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# INTRODUCTION<sup>1</sup>

In the latter part of the 20<sup>th</sup> century a number of aspects of the adversarial system of justice have been questioned. Two forces are at work. As the standard of living in the community has risen, the unit cost of labour for any task has also risen. This is as true of litigation as it is of manufacturing or agriculture. The consequence has been an increasing demand for efficiency of process to ensure that the cost of the ultimate product remains affordable. Although the price of a refrigerator, motor car, or bottle of wine has, in real terms, reduced over the last 30 years, the same is not true of our system of justice. The result, as a former Chief Justice of the High Court of Australia Sir Anthony Mason commented, has been an “erosion of faith” in the adversarial system. In a paper titled “The Future of Adversarial Justice”, Sir Anthony commented: “The rigidities and complexity, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice.”<sup>2</sup>

The adversarial system in its ultimate manifestation was once accepted as providing the most effective means of resolving a dispute. When the community was less

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<sup>1</sup> I gratefully acknowledge the considerable assistance of Ms Natalia Blecher in the preparation of this paper. Ms Blecher was responsible for the primary research and gave considerable assistance in the original draft of the paper.

<sup>2</sup> Sir Anthony Mason AC KBE, “The Future of Adversarial Justice”, Paper presented to the 17<sup>th</sup> AIJA Annual Conference, Adelaide, 6-8 August 1999

concerned with the time and cost of the judicial process, and in any event those costs were less onerous, most people accepted that its benefits outweighed the detriments. The primacy of individual autonomy which it acknowledged could be afforded. This is no longer the case. In Australia, the adversarial system has already been modified in some significant respects.

The western world took some time to recover from the Second World War. For a time, at least in Australia but most likely throughout the western world, the institutions which had served societies before the Second World War remained intact. There was a sense of relief that the War had ended but a concern that communist ideals may prevail, leading to concern that the stability of society may again be threatened. However, with increased prosperity and the coming to adulthood of a generation for whom the War was the related experience of their parents, it became safe to challenge many of the political and social ideas which had previously prevailed. It was a time when change, although threatening for some, was the expectation of others.

In this process the public sector has undergone significant change. Where it was believed that the private sector would be more effective, public enterprises have been ceded or sold, leaving privately owned corporations to achieve the efficiencies in the delivery of the services. In Australia, as has happened in many developed economies, much of our infrastructure is now owned by private enterprise, private education has been encouraged by public subsidies, corporations trading in bulk farm goods have been privatised, and many public organisations including defence now contract to the private sector for much of their supporting activities.

Notwithstanding the demands for efficiency in both the public and private sector, the law was slow to respond. Computers brought efficiencies for the conveyancer and the lawyers who advised corporations and investors inevitably responded. The demands of their clients ensured this would happen. However, the response by courts and the litigators was delayed. Although it was slow, the cost of litigation, a product of the complexities of the law, the arcane rules and procedures of the adversary system, which fuelled controversy rather than encouraged a solution to the problem and a loss of confidence in the decisions which were being made inevitably resulted in pressure for change.

Most common law systems have now responded in varying degrees to the challenge. For many jurisdictions including the State and Federal courts in Australia, the Woolf Reforms have been an inspiration, although not all of Lord Woolf's suggestions have been taken up. Nevertheless as in England where the practice and procedures of the courts remain under constant review the discussion at any judge or professional litigation conference in Australia is likely to include topics questioning "how we do things" with suggestions for improvements.

The organisers of this conference requested that I discuss civil justice in Australia. Because each State has its own independent court system with, in addition, a Federal Court system which deals with matters within federal jurisdiction, a complete analysis of the process in each State would extend beyond this paper. I have for that reason concentrated on the changes which have been made in my own State, New South Wales, with mention of some of the reforms in other jurisdictions. I have written on many aspects of this topic previously. This paper includes material taken from some of those earlier papers.

## PREPARING FOR THE TRIAL

The fundamental change common in all Australian jurisdictions has been a move away from allowing the parties complete control of their proceedings to a process in which the court takes greater control of the litigation. Described in 1995 as a change which “would have been unimaginable in earlier years” where party autonomy was paramount, it is now almost universally accepted in Australia.<sup>3</sup> Case management involves increased judicial supervision over, and management of, pre-trial procedures. Its objectives are to facilitate settlement of disputes that have the potential to settle, and to ensure that disputes that must proceed to trial do so “efficiently on the real issues between the parties.”<sup>4</sup>

The development of case management has given rise to the “managerial judge”. Managerial judging describes the process by which the judge actively uses the court’s powers to facilitate the swift disposition of cases. A managerial judge is not limited to being a passive arbiter of disputes but is an active case supervisor. His or her role is not confined to the courtroom: it begins the moment proceedings are commenced and ends at the time of final disposition. Managerial judging is a

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<sup>3</sup> But see, eg, The Hon Justice D Byrne, “Promoting the Efficient, Thorough and Ethical Resolution of Commercial Disputes: A Judicial Perspective”, Paper presented to the LexisNexis Commercial Litigation Conference, Melbourne, 20 April 2005

<sup>4</sup> The Hon Justice PA Bergin, “Case Management”, Paper presented to the National Judicial Orientation Program, Broadbeach, 3-8 August 2008

significant departure from the traditional judicial role, typified by aloofness, stoicism and detachment from the parties.<sup>5</sup>

Managerial judging is widely practised by judges of the Supreme Courts of the States, the Federal and Family Courts, the District and County Courts and some lower courts.<sup>6</sup> A managerial approach is embedded in the purpose clause of the New South Wales *Civil Procedure Act* 2005 (NSW) which, together with the *Uniform Civil Procedure Rules* 2005 (NSW), is fundamental in underpinning the approach which judges take to their tasks. The *Civil Procedure Act* and the *Uniform Civil Procedure Rules* 2005 bind all courts in New South Wales. The purpose clause of the *Civil Procedure Act* reads:

“The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to **facilitate** the just, quick and cheap resolution of the real issues in the proceedings.”<sup>7</sup> (emphasis added)

Statements of overriding purpose such as that existing in New South Wales have been adopted by courts in Victoria,<sup>8</sup> Western Australia,<sup>9</sup> Queensland,<sup>10</sup> South Australia,<sup>11</sup> the Northern Territory<sup>12</sup> and the Australian Capital Territory.<sup>13</sup> Recently

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<sup>5</sup> The Hon Justice R Sackville AO, “The Future of Case Management in Litigation” (2009) 18 *Journal of Judicial Administration* 211 at 212-3, quoting J Resnick, “Managerial Judges” (1982) 96 *Harvard Law Review* 374 at 383

<sup>6</sup> See, eg, Victorian Law Reform Commission, *Civil Justice Review: Final Report* (2008) at 297-8

<sup>7</sup> *Civil Procedure Act* 2005 (NSW) s 56

<sup>8</sup> *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) r 1.14

<sup>9</sup> *Rules of the Supreme Court* 1971 (WA) rr 1.4A, 1.4B

<sup>10</sup> *Uniform Civil Procedure Rules* 1999 (Qld) r 5

<sup>11</sup> *Supreme Court Civil Procedure Rules* 2006 (SA) Chapter 1 Part 2

<sup>12</sup> *Supreme Court Rules* 1987 (NT) r 1.10

<sup>13</sup> *Court Procedures Rules* 2006 (ACT) r 21

the *Federal Court of Australia Act 1976* (Cth) was amended to incorporate an “overarching purpose” statement to similar effect.<sup>14</sup>

Most Australian courts utilise powers provided by statute for the management of the pre-trial process.<sup>15</sup> These powers supplement the rule making powers and other inherent powers of judges to regulate the conduct of proceedings.<sup>16</sup> In New South Wales, the statutory powers are provided in Part 6 of the *Civil Procedure Act* which I have set out in Appendix A. They are comprehensive.

## **EARLY IDENTIFICATION OF ISSUES IN DISPUTE**

In New South Wales, courts have been particularly concerned about the time which can elapse before a matter is brought on for trial. Although in former years the court processes may have contributed to the delays, by effective management of judicial resources and, in part, because of the legislative changes to the rights of injured persons and the tribunals in which those rights can be determined, the New South Wales Supreme and District courts can now generally offer a hearing date almost within a few weeks of the parties being ready for trial.

A primary cause of delay before trial has been identified in the failure of parties (in some cases deliberately, in others because of a lack of confidence in the lawyers,

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<sup>14</sup> *Federal Court of Australia Act 1976* (Cth) s 37M

<sup>15</sup> *Uniform Civil Procedure Rules 2005* (NSW) Part 2 and *Civil Procedure Act 2005* (NSW) Part 6; *Supreme Court of Queensland Act 1991* (Qld) ss 118D, 118E and *Uniform Civil Procedure Rules 1999* (Qld) Ch 10; *Rules of the Supreme Court 1971* (WA) O 29A; *Supreme Court Civil Procedure Rules 2006* (SA) Chapter 6; *Supreme Court Rules 2000* (Tas) Part 14

<sup>16</sup> Victorian Law Reform Commission, *op cit* at 291



and in others the inadequacy of the advice given to a party) to identify, at an early stage, the real issues in dispute. Justice Bergin who for a number of years was the judge responsible for the Commercial List in the New South Wales Supreme Court has said:

“There are a number of causes of delay that seem to stem from the failure to identify or appreciate the real issues between the parties at an early stage of the proceedings. It is imperative to focus on the issues that are ‘real’ and to see if some agreement on those issues is able to be reached at an early stage of the proceedings. When that is done the interlocutory steps are completed far more quickly than if agreement is not reached (emphasis omitted).”<sup>17</sup>

Australian courts routinely make use of their pre-trial directions powers to “pin the parties down to agreed issues at the earliest stage practicable.”<sup>18</sup> The *Uniform Civil Procedure Rules* provide that a court may make directions that will result in the speedy determination of the real issues.<sup>19</sup> Case management conferences chaired by a judge or a registrar are commonly utilised to ascertain the real issues in contention.<sup>20</sup> The New South Wales Supreme Court generally utilises registrars with particular skill and experience to hold initial Directions Hearings.<sup>21</sup> However, the more complex or difficult cases are given over to judges to manage. In some cases the attitude of the parties or their lawyers requires a judge to ensure that the

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<sup>17</sup> The Hon Justice PA Bergin, “Presentation of Commercial Cases in the Supreme Court of New South Wales”, Paper presented to the Commercial Litigation LexisNexis Conference, 26 October 2005; see also The Hon Justice PA Bergin, “Case Management”, Paper presented to the National Judicial Orientation Program, Broadbeach, 3-8 August 2008

<sup>18</sup> Ibid

<sup>19</sup> *Uniform Civil Procedure Rules 2005 (NSW)* r 2.1

<sup>20</sup> See, eg, Supreme Court of the Northern Territory, *Practice Direction No 6 of 2009*; Supreme Court of Victoria, *Notice to Profession No 9 of 2009 - Case Management Conference in the Commercial Court*

<sup>21</sup> Supreme Court of New South Wales, *Practice Note SC CL 1*

proceedings do not develop into a complex war of attrition. The New South Wales Court of Appeal also uses judges to manage complex cases.

In the Victorian Court of Appeal, an Associate Justice is responsible for convening directions hearings for all new appeals and in particular for regulating the nature and volume of materials placed before the Court in the appeal books. The relevant Practice Statement describes this as a “front end management” system.<sup>22</sup>

## **DISCOVERY**

Discovery, particularly in commercial matters, has been widely recognised as a cause of unnecessary delay, expense and effort, which are often out of all proportion to the importance and complexity of the dispute.<sup>23</sup> The problem has been discussed by Justice Keane, who was recently appointed as the Chief Justice of the Australian Federal Court:

“You will all have heard judges in such cases complaining, or made the complaints yourselves, that in the mega-litres of electrons that the parties thrust at the court, there are still only a handful of documents that really matter. And yet the judge still has to sit patiently while Counsel trawl at length, but to little purpose and sometimes, it would appear, for the first time, through the database to see if something relevant comes up.

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<sup>22</sup> Supreme Court of Victoria, Court of Appeal *Practice Statement No 1 of 2006*

<sup>23</sup> The Hon Justice PA Bergin, “Presentation of Commercial Cases in the Supreme Court of New South Wales”, Paper presented to the Commercial Litigation 2005 LexisNexis Conference, 26 October 2005; Victorian Law Reform Commission, *op cit* at 434

In mega litigation, and indeed in more mundane commercial litigation, the rallying cry of the traditionalist judge: "We are not conducting a Royal Commission!" is now largely pietistic wishful thinking.

There are a number of reasons for this state of affairs, but the principal reason is, I fear, the combination of technological capability and economic incentive. It is highly remunerative for solicitors to transfer vast amounts of their clients' information into a database – and it can be done so easily – without the need for the time, effort, and expertise involved in the application of a critical lawyerly intelligence to the information. The enthusiastic embrace of technology by the legal profession plainly has a lot to do with the charging of costs for putting a client's corporate life history onto a litigation database. There is little evidence that it has much to do with the efficient prosecution of litigation."<sup>24</sup>

These same concerns were referred to by the Chief Justice's Working Party on Civil Justice Reform in the initial stages of civil justice reform in Hong Kong.<sup>25</sup> In its 2006 Report to the Justice Review Task Force, the Working Party stated:

"Many lawyers have commented that while discovery tools have successfully eliminated trial by ambush, they have replaced it with something that may be as bad or worse—trial by avalanche. We compared approaching the discovery stage of litigation to standing on the edge of a dark abyss. As litigants move forward they are required to descend into the abyss, and only the wealthiest are able to crawl up and out the other side."<sup>26</sup>

Many courts in Australia have done away with orders for general discovery in favour of discovery by categories of documents.<sup>27</sup> Courts in South Australia and Queensland as well as the Federal Court have imposed a threshold for discovery

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<sup>24</sup> The Hon Keane CJ, "Access to Justice and Other Shibboleths", Paper presented to the Judicial Conference of Australia 2009 Colloquium, Melbourne, 10 October 2009

<sup>25</sup> BC Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006) at 25-26

<sup>26</sup> *Ibid* at 25

<sup>27</sup> The Hon Justice JP Hamilton, "Thirty Years of Civil Procedure Reforms in Australia: A Personal Reminiscence" (2005) 26 *Australian Bar Review* 258

expressed as a test of “direct relevance”.<sup>28</sup> In New South Wales, discovery may only be obtained by court order.<sup>29</sup> A notice to produce a document or documents may be served, but the serving party is required to specifically identify the document sought. Discovery in the Commercial, Technology and Construction Lists of the Court is closely regulated. The relevant Practice Note requires the opposing practitioners to meet and reach agreement about the nature and extent of discovery.<sup>30</sup>

The Federal Court has expressed its concern about the problem of discovery in direct terms. Discovery in that Court is available only by leave.<sup>31</sup> The relevant Practice Note warns practitioners to expect the following questions to be asked if they seek leave:<sup>32</sup>

- (i) is discovery necessary at all, and if so for what purposes?
- (ii) can those purposes be achieved:
  - by a means less expensive than discovery?
  - by discovery only in relation to particular issues?
  - by discovery (at least in the first instance - see (iii)) only of defined categories of documents?
- (iii) particularly in cases where there are many documents, should discovery be given in stages, e.g. initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?

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<sup>28</sup> Victorian Law Reform Commission, *op cit* at 438-9

<sup>29</sup> *Uniform Civil Procedure Rules 2005 (NSW)* r 21.2

<sup>30</sup> Supreme Court of New South Wales, *Practice Note SC Eq 3*

<sup>31</sup> *Federal Court Rules 1979 (Cth)* r 15.1

<sup>32</sup> Federal Court of Australia, *Practice Note CM 5*

(iv) should discovery be given in the list of documents by general description rather than by identification of individual documents?

Even where the Court permits discovery, the *Federal Court Rules* enable it to make orders limiting the extent of discovery.<sup>33</sup> Where a substantial number of relevant documents are stored electronically, the Court may order that discovery itself be made electronically.<sup>34</sup> In such cases, the parties are expected to have developed a “discovery plan” which identifies likely number, nature and significance of the documents which might be discoverable.<sup>35</sup>

In the South Australian Supreme Court, parties may agree to dispense with or limit their discovery obligations. The court retains a general power to supervise and, if necessary, intervene in relation to the process and content of disclosure.<sup>36</sup>

In Queensland, courts may regulate the discovery process having regard to a wide range of factors including time, cost, inconvenience and importance of the question to which the documents relate.<sup>37</sup>

Courts in the Australian Capital Territory may limit a party’s discovery obligations having regard to similar factors.<sup>38</sup>

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<sup>33</sup> *Federal Court Rules* 1979 (Cth) r 15.3

<sup>34</sup> Federal Court of Australia, *Practice Note CM 6*

<sup>35</sup> Federal Court of Australia, *Practice Note CM 6*

<sup>36</sup> *Supreme Court Civil Rules* 2006 (SA) r 139

<sup>37</sup> *Uniform Civil Procedure Rules* 1999 (Qld) r 224; Victorian Law Reform Commission, *op cit* at 442

<sup>38</sup> *Court Procedure Rules* 2006 (ACT) r 606(3); Victorian Law Reform Commission, *op cit* at 443

In the Tasmanian Supreme Court, orders for discovery can only be made where they are deemed necessary.<sup>39</sup>

In the Northern Territory Supreme Court, parties can agree to limit or dispense with discovery<sup>40</sup> or the Court may impose such a limitation.<sup>41</sup>

In Western Australia, the *Rules of the Supreme Court* 1971 (WA) confer very broad “discovery management” powers. However, despite the breadth of these powers, discovery is seldom limited in practice. The Law Reform Commission of Western Australia has proposed changes to the *Rules* to facilitate better use of the powers.<sup>42</sup>

In Victoria the much-criticised “Peruvian Guano” relevance test prevails in most courts.<sup>43</sup> The Victorian Law Reform Commission has recommended raising the relevance threshold and vesting courts with broad powers to control discovery, including the capacity to appoint a special master to assist in complex cases and to appoint an independent assessor to inspect all documents in a party’s possession. The Commission has not recommended that discovery cease to be available as of right.<sup>44</sup>

Chief Justice Keane has suggested a possible innovative solution to the entrenched problems of discovery. He accepts the proposition that “trolley load litigation” (as it is

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<sup>39</sup> *Supreme Court Rules* 2000 (Tas) r 389

<sup>40</sup> *Supreme Court Rules* 1987 (NT) r 29.02(2)

<sup>41</sup> *Supreme Court Rules* 1987 (NT) r 29.05

<sup>42</sup> Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System: Final Report*, Report No 92 (1999) at Chapter 13; Victorian Law Reform Commission, *op cit* at 443-4

<sup>43</sup> *Compagnie Financiere Commerciale Du Pacifique v Peruvian Guano* (1882) 11 QBD 55 as discussed in Victorian Law Reform Commission, *op cit* at 429-430

<sup>44</sup> Victorian Law Reform Commission, *op cit* at 474-477

known in Australia) is as much a product of technological advances as it is of lawyers' excessive caution. However, he maintains, and my experience bears this out, that in the majority of cases, only a small selection of disclosed documents are actually of any significance. He remarked:

“But even if every allowance is made for these features of the modern legal landscape, there is little evidence to suggest, even in the age of the email, that it is no longer true that there are only a handful of critical documents in a case. If, in what are said to be complex cases, each side was required to file with its pleading copies of the ten most important documents to that party's case, it would, I think, serve to concentrate the lawyers' minds and on the real issues and provide a focus of, and limit upon, orders for discovery. Where mediation is thought desirable, this may get the parties to the table with less delay and expense than is presently the case and hopefully prevent long pocket strategies.”<sup>45</sup>

Although different courts in Australia are addressing the problem of discovery in different ways, they all involve a transfer of control to the court over what has traditionally been the parties' domain. However I doubt that any Australian court presently believes it has the solution to all of the problems.

## **NEW PROFESSIONAL RESPONSIBILITIES**

In Australia, the ultimate responsibility for ensuring that litigation has merit has been moved from the parties to their legal representatives. Section 345(1) of the *Legal Profession Act 2004* (NSW) prohibits legal practitioners from acting for clients in litigation unless the responsible practitioner reasonably believes that the matter has reasonable prospects of success. The obligation not to act in unmeritorious cases

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<sup>45</sup> The Hon Keane CJ, op cit

overrides the duty to act in accordance with the client's instructions.<sup>46</sup> In New South Wales, practitioners must also certify their reasonable belief in the prospects of success when commencing proceedings.<sup>47</sup> A breach of this duty may constitute professional misconduct or unprofessional conduct and may result in costs being ordered against the law practice or the practitioner personally.<sup>48</sup> Victoria's *Legal Profession Act 2004* (Vic) does not contain a similar provision, although as in New South Wales, practitioners may face personal costs orders if they cause costs to be incurred improperly.<sup>49</sup>

In the Federal Court, practitioners who are responsible for wasting costs or causing costs to be incurred improperly or without reasonable cause may, after being given an opportunity to be heard, have orders made against them including disallowing solicitor-client costs, requiring the practitioner to repay the client costs which the client has been ordered to pay another party, or requiring the practitioner to indemnify a third party against costs payable by the indemnified party.<sup>50</sup> Federal Court practitioners are also vulnerable to personal costs orders.<sup>51</sup>

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<sup>46</sup> *Legal Profession Act 2004* (NSW) s 345(3)

<sup>47</sup> *Legal Profession Act 2004* (NSW) s 347(2)

<sup>48</sup> *Legal Profession Act 2004* (NSW) s 347(1), s 348

<sup>49</sup> See, eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.23

<sup>50</sup> *Federal Court Rules 1979* (Cth) r 62.9

<sup>51</sup> *Federal Court of Australia Act 1976* (Cth) s 43



## LIBERALISING THE TEST FOR SUMMARY JUDGMENT

All Australian courts have power to summarily dismiss cases for want of merit or where a case is instituted frivolously or vexatiously. Some courts have modified<sup>52</sup> or are considering modifying<sup>53</sup> their summary judgment thresholds. This would enable summary judgment to be entered where the case, albeit not hopeless, lacks any realistic prospect of success. This proposed modification is in line with the approach adopted in England and Wales, under which courts may issue summary judgment if a plaintiff or defendant has “no real prospect” of success and there is no other compelling reason why the matter should proceed to trial.<sup>54</sup> The purpose of reformulating the test is to impose a more effective filter on frivolous or purely tactical claims and defences. However, there are dangers associated with “widening the net”. These dangers were referred to in the Hong Kong Civil Justice Review *Final Report*. They include, firstly, that it could produce injustice because judges might summarily dismiss claims or defences without being in a position to properly assess the merits of those claims or defences; and secondly, that a widened dismissal power might “magnify the subjectivity inherent in such decisions” thereby jeopardising the consistency of judicial decision making. Others have expressed concern that liberalising the summary judgment test would mean that there will be

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<sup>52</sup> *Uniform Civil Procedure Rules* 1999 (Qld) rr 292, 293; *Supreme Court Civil Rules* 2006 (SA) r 232; *Federal Court of Australia Act* 1976 (Cth) s 31A

<sup>53</sup> Western Australia and Victoria: Victorian Law Reform Commission, op cit at 352-358

<sup>54</sup> *Civil Procedure Rules* 1998 (Eng) r 24.2

more applications for summary judgment and more cases disposed of by the courts, possibly improperly.<sup>55</sup>

For my part I doubt whether liberalising the summary judgment test will produce a situation where cases that merit a full hearing are more frequently summarily dismissed. I also do not consider there to be any heightened risk of inconsistency as a result of relaxing the test. A test importing considerations of reasonableness is no more subjective than one requiring the judge to consider whether a claim is “manifestly groundless” or “so obviously untenable that it cannot possibly succeed”. Summary judgment is a form of discretionary relief, and judges are generally adept at exercising discretionary powers according to law. It is true that more “robust” judges might look more closely at the case of the party against whom the application is made, but in my view that would be a welcome development.

## **SPECIALISED LISTS**

Many Australian courts now provide specialist lists for different types of cases which are often managed by judges assigned that task. In the New South Wales Supreme Court we have 15 specialist lists, each managed by a judge who is identified as the list judge for that list. These lists have contributed to the Court’s overall efficiency. In addition to these lists, in the Common Law Division we have introduced a practice of intense management by a judge of complex cases, presently defined as cases expected to take ten days or more of hearing time.

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<sup>55</sup> Victorian Law Reform Commission, op cit at 354 citing Submission ED2 19 (Maurice Blackburn)

The list judge will be responsible for the supervision of each matter in the list and for ensuring that it is resolved in a timely fashion. Each list judge is responsible for the management of his or her list to either the Chief Judge at Common Law or the Chief Judge in Equity who are in turn responsible to the Chief Justice. List judges are assisted in their tasks by a Case Management Registrar who conducts directions hearings in which acceptable timeframes for the disposition of cases are defined and other pre-trial matters considered.

The list judge or Case Management Registrar has responsibility for the setting of timetables for the pleadings, discovery, interrogatories and the filing, where appropriate, of written evidence, either by affidavit or witness statement. The management process includes a discussion in which the issues in dispute may be agreed and the prospects of settlement explored.

Lawyers for each of the parties are expected to speak with each other in advance of the directions hearing to discuss the prospects of settlement and/or to narrow the issues in dispute, draft initial orders and prepare a timetable.<sup>56</sup> After a hearing date is allocated, one or both parties is required to file a chronology, an outline of the remedies sought and a schedule of the issues in dispute. Serious consequences may flow from non-compliance with the pre-trial directions: the defaulting party may, for instance, have their entire claim struck out or be required to pay the whole of the other side's costs.<sup>57</sup>

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<sup>56</sup> See, eg, Supreme Court of New South Wales, *Practice Note SC Eq 4*

<sup>57</sup> *Civil Procedure Act 2005 (NSW)* s 61(3)

## DOCKET SYSTEMS

The Federal Court of Australia operates an individual docket system under which each case filed is randomly allocated for pre-trial management and ultimate determination by a particular judge.<sup>58</sup> The docket judge makes any interlocutory orders, conducts case management conferences and refers matters to mediation. He or she supervises the parties' adherence to directions and timetables.

The Commercial and Building Lists in the Victorian Supreme Court operate docket systems, although each list operates according to different rules.<sup>59</sup> The Victorian Law Reform Commission has recommended that the Federal Court docket system be implemented across the State's Supreme and County Courts.<sup>60</sup>

The Federal Magistrates Court and Western Australian Supreme Court (Commercial and Managed Cases Division) also utilise docket systems.

New South Wales does not operate a docket system. Chief Justice Spigelman has indicated his reservations about docket systems on numerous occasions. In 2006 his Honour expressed the view that "if New South Wales were to adopt a docket system the productivity of our courts would significantly decline."<sup>61</sup>

For my part I share those reservations. Because a docket system confines a judge to the matters in his or her own list, when a matter is adjourned or settles, that judge

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<sup>58</sup> Federal Court of Australia, *Practice Note CM1*

<sup>59</sup> Victorian Law Reform Commission, *op cit* at 293

<sup>60</sup> *Ibid* at 292

<sup>61</sup> The Hon Spigelman CJ, "Case Management in New South Wales", Paper presented to the Annual Judges Conference, Kuala Lumpur, 22 August 2006

may be left with free time which cannot be effectively utilised. All of the other matters in the court will have been assigned to another judge's list who will already have made arrangements for their disposition in that list. This may explain the popularity of a docket system with judges. However, when there is one list managed by one judge who allocates the tasks according to the available resources, the opportunity for under-utilisation is significantly reduced.

## **TIMETABLES AND EXPEDITED PROCEEDINGS**

In complex civil trials in the Common Law Division of the New South Wales Supreme Court, it is now common for the managing judge to ask the parties to prepare a timetable including the estimated length of time for the examination and cross-examination of witnesses and the making of submissions. Although not rigidly enforced (the unexpected must always be accommodated) these timetables have the benefit of ensuring so far as possible that the available time is effectively used, delays caused by the unavailability of witnesses are avoided and submissions are appropriately to the point. The fundamental principle is that the cost of time in court, to both the state (in providing the physical facilities and personnel) and the parties in funding their representation, must be rigorously managed. As with any enterprise a budget is a fundamental management tool. A timetable provides an effective "budget" by which a trial can be managed.

The New South Wales Supreme Court has for more than 30 years conducted a special list for commercial and construction cases. It provides for an efficient turnaround, in particular of commercial disputes, with a high degree of judicial management, and an early judgment.

The Federal Court has recently introduced a similar list in Victoria for commercial matters known as a “Fast Track List”. Special lists also operate for commercial matters in the Supreme Courts of Victoria, Western Australia and Queensland.

The key features of these lists are:<sup>62</sup>

- substitution of pleadings with case outlines;
- substitution of lay witness statements with agreed statements of fact;
- a preference for interlocutory hearings to be heard “on the papers”;
- confining the use of interrogatories to exceptional cases;
- the availability of discovery only by leave and under strict controls;
- a mandatory pre-trial conference;
- on occasion, the use of “stopwatch” processes at trial; and
- early delivery of judgment.

## **ADJOURNMENTS AND AMENDMENTS**

The objectives of minimising delay and maximising efficiency have led to a more strict approach by judges to requests for amendments of pleadings and adjournments of the proceedings.<sup>63</sup>

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<sup>62</sup> Victorian Law Reform Commission, *op cit* at 316

In the 1990s, Australian trial courts became steadily less tolerant of requests for leave to adjourn proceedings or to make last-minute amendments to documents. Until recently, that trend was at odds with the High Court's decision in *Queensland v J L Holdings Pty Ltd*.<sup>64</sup> In that case the High Court held that the "ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim".<sup>65</sup> *J L Holdings* came under widespread attack for perpetuating a "lip service" attitude towards case management. In 2007, Justice Finkelstein of the Federal Court was particularly critical of the effect that *J L Holdings* had upon commercial disputes. In his characteristically direct manner he said:<sup>66</sup>

"[3] The courts, in no small measure, are responsible for allowing this state of affairs to come about. One of the chief causes is the chilling effect of the High Court's decision in *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146. That was an appeal against the refusal by the trial judge to allow a party to amend its pleadings. The High Court ruled that case management, while a relevant consideration, does not trump justice to the parties. A close reading of *J L Holdings* shows that the High Court was confining its comments to the case where costs would provide full compensation to the opposite party. However, *J L Holdings* has been applied in many cases where a simple costs order will not do justice between the parties. The case has, in my view, unfairly hamstrung courts. Almost every day a defaulting party seeks the court's indulgence to extend time, amend documents or obtain some other allowance (often not for the first, second or third time) and successfully relies on *J L Holdings* to obtain relief.

[4] It is time that this approach is revisited, especially when the case involves significant commercial litigation. One of the primary objects of a commercial court is to bring the litigants' dispute on for trial as soon as can reasonably and fairly be done. If, in some instances, the preparation of the case is not perfect so be it. A case that is reasonably well prepared is just as likely to be decided correctly as a perfectly prepared case."

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<sup>63</sup> Justice Hamilton writes: "The rise of case management led to the growth of a more stringent attitude, which took account of the efficient dispatch of the business of the court and the interests of other litigants." The Hon Justice JP Hamilton, *op cit* at 265

<sup>64</sup> [1997] HCA 1; (1997) 189 CLR 146

<sup>65</sup> (1997) 141 ALR 353 at 357

<sup>66</sup> *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* [2007] FCA 1623

*JL Holdings* did not survive. It was unanimously overturned by the High Court in *Aon Risk Services Australia Limited v Australian National University*.<sup>67</sup>

The decision in *Aon* has sent a strong signal to litigators that Australian courts will no longer tolerate a “carte blanche” approach to amendments and adjournments with consequential delay in the matter being resolved.<sup>68</sup>

## **INCREASED USE OF TECHNOLOGY**

Courts, particularly the New South Wales Supreme Court and Federal Court<sup>69</sup> have embraced contemporary technologies in an effort to reduce systemic delays and increase access to justice. Although there are problems of implementation and the demands on any system are complex, the use of the computer offers the real prospect of reducing the costs of litigation. Apart from facilitating the dispute resolution process itself, it has given increased opportunity for the public to understand the outcomes. The opportunities for live transmission of court hearings on the internet will inevitably be taken up. On occasion it has already happened.

New South Wales, unlike some other States, has welcomed the increased use of technology in civil litigation. The Common Law Division of the Supreme Court operates a telephone directions list for hearings before the Registrar.<sup>70</sup> A Practice

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<sup>67</sup> [2009] HCA 27; (2009) 239 CLR 175

<sup>68</sup> *Ibid*

<sup>69</sup> Federal Court of Australia, *Practice Note CM 6*

<sup>70</sup> Supreme Court of New South Wales, *Practice Note SC CL 5*; Supreme Court of New South Wales, “Telephone Directions”

[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/vwFiles/TelephoneDirections.pdf/\\$file/TelephoneDirections.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/TelephoneDirections.pdf/$file/TelephoneDirections.pdf) accessed 16 February 2010



Note encourages litigants to file and serve documents (whether at the pre-trial or trial stage) electronically where practicable.<sup>71</sup> The Note includes provisions for electronic exchange of discovery lists and documents stored electronically.

The Attorney General's Department has also launched its JusticeLink service across the State's court network. JusticeLink is a centralised online case processing system designed to reduce duplication across the State courts and remove the need for parties to attend court for minor procedural matters.<sup>72</sup> It is also expected to reduce the time between commencement of proceedings and trial. JusticeLink's specific capabilities include electronic filing ("eFiling"), Online Court (through which directions and orders can be made in real time); "eListing" (through which parties can request hearing dates and view court listings); "eInformation" (which allows parties and their representatives to retrieve case records online); and "eTranscripts" (which provides electronic transcripts of court proceedings).

Some technological advances have been more modest and a cautious approach adopted. The Victorian Supreme Court offers telephone directions hearings on an ad hoc basis. The Victorian Law Reform Commission has proposed wider and more systematic use of telephone directions hearings, citing a likely decrease of costs and a likely increase in access to justice, "particularly for individuals and small businesses".<sup>73</sup> The Commission reported in 2008 that despite being available in

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<sup>71</sup> Supreme Court of New South Wales, *Practice Note SC Gen 7*

<sup>72</sup> Victorian Law Reform Commission, *op cit* at 330

<sup>73</sup> *Ibid* at 335

most courts around the country, electronic filing of court documents has not been enthusiastically embraced.<sup>74</sup>

## ALTERNATIVE DISPUTE RESOLUTION

There are many forms of Alternative Dispute Resolution, each of which differs in its degree of formality, mode of facilitation and enforceability. The most common are mediation, arbitration and conciliation<sup>75</sup> although newer forms including collaborative law, early neutral evaluation, expert appraisal and mini-trials are emerging.<sup>76</sup> These mechanisms initially operated independently of the court system, but court-annexed and court-referred Alternative Dispute Resolution initiatives are now commonplace.<sup>77</sup> Many Australian courts have power to refer matters to compulsory mediation.<sup>78</sup>

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<sup>74</sup> Ibid at 327

<sup>75</sup> National Alternative Dispute Resolution Advisory Council, "What is ADR?" [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What\\_is\\_ADR](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADR) accessed 20 April 2010

<sup>76</sup> Neutral evaluation schemes commenced in the United States and have since been adopted in the United Kingdom, Australia and elsewhere (Victorian Law Reform Commission, op cit at 220). Expert appraisal is widely utilised in proceedings before the Administrative Appeals Tribunal and in Queensland courts (Ibid at 221)

<sup>77</sup> The Hon Justice JP Hamilton, op cit. See also *Federal Court of Australia Act 1976* (Cth) s 53A; *Family Law Act 1975* (Cth) Part II; *Mediation Act 1997* (ACT); *Civil Procedure Act 2005* (NSW) Parts 4 and 5; *Uniform Civil Procedure Rules 2005* (NSW) Part 20; *Supreme Court Rules 2000* (Tas) Part 20; *Supreme Court Civil Rules 2006* (SA) Chapter 10; *Supreme Court Rules 1987* (NT) r 48.13; *Uniform Civil Procedure Rules 1999* (Qld) Chapter 9 Part 4; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 50; *Rules of the Supreme Court 1971* (WA) O 29

<sup>78</sup> *Federal Court of Australia Act 1976* (Cth) s 53A; *Federal Magistrates Act 1999* (Cth) ss 34, 35; *Civil Procedure Act 2005* (NSW) s 26; *Magistrates Court Act 1991* (SA) s 27(1); *District Court Act 1991* (SA) s 32(1); *Supreme Court Act 1935* (SA) s 65; *Supreme Court Rules 2000* (Tas) r 518; *Court Procedures Rules 2006* (ACT) r 1179

## MEDIATION

Part 4 of the *Civil Procedure Act 2005* (NSW) contains the mediation provisions. Mediation is defined under section 25 as “a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.” In the Supreme Court, the mediator is normally a formally accredited court registrar.<sup>79</sup> New South Wales courts may and do refer matters to mediation with or without the consent of the parties. Parties are under a statutory duty to participate in mediation in good faith. In the Commercial and Technology and Construction Lists of the Equity Division, parties are expected to have considered if not attempted mediation before commencing proceedings.<sup>80</sup>

In 2008 the New South Wales Supreme Court Registry recorded 868 separate referrals to mediation. Approximately 65 per cent of these referrals were processed through court-annexed mediation (rather than private mediation). Of those cases that proceeded to court-annexed mediation, 59 per cent were settled at mediation.<sup>81</sup>

The Federal Court has an Alternative Dispute Resolution program. Section 53A of the *Federal Court of Australia Act 1976* (Cth) permits the Court to refer a case to mediation before a Court registrar (who is an accredited mediator) or a person nominated by the parties. Although the Court has had power to order cases to compulsory mediation since 1997, in practice most referrals have been “at the

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<sup>79</sup> The Hon Justice JP Hamilton, *op cit*, 265

<sup>80</sup> Supreme Court of New South Wales, *Practice Note SC Eq 3*

<sup>81</sup> Supreme Court of New South Wales, *Annual Review 2008* at Appendix (ii)

request, or with the consent, of the parties.”<sup>82</sup> The Court’s most recent Annual Report records a steady increase in mediation referrals over the last five years, remarking that this “reflects the increasing recognition both within the Court and the legal profession of the benefits of Alternative Dispute Resolution and its role in the effective management of cases to resolution.”<sup>83</sup> It does not seem that any particular type of dispute is more suited to Alternative Dispute Resolution: in the Federal Court, the most commonly mediated cases are corporations cases, trade practices matters, industrial disputes, intellectual property disputes and human rights matters.<sup>84</sup>

## REFEREES

All State and Territory jurisdictions confer power on the court to appoint referees where the trial is without a jury. This power is particularly useful where the proceeding involves complex technical questions. A referee may be appointed to try the proceedings (or some question of fact arising from them) or to inquire into and report upon the whole or any part of the proceedings.<sup>85</sup> In New South Wales, referees can only perform the “inquiry and report” function.<sup>86</sup> Although expert referral is widely regarded as a form of Alternative Dispute Resolution, it can be, and often is, utilised within the conventional litigation process.

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<sup>82</sup> Federal Court of Australia, *Annual Report 2008 – 2009* at 32

<sup>83</sup> *Ibid*

<sup>84</sup> *Ibid*

<sup>85</sup> This is the case in the Northern Territory, Queensland, Tasmania and Western Australia. In the Australian Capital Territory the court can appoint a referee to inquire into and report on, or hear and determine, the entire proceedings or part thereof: Victorian Law Reform Commission, *op cit* at 232; *Court Procedures Rules 2006 (ACT)* Div 2.15.4

<sup>86</sup> *Uniform Civil Procedure Rules 2005 (NSW)* r 20.14

## **COLLABORATIVE LAW**

Collaborative law provides a non-adversarial approach to legal practice that developed in North America in the 1990s and was introduced into Australia in 2005. Collaborative law builds on, and departs from, various pre-existing Alternative Dispute Resolution techniques, including negotiation and mediation. Collaborative practitioners are engaged under a limited retainer for the sole purpose of facilitating a settlement outcome. Lawyers for each side sign written undertakings to the effect that they will not resort to the court system. Should settlement discussions fail, the retainer is automatically extinguished<sup>87</sup> and the parties must engage new representatives. Parties are required to participate in collaborative settlement discussions in good faith and to make full disclosure of all relevant information.<sup>88</sup> Collaborative practice has spread throughout the United States and has been enthusiastically embraced in many common law jurisdictions including the United Kingdom, Hong Kong, New Zealand and Australia.<sup>89</sup>

## **SPECIALIST TRIBUNALS**

One of the responses in Australia and I suspect elsewhere to the problems, particularly the cost of resolving disputes in the courts, has been the growth of specialist tribunals. Specialist tribunals have arisen independently of, but in tandem

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<sup>87</sup> A Ardagh, "Repositioning the Legal Professional in ADR Services: The Place of Collaborative Law in the New Family Law System in Australia" (2008) 8 *Queensland University of Technology Law and Justice Journal* 238 at 240

<sup>88</sup> M Scott, "Collaborative Law: Dispute Resolution Competencies for the 'New Advocacy'" (2008) 8 *Queensland University of Technology Law and Justice Journal* 213 at 215

<sup>89</sup> *Ibid* at 218-9

with, case management theory and practice. Even those that predate the advent of case management can be seen as examples of it. Dozens of specialist tribunals have been created by legislation in various Australian States and Territories as well as at the Federal level. They include the Victorian Civil and Administrative Tribunal (VCAT) and the NSW Consumer, Trader and Tenancy Tribunal (CTTT). The NSW Land and Environment Court is a hybrid providing for disputes to be resolved, depending on their nature, by judges or expert commissioners.

VCAT was established in 1998 to replace 15 pre-existing boards and tribunals. The Tribunal operates various lists and hears civil disputes ranging from consumer matters to discrimination, retail tenancies, disability, guardianship, domestic building and legal services. The specific case management steps applicable for a particular case are heavily dependent on the list to which the matter is assigned. But all VCAT proceedings are conducted in an informal and non-technical manner, unconstrained by the rules of evidence.<sup>90</sup> Parties may appear personally or in some circumstances may be represented.<sup>91</sup> VCAT describes itself as a “one stop shop” that aims to provide “access to a civil justice system which is modern, accessible, efficient and cost effective.”<sup>92</sup>

The CTTT was established in 2002. Its nine divisions include tenancy, social housing, general consumer claims, home building, residential parks, strata and community schemes, motor vehicles, commercial credit and retirement villages. CTTT hearings are determined by Members, who are not normally legally qualified.

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<sup>90</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)

<sup>91</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62(1)

<sup>92</sup> “About VCAT” [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au) accessed 19 March 2010

Decisions and orders are usually handed down on the date of the hearing. One of the CTTT's objectives is "to enable proceedings to be determined in an informal, expeditious and inexpensive manner."<sup>93</sup> To that end, the normal rules of evidence do not apply in Tribunal proceedings.<sup>94</sup> The CTTT is directed to operate with as little formality and technicality as possible.<sup>95</sup> Legal representation is the exception rather than the norm.<sup>96</sup>

## THE TRIAL

### STOPWATCH TRIALS

Efforts are being made to limit the time taken for the trial. Section 62(3) of the *Civil Procedure Act 2005* (NSW) empowers the court to limit the time taken at the hearing. In the Equity Division of the Supreme Court (Commercial and Technology and Construction Lists) this general power forms the foundation of the "stopwatch trial".<sup>97</sup> In a stopwatch trial, the parties jointly estimate the total time that the trial will take. They then divide that time between themselves.<sup>98</sup> To facilitate adherence to these time periods, orders prescribing the time estimates are made in advance of the trial. The relevant Practice Note states:

"51. This method of hearing is aimed at achieving a more cost effective resolution of the real issues between the parties. It will require more

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<sup>93</sup> *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 3(c)

<sup>94</sup> *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 28(2)

<sup>95</sup> *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 28(3)

<sup>96</sup> *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 36

<sup>97</sup> *Civil Procedure Act 2005* (NSW) s 62(3); Supreme Court of New South Wales, *Practice Note SC Eq 3*

<sup>98</sup> The Hon Spigelman CJ, "Access to Justice and Access to Lawyers", Paper presented to the 35<sup>th</sup> Australian Legal Convention, Sydney, 24 March 2007

intensive planning by counsel and solicitors prior to trial including conferring with opposing solicitors and counsel to ascertain estimates of time for cross-examination of witnesses and submissions to be built in to the estimate for hearing.”<sup>99</sup>

Stopwatch trials can generally only be ordered with the consent of the parties. They provide an enforceable regime by which the parties must commit well in advance to a certain mode of running their case.

## **WRITTEN EVIDENCE IN CHIEF**

The courts of Chancery developed the practice of requiring parties to exchange witness statements pre-trial “on the basis that they may stand as the evidence in chief of the witness”.<sup>100</sup> The Commercial List of the New South Wales Supreme Court has, since inception, utilised this practice. Parties may be required to exchange written statements ahead of the trial.<sup>101</sup> Except with leave, a party may only rely on a witness statement at trial if the witness is called to give evidence. Provided that person is called as a witness and affirms the truth of his or her witness statement in court, the statement is deemed to constitute the whole of that witness’ evidence in chief. The witness may then be cross-examined in the usual way. The same procedure is being followed in professional negligence cases, in breach of contract disputes and in other matters where the factual history is lengthy but relatively few matters are disputed.

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<sup>99</sup> Supreme Court of New South Wales, *Practice Note SC Eq 3*

<sup>100</sup> Western Australian Bar Association, *Best Practice Guide 01/2009: Preparing Witness Statements for Use in Civil Cases* (2009) at ii

<sup>101</sup> *Uniform Civil Procedure Rules 2005* (NSW) r 31.4



This process has three main objectives.<sup>102</sup> The first is to put the other party on notice as to the evidence which will be called in relation to which issues and by whom. The second is to reduce the time taken at trial in giving the evidence. The third is to eliminate the need for written interrogatories.

Evidence in chief in the Victorian Commercial Court is given through witness statements “unless and to the extent that it concerns a contested issue of fact involving the evidence of that witness or where the List Judge otherwise orders.”<sup>103</sup>

Where witness statements are not ordered, the parties are still required to file and serve summaries of the evidence to be given by the witness.<sup>104</sup> Parties cannot, without leave, adduce any evidence in chief other than what is contained in the witness statement or summary.<sup>105</sup> Similar provisions exist in other Australian jurisdictions.

Pre-trial exchange of witness statements has the significant advantage of alerting litigants, well in advance, to the nature of the case against them and what they will need to do to test or rebut it. The written evidence process can bring “issues into sharp focus” and yields associated time and cost benefits.<sup>106</sup> Pre-trial exchange of witness statements eliminates surprise and guesswork and limits the capacity for trial by ambush, “techniques whose time has passed in the modern day quest for the

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<sup>102</sup> Justice DA Ipp, “Reforms to the Adversarial Process in Civil Litigation – Part II” (1995) 69 *Australian Law Journal* 790 at 798

<sup>103</sup> Supreme Court of Victoria, *Commercial Court Practice Note 1 of 2010* at [13.11]

<sup>104</sup> *Ibid* at [13.18]

<sup>105</sup> *Ibid* at [13.21]

<sup>106</sup> The Hon Justice DA Ipp, “Reforms to the Adversarial Process in Civil Litigation – Part II” (1995) 69 *Australian Law Journal* 790 at 800

highest quality of justice.”<sup>107</sup> Statements also assist the judge by providing a comprehensive record of a witness’ account of relevant events that can be compared against competing accounts. This can bring significant benefits of efficiency and quality of decision making in all cases, particularly in cases of any complexity.

There are also recognised benefits for the cross-examiner. Justice Ipp, who was responsible for many reforms to civil proceedings in the Western Australian Supreme Court, has written:

“The use of written statements affords cross-examining counsel considerable opportunity to reveal inconsistencies and fabrications in the witness’ evidence. The provision of statements at an earlier stage often provides the opposing party with an advantage in that greater candour may then be shown than would be the case were the witness to give oral evidence in chief at the trial, when all the implications of their testimony would more readily be appreciated.”<sup>108</sup>

Elsewhere I have questioned the rationale for relying on a witness’ demeanour as an indicator of his or her credibility.<sup>109</sup> There are no prototypical indicators of dishonesty. A person’s demeanour can obscure or belie their state of mind. Even where it does not, we assume – with I believe questionable justification – that judges are skilled in detecting the signs of dishonesty. Some judges have confessed their disquiet with their own credibility assessments.<sup>110</sup> Documentary evidence in chief has the benefit of focusing the issues, enabling the cross examiner to clearly contrast their client’s account of the relevant events with the accounts of others. It is

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<sup>107</sup> Ibid

<sup>108</sup> Ibid at 799

<sup>109</sup> See, eg, McClellan CJ at CL, “Who is Telling the Truth? Psychology, Common Sense and the Law”, Paper presented to the Local Courts of New South Wales Annual Conference, 2-4 August 2006

<sup>110</sup> See, eg, the comments of the trial judge in *Rama Furniture v QBE Insurance* (NSWCA, 20 June 1986, unreported)

the inherent logic of a witness's position, particularly if there are documents to support or contradict it, which provides the most reliable guide as to whether a witness is telling the truth.

There are some potential problems with written evidence which must be recognised. To ensure that it complies with the rules of evidence and accordingly is admissible in the proceedings, a lawyer may have considerable input into the content of a witness statement. There is a well-founded fear that the lawyer's input may, in Justice Brereton's words, "colour the recollection of the witness and diminish its value as an independent recollection even below that of oral testimonial evidence."<sup>111</sup>

Evidence by written statement may also be of limited use in cases involving serious factual disputes. Some judges address this problem by directing that the controversial portions of the evidence in chief be elicited orally, requiring the witnesses to give their recollections of the event or conversation rather than one carefully crafted, put on paper and "settled" by a lawyer.

## **REFORMS TO THE EXPERT EVIDENCE PROCESS**

Apart from the challenge of efficiency of court processes, the quality of judicial decision-making has been called into question, particularly when the evidence of experts is involved. The judges are not the subjects of the criticism. The concern is with the integrity of the evidence upon which they are required to adjudicate. The

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<sup>111</sup> The Hon Justice PLG Brereton, "Evidence in Civil Proceedings: An Australian Perspective on Documentary and Electronic Evidence", Paper presented to the National Judges College of the Supreme People's Court of the People's Republic of China, September 2007

abolition of the jury as the decision-maker means that there is now a reasoned judgment from a judicial officer. Those reasons will disclose the impact upon the judge of the evidence of individuals, including the experts, and the part their evidence has played in the resolution of the problem. It provides a capacity in the parties and others to assess whether the judge's reasoning is sound or whether the judge has misunderstood or been misled by the evidence. Those with special knowledge of areas of learning critical to the decision are able to assess whether "the science" applied by the judge is consistent with that accepted by leaders in the particular field. If the judge has got it wrong members of the profession can identify the error. Any error has the potential to erode confidence in the judicial process. Repeated errors will lead to considerable disquiet.

Both because of the cost to the parties of the receipt and scrutiny of expert evidence and because of questions about its integrity, many professional bodies have expressed concern about whether our conventional approach to expert evidence is acceptable. The concerns are widespread. Many highly qualified professional people will quite simply not accept a retainer to give evidence in court.

In response to these concerns, changes have been made to the procedures for receiving expert evidence in a number of Australian courts and tribunals. The aim of the changes has been to enhance the integrity and reliability of expert evidence. The changes have brought considerable efficiencies in many cases.

The changes include single experts appointed by agreement between the parties, the option of court-appointed experts, and powers in the court to control the number of experts and the manner in which they give their evidence. The amended rules allow courts to confine the number of experts called and to refuse to allow an expert

to give evidence on particular issues. They also allow judges to order the sequence for the giving of evidence and to require the defendant to call lay or expert evidence in what would otherwise be the plaintiff's case.

### TIGHTER CONTROLS ON THE USE OF EXPERT EVIDENCE

Control over expert evidence has been taken up by Australian courts. In some jurisdictions, expert evidence may only be tendered with leave or by the court's direction.<sup>112</sup> Some courts can limit the number of experts who may be called at trial.<sup>113</sup> Both the content<sup>114</sup> and pre-trial disclosure<sup>115</sup> of expert reports are attracting greater scrutiny from the courts.

Although in New South Wales the permission rule (as it is known in the United Kingdom) in complete form was not adopted, the amendments made to the *Uniform Civil Procedure Rules* provide for significantly greater control of expert evidence by the court. The amended rules allow the courts to confine the number of experts called and to refuse to allow an expert to give evidence on particular issues.

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<sup>112</sup> *Family Law Rules* 2004 (Cth) r 15.51; *Rules of the Supreme Court* 1971 (WA) O 36A.3(2); *Uniform Civil Procedure Rules* 2005 (NSW) r 31.19

<sup>113</sup> *Rules of the Supreme Court* 1971 (WA) O 36A.5; *Supreme Court Rules* 2000 (Tas) r 460; *Uniform Civil Procedure Rules* 1999 (Qld) r 367(3)(e)

<sup>114</sup> *Civil Procedure Rules* 1998 (Eng) r 35.10 and *Practice Direction 35* r 3.2; *Family Law Rules* 2004 (Cth) rr 15.62, 15.63; *Federal Court Rules* 1979 (Cth) r 33.20; *Supreme Court Civil Rules* 2006 (SA) r 160(3); *Uniform Civil Procedure Rules* 1999 (Qld) r 428; *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) r 44.03(2); *Uniform Civil Procedure Rules* 2005 (NSW) r 31.27; *Court Procedures Rules* 2006 (ACT) r 1201(2)

<sup>115</sup> *Civil Procedure Rules* 1998 (Eng) Part 35; *Family Law Rules* 2004 (Cth) Div 15.5.4; *Supreme Court Civil Rules* 2006 (SA) r 160(1); *Uniform Civil Procedure Rules* 1999 (Qld) r 429; *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) r 44.03(1); *Court Procedures Rules* 2006 (ACT) r 1241; *Uniform Civil Procedure Rules* 2005 (NSW) r 31.28

Rule 31.17 provides a comprehensive statement of the main purposes of Division 2 of Part 31, which relates to expert evidence. They must be understood in light of the overriding purpose of the *Civil Procedure Act 2005* and *Rules*, being the “just quick and cheap resolution of the real issues in the proceedings.”<sup>116</sup> Rule 31.17 states the main purposes of Division 2 as follows:

- (a) to ensure that the court has control over the giving of expert evidence;
- (b) to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings;
- (c) to avoid unnecessary costs associated with parties to proceedings retaining different experts;
- (d) if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court;
- (e) if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings;
- (f) to declare the duty of an expert witness in relation to the court and the parties to proceedings.

Rule 31.18 sets out various definitions. Rule 31.19 provides that if parties intend to adduce, or if it becomes apparent that they may adduce expert evidence at trial, they must first seek directions from the court. The rule clearly states that in the absence of directions, expert evidence may not be adduced at the trial unless the court orders otherwise. Rule 31.20 contains a wide-ranging list of directions which the court may

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<sup>116</sup> *Civil Procedure Act 2005* (NSW) s 56

consider giving. Both rules give the court extensive control over the use of expert evidence at any trial.<sup>117</sup>

## SINGLE EXPERTS

In his 1995 Interim Report, Lord Woolf introduced the concept of the single expert. The single expert, who may be chosen by the parties or appointed by the court, is the sole person who is able to give evidence on a particular issue unless the court otherwise directs.<sup>118</sup> Single experts are routinely used in the Australian Family Court,<sup>119</sup> in Queensland (where there is a blanket presumption in favour of single experts)<sup>120</sup> and in the Supreme Court of the Australian Capital Territory.<sup>121</sup>

In New South Wales, the *Uniform Civil Procedure Rules* provide for parties' single experts. The court may order at any stage of proceedings that an expert be engaged jointly by the parties. A "parties' single expert" is engaged and selected by agreement of the parties. The parties take the initiative. The selection of the expert by the parties is integral to the concept of the joint expert witness. The amended *Rules* also preserve the role of the "court-appointed expert" who is the court's witness and different from the "parties' single expert".

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<sup>117</sup> McClellan CJ at CL, "The New Rules", Paper presented to the Expert Evidence Symposium, Sydney, 16 April 2007

<sup>118</sup> New South Wales Law Reform Commission, *Report 109: Expert Witnesses* (2005) at 45

<sup>119</sup> *Family Law Rules* 2004 (Cth) Div 15.5.2

<sup>120</sup> *Uniform Civil Procedure Rules* 1999 (Qld) r 429G

<sup>121</sup> *Court Procedures Rules* 2006 (ACT) Div 2.12.3 concerning certain medical experts

The general but not universal view is that in the appropriate case and where the issues are amenable to it, a single expert can bring significant savings in costs to the parties, reducing the court time necessary to resolve the dispute. However it must be recognised that not every controversy is amenable to a single expert. When I introduced the concept in the NSW Land and Environment Court I said:

“[T]ypically matters such as noise, traffic, parking, overshadowing, engineering, hydrology, contamination issues, among others, appear suitable for a court expert. Increasingly matters of heritage, urban design and general planning are also being dealt with by court experts, often at the request of both parties and commonly after a request from the council. The court expert has the responsibility to prepare a report after consultation with the parties. In some cases, this may mean consultation with experts which the parties have retained to advise them, but very often the court expert will be the only expert who looks at a particular problem.”<sup>122</sup>

My expectations have turned out to be the case. Single experts are used in somewhere above 40 per cent of the cases heard by that Court. We have also found them to be of significant utility in cases in the Common Law Division of the New South Wales Supreme Court, particularly in relation to less controversial issues relating to damages. When an accountant is required to assess the worth of a company, or an engineer or builder to assess the likely cost of repair or maintenance of a building, or where ongoing medical costs must be quantified, a single expert has proved useful. On occasion, a judge will appoint an expert to assist in understanding the evidence of the experts called by the parties. Although adding to the cost of the proceedings, where that cost is justified, this process can assist with the resolution of

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<sup>122</sup> Justice P McClellan, “Keynote Address: Expert Evidence – The Experience of the Land and Environment Court”, Paper presented to the National Forensic Accounting Conference 2005, 24-25 February 2005



complex issues which the retained experts may be either unable or unwilling to resolve.

There are legitimate concerns about the use of single experts. They may mask legitimate differences of opinion in relation to complex issues. They may also lead the parties to incur additional expense, especially if a party engages another expert to evaluate and advise with respect to the single expert. These issues must be recognised and the case for a single expert carefully considered. The complexity of the litigation and the amount at stake may mean that the cost of the parties engaging their own experts can readily be justified, particularly when it is recognised that a significant part of the expert's fee will be incurred in preparing a written statement of evidence for the court. These costs will be avoided if an expert's role is confined to advice without giving evidence.

### CONCURRENT EVIDENCE

One of the most significant reforms in the civil trial process in Australia has been the concurrent method of receiving expert evidence. Concurrent evidence was pioneered in Australia<sup>123</sup> and is utilised by various Australian courts and tribunals, including the Common Law Division of the New South Wales Supreme Court, the New South Wales Land and Environment Court, the Queensland Land and Resource Tribunal, the Federal Court of Australia and the Administrative Appeals

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<sup>123</sup> I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy*, 4<sup>th</sup> ed (2009) Lawbook Co at 489

Tribunal. It has also been used in three murder trials in New South Wales where the judge was sitting without a jury.

A Practice Note makes particular provision for concurrent evidence in the New South Wales Supreme Court. It reads as follows:

“All expert evidence will be given concurrently unless there is a single expert appointed or the Court grants leave for expert evidence to be given in an alternate manner.”<sup>124</sup>

Provision has also been made in *Uniform Civil Procedure Rules* to facilitate concurrent evidence. The relevant Rule is r 31.35 which is extracted in Appendix B.

How does it work? Although variations may be made to meet the needs of a particular case, concurrent evidence requires the experts retained by the parties to prepare a written report in the conventional fashion. The reports are exchanged and, as is now the case in many Australian courts, the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a short point document incorporating a summary of the matters upon which they are agreed, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a “directed” discussion, chaired by the judge, of the issues the subject of disagreement. The process provides an opportunity for each expert to place his or her view before the court on a particular issue or sub-issue. The experts are encouraged to ask and answer questions of each other. Counsel may also ask questions during the course of the discussion to ensure that

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<sup>124</sup> Supreme Court of New South Wales, *Practice Note SC CL 5*

an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the process the judge will ask a general question to ensure that all of the experts have had the opportunity of fully explaining their position.

I have utilised the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court, and in the Supreme Court. In 2006 I sat as the trial judge in relation to a claim by a young lad who was aged 18 at the time he had a cardiac arrest and suffered catastrophic and permanent brain damage. He sued his general practitioner. The issues required evidence from other general practitioners about the duty of a doctor given the plaintiff's circumstances. There was also a major cardiological issue.

As it happened, the parties called a total of five general practitioners. They gave evidence concurrently. They sat at the bar table together and in one and a half days discussed in a structured and cooperative manner the issues which fell within their expertise. They had previously conferenced together for some hours and prepared a joint report which was tendered. In all likelihood if their evidence had been received in the conventional manner it would have taken at least five days. I would not have had the benefit of the questions which they asked each other, and, of even greater value, the responses to those questions.

Four cardiologists also gave evidence together – one by satellite from the USA, the others sitting at the bar table in the courtroom. Their evidence took one day. The doctors were effectively able to distil the cardiac issue to one question which was identified by them and although they held different views, their respective positions on the question were clearly stated. The reports to me indicate that the process was welcomed by the cardiologists and the parties' advocates.

I have been a lawyer for in excess of 35 years. That day in court was the most significant I have experienced. It was a privilege to be present and chair the discussion between four doctors – all with the highest level of expertise, discussing the issues in an endeavour to assist me to resolve the ultimate question.

Concurrent evidence is the means by which we can provide in the courtroom the decision-making process which professional people conventionally adopt. If one of us suffered a traumatic injury which required hospitalisation and the possibility of major surgery to save our life, a team of doctors would come together to make the decision whether or not to operate. There would be a surgeon, anaesthetist, physician, maybe a cardiologist, neurologist or one of the many specialities which might have a professional understanding of our problems. They would meet, discuss the situation and the senior person would ultimately decide whether the operation should take place. It would be a discussion in which everyone's views were put forward, analysed and debated. The hospital would not set up a court case. If this is the conventional decision-making process of professional people, why should it not also be the method adopted in the courtroom?

Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do not encourage it, very often the experts, who will be sitting next to each other, end up using first names. Within a short time of the discussion commencing, you can feel the release of the tension, which infects the conventional evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

I have had the opportunity of speaking with many witnesses who have been involved in the concurrent process and with counsel who have appeared in cases where it has been utilised. Although, generally because of inexperience, counsel may be hesitant before being involved I have heard little criticism once they have experienced the process. The change in procedure has been met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to those of the other expert or experts. Because they must answer to a professional colleague rather than an opposing advocate, they readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate's skill. The process is significantly more efficient than conventional methods. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20 per cent of the time which would otherwise have been required.

I have had cases where eight witnesses gave evidence at the one time. I know of one case where there were 12. There have been many cases where four experts have given evidence together. As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others' questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you have the expert's views expressed in his or her own words. There are

also benefits when it comes to writing a judgment. The judge has a transcript where each witness answers exactly the same question at the same point in the proceedings.

I am often asked whether concurrent evidence favours the more loquacious and disadvantages the less articulate witnesses. In my experience, this does not occur. Since each expert must answer to their professional colleagues in their presence, the opportunity for diversion of attention from the intellectual content of the response is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious, rather than a forum within which to put forward their reasoned views, the less experienced, or perhaps shy person, becomes a far more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skilful advocate in the conventional evidence gathering procedure than by a professional colleague with whom, under the scrutiny of the courtroom, they must maintain the debate at an appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is, of course, available for the judge to intervene and ensure each witness has a proper opportunity to express his or her opinion.

Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in an endeavour to identify the issues and arrive where possible at a common resolution of them. In relation to the issues where agreement is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without constraint by the advocates in a forum which enables them to respond directly to each other.

The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.

### THE PHASED TRIAL

In the Common Law Division of the New South Wales Supreme Court we have taken a further significant step in the evolution of the trial process.

A consequence of using concurrent expert evidence is the need to reconsider the conventional structure of a civil trial. The traditional process requires the plaintiff to present its complete case, both lay and expert evidence, and “close its case” before the defence presents its lay and expert evidence. This sequence favours the defence. It provides the opportunity for the defence to “ambush” the plaintiff. Once the plaintiff’s version of events is on oath, the defence is able to plot its path knowing of the view of the plaintiff’s experts about those events. The defendant has the freedom to select from its available lay evidence and may choose to discard some witnesses. More likely it may choose to discard experts who may, in light of the plaintiff’s evidence, be seen as less favourable to the defendant. The opportunity for strategic, tactical decisions is obvious to any experienced advocate. This forensic advantage, not available to the plaintiff, has traditionally been justified because the plaintiff bears the burden of proof.

The traditional process can make for an inefficient trial. Experts are required to prepare their evidence with regard to the instructions they receive as to the relevant factual history. The account of those events may change either when the plaintiff’s lay evidence is given, or more likely when the plaintiff’s witness are cross-examined.

It may also change, sometimes significantly, when the defence has called its lay evidence. If the instructions change then so must the expert's opinion, sometimes quite significantly.

The New South Wales *Uniform Civil Procedure Rules* now permit judges to direct that an expert "give evidence at any stage of the trial, whether before or after the plaintiff has closed his or her case".<sup>125</sup> The court retains a general power under these *Rules* to "give such directions as it considers appropriate in relation to the use of expert evidence in proceedings."<sup>126</sup> The *Rules* of the Australian Capital Territory courts contain a similar power.<sup>127</sup>

Both because of its efficiency and the prospect of real change in an expert's perception of their role in the trial process, it is common that we change the order in which evidence is given. Unless for any reason it will be inappropriate in a particular case, all of the factual evidence is now received in advance of any expert being called. If the case is one of any complexity the factual evidence may be followed by a short break, perhaps a couple of days or occasionally longer, during which the experts will have an opportunity to review the transcript. This will enable them to understand the extent to which the relevant factual accounts are consistent and where they diverge. It ensures that the experts are able to give their evidence with a clear understanding of the facts which are accepted and those which are in dispute. The process eliminates the guesswork and enables the controversy to be refined. It encourages the experts to cooperate with each other in assisting the judge to arrive

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<sup>125</sup> *Uniform Civil Procedure Rules* 2005 (NSW) r 31.35(a)(ii)

<sup>126</sup> *Uniform Civil Procedure Rules* 2005 (NSW) r 31.20(1)

<sup>127</sup> *Court Procedures Rules* 2006 (ACT) rr 1211(1)(j), 1211(2)



at the correct conclusion. We refer to it as a “phased trial.” Although it has only been used for a short while, we believe it has significant benefits both for the integrity and efficiency of the trial process. Judges of various State courts,<sup>128</sup> the Federal Court<sup>129</sup> and the Family Court<sup>130</sup> now have express power to defer expert evidence until some or all of the relevant factual evidence has been led.

## **MORE TO BE DONE: HAVE THE REFORMS SUCCEEDED?**

### **THE PROBLEM OF EVALUATION**

With any significant change in the law, there is a legitimate need to seek “hard data” to prove the benefits of the change. However, with some exceptions (discussed below), empirical research on the consequences of civil justice reform has rarely been undertaken in Australia. This is for good reason. It is difficult to test the success of any particular reform without knowing what might otherwise have been the case, that is, without an effective control. Even when a control is available and is utilised, there are difficulties in establishing a cause and effect relationship. A case which is successfully resolved at mediation might have settled in any event. Justice Ipp wrote of these difficulties:

“Productivity is difficult to measure. How does one compare the use of a judge’s time for case management purposes in any given week resulting in the disposition of say 10 cases, and the use of that time to try a three

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<sup>128</sup> Australian Capital Territory, Northern Territory, South Australia and New South Wales

<sup>129</sup> *Federal Court Rules* 1979 (Cth) r 34A.3(2)(c)(i)

<sup>130</sup> *Family Law Rules* 2004 (Cth) r 15.70(b); *Court Procedures Rules* 2006 (ACT) r 1211(1)(c)(i); *Supreme Court Civil Rules* 2006 (SA) r 213(1)(a); *Uniform Civil Procedure Rules* 2005 (NSW) r 31.35(a)(i)

day case and to write a judgment that is affirmed on appeal and which affects the lives of hundreds of thousands of persons in the community. The fact is that standards designed to measure achievement in other fields cannot be transferred into the courtroom.”<sup>131</sup>

## CASE MANAGEMENT

Case management has its critics but has also been praised as a “very efficient tool for the proper and timely disposal of simpler cases and also for the purpose of allocating more time to complex cases”.<sup>132</sup> Its critics argue that it increases the number of interlocutory proceedings, vests too much confidence in judges as managers, and undermines the adversarial system.<sup>133</sup> Some consider that judges who become “entangled” in disputes at the pre-trial stage may find it difficult to

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<sup>131</sup> The Hon Justice DA Ipp, “Reforms to the Adversarial Process in Civil Litigation – Part I” (1995) 69 *Australian Law Journal* 705, 721

<sup>132</sup> Justice M Rao, “Case Management and its Advantages”  
[http://lawcommissionofindia.nic.in/adr\\_conf/Mayo%20Rao%20case%20mngt%203.pdf](http://lawcommissionofindia.nic.in/adr_conf/Mayo%20Rao%20case%20mngt%203.pdf) accessed 8 February 2010

<sup>133</sup> Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) HMSO, London, Chapter 1. In the United States of America, the “Rand Report” (J Kakalik et al, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (1996) RAND Institute for Civil Justice) considered civil processes including case management. It surveyed a total of 10,000 cases across 20 federal courts in 16 separate States. The Report found that case management reduced delays but may have increased costs to litigants. The authors considered case management to be more labour-intensive due to the additional responsibilities it imposes on lawyers. They argued that it requires the practitioner to engage with and adhere to judge-imposed procedural requirements. Acting within a case management framework, the practitioner must “respond to the court’s management – for example, talking to the litigant and to the other lawyers in advance of a conference with the judge, travelling, spending time waiting at the courthouse, meeting with the judge, and updating the file after the conference.” The authors of the Report concluded that the results of the survey “debunk[ed] the myth that reducing time to disposition will necessarily reduce litigation costs.”

remain impartial at trial.<sup>134</sup> Others are concerned that case management at the Federal level may overstep constitutional limitations on the exercise of judicial power.<sup>135</sup> This is of course a uniquely Australian problem.

In his *Review of Civil Litigation Costs: Final Report*,<sup>136</sup> Lord Justice Jackson surveyed developments in Australia and elsewhere before recommending an extension of case management principles in the United Kingdom. He stated (at 497):

“The shift in balance which I am advocating for England and Wales has echoes elsewhere across the common law world. See, for example, the civil procedure reforms which are to be introduced in Ontario in January 2010; the massive procedural reforms introduced in Hong Kong on 2<sup>nd</sup> April 2009; and the strict approach to case management adopted by the Australian Federal Court in respect of those cases which can be tried within eight days. The decision of the High Court of Australia in *Aon Risk Services Australia Ltd v Australia National University* [2009] HCA 27 marks a much tougher attitude by that court to delays by parties. The decision also signals a clear shift in the balance which is struck between case management considerations and pure justice.”

In its *Civil Justice Report*, the Law Reform Commission for the State of Victoria discussed the advantages and disadvantages of discrete case management initiatives. The Commission did not offer an authoritative opinion with respect to the success of case management in Australia. However, its recommendations supported the expansion of case management initiatives in Victoria.<sup>137</sup>

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<sup>134</sup> The Hon Justice A Rogers, “The Managerial or Interventionist Judge” (1993) 3 *Journal of Judicial Administration* 2, 97, discussed in T Sourdin, “Judicial Management and ADR Process Trends” (1996) 14 *Australian Bar Review* 185

<sup>135</sup> The Hon M Black CJ, “The Role of the Judge in Attacking Endemic Delays: Some Lessons from Fast Track” (2009) 19 *Journal of Judicial Administration* 88, 91

<sup>136</sup> (2009) Ministry of Justice, London

<sup>137</sup> The Commission made 49 separate recommendations falling within the topic of case management. These include more specific judicial powers to actively manage cases; the imposition of limits on the conduct of proceedings and interlocutory procedures; expansion of individual docket systems; greater use of telephone

The Commission summarised the key arguments for and against managerial judging.<sup>138</sup> The main arguments in support were said to be:

- it curtails the “disruptive self-interest of parties and their lawyers”;<sup>139</sup>
- it compels parties to behave efficiently (this contention is supported empirically);<sup>140</sup>
- increased efficiency enhances access to justice for would be litigants;<sup>141</sup>
- it accepts “the economic reality that court resources are limited”<sup>142</sup> and that judges are in a position to control litigation; and
- it occurs in a courtroom environment which provides safeguards against misuses of judicial power being perpetuated under the guise of managerialism.<sup>143</sup>

The arguments against managerial judging were discussed by the Australian Law Reform Commission more than a decade ago. The Review was particularly

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directions hearings and technology; and, earlier and more determinate trial dates:  
See Victorian Law Reform Commission, *op cit* at 376–381

<sup>138</sup> *Ibid* at 299-300

<sup>139</sup> *Ibid* at 299 quoting A Zuckerman, “Justice in Crisis: Comparative Dimensions of Civil Procedure” in A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999) 3, 47

<sup>140</sup> A Eyland et al, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms* (2003) at 75

<sup>141</sup> The Hon Justice DA Ipp, “Judicial Intervention in the Trial Process” (1995) 69 *Australian Law Journal* 365, 376 quoting Sir Anthony Mason AC KBE, “The Role of the Courts at the Turn of the Century” (1993) 3 *Journal of Judicial Administration* 156, 160-1

<sup>142</sup> Victorian Law Reform Commission, *op cit* at 299 citing Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, Issues Paper No 22 (1997) at [9.2.1]

<sup>143</sup> Victorian Law Reform Commission, *op cit* at 300

concerned with proceedings in the Family Court of Australia. It identified the following issues:<sup>144</sup>

- the term “managerial” can simply be applied to facilitate impermissible judicial activism;
- because a managerial judge will have more contact with and information about the parties as a result of his or her close involvement in the case, he or she may more easily become partial to one or other party;<sup>145</sup>
- excessive interventionism may frustrate lines of argument that, if explored, might have been successful;
- a managerial approach may save money and time at the expense of quality of decisions. “The concern is that case processing may become an end in itself, rather than the means of achieving justice;<sup>146</sup> and
- not all judges are willing or able to act as case managers.<sup>147</sup>

For my part I do not believe that the concerns raised by the Australian Law Reform Commission have been justified in practice. I recognise that not all judges are adept case managers. Although they may be outstanding exponents of the traditional role of the judge, their personality, including any natural disinclination to manage the process or their professional experience may make them less suitable for the task. A

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<sup>144</sup> Ibid

<sup>145</sup> See, eg, C Down, “Crying Woolf? Reform of the Adversarial System in Australia” (1998) 7 *Journal of Judicial Administration* 213 at 218 and footnote 71

<sup>146</sup> Victorian Law Reform Commission, *op cit* at 300

<sup>147</sup> The Hon Justice R Sackville AO, “The Future of Case Management in Litigation” (2009) 18 *Journal of Judicial Administration* 211 at 214

good manager, whilst not imposing themselves on the litigants, will be adept at identifying the real issues and have an instinct for where the real problems lie. The best managers will have an ability to communicate to all involved, both the parties and their representatives, and a determination to ensure that both the courts' resources and those of the parties are put to efficient use.

In 1998-1999 the Law and Justice Foundation of New South Wales evaluated various case management reforms introduced to the civil lists of the New South Wales District Court and the Victorian County Court in 1996. The research led to the publication of an evaluation report in 2003.<sup>148</sup> The study monitored the effects of the case management reforms on case processing times, settlements, litigation costs and the perceived quality of litigation. The authors found that the reforms reduced case processing times (particularly in New South Wales) and enhanced lawyers' perceptions of the quality of the civil litigation process.<sup>149</sup> However, there was no evidence that shorter case processing visibly impacted the number of settlements, nor that it produced earlier settlements. In New South Wales, costs to litigants were found to have "increased significantly" during the study period.<sup>150</sup> Accordingly, it could not be concluded that the reforms had any beneficial impact on costs in that State. The position was different in Victoria. The study found that the reforms introduced in the Victorian County Court "have at least contained litigant costs, and there is some indication that they have in fact decreased."<sup>151</sup> The authors attributed

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<sup>148</sup> Eyland et al, op cit.

<sup>149</sup> Ibid at Chapter 7

<sup>150</sup> Ibid at 102

<sup>151</sup> Ibid

these findings to the active judicial management of the discovery and interrogatories processes.

I am in no doubt that pre-trial case management has brought many benefits.

Creation of special lists for matters in identifiable categories with a judge responsible for each list ensures that effective control over each matter can be maintained.

Where the parties are free to run litigation at their own pace, inherent inefficiencies and the economic imperatives both of the litigator and the well-resourced litigant provide incentive for delay and cost which active judicial intervention can minimise.

Requiring adherence to defined timetables and confining the pre-trial processes to those which are necessary ensure an earlier and more efficient trial and provide an opportunity for a more timely resolution of the dispute. Although the Law and Justice Foundation study could not confirm it I believe that an early trial date encourages settlement before the costs incurred make that impossible or at least become a significant disincentive to an agreed outcome.

I do have some statistics from the New South Wales Supreme Court in relation to long cases but stress that they must be treated with caution. It is too early in our experience to confidently draw conclusions. The Caseload Analysis Manager of the New South Wales Supreme Court has produced settlement data for long cases (excluding those in the Defamation List) listed in the Common Law Division of the Court. As noted earlier, "long cases" have been defined as those expected to run for at least ten sitting days. In 2006 and 2007 (before the practice of intensive management by judges was introduced) the proportion of cases that settled before hearing was between 36 and 38 per cent. In 2008, the first year in which judges were assigned to long cases as case managers, 78 per cent of those cases settled. In

2009, 48 per cent of cases settled before the hearing. It is too early to say whether 78 per cent represents an unusually high figure. More experience is required. What can be said is that the proportion of settlements in the Court has increased from an average of 37 per cent (in the two years predating the case management initiative). There could be a number of reasons for this. Case management allows the issues to be identified, facilitating preparation but also negotiation. Directing the parties to mediate in appropriate cases is likely to make a contribution. Another and I believe very significant factor is the requirement that experts confer without the lawyers before trial. This often leads to the experts either narrowing the issues or coming to realise that one or other position cannot be publicly defended. Settlement often follows.

## **DISCOVERY**

Reforms to the discovery process have not yet proved their effectiveness. Section 60 of the *Civil Procedure Act 2005* (NSW) recognises the importance of proportionality of costs of the litigation to the issues involved.<sup>152</sup> Realisation of this goal in relation to discovery has proven difficult. Chief Justice Spigelman has termed section 60 “a statement of ambition, rather than a description of what occurs.”<sup>153</sup> Problems still frequently emerge with the cost of giving discovery.<sup>154</sup>

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<sup>152</sup> See, eg, *Richard Crookes Constructions Pty Ltd v F Hannan (Properties) Pty Ltd* [2009] NSWSC 142 per Einstein J at [17] - [19]

<sup>153</sup> The Hon Spigelman CJ, “Access to Justice and Access to Lawyers” (2007) 29 *Australian Bar Review* 136

<sup>154</sup> The problem is not unique to New South Wales: see, eg, *Leighton Contractors v Public Transport Authority of Western Australia* [2007] WASC 65; *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2007] VSC 123



Whilst the “class of documents” method of discovery has its proponents,<sup>155</sup> it has been criticised as simply changing the nature of the interlocutory question from “which documents must be disclosed” to “which classes of documents must be disclosed.”<sup>156</sup> Some favour a more strict relevance test, arguing that the Peruvian Guano “train of inquiry” test was formulated before the emergence of modern document production techniques and is not suitable to contemporary litigation<sup>157</sup> or that it authorises “fishing expeditions”.<sup>158</sup> The Supreme Court of Victoria has cautioned against narrowing the relevance test, arguing that it might “squeeze out” relevant documents that do not satisfy the higher threshold of relevance.<sup>159</sup> There is a significant divergence of views as to whether discovery should be available as of right.<sup>160</sup>

The problems with discovery do not appear to have been effectively resolved anywhere in the common law world.<sup>161</sup> In Ontario, discovery was the subject of a major Task Force inquiry commissioned by the Attorney General and Chief Justice of the Superior Court in 2001. In 2003 the Task Force made a suite of 57 reform

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<sup>155</sup> The Hon Justice JP Hamilton, op cit

<sup>156</sup> The Hon Justice PA Bergin, “Presentation of Commercial Cases in the Supreme Court of New South Wales”, Paper presented to the Commercial Litigation 2005 LexisNexis Conference, 26 October 2005

<sup>157</sup> Victorian Law Reform Commission, op cit at 457, citing Submission CP 47 (the Group Submission)

<sup>158</sup> Ibid, citing Submission CP 10 (Peter Mair)

<sup>159</sup> Ibid, citing Submission CP 58 (Supreme Court of Victoria)

<sup>160</sup> Ibid at 458; Australasian Institute of Judicial Administration, *Discovery Seminar* (Melbourne Business School, 24 August 2007); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000), [6.73]

<sup>161</sup> See, eg, Task Force on the Discovery Process in Ontario, *Report of the Task Force on the Discovery Process in Ontario* (2003) Task Force on the Discovery Process in Ontario, Toronto; K Withers, “Computer-Based Disclosure and Discovery in Civil Litigation” [2001] *Journal of Information, Law and Technology* 10

recommendations including provision for discovery plans and a narrower test of relevance.<sup>162</sup>

More recently, the American College of Trial Lawyers Task Force on Discovery in partnership with the University of Denver's Institute for the Advancement of the American Legal System released a Final Report on discovery after conducting an extensive consultation process.<sup>163</sup> The Report was scathing of the existing discovery provisions and recommended a raft of reforms to the Federal Rules of Civil Procedure.

*Qualcomm v Broadcom*<sup>164</sup> illustrates the problems. *Qualcomm* was a patent infringement case tried in the District Court for the Southern District of California. In that case, e-discovery took 15 months, involved 1.6 million documents, and produced 22,500 documents at a total length of over 100,000 pages. Qualcomm, the plaintiff, failed to disclose 46,000 relevant emails stored on various witness' computers. It then sought to conceal their eventual discovery at trial, a fact which led the trial judge to order Qualcomm to pay over \$9m in costs and fees to Broadcom (a result confirmed on appeal to the US Federal Court). This sum has been described

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<sup>162</sup> Ontario Supreme Court of Justice and Minister for the Attorney General, "Report of the Task Force on Discovery Processes" (2003) <http://www.ontariocourts.on.ca/scj/en/reports/discoveryreview/index.htm> accessed 9 April 2010

<sup>163</sup> American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System" (2009) <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20Revised%204-15-09.pdf> accessed 20 April 2010

<sup>164</sup> *Qualcomm v Broadcom* No. 05cv1958-B (BLM), 2008 WL 66932 (SD Cal 2008)

as “one of the highest monetary discovery sanction awards in history”.<sup>165</sup>

Professional misconduct proceedings were subsequently brought against six of Qualcomm's (now former) counsel.<sup>166</sup>

*Qualcomm* is an extreme case. Judge Elizabeth Laporte, Magistrate Judge for the Northern District of California, described the *Qualcomm* litigation as an “example of prolonged, inexcusable, repetitive wrongdoing and behavior”.<sup>167</sup> However, due to the extraordinary search capabilities of electronic devices, and the unprecedented quantity of documents now stored electronically, problems in the discovery process can occur without any deliberate wrongdoing on the part of the parties or their representatives. As Professor Capra has explained:

“Instead of single hard copies of documents, where all the drafts are destroyed, now electronic information has multiple iterations, strings of emails and the like, and often it's not destroyed in any kind of permanent sense. ... The result, I think, is that many parties in litigation--and lawyers, as well as parties--end up not producing all of the electronic data that is discoverable or end up producing it so late in the process that the adversary is prejudiced.”<sup>168</sup>

As I have already discussed, the Victorian Law Reform Commission has made a raft of recommendations which aim to address these problems (see above, “Discovery”). I look forward to seeing which, if any, of these recommendations are implemented and how, if at all, they address the problems in the discovery process.

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<sup>165</sup> K McNeal, “Qualcomm Inc v Broadcom Corp: 9,259,985 Reasons To Comply with Discovery Requests” (2008-2009) 15 *Richmond Journal of Law & Technology* 3, 2

<sup>166</sup> EB Micheletti and M McGraw, “Feature: Forward from Zubulake” (2009-2010) 27 *Delaware Lawyer* 12

<sup>167</sup> Justice JM Facciola et al, “Sanctions in Electronic Discovery Cases: Views from the Judges” (2009) 19 *Fordham Law Review* 78

<sup>168</sup> *Ibid*

## FEDERAL COURT OF AUSTRALIA'S "FAST TRACK" LIST

There has been a pilot evaluation of the Federal Court's Fast Track System.<sup>169</sup> It found that a high proportion of cases were finalised within the pilot period, whether by settlement, discontinuance or judgment. Cases were disposed of efficiently, with the average time between commencement and judgment running just over four months. Judgments were handed down an average of 35.1 days from the end of trial.

The abolition of pleadings has been found to have "largely eliminated surprise, ... avoided pleading arguments and ... greatly assisted in the early identification of the issues."<sup>170</sup> The pre-trial conference becomes a "dynamic discussion of every aspect of the case, where parties and the judge identify the real issues in dispute and closely examine how best to dispose of the real issues at trial."<sup>171</sup> Because the court is in a position to hand down judgment quickly it is in a "strong 'moral' position to insist upon strict compliance with its time limits".<sup>172</sup>

I have no doubt that if a similar review was undertaken of the Commercial List in the New South Wales Supreme Court, the conclusions would be the same. To ensure that the desired efficiencies are achieved, the judge must be an efficient manager and the parties and their representatives must accept an obligation to cooperate in identifying and litigating the real issues in dispute.

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<sup>169</sup> The Hon M Black AC, *op cit*

<sup>170</sup> *Ibid* at 94

<sup>171</sup> *Ibid* at 95

<sup>172</sup> *Ibid*

Submissions to the Victorian Law Reform Commission in support of a Victorian Fast Track list argue that it would increase access to justice for litigation-averse corporations and could be usefully applied beyond the commercial sphere, for instance to personal injury litigation.<sup>173</sup> I share these views.

## ALTERNATIVE DISPUTE RESOLUTION

As I have indicated, Alternative Dispute Resolution processes (mediation in particular) have been the subject of consistent empirical evaluation in Australia.<sup>174</sup>

Whilst there are various key evaluation criteria, including participant satisfaction, outcome quality, and time and cost savings, the success of Alternative Dispute Resolution is most commonly assessed by its impact on settlement rates.

In 2003 the National Alternative Dispute Resolution Advisory Council (NADRAC) prepared a statistical overview of Alternative Dispute Resolution in Australia.<sup>175</sup> The statistics relating to the proportion of matters settled through court-annexed

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<sup>173</sup> Victorian Law Reform Commission, op cit at 316, citing M Drummond, “Court Puts Rocket Under Commercial Litigation”, *Australian Financial Review* (Sydney), 11 May 2007, 57

<sup>174</sup> See, eg, National Alternative Dispute Resolution Advisory Council, “ADR Research: A Resource Paper” (2004) [http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~1+NADRAC+Resource+paper+9.pdf/\\$file/1+NADRAC+Resource+paper+9.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~1+NADRAC+Resource+paper+9.pdf/$file/1+NADRAC+Resource+paper+9.pdf) accessed 20 April 2010; National Alternative Dispute Resolution Advisory Council, “Legislating for Alternative Dispute Resolution: A Guide for Government Policy-makers and Legal Drafters” (2006) [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_Legislatingforalternativedisputeresolution](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_Legislatingforalternativedisputeresolution) accessed 20 April 2010

<sup>175</sup> National Alternative Dispute Resolution Advisory Council, “ADR Statistics – Published Statistics on Alternative Dispute Resolution in Australia” (2003) [http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~ADRstats+2003.pdf/\\$file/ADRstats+2003.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~ADRstats+2003.pdf/$file/ADRstats+2003.pdf) accessed 17 February 2010

Alternative Dispute Resolution schemes are, overall, positive, although now a little dated:

- 70 per cent of matters referred to mediation in the Family Court between 1998 and 1999 settled;
- 80 per cent of matters referred to mediation in the New South Wales Land and Environment Court between 2001 and 2002 settled;
- 67 per cent of matters referred to mediation in the South Australian District Court between 1999 and 2000 settled; and
- 70 per cent of matters referred to mediation conferences or preliminary conferences in the Supreme Court of Western Australia between 1998 and 2002 settled.

In 2008, 57 per cent of Federal Court referrals<sup>176</sup> and 59 per cent of New South Wales Supreme Court referrals<sup>177</sup> were settled at mediation.

Other benefits of Alternative Dispute Resolution identified by the Victorian Law Reform Commission include enhanced access to justice, swifter resolution of cases, time and cost savings, the potential to devise creative case outcomes, the confidential nature of Alternative Dispute Resolution processes, and a high degree of participant satisfaction.<sup>178</sup>

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<sup>176</sup> Federal Court of Australia, *Annual Report 2008 – 2009*, 32

<sup>177</sup> Supreme Court of New South Wales, *Annual Review (2008)*, 28

<sup>178</sup> Victorian Law Reform Commission, *op cit* at 214 and accompanying footnotes

It is sometimes said that mediation is futile where one or both parties are determined to litigate. Ordering an unwilling party to mediate is believed to be a waste of time. However my own experience is otherwise. Although there are cases where it is obviously futile and should not be ordered, there are a surprising number of cases, particularly in my experience in commercial matters, where bringing the parties to the table results in a resolution of their problems. As Chief Justice Spigelman has remarked, “reluctant starters have frequently turned into willing participants”.<sup>179</sup>

Some fear that Alternative Dispute Resolution processes may be abused either “as a delaying tactic or to obtain useful intelligence on an opponent before proceeding with litigation”.<sup>180</sup> Its use as a tactic must be guarded against. Experience has shown that in many cases, mediation is more successful when a trial date has been given and the parties know that unless settled, their position will be tested in court at an early date. Mediation has the benefit of facilitating consensus and good will between the parties which, particularly in commercial matters, provides an opportunity for a continuing relationship between them.

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<sup>179</sup> The Hon Spigelman CJ, “Case Management in New South Wales”, Paper presented to the Annual Judges Conference, Kuala Lumpur, 22 August 2006. See also National Alternative Dispute Resolution Advisory Council, “Issues of Fairness and Justice in Alternative Dispute Resolution: Discussion Paper” (1997) [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_IssuesofFairness](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_IssuesofFairness) accessed 20 April 2010; National Alternative Dispute Resolution Advisory Council, “ADR: A Better Way to do Business – Summary of Proceedings” (2003) [http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~ADR+-+A+Better+Way+to+do+Business+-+September+2003\(2\).PDF/\\$file/ADR+-+A+Better+Way+to+do+Business+-+September+2003\(2\).PDF](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~ADR+-+A+Better+Way+to+do+Business+-+September+2003(2).PDF/$file/ADR+-+A+Better+Way+to+do+Business+-+September+2003(2).PDF) accessed 20 April 2010

<sup>180</sup> Victorian Law Reform Commission, op cit at 215

In cases where Alternative Dispute Resolution comes at a fee (which is not true of the New South Wales Supreme Court mediation program) the costs involved may sometimes be high and on occasion prohibitive.<sup>181</sup> Questions have also been raised about the utility of Alternative Dispute Resolution in cases where there is an inequality of bargaining power, and the fairness of Alternative Dispute Resolution in circumstances where the procedural safeguards that would be present in court (such as the right to an appeal) do not apply.<sup>182</sup>

Collaborative law has no shortage of proponents. The former Australian Attorney-General, Philip Ruddock, was a keen advocate of collaborative processes in family dispute problems. Chief amongst its benefits is the removal of the lawyers' financial incentive to sustain conflict in order to progress matters through to litigation.

Collaborative processes are said to create a dignified environment in which all relevant views are aired and respected.<sup>183</sup> The collaborative process is also a flexible one: it may take the form of the 'usual' negotiation process (involving only the parties and their legal representatives) or it may extend to a "friendly" discussion between the parties, lawyers and other professionals such as counsellors, valuers and financial advisers. Collaborative law is capable of broad application: it can be used in virtually any dispute in which the parties wish to avoid the court system and preserve their relationship going forward.<sup>184</sup> Many civil and commercial disputes fall

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<sup>181</sup> Ibid

<sup>182</sup> Ibid at 214-5

<sup>183</sup> A Ardagh, op cit at 240-241

<sup>184</sup> M Scott, op cit at 221



into this category.<sup>185</sup> Collaborative law has also been praised, albeit anecdotally, for providing a timely and less expensive method of dispute resolution.<sup>186</sup>

However, there are concerns. They include the absence of an independent and impartial third party during negotiations; concerns that the process may mask inbuilt power inequalities between the parties; the absence of any empirical data suggesting that the approach is quicker and cheaper than traditional court-based processes (or other mediated outcomes); and the very real concern that the approach, involving as it often does a multi-disciplinary team of professionals, is one that only the wealthy can afford. A related difficulty is that where settlement discussions do break down, new practitioners (including barristers) must be briefed, inevitably resulting in a duplication of work with associated cost consequences.

Alternative Dispute Resolution necessarily reduces the time to disposition and costs to litigants where (as is often the case) it is successful. Likewise, specialist tribunals provide a relatively inexpensive and informal forum in which litigants may pursue or defend their claims. Measures which aim to pin the parties down, at an early stage, to a case timetable or which limit counsel's ability to make submissions running into hours or days, cause litigators to be productive with their time and are for this reason to be welcomed.

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<sup>185</sup> A Ardagh, *op cit* at 241, footnote 18

<sup>186</sup> *Ibid* at 243

## **A CAUTIONARY NOTE**

### **COST**

Although the changes which have been made to the civil justice processes in Australia have proved beneficial, problems remain. Ensuring a timely resolution of a dispute where only the real issues are litigated will mean that less lawyer and judge hours should be required for its resolution. Timeliness and efficiency should result in less cost for the litigant. There should be less time spent in preparing the irrelevant or discovering the insignificant. The result should allow more persons and corporations access to justice.

However, as I have already indicated, it is difficult to objectively measure whether the expectations are being realised. Although in Australia the alternative to a court of a specialised tribunal allows many people to efficiently and at a moderate or insignificant cost sue for or defend a modest civil claim, litigation at the superior court level, particularly if represented by the more experienced solicitors and barristers, remains a costly exercise. Very few individuals can afford to fund litigation for two or three weeks with multiple counsel and a team of litigation solicitors. When the contest is between a public corporation and an individual, and as will often be the case there is a significant risk that the individual will lose, the justice system can be rightly criticised as unfair.

In many cases where there are allegations of professional negligence, particularly by doctors or hospitals, an individual is in reality litigating against a major insurance

company. The litigation is often only possible because the lawyers for the plaintiff are prepared to accept a “no win no fee” arrangement.

There are in Australia corporations which are prepared to fund litigation in the expectation of a significant profit if the proceedings are successful. Although sanctioned by the High Court upon the assumption that they may increase access to justice,<sup>187</sup> there are inherent risks for the integrity of the litigation itself. I spoke of these risks in the case of *Smits v Roach*.<sup>188</sup> Chief Justice Keane expressed similar reservations in a recent address.<sup>189</sup>

The problem of cost has always been present. However, new issues are emerging. In Australia, we have had the experience of cases now referred to as “Mega Litigation”, cases which take a long time (six months or more) to litigate, greater time to prepare, and a very significant time for the judge to prepare his or her judgment. Some of these cases have involved commercial problems between individuals and corporations. Others have related to civil enforcement of the obligations of company directors. Concerned with voluminous documents, complicated financial arrangements and personal exchanges between individuals, the facts must be analysed against increasingly complex statutory obligations. In one of Australia’s largest ever mega trials, known colloquially as the C7 proceedings,<sup>190</sup> the pleadings alone occupied 1,028 pages. The trial in the Federal Court took 120 sitting days and involved 12,849 items of documentary evidence. Written submissions totalled 4,962

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<sup>187</sup> *Campbells Cash and Carry v Fostif* [2006] HCA 41; (2006) 229 CLR 386; affirmed in *Jeffery & Katauskas v SST Consulting* [2009] HCA 43; (2009) 239 CLR 75

<sup>188</sup> *Smits v Roach* [2002] NSWSC 241; (2002) 55 NSWLR 166

<sup>189</sup> The Hon Keane CJ, *op cit*

<sup>190</sup> *Seven Network Limited v News Limited* [2007] FCA 1062; (2007) ATPR (Digest) 42-274

pages and the judgment consisted of 3,399 separate paragraphs. Justice Sackville, the trial judge in that case, dubbed the litigation wasteful and bordering on scandalous.<sup>191</sup> The judgment took his Honour “effectively nine months of full-time work,” an effort described by the Full Federal Court on appeal as “Herculean”.<sup>192</sup> Justice Sackville announced his retirement shortly after issuing the C7 judgment.

The reality is that there is no easily identifiable answer to these problems. One suggestion which will be taken up in New South Wales is to provide that the court may appoint two judges to hear and determine the case. Although this does have the potential to relieve the burden for the trial judge, it reflects a recognition that “large cases” are inevitable and likely to increase in number.

As Australian courts have moved from the oral tradition required by trial by jury to greater reliance on written submissions, those submissions, even in cases where the dispute is modest, have become increasingly prolix. Whereas the good jury advocate was required to confine the debate to the issues that mattered, abandon the unlikely although possible and concentrate on the most likely, written submissions do not impose the same discipline. The imperative to “leave no stone unturned” becomes the dominant motivation of the litigator. A former judge of the Queensland Supreme Court, Geoff Davies AO suggested:

“This is, in part, motivated by the adversarial imperative but it had other motives. One is to achieve the best result for the client, for the more work done on a case the more likely it is to succeed. A second is concern by the lawyer for her or his own welfare for if the lawyer were to leave a stone unturned and the opposing lawyer did not, the first might lose the

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<sup>191</sup> Ibid at [18]

<sup>192</sup> *Seven Network Limited v News Limited* [2009] FCAFC 166; (2009) 262 ALR 160 at [72]

case and the client might sue the lawyer. And a third is a practice, fortunately uncommon but by no means rare, of engaging in time- and cost wasting procedures for the purpose of compelling a poorer opponent either to compromise unfairly or to give up.”<sup>193</sup>

It is now commonplace in Australia to hear judges complain of the length of written submissions. The solution, if there is one, is to increase the rigour with which the issues to be litigated are controlled and impose a greater discipline on the advocates to require a succinct summary of the relevant and analysis of the appropriate law.

### **INCREASING COMPLEXITY OF SCIENCE AND LEARNING**

As I have discussed, Australian courts are changing the way in which they engage with experts. The concurrent expert process enables judges to put questions to witnesses so that conflicts (and misunderstandings in the judge’s own mind) can be reconciled or at least clarified. The phased trial gives coherency to the evidence process, so that complex scientific or technical questions can be resolved one at a time and in logical sequence. All of these developments are important in allowing the court to receive the best expert evidence in the most useful manner.

Before allowing a witness to give opinion evidence in legal proceedings, a judge must be satisfied that “a field of knowledge in which the witness professes expertise

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<sup>193</sup> GL Davies AO, “The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System” (2003) 12 *Journal of Judicial Administration* 155, 160-161

is a recognised and organised body of knowledge".<sup>194</sup> There are countless such areas, and no definitive criteria exist for their determination.

With time, these fields of learning are expanding, diversifying, and growing more complex. In past times there were simply physicians. Now there are all types of surgeons, psychiatrists, radiologists, endocrinologists, cardiologists, paediatricians, to name but a few of the medical specialties. The undergraduate, graduate and continuing professional requirements of specialist fields are all increasing, and will no doubt continue to do so. In an era of peer-reviewed journals and online research databases, the days of the single seminal text book are long gone. This phenomenon of increasing complexity is not limited to medicine but spans all of the fields in which experts are typically called to give evidence in court, including accounting, civil engineering, construction, insurance and the forensic sciences.

This increase in knowledge and specialisation poses particular problems for the courts. Courts must continue to receive expert evidence in a form which can be understood and applied by judges who are not experts in science or engineering. I have no doubt that further innovations will be required to ensure that public confidence in the decision-making of the courts can be maintained.

Some innovations are already emerging in criminal cases. The State government of Victoria recently commissioned an inquiry into the use of DNA evidence in criminal trials. The inquiry comes at the same time as a High Court challenge to the use of

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<sup>194</sup> *Fisher v Brown* [1968] SASR 65 at 71 per Travers J; *Casley-Smith v FS Evans & Sons Pty Ltd (No 1)* (1988) 49 SASR 314 at 320 per Olsson J

DNA evidence by prosecutors.<sup>195</sup> The Australian Institute of Criminology has recommended that in appropriate cases, juries be presented with an 18 minute pre-recorded 'expert tutorial' on general scientific concepts and on the topic of DNA evidence before they are exposed to the evidence. The Institute suggested that single- or court-appointed experts could be effectively utilised for this purpose.<sup>196</sup>

## **LEGAL AID AND ACCESS TO JUSTICE**

Some litigation in Australia is supported by government funding in the form of legal aid. However, the funding priorities of the State and Territory legal aid commissions have been modified in recent years as a result of a decline in Commonwealth government funding.<sup>197</sup> Grants of legal aid are now overwhelmingly directed to criminal trials and some family law disputes. Although eligible for aid because of their modest means, litigants wishing to bring or defend a civil action seldom receive grants. This is despite the fact that civil matters constitute a significant portion – in many cases a majority – of cases handled by community legal centres, which are supported in the main by volunteer lawyers. In its submission to the Victorian Law Reform Commission, the Federation of Community Legal Centres noted that civil law

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<sup>195</sup> On March 12, 2010 the High Court of Australia granted special leave to appeal against the decision of the Court of Appeal of the Australian Capital Territory in *Forbes v R* [2009] ACTCA 10

<sup>196</sup> J Goodman-Delahunty and L Hewson, *Improving Jury Understanding and Use of Expert DNA Evidence: Technical and Background Paper* (2010) Australian Institute of Criminology, Canberra

<sup>197</sup> Victorian Law Reform Commission, op cit at 608

made up “61 per cent of advice and casework ... more than family law (33 per cent) and criminal law (6 per cent).”<sup>198</sup>

The Honourable Murray Gleeson AC, formerly Chief Justice of the High Court of Australia, said in 1999:

“Of course, the very rich can, and always have been able to, sue. As for the very poor, the assumption that they can readily obtain legal aid for civil proceedings is not warranted. In recent years the legal aid budget in New South Wales has been stretched to the limit, and has been spent mostly on legal aid for people charged with criminal offences. There is, I believe, only a relatively modest amount of legal aid made available for civil cases.”<sup>199</sup>

The trend has continued. In 2008-09, Legal Aid New South Wales, the nation’s largest civil law legal aid commission, made grants of legal representation in 29,531 criminal cases and 14,698 family law cases. It granted representation in only 1,976 civil cases.<sup>200</sup> And where aid is granted in civil cases, it is likely to be for a modest sum which bears little relationship to the costs of a party who is privately funded and adequately represented.

Legal aid can play a pivotal role in the provision and enhancement of access to justice. If its availability continues to decline, access to justice will be increasingly denied to other than the very rich or those who have access to pro bono representation. This is an issue of importance to all our communities. The debate can readily develop into a discussion of rights and social justice. Whether funds to

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<sup>198</sup> Victorian Law Reform Commission, op cit at 608 citing Submission CP 32 (Federation of Community Legal Centres)

<sup>199</sup> The Hon Murray Gleeson AC, “Access to Justice – A New South Wales Perspective” (1999) 28 *University of Western Australia Law Review* 192, 193

<sup>200</sup> Legal Aid New South Wales, *Annual Report 2008-2009*, 15



provide access to justice is or should be the responsibility of government is an issue which although debated has not been resolved.

## **AN AFTERTHOUGHT**

From even this brief look at the civil justice system in Australia it is apparent that many of the assumptions which underpinned our approach at the end of World War Two have been modified, in some cases significantly. The model of a single trial with a judge as a neutral and silent umpire leaving the parties with absolute control over the dispute is gradually being replaced. The assumption upon which that model was based – that the appropriate method of resolving a dispute is by a “contest between competing adversaries”<sup>201</sup> – is being replaced by a model which seeks consensus, and if that cannot be achieved, by a trial process which is actively managed by a judge with the assistance of advice, where necessary, from experts whose primary duty is to assist the court.

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<sup>201</sup> The Hon GL Davies AO, *op cit*, 156

# APPENDIX A

## *Civil Procedure Act 2005 (NSW) Part 6*

### Division 1 — Guiding principles

#### 56 Overriding purpose

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(4) A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).

(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

#### 57 Objects of case management

(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:

- (a) the just determination of the proceedings,
- (b) the efficient disposal of the business of the court,
- (c) the efficient use of available judicial and administrative resources,
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

## **58 Court to follow dictates of justice**

**(1)** In deciding:

(a) whether to make any order or direction for the management of proceedings, including:

- (i) any order for the amendment of a document, and
- (ii) any order granting an adjournment or stay of proceedings, and
- (iii) any other order of a procedural nature, and
- (iv) any direction under Division 2, and

(b) the terms in which any such order or direction is to be made,

the court must seek to act in accordance with the dictates of justice.

**(2)** For the purpose of determining what are the dictates of justice in a particular case, the court:

(a) must have regard to the provisions of sections 56 and 57, and

(b) may have regard to the following matters to the extent to which it considers them relevant:

- (i) the degree of difficulty or complexity to which the issues in the proceedings give rise,
- (ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,
- (iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties;
- (iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),
- (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,
- (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
- (vii) such other matters as the court considers relevant in the circumstances of the case.

## **59 Elimination of delay**

In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just

determination of the issues in dispute between the parties and the preparation of the case for trial.

## **60 Proportionality of costs**

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

## **Division 2 — Powers of court to give directions**

### **61 Directions as to practice and procedure generally**

**(1)** The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings.

**(2)** In particular, the court may, by order, do any one or more of the following:

(a) it may direct any party to proceedings to take specified steps in relation to the proceedings,

(b) it may direct the parties to proceedings as to the time within which specified steps in the proceedings must be completed,

(c) it may give such other directions with respect to the conduct of proceedings as it considers appropriate.

**(3)** If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:

(a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,

(b) it may strike out or limit any claim made by a plaintiff,

(c) it may strike out any defence filed by a defendant, and give judgment accordingly,

(d) it may strike out or amend any document filed by the party, either in whole or in part,

(e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,

(f) it may direct the party to pay the whole or part of the costs of another party,

(g) it may make such other order or give such other direction as it considers appropriate.

**(4)** Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court.

## **62 Directions as to conduct of hearing**

**(1)** The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.

**(2)** The court may, by order, give directions as to the order in which questions of fact are to be tried.

**(3)** Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:

(a) a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,

(b) a direction limiting the number of witnesses (including expert witnesses) that a party may call,

(c) a direction limiting the number of documents that a party may tender in evidence,

(d) a direction limiting the time that may be taken in making any oral submissions,

(e) a direction that all or any part of any submissions be in writing,

(f) a direction limiting the time that may be taken by a party in presenting his or her case,

(g) a direction limiting the time that may be taken by the hearing.

**(4)** A direction under this section must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity:

(a) to lead evidence, and

(b) to make submissions, and

(c) to present a case, and

(d) at trial, other than a trial before the Local Court sitting in its Small Claims Division, to cross-examine witnesses.

**(5)** In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any other matters that the court considers relevant:

- (a) the subject-matter, and the complexity or simplicity, of the case,
- (b) the number of witnesses to be called,
- (c) the volume and character of the evidence to be led,
- (d) the need to place a reasonable limit on the time allowed for any hearing,
- (e) the efficient administration of the court lists,
- (f) the interests of parties to other proceedings before the court,
- (g) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,
- (h) the court's estimate of the length of the hearing.

**(6)** At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party a memorandum stating:

- (a) the estimated length of the trial, and the estimated costs and disbursements of the solicitor or barrister, and
- (b) the estimated costs that, if the party were unsuccessful at trial, would be payable by the party to any other party.

## **APPENDIX B**

### ***Uniform Civil Procedure Rules 2005 (NSW)***

#### **Rule 31.35 - Opinion evidence by expert witnesses**

In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same issue or similar issues, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

**(a)** a direction that, at trial:

(i) the expert witnesses give evidence after all factual evidence relevant to the issue or issues concerned, or such evidence as may be specified by the court, has been adduced, or

(ii) the expert witnesses give evidence at any stage of the trial, whether before or after the plaintiff has closed his or her case, or

(iii) each party intending to call one or more expert witnesses close that party's case in relation to the issue or issues concerned, subject only to adducing evidence of the expert witnesses later in the trial,

**(b)** a direction that, after all factual evidence relevant to the issue, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:

(i) whether the expert witness adheres to any opinion earlier given, or

(ii) whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given,

**(c)** a direction that the expert witnesses:

(i) be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h)), and

(ii) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence,

**(d)** a direction that each expert witness give an oral exposition of his or her opinion, or opinions, on the issue or issues concerned,

**(e)** a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness,

**(f)** a direction that each expert witness be cross-examined in a particular manner or sequence,

**(g)** a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:

(i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or

(ii) by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete,

**(h)** a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to,

**(i)** such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.