went through the sorts of things they are doing with their case management conferences again consistent with what is now enshrined in the legislation. Judge Anderson from the County Court, together with Judge Kennedy, they being the judges responsible for the Commercial List in the County Court, ran through experiences with difficult cases such as construction cases, how they have approached them in the past and highlighting that this Act, in effect, does little more than enshrine case management practices that they have been operating for some time.

It might be that I should give you some tips as to how to approach the legislation. I have one tip. Read the Act. I would encourage all of you to take time out in your busy lives in practice to close the door, turn off the phone, acquire a cup of tea, coffee, glass of water, whatever is your preference, open the Act and read it from cover to cover.

It is essential to understand that the Act involves a framework. It is not a piece of procedural legislation to just be dived upon when there is a discovery problem, a mediation issue when there is a summary judgment you wish to issue.

It is a framework. At the beginning of the Act, are the overarching obligations. The Act also sets out the ethical obligations of lawyers in Victoria now as of 1 January. The overarching obligations are largely, as I have said, what you were already doing. If we turn to those I'm going straight to s.7s there is set out there the overarching purpose. In s.8 there are obligations imposed on the courts themselves to give effect to the overarching purpose. The purpose to facilitate just, efficient, timely and cost effective resolution of the real issues in dispute.

Surely no one in the room would disagree with those principles. They are merely an enshrinement in legislation of what we, as lawyers, have been committed to from the day of our admission to practice. Importantly, I would direct your attention to s.9 which

sets out the court's power to further the overarching purpose: timeliness, effectiveness, efficient use of judicial and administrative resources.

Significantly there is a list of exemptions contained in the Act. One of the significant discussions we had in the advisory group, and the judiciary was very forceful in this regard, we insisted that the courts not lose their power to make court procedural rules. We saw it as fundamental that the courts remain in charge of their procedure, not the government. We considered it overly prescriptive if the courts were to be told how to case manage their cases. Hence you will see running through key parts of the Act, particularly the exemptions, that there is a residual court rule making power. This is very important bearing in mind that the rules committees of each of the courts has representation from both the Law Institute and the Victorian Bar.

The implementation of the Act will take time. In our discussion at the Judicial College workshop the other Friday, we already identified areas that will require practice notes, may require rules, but we will engage with the profession and maintain the level of collaboration that has occurred. Again as I have said, this legislation provides an opportunity. There has been some coverage in the press that some lawyers are concerned that this legislation will increase costs for their client, that it will add to the cost of litigation. I refute that. If cases are prevented and deterred from going to trial, then the business sector is better able to return to what it does well, that is, doing business in the business community.

Certainly there will be some shift towards front end costing but it will be an overall saving of costs. The other point I would make is that this legislation places Victoria in a significant leadership role. For some time we have seen other jurisdictions laud themselves as the centre for litigation in Australia. This legislation, I believe, provides us with an opportunity to shift the momentum back. We have fine litigators here in this state, among the finest in the country, we should maximise that intellectual capital.

The remaining matter I want to mention is that the *Civil Procedure Act* is one side of the coin. The next tranche of reforms are the reforms relating to costs and the reforms relating to expert evidence. I have volunteered to again participate in that process if it occurs. We are yet to see what the new Attorney-General will wish to do.

With respect to costs, I see costs as the other side of the coin of the civil procedure reforms. We have in Victoria a unique costs taxation facility, the Costs Court. It is now just on one year old. We are finding that it is providing a service to litigators that is very special and we plan to develop and refine the costs assessment processes. In the Supreme Court, we see long term that a combination of the *Civil Procedure Act* together with the Costs Court will place Victoria in a significant national leadership position.