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CHIEF JUSTICE OF NEW SOUTH WALES

LEXISNEXIS' 10 YEAR CELEBRATION OF THE CIVIL PROCEDURE ACT & RITCHIE'S UNIFORM CIVIL PROCEDURE

23 JULY 2015*

Good evening everyone. May I start by thanking Lexis Nexis for asking me to speak tonight. I am delighted to again speak about the ten year anniversary of the *Civil Procedure Act*. I say "again" because, as some of you may be aware, the Court hosted a day long conference in celebration of the anniversary of the Act earlier this year. In fact, I confess when I was first invited to speak tonight I did initially intend on simply repeating portions of what I had said at that earlier conference. These plans were nipped in the bud however, when my researcher astutely pointed out that the sort of fun-loving, adventurous people who come to evening celebrations, devoted to the *Civil Procedure Act* and accompanying commentary, are the same sort of hip and happening people who come to day long conferences celebrating the exact same thing. In short, she cautioned me that there may be a few repeat attenders in the audience.

Of course, I have not forgotten that tonight is not just about the *Civil Procedure Act*. Ritchie's is also celebrating reaching its ten year milestone. In fact, the *Civil Procedure Act* has the luck, or misfortune, depending on how you view it, of sharing its anniversary this year with the anniversaries of many other important publications and historical events. In saying this, I'm not talking about Elvis Presley's 80th anniversary, or the tenth anniversary of the publication of the Twilight series. Sticking strictly to this year's legal calendar, there is the 800th anniversary of the Magna Carta, the 50th anniversary of the Commercial Law Association and the 20th anniversary of the *Evidence Act*. Even more importantly it is the tenth anniversary of the *Water Efficiency Labelling and Standards Act* and the 20th anniversary of the *Tweed River Entrance Sand Bypassing Act*. I'm not sure if LexisNexis is hosting the functions celebrating those milestones, but I'm sure I'll receive the invitation soon enough and I look forward to seeing you all there.

Now, the reason for me mentioning all these anniversaries is because they have in fact caused me to reflect on the different legislative instruments the subject of celebration; from the great charter itself, to the comprehensive *Evidence Act*, all the way to the exponentially expanding mass of commercial law. This has made me realise, a special feature of the *Civil Procedure Act* which I think has been instrumental in the Act's success over the last ten years. The feature is the fact that the Act is a good, not to say perfect example, of a principled rather than prescriptive approach to legislative drafting.[1]

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* I express my thanks to my researcher, Miss Madeline Hall, for her assistance in the preparation of this address.

[1] This is a feature arguably shared with certain chapters of the Magna Carta. It is no coincidence that the chapters that have retained their relevance are those that express ideals ("to no one will we sell, to no one deny or delay right or justice") rather than the mechanics of debt collection or taxes.

By “principled drafting” I mean that many of the provisions are expressed in fundamental end-orientated terms, often retaining judicial discretion to allow for individualised justice. The obvious example that comes to mind is section 56’s overriding purpose. This section’s success, I believe, stems from its focus on the desired effect or outcome, namely a just, quick and cheap resolution of disputes. This is rather than a focus on *what* “just, quick and cheap” mean or itemising *how* that is to be achieved. Such detail has successfully been left in the “loose rein” the legislation gives to judges.[2] Similarly, section 61(1) empowers the court to give directions “for the speedy determination of the real issues”. Section 64(2) allows necessary amendments for the purpose of determining the real questions, correcting errors or defects and avoiding multiplicity of proceedings. Throughout the Act therefore, there is an emphasis on purpose and outcome, not mechanics and method. This is particularly surprising given the Act’s subject matter is procedure, were you would expect method and mechanics to naturally prevail.

In complimenting this feature of the Act I am not suggesting the legislation is perfect. No doubt a degree of superfluity still exists. For instance, it is debatable how beneficial it is, to have a subsection stating the court may make any order it thinks fit, immediately followed by another subsection listing examples of the types of orders the court could make. Such detail may be considered instructive and but the work of a moment. Yet its logic, when applied to every provision of every act can be nothing less than ruinous. For proof I refer you to section 82KZMGA of our tax legislation, which of course is followed by the illuminating 82KZMGB.

On the whole therefore I do feel the *Civil Procedure Act* resists prescriptive drafting more often than it caves in to it. I think it is largely for this reason alone that the Act has avoided the fate of its tax, competition and corporation brethren. Despite being amended over thirty times, after ten years the Act still has retained its clarity and continuity. In this day and age of statutes, I think this alone, is cause to celebrate the Act’s tenth birthday. I also feel it is thanks to its principled style of drafting that the Act has allowed the needed cultural shift on case management to be effected smoothly and in the spirit, not just letter, of the law. It has provided practical certainty for practitioners whilst retaining flexibility for individualised justice.

Of course, despite all the positive benefits, flexible principled provisions inherently cause some degree of uncertainty. Fortunately for NSW practitioners however, when it comes to uncertainties in civil procedure there is Ritchie’s. The profession’s reliance on the Ritchie’s publication I think can be discerned by counting the number of practitioners who attend court clutching at least one of the red volumes in their grasp. From these statistics it seems physical possession of Ritchie’s is considered a necessary precondition to attending court; a sort of talisman against the unknown. This is a testament to the tremendous work of the authors and all those involved in its publication; not just in creating practical, pithy commentary, but maintaining its up to date status, so it can continue to be relied upon now and in the future. Congratulations and happy birthday!

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[2] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [6.21].