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THREE CONTEMPORARY ISSUES IN CIVIL LITIGATION: EXPERT EVIDENCE, DISCOVERY AND ALTERNATIVE DISPUTE RESOLUTION

ANNUAL CIVIL LITIGATION SEMINAR

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Introduction

1. I would like to begin by respectfully acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders, past and present.

2. When I started practicing, civil litigation was, in many ways, a much simpler, although far less efficient, process. This was a time before the *Civil Procedure Act*,[1] when civil litigation had a strong *laissez faire* flavour. Most cases ran without any case-management by the court or judges, there was limited use of written evidence, discovery regimes were, for the most part, unsupervised and briefs would not arrive in removalist vans. The only limitation on discovery was by the Peruvian Guano principles, namely, that anything relevant to a fact in issue could be subject to discovery. There were logjams on litigation in the form of interrogatories. A great amount of time and creativity was taken by junior council to think of every possible question which could be asked of the other side, and by the junior council on the other side to think of every possible answer to each interrogatory.

3. The problems that I saw as a young barrister in regard to delay and the high costs of litigation were, of-course, not new. In 1853, Dickens famously concocted the case of *Jarndyce v Jarndyce,* in which a legal dispute surrounding a testator who has inexplicably created two wills drags on for so long that when it is finally resolved, legal costs have consumed the entire estate.

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[*] I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

[1] *Civil Procedure Act 2005* (NSW).

4. In *Bleak House,* Dickens describes the litigation process as follows,

> all through the deplorable cause, everybody must have copies, over and over again, of everything that has accumulated about it in the way of cartloads of papers … and must go down the middle and up again through such an infernal country-dance of costs and fees and nonsense and corruption as was never dreamed of in the wildest visions of a Witch's Sabbath.[2]

5. While at times I have been immensely frustrated with the sometimes endless amount of documents involved in civil litigation, I have neither the eloquence, nor the pessimism, of Dickens. Throughout the few years I have been in the legal profession, I have seen changes in the field of civil litigation that provide me with hope as to its future.

6. When I started practicing, the notion that parties should have complete control over proceedings seemed to be absolute. However, things started to change in the mid-1980s, when the judiciary started to take more of a hands-on approach to case management. The Commercial List started to be extensively case managed by judges experienced in the area and cases began to proceed far more efficiently and expeditiously. The list was no place for the faint hearted, much less for the inefficient. Indeed, I heard a number of complaints by my fellow members of the Bar about the brutal manner in which the list was conducted.

7. However, what took place in the Commercial List gradually became the norm, and today we have a landscape in which cases are, generally speaking, managed by Judges and Magistrates and there is an expectation, enshrined in section 56 of the *Civil Procedure Act*, that cases be conducted in an efficient manner.

8. While it hardly needs to be repeated to a group of lawyers who have chosen to attend a seminar on civil litigation, on a Saturday no less, section 56 of the *Civil Procedure Act* states that the overriding purpose of the Act is to "facilitate the just, quick and cheap resolution of the real issues in

[2] C Dickens, *Bleak House* (Bradbury & Evans, 1853), 67.

the proceedings". The High Court, in the *Expense Reduction* case,[3] has made it clear that judges themselves have a duty to ensure that cases progress efficiently. This is obviously in the best interests of both litigants and the community in general. Courts do consume scarce resources and it is necessary for those resources to be utilised as efficiently as possible.

9. However, it is not only judges who bear the responsibility of facilitating efficient court proceedings, both parties in civil proceedings, as well as their lawyers, are obliged by section 56 to assist the court to further this overriding purpose.

10. With this in mind, I will spend my address today speaking from a judicial perspective about some continuing issues which are of concern to judges, such as myself, in civil litigation. One advantage of a judicial perspective is that it provides one with the opportunity to look at issues from a broader view than can be taken as a member of the Bar or the profession, where there is a greater degree of specialisation and matters tend to be looked at from the prism of one's individual client.

11. As such, today I will be talking about three broad areas of civil litigation that present issues and challenges for civil litigators. These are, first, discovery, second, expert evidence and third, court-ordered alternative dispute resolution.

Discovery

12. As for my first topic, Judges are famous, or perhaps infamous, for lecturing lawyers about discovery. Indeed, in a previous lecture, I myself described discovery as "the tail that wags the litigation dog".[4] I will try not to lecture you today, but will rather make some observations and identify some issues arising in the area.

13. In 2011, the Australian Law Reform Commission estimated that discovery in Federal Court proceedings accounted for 20 percent of total litigation

[3] *Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Ltd & Ors* [2013] HCA 46.
[4] TF Bathurst, 'Uncovering Discovery' (NSW Bar Association CPD, Newcastle, 16 February 2013).

costs.[5] This percentage may be even higher in most major cases, as that statistic includes costs in cases where there has been no discovery or discovery has been minimal.

14. Problems associated with the costs of discovery are not new. Prior to the introduction of the *Common Law Procedure Act* in 1857,[6] courts of common law did not have the power to order discovery. Discovery could only be had in a common law suit if a litigant sought a bill of discovery in the auxiliary jurisdiction of a court of Equity. Litigants had no automatic right to such a bill and had to satisfy the court that it was just and equitable for such an order to be made. Even under that system, problems of cost and efficiency arose. In 1840, the former judge, James Wigram, citing Lord Eldon, stated that heavy losses had been incurred by the parties as documents were produced merely to "satisfy curiosity". Wigram emphasised "the necessity of placing under strict regulation the jurisdiction exercised by courts of equity in compelling discovery."[7] Sadly, Wigram's suggestions were largely ignored and for many years, discovery became a statutory right without any need for justification.

15. Alongside the growth of discovery came the practice of administering interrogatories. Indeed, in the sixties and seventies, the drafting and answering of interrogatories became the means by which many practitioners paid off their mortgages. Interrogatories were complex and cumbersome documents, ever expanding as different questions were devised to take account of potentially different answers to preceding questions. Often, they were quite useless.

16. I recall as a young barrister being given a junior brief for a matter involving a claim for damages by a doctor who had fallen off an operating chair during an operation at a hospital in Newcastle. The doctor sued the hospital for negligence and instructed a major law firm to conduct the case. I was asked by the senior barrister on the case to draw interrogatories. I thought

[5] Australian Law Reform Commission (ALRC), 'Managing Discovery: Discovery of Documents in Federal Courts' (Report 115, 25 May 2011), [3.55].
[6] *Common Law Procedure Act 1857* (NSW).
[7] J Wigram, *Points in the Law of Discovery* (A Maxwell, 2nd ed, 1840), 5.

that this was futile, but of course, like any young barrister, I did as I was told.

17. I drafted two or three interrogatories directed to finding out whether any steps had been taken to check the stability of chairs in operating theatres and what had happened to the chair in question after the incident had occurred. When I showed these to the senior barrister, he got quite mad and told me that my interrogatories were hopelessly inadequate. He proceeded to produce, what he described as, a ‘precedent’, which was a voluminous document containing some 200 odd questions, and suggested that I base my interrogatories on that.

18. Fortunately for me, and I think for the doctor, the senior barrister I was working with went on holidays. At the same time, the supervising partner at the major law firm also went on holidays and left the matter in the care of a junior solicitor. The junior solicitor rang me and one of us, I can’t remember who, suggested that rather than waste everyone’s time coming up with hundreds of interrogatories, we try to settle the matter. We proceeded to settle the matter on good terms. The doctor did not want to be exposed as someone who fell off a chair while operating and the hospital did not want the embarrassment of defective operating chairs.

19. However, when the senior barrister on the case returned, he was livid. He told me that this was his major opportunity to get work from the firm and I had effectively stymied it. He never spoke to me again. Fortunately, the junior solicitor’s supervising partner was as relieved as I was that the case had settled. I should add that the senior barrister went on to become a judge of the District Court, while the junior solicitor is currently a member of the NSW Court of Appeal.

20. By 1980, courts were wringing their hands as to what to do about the excessive use of interrogatories. When Andrew Rogers became Chief Judge of the Commercial Division, he devised a simple plan – ban them. While there was much consternation amongst the profession, ultimately, in my view, there was no effect on the quality of justice. I think that the

lawyers who made a living from drafting and answering interrogatories still managed to pay off their mortgages.

21. Now, I am not suggesting that the same radical surgery should be applied to the discovery process. However, there is obviously a need for some limitations. The notion of discovery is based on an assumption, which has persisted for some 150 years that, at least in civil cases, litigants have the right to inspect opposing parties' documents and records, for the purpose of seeing if there are documents which assist their case or which are destructive of their opponent's case. This assumption stands in marked contrast to the position in criminal cases, where it is fundamental that the Crown prove its case without assistance from an accused.

22. While there is an obvious difference between the principles underpinning criminal and civil litigation, as I have stated on other occasions, I would suggest that any future consideration of this issue be considered on the basis that discovery should not be granted as of right. Rather, it should be a form of interlocutory relief only granted by the courts where there is evidence to justify it, and on terms which a court is satisfied are equitable to the party compelled to give discovery.

23. As such, in NSW, in order to reduce the use of discovery as a cause of delay and expense, under rule 21.2 of the Uniform Civil Procedure Rules,[8] discovery may only be obtained by court order. In the Commercial List and Technology Construction List, a practice note sets out that lawyers on opposing sides must meet at an early stage of the proceedings and reach an agreement as to the nature and extent of discovery.[9] In the equity division, a practice note states that unless there are exceptional circumstances, the court will not order discovery until the parties have served their evidence. It also states that, as a matter of course, the court will not make orders for discovery "unless it is necessary for the resolution of the real issues in dispute in the proceedings."[10]

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[8] *Uniform Civil Procedure Rules 2005* (NSW).
[9] Supreme Court of NSW Practice Note No. SC Eq 3, 'Supreme Court Equity Division - Commercial List and Technology and Construction List', 12 October 2008.
[10] Supreme Court of NSW Practice Note No. SC Eq 11, 'Disclosure in the Equity Division', 22 March 2012.

24. Such an approach has been criticised by some in the profession as being too restrictive. However, where a litigant can properly demonstrate a case, but shows that particular elements of her, his or its case can only be fleshed out by reference to documents in the possession of other parties to the proceedings, discovery will be ordered. The practice notes and Uniform Civil Procedure Rules simply enable the court and the parties to determine the case that is sought to be made and thereby limit the ambit of discovery.

Expert Evidence

25. Let me now move on to the second issue I will discuss today, expert evidence. In far earlier times, when issues required technical expertise to be understood, courts would call their own experts, referred to as 'assessors'. Further, as became frequent practice in the fourteenth century, courts could empanel expert juries when matters involved the practices and customs of a particular trade. In the eighteenth century, merchant juries were often employed for their specialised knowledge and professional mercantile experience.[11]

26. Nowadays, there is an increasing tendency for litigants to rely on expert evidence in a broad range of areas, from medicine, to science, to economics, to professional standards. Expert evidence can undoubtedly be useful, particularly for judges such as myself, with no scientific background, who, for example, would never know anything about mitochondrial DNA and the cloning process for horses – something I became familiar with last year in the Court of Appeal.[12]

27. However sometimes, I am afraid, expert evidence can tend to obscure a case rather than provide enlightenment on particular areas where specialist training is required. This may occur when a person seeking to give expert evidence does not give evidence related to matters falling within a well-established discipline of knowledge, but rather, gives evidence based on

[11] P McClellan, 'Two Contemporary Challenges: The Role of Deterrence in Sentencing and the Effective use of Experts' (Association of Australian Magistrates, Annual Conference 2008, 7 June 2008); C Jones, *Expert Witnesses* (Oxford University Press, 1994), 25-6.
[12] *Bull v Australian Quarter Horse Association* [2015] NSWCA 354.

'specialised knowledge'[13] which she or he only claims to have by reason of her or his previous experience.

28. At common law, there has been an ongoing debate as to the extent to which an expert must have a particular level of expertise. The Uniform Evidence Acts do not contain any requirement other than that a person must have specialised knowledge based on their "training, study or experience".[14] There is no minimum threshold for the length or type of training, study or experience. The High Court recognised, in the case of *The Queen v Butera*,[15] that courts can admit the evidence of 'ad hoc' experts, namely, persons who, although having no formal training or qualifications, have acquired expertise based on particular experience in the area.

29. However, although the threshold for expressing an expert opinion is low, litigants should not use the rule to lead evidence from persons with little expertise who would be of no assistance to the court. As stated by Justice Garling, writing extra-judicially, "the mere fact of admissibility is far distant from the acceptance of that evidence by the court."[16]

30. Problems also arise where experts, rather than giving expert opinion based on established facts, conduct something that they describe as a 'forensic analysis' which, at best, causes real issues regarding admissibility and, at worst, is incomprehensible jumble from which it is impossible to extract what is truly expert opinion. As stated by former Chief Justice Gleeson in the case of *HG v The Queen,*[17] witnesses who act as advocates and put "from the witness box the inferences and hypotheses on which the [party calling them wishes] to rely do not assist the court in determining the issues in a case. … Experts who venture 'opinions' (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted."[18]

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[13] See *Evidence Act 1995* (NSW) s 79.
[14] Ibid.
[15] (1987) 164 CLR 180.
[16] P Garling, 'Concurrent Expert Evidence – The New South Wales Experience' (University of Oxford Faculty of Law, 1 December 2015), 3.
[17] (1999) 197 CLR 414.
[18] Ibid at [43]-[44].

31. Both of these issues arose in a case I appeared in in 2005 to 2006 in the Supreme Court. I had the privilege of cross-examining a particular expert witness, let's call him Mr B, from a major accounting firm. Mr B was a chartered accountant who was called to report on accounting standards applicable to a company's review of its half-yearly accounts. Needless to say, Mr B went above and beyond and ended up claiming to be an expert on just about all of the issues which arose in the case. In regard to his purported expertise in due diligence proceedings, documents produced under subpoena revealed that he was not actually on the due diligence committee at the firm and had "attended only one – the 21st and final – meeting of that due diligence committee; and only part of that meeting." Mr B was also criticised for conducting himself more as an advocate than as an expert. "[A]t one point, he called in aid the Sarbanes-Oxley legislation in the United States of America, notwithstanding that this legislation was introduced some 6 years after 30 June 1998", the date of the company's review of its half-yearly reports.

32. Another, more famous, or infamous, example is found in the case of Gordon Wood.[19] In that case, the Crown alleged that Mr Wood threw the deceased, Ms Bryne, off a cliff at the Gap in Sydney. At the trial, the central issue was whether Wood had thrown Ms Bryne off the cliff or whether she had committed suicide. The Crown called a former associate physics professor, Mr Cross, as an expert witness. Cross had conducted experiments, which, in retrospect, were found to be rather crude. The experiments were conducted in a gymnasium and involved first, persons running and jumping into a swimming pool and second, persons and punching bags being thrown into the same swimming pool. The experiments were conducted in 'ideal conditions' bearing little resemblance to the real conditions which would have existed at the top of a seaside cliff. Based on these experiments, in what really was a giant leap, Cross concluded that Ms Bryne's body could not have landed where it did if she had jumped. Rather, Cross gave evidence that she would have to have been "spear-thrown" by Wood.

[19] *Wood v R* [2012] NSWCCA 21.

33. While Wood was initially convicted, he was acquitted on appeal by the Court of Criminal Appeal, which found that the verdict was unreasonable. While the admissibility of Cross's evidence was not a ground of appeal, Chief Judge McClellan suggested that Cross may not have been qualified to give the evidence that he did, particularly as aspects of his evidence concerned biomechanics, and Cross had "no qualifications or experience in biomechanics".[20] Further, the Court of Criminal Appeal found that Cross had taken

> upon himself the role of investigator and became an active participant in attempting to prove that the applicant had committed murder. Rather than remaining impartial to the outcome … he formed the view from speaking with some police and Mr Bryne and from his own assessment of the circumstances that the applicant was guilty and it was his task to assist in proving his guilt.[21]

34. The overriding duty of an expert is to impartially assist the court on matters relevant to their area of expertise. Their paramount duty is to the court and not any party to the proceedings.[22] Many experts forget this, a point which was illustrated by Justice McClellan at a conference in 2007. Justice McClellan mentioned an incident when an engineer who was commonly called as an expert concluded his address at a conference by stating "and of course at the end of the day your fundamental obligation is to do the best you can for your client."[23]

35. Due to these issues, I suspect that we will see ongoing and more stringent scrutiny of expert opinion by courts through case-management procedures. Indeed, under the Uniform Civil Procedure Rules, if parties intend to call expert witnesses, they must first seek directions from the court.[24] Rule 31.20 contains a wide range of directions that the court can give in regard to expert witnesses, for example, that the witness cannot give evidence on particular issues, limiting the number of experts to be called, instructing the

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[20] Ibid at [466]-[468].
[21] Ibid at [758].
[22] See *Uniform Civil Procedure Rules* sch 7, 'Expert Witness Code of Conduct'.
[23] P McClellan, 'Contemporary Challenges for the Justice System – Expert Evidence' (Australian Lawyers' Alliance Medical Law Conference 2007, 20 July 2007).
[24] *Uniform Civil Procedure Rules* r 31.19.

parties to appoint a single expert, appointing a court-appointed expert or requiring experts to confer. Judges have similar case-management powers under relevant Supreme Court practice notes.[25]

36. Two solutions to the court's frustration with impartial or otherwise problematic expert evidence have been expert conclaves and concurrent expert evidence. Expert conclaves are pre-trial conferences attended by all of the experts being called on a particular issue, without the parties or their lawyers being present, at which the experts discuss specified issues and attempt to reach agreement on some or all of the issues. The content of the discussion at the conclave is strictly confidential. As such, experts are free to change their mind and discuss their views with their colleagues without the repercussion of what they say being used against them.[26] It is instructive that the result of these conclaves is often not a disagreement of principle, but rather, different factual assumptions on which those principles are to be applied.

37. Concurrent expert evidence refers to the practice of taking the oral evidence of experts from similar disciplines at the same time. This usually takes the form of a discussion, chaired by the judge, to identify differences of opinion and arrive, where possible, at a common view.[27]

38. From a judicial perspective, expert conclaves and concurrent expert evidence have the advantage of narrowing the issues in dispute, providing clarity as to the precise areas of conflict between different expert opinions, exposing 'pseudo-experts' or those with opinions contrary to accepted scientific opinion, enabling the court to reach a more thorough and consistent understanding of technical issues and saving time on examination and cross-examination.

39. As stated by Justice McDougall, writing extra-judicially:

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[25] Supreme Court of NSW Practice Note No. SC CL 5, 'Supreme Court Common Law Division – General Case Management List', 12 May 2006; Supreme Court of NSW Practice Note No. SC Eq 5, 'Supreme Court – Expert Evidence', 8 October 2012.
[26] See Garling, above n 16, [28].
[27] See P McClellan, 'Concurrent Expert Evidence' (Law Institute of Victoria, Medicine and Law Conference, 29 November 2007); Garling, above n 16, [28].

> The misuse of expert evidence is likely to waste the court's time and unnecessarily increase the costs of the litigation and thus constitute a breach of the obligations under s 56 of the *Civil Procedure Act* ... It is therefore imperative that practitioners are aware of the issues likely to arise when expert evidence is to be relied upon.[28]

40. Legal practitioners should make an effort to ensure that experts are aware that their evidence should be directed at applying their particular and specialised knowledge or skills to the relevant facts or factual assumptions in issue. Practitioners and advocates should spend a greater amount of time educating experts so that their opinions are expressed in a way that avoids unintelligible jargon, or partisan rhetoric.

Court-Ordered Alternative Dispute Resolution

41. The growth of discovery and the misuse of expert evidence both have the capacity, along with a multitude of other issues, to increase costs and delays in civil litigation. The subject of growing litigation costs and delays and increasing case-management brings me to the final topic I will be discussing today, namely, court-ordered alternative dispute resolution, or 'ADR'.

42. For many Australians, access to justice is becoming less and less attainable. In this context, appropriate ADR procedures serve an increasingly important role in facilitating access to dispute resolution services for all citizens and in reducing the time and cost spent on litigation. However, ADR is not regularly seen by parties as the first port of call for the resolution of civil and commercial disputes, and the implications of this trend are the subject of debate about what role the judiciary should play in encouraging and ordering parties to attempt ADR.

43. Section 56 of the *Civil Procedure Act* dictates that today's courts are not only bound to deliver justice that is impartial and discharged with due process, but they must also deliver justice efficiently and in a way that mitigates rising legal costs. Protracted litigation has adverse impacts on

[28] R McDougall, 'Some Thoughts on Calling Expert Evidence' [2009] *New South Wales Judicial Scholarship* 18, 1-2.

both the parties to the dispute, as well as the entire community, by unduly burdening court resources.[29]

44. In 2000, the *Supreme Court Act*[30] was amended to insert a section permitting the court, in all civil cases, if it considered the circumstances to be appropriate, to refer the proceedings to mediation, with or without the consent of the parties. If this occurred, the parties had a duty to participate in the mediation in good faith.[31] While this section has subsequently been repealed, the *Civil Procedure Act* now provides for the same procedure in section 26.

45. The question of whether courts should be able to make orders for ADR in the absence of consent from the parties is highly contested. Indeed, the Bar Association strongly opposed the introduction of compulsory court-ordered mediation in 2000. Barristers criticised the process as eroding "[a] citizen's right to have a matter, commenced bona fide in the Supreme Court of this State, determined according to law and as expeditiously as the Court's processes permitted … if that [was] how the parties wish[ed] to resolve their differences".[32]

46. As I have expressed on other occasions, in my view, judges are in a good position to assess the suitability of cases for ADR, and sometimes, the objective assessment of judges will elude the parties and their legal practitioners. Judges see cases pass through the doors of the courtroom every day and are divorced from the history and emotions that parties bring to disputes. This impartiality that they are charged with makes them ideally placed to assess whether a given case would be amenable to a form of ADR.

47. Courts in New South Wales can, and frequently do, refer matters to mediation without the consent of the parties. The most common criticism directed at court-ordered mediation is that mediation is futile when one or

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[29] See my paper delivered on ADR: TF Bathurst, 'The Role of Courts in the Changing Dispute Resolution Landscape' (2012) 35(3) *UNSW Law Journal* 870.
[30] *Supreme Court Act 1970* (NSW).
[31] See *Supreme Court Amendment (Referral of Proceedings) Act 2000 No 36* (NSW).
[32] See B Walker and AS Bell, 'Justice According to Compulsory Mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)' (2000) *Bar News, The Journal of the NSW Bar Association* 7, 8.

more of the parties is determined to litigate. However, the statistics show otherwise.

48. In 2014, the Supreme Court registry recorded 839 separate referrals to mediation, of which approximately 58 per cent were referrals to court-annexed mediation conducted by the Court's registrars, as opposed to private mediation. Of the cases that proceeded to court-annexed mediation, the settlement rate (with finalised orders being made or heads of agreement being reached) was 54 per cent.[33] The so-called 'success' rates of court-annexed mediation may be even higher than this figure as, in order for a case to be considered to be 'settled at mediation', the parties must have finalised orders or heads of agreement by the end of the mediation. If the parties settle after this time, those settlements are not recorded as 'settled at mediation', even though the mediation may have aided the settlement.[34]

49. These figures demonstrate that there are instances in which the nature of the dispute and the attitudes of the parties make an order to attend mediation fruitful, even where the parties do not consent. Non-consenting parties can, in fact, become willing participants in the mediation process and participate in constructive and successful outcomes. As stated by my predecessor, former Chief Justice Spigelman, "[t]here is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the … power is directed."[35]

50. While I do think that courts are in an ideal position to objectively consider whether certain proceedings are amenable to ADR, judges should be cautious in using their power to refer parties to mediation against their will and should take particular note of the unique circumstances in each case that would warrant such an order. ADR may not be suitable for parties who have already expended a substantial portion of costs on litigation, whose dispute involves complex legal issues or where there is a power imbalance and the weaker party requires the protections that courts of law can

[33] Supreme Court of New South Wales, *Annual Review 2014,* available at <http://www.supremecourt.justice.nsw.gov.au/Documents/Annual%20Reviews/Supreme_Court_Ann_Rev_2014_2.pdf>.
[34] Ibid at 34.
[35] JJ Spigelman, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 63, 65.

provide. It is for this reason that judges in the commercial list recognise that cases are suitable for mediation at different points in time and adopt a flexible approach to such referral practices.

51. In 2008, former Chief Justice Gleeson was reported as having said:

> There are certain types of cases that will settle if they are just left alone. There are other cases where the parties require some encouragement – often very vigorous encouragement – to settle. A good judge is one who can tell the difference between those two kinds of case, and, in relation to cases best left alone, leave them alone.[36]

52. In my view, this flexible, case-based approach is more desirable than a 'one-size fits all' model where broad categories of cases are deemed amenable to compulsory mediation. The latter approach fails to take into consideration the vast divergences between disputes and parties, and the different needs of sophisticated litigants. For this reason, the approach in NSW focuses on facilitating greater efficiency within the litigation process.

53. Undoubtedly, there are some categories of cases where early automatic referral to mediation is preferable, such as family provision applications in the equity division.[37] However, in my view, the preferable approach is for judges to assess every case individually to determine whether it is appropriate for ADR by using criteria such as the nature and history of the dispute, the remedies sought, the relationship of the parties, the complexity of the legal issues, whether the parties are experienced litigants, the presence of legal representation and the parties' preparedness towards trial.

54. Ultimately, legal practitioners have the primary role in informing their clients about ADR.[38] The goals of any regime for ADR will only be achieved if they are supported by the education of legal professionals and thereby, potential litigants.

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[36] J Eyers, 'Chief Justice's Brief to Meddling Judges', *Australian Financial Review,* 20 June 2008, 1. Cited in PA Bergin, 'Case Management' (National Judicial Orientation Program, Broadbeach, Queensland, 3-8 August 2008).

[37] Supreme Court of NSW Practice Note No. SC Eq 7, 'Supreme Court – Family Provision', 12 December 2013.

[38] See *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 35; *New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules)* (NSW) r 7.2.

Conclusion

55. In conclusion, civil litigation faces two essential challenges - to adapt to changing circumstances, while maintaining the core values of the justice system: equality before the law; the right to a fair process; and commitment to the fair and efficient resolution of disputes. All three areas that I have spoken about today raise issues associated with the changing civil litigation landscape and the desire for justice to be achieved through efficient and cheap procedures.

56. Since the 1980s, case-management by the judiciary has, in many ways, replaced the traditional hands-off approach of judges to the conduct of civil litigation. In January 2000, former Chief Justice Spigelman announced amendments to the Supreme Court Rules which were designed to inaugurate a new era of case-management.[39] Spigelman noted that case-management by judges is not, by any means, a new concept:

> For centuries, indeed it was only abolished in the late eighteen[th] century, the common law had a mechanism known as *peine forte et dure*, a form of torture inflicted upon a prisoner indicted for felony who refused to plead and submit to the jurisdiction of the court. Heavy weights were applied to his [or her] body until he [or she] consented to be tried by either pleading "guilty"" or "not guilty", or until he [or she] died. This was an early form of case management.[40]

57. Although many from the profession may deem the court's case-management practices as oppressive, I do sincerely hope that those which have been adopted by the Supreme Court in recent years have evolved from this particular form of torture.

58. Indeed, rather than placing weights on practitioners and forcing them to comply, judicial case-management must go hand-in-hand with cooperation from the Bar and practitioners. As such, in 2000, along with reforms to case-management, new professional rules were implemented, emphasising the importance of practitioners:

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[39] JJ Spigelman, 'Just, Quick and Cheap – A Standard for Civil Justice' (Opening of Law Term Dinner, Parliament House, Sydney, 31 January 2000).
[40] Ibid.

- Confining a case to issues genuinely in dispute.
- Refraining from making allegations of fact without a proper basis.
- Complying with orders, directions, rules and practices of the Court.
- Preparing a case for hearing as soon as practicable.
- Presenting issues clearly and succinctly.
- Being as brief as reasonably necessary.[41]

59. From a judicial perspective, although we have an adversarial system, this system works far better where practitioners are courteous, don't take points for the sake of it and don't make applications unless there is a real reason for doing so. While judicial officers have a high degree of responsibility for ensuring that civil litigation is conducted appropriately, often the most time and money can be saved, and justice achieved, by the parties taking appropriately conciliatory stances on issues, particularly interlocutory ones, before they even reach court.

60. Careful consideration should be given as to what tasks are in fact necessary for the preparation and conduct of a hearing. For example, in some instances, the utility of preparing witness statements will either be negligible or inefficient, compared to simply leading the evidence orally in court. While witness statements have enormous potential to clarify issues early on and lessen court time taken in the leading and adducing of evidence, the statements can end up reading more like position papers prepared by lawyers rather than the actual evidence of a witness. The most extreme case I saw was when I was acting for the appellant in the *Bell Group v Westpac* litigation.[42] One witness put on a statement that was 270 pages long and referred, by way of hyperlink, to another 300 documents. Another statement, which was relatively short, contained a hyperlink to 500 documents. I remember asking those instructing me whether the witnesses had sworn to these documents, to which they replied yes. I then asked them

[41] Ibid.
[42] *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239, (2008) 70 ACSR 1; *Westpac Banking Corporation v the Bell Group Ltd (In Liq) (No 3)* [2012] WASCA 157, (2012) 89 ACSR 1.

whether the witnesses had actually read the entirety of their statements, including the hyperlink documents, to which I was met with an awkward silence.

61. There are many issues which modern-day courts face that have the capacity to delay, obfuscate and increase the costs of civil litigation. I have only mentioned two of these today, namely, discovery and expert evidence. While there is no quick-fix solution to the issues facing the courts, parties and practitioners in this field, there is much that can be achieved by a greater and renewed emphasis on the responsibilities of both the courts and parties to manage matters appropriately.

62. I have spoken on many occasions about the need for cooperation between the courts and the profession in ensuring that access to justice is as cheap and efficient as possible. Civil litigation is an area that cries out for such co-operation. If we do not cooperate, the litigation system will, at best, seem outmoded, and, at worst, be, as Dickens put it, "an infernal country-dance of costs and fees and nonsense and corruption as was never dreamed of in the wildest visions of a Witch's Sabbath."[43]

[43] Dickens, above n 2, 67.