Reflections on the Federal Court

On 13 October 2008 the Hon Justice Catherine Branson was farewelled at a ceremonial sitting of the Federal Court.

As this sitting recognises, I will lose the capacity to exercise the judicial power of the Commonwealth at midnight tonight. I will probably never again sit in this position in a courtroom. I therefore beg your indulgence in allowing me to say a few words on the topic of the administration of civil justice. It seems better for me to talk today on this topic rather than to talk in anticipation of my new role as president of the Australian Human Rights Commission – but recognising, of course, the close connection between access to justice, including access to the courts, and the protection of human rights. What I have to say will surprise none of my colleagues and probably very few legal practitioners who have appeared before me. But let me put it in some form of context.

I was sworn in as a judge of this court in Adelaide on 20 May 1994. I held a commission that entitled me to serve for 24 years on a court then only 18 years old. It was a court conscious that its youth was one of its differentiating features. I walked unwittingly into two controversies. The first, whether the judges of the court should wear wigs – that is, either or both of short wigs for trials and long wigs for ceremonial occasions. The second controversy, whether all male members of the court should be required to drop the 'Mr' ahead of their title 'Justice'.

The chief justice's skilful ability to move the court steadily forward, if occasionally by mildly idiosyncratic steps, was demonstrated by my being sworn in, at a lovely ceremonial sitting of the court (I think one of the first, if not the first, at which television cameras were allowed) wearing a trial wig balanced, as the record of the occasion shows, rather crookedly on my head. The wearing of short wigs at a ceremonial sitting was a plain signal that the days of the long wig were numbered. The demise of the short wig followed shortly thereafter – and then, as you see, traditional robes, court jackets and jabots gave way to the Australian designed open robe manufactured from Australian wool that the court is wearing today. No loss of judicial dignity has resulted from these changes; no diminution in the respect accorded to the court. Simply, I think, recognition that what was seen to be right for common law courts generally in times past, was not necessarily the best option for this court today.

Turning to judicial titles, a colleague, whose identity I don't now recall, on the very first occasion that I attended a judges' meeting, suggested to me that I might move that, rather than those male judges who continued to use the title 'Mr Justice' being asked to drop the 'Mr', the female judges should assume the title 'Madame Justice'. This colleague, assuming that his intent was not just to tease, which it might have been, showed a lesser aptitude for managing change than the chief justice. It was not just that he misread me and the mood of the times;

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his suggestion showed a failure to appreciate that what worked well in one place (in this instance Canada) might not work well in another. It also showed, I think, a failure to understand something about Australians. That is, as it seems to me, that while Australians generally are willing to offer respect where respect is due – they are likely to make a joke of those who leave themselves open to accusation of pomposity.

Of course, the issues of court dress and judicial titles can be seen to be relatively unimportant in the greater scheme of things. But they illustrate a more fundamental question that the court was then facing, and which it continues to face. That is, how a relatively young court, created by the federal parliament as part of an innovative program of law reforms, should imagine itself and manage its relationship with the public. In particular, what is, for this court, the right balance between respecting the traditions of the common law and the need to embrace change to serve the present day needs of the Australian people? The answer must lie in the identification of the values reflected in the traditions. The mere fact that something has been done for a long time is no reason to continue doing it, should it seem incompatible with otherwise desirable change. It is important to recognise the values reflected in a particular tradition. If those values have enduring importance it is sensible for the court to ask whether continued observance of the tradition remains the most appropriate way for the Federal Court to demonstrate respect for them.

The Federal Court has been asking questions like this throughout my time on the court. It is critical that it continue to do so.

The Federal Court was one of the first in Australia, if not the first, to break with the tradition that common law judges should simply umpire disputes managed by the parties to litigation. The tradition of judicial non-intervention reflected the value attributed to judicial impartiality, to efficient use of judicial time and to demonstrating respect for the knowledge and skills of legal practitioners. The downside of the tradition was parodied by Dickens with great effect when he wrote in *Bleak House* of the imaginary case of *Jarndyce v Jarndyce.*

Those courts which, like the Federal Court, have abandoned the tradition of judicial non-intervention, have been persuaded that the values reflected by the tradition, which are all good values, are not incompatible with a system of case management more likely to meet the needs of present day Australia. Those needs are for a system of case management calculated to lead to the just resolution of disputes as quickly, inexpensively and efficiently as possible. In particular, as the former Justice Sackville has recently stressed, it is critical that legal costs are proportionate to the significance of the dispute in question.

The present financial troubles facing this country, and others, make this even more important than it has been before. Civil law courts and their legal practitioners will play a diminishing role in the life of the nation if means of constraining legal costs cannot be identified.

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This court recognises that its methods of case management must be kept under review and to this end it consults with representatives of the practising professions, and more widely.

However, and this is the point that I wish particularly to stress today; there is a limit to what the court alone can do. Litigation can only be conducted efficiently and cost effectively where there is real co-operation between legal practitioners and the court. While changes to the legislation governing the court, and amendment of the court's rules, are likely to be helpful at the margins they cannot alter this reality.

Legal practitioners and the court must be partners in case management. Unless this becomes much more uniformly the case, legal costs will continue to be unacceptably high and litigants will increasingly question whether resort to litigation is the way to resolve their disputes.

Critical to the efficient management of litigation is identification of the real issues in dispute. Practitioners are much better placed than the judge to know what the real issues in dispute in any case are. The judge has little option but to accept assurances given by legal practitioners.

Moreover, the court is always dependent on legal practitioners to ensure that its orders and directions are complied with. The making of orders and directions that cannot be, or simply are not, complied with is an unnecessary waste of both time and money. So is the making of orders at the request of practitioners for, for example, extensive (which necessarily means expensive) discovery when the chance that it will enhance the just and efficient resolution of the dispute is small.

In short, efficient and effective case management is dependent in significant ways on the co-operation and frankness of legal practitioners with the court. It is in this context that I would like to reflect briefly on the content of a legal practitioner's duty to act in the best interests of his or her client.

Modern legal practitioners tend to identify much more closely today than once they did with their client's commercial objectives and interests. This tendency, although it might be thought to carry the risk of compromise of professional independence, will probably not be reversed. Attention to a client's commercial interests may cause some legal practitioners to misunderstand what is involved in their duty to act in the best interests of that client in legal proceedings. It cannot, in my view, be stressed too highly that their duty is a duty to act in the best interest of their client in achieving a just and efficient resolution of the client's dispute according to law. It is not a duty to act in the client's best commercial interest should the client's commercial interests not be advanced by efficient resolution of the dispute. The duty of a legal practitioner to his or her client is thus entirely consistent with the practitioner's parallel duty to co-operate with the court's endeavours to resolve all proceedings as quickly, inexpensively and efficiently as possible.

A change in litigation culture will require courage in legal practitioners and trial judges alike. It will also require a sensitive appreciation in appellate courts of the need for change if we are to achieve a system of case management better calculated to lead to the just resolution of disputes as quickly, inexpensively and efficiently as possible.

I should say immediately that I have had many happy experiences as a member of the court receiving assistance from barristers and solicitors throughout Australia who well understood the nature of their duty both to the court and to their client. Since we are sitting today in Sydney may I comment particularly on the courtesy and high level of assistance I have received from members of the New South Wales Bar – quite often in cases in which they have appeared *pro bono* to protect the interests of litigants who would otherwise have been without legal assistance. The extent to which barristers and solicitors in this state, and Australia generally, are willing to work for no fee or limited fees to advance social justice and assist the administration of justice reflects extremely well on the legal profession.

I have found recent days much more emotional that I expected to do. It has been a great privilege to serve as a judge of this court for more than 14 years. I leave it with considerable regret although I am convinced that the time is right for me to make a change. It is also a great honour and privilege to have been asked to serve as president of the Australian Human Rights Commission. I look am looking forward with considerable excitement to the challenges that this new chapter in my professional life will bring.