The purpose of the Seminar is twofold. I intend as briefly as may be to give a resume of the problems of the commercial jurisdiction as the Judges see them. We hope that there will then be a discussion in the course of which we would appreciate hearing any suggestions you may have as to changes and improvements in the operation of the Court. We are interested to know what problems you feel exist in the working of the jurisdiction. We do not for a moment pretend that the system we presently have is perfect and we are always happy to and prepared to listen in a discussion of this type, to any problems that the profession feels are presented in the course of the Court's operations.

If I may, I shall try to direct my remarks to those to whom the jurisdiction is perhaps somewhat strange. If those who come there day after day, forgive me, I will have to be somewhat elementary in some of the things that I say. Nonetheless, I hope my remarks will highlight how the Court sees the present situation.

The purpose of the Commercial Court as you know is to obtain for those who come to it, more expeditious trials before Judges with special experience in commercial work. The expeditious trial is sought to be obtained by means of eliminating technicalities, striving to get a determination of what are the real issues between the parties and by these means we seek to achieve the other objective of keeping down costs. It is clear beyond question, that these objectives cannot be achieved without a real effort, not only on our part, which I hope we make, but also on the part of the

profession and the clients themselves. I want to say right at the outset that all three of us acknowledge the help that we get from the profession and we look forward to getting it in the future. I will have occasion to remark upon certain matters which are causes of concern to us. In no way is anything I say intended to be, or thought to be, any form of attack on the profession. We consider ourselves fortunate to have the assistance of lawyers who are skilled in the presentation of commercial cases.

At the outset I can do no better than to cite some words which fell from Mr. Justice Wells in a recent unreported decision of the Supreme Court of South Australia, because it illustrates to perfection what we feel is the role of a Judge. He said:-

> "In former times it was fashionable - I am not sure that it was always correct, but it was certainly fashionable - to regard the procedures laid down in the Rules of Court as providing simply the facilities for parties to use at their will and pleasure. They could make use of them if they wished; they could decline to make use of them further if they wished; they could, in a phrase, if they wished, play ducks and drakes with them. It was apparently thought that the Court is required simply to act as arbitrator on the sidelines, and if the parties, did not wish to proceed any further with something, if they wished to delay inordinately, if they wished to disobey the rules, then that was up to them, and the Court had no responsibility to the community and the parties had no responsibility to the Court. Well, however that may have been, in my opinion, it is now no longer the case. Courts provide a facility, an important facility, to the community. It is a facility that is greatly sought by litigants. Lists are increasing, difficulties are continuous in the management of hearings. It seems to me that if parties decide that they want to invoke the proceedings of this Court, then they should act crisply, responsibly, promptly. Once the wheels are set in motion, then, in the absence of some good reason, they should continue to turn; and, in my view, there is a dual responsibility, a responsibility of the parties to courts and also to the community, a responsibility of the courts to the parties and to the community. There are scattered throughout the rules of court discretions reposed in Judges to relieve parties of the consequence of non-compliance with rules. They are what they are intended to be, namely discretions ... It seems to me that if parties

> go to sleep on their rights, go to sleep on the procedures, they cannot expect that discretion will be exercised in their favour as a matter of course, and if discretions are exercised, then they must be prepared to accept the responsibility for their own shortcomings."

As those of you who have had the misfortune to come and see me on Thursdays know, those words express fairly accurately the way I seek to administer the Commercial Court. I am glad to say that I still have some friends left, albeit the numbers of dwindling rapidly, but His Honour emphasises some of the points I am seeking to make. There is involved in the work of the Commercial Court, a co-operative enterprise between the Court, the profession and the client. If we are going to make the system work, as we have to for reasons I need not enumerate, we will all have to co-operate, one with the other, in bringing about that desirable achievement. It has to be faced that in any litigation the parties are not equally anxious to achieve an early hearing. It also has to be recognised, and I wish to assure you that we do recognise the facts, that litigation imposes great pressures on the commercial community. One only has to think of the small business faced as it is with having to provide a list of documents relating to litigation. A one-man, two-man or otherwise small business simply has not got the manpower to devote to the necessary task. The demands on executive time in a big business in the preparation of a case, impose conflicting demands on an executive that will have to be reconciled in some way. There is another problem which we have to recognise and that is that there are a limited number of experienced practitioners in this field, That even though

in their anxiety to make a fairly small income, they do work 25 hours a day, there are still occasions when we find that timetables forthe preparation of cases have not been adhered to. What the answer is to that problem is one that we have to grapple with. When we require that the wheels of litigation be kept moving, we are by no means unconscious of the various pressures that are imposed on both the community in the sense of the individual litigant and on members of the profession. Nonetheless the community is entitled to have the Courts act in a way that Mr. Justice Wells has described, and insofar as it is within our power, my colleagues and I intend to see that that is done.

Notwithstanding a recognition that these problems do exist, we by no means consider ourselves to have failed in the ambition that we have, of providing the kind of Commercial Court I have described. My brother Yeldham heard a matter in which the cause of action crystallised in May 1980, a statement of claim was issued on the 27th June, 1980 and the matter first came into the list for mention on the 24th July, 1980. I then fixed it for hearing on the 27th October and laid down the timetable for interlocutory steps to be taken. His Honour delivered his reserved judgment on the 16th December, 1980 and I should say that it was a judgment running into some 55 pages, so it was not a matter that was free of complexity. The elapsed time for this litigation was under six months. The question which we ask ourselves is why does this not always happen? It is with a view to exploring the answer to that question that I propose to look at the various problems which present themselves in the course of cases coming before us.

An illustration of the nature of the problem may be the posing of a simple question. Jones is a small businessman and he has supplied goods to Smith Pty. Limited and gets a guarantee from Mr. Smith. Company does not pay, Smith does not pay and Jones asks a simple question to which he is entitled to an answer "Why do I have to go through all the elaborate procedures of interlocutory steps in order to get paid the money which I am justly entitled to?" Unless we come up with a satisfactory answer to that, it seems to me that in a substantial respect we would have to consider the Commercial Court a failure, notwithstanding our ability to delivery speedy service in some cases. May I therefore work my way into the answer to this question by referring to a number of problems that require examination as a demand for payment of the money works its tortuous way along the path of litigation.

The first question, of course, that any litigant in our Court has to ask himself is "Is it an appropriate matter for the Commercial List?". As you know, the limits of our power to list a matter in the Commercial List are prescribed by the Supreme Court Act and basically the test is - is the dispute one that arises in the course of an ordinary commercial transaction? We consider the notion of ordinary commercial transactions to be an evolving concept and we try to ensure that as the means of commerce evolve into new paths, we keep pace with what happens in the real world. Thus we try to ensure that the notion of ordinary commercial transactions embraces those matters which the market place so recognises. One illustration that perhaps may be given, is that until recently transactions in the Futures Markets were unknown to the world of commerce. We had no difficulty in so structuring our affairs that transactions in that market are embraced by the concept of a commercial cause. In a judgment which I hope

has the agreement of my colleagues, I have recently sought to indicate that the Court will ever be ready to ensure that those matters which truly demand the attention of a Judge having those attributes which the legislature thought it detected in us will be heard by the Commercial Court.

Having surmounted the barrier of satisfying the call of the definition of a commercial cause quickly enough, one comes up against the first matter which causes problems and delay. For reasons which I cannot satisfactorily explain to myself, the number of cases in which there is a delay in bringing the matter into the Commercial List, are absolutely beyond belief. In the case of an application today, the applicant eventually took the path of prudence and did not pursue an application to transfer a matter into the Commercial List. The cause of action crystallised at the latest in 1972, the action was commenced in 1976, from time to time it has been adjourned since 1978, with the parties making an application to transfer it into the Commercial List in March 1981. The reason why I am mentioning that matter is this. It is a source of profound concern to me, that there is a client somewhere out in the cold who is no doubt going around saying it is the fault of the courts that my litigation has taken nine years and still has not come up for hearing. There is absolutely nothing that we can do in situations such as this. The firm of solicitors that were acting for the plaintiff in that action are a large, wellknown and highly regarded firm and I am in no way seeking to impugn their professional expertise. Why the situation I have described has been allowed to come about, I do not know.

This is but a glaring instance of a problem which regularly arises and which will have to be grappled with. Unfortunately when an action is instituted by the filing of a statement of claim, the Supreme Court office has no means of making up its own mind whether the matter is fit for the Commercial List or not and if the parties do not themselves ensure that it comes into our list, it never comes to our attention and there is naught we can do towards ensuring an early and expeditous determination. There is provision made in the Rules to try and overcome this problem to some extent by giving the defendant an option to put the matter in the Commercial List, but again there are instances where defendants for reasons of their own or through sheer oversight, fail to take the necessary action bringing about the result I have already stated. The legal system , the courts and the profession generally, are all the subject of public examination. It seems to me that we ought to take some steps to ensure that failure to afford to litigants an opportunity which the legislation provides of an early and speedy determination is not lost through sheer neglect.

Having surmounted that initial step of bringing the matter into the Commercial List the Rules require that either the plaintiff or defendant, depending on who made the initial application to put the matter in the Commercial List, should within the shortest possible time put the matter in the List for directions. The Rules further provide for an obligation on the other party, should the party carrying the primary obligation to list the matter for directions fail to do so, to take out a motion for directions. The importance of

putting the matter in the list for directions is that it then comes before the Judge who can then make the necessary orders to ensure that a timetable is laid down which will bring the matter to an early hearing. There have been numerous cases of unexplained non-compliance with that obligation. There is nothing more unsatisfactory than to enquire from a legal representative why the Rule has not been complied with and to be met with the answer that there is really no explanation. This is not satisfactory to the Court. It may not be satisfactory to the legal representative but just think how unsatisfactory it must be to the ultimate customer. I am concerned that we as a profession allow this situation to obtain with the frequency with which it occurs. Again, procedurally it is not possible for the Supreme Court to detect failures to comply with this Rule.

Eventually the day dawns and the matter is in the list for directions and the time arrives for the setting of the timetable. On the first occasion when the matter comes in the list, I try to ascertain what the parties conceive the issues will be. It is unsatisfactory in the extreme that the legal representative attending at the directions hearing should be a person who is not fully seized of the matter. In those circumstances the directions hearing is akin to useless. I try to ascertain whether all the varied armoury which the Rules provide in the nature of interlocutory steps are necessary to be gone through in the particular case. I can only do that with some hope of success if I am told what the issues will be.

It is clearly perceived by the profession I would imagine, that the Rules of Court require that any properly drawn statement of claim should contain the necessary particulars

to enable a defence to be filed. My predecessor in title and I have discussed on a number of occasions what means could be used, short of dynamite, to separate those who appear on a directions hearing from the notion that particulars should be sought and obtained even when they are not required for the purposes of pleading. Obtaining particulars at that stage results merely in a doubling up, because the question is then usually asked again when interrogatories are administered and the effect on costs need not be emphasised. By means of judicious pleading and sundry other matters that I will not go into, I am gradually getting to the stage where parties are willing to forego the request for particulars unless they are really genuinely needed. In those cases, of course, the question arises why those particulars have not been included in the statement of claim. I leave that problem with you.

It may be useful to digress for a moment and mention that the procedure which was provided in the '60's and which enjoyed temporary popularity of dispensing with pleadings and proceeding by summons and affidavit, seems to have fallen into complete disuse. I can understand that this is to be ascribed to an apprehension that counsel feels that without pleadings, he may be met by a claim or defence strucutured in a way that he had not anticipated. It is not clear to me why that problem could not be met by the framing of issues for trial in simple cases. If I may say so, I think that having pleadings is an easy course for parties to take, whereas framing issues for trial perhaps calls for more co-operation and effort. I rather suspect that it is for that reason that in cases where pleadings could be dispensed with, the parties nonetheless employ the full armoury of litigation.

To return to the first directions hearing, as I say, a timetable is drawn up which almost invariably provides for discovery of documents and administration of interrogatories. Now at that stage of the proceedings, the Judge really knows very little about the matter. He is dependent entirely on the representatives of the parties who solemnly assure him that indeed discovery and interrogatories are necessary. This is so notwithstanding that in the hearing of the action when it comes on, time after time, one, two or three interrogatories are tendered out of a vast number of questions asked and answered. Now I recognise that of course answers to interrogatories fulfil other purposes than simply that of being tendered. It puts one in fear and trembling for the amount of money that must be incurred by way of costs and also apprehensive of the delay that is consequent on the drawing of interrogatories and answering them in cases where that exercise has not been truly necessary.
I ask people from time to time, that we give some attention to the question in individual cases whether all that machinery which the Rules provide by way of preparation of a case are necessary in the particular instance.

Having laid down the timetable, frequent problems seem to arise with regard to the adequacy of discovery. It must be profoundly difficult, I imagine, to explain to a businessman what is required by the rules relating to discovery. A gramophone record could be obtained and regularly played with regularity as in the course of a hearing, one party or the other gets up and complains that some document or other had not been discoved by the other party. It seems to me that it would be of some great advantage to all concerned, if more strenuous efforts were taken to explain to members of the commercial community what is encompassed by the requirement that documents

should be discovered. Let me say that I recognise the fact that the relevance of documents often does not become clear until somewhat late in the proceedings after the initial time for discovery. That no doubt explains why time after time supplementary lists of documents are filed. I return to the point that I made earlier. What are we going to do about the one man business where the proprietor is busy, either repairing the plumbing or electricity installations, instead of attending and going through his no doubt somewhat scattered invoices and other documents going back over many years and sitting in a shed in the back of his home. You cannot say to a person in that position that if he has not got the time to do that, then he should not be in court. He wants his money and he wants to know why he has to go through, that to him no doubt unnecessary exercise, in order to get his money to go through the accumulated debris of ten years of business life in order to find particular invoices or letters. One should discard in litigation of that kind, the requirements of the vast armoury that the law has erected for the resolution of involved disputes between parties. At the other end of the scale one has the company with a branch in Canada, a branch in the United States and a couple dotted around the South Pacific, To go around inquiring in each and every branch what documents are available is a task not many undertake and many and sad are the stories that are propounded by way of excuse to justify non production of documents. I have taken time to deal with this aspect because it seems to me that a great deal of attention should be paid by solicitors towards ensuring that the client is given assistance in knowing what he has to do or what the company has to do in connection with the obligation to discover documents. With minor exceptions, I can think of no proceedings during the twelve months or so that I have been sitting as a Judge, in which the

original timetable has been adhered to. However, there have been some success stories. For example, in one matter where the parties adhered to a timetable and in an admittedly simple matter, a hearing was held within some eight weeks of the date of institution of the proceedings. That was a direct result of an adherence to timetable. When there is departure from the original agreed dates, parties consent to extensions of time as between each other, and I must confess I often wonder if clients really know what is going on. To try and avoid a situation in which timetables simply fall into disregard, I have now instituted a system of default orders. Under such orders, if a timetable is departed from, the matter is required to be brought back before the Judge. Whether that system has improved matters or not is rather more for you to judge than for me, I hope it has.

Ultimately a cardinal reason for the disruption of the efficient business of the court, is the number of settlements that take place at the door of the court or indeed after cases commence. It is a regular feature of life for all of us, to get a telephone call on Monday morning, after counsel has had the weekend to actually prepare the case, and to be informed that the matter has been settled. This may be an inevitable consequence of the fact that there are a limited number of counsel doing this sort of work and they are all very busy. However, it is not a state of affairs which any regulated community can allow to continue. It is unfair on those whose cases are postponed because time has been allocated to the hearing of the particular case. One of the other reasons for last minute settlements is that most businessmen do not realise until the case is actually

due to come on, just what will be involved. It means that they will be out of their office or that executive officers ofthe company will be out of their offices for a great deal of time, if not the entire day, in the ensuing two, three four days, or even weeks. When this realisation dawns on them, more realistic efforts for settlement are made and often result in agreement. Why it can't be explained to litigants at an earlier stage what extortionate demands litigation makes on commercial time, is not quite clear to me. I have a feeling that if it was really appreciated by those who ultimately will have to spend the time unpaid in attending court, they may well be prepared to consider a settlement of their cases well before the date fixed for hearing.

In an effort to reduce the instances of settlements at the door of the court, I have instituted a reasonably elaborate directions hearing system held approximately a month before the hearing. Even that does not seem to have brought about the necessary improvement. We have sought to meet the convenience of litigants by giving fixed dates for hearing and I am proud to say that owing to hard work of at least two of the other Judges sitting in the Commercial Court we have not had to cancel or vacate one fixture. The Court is there, it is ready, willing and sometimes even anxious, to actually embark on the hearing of a case. In order to maintain the kind of service to the community that we seek to give, we have to overcome the problem of last minute settlements. I would be most interested to have the views of those intimately concerned with day to day litigation on what could be done in this regard.

I then come to the bugbear of all of us. Last minute amendments occasioning the need for adjournments, are even worse than last minute settlements. Notwithstanding the frequent occasions in which a matter is in the directions list as it traverses its way towards being allocated a date for hearing, notwithstanding the discussions about issues, notwithstanding the final more elaborate directions hearing, notwithstanding the assurance that the matter is now ready for hearing,with disturbing frequency as a matter is called on, one side or the other rises to its feet and says that an amendment is sought, the concomittant of which will be an adjournment. Of course, it is not even just on the first day that this occurs. Occasionally a matter may be in its third, fourth or fifth day and the trial judge is still awaiting the filing of the latest amendment to the pleadings. Indeed in a recent action which went for seven days I reserved my decision with the injunction that the amended pleadings will have to be delivered before judgment was given. There are limits to the extent to which the Courts can go in informality in trying to accommodate the legitimate desires of the parties to dispose of matters in this sort of way. Mr. Justice Wells no doubt had some of this sort of thing in mind when he said that there are conjoint obligations and duties owed by the profession and the parties to the Court and vice versa. If I may for a moment advert to another aspect of amendments and adjournments which we as lawyers do not think about very often. It must be stressful and dismaying to a client when at the last minute and without warning, his case is adjourned.

We are anxious and we have from time to time demonstrated our willingness to experiment in an endeavour to improve the despatch of the Court's business. If I may give an illustration.Just within the last couple of weeks the liquidators of a wellknown public company which had the misfortune to fail to the tune of many millions of dollars decided to commence an action against the auditors for something in excess of ten million dollars. I freely confess that I was cribbing from the American Manual for Complex Litigation in ordering the parties that instead of going through statements of claim and statements of defence and interrogatories, we have each party file a narrative of the facts upon which reliance is sought to be based with each party contradicting so much of the others narrative as is really in dispute. We are also going to have filed in that case what I suppose the Americans would term a brief which sets out the legal authorities upon which reliance is sought to be placed. The parties will be required to file all the exhibits upon which they propose to rely and then those to which objections are to be taken will be the only ones to occupy actual court time. Any steps like that which can reduce the amount of time that is taken by litigants away from their business and which occupy the Court's time, we welcome and encourage. We recognise that it is singularly inappropriate to the sort of problem with which I started, that is someone suing on a small guarantee. The example I gave is merely an instance of a situation in which we thought that there were steps available to try and solve problems created by complex litigation.

We recognise many of the problems which face litigants in other ways. One of the most irritating things in the commercial world must be the late receipt of supboenaes.

Occasionally banks and other institutions have to ransack their records in an endeavour to comply with an order of the Court on short notice. We are hoping to take some steps in order to avoid that situation occurring.

Some years ago the Judge who then presided in the Commercial Court sought to set up a committee of users of the Court. That has fallen into disuse.If an endeavour was made to resuscitate that commitee, I am sure that we for our part would be delighted to have any suggestions from those who are really in day to day contact with the procedures of the Court and have some suggestions available to improve the daily flow of the Court's business. For myself, I am quite happy to receive suggestions, quite apart from semi-formal occasions such as this, in the course of everyday operation of the Court.

As I have said, we have endeavoured to provide in the directions hearings for adaptation of existing procedures. I hope that these directions hearings will yield further and I hope more substantial improvement. But of one matter there can be no doubt. Notwithstanding instances such as the one I have given you where a speedy decision was given, we have to ensure that that becomes a norm rather than the exception. The ultimate would be if one could provide a Commercial Court which can in a range of between 90 and 180 days, provide a hearing for any type of case.

One of the reasons why it is singularly apt that the Chief Justice should open the proceedings, is because he was the trial Judge in 1973 in a dispute between Ampol and R.W. Miller. The matter first came before the Court

in July, the hearing took place in September or October and judgment was given by November. That was a matter which required an immense amount of preparation and there is no reason why it could be done in that complex matter that any other case should not be prepared at the same expedition. There were reasons there which demanded special expedition but somehow or other we have got to ensure that such expedition becomes the everyday performance of the profession and the courts. That is our aim and the reason why we have gathered here is to invite your comments and assistance in providing just that.