

**REMARKS OF
THE HONOURABLE MARILYN WARREN AC
CHIEF JUSTICE OF VICTORIA
ON THE OCCASION OF THE
VICTORIAN COMMERCIAL BAR ASSOCIATION RECEPTION
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6 May 2010**

Your Honours, Mr Digby QC, the Honourable Robert Clark MP, Shadow Attorney-General for Victoria, the Honourable Mr Justice Mohammed Fazlul Karim, Chief Justice of Bangladesh, Your Excellency the High Commissioner for Bangladesh, distinguished guests, ladies and gentlemen.

I extend a very warm welcome to the Supreme Court of Victoria and a special welcome to the Chief Justice of Bangladesh.

This is an opportunity to celebrate Victorian commercial advocacy. This morning, Chief Justice Keane of the Federal Court of Australia spoke about the quality and ability of the Victorian advocate including the expression 'second to none'. I have urged the Chairman of the Victorian Bar to include His Honour's remarks in the *Victorian Bar News*.

Both in my capacity as a former Commercial List Judge of this court and as Chief Justice, I join with Chief Justice Keane in praising the Victorian Commercial Bar. I sit in all jurisdictions and observe that your advocacy, preparation and support of the bench is outstanding – to repeat, ‘second to none’.

This is a time of challenge for commercial litigators and advocates. There are the proposed Victorian Civil Procedure reforms following the Victorian Law Reform Commission report on civil procedure (*The Cashman Report*). We also have the federal reforms announced by the Commonwealth Attorney General for civil litigation.

Pre-action protocols are one significant example. It needs to be recalled that commercial litigation is conducted differently from most other litigation. By the time commercial litigators are ready to initiate proceedings, mostly, they have been through all the processes contemplated by proposed pre-action protocols. Indeed, in England Lord Justice Jackson in his report has recommended that pre-action protocols not apply in commercial litigation.

It is important that the Commercial Bar and the commercial profession engage in discussion on this topic. I chair the Civil

Procedure Advisory Group considering *The Cashman Report* and reforms. I acknowledge the assistance provided by the Chairman and Mark Moshinsky SC of the Victorian Bar and Mr Steven Stevens, President of the Law Institute in assisting the Group's work especially helping the Department of Justice in understanding the ramifications of universal and mandatory pre-action protocols. Ultimately pre-action protocols and their application is a matter that should be left to the courts and court rules made by the judges.

In political circles there is a temptation, often, to do all things novel: therapeutic jurisprudence, non-adversarial justice, restorative justice, alternative dispute resolution, appropriate dispute resolution and multi-door court house concepts are some of the ideas dominating discussion.

Ultimately, some matters must go to court. That is the time when the state is obliged to provide the facility for commercial litigation – to keep the wheels running upon which the economy depends.

That said, judges play an important part in guiding parties to settlement: they narrow issues, focus thinking and promote an environment of productive negotiation. There is a challenge for all

involved in commercial litigation to examine how we do things and how we might do things differently.

The Commercial Court in the Supreme Court of Victoria and the Fast Track List in the Federal Court are examples of how well Victorian commercial judges, advocates and litigators do things. We see case management conferences providing opportunities for litigants to express in their own words how they see their case playing out. In the Commercial Court there are opportunities for judge led early neutral evaluations. These are all measures where judges play an important part in the litigation process beyond who wins and who loses.

We know from independent research commissioned by the Victorian Bar that civil litigation contributes over \$800 million dollars per annum to the Victorian economy.

Courts and court buildings are a significant part of the infrastructure of Victoria. Just as governments fund education, health and transport infrastructure, so too, must there be expenditure on court buildings.

We need the highest court in this state to match the infrastructure benchmark set by the Commonwealth Government.

It is a bipartisan issue – not a competitive or political one – the Victorian business community should have its commercial litigation conducted in a twenty first century environment. No modern commercial law firm or commercial advocate would contemplate working with corporate clients in run down facilities. Here in the Victorian Supreme Court we have limited high standard commercial facilities – the new Court 15 warrants particular recognition. However, it is a single court room. The Court is trying to help government understand the environmental expectations of the corporate world. If we do not have proper modern facilities, business and its litigation will go elsewhere, potentially at a loss to the Victorian economy and its reputation for excellence.

I encourage commercial advocates, litigators and their corporate clients to tell government what is expected. Melbourne must not be left behind.

One last remark. The Honourable Justice David Byrne will retire at the end of the month as a judge of this Court after 19 years service, eight years as Principal Judge of the Commercial and Equity Division. His Honour will be farewelled in the Banco Court on Monday 31 May 2010 at 4.30. I invite you all to attend. I take the opportunity to publicly acknowledge and thank His Honour

for his extraordinary contribution to commercial litigation and innovation in this court.

I again extend a very warm welcome to each and every one this evening and invite you all to celebrate, in this wonderful space, Victorian commercial advocacy.