SECTION 1

Overview

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1.1

The Touchstones of a Justice System

THE JUSTICE SYSTEM

The survival of a peaceful and ordered society depends in large part upon the means provided for resolving disputes between individuals and for dealing with offences against public order. This is the justice system.

The justice system in Western Australia is not the result of some logical, well ordered plan. It is the product of centuries of development, inherited from England but substantially modified over the years in the light of local conditions. It is the result of legislative initiative, administrative direction and judicial decision. Even the name suggests a more tightly organised structure than is the case. The 'system' comprises the courts and tribunals, other forms of dispute resolution, the legal profession, public and private, and investigative bodies, principally the police force.

The expression justice system has an engaging quality. It suggests an objective with which no-one could quarrel. But what does it mean? A legal system is something that is comprehensible; it is the system produced by the various structures just identified. It may be adequate or not, fair or not, efficient or not. Within limits these are characteristics that can be examined, assessed and implemented. But 'justice' suggests something more profound. It has a quality which philosophers have debated, at least since Plato, and which they continue to debate. In 1994 the Access to Justice Committee, constituted by the Federal Attorney-General and the Minister for Justice, delivered its report 'Access to Justice, an Action Plan'. The Committee had in mind three objectives — equality of access to legal resources, national equity and equality before the law — and its report was devoted to achieving them. The emphasis in the report was necessarily on access to the system, albeit a system intended to be fairer, more efficient and more effective than presently exists. In speaking

of a justice system, access is an essential quality. But the system must also lead to results that are just, however hard that may be to define. That means just as between the parties to litigation, civil and criminal, and it also means socially just, that is, just in terms of the community. Put that way, the task of the Law Reform Commission of Western Australia is formidable indeed.

Justice has been defined as:

> A moral value commonly considered to be the end which law ought to try to attain, which it should realise for the men whose conduct is governed by law, and which is the standard or measure or criterion of goodness in law and conduct, by which it can be criticised or evaluated.[1]

The reference to 'men' in such a recent publication strikes a jarring note but the definition does stress the overarching character of justice and the role of law in attaining that character. There are various kinds of justice — social, political, economic, moral and legal — of which legal is only one though it touches and is touched by justice in all its aspects. It could be argued that law is not essential to the administration of justice and that disputes could be resolved on the basis of merit and according to the dictates of justice. As Walker points out, 'Plato's Republic was a commonwealth without law or judges, the philosopher kings' knowledge and judgment ensuring justice'.[2]

But in the justice system with which we are familiar, justice is justice according to law, that is, according to pre-ordained and publicly-known principles and rules. However precisely these principles and rules may be defined, their application will depend upon the facts of the particular case and will, in many areas, involve an exercise of discretion.

Justice requires that those who offend against public order are punished. A system of criminal justice aims to ensure that 'the risks of the innocent being convicted and of the guilty being acquitted are as low as human fallibility allows'.[3]

The present system is not written in stone; it is amenable to change, even substantial change. However it would not be practicable to dismantle the existing structures completely and start again even if powerful arguments could be found for doing so. So any move for reform has to take the system in its fundamentals and build on that. The terms of reference of the Commission embrace 'the criminal and civil justice systems in Western Australia'.[4] Most comparable references in Australia and elsewhere in the common law world have looked at criminal or civil justice, more often the latter. A reference of such breadth as this one is unusual.

THE TOUCHSTONES

A touchstone is something which serves to test the genuineness or value of anything, a criterion by which something can be judged. What are the

touchstones of the justice system? The Commission has expressed its task as recommending changes to the present system in order to achieve the objectives identified by Lord Woolf in his review of the civil justice system in England and Wales.[5] In summary form the system should be 'just, fair, comprehensible, certain and reasonably expeditious'.

No one could quarrel with the need for a justice system to have these characteristics, whether stated in this summary form or in the expanded form appearing in Woolf's *Final Report*.[6] While the characteristics are in apparent harmony, undue emphasis on expedition may sometimes be at the expense of fairness. There is inestimable value in the litigant feeling that he or she has had a reasonable opportunity to present his or her case and that he or she has been listened to. Experience with fast track procedures should be a useful guide in this respect. And while the justice system must aim for certainty, the outcome of much litigation will turn on the facts. So the system will always be characterised by some unpredictability. Furthermore, while the courts have long grappled with abstract formulae such as reasonableness and public policy, there is a growing tendency on the part of legislatures to entrust the courts with additional concepts such as 'harsh and unconscionable' in the field of contracts. This inevitably takes the courts more and more into areas of social policy and discretion where certainty cannot be predicted. Nevertheless the community may, and almost certainly does, prefer that these issues remain under the courts than be entrusted to other bodies.[7] Here is an area for empirical study. The law will always be in a state of development; that is the story of common law.

Though special considerations apply to criminal matters, the search is still for justice, and, at a quite basic level, the limited resources available must be applied to all aspects of the system. An increased demand on the resources of the courts in one aspect necessarily impinges on those services in other aspects. And so, while from time to time it is necessary to look at civil and criminal procedures independently, the system embraces both and should be seen as doing so. Furthermore the lines become somewhat blurred. Commercial transactions may give rise to criminal liability outside the constraints of the *Criminal Code*. There is a form of quasi-criminal proscription involved. In any event, considerations of efficiency, economy and accessibility are desirable attributes of criminal justice as much as of civil justice.

The details of the justice system appear in the consultation drafts which have been provided to the Commission. The system itself has evolved since medieval times but it is worth remembering that what has come to be known as the adversarial system — passivity on the part of judges, the heightened role of lawyers, the use of oral testimony and cross-examination — is of relatively recent origin, really dating from the late 18th century.[8] It too is part of an evolving process.

THE RELEVANT CULTURE

The tide of history has not only produced a system. It has resulted in a culture which affects all those working within the system: judges, lawyers and administrators. Any attempt to reform the justice system must take that culture into account, not as an insuperable obstacle to reform but as something that is deep seated and changing which is a long term process.

The culture is one which, at least in the area of civil disputes, turns very much on winning or losing. It is embedded in the system by which costs are awarded to the successful party and against the unsuccessful party and in that regard it sometimes fails to recognise wider community issues that are at stake in litigation. It depends upon the identification by the parties of the issues they wish resolved, upon the giving of oral testimony and cross-examination and upon the determination of those issues by a judge by reference to the evidence, oral and written, tendered by the parties. The system casts the parties in an adversarial position which can affect their relationship long after the litigation has concluded.

On the other hand, it is possible to have a somewhat distorted picture of the way in which this process operates. There must in any event be a dispute which is the catalyst for litigation. Most lawyers approach such a matter on the basis that settlement may be possible and should be explored even though there are some who seem to regard it as part of their duty to their client to force the matter into court, whatever the cost. The very great majority of civil disputes do not go to trial, they are settled. And often they are settled because of a sensible approach by the legal representatives. Mediation is playing a significant part in the settlement of civil disputes, even those of a complex commercial nature, involving large sums of money.

It has to be recognised that some actions are not capable of settlement. The parties may be too far apart. More importantly perhaps, there are always cases (and they may be growing in number) where there is a real question of principle at stake involving many more persons than are parties to the particular dispute. Cases turning on environmental issues are one example.

A legitimate cause of complaint is that, in the past, litigants have been left too much to themselves as to the way in which an action progresses, that there is an undue expenditure of time and money on interlocutory matters and that settlement is only explored in any depth once a trial date has been set and draws near. This situation is one which rules of court can do much to counter, especially by giving the judge a more active, managerial role once an action is begun. There are some who are uneasy with this role, arguing that it takes the judge too much into the well of the court. The argument underestimates the experience and sensitivity of most judges and it ignores the success which steps in that direction have already met. Greater participation by judges in the management of litigation is inevitable; the real

question is how far this can be done without undermining the neutral approach expected of judges.

The point being made here is not so much the steps that can be taken to force parties to recognise the real issues at an early stage and to explore in a meaningful way the possibilities of settlement. It is to acknowledge the culture that surrounds litigation. And it is not peculiar to the civil system of justice. There is much in the criminal system that encourages the accused to take no positive role in the process, even once a trial has begun. This involves such matters as committal hearings and pre-trial procedures designed to avoid time and cost in proving something about which there is no dispute and, at least in a general way, to understand the nature of the defence. In this regard, analogies between the two systems cannot be pressed too far. The Crown prosecutes with all the might of the State and its resources. The accused is rarely in a comparable position and is entitled to protections which play no part in civil litigation.

To take the system in its fundamentals still leaves a great deal of scope for change. Changing the prevailing culture does not mean riding roughshod over established conventions. But equally it does mean not accepting them at face value. If they are not conducive to the working of a just system, they should not survive.

How far the prevailing culture needs changing and how far, realistically, it can be changed are issues that bear heavily on the operation of the justice system. Any reforms must accept the need to educate all those who play a part in the system. Without their willingness to recognise the defects of the present system, procedural changes can be thwarted. That recognition should start at an early stage, in the law schools so far as lawyers are involved, and form part of their continuing legal education. Acceptance of change involves the entire community. And while many are quick to criticise the present system, there must be an understanding of any changes that are made if they are to have general acceptance. Informing the public is an important touchstone of the justice system.

THE POSITION OF WITNESSES

One illustration of how the emphasis on the rights of the parties to civil litigation or the rights of the accused in criminal trials has dominated the justice system is the way in which witnesses have been dealt with over the years. At its most basic the provision made for the convenience of witnesses to give evidence and the facilities provided for them have often been shameful. Fortunately that has changed for the better in many courts though much remains to be done.

More importantly, the special position of witnesses, especially those whose involvement in the circumstances giving rise to the litigation has been quite fortuitous, has not been sufficiently recognised. Too often they have received

insufficient protection from the bench against hectoring and sometimes bullying cross-examination. The absurd insistence on an answer yes or no to a question which does not sensibly admit of such an answer has left many witnesses with a jaundiced view of the judicial process. So too has the damning of a witness in the course of a judgment when the witness has no right of recourse except indirectly if the unsuccessful party appeals.

The situation of witnesses is important not because the system can formally do a great deal about the concerns which have been expressed but because it illustrates the way in which the culture of the system can have serious consequences. There has been some redress, for instance by the use of victim impact statements in the sentencing process. No doubt the peculiar position which witnesses often find themselves has been contributed to by adversarial procedures but it goes deeper than that. There are a number of empirical studies that, ideally, should be conducted in the course of a reference such as the present one. But there are obvious constraints of time and money in the way. Nevertheless, because we are concerned with the justice system in its entirety, a review cannot rely solely upon the opinions of those most closely connected with the working of the system. There is a wider community whose views are entitled to consideration.

DISSATISFACTION WITH THE SYSTEM

It would be comforting to record that the history of the justice system has been one of constant review. That would be a mistake though steps have been taken from time to time to bring the system into accord with contemporary conditions. At the present time and for a number of reasons, not least the exponential growth in the number of civil and criminal cases coming before the courts, much dissatisfaction has been expressed with the way in which the system operates. The headline in *The Australian* of 25 November 1998, 'Justice: Our Legal System on Trial', is a typical expression of that dissatisfaction. There is a paradox here because at no time has more attention been given to the working of the justice system and at no time has there been a greater realisation of the need for change.

This increase in litigation is often referred to as the litigation explosion, a derisory term for what is seen as an excessive use of the courts in order to resolve disputes which could be better resolved in other ways. To some extent that derision is justified. Perhaps not in this country but certainly in the United States there are recurring accounts of bizarre complaints that find their way to the courts. However, that is not the whole picture; other, quite proper, considerations have played their part in the growth of litigation. In the early part of this century the American Bar Association was outraged by Dean Roscoe Pound's address 'The Causes of Popular Dissatisfaction with the Administration of Justice'.[9] But shortly afterwards Pound delivered another paper espousing more law in order to acknowledge emerging social interests.[10] The growth in statute law has led to many new causes of action. Class

actions have become a significant factor in litigation. Human rights have assumed great importance. Cases involving the environment are much more common now than in the past. So there are positive considerations which have contributed to the growth in litigation. Put shortly, the law has become more pervasive and the citizen resorts to it more often. The fact remains that the increase makes even more critical the need to examine the justice system.

Expense and delay are the main complaints but they reflect some deeper malaise. Furthermore, cheapness and expedition are not ends in themselves. At least in theory one could devise a system that cost the parties to a civil dispute very little and provided a hearing at short notice. Apart from the massive economic implications, the result would be no disincentive to litigation, no incentive to compromise disputes. In the end the system could not cope but, importantly, an obdurate culture of resorting to the courts on every occasion would emerge. That would have consequences for the orderly conduct of the community's affairs. These are considerations that any proposal for better access to justice must recognise.

MEETING THE NEEDS

The justice system is not an end in itself. It exists to satisfy the needs of society. Those needs have to be identified and that is no easy task. But it has to be done and done in an ongoing way if the justice system is to be responsive to those needs. Professor Parker has discussed the needs of the public and ways of meeting those needs, so far as the use of the courts is concerned.[11] But the issue goes much deeper. It bears upon the place of the courts in the justice system, the procedures within the court system and alternative methods of resolving disputes.

The emphasis on expense and delay should not distract us from acknowledging a curious ambivalence in the community. The way in which law is used to control conflict has undergone considerable change, particularly in the civil area. The growing use of Alternative Dispute Resolution ('ADR', usually written in that way as if it were an established institution) reflects the change. Is that what the community wants or is it what those who would reform the system think will make it work more efficiently? ADR is not necessarily cost effective. Ambivalence exists because, at the same time, the citizen looks more and more to the courts as a means of obtaining justice in almost every facet of community life. To some extent this is lawyer driven as in the case of major class actions but it may equally be said that thereby the legal profession is giving effect to legitimate demands that could not otherwise be met. This felt need to resort to law heightens the frustration at what are seen as the law's failures: 'the gap between what the letter of the law promises and what it is actually able to deliver; the detail and complexity of even the simplest types of legal regulation; the limited scope and effectiveness of judicial remedies; and the cost and delays associated with the process of civil disputing'.[12]

There is an inevitable tension between procedures designed to head off litigants from hearings which may be lengthy and expensive and the desire of some to place their case before a judge and to obtain a ruling, after a hearing in open court. Those procedures may be driven by economic considerations or they may have the deeper aim of satisfying the parties in a non-hostile atmosphere. The very proper aim of such procedures should not shut out the courts or make them virtually inaccessible. Diversionary procedures do not have as their sole aim relieving the burden on the courts. They seek to reach consensus between the parties, to get away from ideas of fault and the attribution of blame which emerges from a judicial decision. But others see the courts as playing a unique role in the vindication of the rights of the citizen. Is everyone entitled to have his or her day in court? Is that a right, or a privilege? Are we trying too hard to divert the citizen from access to the court system? Is this an inevitable consequence of the cost of going to court and the diminution in legal aid?

While the courts are there for the resolution of disputes, they perform a much wider function. In that resolution they may lay down principles which go well beyond the case at hand. They develop the common law, construe statutes which affect the lives of citizens and give meaning to constitutions. It is the task of the courts to preserve the rule of law and, particularly in criminal matters, to provide some balance to the power of the State. Forms of alternative dispute resolution have much to offer but not at the expense of the vital role performed by the courts.

JUDICIAL INDEPENDENCE

The justice system in this State operates essentially through the courts and, to a lesser extent, tribunals. It is structured on the notion of the separation of powers; a legislature, an executive and a judiciary. The relationship between the three arms of government is critical to the working of the system. At the heart of this relationship is judicial independence, the principle that courts must be allowed to exercise judicial power and decide cases according to the rule of law and without pressure from the legislature or the executive. Judicial independence has taken on a wider meaning these days because of the influence of the media but, for immediate purposes, it can bear its historical character. Its rationale is essentially the protection of the citizen from the overbearing power of the state. It is more than a touchstone, it is a cornerstone. It follows that any proposal to change the justice system must be weighed to ensure that the implementation of the proposal would not bring down the scales too heavily against judicial independence. Ordinarily the power of the state is seen most clearly in criminal prosecutions. But it should not be forgotten that the state is a frequent litigant in civil actions, either directly or through statutory bodies.

At the same time, judicial independence is not just a synonym for the terms and conditions of judicial office. Inadequacies in this respect do not necessarily

impinge on independence, but a system which virtually dictates the outcome of a matter in truth robs judges of judicial power and undermines independence. The extent to which the legislature should lessen judicial discretion in the sentences to be imposed for criminal offences is a current illustration of the tensions that may arise, particularly when the courts themselves issue sentencing guidelines in order to achieve consistency.[13] The issue of part time judges and short term appointments is rightly seen as an aspect of judicial independence.

While judicial independence is essentially an aspect of the separation of powers, the influence of the media cannot be overlooked. Judges may be placed under considerable pressure by the media, especially if a newspaper, radio station or television channel runs a campaign on some aspect of the justice system. Again, the severity of sentences is an obvious illustration. In the context of the touchstones of the system, it is clear that courts do have to take a more active role in the explanation of decisions. The courts have not done very well in the past in this respect. To some extent this was because understanding the system was thought to be the prerogative of the professionals. This does not mean that the interests of the community were ignored, rather that the professionals assumed that they knew what those interests were. Much of this thinking has changed. The courts feel a need to explain themselves, to say why cases seem to take so long, why legal costs seem so high.

Many courts now employ a press or liaison officer for that purpose. The High Court has just announced its intention to follow suit. The judiciary now takes a healthier view of judges speaking publicly on topics relevant to the justice system. The practice has its dangers but, to a large extent, they are avoided by the well understood caveat that a judge should not speak publicly about a decision to which he or she was a party or on a topic which is likely to be the subject of litigation. In the former respect, the judge must stand or fall by the judgment itself.

When the rights of the citizen are ruthlessly trampled on, the importance of the rule of law, of independent judges and fearless advocates is readily appreciated. But by then it is usually too late. It is important that the justice system is well understood when the democratic process appears to be working satisfactorily.

RELEVANT PRINCIPLES

In his final report Lord Woolf identified principles which, he said,

> [T]he civil justice system should meet in order to ensure access to justice. The system should:
>
> (a) be *just* in the results it delivers;
> (b) be *fair* in the way it treats litigants;
> (c) offer appropriate procedures at a reasonable cost;
> (d) deal with cases with reasonable *speed*;

(e) be *understandable* to those who use it;
(f) be *responsive* to the needs of those who use it;
(g) provide as much *certainty* as the nature of particular cases allows; and
(h) be *effective*: adequately resourced and organised.[14]

So long as one keeps in mind the overriding conditions that should govern a criminal trial, there is no reason why these principles should not apply to the criminal justice system.

Justice in this catalogue of objectives focuses on the result of the case. If the matter proceeds to a full-scale hearing, the successful party no doubt sees the result as just. The unsuccessful party may feel differently but at the same time be prepared to accept that he or she received a fair hearing. If the claim is disposed of before a hearing, whether by mediation or simply by negotiations between the parties' legal advisers, the result can be seen as just, so long as it was freely arrived at and not the product of undue pressure, and furthermore that the parties do not feel that they have been deprived of access to the courts.

Justice and fairness are virtually two sides of the same coin. Fairness certainly implies that those involved in the justice system have had every reasonable opportunity to put their case, that they have been listened to, that they have been treated with courtesy by the bench and bar (unless by their own conduct they have forfeited the right to be so treated), and that the judgment reflects an understanding of the issues involved and of the relevant law.

A system cannot be described as just if it is too expensive. Expense relates both to the cost of representation and to the fees that must be paid. Court fees are of course controlled. As suggested earlier, it would be possible (if hardly practicable) to devise a system which imposed virtually no cost on litigants. But that would be self-defeating; the system would be swamped. On the other hand, so long as the courts are expected to be self-sufficient or nearly so and their funding is dominated by the user pays philosophy (and that is the current climate), fees represent an obstacle to access to justice. It is of course true that government revenue has to be distributed over many areas. The concern is that the courts are too often regarded as just another department and the very special concern with access to justice may not be sufficiently recognised.

The cost of representation is another matter and it is one that the system cannot entirely control. The government may (and does) fix the fees of the legal practitioners in contentious and non-contentious matters. Representation must cost any litigant who is not legally aided or for whom services are not provided *pro bono*. It is a service provided by those who make their living from it. They are entitled to be paid like everyone who provides a service and the cost is subject to as much control as the fees of anyone. It is of course possible to contract out of the relevant scale of costs but even then

there is an overriding power in a disciplinary or other body to disallow fees. The amount of *pro bono* work done by the legal profession receives insufficient recognition. Publicity invariably focuses on cases of overcharging. The fact remains that the cost of legal representation is very high and discourages many from approaching the courts.

A justice system which is not properly funded is an unsatisfactory system. Funding, in this context, relates to the administration of the courts: the number of judges, appropriate remuneration and facilities, and back-up staff. Adequate funding is certainly a touchstone of the justice system.

THE ROLE OF THE COURTS

The proper role of the courts is itself a touchstone. What sort of disputes should be the province of the courts, either exclusively or as an alternative to some other form of dispute resolution? This in turn invites the question: what are the needs that a justice system should seek to meet? That is a more basic issue than identifying the desirable characteristics of the system.

Professor Parker has listed some of what he calls 'deep issues' which bear on the relationship between the courts and the public. They are:

- the core or elementary features of a 'court' for these purposes;
- the role of courts in a democratic society;
- whether courts are service industries, arms of government or a unique and evolving mix of the two; and
- the proper role of public opinion and the satisfaction of public needs in the organisation and services of a court.[15]

Consideration of the justice system inevitably tends to focus on the courts and on their efficiency. It is often said that the courts should be more consumer-oriented, that they should be more user-friendly. The criticism is warranted. However there is relevantly an important difference between the civil and criminal components of the justice system, at least as it stands. Civil disputes do not come to the attention of the courts until proceedings are commenced. Lord Woolf recommends some pre-action protocols but they do not presently exist except through the use of preliminary subpoenas; the justice system has not begun to engage. In criminal matters it is true that the attention of the courts is not engaged until a charge is laid. Nevertheless the entire investigation procedure has a bearing, often a critical bearing, on the criminal justice system. And the Commission's terms of reference expressly include: 'The rights of suspects and the powers of police and other investigators in relation to suspects'.[16]

It follows that considerations going to the fairness of the system intrude at an earlier stage in criminal matters than they do in the case of civil disputes.

DISPOSING OF LITIGATION

The efficient disposition of litigation is unquestionably a desirable end and is a touchstone of the justice system. Two qualifications operate however. The first is that efficiency should not be at the cost of achieving a just result.

The elimination of interlocutory procedures might be conducive to the efficient disposition of cases though even that is debatable. Certainly undue and prolonged hearings in relation to such matters as discovery and interrogatories are an obstacle to the expeditious disposition of cases. But care should be taken that their elimination or limitation does not result in cases coming before the courts ill-prepared and with the real issues ill-defined. This is a matter of balance but certainly there is a strong and irresistible body of opinion that they are greatly over-used.

The other qualification, if it can be so called, is that efficiency must be considered on a comprehensive basis. Procedures which bring an action to trial more speedily are of course to be aimed for. However, it is necessary that judges be in a position to deal with the cases once they are heard. *Ex tempore* judgments serve a valuable but a necessarily limited role. A system which brings cases before the courts more speedily but produces a backlog of undelivered judgments is in truth not an efficient system. And it may not be a fair system, particularly at first instance where fact finding is usually the primary task, a task which depends in part at least on the impression made by witnesses. That impression is obscured if there is a lengthy delay in the handing down of judgments. Some courts have introduced timetables or, in this country, standards for which judges should aim, depending on the length and complexity of the case. Since expedition is a touchstone of the justice system, it is hard to quarrel with the use of standards, particularly those which the courts have imposed on themselves.

Another aspect of the justice system which we have come to accept as virtually sacrosanct is the giving of reasons. Though this is usually thought of in regard to the civil system, it has its counterpart in the criminal system in the direction to the jury. Nothing in what follows is intended to detract from the need to give reasons to explain the result after a substantive hearing. However, as cases take longer and longer to hear, any requirement that a judge should deal with every issue aired is not conducive to justice. And even with issues that are important, a detailed treatment of the evidence of every witness results in unnecessary expansion and inevitable delay in handing down judgment. The time taken in arguments over such interlocutory matters as particulars, interrogatories and discovery is compounded by the need to give any more than summary reasons in disposing of these arguments.

The word 'delay' is itself misleading. Time must elapse between any cause of action, the commencement of proceedings, the hearing and the delivery of judgment. But time of itself does not constitute delay. Proper preparation takes time. Only an unreasonable lapse of time warrants that description.

The problem in the criminal sphere is somewhat different. Judges are expected to direct the jury as to the relevant law and facts. In the United States directions as to the law largely form the content of the charge to the jury;

examination of the facts is left to them. There are Australian authorities holding that a judge who virtually leaves the facts to the jury without elaboration may not have failed to discharge the judicial function. Clearly some balance is required; an overly long direction is likely to confuse the jury rather than help it.

Certainly in the case of interlocutory proceedings there is much to be said for peremptory disposition. It is the outcome of the interlocutory step which is important rather than the reasons which lead to the outcome. While it would be possible to deal with such matters by legislation or rules of court, it is open to appeal courts to enunciate relevant principles and leave their application to the courts below. If appeal courts are overly pedantic in their approach to judgements under appeal it will be hard to move from the present culture.

THE RIGHT OF APPEAL

A right of appeal is an essential ingredient of a justice system. The current approach, endorsed by the special leave procedures in the High Court and by pronouncements from that Court, is that ordinarily an appeal to the Full Court of the Supreme Court, Federal Court or Family Court determines litigation. Only in the circumstances identified by section 38B of the *Judiciary Act 1903* (Cth), as expounded by the High Court, will there be any further appeal.

There is a powerful argument for limiting drastically any appeal in interlocutory matters and, in such cases, to require leave and to confine the parties to written submissions. In substantive appeals the trend is to restrict oral argument, and to demand more from the parties by way of written submissions. This is an issue of great importance. The tradition of oral argument is strong and there is no doubt that, well done, it is of great assistance to the bench. The balance between written and oral argument is best left to the bench rather than detailed prescription. Directions hearings, particularly in significant appeals, will serve to determine this balance and any appropriate limitation on the time for oral argument. These considerations apply to appeals in civil and criminal matters though greater caution is called for in the latter. The power of courts to give appropriate directions needs explicit recognition.

Experiences in Western Australia, in Australia generally, and in the United Kingdom have produced unease with the way in which appeals in criminal matters, particularly appeals against conviction, have been dealt with. To some extent a contributing factor to this unease has been the reluctance of judges to disturb jury verdicts and, in some cases, a too ready acceptance of the evidence of police witnesses and some naivety in the approach to the circumstances surrounding confessional statements. This has changed though there is a natural and justified unwillingness to interfere with jury verdicts by simply substituting the views of appellate judges for those of the jury.

There are obvious constraints on the calling of further evidence at the appellate level, whether by the parties or at the instance of the court. But if a touchstone of the justice system is eliminating the risk of the innocent being convicted the persuasive powers of these constraints has to be considered carefully. And, fresh evidence aside, the jury system is not undermined because from time to time an appellate court, forced to the conclusion that a verdict is unsatisfactory, quashes a conviction. In any event such a step will result ordinarily in a retrial.

JUDICIAL REVIEW

No discussion of civil justice can fail to take into account judicial review of the administrative arm of government. Historically this has come about through the use of prerogative writs but it has flourished, certainly at the federal level, through legislation.

This growth has led to tension between the judiciary and the executive, a tension which can be found in many countries. Concern is expressed that judicial review too often crosses the boundary into review on the merits. Should the grounds for judicial review be tightened to counter this trend? There is no doubt that judicial review of administrative agencies has empowered the ordinary citizen to seek relief against the actions of government agencies which have affected him or her adversely. Is review of administrative decisions truly a matter for the courts or is it more appropriately handled by tribunals? The current approach, though not so much in Western Australia, is to distinguish judicial and administrative review by entrusting the former to the courts and the latter to tribunals. The distinction may be hard to support in terms of efficiency but it has a sound institutional basis and may indeed be dictated by constitutional considerations. At base, the issue is one of the proper role of the courts.

ADVERSARIAL AND INQUISITORIAL SYSTEMS

The terms of reference of the Law Reform Commission of Western Australia are wide enough to embrace consideration of the adversarial and the inquisitorial systems. This is a subject of much present debate though reasoned discussion sometimes gets lost in the use of labels. In the so-called adversarial system operating in Western Australia the role of the judge in ascertaining the facts and managing the progress of civil actions has been greatly enhanced and will grow because rules of court enable it to grow and because judicial culture has now come down on the side of managing cases. At the same time some inquisitorial systems in Europe have become disenchanted with the power of the *juge d'instruction* or its counterpart. And, it must be remembered, the early involvement of the judiciary in those systems is not just an aspect of the procedure at trial. In criminal matters it bears upon the whole investigative process. It is better to avoid labels, to identify problems and to come up with solutions.

There are limits as to how far the Law Reform Commission may usefully go down this track, particularly in the criminal area. But the terms of reference

empower the Law Reform Commission to recommend changes in the present procedures, particularly once a person has been charged with an offence. The touchstone is that all relevant material should be before the jury, or the judge in the event of a non-jury trial, so long as the accused's basic rights are not prejudiced. The most constant criticism of the trial procedure is that evidentiary rules lead to the exclusion of material that is not only relevant but may be highly persuasive. One approach is to treat all relevant evidence as admissible, subject only to the court's power to exclude evidence, the prejudicial effect of which far outweighs its relevance. This, to an extent, is the approach taken by the *Evidence Act 1995 (Cth)* mentioned later in this sub-section. A greater use by judges of the power to call a witness whose evidence seems critical but whom neither side is prepared to call would bring the criminal trial closer to a search for the truth and ought not preclude a fair trial if the power is sparingly exercised.

CIVIL AND CRIMINAL PROCEEDINGS: DIFFERENCES

Inquiries into the justice system have tended to focus on civil proceedings. Many of the procedures that will reduce cost and delay in civil cases are simply not appropriate in the criminal sphere or, if appropriate, to a limited extent only. Alternative dispute resolution has little place in the criminal law, certainly not with serious charges. With minor offences there is scope for channelling charges through panels or the like so as to avoid a trial and formal conviction. A touchstone here is the extent to which the offence in question involves a victim as well as an offender. Outside the area of minor offences, the community expects prosecution and trial. On the other side of the coin, the person charged expects the protection which a trial at law requires.

Where the Crown and the accused are in contention, there is no interpersonal conflict. The Crown charges the accused with the offence and assumes the burden of proving guilt. Absent a plea of guilty, the accused may put the Crown to proof and is not required to make the Crown's task any easier. Serious questions arise as to whether the present system is conducive to justice, whether an accused should be compelled to disclose the nature of the defence at any time before trial and whether failure to do so should carry some sanction such as comment by the judge or prosecution. Are committal proceedings a necessary part of a criminal justice system? They may have advantages for the accused but is the system affronted by their absence, so long as an accused is provided with the statements of witnesses and the other material upon which the Crown intends to rely? There can be no argument but that committal proceedings delay trials (and pleas of guilty) and cause considerable expense to the prosecution and to the defence. Is this consideration outweighed by fairness to the accused?

The point of these examples is that there are aspects of criminal justice different from civil justice. We have to ask what we are looking for in criminal

procedures. Answers such as fair trial and due process tend to beg the question; the content of these concepts has to be expanded.

THE CRIMINAL JUSTICE SYSTEM

The point has already been made that the criminal justice system begins to operate at an early stage, that is, as soon as the law enforcement agency begins to investigate the commission of an offence. The task of the agency is to identify the offender, gather the evidence necessary to sustain a change (which, very often, will rest largely on a confession) and then take the prescribed steps to bring the offender before the court.

Thus considerations of fairness and justice take on a particular colour. The judicial process has not begun; there are no parties in the usual sense. Because the power of the state has come into play, there has always been an emphasis placed on the 'rights' of the suspect — the right to remain silent when questioned, the right to seek legal advice while in custody and, ultimately, the right to counsel at trial. The term 'rights' is used loosely. In part it is an immunity from unfair actions on the part of the police that is at stake and, strictly speaking, there is no right to counsel. The consequences include the inadmissibility of evidence and the staying of proceedings.

On the other hand, law enforcement agencies complain that their hands are unduly tied. While Australian law does not recognise a defence of entrapment, undue involvement by the police in the circumstances surrounding the commission of an offence may result in vital evidence being excluded by the courts, sometimes as a mark of the court's disapproval of the tactics being employed.[17]

What is the appropriate touchstone in these circumstances? It is still fairness and justice but the ground rules are necessarily different from those operating within the judicial process itself. To say that the courts will not countenance unfair tactics on the part of the police is to invite the question: what is unfair when the police are investigating a crime or the likely commission of a crime? This is not a game to be played according to rules; certainly the offender has not acted according to any rules but those of his or her making.

Clearly enough, law enforcement authorities need the prescription of rules with which they must abide. The *Judges Rules* came into existence in England and later in Australia for this reason. It should not be overlooked that the issue generally resolves itself into one of the admissibility of evidence. The consequence of the use of force or duplicity is the exclusion of evidence at trial, as well as, of course, any disciplinary proceedings that may take place. The touchstone may perhaps be met by making more specific the circumstances in which evidence may be excluded. There is a wealth of case law on voluntary statements, evidence obtained in breach of the law and evidence obtained in circumstances where no breach of the law is involved but where the courts have made it clear that certain tactics will not be

countenanced. A more specific delineation of these cases would make the task of law enforcement and of the courts more clear and also, perhaps, lead to greater community understanding of why evidence is excluded and why trials take the form that they do.

A basic touchstone of the criminal justice system is that the system should seek to ensure that the risks of the innocent being convicted and of the guilty being acquitted are eliminated so far as this is possible. Because the Crown is required to prove its case beyond reasonable doubt and because an accused is not obliged to give evidence, the risk of the guilty being acquitted might seem to outweigh the risk of the innocent being convicted. However, the disclosures of the Royal Commission into Police Corruption in New South Wales (the Wood Inquiry) and a number of *causes celebres,* particularly in the United Kingdom, have left the community with an unease at the activities of many police officers, including some at a very senior level. At any rate, the touchstone itself is sound.

Trial by jury is so engrained in our criminal justice system it is unrealistic to consider its elimination even if that were thought desirable. And the weight of opinion, professional and lay, strongly favours its retention. It is mainly the length and complexity of the trial of some 'white collar' offences that have placed the jury under a spotlight and have led to calls for trial by judge alone or by judge and assessors. A number of factors have made the task of the jury unduly difficult in these cases: multiplicity of charges, reliance upon conspiracy charges, prolix cross-examination and a failure by the trial judge sufficiently to control the proceedings have all played their part. Nevertheless there is a body of support for trial by judge alone or by judge and assessors in the more complex cases. One question must be whether such a method of trial increases the risk of the innocent being convicted or the guilty being acquitted.

There is also a case for greater use of pre-trial conferences and directions in those cases, even if not generally in criminal trials. On its face moves for greater defence disclosure have much to commend them. The Runciman Commission recommended, by majority, an extension of the arrangements for defence disclosure, in broad terms that accused who propose to contest the charges against them should be obliged to disclose the substance of their defence before trial or to indicate that they will not be calling any evidence but will simply be arguing that the prosecution has failed to make out its case. The sanction proposed is that where accused do not make sufficient disclosure or where the explanation given at trial differs from that given before trial, the prosecution should be able, with the leave of the judge, to invite the jury to draw adverse inferences. It should also be a matter for comment by the judge in summing up.[18]

In this regard there are two touchstones at play. The first is effectiveness;

the second is the wider question of fairness to the accused. As to the first, Professor Zander, a member of the Runciman Commission, wrote a Note of Dissent aimed at showing that the overuse of pre-trial procedures and forms in the course of criminal trials increases cost and delay without securing compensating advantages.[19] This is not the place to detail the arguments for and against defence disclosures. It is appropriate to draw attention to the relevant touchstones against which such proposals may be measured.

There is the wider touchstone of fairness to the accused. This is not quite the same thing as asking whether due process has been observed and whether there has been a trial according to law. Clearly a trial which is grossly unfair to an accused will not be a trial according to law. Pre-trial disclosure by an accused, accompanied by various protections, is not likely to be grossly unfair. After all, accused are required to give notice of an alibi defence. Those acting for accused will no doubt complain about the time and cost such procedures involve, particularly where there is a change of legal representation as is often the case. But in the end that is really a question of what advantages and disadvantages in the trial process are likely to result from a requirement of disclosure.

Trial by jury is historically a protection for those accused of an offence by the state. If an accused nevertheless wishes a trial by judge alone there seems to be no overriding principle which should exclude such a course, exercisable at the option of the accused or, at any rate, exercisable unless the Crown can satisfy a judge of good reasons why there should not be a trial by judge alone.

Returning to the objective of convicting the guilty and acquitting the innocent, what should be the aim of the rules of evidence? Evidence must be relevant but evidence that is relevant is excluded if it is thought to be unduly prejudicial to the accused. On this footing the touchstone which prevails is fairness to the accused. This is particularly apparent when similar fact evidence is contested and, in some respects, when it is sought to exclude confessional evidence. In both respects the law has become complex and to an extent unwieldy. Furthermore rules that lead to the exclusion of relevant evidence tend to underestimate the sophistication of modern juries. The disqualifications from jury service have been reduced greatly over the years so that a wider range of persons is eligible for jury service.

All these considerations have to be taken into account in deciding whether the rules themselves should be altered so as to give proper but not undue weight to the possibility of prejudice or whether the exclusion of relevant evidence because of the risk of prejudice is best left to the trial judge, aided perhaps by statutory guidelines. The *Evidence Act 1995* (Cth) has adopted the approach of empowering the court to refuse to admit evidence of an admission where it would be 'unfair' to a defendant to use the evidence;[20] of excluding similar fact evidence under a very complex provision;[21] of excluding

evidence the probative value of which is outweighed by the danger of prejudice;[22] and excluding evidence obtained improperly or in contravention of an Australian law unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence so obtained.[23] The workability of these provisions remains to be assessed.[24]

SELF-REPRESENTED LITIGANTS

A feature of current litigation, both civilly and criminally, is the number of litigants in person. The presence of self-represented litigants in criminal trials is of course affected by the decision of the High Court in *Dietrich*.[25] Strictly speaking, the presence of self-represented litigants does not involve a touchstone of the justice system. However, its effect on the courts is so marked that the system must take particular care that they receive a fair hearing but that at the same time the other party's case does not suffer. The procedures will be the same; it is their application that requires particular sensitivity.

In fairness to the other party and to the effectiveness of the system, claims that lack any substance call for summary judgment or, at least, their early disposition. In that respect the claims stand in no special position.

ALTERNATIVE DISPUTE MECHANISMS

Some deep thinking has to be done about the role of the courts. Where other dispute mechanisms are involved, the issue is presented as one of alternatives. The jurisdiction of the courts is not curtailed but other options are offered and these options carry the attraction of lack of formality, expedition and relatively low cost. To some extent these attractions may accompany traditional court procedures. However there are limits to the informality that may characterise such procedures, particularly where evidence is given orally and cross-examination permitted. Certainly the rules of court may aid expedition and they may reduce cost in various ways as by limiting the use of pleadings, discouraging interlocutory procedures and by the use of statements of evidence.

In the ordinary course the use of alternative dispute mechanisms does not preclude resort to the usual mechanisms associated with trials though it may make those mechanisms less attractive. But it is important not to jump to the conclusion that alternatives are the answer and to assume that the only issue is the point at which they should operate. Their intrinsic worth must first be assessed and it is then appropriate to identify the sort of cases to which they may be applied.

EMPIRICAL DATA

A theme of inquiries into the justice system is the need for empirical data before recommending sweeping changes. With many procedural matters data is hardly necessary. The judges and practitioners are in a good position to identify defects in procedures and to recommend changes. If they fail to do so, as they have sometimes failed in the past, there are observers and commentators with the knowledge and experience to fill the gap.

More fundamental changes do require some assessment of public opinion in order to determine first what the community is seeking. We pride ourselves on many aspects of the current justice system and there is justification for doing so. Faced with the accusation that it offers a 'Rolls Royce system' which suffers from expense and delay, how do we determine the extent to which the community would prefer something more basic? The success of alternative dispute resolution methods suggests something more basic does appeal. Is the answer to promote these methods but to leave the present court system virtually intact? Or is it to make that system an alternative to the litigant? The answer is hardly intuitive; some assessment of public opinion is necessary.

ENDNOTES

1 DM Walker *The Oxford Companion of Law* (Oxford: Clarendon Press, 1980) 689.
2 Ibid 691.
3 *Runciman Report* Report of the Royal Commission on Criminal Justice (1993) CM2263 Ch 1 para 9.
4 LRCWA *Reforming the Justice System: An Issues Paper* (1998) 12.
5 Lord Woolf, *Access to Justice — Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).
6 Ibid.
7 On the question of certainty, see Ontario Law Reform Commission *Study Paper on Prospects for Civil Justice*(1995) 40-43.
8 There is a useful summary of the historical development in DA Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part 1' (1995) 69 *Australian Law Journal* 705.
9 (1906) 40 *American Law Review* 729.
10 R Pound 'The Need for a Sociological Jurisprudence' (1907) 29 *Green Bag* 607.
11 Stephen Parker, *Courts and the Public* (1998).
12 Ontario Law Reform Commission, above n 7, 8.
13 Evelyn McWilliams, 'Sentencing Guidelines. Who Should Be the Arbiter: The Judiciary or Parliament?' (1998) 36 *Law Society Journal* 48.
14 Woolf, above n 5, 2.
15 Parker, above n 11, 5.
16 LRCWA, above n 4.
17 *Ridgeway v The Queen* (1995) 184 CLR19; *R v Swaffield* (1998) 151 ALR 98.
18 *Runciman Report* , above n 3, Ch 6 paras 57-73.
19 Ibid 223-233.
20 *Evidence Act 1995* (Cth) s 90.
21 *Evidence Act 1995* (Cth) s 98.
22 *Evidence Act 1995* (Cth) ss 135, 136, 137.
23 *Evidence Act 1995* (Cth) s 138.
24 See generally the commentary in Stephen Odgers, *Uniform Evidence Law* (2nd ed, 1997).
25 *Dietrich v The Queen (*1992) 177 CLR 292.

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1.2

Advantages and Disadvantages of the Adversarial System in Civil Proceedings

INTRODUCTION

The advantages and disadvantages of the adversarial system have traditionally been debated by comparison with 'the inquisitorial system'. We argue that the validity of that comparison is now so flawed as to render it useless. There is no longer any single pure form of adversarial system. Instead, we can see in the common law world multiple forms of procedure and institutional arrangements that merely have family resemblances with each other. As in families, some members are related more distantly to some than to others. As in families, even in the case of identical twins, personal histories and environmental influences are important factors in the behaviour, appearance and personalities of the members. The same can probably be said for inquisitorial systems. A more useful approach to reform is to settle on the principles that should govern a legal system for that society and work towards a realistic vision of the future based on those principles. The advantages and disadvantages of the relevant adversarial system can then be assessed by reference to the vision. In conclusion, a set of principles and a vision of the civil justice system as it might be by 2020 is presented.

The adversarial system in civil proceedings is often thought to be characterised by a high degree of 'partisan behaviour, party autonomy, judicial passivity' and 'reliance on lawyers' integrity'.[1] In this stereotype, the parties are responsible for identifying the issues in dispute and the evidence to be adduced. They determine the pace of pre-trial procedure, so that departures from the timetables laid down in Rules of Court, and even from some of the procedural stages, can be agreed privately. The parties may settle the matter at any time without adverse comment or sanction from the court. The judge at the trial rules on disputed points of procedure and evidence, and might seek to clarify

the testimony of a witness, but will not otherwise take an active part. At or after the conclusion of the trial, the judge delivers a judgment, with reasons.

The norm for adversarial systems, even though not strictly entailed by anything in the procedures themselves, has been for court fees to be relatively minimal, perhaps aimed at a level just sufficient to deter frivolous proceedings. The idea is that the State uses public moneys to create the infrastructure within which private disputes are litigated or settled. One justification for using public moneys in this way is that the decisions of superior courts actually constitute the law as it develops over time. The public interest in the adjustment of legal norms to new ideas and circumstances is a good reason for funding the system. Another justification is that courts are a civilised society's substitute for vengeance. Without the State's involvement, unfair or anti-social behaviour would be used to 'settle' grievances.

Inappropriate or excessive use of the publicly-funded civil justice system is, in theory, controlled (in the Anglo-Australian tradition) by the power to award costs on various bases — including orders against practitioners, crimes about perverting the course of justice, torts such as malicious prosecution and collateral abuse of process, and powers to punish for contempt. In addition, courts have inherent powers to discipline lawyers; powers that operate alongside the ethics regimes of professional bodies and statutory forms of regulation.

The actual history of the adversarial system reveals that the connection between adversarial processes and civil disputes is not as intimate or long-standing as some suppose. Adversarial processes in civil matters crystallised only in the nineteenth century, following the spread of an adversarial spirit from eighteenth century criminal procedure which was intermingled with procedural reforms between 1852 and 1875.[2] Although there may be some instances where the criminal/civil boundary appears artificial, for the most part one can still separate the two kinds of matters so that one could adopt quite different procedures and forms of regulation. The growing differences between criminal and civil evidence law suggest there is an organic process to this effect anyway.

THE ORTHODOX ACCOUNT

Comparative law texts and treatises on procedure have long told a straightforward story about the adversarial system along the following lines. Amongst the world's families of legal systems, two traditions have dominated in the West: common law and civil law systems.[3] Common law systems operate adversarial procedures; civil law systems operate inquisitorial procedures. Legal institutions and cultures have grown up around the two procedural models, and these affect every aspect of the legal order; such as legal education, the structure and organisation of the legal profession, legal

ethics, the selection and training of judges, the mode of pre-trial and trial procedures and the nature of legal reasoning.

High level definitions, or at least descriptions, of the adversarial system abound, such as that of Lord Denning in *Jones v The National Coal Board.*[4] They are all to the effect that the judge is a passive and neutral umpire who cannot descend into the arena for fear of having her or his judgement clouded (and decisions overturned on appeal). The parties choose the issues to be tried (through the structured conversation of pleadings and particulars as introduced by the *Judicature Acts* of the 19th century) and the evidence to be adduced. The judge, and occasionally still in civil matters the jury, decides which of the parties' cases to prefer. Comparable descriptions of criminal procedure can be found.[5]

In contrast, according to the orthodox account, in the inquisitorial system the judge (who is trained from law school to be a judge) has the carriage of a case from the outset and decides which issues and evidence are most relevant. The case develops over a series of hearings and may never culminate in a 'trial' in the sense that common lawyers understand it. The parties' advocates assist the court and put their clients' cases, when permitted, but the judge runs the trial. As the name of the system implies, the court conducts an inquiry and is not confined to deciding between the submissions of the opponents.[6]

Around these stereotypes of the adversarial and inquisitorial systems have developed a number of normative and philosophical arguments. (At least in the case of the adversarial system, the system came along some time before many of the arguments that are now used to justify it.) The adversarial system is said to be cheaper to run, because there are fewer judges and less court time is spent on most matters. It is said to respect individual autonomy, because the power of the State is only fully invoked when a case has been made out, and even then it is up to the winner to decide whether and how to have the judgment enforced.

In effect, the state does not embark on a roving inquiry merely at the request of the plaintiff. The adversarial system is said to be the most efficient means of arriving at approximate truth because it harnesses the power of self-interest on each side to unearth the best evidence. Similarly, the best legal arguments are thought to emerge from the clash of advocates' submissions on the law. A classic quotation is that of Lord Eldon in *Ex parte Lloyd* [7] that 'truth is best discovered by powerful statements on both sides of the question'.

ORTHODOXY OR MYTH?

At a high level of generality and for periods during the last two centuries, the orthodox account above may have been sustainable. On closer enquiry, the accuracy of the factual premises and the coherence of the justifications today are greatly weakened.

Diversity between common law systems

The English and American procedural systems have significant differences between them, despite their shared common law traditions. The English model places greater reliance on oral testimony and argument than American courts, which have curtailed it in favour of written briefs and documentary evidence.[8] America has not seen the emergence of a separate Bar in anything like the English form. These simple differences suggest that 'the common law' does not entail any specific approach to procedure or professional organisation. Imperialist expansion and historical accident have mingled with cultural, political and social conditions to produce the procedures that are now followed in different common law jurisdictions. The closeness of the state legal systems in Australia to the English variant owes more to colonial history than to a logic embedded in the common law.

Much the same can be said of civil law systems.[9] The procedure and spirit of French and German courts are said to be different. The countries colonised by France and Germany inherited and then developed distinct approaches to civil dispute resolution.

Diversity within common law systems

At few times in the histories of specific common law jurisdictions has there been procedural purity. Historically, equity matters, including Chancery's protective jurisdictions, proceeded along different lines. Commercial causes were sometimes treated separately and often handled in ways that may have foreshadowed the modern idea of case management. Furthermore, judicial powers of intervention may have existed but been under-utilised[10] or have been utilised in some courts more than others. What *might* have been more constant across different kinds of cases was the partisan ethic of the lawyer. Subject to some relatively unobtrusive duties to the court, the lawyer's goal has been to win the case, not to take an independent line that would promote the lawyer's conception of justice. Even this proposition must be qualified. The evidence is scant, but it seems that localised legal cultures have always existed, with some regions dominated more by an adversarial spirit than others.

In modern times, administrative and other tribunals have almost always been modelled on inquisitorial starting points.[11] We cannot tell how many of the cases they deal with would have been commenced in a court had the tribunal not existed, but the net result is that a significant number of legal disputes in all common law jurisdictions are now actually disposed of following a procedure in the nature of an inquiry. Arbitration, under some degree of supervision by the court, and sometimes even ordered by the court in the absence of all parties' consent, has an even longer pedigree in certain kinds of cases.

In truth, as Twining has observed, 'We live in a world of hybrids'.[12]

Mutation

Not only has there rarely been procedural purity in any particular jurisdiction, the adversarial system in many jurisdictions has usually been quietly mutating, with occasional genetic growth spurts.[13] Some courts have become more directive at an early stage about the procedure and timetable to be followed. Some have become more interventionist in encouraging attempts to settle the dispute. Latterly, the mechanisms for costs penalties on unreasonable behaviour or poor predictive skills have become more sophisticated (for example, payments into court were supplemented first by 'Calderbank offers'[14] and then by formal offers to settle procedures). Some courts have assigned a continuing responsibility for a case to the same judge throughout (manifested now in the Federal Court's individual docket system).[15] Some have encouraged the use of alternative dispute resolution techniques, and some now have, and use, powers to compel it.

Mutation has also been *forced* on courts recently. The growth of litigants in person, seemingly in all jurisdictions, is forcing change in daily practice, although not yet in formal procedure.[16] Other changes have been forced by an increased civil case load without a commensurate increase in judges and financial resources. To complete the pincer movement, public and political pressure has prevented courts from simply allowing the queues to become longer. The courts themselves have had to think laterally about new ways of making less go further.

Philosophical underpinning and practical operation

Critiques of the adversarial system have become more trenchant and sophisticated since at least the 1970s. To some extent these have been entwined with the growth in tribunals. And they have not been the exclusive preserve of professional philosophers. Australia and England have seen populist and polemical works by lay people and renegade lawyers who make substantially similar arguments to those found in jurisprudential and comparative law texts.

The relative cheapness of the adversarial system compared with inquisitorial ones may be due, it is said, to an artificial form of accounting. Adversarial systems externalise many of the costs to the parties. This is not the same as reducing cost over all.

The supposed efficiency of the adversarial system in fact-finding and high quality legal argument is itself crucially dependent upon each side being able to fund a lawyer or legal team to roughly the same extent, and upon each side's lawyer being competent, expeditious and ethical. Ethics become relevant because, inter alia, the court embarks on virtually no fact-finding of its own, and so the supply of accurate information depends upon lawyers not actively concealing damaging material or relevant legal authorities and on them spotting the other side's passive omission to proffer it. There is now considerable concern about the unfairness resulting from the incapacity of many people to

afford lawyers who exhibit these qualities of competence, promptness and ethics.

The political value in the adversarial system's restraint on the role of the State is also questioned to the extent that it supposes that institutionalised power resides only in governments. Large corporations can sometimes wield greater power than some nation states or at least their constituent jurisdictions, in the case of federations. One might just as well now argue that the individual *needs* the power of the State in order to counter what in Tudor times were known as 'over-mighty subjects'.

Finally, it is by no means clear that all citizens particularly *want* their disputes to be resolved in adversarial and partisan ways. Some people and successful organisations wish to move on from warrior ways. The research on litigant satisfaction bears this out to some degree.

WHAT ARE 'ADVANTAGE' AND 'DISADVANTAGE'?

The concept of advantage is inevitably a relative one. Hitherto, the comparator has almost always been the 'inquisitorial' method. Much as the threat of Napoleon's invasion was used by the parents of fractious English children to keep them in line, the Napoleonic Code was thought to have spawned a single alien procedural method that was to be resisted at all costs. The account above suggests, however, that we may have been comparing mythical beasts: hardly a sound foundation for law reform.

Law reform is undoubtedly needed. Merely because the adversarial-inquisitorial dichotomy turns out to be unhelpful, we should not think that we have the best system that can be devised. Lord Woolf's remarks about the English situation in 1996 are broadly applicable in Australia:

> The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of courts, all too often, are ignored by the parties and not enforced by the court.[17]

Our ideas of advantage and disadvantage are better developed relative to a *realistic vision of the future* that is based on an identified set of *principles* we wish to adopt rather than relative to an idealised conception of a system supposedly in operation elsewhere. In other words, we should decide how we want cases to be handled and then assess whether that is

a net improvement on the present. This, essentially, is the approach taken by several major reviews of the justice system in recent times, including the Judicial Conference of the United States' *Long Range Plan for the Federal Courts*,[18] the Canadian Bar Association's *Task Force on Systems of Civil Justice*,[19] and the *Civil Justice Review* in Ontario.[20]

The history of legal systems and of the mutations within these systems suggests that the possibilities are greater than we may have supposed. This is not to say that there are no restraints, but it is to say that they may not lie in an immutable logic of the common law. Three practical restraints may be:

- The current organisation, traditions and ethos of the legal profession;
- The political difficulties in persuading governments to devote extra public money to the legal system and legal aid; and perhaps
- The limits on experimentation that the High Court might impose stemming from a particular interpretation of the judicial power of the Commonwealth and the procedures that are required for its exercise.

PRINCIPLES

Most recent literature[21] about the reform of the justice system has put forward variants of the following operating principles, described deliberately in this sequence:

1. The system should be procedurally and substantively *just*. Thus the processing of cases must comply with ideas of procedural rectitude, and the aim of the system should be the fair application or development of the law by impartial decision-makers.
2. The system should be *expeditious*. There is an efficient pace for different kinds of cases, depending on their nature and complexity, but the starting point is that justice delayed is justice denied. Studies of litigant satisfaction rate timeliness highly.
3. The system should be *proportionate*. The complexity of the dispute and the amount at stake should have some relationship to the time and procedure invested in it.[22]
4. The system should be *managed*, at least in cases where it is suspected that the self-correcting mechanisms of clashing interests will not deliver proportionate and timely justice.

The system should take advantage of *information technology* to the maximum extent compatible with principles 1 to 4.

In addition, some recent reform literature has attempted to articulate a single foundational principle, or grundnorm, to guide the justice system at large. For example, Lord Woolf proposed a Rule 1.1 of procedure as follows:

(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) The court must apply the Rules so as to further the overriding objective.

(3) Dealing with a case justly includes -

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate -

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the parties' financial position;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

This was then followed by obligations upon the parties to further the overriding objective and upon the courts to manage cases actively.

The Civil Justice Review in Ontario went further by stressing the need for co-operation between the judiciary, government and the legal profession. Referring to these groups as 'the three solitudes'[23] the First Report referred to a deep chasm of mistrust and defensiveness behind a veneer of co-operation. Quoting an unusual authority in this context, the Review used Winnie the Pooh's concept of 'confuzzlement' to capture the situation.

A 2020 VISION OF CIVIL COURTS

A realistic vision of civil courts by the year 2020 has the general components set out below and is based on the principles set out above. The vision below deals mainly with questions of structure and culture rather than the detail of procedural rules. It is not described with Western Australia particularly in mind, although if Western Australia were to adopt this as a vision it would arguably be a world leader in civil justice reform. It is against this vision, some parts of which being severable from the remainder, that the reader is invited to consider the advantages and disadvantages of the present system.

A public court system funded by a mix of public and private contributions, with private contributions being at a higher level than today

The procedural changes described below require the court to become more involved in the direction and pace of litigation. Although some efficiency gains can be made through changes in current practice, this greater involvement must be funded by new revenue. Civil justice will never be given a sufficiently high political priority to allow governments to allocate significantly larger sums of public money to it. Much of the new revenue will come from the users of the courts.

Filing fees and other court costs are already rising in real terms in most

jurisdictions in Australia, although we have not yet arrived at full cost recovery.[24] One principle by which fees may have been set in the past was by reference to a level just sufficient to deter frivolous proceedings. It may have been overtaken by a principle of setting higher fees to encourage early settlement. Latterly, an explicit aim of full cost recovery has been articulated in England and Wales.[25]

We need to rid ourselves of certain preconceptions and articulate some clear principles if we are to move forward. The state has an obligation to ensure that all citizens and lawful organisations can enforce their rights and defend their liberties in courts of law. In recent times, however, there has tended to be a view that the state should have a *monopoly* in the provision of justice and that that monopoly requires heavy, if not total, subsidisation by the public purse. An alternative perspective is to acknowledge the obligation to ensure civil justice but to reframe the monopoly as being over the imposition of legitimate *force*. The duty to subsidise civil justice could be seen as limited to the extent that the public interest is at stake in litigation generally.

This would justify (a) a level of user contribution that approximates to the element of private gain in litigation and (b) the co-existence of non-state justice providers, the decisions of which are enforced by the state (pursuant to the monopoly on force). The idea behind (a) is developed immediately below. The idea behind (b) is developed later in a discussion of parallel private courts.

Users of the public higher education system currently make a contribution to the cost of their tuition through the Higher Education Contribution Scheme. The rationale for this is that higher education confers a mixture of public good and private gain. Civil justice can be seen in this way. Case law contributes to the development of the common law. The availability of a system for dispute resolution deters resort to anti-social or violent alternatives. We all benefit by not being caught in the cross-fire.

Equally, however, there can be an element of private gain in using the legal system. Before transacting, people and businesses acting rationally will take into account the availability of a subsidised civil justice system in deciding what level of precautions and risk they should take. Consider the extreme imaginary example of a completely costless and expeditious civil justice system with total effectiveness in the enforcement of its judgments. There would be few incentives to check the reliability or creditworthiness of prospective borrowers or contractors because all problems would be mopped up by a publicly funded mechanism. To the extent, therefore, that the civil justice system *is* subsidised and effective in real life, a gain is being conferred on people in going about their business by relieving them of certain transaction costs.

By analogy with contributions to higher education, this offers a coherent rationale for exacting a contribution from the users of the court system at a level higher than that necessary to deter frivolous applications. The analogy might break down to the extent that court fees should be paid up-front, but there is nothing obviously wrong in allowing deferred repayment in the event that the fees are not recovered under the costs indemnity principle whereby the loser normally pays the winner's costs.

Courts with a new focus on efficiency

A recently retired Federal Court judge, Daryl Davies, is reported to have called for a greater efficiency focus in Australian courts. 'You can't have an efficient business or commercial section of the community unless you have efficient laws, laws which enable business to work in an efficient manner. And you must have not only the laws, but you must have a court system that works with reasonable efficiency'.[26] The difficulty with these sentiments is that the meaning of 'efficiency' is left unclear.

What amounts to 'efficiency' is much debated within economics. Two standards are often put forward. The first, a pure Pareto standard, treats as an efficiency increase any change that makes at least one person better off without anyone being worse off. Efficiency is reached when no further such changes are possible. This tends to be a conservative standard in practice because few situations arise in complex societies where a proposed change would make no one worse off. The second, the Kaldor-Hicks or hypothetical compensation standard, treats as an efficiency gain any increase which theoretically produces benefits for winners that would allow them to compensate the losers and still be better off. There is no requirement that the winners actually do compensate the losers; only that the amount of gain is theoretically sufficient to do so and still produce a benefit. Put loosely, Kaldor-Hicks involves a cost-benefit comparison and it affords more opportunity for introducing changes.[27]

One way of understanding the 'new' efficiency focus of courts is to identify a general shift from the first of these meanings to the second. Courts in the past have tended to have Pareto efficiency in mind when examining possible changes. They have been reluctant to introduce any changes that might produce a loser, because of the high priority attached to justice in the particular case. Latterly, however, concern for 'proportionality' and delivering a Holden rather than a Rolls Royce court system has entailed a shift in approach reminiscent of Kaldor-Hicks thinking. This trend will continue and accelerate. The community will accept it, by and large, because they see more clearly than the legal profession that there is more to life than litigating to the nth degree. There is, however, a need to explain things to the community and communicate with them[28] so that people and businesses understand, for example, why procedure is rationed, why trials may have to operate within

strict time limits, why adjournments might be refused and why more severe sanctions must be imposed on parties and lawyers whose behaviour is sub-optimal.

The case law on these matters is in its early stages. In some decisions,[29] including the High Court decision in *Sali v SPC Ltd*,[30] judges have been sympathetic to concerns to promote Kaldor-Hicks efficiency. In that case, Brennan, Deane and McHugh JJ noted that:

> What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigation and the public interest in achieving the most efficient use of court resources.[31]

The High Court decision in *Queensland v JL Holdings Pty Ltd*[32] might, however, suggest a reversion to the more conservative approach. It was held there that the concerns of case management cannot be allowed to supplant the aim of attaining justice. The decisions are, however, few; and they can each be distinguished on their facts. In time, it is anticipated, the judiciary will give greater priority to cost-benefit efficiency when making decisions that are essentially about the required level of discipline in the system. One manifestation of this will be the emergence of clear legal and ethical duties on lawyers in matters such as presenting the issues as clearly and economically as possible, avoiding waste of time, prolixity and repetition, being courteous, avoiding unnecessary disputation, observing listing procedures, ensuring readiness for trial and other hearings, providing accurate estimates of hearing length and giving due notice of likely causes of an adjournment application.[33]

Information technology offers significant potential for increasing the efficiency of courts' operation and reducing the costs of users and witnesses. The whole subject is reviewed extensively by the Australian Law Reform Commission in its Issues Paper *Technology – What It Means For Federal Dispute Resolution.*[34] A conference run by the Australian Institute of Judicial Administration in 1998 also considered the potential of information technology. The papers are available on the internet.[35] Sub-section 5.3 (Volume 2) will further consider this potential. It is not considered further here.

A greater degree of court intervention in the management of cases

The trend towards greater judicial control over the pace and direction of litigation has been evident throughout the 1990s.[36] Although not fully evaluated anywhere in Australia, there is a perception that at least a limited form of case management is desirable. There is also a perception that the individual docket system, or some variant thereof, whereby the same judge deals with all interlocutory matters and, if it eventuates, a trial, is a worthwhile arrangement.

In the United States the largest evaluation study of judicial case management has disappointed the more evangelical of case management supporters. The procedures under review were found generally to have had little effect on time to disposition, litigation costs and lawyers' satisfaction and views of the fairness of case management.[37] On the other hand, what judges *do* to manage cases does matter. The study found that early judicial case management, setting the trial schedule early, shortening the time for discovery and having litigants present at settlement conferences does significantly reduce the time to disposition. Shortening discovery significantly decreases the hours that lawyers apply to the case. The findings of this study have now largely been endorsed by the Judicial Conference of the United States.[38]

The vision discussed here is one where judicial intervention is greater than at present, but is funded, as we saw above, by a higher level of court fee (recoverable usually by the winner under the normal costs indemnity principle). Judicial intervention will take the form of more searching enquiries at an early stage into the merits of the case, the evidence to be adduced and the progress of settlement negotiations. It will also entail, for the purpose of concentrating the minds of the parties throughout the litigation, a realistic chance of a 'post mortem' into the appropriateness of their actions and those of their legal advisers. It will involve specific decisions as to how much procedure is to be rationed for the dispute (for example, concerning discovery and interrogatories). It will include a greater willingness to invoke procedures for summary judgment (see below).

Uniform procedures expressed in plain English

Procedural differences between tiers of courts will exist only to the extent positively justified by the nature of the jurisdiction and the kinds of likely litigants.[39] Uniformity of procedure has now been adopted as a policy goal by the Lord Chancellor in England and Wales.[40] Differences will no longer be the product of separate historical development of the courts. Litigants in person will have become a significant proportion of court users. Court procedures will therefore have been designed and described in a way that recognises they are a permanent feature. Public courts in the future will probably not resort to allocating cases along different 'tracks', as suggested by Lord Woolf in 1996,[41] because market mechanisms in private courts over time will develop attractive procedures for particular kinds of cases (see below).

Some courts as integrated dispute resolution centres, with others having arrangements with outside providers

Future civil courts, whether public or private, will be regarded as dispute resolution centres. This idea, sometimes described as the 'multi-door courthouse', has a reasonably long heritage.[42] Depending on their geographical location and population base, courts will either provide a range of services themselves or they will take responsibility for ensuring that those services are provided by others. The relevant services will include counselling, conciliation, mediation, early neutral evaluation, arbitration and other alternative dispute

resolution techniques so that a continuum of mechanisms is available, from the purely consensual to the coercive.[43]

The driving force behind the move towards a multi-door courthouse concept is not particularly any general faith in ADR being more civilised than traditional litigation: it is efficiency. Disputes differ in their intensity, subject matter and complexity. Different procedures are more fitted to resolving different kinds of dispute. By establishing a mechanism whereby disputes can be allocated seamlessly to the most appropriate method of dealing with them will save on legal and other transaction costs, and it will improve disputant satisfaction. The empirical evidence for these propositions is scant at the moment. Conversely, however, there is no evidence at all to support a proposition that a system offering only a stark choice between 'litigation' and lawyer-negotiation is efficient by comparison.

Greater use of summary judgment and mini-trial, buttressed by costs penalties

Greater use will be made of summary judgment procedures, following statutory change to ease the legal test for its use. A relevant factor in deciding whether to allow a 'mini-trial' for the purposes of reaching summary judgment will be the amount at stake and its likely relationship to the predicted time and cost of invoking the full procedure. This is in line with the principle of proportionality, above, which is itself a manifestation of Kaldor-Hicks efficiency. In short, it trades off early determination and lower costs against a more exact approach to unearthing all the relevant evidence and arguing all the potentially applicable legal points: 'quality' against 'economy', in Zuckerman's words.[44]

Provision will be made for an appeal de novo from summary judgment but there will be greater costs risks. An unsuccessful appeal will invite an order for costs for the whole proceeding on a solicitor-client basis.

Licensed private 'courts' in parallel with public civil courts

Private courts will co-exist with public courts for the determination of cases that fall within the jurisdictional limits of magistrates' courts and the District Court, or for a sub-set of those cases.[45] The dynamic set in train by an environment conducive to choice and experimentation will lead to far more effective changes than can be devised by solitary thinkers sitting at computer screens or by well-intentioned committees.

This may have been a shocking thought to people at the end of the 20th century but it will have become less so on closer inspection. In some respects, the idea of parallel private first instance courts is an expansion of the arbitration system, combined with the growing phenomenon of private alternative dispute resolution services. It is not dissimilar in substance from the power that some courts have had since the late nineteenth century to refer an action to arbitration without the consent of the parties, with the arbitrator's award being entered as the judgment unless challenged.

At present, the majority of civil claims are dealt with in courts of summary jurisdiction and intermediate courts (District or County Courts). Most of these claims are abandoned, capitulated to, or settled by agreement. The remainder that reach adjudication do not constitute precedents within our system of *stare decisis*. The public interest in these cases is certainly real, because lower courts produce local understandings about how the law is to be applied, they protect individual rights and liberties, they equalise to some extent the balance of power between parties and they remove incentives for less desirable ways of settling disputes. Nevertheless, bearing in mind the relatively standard nature of many of these cases, especially in debt recovery and claims for damages in respect of personal injuries, a way has been found, in this vision, of preserving the public interest in them whilst providing effective alternatives to the publicly funded court system.

The vision entails the licensing of private organisations to provide court services in certain matters up to particular jurisdictional limits (in no case higher than the District Court upper limit). Adjudicating officers in private courts will meet qualification standards, including having been admitted to legal practice for a specified period or having served as a judge. Legal obligations will be imposed in respect of natural justice, confidentiality and avoiding conflict of interest, and legal practitioners will remain subject to their general ethical duties. The jurisdiction of a private court will be based on informed consent, including consent given through a contractual term before the dispute arose. If an applicant chooses to commence proceedings in a private court, the respondent may object (unless already contractually committed) and the matter will be transferred to the appropriate public court. Otherwise, it will remain in the private court subject to a later application by either party to transfer it on the ground that there are special circumstances making the transfer appropriate; for example because of the unexpected complexity of the matter, the desirability of consolidating it with a case in a public court, or because an interlocutory injunction is required. Private courts would have no coercive powers and so could not give injunctive relief.

Appeals against private court decisions will be to the District Court or Supreme Court, as the case may be, in the normal way. Procedural fairness in private courts will also be subject to judicial review by the Supreme Court. Judgments of private courts will be enforced by registration in the Local or District Court, depending on the amount involved, and then execution in the appropriate way. By statute, the duty that lawyers owe to the court will apply in private courts, but that duty will be enforced in the normal way by a regulatory body or the Supreme Court.

The private court will decide for itself whether to operate a costs indemnity rule or any other costs rule, in the light of what will attract applicants or respondents. Taxation and enforcement of any costs orders would take place in the appropriate public court.

The incentives driving the system will be for organisations to offer dispute resolution services at a price and a quality that fully-informed consumers may choose to select, and to build up a reputation for service. There will be pressure, subject to regulation and the supervisory jurisdiction of the Supreme Court concerning natural justice, to devise procedures and facilities (including opening hours) that offer an adequate level of service at the lowest cost or at the most expeditious pace. The resultant contrast between public and private courts will force all courts to consider continually their operating methods and the level of service they provide.

The system will have been introduced gradually, following pilot projects and experiments. It might also have been introduced for selected kinds of matters in the first instance. Initially, quite restrictive regulations on the ownership of companies operating private courts may have been necessary. It is likely that organisations controlled by lawyers and former judges will have been the pioneers.

Where private courts have failed, it has been because the public courts offered something of higher value to litigants. Conversely, where they have succeeded, it has been because they offered something that people and businesses wanted. The publicly funded civil justice system may have contracted in line with the success of private courts but not necessarily so. The total volume of civil litigation may have increased but that was because there was a demand for dispute resolution that was not previously being met. Because a defendant under this vision always has the right to choose a public court, there is no reason to suppose that frivolous litigation or other abuses of process by plaintiffs will be any greater than if private courts did not exist. If public courts are today deterring frivolous litigation they will continue to deter it because the defendant will simply elect that the case should go to a public court. More likely, any increase in civil litigation will reflect a level of genuine claims that are currently being damped down by the imperfections of the public system.

In no circumstances will appellate matters or cases warranting the attention of a superior court of record be heard in private courts. The quality and independence of constitutionally-protected judicial officers, and the resources available to run a superior court, will be at least as high as today so that, inter alia, a proper system of supervision of the lower courts is maintained. Precedents will be produced by superior courts in the normal way. These courts will, however, have benefited from the experiences of lower courts and introduced further procedural reforms that are appropriate to their jurisdiction.

Consumer-conscious courts

Australian courts began moving towards a greater consumer-orientation in the early 1990s.[46] The mere prospect of private courts and higher levels of user contributions will have spurred the public courts further in this direction.

The real spur will have been a realisation of the fact that confidence in the courts was not conditioned solely by the majesty of the building and the independence of the adjudicators. It was also determined by the perceptions of people based on their experience of using the courts, whether as inquirer, litigant, defendant, witness or juror.

In the late 1990s, research and internal surveys revealed an extremely low level of satisfaction with some basic issues of service, to do with the availability of information, the language used, the clarity of literature and procedures, the helpfulness of staff, the atmosphere in the court and the psychological and emotional support available.

In a report entitled *Courts and the Public*, commissioned by the Australian Institute of Judicial Administration, a research project was described which suggested that a perceptual gap existed between courts and their users.[47] Whilst the courts believed they were generally responsive to the needs of their public, this belief was emphatically not shared by the public itself. The report argued that the organisation, procedures, facilities, services and overall culture of courts were based on certain premises about the users of courts and the nature of law in modern society that were outmoded, assuming they had ever been accurate. The public had come to need and expect a higher level of user-centred services in Australian courts. Courts had to develop a conditioned reflex of putting themselves into the shoes of the user in all encounters with the public. Although there were justifiable limits on the expected responsiveness of courts, stemming from the need to do transparent justice, the report showed that a considerable distance could be travelled before these limits were reached in many cases.

By the end of the century, courts had realised they needed to become learning organisations. They needed processes and procedures in place to ensure two-way communication with their public. They produced communication plans and information strategies, they embarked upon outreach programmes, they set up user forums and they invited feedback through exit polls on a regular basis. They also worked on issues of internal culture. They moved away from the traditional idea of a court as 'Judge and Co' towards a 'whole court' approach where the focus of the whole organisation was on doing justice whilst serving the public.

A legal profession with a changed self-image, assisted by some legal immunities

Battered and bruised by a series of inquiries, and also by startling revelations in some celebrated cases where legal professional privilege had been waived so as to reveal the nature of legal advice,[48] the legal profession will have come to two realisations.

The first was that its interpretation of legal ethics (or professional responsibility) had been conveniently premised on a selective interpretation of the adversarial system. The theory was (and remains) that a lawyer's duty to the court and the administration of justice prevails over the lawyer's duty to a client. It had become clear, however, that the rules and principles concerning the lawyer's duty to the court were expressed in exceedingly vague terms and were organised around a confusing variety of concepts. The upshot was that too many lawyers had relied on the practical indeterminacy of legal ethics as an excuse for giving priority to their clients' interests except in the most egregious of cases.

The second realisation was that many of the most prized clients of the profession had begun to view the world differently. The corporate world in particular had become taken by ideas of trust, strategic alliance, abundance rather than scarcity (ie, win-win) and long term thinking. They began to gravitate to those lawyers who shared a similar outlook.

The result was that lawyers were persuaded to reassert their role as leaders in society rather than hired hands. This involved some personal transformation, in terms of a balanced life and responsible work practices, and some collective re-positioning so that the profession adopted heroic or statesmanlike qualities whilst abandoning some older warrior ways.

Fortunately, professional bodies at the time were led by far-sighted officers who saw these developments as being in the collective interest of the profession as well as right for the times. Accordingly, lawyers were reminded more forcefully that they were officers of the justice system rather than operators of a stereotyped view of an adversarial system. They took seriously the principles on which the new justice system was explicitly based (see above). In the myriad microscopic choices open to them in their daily litigation practices they began to opt for the course that best exemplified those principles. They were assisted in this, not only by mandatory continuing legal education and professional support, but by some new statutory defences that immunised them against the complaints of their clients where they could show that they were honestly seeking a just and timely resolution of the dispute. It has to be said also that as more and more lawyers acquired experience as adjudicators in private courts, they began to take a more top-down and less partisan view of the dynamics of dispute resolution.

In 2020, the Law Reform Commission of Western Australia was asked to review the civil justice system in the state and concluded that it had great advantages over what had, until the end of the twentieth century, been described as the adversarial system.

PROPOSALS

1. Objects clauses should be included in all legislation impacting upon civil justice, including Rules of Court, so that the principles on which the civil justice system rest are clearly set out. One suggested set of principles is included on page 29. The principles currently in Order 1, rule 4A-C of the *Rules of the Supreme Court of Western Australia* also provide an appropriate basis. The value of such objects provisions is that they aid in the interpretation of the legislation or Rules, and they assist in the exercise of discretionary powers. They also provide a basis against which the conduct of lawyers can be evaluated, for example where costs are in issue.

2. There should be a calculation of the average level of court fees paid by litigants as a proportion of the average cost per case to the public purse. Consideration should be given to whether this is an appropriate division between public and private. A set of principles should be established against which fees can be set in future. This review should take into account the desirability of exemptions for litigants without means and the possibility of allowing deferred repayments. Suitable, efficient and secured repayment schemes should be considered.

3. Provision should be made in the Rules, and practical arrangements devised, whereby courts may conduct random audits of cases that have been settled. The practical possibility should exist that where litigation has been commenced but settled at some point prior to judgment after a contested trial, lawyers may have to produce their files, and other information similar to that required on a taxation of costs, that will allow a court to assess whether the litigation was conducted appropriately.

4. The Commission should investigate the Uniform Civil Procedure project in Queensland with a view to promoting greater uniformity of Rules, and clarity of drafting.

5. Legislation should be introduced to govern summary judgment procedures so that the primary factors to be considered are the apparent strength of the respondent's case and the amount at stake in the litigation. The principle should be clear in the legislation that the smaller the amount at stake then the more arguable must be the case of the respondent to the application before summary judgment will be denied.

6. A feasibility study of parallel private civil courts should be commissioned and, if sufficiently encouraging, a pilot project should be devised. A copy of the unpublished paper 'A Case for Private Courts' is attached, Appendix I.

7. The recommendations contained in the Australian Institute of Judicial Administration report *Courts and the Public* should be considered for implementation in Western Australian courts. A copy of chapter 7 of the report is attached, Appendix 2.

ENDNOTES

* To prepare this sub-section the Law Reform Commission of Western Australia engaged Professor Stephen Parker, Dean of Law, Monash University (Melbourne).

1 The descriptions do differ, however. See for example D Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part 1' (1995) 69 *Australian Law Journal* 712; and D Luban, 'The Adversary System Excuse' in D Luban (ed) *The Ethics of Lawyers* (1994).

2 See generally the discussion in Ipp, ibid 708-709.

3 See generally R David and J Brierley, *Major Legal Systems in the World Today* (3rd ed, 1985); and ALRC, *Rethinking the Federal Civil Litigation System*, Issues Paper 20 (1997) ch 2.

4 [1957] 2 QB 55, 63.

5 See eg *Ratten v The Queen* (1974) 131 CLR 51,517 (Barwick CJ).

6 For a standard account intended for a common law readership see B Kaplan, AT von Mehren and R Schaefer, 'Phases of German Civil Procedure 1' (1958) 71 *Harvard Law Review* 1193. See also B Kaplan, 'Civil Procedure – Reflections on the Comparison of Systems' (1959-60) 9 *Buffalo Law Review* 409.

7 (1822) Mont 70 and 72.

8 There are clear signs, however, that the Anglo-Australian tradition is moving away from orality in civil proceedings; see C Glasser, 'Civil Procedure and the Lawyers – The Adversary System and the Decline of the Orality Principle' (1993) 56 *Modern Law Review* 307; and Ipp, above n 1, 797.

9 See J McEwan, *Evidence and the Adversarial Process: The Modern Law* (1992) 8.

10 See D Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365.

11 See generally ALRC, *Federal Tribunal Proceedings*, Issues Paper 24 (1998).

12 W Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Resolution in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *Modern Law Review* 380, 391.

13 See the brief description of current thinking in the Australian system in C Downs, 'Crying Woolf? Reform of the Adversarial System in Australia' (1998) 7 *Journal of Judicial Administration* 213.

14 After the English family law decision in *Calderbank v Calderbank* [1976] Fam 93 which allowed 'without prejudice' offers to be qualified so that an unreasonable refusal might be disclosed in later argument about costs liability.

15 The literature on judicial case management is now voluminous. See generally, however, ALRC Issues Paper 20, above n 3, ch 5; and for an early thoughtful piece, Justice A Rogers, 'The Managerial or Interventionist Judge' (1993) 3 *Journal of Judicial Administration* 96.

16 Professor Stephen Parker, has recommended that all courts consider the preparation of a Litigants in Person Plan to suit their particular circumstances: see S Parker, *Courts and the Public* ((Unpublished paper presented to the Australian Institute of Judicial Administration, September 1998) 166.

17 Lord Woolf *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) s 1, para 2.

18 <http://www.uscourts.gov/lrp/CVRPGTOC.htm>ch 3.

19 Canadian Bar Association *A New Vision – Civil Justice in the Twenty-First Century* (1996) ch 3.

20 See the First Report: Ontario Law Reform Commission *The Modern Civil Justice System in 10 Years: What Will It Look Like* (March 1995) 19.

21 See eg, ALRC, above n 3, paras 3.9 – 3.16; Woolf, above n 17, 2; Ontario Law Reform Commission, ibid 4; Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform* (1993) 10; Law Society of NSW, *Access to Justice*, Discussion Paper (September 1998) 12.

22 It is helpful to see the allocation of time and resources to a dispute as an 'investment' so that the returns can be evaluated by reference to the benefits and decisions can be made about trade-offs. See generally, AAS Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 *Oxford Journal of Legal Studies* 353; and 'A Reform of Civil Procedure – Rationing Procedure rather than Access to Justice' (1995) 22 *Journal of Law and Society* 155.

23 Ontario Law Reform Commission, above n 20, 109.

24 For a description which may now be out of date, see The Senate Standing Committee on Legal and Constitutional Affairs, *Checks and and Imbalances: The Role of Parliament and the Executive* (1993) ch 4.

25 See the Lord Chancellor's Department Discussion Paper, *Access to Justice – Civil Fees* (1997) <http://www.open.gov.uk/lcd/consult/civ-just/fees.htm>.

26 *The Canberra Times* (21 September 1998) 3.

27 For an introduction to these ideas, see S Bottomley and S Parker, *Law in Context* (2nd ed, 1997).

28 See pp 37-38.

29 See generally the discussion in ALRC, above n 3, para 5.21 ff.

30 (1993) 116 ALR 625.

31 Ibid, 629.

32 (1997) 141 ALR 353

33 See the argument that these duties now exist in DA Ipp, 'Lawyers Duty to the Court' (1998) 114 *Law Quarterly Review* 63, 95-98.

34 ALRC, Issues Paper 23 (1998).

35 See <http://www.austlii.edu.au./conferences/techjust/>.

36 See generally ALRC, above n 3, ch 6.

37 See JS Kakalik, T Dunworth, LA Hill, D McCaffrey, M Oshiro, NM Pace, ME Vaiana, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, (RAND, 1996) <http://www.rand.org/publications/MR/MR800/>.

38 Judicial Conference of the US, *Final Report to Congress on the Civil Justice Reform Act 1990* (1998).

39 See ALRC, above n 3, para 7.77; Woolf, above n 17, para 7.

40 See The Lord Chancellor's Strategy for Implementing Lord Woolf's Review of the Procedures of the Civil Courts, 'The Way Forward' <http://www.law.warwick.ac.uk/woolf/wayfwd.html> para 15.

41 See Woolf, above n 17, ch 2.

42 The history of the idea is described in ALRC, *Alternative or Assisted Dispute Resolution*, Background Paper 2 (December 1996) ch 5.

43 For a discussion of one such vision see Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (1996) ch 4. See also the Ontario Law Reform Commission, above n 20, para 1.3.

44 See the two articles by AAS Zuckerman, above n 22.

45 For an expanded discussion of the parallel private courts idea, see S Parker, 'A Case for Private Courts' (Appendix 1).

46 See Parker, above n 16, ch 1.

47 Ibid. In some respects, Parker's report continues and expands the material in the Access to Justice Advisory Committee Report, *Access to Justice: An Action Plan* (1994) ch 15.

48 In particular, *White Industries v Flower & Hart* (1998) 156 ALR 169.

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Appendix 1

A Case for Private Courts*

INTRODUCTION

This article is a contribution to the continuing debate about how to improve access to civil justice in Australia. It is intended to stimulate argument and prompt us to examine our preconceptions about courts. Even if the ideas discussed below are rejected, it will have served its purpose if it has helped readers to clarify in their minds what is fundamental about courts and what might be changed. The first draft was delivered as The Martin Kriewaldt Memorial Address under the title 'Thinking Again About Courts in a Liberal Democracy'. This title was partly chosen so as to preserve the element of surprise when unleashing on an unsuspecting audience a suggestion for a private civil court system that would operate in parallel with magistrates' courts and intermediate courts. It was also to emphasise that debates about reforming the court system are *political* debates, as well as legal and institutional ones. The values of a liberal democracy, including the ideal of the Rule of Law, impose some outer limits on what can safely be contemplated. On the other hand, these values require examination and interpretation. The scope for reform might be wider than initially supposed.

What follows is intended to be easily readable and controversial, reflecting its origins as a paper intended for oral delivery. Particular aspects will be developed in future work. The article begins by suggesting that we have three sets of problems that are related in complex ways to institutionalised attitudes or 'mindsets'. I go on to suggest that we should adjust our ways of thinking so as to allow for the contemplation of private courts. I give a description of how a system of parallel private courts might work and then deal with some objections to the idea. It will become apparent that the idea of parallel private courts is more relevant to States and Territories than to the Commonwealth jurisdiction.

* Stephen Parker. An earlier version of this paper was delivered by Professor Parker as the Martin Kriewaldt Memorial Address at the Supreme Court of the Northern Territory on 14 August 1998.

Finally by way of introduction, I have no particular predisposition towards 'privatisation'. The ideas below are not the result of a doctrinaire adhesion to reducing the scale of public institutions. Rather, they stem from an intuition that unless some radical change is at least considered we will be enmeshed for years in inquiry into the judicial system without any great optimism that the situation will be improved.

PROBLEMS

We have three sets of problems; to do with access to justice, public perceptions of courts and predicting the effects of change.

The problem of access

We are said to have a crisis of access to civil justice. The word 'crisis', or a functional substitute, has been used by former Chief Justices, other senior members of the judiciary, political figures and leaders of the legal profession. There are many judges who will say that they could not afford to be litigants in their own court and, as one should with clichés, they would avoid litigation like the plague. It is unnecessary to labour this point. The problem of access to justice, and its components such as cost, delay, complexity and cultural barriers, are not seriously disputed, as far as I am aware. The problem does need to be *stressed*, however, because its extremity may lead us to contemplate solutions that would otherwise have been beyond the pale.

The problem of public perception

There are significant adverse perceptions of the courts in the community. I recently concluded a research project on behalf of the Australian Institute of Judicial Administration into public perceptions of the courts' facilities, processes and services. The report, *Courts and the Public*,[1] attracted some predictably sensational publicity and a little judicial resistance. Much of the media coverage omitted to mention key findings in the report that Australian courts fare reasonably well by international standards and that there have been significant improvements in recent years. Nevertheless, the views of 'the public', as divined from qualitative fieldwork, were remarkably clear and consistent. We conducted lengthy interviews with 50 people who were representative of court users around Australia. We spoke to peak commercial bodies, court support workers, community legal centres, legal aid authorities, legal professional bodies, the police, prosecutors, victims of crime associations, government officials and various others. We also spoke with 50 people *in* the courts, from Chief Justices to Sheriffs, Chief Executive Officers to registrars. Although there was some recognition by our public group that improvement is under way, their responses were by and large highly critical of the courts. They contrasted sharply with the courts' own image of themselves, as reflected in our 50 interviews with court personnel. Although there are exceptions and varying degrees, overall it seems that Australian courts have failed to develop a reflex of putting themselves in the shoes of people who come into contact with them in one capacity or another. They have also failed to convey to the public at large what courts are there to do and the limits they work within.

1 Stepher Parker *Courts and the Public* (Melbourne: Australian Institute of Judicial Administration Inc, September 1998).

To be clear, this research was about the perceptions of people dealings with courts. It was not a public opinion survey about the justice system, nor was it a litigant satisfaction study. Australia has not yet had a national public opinion survey of the former kind. Some small-scale litigant satisfaction studies have been carried out that tend to show quite a high degree of satisfaction among litigants. These are, however, of litigants who went through to an outcome, they were not people who had been frightened off from litigating or who had abandoned their case or defence. Nor were they witnesses, jurors, visitors to court or people making inquiries.

The problem of adverse public perceptions may be dismissed by some as mere 'consumerism' but it goes right to the heart of the justice system we operate. The justice system in liberal democracies like Australia relies ultimately on public confidence. In the absence of a civil militia or religious fundamentalism, neither force nor dogma is available to shore up respect for the courts. Rather, they have to win the consent of people. Despite the obvious desire within the courts for improvement, I doubt that mental hygiene alone will work. A more bracing influence is required.

The problem of prediction

The 'unknowns' associated with fundamental reforms are too complicated for us to predict or even process mentally. Court procedure is tied in to multiple arrangements outside the courts. It is related, for example, to the training, organisation and culture of lawyers, to the mode of legal reasoning, to the preferences and behaviour of litigants, and to wider social and economic forces and ideologies. This is also the case of jurisdictions that have inquisitorial systems. One international scholar has suggested that court procedure can tell us something about the dominant values in a society, about the role of the state, the authority of government and the place of the individual: so far-reaching is the relationship between procedure and the world outside the court building.[2]

We understand so little about the nature of this relationship that we cannot predict what any major change would mean for litigants, for the profession, for the economy, for government or society, nor how their behaviour would change and act back upon the court system. By 'we' is included governments, courts, law reform commissions, social commentators, authors of self-published populist critiques and academics. No one knows.

To a scientist pursuing a new theory, or a manufacturer developing a new product, the situation would call for pilot projects, experimentation and market testing, but there are limits to what a responsible government or court can do in this regard. The product is justice, not a new brand of cosmetics, and one of the central values of procedural justice is the equal treatment of all who come before the court. We cannot give a controlled sample of litigants a placebo. We cannot use unemployed actors wearing wigs and gowns and trick people into thinking they are judges. Nor is the right answer to a civil dispute waiting to be found in a sealed envelope somewhere, but revealed

2 M Damaska, *The Faces of Justice and State Authority: A Comparative Approach the Legal Process* (New Haven: Yale University Press, 1986).

only by the best procedure. The answer is what a court decides, whatever the procedure.

To some extent, differences in procedure and approach between Australian jurisdictions offer a limited form of laboratory, and one which is under-utilised because of the dearth of research in the area, but these differences between jurisdictions have not been designed for experimental purposes and there is in fact pressure towards *uniformity* across jurisdictions.

These three sets of problems, to do with access to justice, adverse public perceptions and the unknown effects of change, are inter-related. They are also related, in a complex fashion, simultaneously as cause and effect, to some *mindsets* we have.

MINDSETS

The adversarial versus inquisitorial system mindset

We seem to have difficulty in escaping from the idea that in any really major reform we have to choose between 'the' adversarial system and 'the' inquisitorial system. At the level of generality that this is often debated the comparison is in fact useless.

Adversarial systems differ one from the other, as do inquisitorial systems. We have no more basis for choosing, say, the Belgian approach to litigation than the Belgians have for choosing between the English and the American. Also, each system is embedded in professional, social, economic and political arrangements and could not be dug up and transplanted with a different one without enormous cost and risks. It would be ludicrous for us to resolve to adopt the Belgian system by, say, 2010 and start work now copying their law schools, their admission requirements, their method of selecting judges, their legal reasoning processes, their constitutional protections for judicial independence (if any) and so on. Setting a date for changing over to driving on the right-hand side of the road would be simple by comparison. The Belgians themselves might discourage us, just as we might discourage them if they made the equivalent decision.

The adjudication versus ADR mindset

When we think of alternatives to judging, we think of procedures like mediation and conciliation. The choice is thought to be between an imposed decision or one agreed through a consensual procedure. We tend *not* to think of new ways of adjudicating or of mixing consent and coercion even though our knowledge of litigant satisfaction, which is admittedly limited, suggests that dignity and fairness may be regarded more highly by litigants than the mere fact of agreement.

The State monopoly mindset

We tend to think that, with some exceptions at the margins, the State in a liberal democracy must have a monopoly over the delivery of justice. The broad reason *why* the State is centrally connected with the delivery of justice is because the State represents the social or collective interest. We have a collective interest in civil justice as well as criminal justice. The courts are a civilised society's substitute for vengeance. If a system were not provided for redressing grievances, then peace, order and good governance would suffer,

let alone the economy. In the superior courts, of course, civil litigation also drives the development of the law itself.

We need to look more closely at this because we may be conflating two separate principles. The first is that the State cannot *abdicate* responsibility for providing a system of civil and criminal justice. The second is that the State must have a monopoly over force or coercion.

These principles are foundations of individual liberty in a liberal democracy. Our freedom of movement and ownership of property can normally only be restricted by an authority that receives its legitimacy from the will of the people acting under constitutional and legal processes. There are, of course, some exceptions. Self-defence must be permitted, because the State cannot be everywhere instantly to protect our person. Physical chastisement of children is permissible in the eyes of those who value family privacy more highly and do not *want* the State to be everywhere instantly. Indigenous forms of punishment might be acceptable, because we can contemplate limiting the geographical or social reach of a liberal democracy for historical reasons. Some also think that private stands, however, that the collective interest requires that the State should have a monopoly over force or coercion and, to ensure legality, must exercise it through its own courts.

The mindset I am referring to is one that adds the *principle of non-abdication* with the *principle of monopoly over force* and somehow arrives at a *principle of State monopoly over justice*.

The 'end-state' mindset

When we think of reform we assume we must have a specific outcome or new model for doing things in mind. This stems in part from the objection to experimenting with justice mentioned earlier. An alternative to end-state thinking involves introducing new processes and catalysts and monitoring closely where they take us. The suggestion about private courts, below, is essentially motivated by a need to stimulate some chemical reactions whilst at the same time keeping the 'guinea pig' objection to an acceptable level.

NEW WAYS OF THINKING

To address our problems and modify our mindsets we must adjust our conditioned reflexes to some degree.

With the *Adversarial versus Inquisitorial mindset*, we need to recognise a *continuum* of procedures joining up two extreme stereotypes. The most important composite variable that helps one decide where to place a particular system along the continuum is, in my view, the degree that the judge or court organisation is involved in formulating and managing the case. Who decides what issues are in dispute? Who decides how the dispute should be characterised legally? Who decides what evidence should be adduced? Who decides how quickly things should move along and when the case is ready for decision? Who questions the witnesses and drives the final hearing?

The traditional answer in adversarial systems has been the parties; in inquisitorial

systems it has been the court. The typical adversarial system externalised or privatised these decisions — and the privilege of paying for them — to the parties. In this light, new techniques of case management and interventionist judging in Australian courts suggests that some of our systems have already moved along the line towards the inquisitorial end.

With the *Adjudication versus ADR mindset*, we can begin to imagine parties being allowed to give informed consent to procedures that will allow for the imposition of a decision they would not have chosen.

With the *State's monopoly over justice mindset* we can conceive of the State regulating procedures that are run outside the State apparatus — including procedures that impose decisions — provided the enforcement of those decisions (that is, the use of force or coercion) is always reserved to the State itself.

With the *end-state mindset*, we can imagine arrangements that will allow adjudicative bodies *themselves* to settle on a point in the interventionist continuum between adversarial and inquisitorial extremes, but doing so on the basis of experience built up over time about the preferences of litigants rather than on the basis of *ex ante* thinking. The point on the continuum might also differ according to the kind of case, the parties or some other relevant circumstance. In effect, we can devise a framework which allows for the reaching of a point on the continuum without stipulating in advance what that point is going to be.

If we achieve this we would be emulating the kind of thinking that large organisations are increasingly adopting in a fast-changing world. Strategic planning used to be about envisioning now where one wants to be at a certain time in the future and then developing strategies for getting there (*ex ante* thinking). This is giving way to ideas of strategic intent, multiple plausible scenarios, and other unattractive terminology, where the organisation confronts uncertainty and develops flexible processes for taking advantage of it without ever engaging in a form of crystal ball-gazing that locks one in.

A POSSIBILITY

Imagine private courts, always operating in parallel with the public courts of inferior jurisdiction, never to their exclusion, as the engine driving the process; as the catalyst.

Before describing one possible vision of parallel private courts, bear in mind that a number of procedures, old and new, already emulate some or all of what the system might look like. Most notably, there is arbitration. Essentially, in common law jurisdictions, this is a consent-based, private, profit-driven process of imposed decision-making, which allows for recourse back into the public court system by way of judicial review or appeal.

In addition, many jurisdictions have power to order the transfer of some or all of an action to arbitration, even in the absence of the parties' consent.

This power has existed since the late nineteenth century and is in some respects an Australian invention. As a matter of discretion, some courts have been reluctant to order referral to arbitration without consent because the consequence is to impose the costs of the arbitration on the parties when the justice system is supposed to be funded by the taxpayer to decide cases. Nevertheless, it has long existed and has re-appeared in an ADR disguise, for example in Queensland, where the courts can refer a matter for case appraisal without the consent of the parties. Under this system, which has counterparts elsewhere, case appraisers must be barristers or solicitors of five years standing, must satisfy the Senior Judge Administrator of their suitability and must notify the registrar of their fees. Similar arrangements apply in the lower courts. Essentially, litigants can be required to go through what may be a mini-trial and have the privilege of paying for it. Any or all of the parties may challenge the case appraiser's decision, in which event it goes to trial in the normal way (that is, it rejoins the public court system) but there may be a greater than normal costs penalty if the challenger does not beat the case appraiser's award.

It is also relevant to observe that we have seen filing fees in Australian courts moving upwards in real terms so that litigants are slowly being drawn towards full-cost recovery. Initially the fees are paid by the plaintiff but the liability will be shifted to the defendant under the costs indemnity rule if the plaintiff wins and the defendant complies or has assets. This arises later because, rather like the under-cover privatisation of our public universities through the Higher Education Contribution Scheme and full fee-paying options, we may have a covert form of privatisation of courts but without the level of consumer sovereignty typically associated with private markets (in theory). A system of parallel private courts of inferior jurisdiction might actually offer advantages over this trend.

Imagine, then, private civil courts operating in parallel with the magistrates' and District Court. They might be local (although with information technology they might be nowhere specific at all) and they might be confined to certain kinds of matters. They would be established under legislation and there would be regulations about who may operate them. The minimum qualifications for the adjudicators would be prescribed and would require that an adjudicator be admitted to practise law in the jurisdiction or be a former judicial officer in a public court. There would be statutory obligations about natural justice, confidentiality and conflicts of interest but the private court would otherwise have control of procedures, forms and other documentation. Legal practitioners would be subject to their normal ethical responsibilities when participating as an advocate or an adjudicator in a private court. Consortia of practitioners might actually be interested in *establishing* private courts, as might professional bodies.

The jurisdiction of a private court is founded on consent, like commercial arbitration today, but once given there are limits on withdrawal, as with a contract. The consent might be given in a pre-existing agreement, like arbitration clauses in insurance policies and building contracts, or at the time an action is commenced. Private courts could never hear matters going above the upper civil jurisdictional limit of the District Court (or magistrates' court where there is no intermediate court); partly because the Supreme Court will have a crucial role in supervising all courts.

A typical career of a claim might be as follows. The applicant chooses to file the claim in a private court and it is served on the respondent. The respondent may consent to the jurisdiction of the private court, rather like the traditional function of entering an appearance, or may refuse. If the latter, the case is automatically transferred to the magistrates' or District Court, as appropriate. If the respondent accepts the jurisdiction, however, the case stays in the private court but there is provision, on application by either party, for its transfer to a public court, for example on the ground of unexpected complexity or to consolidate the case with another one in the public court. The private court will never have coercive powers (the State has that monopoly) and so if an interim injunction is required the case would have to be transferred.

A case in a private court follows whatever procedure the private court offers, subject to the statutory obligations of natural justice, confidentiality and avoiding conflict of interest. The court might only offer one procedure, or it might have a range to choose from. The procedure might involve the court having inquisitorial functions, so that the court does more and the lawyers do less. This is very likely but the decision would be settled over time by market mechanisms and not by the *ex ante* thinking of law reformers or, worse, legal academics. After disposition, the party with the benefit of the decision can register it with the appropriate public court for enforcement through the normal methods. (The State has the monopoly over force etc). An appeal from a decision of a private court lies to the court that would hear an appeal from an identical case in the public system. There is no difference by that stage. The Supreme Court would also have a supervisory jurisdiction, using prerogative writs or modern equivalents, to regulate the processes of the private court.

The question whether a private court should award costs needs further consideration. There is little research into the effects of the costs indemnity rule (more accurately a principle). It is probably best left to private courts to decide for themselves in the light of what would attract applicants and respondents. Obviously, like the judgment itself, a costs order could only be enforced by a public court. It would seem to follow that the public courts should have power to tax an order for costs in line with their role as courts of review.

What are the advantages of this idea and why does it meet some of the problems discussed earlier?

First, it gives incentives to people to think of new ways of doing things better without those people being judges, who are constrained in what they can say publicly and in what they can experiment with. The private court might operate at weekends or at nights. Its premises will be chosen according to what will attract litigants, as will the information and litigant support systems it operates. Its ambience, language, sensitivity to culture and so on will be set by the search to attract the litigant. It might use paper and electronic documents to minimise physical appearance anywhere. Its adjudicators will be chosen for their expertise or at least aptitude for the kinds of cases the court handles. If there are reservations about the quality or fairness of its decisions, or the way that people are treated generally, that will soon become known. Lawyers, community legal centres, industry organisations, family, friends and colleagues will soon advise applicants not to invoke, and respondents not to consent to, the jurisdiction if the private court has a poor reputation. Private courts will study patterns of refusals by defendants and look for reasons. Subject to questions of privacy, they may also study who is making claims in *public* courts and why they are not choosing their own services. And so on.

Secondly, it allows us to find a point on that continuum of court intervention between adversarial and inquisitorial extremes without legislating for it in advance. If we finish up close to the inquisitorial end, it is because informed choice, over time and in the light of experience, has impelled us there. We do not incur the risks and costs associated with imposed, revolutionary change.

Thirdly, it allows the wider world to adjust. New ideas would surface in the education and training of lawyers, as they are doing (slowly) because of ADR. Professional organisation and culture may have to change. For example, excessive adversarial zeal might be dampened by collective consumer preference, as measured in the choice of private courts, in a way that judges seemingly cannot bring about at present, for various reasons. The qualities we expect in adjudicators, and the expected ranks from which judges are chosen, may also mutate. All these changes will occur gradually and organically.

Fourth, it provides a laboratory that we presently lack, legitimated by the foundational consent of the participants. Public courts (magistrates' and District) will see methods that work and do not work in private courts and may adopt the appropriate ones. Their ideas about consumer-orientation may develop in fresh directions. Supreme Courts, which are above the parallel court system, may also acquire some new ideas. In effect, it provides the deliverers of civil justice with the incentive and information to become 'learning organisations', to borrow an expression from organisational theory and public sector management.

SOME OBJECTIONS

These are not ranked in order of weight, although the first deserves the earliest discussion.

Judicial independence will be compromised

At present we have constitutional or legal protection of the tenure and terms and conditions of judicial officers. The protection is less extensive and entrenched in some States and Territories than in the Commonwealth, but in all jurisdictions it is better than none. There would be absolutely no diminution of protected judicial independence in the public courts if this model of private courts were implemented. It might even be appropriate to use the occasion of legislation concerning private courts to *upgrade* the protection for judicial officers in the public courts.

The ultimate purpose of judicial independence is to promote impartiality of decision-making. Provided there is sufficient information about private court proceedings and decisions, as relayed through the many networks that have dealings with the courts, private courts will fail if there is reason to doubt their impartiality. Provided litigants in private courts are only there because they have consented, and there is always a 'constitutional' alternative, the dangers are diminished but never removed. Although rights of appeal would never be curtailed, there is a risk of undetectable bias that may be greater than in the public courts. Litigants will have to decide whether to take that risk.

The discipline of public scrutiny may be removed

I am not sure whether private courts should be allowed to sit in private. Privacy might be an incentive for both parties to use them. In theory at least, the possibility of public scrutiny by spectators and the media is a further prop of impartial decision-making. At the moment, the level of actual scrutiny of civil cases in inferior courts is low to the point of non-existence. On balance, informed consent to privacy should trump the publicity card.

Lawyers will lose

Litigants will only use private courts if there is an advantage in their particular situation. One very likely advantage is that whilst the court costs could be much higher, in order to fund the court, lawyers' costs could be much lower. This is the logic of a move towards an inquiry model. Resources are channelled to the courts and away from the lawyers. The prospect of lawyers losing work will not keep many members of the public awake at nights, but it would not necessarily happen anyway. The volume of litigation might increase and compensate for the lower income per case. Because this too could be seen as an objection, it is my next point.

It would encourage hyperlexis

Hyperlexis is the condition or syndrome of resorting too often to litigation. The United States is said to suffer from it, chronically and acutely. The hyperlexis claim is rarely analysed in detail and had been doubted by some leading scholars who say that filing rates are no higher than one would expect, and not grossly out of line with Australia, Canada, Great Britain or New Zealand, given the respective populations and Gross Domestic Products.[3] The *argumentum ad Americanum* may actually be flawed at the outset.

3 See D Luban, 'Contingency Fees' in S Parker and C Sampford (eds), *Legal Ethics and Legal Practice* (New York: Clarendon Press, 1995) 98 ff, and sources cited therein.

The general response to this objection, however, is that we cannot have it all ways. We cannot complain about the barriers to litigation and then complain about 'too much' litigation if the barriers are lowered. In any event, as a society governed by the Rule of Law if we do not want certain kinds or levels of litigation we should deal with that openly, by removing or restricting causes of action, not by declaring that rights exist and then making it hard for the less well-off to assert or defend them.

An off-shoot of hyperlexis is what might be call *frivolexis*; that is, the commencement of hopeless, spurious or abusive claims, or the entry of equivalent defences. Under this proposal, if a frivolous claim is made in a private court then the respondent need only object to the jurisdiction and it goes to the public court. To the extent that public courts are *presently* effective to deter such claims, parallel private courts do not change the situation. As for purely tactical defences, it is up to the private courts to develop summary judgment procedures that attract applicants, within the confines of natural justice principles. (Arguably, public courts at the moment should make more use of summary judgment, through a new test that seeks to weigh the arguability of the case against the size of the claim — ie, a proportionality calculus — rather than, as at present, considering only slight arguability.) Over all, *frivolexis* is a problem that already needs to be addressed and private courts do not add to it.

The retention of a State monopoly over justice at Supreme Court level is an essential part of the idea, along with the principles of non-abdication and monopoly on force at all levels. There is no logical reason why a domino effect *should* be set in motion but, because there are independently good reasons for the constitutional entrenchment in the States and Territories of the Supreme Court as a court of general and unlimited jurisdiction, it would be appropriate to take the opportunity for such entrenchment and ward off this fear.

This is a prelude to complete privatisation of civil justice

There remains the possibility that the civil jurisdictions of magistrates' courts and the District Court would wither away so that, de facto, there is privatisation of first instance civil justice for the majority of causes of action. If this were because of litigants' preferences for private courts then it is not State abdication, it is citizen choice. If, however, it is because executive governments so undermine the inferior public courts that private courts are made artificially attractive by comparison then that is a problem, although possibly less of a problem than today's creeping filing fees with *no* choice.

There is no minimum value for a claim in a Supreme Court, although there may be a costs penalty on a plaintiff who makes the wrong initial decision. That costs penalty might need revisiting, if these ideas were implemented, in line with the principle that Supreme Courts are fundamental to the integrity of the system, both public and private. If, however, people did start making

small claims in Supreme Courts in any volume because of the running down of the public lower courts, this would bring about pressure for a revival for the inferior courts' civil jurisdiction on efficiency grounds. Provided the Supreme Courts are inviolate, the system is self-correcting over time.

The High Court will strike down legislation permitting private courts

There is no suggestion that private courts should be invested with the judicial power of the Commonwealth. If we can have valid arbitration legislation and Rules of Court empowering compulsory arbitration and case appraisal, it is hard to see why legislation that seeks to improve upon these procedures and extend the benefits to ordinary people and small businesses should be invalid.

The development of the law would be inhibited

Courts of inferior jurisdiction do not set precedents and so there would be no change to the situation. One could appeal to a Supreme Court from private and public courts alike and thus potentially bring about a precedent. If the volume of civil litigation rises, there is more first instance decision-making to fuel appeals. If anything, there would be more development of the law. If that invokes the reverse objection that there would be *too much* development of the law, then one returns to the counter to the hyperlexis objection.

On hearing these ideas, one might recoil in horror but it is important to end as we began. We feel beset by problems. Litigation is said to be too expensive, too slow, too uncertain, too off-putting and so on. The trouble is we have no adequate basis for assessing these claims. Something is only too expensive if we have an idea of what it *should* cost; too slow only if we have an idea of the appropriate pace, too formal only if we have an idea of how it should be, too intimidating if we have an idea of friendliness, and so on. We need to frame our criticisms more exactly and relate them back to some first principles about the kind of society we believe we are. The parallel private court idea offers a framework for assessing them. The parallel private court idea is as much a *mirror* as a proposal. It reflects the present back at us and makes us think about it more precisely; what we like, what we do not like, and what might not be so bad after all.

Appendix 2

Courts and the Public[1]

THEMES, FINDINGS AND RECOMMENDATIONS

What improvements are necessary to enhance communication between the public and the courts?

The themes, findings and recommendations that follow mostly address this question directly. Nevertheless, as is always the case, new questions and observations became apparent during the course of the research. These are also dealt with in the present chapter.

At various points in this study qualifications or provisos have been expressed about methodology and what can safely be inferred from the evidence. It is appropriate to group together the main ones at this point.

1. The interviews and discussions we engaged in provided what may be a unique collection of views about and insights into the perspectives, images, values and priorities of Australian courts. The fieldwork did not, however, amount to surveys or polls. Even if the number of respondents had been sufficient to yield statistically valid results the interviews were semi-structured and they did not all cover the same ground. This report is therefore an interpretation of interpretations. The findings, themes and recommendations below are the result of an analysis of interview transcripts and notes, the available literature and the author's own reflection. Whilst not resiling from what is said here, other research on a larger scale with more standardised questions or by other researchers might lead to different conclusions. At the least, however, the findings and themes are suggestive of further enquiries that need to be made.[2]

2. Where possible during the project we attempted to record our *personal* observations of the courts, and not simply rely on our interviewees' claims. When visiting a court to talk to someone in this project, or as part of other

1 From Stephen Parker *Courts and the Public* (Melbourne: Australian Institute of Judicial Administration, 1998) ch 7.

2 See S Wain 'Public Perceptions of the Civil Justice System' in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies of the Civil Justice Review* (1996) for some of the strengths and weaknesses of qualitative studies about the justice system. See also D Hensler 'Researching Civil Justice: Problems and Pitfalls' (1988) 51 *Law and Contemporary Problems* 55, 62-63 for the tongue-in-cheek comment that even though case study material does not generate regression models 'it is important for researchers to recognise the continuing importance of qualitative data in civil justice research.'

work, we made a point of arriving early or staying on and looking around the court, noting facilities, signage and so on. Some of what follows is based on direct observation but naturally not in the circumstances of being a participant in a court process.

3. An attempt has been made to bear in mind that many of the initiatives in this area are recent. As has been noted at several places in the previous chapters, there is often a time-lag before people learn about reforms or have them at the forefront of their mind. Our courts and public groups are not necessarily occupying parallel universes. To some extent at least, the latter group may simply not have caught up with, or been impressed by, what is undoubtedly happening in the courts.

4. We talked to a wide range of people but did not, even if it were possible to do so, attempt to weight them numerically according to their representation in the court system.

5. In many of the themes and recommendations that follow, the interests of the financial and business communities do not seem to feature prominently. To some extent this is because their concerns seem to cluster around only a small number of issues that are relevant to this project, such as the need for routine user feedback in courts. We learned of other concerns in the financial and business communities about the decisions that courts make and the procedures they follow, but these were not the focus of the present research.

6. The Australian court system is dispersed and complicated. Courts themselves differ markedly from one another in their mission and users. Research on this scale and budget cannot possibly grapple fully with this complexity. There has had to be an element of broad brush.

7. So much is happening in Australian courts than any snapshot is out of date before it has even been developed. Furthermore, the project lacked the resources and time to provide an exhaustive account of everything that is happening. The developments included in the report should be treated as illustrations, although we think representative ones.

8. There was a problem in gaining access to all the relevant material. A considerable amount of it is 'grey literature'; not adequately catalogued, if at all, and confidential or semi-confidential.

9. As with much qualitative research with social policy dimensions, the values of the researchers can protrude. The expansion of qualitative research in many disciplines since the mid 1980s, based on a belief in the value of this approach, has been described as 'phenomenal'.[3] Qualitative data enables one to determine chronological flow, link events, identify people's motivations, generate and revise conceptual frameworks and provide rich descriptions of complex processes in a way that is beyond the capacity of quantitative research. Having said that, one of the limitations of this kind of research is the risk of researcher bias. The author acknowledges a predisposition in favour of the consumer-orientation of courts but he hopes and believes he kept an open mind to the evidence through the study....

3 MB Miles and AM Humberman, *Qualitative Data Analysis: An Expanded Sourcebook*, 2nd ed, (Thousand Oaks: Sage Publications, 1994) 1.

Themes and findings

1. The organisation, procedures, facilities, services and overall culture of courts were based traditionally on certain premises, including at least the following. In substantial matters litigants would almost always be represented by competent and ethical lawyers who would tell their clients all they needed to know. Witnesses would be given sufficient briefing by the lawyer for the party calling them to carry out their function in the court. Victims of crime, not being parties in the case, had no interest in the proceedings except as witnesses. Unrepresented litigants and defendants would somehow acquire an understanding of court procedure and terminology sufficient for the relatively minor nature of their matter. The public generally, and the media particularly, would appreciate that participation in the administration of justice was a civic duty that needed no further justification.

Behind these assumptions no doubt lay other assumptions about individualism, autonomy, culture, education, language and the nature of legitimate authority in society. It may also be that 'law' itself did not reach as far into social and economic life as it does today and so the courts of the past could reasonably have in mind a different kind of court user than is now the case.

2. Whether or not the above assumptions were ever wholly adequate, it is clear that they are increasingly false. Litigants in person are found regularly in Australian courts today, even in quite complex first instance and appellate matters. Lawyers, but particularly duty lawyers, legal aid solicitors, prosecutors, and community legal centre staff, may have heavy case loads which substantially curtail their capacity to guide people through the system. (There are also some suggestions, not pursued directly in this research, that many lawyers need to improve their communication skills and time management so that people are better prepared, at an earlier stage, for a court appearance.) Many participants do not seem to understand what is happening to them in a court matter, where they are in the case and what part they are supposed to play. Many participants, whether represented or not, find contact with the court extremely stressful and might only be there because their lives are already in crisis. The interests and physical and emotional health of victims are now given much more importance. Heightened concern for human rights and the situation of disadvantaged groups has led to closer scrutiny of the courts' sensitivity towards difference; especially in the areas of domestic violence and the involvement of Aborigines in the courts. Courts generally are suspected of being intimidating places where one might be left to sink or swim. The very role of courts in the maintenance of a stable society based on the Rule of Law is only dimly perceived by some sections of the community.

In short, whatever the old certainties and however soundly they might have been based, the world of the *modern* courts is a world of shifting patterns of usage, changing laws, constant re-evaluation and uninhibited questioning. Furthermore, the extended reach of law into social and economic life, particularly in family and consumer protection matters, has brought new groups of people into contact with the courts.

3. It is clear that all court systems in Australia are moving in the direction of consumer-orientation and a culture of service. There is, however, uncertainty over the meaning of 'service' for these purposes and over what should count as customer 'satisfaction'.

4. The changes under way in Australian courts are being piloted by dedicated and talented people, inside and outside the courts, who are working in a difficult climate of resource constraint and public scepticism.

5. The progress of Australian courts in the direction of consumer-orientation and a culture of service seems to compare reasonably well with systems in Europe and North America. In terms of a willingness to improve through new technology and experimentation with procedural change, Australian courts are arguably amongst world-leaders.

6. It is clear, however, that some courts or jurisdictions are moving considerably more quickly than others, even after allowing for their different situations, resource levels, missions and users.

7. The changes under way are responses to similar stimuli around Australia and in some overseas countries but they do not seem to have their origin in any single plan, blueprint or initiative.

8. The stimuli include, in particular: (I) shifting beliefs about the way that all large institutions should plan and organise themselves internally for improvement; (ii) new thinking about public sector management; and (iii) a sense that public respect for the system of justice (as refracted through the attitudes of political leaders and the media) is in danger of collapse. An additional stimulus seems to lie in a growing diversity amongst the people who use the courts, especially in terms of ethnic and cultural background and capacity to understand the language and procedures of courts.

9. Australia does not have *a* court system except in limited legal respects (such as through cross-vesting legislation and the investing in most state courts of the Commonwealth's judicial power). It does, however, have multiple hives of largely unco-ordinated activity. This is even manifest *within* some states, let alone across jurisdictional boundaries.

10. There is no reliable mechanism for identifying and sharing best practice. This has the consequence that many wheels, of differing radius, are repeatedly re-invented; sometimes by different courts within the same tier and jurisdiction.

11. One contributory factor to this lack of system is the absence of common performance indicators or standards that will allow for valid comparisons across courts with similar missions. This seems to nourish a belief within courts that the problems facing them have more unique qualities than may objectively be the case.

12. Another, related, contributory factor is a dearth of statistical information about who uses the courts, how they use them, the unit cost of different kinds of case and the time taken.

13. Differing models of court governance may contribute to an unevenness in the movement towards consumer-orientation but this needs further

investigation. In the early period of the research we had a working hypothesis that the governance model might be a key variable. It still seems to be an important issue but our evidence was too limited and contradictory for us to draw conclusions.

14. An incipient culture of continuous improvement is evident in Australian courts but it is not matched by a culture of subsequent evaluation. Few of the initiatives we learned about have had built into them at the outset any obvious provision for later evaluation. Where it has happened, for example with the *Evaluation of Simplification of Procedures in the Family Court*, the evaluation seems to have been useful and forthright.

15. Some courts do not seem to have given systematic attention to the question of who their public or communities are. This includes some courts that have clearly been through planning processes to identify their mission and how they will carry it out. Whilst we would have thought that an indispensable component of strategic planning is an accurate sense of who is being served, the evidence of that sense was not always apparent.

16. The absence of accepted, standard terminology may be a factor. 'Client', 'customer', 'user', 'visitor', 'public', 'stakeholder' are used in varying senses within Australian courts. This might be a trivial point, or it might indicate some fundamental uncertainties.

17. The commitment to obtaining and learning from user feedback varies across courts and jurisdictions, both in its extent and depth. There is no evidence of *routine* seeking of user feedback, or even a mechanism for obtaining it. Australia seems to lag considerably behind North America in this regard. Routine opportunities to provide feedback on their encounter with the court were supported by our Public interviewees.

18. Australian courts are difficult places for infrequent users to navigate around. Even regular users face unnecessary barriers. These navigational problems are found at all levels: being put through on the telephone to the appropriate registry (except where a Call Centre operates), working out where to go once through the main door, understanding notices and other directions, understanding what has been decided or ordered.

19. Some Australian courts do not appear to be safe places. At the least, there is a perception of danger or intimidation in the minds of some users, both staff and non-staff. In some courts, people who are deeply antagonistic to each other are closely confined together for lengthy periods.

20. Some courts erect 'boundaries' around themselves to an extent greater than is necessary for the preservation of judicial independence. There is a perception amongst some users of the courts that some courts, and some judges in particular, do not see themselves as part of a system where changes in one component have implications for another. This may diminish their awareness of the consequences of their actions. For example, some cost-cutting and efficiency measures within the courts might only move the cost elsewhere, to another budget. Over-listing of cases, which was repeatedly

mentioned by the Public interviewees as a problems, sometimes only externalises costs to people who are kept waiting, or whose cases are not reached, such as lawyers, prosecutors, police, witnesses and litigants, even though it might be rational use of resources from the courts' perspective.

21. Unnecessary boundary-drawing may also inhibit the courts' capacity to link other organisations that might be able to help the users of courts with other aspects of their problems. Courts are compared unfavourably with tribunals on this subject.

22. Australian courts differ markedly in the messages they send out, intentionally or otherwise, about their openness to members of the general public. In few courts does it seem to be made clear that citizens have a right to be present in most instances and that their presence is welcome.

23. Court Support Volunteers and Workers provide a most valuable service to court users in many courts but it is extremely patchy around the country and within particular jurisdictions. They could provide a much better service with appropriate resourcing and co-ordination. There are strong arguments for extending their use to more courts.

24. Australian courts generally fail to satisfy an elementary requirement of a consumer-conscious organisation: to have and make known that they have a clear and responsive system for dealing with complaints.

25. Those working within the courts seem generally to be more satisfied about the level of service they offer to users of the courts than do the users themselves. In broad terms, our Courts group felt that courts were doing quite well in serving the needs of their public, although there was an acknowledged need for improvement. Our Public group generally felt that courts were doing quite badly and that reforms were not proceeding broadly enough or with sufficient urgency.

26. There seems to be a widespread perception that the judiciary as a group constitute an obstacle to desirable change. This is coupled with, and possibly related to, a perception that some courts are organised largely for the benefit of judicial officers. Of all the groups discussed in the interviews, judicial officers emerged as the least sensitive to the needs of users. There appears even to be a degree of antagonism towards the judiciary from court staff and public servants and this must presumably lead to tensions, or a degree of seething in silence, that cannot be described as creative. This is a broad generalisation, of course. There are Chief Justices, Chief Judges and other judicial officers who are widely regarded as amenable to change and who in some respects are treated almost as heroes. This enthusiasm for some members of the judiciary might be conditioned in part by a pronounced lack of enthusiasm for others.

27. Courts need to continue working on issues of internal culture and how they see themselves. In rather simple terms, they need to consider whether they are organised as 'Judges and Co' or along the lines of a 'whole court' approach where the focus of the organisation is all on doing justice

whilst servicing the public. The issues are complex and an academic lawyer should not presume to advise. It may be that no judicial officer will believe that this is relevant to her or his own court. From an outsider's perspective, however, it is quite clear that some things need thrashing out in some courts.

28. Relationships between courts and the media seem to vary. In most cases, the public interest requires that they be improved.

29. Whether for reasons of resources or attitude, some courts give little or no assistance to the media in helping them to provide accurate and balanced summaries of cases. To the extent that this contributes to inaccurate or unbalanced reporting, problems in the relationship between the courts and the media are thereby exacerbated.

30. Media Liaison Officers provide a valuable service. Their role was universally approved by our respondents. It is possible, however, that they have necessarily tended to become reactive. Courts are essentially places of conflicting interests and claims, and the media will always be hungry for material about them. The demands on the time of Media Liaison Officers will expand to fill the space available unless their role and responsibilities are reconsidered.

31. The court system needs to think about proactive ways of educating the public about the role, function and activities of Australian courts. It seems that there is considerable public receptiveness to attempts to convey accurately what courts do and why they do it.

32. Courts seem generally to be compared unfavourably with tribunals when it comes to consumer issues. There is thought to be a greater likelihood of client focus in tribunals, as evidenced for example by leaflets, staff availability, directions hearings, explanations of the next step in the process and what documents are required.

33. There are reasons to believe that without continuing action a sense will grow that Australian courts are becoming increasingly irrelevant to society. Remarks to this effect were made by a number of respondents although it is not always clear what was meant. It seems, however, that self-help, 'lumping it' and resorting to inappropriate forms of alternative dispute resolution or extra-curial decision-makers were being predicted.

Recommendations

Against the background of the above themes and findings, but without tracking them sequentially, these are the recommendations of this study. They are set out in groups, beginning with specific consumer-focused measures and moving towards improvements to the system as a whole.

Promoting better communication and the better identification of needs

Recommendation 1: A communication plan

All courts should have, and keep under review, a Communication Plan that sets out in broad terms the different mechanisms by which one-way and two-way communication between the court and its publics are to take place. These might include court users' forums, feedback forms and user surveys. In addition, the strategies mentioned in the next two recommendations should be included as components of the Communication Plan.

Recommendation 2: An information strategy

All courts should have, and keep under review, an information strategy that sets out clearly the different mechanisms by which information is to be given to the court's publics. These might include web sites, summaries of judgments in prominent cases, charters and plans, annual reports, leaflets, brochures, fact-sheets, newsletters to addressees on a mailing list, videos, help-desks and information sessions. Opportunities should be given to allow routine feedback by the public about the adequacy of the information and the way it is communicated.

Recommendation 3: A Community education strategy

All courts should have, and keep under review, a community education strategy that sets out clearly the different mechanisms by which the court aims to inform the public about the role of courts in the community. These might include judicial outreach programmes, school and community visits, open days, public meetings, pamphlets, and juror education programmes. The majority of jurisdictions in the United States have had one or more of these components in place for some time and a systematic review of them may be useful.

Recommendation 4: Media Liaison

Media liaison officers (or equivalents) should be appointed in all jurisdictions and appropriately resourced. It would seem impossible for a single person to adequately cover all tiers of a state jurisdiction.

In cases where a decision or sentence is to be handed down that is likely to excite public controversy, the judicial officer should consider, where practical, providing the media liaison officer with a statement about the case for use, if thought appropriate in the circumstances, in conveying a fair summary to the public. The purpose of this is neither to encourage nor discourage the controversy but to inform any debate that does occur.

Recommendation 5: Communication between arms of government

Communication between the judicial and the political arms of government needs to be improved. Executive governments, as litigants and policy makers, are amongst the courts' publics. Legislatures, as appropriators of public funds and law-makers, also have a legitimate interest in the work of the courts. Measures recommended by the Judicial Conference of the United States in its *Long Plan for the Federal Courts* in December 1995 should be considered for adoption, with the necessary modifications to suit Australian conditions. For example:

- The Chief Justice of the High Court might deliver the State of the Judicature Address annually rather than biennially and not direct it, in an immediate sense, only to the legal profession;
- Procedures might be developed, for the purpose of avoiding future tension or unnecessary litigation, whereby the judiciary can alert scrutiny of legislation committees (or their equivalents) in Australian legislatures to

avoidable problems in the drafting of legislation that are not related to policy decisions about content;

- Periodic meetings might be held between representatives of the judiciary, legislatures and executive governments, perhaps modelled on the workshops currently organised by the Judicial Conference of Australia, to inform each group about the perspectives of the other and to iron out avoidable differences.

Recommendation 6: Gauging public satisfaction

In addition to court user surveys, courts (individually or in consortium with other courts) or the administering government departments should conduct community perceptions surveys with sufficient frequency and stability of methodology to enable changes in opinion and satisfaction to be monitored over time. In view of the difficulty that people understandably have in distinguishing between State, Territory and Commonwealth courts, co-operation between governments or jurisdictions might be required.

Recommendation 7: Complaints

All courts should state clearly the mechanisms by which complaints about the service of the court can be made by court users and how those complaints will be dealt with. 'Service' for these purposes does not include the content of decisions made by the court in interlocutory matters or at a trial.

Environment, facilities and support

Recommendation 8: Safety

All courts should have, and keep under review, a Safety Plan so that attention is focused on the current facilities for assuring the safety of all court users and ways of improving them. In approaching the question of safety, the reasonable apprehensions of court users should be kept in mind. An indispensable component of a Safety Plan is the requirement that prominent signs are in place, in appropriate languages, advising people where to go or who to contact if they feel unsafe.

Recommendation 9: Court support

This research lacked the authority and resources to review comprehensively the current levels of provision of court support. Court support workers provide a most valuable service, not only to parties, witnesses, victims and their families but also to the reputation of courts and the justice system at large. A national inquiry is recommended to assess the current situation and suggest improvements. Alternatively, jurisdiction-based inquiries, using similar methodologies, should be carried out. What matters is that a national picture should emerge.

Recommendation 10: Unrepresented parties

All courts should have Litigants in Person Plan that deals with every stage in the process, from filing through to enforcement, or the equivalent in criminal matters. This is recommended so that systematic attention is given to the issues. As part of the Litigants in Person Plan, guidelines should be prepared by the judicial officers so that best practice is identified and shared between

them about how to conduct a hearing where one or more of the parties are unrepresented.

Recommendation 11: Information technology

Information technology offers the prospect of continuing efficiency gains in Australian courts that can free resources for improving other services and communicating with the public. As a *means* of communication with the public, however, heavy or exclusive reliance upon new information technologies should not be placed unless the court is satisfied that its relevant publics have reasonable access to, and facility with, computers. Even then, courts should remain aware that some sections of the community already find them intimidating and alien places. It is important that, in embracing the possibilities of new information technologies, groups who are already disadvantaged should not be left further behind. Furthermore, in considering changes that would replace a physical facility, the symbolic importance of a court as a civic institution should be borne in mind.

Recommendation 12: Access to the court by telephone

Courts with multiple sites should consider whether improvements can be made (for example through the introduction of a Call Centre) in the ease of accessibility by telephone.

Recommendation 13: Referrals to other agencies

A referrals strategy should exist in all courts under which responsibility should be allocated to an appropriate person or body for the maintenance of up to date information about local advice and support services in the community that may be relevant to the likely users of the court. This information should be made available to court users and a record or database of referrals should be maintained.

System-wide recommendations

Recommendation 14: Sharing best practice amongst the courts

There should be an independent, central site with the resources and authority to survey what is happening in all Australian courts and, building upon a deep understanding of the nature and functions of courts, facilitate and monitor change. This might take the form of a national body or the secretariat of a consortium of courts or Departments of Justice. It would be a repository of data about courts, an influence in the production of comparable data and a clearinghouse of best practice on relevant issues. These issues include: performance indicators; best methods for identifying user and public opinion about the processes, facilities and administration of Australian courts; methods for determining the needs of the relevant publics; channels of communication with those publics; and programmes for educating the public about the work of the courts.

Recommendation 15: Consultation with the judiciary

The Council of Chief Justices and the Judicial Conference of Australia should be encouraged to continue their active role in promoting greater communication between Courts and the Public. Only with their involvement will concerns about judicial independence be properly discussed and resolved.

Recommendation 16: Benchmarking

Benchmarking exercises between courts should be supported, either by the body mentioned in recommendation 14 or separately, as catalysts to the exchange of information and best practice, in part to compensate for the fragmented and unsystematic character of Australia's court 'system'.

CONCLUSION

The recommendations above are not intended to prescribe the content or level of service that courts should provide to their users and wider publics. Rather, they are intended to put in place systems and processes for communication between courts and the public so that, in some form of partnership, the appropriate services are identified and continuously improved. Some of the recommendations would require time and thought to implement but little in the way of financial resources. Others will take money. As was explained in chapter 1, however, a great deal is at stake. The justice system in a liberal democracy operates on the basis of public confidence. If that confidence is sapped, as it very well might be by unnecessarily unpleasant encounters in courts or by community disappointment in the services offered, then loss of confidence may spread to other issues, such as the quality of justice provided. Many societies with similarities to Australia are waking up to this, and Australia must do the same.

In the concluding remarks to chapter 1,[4] some outer limits to what is possible were sketched. In part these are provided by the fundamental requirement that cases must transparently be decided impartially. Other limits are to do with the so-called adversarial system. Australia probably has a number of adversarial systems in operation, and they are all mutating. What links them, and distinguishes them from inquisitorial systems, is the traditional policy of externalising certain costs to the parties and others. There may be justifications for this, in terms of preserving individual autonomy, restraining the State and promoting a reasonably efficient way of eliciting relevant information. The literature on the relative merits of different approaches is huge and the debate continues. It seems clear, however, that public budget allocations to courts in Australia have been premised on the idea that other budgets are covering particular costs. There will be major political difficulties in securing any significant redistribution. It may even be that the mutation currently under way in adversarial systems will feed greater public expectations of service from the courts, for which there is currently no money. Nevertheless, there is much that can be done before these outer limits are reached. And if the relationship between courts and their publics can be improved through better communication, the courts may be in a better position to negotiate their future.

4 Parker, above n 1, Ch 1.

1.3

Advantages and Disadvantages of the Adversarial System in Criminal Proceedings

INTRODUCTION

General remarks

In this sub-section the advantages and disadvantages of the adversarial system are investigated with reference to the most well-known (and closely affiliated) alternative, the (so-called) inquisitorial system prevalent in continental Europe, and in a large number of other nations, including some in our region.

Although the adversarial system is *contrasted* with the inquisitorial system, the latter in fact also enshrines in law the right of the accused to oppose the evidence of the prosecution and introduce evidence to prove innocence; it is thus '*contradictoire*' (to use the French term) or adversarial in that sense. It is rather the structure and organisation of the forensic process or investigative method, than the adversarial nature of proceedings, that distinguishes the two systems.[1] In an adversarial system, the parties, acting independently and in a partisan fashion, are responsible for uncovering and presenting evidence before a passive and neutral trial judge or jury. In an inquisitorial system, the ultimate responsibility for finding the truth lies with an official body that acts with judicial authority, and gathers evidence both for and against the accused. Whereas the actors in an adversarial system are equal and opposing parties, in an inquisitorial system the accused is thus not a party to proceedings to the same extent.

Both the pre-trial *and* trial stages are covered in this sub-section. In civil law jurisdictions, the two stages (the *instruction* and the trial) tend to coalesce more into a seamless process, and one of the main areas of contention concerning reform of criminal procedure in adversarial jurisdictions is precisely the extension of judicial management and supervision into the pre-trial stage.

The theoretical distinctions between inquisitorial and adversarial jurisdictions

(primarily concerning party prosecution and presentation, judicial activism, and different fact-finding methods) translate into systems that operate quite distinctly at the practical level as well. The inquisitorial system is thus a useful reference point with a view to reform in Western Australia. Much of the criticism levelled at the adversarial system is centred precisely on the autonomous role of the accused as a party, and proposals have been put forward for greater judicial control over the actions of both parties before and during the trial.[2] Indeed, there have even been calls for the adoption of an inquisitorial model in Australian states.[3] A closer analysis of inquisitorial models facilitates a measured response to such calls, and to the various claims — some more justifiable than others — that are made on behalf of inquisitorial models; it permits realistic identification of 'transportable' elements.

The main inquisitorial jurisdictions that are taken into account are France, Belgium, Italy, the Netherlands and Germany. The most general common characteristics of inquisitorial systems are referred to, and detailed points of difference are only mentioned where it is relevant to do so.[4] This is done in full realisation of the fact that there are important differences between civilian jurisdictions in the area of criminal proceedings.

Basic policy goals of the law of criminal procedure

Both adversarial and inquisitorial systems, which effectively monopolise the determination of the existence of a criminal offence and sentencing, in the hands of the state,[5] have as their primary and most fundamental purpose the prevention of private justice by retribution, i.e. *nec cives ad arma ruant.*[6] In this object both inquisitorial and adversarial systems have arguably been largely successful over long periods of time. Further, the goal of the law of criminal procedure in a democratic and rights-based jurisdiction is to ensure procedural fairness, while balancing the rights of the individual with the rights and interests of society as a whole.[7] And *public demonstration* of fairness, justice and respect for rights in criminal proceedings is important as it justifies the monopolisation of criminal justice by the state, and helps to maintain public confidence in the system.[8]

Strictly speaking the goals of the *law of criminal procedure* are different from, and more limited than, those of *substantive criminal law.*[9] The primary goals of substantive criminal law and the administration of sentences, are punishment, deterrence, prevention, and rehabilitation. The law of criminal procedure must be in tune with the goals of substantive criminal law, and *vice versa*; it is, in any case, not always possible or desirable to maintain a strict separation between the two areas of law.[10] Furthermore, there will always be areas of tension between the goals, rules and principles of substantive criminal law and those of the law of criminal procedure.

Achieving the aforementioned policy goals against a background of unavoidably limited, and also unequal, resources requires compromise. The nature of the

compromise may differ from jurisdiction to jurisdiction and from system to system.[11] Nonetheless, it is of cardinal importance that, in considering reform of criminal procedure, those principles that underlie each individual system, ensure justice, and justify public confidence, not be compromised on the basis alone of adverse prioratisation concerning expenditure of limited resources.

One final point, important given the apparent trend towards harsher criminal penalties and greater limitations on traditional judicial discretions: the role of the system of criminal justice in preventing crime will not be greatly emphasised, because deterrence is only a secondary goal of the law of *criminal procedur*e, and because in any case the effectiveness of the substantive criminal law in deterring criminal conduct is uncertain. Nonetheless, it is uncontroversial that a system of criminal procedure that is inherently adapted to producing correct outcomes quickly and fairly, will be more effective in delivering the goals that the substantive criminal law pursues, including deterrence. Further, the administration of criminal justice as opposed to the policing of criminal conduct, is the subject of this sub-section.

Starting premises relevant to reform of adversarial criminal procedure

Serious concerns about the law of criminal procedure are not unique to Western Australia or even to adversarial systems in general, and can be discussed in a dispassionate atmosphere, transcending national and jurisdictional boundaries. Nonetheless, the wholesale adoption of an inquisitorial system seems impractical in an adversarial jurisdiction such as Western Australia, and would not necessarily address many of the problems of the adversarial system. In any case, this sub-section does not consider adoption of an inquisitorial model, but the advantages and disadvantages of the adversarial model. And although some, even major, aspects of an inquisitorial system may be appropriate for adoption in Western Australia they will not necessarily be those that appear most enticing upon a cursory survey of inquisitorial models.[12]

Both adversarial and inquisitorial systems have advantages and disadvantages. Discussions as to which is better than the other almost invariably focus on one single aspect of each system, rather than on a balanced appraisal of the system as a whole, and are therefore misleading and unhelpful. Nonetheless, on a detailed analysis, most of the advantages and disadvantages of each system are readily identifiable. The overall effect of those disadvantages and advantages on the quality of justice though, is less easy to identify or assess.

The fact that despite important differences in the way the criminal law is administered, authorities in inquisitorial and adversarial jurisdictions struggle with similar problems, supports the point just made. On the one hand, each system has its inherent structural shortcomings, in terms of acceptable standards of prosecution of cases, in terms of rights, and in terms of outcomes. On the other hand, each type of jurisdiction also faces resource limitations in

a context of increasing criminalisation of conduct and public concern about criminality and victimisation. Interestingly enough, responses to these pressures in both inquisitorial and adversarial jurisdictions follow broadly similar lines and have already resulted in a degree of convergence.[13] Inquisitorial jurisdictions are engaged upon a search for reforms with equal urgency, and are subject to legal impulses from various quarters, just as much as common law jurisdictions are.[14] There is little evidence of a general movement only in one direction (ie towards the adoption of more inquisitorial models).

THE MAIN CHARACTERISTICS OF THE INQUISITORIAL SYSTEM

A brief and generalised account of the basic theoretical characteristics of an inquisitorial system of criminal procedure follows.[15]

Theoretical Characteristics of the Inquisitorial System

The deliberate use of the term 'theoretical' is motivated by the fact that the *theory* (i.e. the formal codified structures) of the law of criminal procedure is very different from its *practice* in inquisitorial systems. In other words, there is a *normative model* of the criminal process, and a quite distinct *practice* of the criminal process. Thus in theory the inquisitorial system (as described in many textbooks) may arguably be stronger and more reliable, but in truth the system may appear more attractive than the actual practice justifies.[16] Different *practice* may well be the effect, of course, of lax application of legal norms, but it may as well reflect, at least to some degree, the inherent impracticality of the complex theoretical model in modern conditions.[17] Conversely, the adversarial system, more organically grown from practice, is arguably less satisfying in theory, but at least its operation in practice approximates the theoretical model more closely.

The normative/practical divide in inquisitorial systems results in part from codification, based as it is, in theoretically conceived constructs. Codified structures also tend to rigidity, complexity, and piecemeal amendment. The result is a failure to adjust adequately to the present-day reality of a congruence between a rise in the number of offences and a decline in available resources (that is not to say that there have not been regular attempts to update the law of criminal procedure).[18] Another cause of the divergence between practice and theory is the legalistic nature of codified systems, with a general aversion to discretionary (judicial) decision making. In reality, of course, discretion on the part of all judicial and non-judicial officers is part and parcel of everyday life in the criminal law.

The codified inquisitorial system is based on a mandatory sequence of formally documented steps. In theory each decision *en route* from offence to conviction or acquittal, is circumscribed by legal rules (the principle of 'legality' as opposed to 'opportunity'). By law, judicial police officers (*police judiciaire*, effectively the CIB or equivalent)[19] have the power to investigate offences. They draw up documents (the *proces-verbal*) with a formal legal status concerning notification of an offence, and concerning each investigative measure. These documents

are gradually added to the file or *dossier.* In theory the prosecutor (*procureur*) must be notified in writing of every offence of which the judicial police has itself taken written notice, and must receive the relevant file (*dossier*). The prosecutor may then deal with the matter by filing the notification without further action (*le sepot*), for instance because the facts do not reveal any offence. Alternatively, he may instruct the judicial police to take further forensic and investigative measures. He is under an obligation to gather evidence for and against the accused in a neutral and objective manner, as the goal of the prosecution is not to obtain a conviction but to discover the truth and to apply the law. In complex cases, major offences, or politically sensitive matters, the investigation will be supervised and directed not by the prosecutor, but by an investigating magistrate (*juge d'instruction*), to whom the prosecutor transmits the file (*dossier*) until the investigation is complete.[20] In reality, in most ordinary cases the investigation is effectively completed by the judicial police even before the prosecutor receives the file or *dossier,* and few active steps remain to be taken under the instructions of the prosecutor.[21] Once the file or *dossier* is complete, the case may proceed to trial. The trial judge will largely base his or her decision upon the contents of the *dossier*. Hearsay rules are unknown in the inquisitorial system.

Judges and *procureurs* alike make up the 'magistracy', but each has a defined role and obligations, and no person can be prosecutor and judge in the same case.[22] Judicial independence is guaranteed as, once appointed by the government, no judge can be removed other than by Parliament, but the procuracy is organised as a hierarchical corps and is subject to disciplinary supervision.[23] Each judicial region has an attachment of prosecutors (*procureurs*), known as the '*parquet'* attached to a given court in that region. The *procureurs* take control of the criminal investigation and supervise the appropriate conduct of the judicial police, and also act as prosecutors in court (in that guise they are collectively known as the '*ministere public'*).

Each region has one or more investigating magistrates (*juge d'instruction*), who combine control of major criminal investigations with certain judicial functions (ordering restrictive measures when required, for instance).[24] When the investigating magistrate is exercising his judicial function, the accused has the right to be heard, with counsel. The advantage of an investigating magistrate is that a judicial figure, closely engaged with the investigation, will be able to exercise effective control over the conduct of the investigation by the police. He will also be well placed to judge the real necessity of measures that affect the freedom, rights and integrity of the accused.

In some civil law jurisdictions a special court decides about the classification of offences. All criminal courts with the exception of the highest court (*Cour de cassation* in France) are specialised.

Prior to trial, the defence gets limited access to the *dossier*, and may make

informal suggestions to the prosecutor or investigating magistrate concerning further forensic measures. Proof of a trial is largely documentary, recorded in documents with a formal legal status (*proces-verbal*), although in theory all proofs, evidence of which is found in the file or *dossier* handed to the trial judge just prior to the trial, must be repeated orally before the court. But the trial judge has the discretion not to order such repetition, and usually does not. Only the judge questions witnesses; there is no cross-examination and expert witnesses are court appointed. The only rule regarding admissibility of evidence is relevance, but the presumption of innocence is also fundamental to civilian systems. The role of defence counsel at trial is restricted to making written submissions regarding the evidence and legal matters, but counsel may suggest to the judge certain questions that may be asked of witnesses and further investigative measures that should be ordered. Most often the case is largely determined on the basis of the written proofs in the *dossier*. Ultimately the trial judge is responsible for discovering the truth, and can thus theoretically order further investigative measures (which rarely happens). The *investigation* of the truth pre-trial, and the *determination* of the truth at the trial itself, are subject to judicial control and supervision.

Hearings and submissions regarding sentence and regarding guilt are not strictly separate as in common law systems. The history (antecedents) of the accused thus plays a greater role, as does evidence gathered regarding his 'character'. There are no rules excluding evidence of propensity (ie of previous criminal conduct or convictions); all this information is seen as relevant to the trier of fact forming its *intime conviction* (the relevant standard of proof in inquisitorial jurisdictions) concerning the guilt or innocence of the accused.

In some systems jury trials exist for major crimes (*cour d'assise*; see France and Belgium), the jury consisting of a varying mixture of judges and lay people (so-called lay judges). Different rules apply to jury trials, the evidence being presented orally and continuously, and something akin to cross-examination taking place.

Accused persons tend to spend longer periods in preventative detention (remand) and bail is less prevalent. There is greater discretion concerning the execution of sentences than in most common law jurisdictions.

SOME STRIKING DIFFERENCES BETWEEN ADVERSARIAL AND INQUISITORIAL MODELS

The law of evidence

As said above, there are no exclusionary rules of evidence in inquisitorial systems, materiality, relevance and legality determining admissibility. Before the trial takes place the evidence has largely been identified and gathered, in a statutorily determined documentary format, in the form in which it is to be heard (or more correctly, seen) at the trial. In some cases, the evidence has been received prior to the trial in an adversarial format (before the investigating magistrate, acting in his judicial capacity), but generally speaking the pre-trial stage (the *information*) is secret and not *contradictoire*. Nonetheless the accused has a limited right of access to the *dossier* at a given moment prior to the trial.

Exclusionary rules of evidence are said to originate in the predominance of jury trials in the common law system, dependent as they are on oral and continuous presentation of evidence. However, they also result from professionalisation of the representation of accused persons in an adversarial trial. Be that as it may, it is better accepted in civilian jurisdictions, where juries are very rare[25] that a professional judge (specialised in criminal matters to boot) will not be swayed by unreliable, unfairly prejudicial evidence. Nor are there strict rules excluding evidence about previous conduct of the accused. Again, a professional judge is thought capable of avoiding the trap of determining guilt by disposition, and to give full weight to the right to silence, and the presumption of innocence, of the accused. Conversely, there is not, in inquisitorial systems, the kind of adversarial pressure that results in partisan presentation of evidence in an adversarial trial.

The civil law system is thus said to be simpler, without the rules of evidence that are such an unpredictable factor in criminal prosecutions in adversarial jurisdictions, where late determination (ie at the trial) of admissibility may lead to a waste of resources on prosecutions and investigative measures, and can make planning a trial difficult. The strict rules concerning hearsay evidence also result in the loss of much valuable evidence gathered in a form that is not admissible during the early stages of a criminal investigation and prosecution.[26] In inquisitorial systems this does not occur, but to a common lawyer the secret compilation of a file with documentary evidence which cannot effectively be challenged naturally invokes concerns about the position of the accused. Nonetheless this must be seen in the totality of the system, which is less partisan by nature.

Jury trials

Jury trials are the exception rather than the rule in civil law jurisdictions; where they do occur, they are conducted more along adversarial lines. Jury trials, more prevalent in common law systems (although they occur in only a small percentage of cases), introduce an element of complexity and uncertainty that is virtually absent in civilian jurisdictions. They frequently misfire because of problems with the jury, requiring the empanelment of new juries, because of errors in summing up, because of complex appeals against guilty verdicts, etc. A system without (or with very few, as in France) jury trials will clearly be less complex, and less prone to mishaps.[27]

A jury trial is of necessity predicated on continuous and adversarial oral presentation of evidence, but such a method of determining criminal cases is time and resource intensive (as was, for instance, experienced in Italy when the adversarial trial was introduced in 1988).[28] Doing away with jury trials would thus probably reduce costs, and would also enhance opportunities to deal with matters in alternative ways not subject to the same concerns about admissibility and presentation of evidence, and hence possibly also increase predictability.

Nonetheless, juries fulfil an important function of civic involvement, democratic accountability, and possibly restrain the growth of a sense of alienation and distrust between the system of criminal justice and the wider community. As was established in *Stonehouse*, the jury is entitled to acquit, no matter how strong the prosecution case is. A judge is not entitled to direct the jury to convict. In other words, an element of subjectivity can enter a trial through the jury, without possible accusations of bias as could be leveled at a judge in such circumstances. Furthermore, in Australia there may be constitutional restrictions on the abolition of jury trials.[29]

The question of the survival of jury trials, however, must be anchored in the reality that a large and complex society cannot be universally engaged with the doing of justice, and that therefore resources must be allocated to specialised agencies to perform the task. Such resources will of necessity be limited. The question thus becomes a relative one: which cases should be tried before a jury? The answer depends on an objective element (the taxonomy of the offence) and on a subjective element (the exercising of the right to a jury trial by the accused). Certainly, in civilian jurisdictions where they do exist, jury trials only occur for the very gravest offences.

If exclusionary rules of evidence are necessary for the appropriate functioning of jury trials, both because of their continuous oral nature and because of the peculiar susceptibilities of juries, should jury trials and summary trials (trials before a judge alone) be subject to different rules of evidence?[30] One option for reform might be a system similar to that in France, with a very limited number of jury trials for the gravest crimes, subject to a separate body or rules of evidence and of procedure.

Proposal 1

Restrict jury trials to the gravest offences.

Investigating magistrates (*juges d'instruction*)

The investigating magistrate conducts the investigation, either in person and/or through instructing the police, but is not a prosecutor. He alternates between this forensic role and the exercise of his judicial power in the context of the investigation. The *juge d'instruction* is sometimes identified as a powerful and valuable institution that common law jurisdictions would do well to emulate.[31] However, it should not be forgotten that in Italy, the institution of investigating magistrate was recently abolished.[32] Instead, and this is a more realistic model for an adversarial jurisdiction, as Italy now is for criminal matters, a 'judge of the pre-trial stage,[33] or alternatively a 'pre-trial court' (*juge de l'instruction*) was instituted. That court exercises purely judicial powers where required during the conduct of the prosecution and investigation of an offence

by the police and prosecution, but has no power to conduct the investigation and order forensic measures. It is indisputable that the traditional role of *juge d'instruction* is a difficult one, precisely because it combines two powers (judicial and investigative) that are at times incompatible.

The position has also been considered to be excessively powerful and not sufficiently subject to independent control.

Codification of the law of criminal procedure

The complexity and uncertainty of the law relating to criminal procedure, including the law of evidence, in a jurisdiction such as Western Australia is possibly enhanced by the fact that there is no comprehensive and separate codification of the law of criminal procedure, as does exist in civil law jurisdictions (in most civilian jurisdictions there is a Code of criminal law and a Code of criminal procedure). In Western Australia and Queensland the substantive criminal law is of course found in the Griffith code. Nonetheless, many aspects of criminal procedure are either shaped by the common law, particularly the law of evidence,[34] or by disparate enactments. Arguably the enactment of a comprehensive code concerning the trial and pre-trial stage would generate greater certainty and clarity, and would shift the balance of determination of important issues in criminal procedure from the courts to the legislator. As it stands, much of the conduct of police in criminal investigations is ultimately only controlled by judicial discretions (by their nature uncertain in outcome) regarding evidence. On the other hand, as pointed out above, codification may result in rigidity, and the development of practices that ignore the codified rules, as has happened in various civilian jurisdictions. The *Criminal Procedure and Investigations Act* 1996 (UK) is an example of a statutory approach.[35]

Proposal 2

Adopt a code of criminal procedure.

Guilty pleas and abbreviated processes

The guilty plea does not exist in inquisitorial jurisdictions.[36] It has been argued convincingly that the guilty plea flows from a belief in the accused's fundamental freedom to bargain (contractual freedom) in an adversarial systems, and the procedural freedom of the parties.[37] Thus the adversarial system conforms to a more liberal constitutional theory, which envisages that an individual is free to give up his or her procedural rights, whereas a more institutional theory emphasises the public interest in finding the truth above all else. Thus an accused can enter into informal negotiations with the prosecution to obtain a diminution of sentence in return for a plea of guilty. The plea obviates the need for a lengthy and expensive (jury-) trial. Guilty pleas do not figure in inquisitorial systems because the accused is not a fully-fledged party to the proceedings, and because it is ultimately always the responsibility of the trial

judge to ascertain the truth. The judge need not necessarily accept a confession of guilt in the form of a plea.

A plea bargaining process may lead to excessive emphasis on confessions.[38] As a consequence police use unacceptable methods to put pressure on an accused to confess, since a confession is in principle sufficient basis for a conviction. This leads to miscarriages of justice. The guilty plea procedure may also result in a lack of public confidence in criminal justice, since justice is seen to be 'for sale', and offenders are seen to get off too lightly.[39] But the major potential drawback of guilty pleas is that the rights of the accused may be compromised if unlawful or unethical pressure is brought to bear in circumstances where the plea does not reflect the truth.

Despite the drawbacks of the system, the attractiveness of a simplified and cheaper procedure has induced various European jurisdictions to investigate the introduction of guilty pleas, or to introduce similar procedures, although in most cases subject to some form of judicial supervision. In France, the *Commission Delmas-Marty* proposed such a scheme in 1990, but the government did not act upon the recommendation. In the Netherlands the ministerial *Commissie Herijking Wetboek van Strafvordering* also proposed the introduction of a guilty plea procedure in 1992, but the proposed new structures were not uniformly well received. Alternatively, as in Belgium and the Netherlands for instance, there is the possibility of a '*minnelijke schikking*' (an 'amicable settlement'), where the prosecutor can propose that the accused pay a certain sum of money (at most the amount of the maximum fine for the offence concerned) to 'settle' the case. The free choice of the accused determines whether to accept the proposal or proceed via the traditional judicial route, but if he does, he forfeits the right of access to a court. Alternatively the *bemiddeling in strafzaken* (mediation in criminal cases) procedure may be used, whereby the prosecutor proposes that the accused pay compensation in relation to the offence and agree to certain conditions. If the accused consents, and then complies with all the conditions, the prosecution lapses.

Similarly, the German *Strafbefehlverfahren*, permits the trial judge to decide the case purely on the basis of the *dossier*, and upon the request for the imposition of a certain fine by the prosecution. If the accused is not satisfied, he can appeal the decision within one week, and the case is then heard in a 'regular' public trial. A similar process exists in France and is known as the *ordonance penale*. (All the simplified procedures apply only to relatively minor offences). The advantage of this process over a common law guilty plea, is that the bargained fine is subject to the independent control of a judge, whose decision is subject to an appeal, thus guaranteeing the rights of the accused and preventing excessive pressure. A similar procedure exists in Italy.[40]

SOME RECURRENT THEMES IN COMPARISONS BETWEEN ADVERSARIAL AND INQUISITORIAL SYSTEMS

Truth and justice

The adversarial system, typified by party disposition and party prosecution, is often criticised because it is not sufficiently concerned with finding the truth, as parties, rather than state agencies, control and circumscribe the forensic process, and judges do not participate actively in the search for truth. Injustice may result, as prosecuting authorities pursue convictions while disregarding the truth, and because judges are passive adjudicators, neither concerned with nor responsible for identifying the truth. There is no neutral forensic process, as is said to exist in inquisitorial systems.

In the inquisitorial system the emphasis is on outcomes, in the common law systems on process. The process-focused, mechanistic common law principle may be described as follows: the result of the two parties vigorously defending their version of the facts from legally equal positions and before a neutral and unprejudiced arbiter will be that the truth comes out. The inquisitorial attitude is that a search for the truth by an impartial officer of the state is the best method. It is important in that system that the judicial officer, be it judge or prosecutor, is indifferent as to whether a conviction results or not. Thus a prosecutor in a civil law system demands little more than the application of the law; in the common law system the prosecutor demands a conviction.

One of the problems with the civil law approach is that even if justice is ultimately done, there may be injustice along the way. For instance, a person ultimately acquitted may have spent an inordinately long time in preventative detention, because the system did not offer a sufficient opportunity to intervene in the forensic process at an early stage. Possibly the major problem with the common law approach is that the theoretical legal equality of parties in the system will be subverted by actual inequality of means, favouring the prosecution in most cases.

However, although the excessive vigour of the prosecution and manipulation of the forensic process by police in common law systems frequently come under attack, at the same time the system is accused of being potentially skewed in favour of the accused. This criticism takes two forms: first, a general criticism of the traditional view of common law systems, that ten guilty persons escaping punishment is better than one innocent party being convicted. Too many guilty persons are said to be acquitted as a result. The appropriate response, however, is not to attack the traditional maxim, but to implement a system that will produce a correct result more frequently (ie more effective identification of the truth). Secondly, criticism is aimed at the fallibility of the process in relation to a certain class of offender. Party prosecution, rules of evidence and judicial passivity all combine to make the system open to manipulation by smart, wealthy and determined criminals. (It could, of course, be argued that all socio-economic groups can 'benefit' from these factors, not simply the wealthy and smart) Naturally, these attacks rarely emanate

from the same source as the complaints about the excessive vigour of the prosecution.

Because in the inquisitorial system the accused is not a party, and neutral officials pursue the truth rather than convictions, these critiques are said not to apply there. Further, courts play a greater role in the pre-trial stage, and will therefore prevent manipulation of the process by the parties. However, the rich and influential accused may be able to manipulate the system in different ways in civil law jurisdictions (e.g. by political influence that filters down to prosecutorial ranks), where common law systems are less open to such manipulation. Further, the belief in the neutrality of the prosecutor and investigating magistrate, and the active interest in the truth of the trial judge, represent a *normative* picture of criminal proceedings in inquisitorial systems. The role that the trial judge actually plays *in practice* in any given case is quite limited. For instance, a judge in a civil law jurisdiction will rarely conduct a vigorous examination of the evidence at the trial, normally rather relying on the contents of the *dossier* without much question, simply checking that there are no formal irregularities. And the prosecutor naturally and instinctively assumes a partisan position, in spite of normative statements to the contrary.

It is important also to focus on the ability of the system *as a whole* to discover the truth. Factors other than the nature of the forensic process affect systemic efficiency. For instance, even though in an inquisitorial system the role of the prosecution is that of a neutral searcher for the truth (not partisan pursuit of convictions), and this may arguably benefit the finding of 'the truth', other factors such as very long delays between offence and trial, powerlessness of the accused in the forensic process and at the trial, a lack of emphasis on the innocence of an accused until proven guilty, the use of disposition and character evidence may affect the ability of a system as a whole to find 'the truth'. Further, a lack of vigour in prosecution (the ready filing of complaints without consequence, and forensic dilatoriness, partly because nothing much is to be gained from achieving convictions) may also result in a systemic failure to pursue those in fact guilty of offences.

Truth and evidence

But in any case, the ultimate aim of the system is to deliver *justice*, rather than truth. If the ultimate goal of the system were to deliver truth above all, it would no doubt have a totally different, and not necessarily edifying aspect. From that perspective, forensic effectiveness is only one, if vital, element of a system with the prime goal of doing justice. But forensic effectiveness is always to be balanced with other factors in a human system, both practical (limited resources) and legal (respect for the rights of the individual). The whole aim of the law, and the complex nature of its rules, is exactly aimed at finding a balance between a number of constraining factors.

But the previous statements do not detract from the fact that finding and

presenting relevant facts in evidence is of the greatest importance to an accused in any given case. The adversarial system has come under attack for its insistence on the oral delivery of evidence by first hand witnesses at the trial, and also for party control over the pre-trial stage with limited judicial intervention, resulting in delay. The result is an unfortunate congruence of factors. On the one hand, considerable delays occur between commission of an alleged offence, and the trial, which means that the recall of witnesses is diminished and that witnesses are subject to all sorts of influences between the events and the trial. On the other hand, insistence that evidence gathered before the trial (e.g. immediately after the events) should largely be rejected in favour of evidence given at the trial results in the trial itself being a flawed forensic process with a propensity for missing 'the truth'.[41]

The fact that party prosecution renders the accused largely responsible for finding and adducing evidence in his favour also contains a fundamental flaw where the accused is not in a position to commit sufficient resources to the search for evidence.[42] The truth is not likely to be found because the evidence of the prosecution is in the end all that is heard by the court. This criticism is doubtless justified, even more so in a period of diminished resources for legal aid. Nonetheless, continental writers often overstate their case in this regard, ignoring that the accused in the adversarial system is not obliged to present evidence *a decharge*, ie is not obliged to disprove guilt. They tend to ignore the fact that, because of the absolute right to silence, and the presumption of innocence, the accused may simply rest his case and let the crown meet the high standard of 'beyond reasonable doubt'. There is no obligation on the part of the accused, either to prove innocence, or to collaborate with the case against him or her.[43]

Cross-examination constitutes at least a partial response to the criticism of the adversarial system rehearsed above. Vigorous cross-examination allows the accused to undermine the prosecution case, even without adducing evidence of his own. This opportunity barely exists in a civilian jurisdiction. It is seen as 'the motor of truth'. Nonetheless, when brought to bear on witnesses long after the event, cross-examination may have the unfortunate effect of painting a witness in a far less favourable light than is fair. Much of the apparent effectiveness of cross-examination in breaking down a case, is arguably more the result of exposing the kind of normal psychological processes that affect recall, than with a truly effective way of getting to the truth. It is in this sense an essentially negative tool, apparently rendered effective more by the structural characteristics of the system, which encourage delay between facts and trial, than by any inherent usefulness in finding the truth. The accused, whose lot becomes dependent on such unnecessarily unreliable processes, may find this whole event both illogical and pointless, as may many honest witnesses.

In this respect the inquisitorial system differs substantially from the adversarial. The strict rules of evidence concerning hearsay do not exist, relevance and legality being the only restraining factors. The early stages of inquisitorial criminal prosecutions tend to be characterised by the gathering of evidence for all sides, that will be placed in the *dossier* and presented to the court at the trial in that form. Various measures may take place to gather admissible evidence, rendered in official documentary form (*proces-verbal*), that do not exist in common law jurisdictions. For example, witness statements, so-called *confrontations* (between accused and a witness), the production of official statements of evidence concerning the conduct of the accused immediately after the commission of an alleged offence, the *garde a vue* (where the accused is held in a police station for an extended period) with interrogation, documentation regarding character and antecedents. Undoubtedly, much evidence that is relevant and significant is thus collected, and collected at a stage when recollections are fresh and there has been less reflection on the consequences of making statements. It is precisely the more limited basis for suspicion towards officialdom in a non-adversarial system that makes this possible.

But although civil law systems may have the advantage of gathering admissible evidence at an early stage after the occurrence of an offence, the clear disadvantage lies in the excess pressure on the accused that goes with this evidence gathering, and on the lack of genuine opportunity to question such evidence vigorously before the ultimate fact-finder. Further, in reality the civilian system struggles from a lack of resources to fully investigate the truth, because this process is entirely dependent on the extent of resources available to state institutions, and such resources have come under severe stress in recent times. Thus the resources expended on any given prosecution are entirely outside the control of an individual accused; this does not always benefit the finding of the truth.

Documentary evidence

As has been pointed out repeatedly above, the evidence for a criminal trial in an inquisitorial system will be built into a *dossier* in documentary form, which forms the principle basis for the decision of the trial court. Such a *dossier* contains not only forensic evidence, but also evidence about the character and antecedents of the accused, since guilt and sentence are considered simultaneously by the court. As a consequence, the *objecitivite du dossier* (objectivity of the case file) is a vital goal for the system of criminal proceedings in inquisitorial countries, since the *dossier* will be largely determinative of the outcome of the case at trial. The main guarantees of the objectivity of the *dossier* are twofold: first, that the obligation of the prosecution is not to obtain a conviction but to reveal the truth, and thus to gather in the *dossier* evidence for and against the accused. And secondly, the intervention, first, of the prosecutor, whose role at least in part is to supervise the police, and secondly, of the investigating magistrate, who, being a judicial officer, will

supervise the police and the prosecutor and ensure that an objective balance is struck in all investigative measures. In particular, he or she will be able to ensure that no excessive pressure is used to obtain a confession, the latter being the principal goal of police conduct of the investigation in most cases.

The problems, however, with both those guarantees of objectivity, are, first, that the prosecutor (*parquet*) is naturally inclined, because of the nature of his role, to take a partisan position against an accused, of whose guilt he may have become convinced, and is often in the power of the police, rather than effectively supervising police conduct of the investigation; and secondly, that the investigating magistrate, key figure in the process, because of lack of resources, is only involved with a minimum of cases (less than 10 per cent in Belgium, for instance), and then often only for the purpose of ordering specific measures in his judicial capacity, rather than to conduct and supervise the investigation. The instinctive scepticism about a system based on documentary proofs of evidence experienced by a common lawyer is thus in part justified. The dilemma facing many inquisitorial jurisdictions, however, is how to counterbalance these long-standing developments. A clearer taxonomy of cases to be submitted to the investigating magistrate is a common focus of the search for solutions.

Balancing rights

Ensuring systemic respect for rights is a primary goal of the law of criminal procedure.[44] At the whole-system level there is a balance to be struck between the rights of society and the rights of individual accused persons: a balance between private rights and public efficiency.[45] A system of criminal law must not amount to a system of repression. At the level of a given prosecution a balance must be struck between the rights of the individual and the rights of the prosecution. The individual has a basic right both to procedural justice and to respect for human rights, but the rights of the prosecution are exclusively concerned with procedural justice. In more recent times, more emphasis has also been put on the rights of the victim(s) of an offence, which are manifold (the right to prosecution, the rights to be heard, the right to compensation etc), and on respecting those rights through appropriate involvement with the process of criminal justice. The rights of witnesses have also received wider consideration.

Although victims can play a more active role in civil law jurisdictions, similar concerns have been expressed there. Victims in civil law jurisdictions can appear as civil claimants (for damages) in criminal cases (*'party civil'*) and their claim for compensation can be heard at the same time as the criminal case. Victims can also have recourse to the investigating magistrate and demand that a criminal investigation be undertaken in cases where the *parquet* refuses to prosecute (at least in Belgium). The investigating magistrate is then obliged *ex officio* to investigate the matter. The advantage to the civil claimant lies partly in so obtaining proof that may assist him in establishing his civil claim.

Furthermore, once there is a civil claimant, the prosecutor can not classify the case without further action or proceed with the case by way of a non-judicial measure.

At the same time, in inquisitorial systems, witnesses, including victims, are not subjected to the rigours of cross-examination, their written depositions as they appear in the *dossier* amounting to the full extent of their involvement in the process in most cases. This obviates the many concerns about the adversarial system expressed on behalf of youthful victims, victims of sexual offences, and witnesses of minority and disadvantaged backgrounds.

There is another interesting contrast in the matter of rights, between civilian and common law jurisdictions, that flows from the fact that civil law jurisdictions are code-based, and in particular, from the existence of a detailed separate code of criminal procedure as well as a substantive criminal code. The codes are rights-based, in the sense that they are expressed in terms of procedural rights: for instance, the accused has a statutory right to representation and the right to have all forensic measures repeated before the trial court. But the reality is often different, either because those rights are expressed in a manner that can not possibly be sustained in practice, or because those rights are subject to judicial discretion. There is a great gap between legalistic prescripts and reality in many civilian systems, which may be the inevitable effect of codification and its attempts to formalise and circumscribe discretionary decision making in an unrealistic manner. Adversarial systems are less concerned with rights, because the relationship between the accused and other parties, and the officials and institutions that conduct the investigation and prosecution is not as central as it is in an inquisitorial system.

Ultimately the balance of rights that is struck in Western Australia, in the absence of a bill of rights, is a political matter. Nonetheless it is important that rights are emphasised and suggestions are made concerning an appropriate balance when conducting a legal analysis of the system of criminal prosecutions. The process must be conducted in an atmosphere of vigilance concerning human rights. There is a limit on the extent to which a government can, on the one hand, criminalise more forms of conduct, or impose greater criminal sanctions for the same conduct, and on the other hand decrease the rights of the accused person, either by express measures to that effect, or by allocating fewer resources for the conduct of criminal proceedings. There are absolutes, expressed in terms of rights and principles, that must stand in the way of such moves in a democratic state. It is obvious that the right to silence of the accused is an important issue in this respect.

The presumption of innocence and the right to silence

Adversarial jurisdiction, greatly emphasise the right of the accused not to contribute to the case against him (the right to silence). This question of the presumption of innocence is often raised in a comparative context, because

it is sometimes presumed not to exist on the continent of Europe, and it is probably worth saying a little more about the issue here. It is also appropriate to do so in the context of the revision of the right to silence in some Australian jurisdictions.[46] It is sometimes argued that the right to silence forms an unnecessary barrier to the finding of the truth in adversarial jurisdictions.

Many of the methods used to obtain evidence in inquisitorial jurisdictions have come under severe criticism, both from courts and commentators, for their deleterious effect on the right of silence and the presumption of innocence of the accused. There is considerable concern that a suspect is put under excessive pressure at the early stage after an offence is committed (eg during the *garde a vue*), and that confessions are sought in an atmosphere where an accused is powerless.[47] It is not clear that the accused who has confessed has sufficient opportunity to recant or put forward his or her version of events before the court at the trial stage either, and from this perspective important questions may be asked about the 'presumption of innocence' in inquisitorial systems.

There is certainly a greater tendency towards undermining the right to silence and a surreptitious reversal of the onus of proof in civil law systems. Thus it is arguable that in an inquisitorial system, there will be greater pressure on an accused to explain away certain evidence gathered against him, irrespective of how probative that evidence may be, subtly shifting the onus away from the prosecution. (Note in this respect that the *garde a vue* is used for the purpose of questioning a suspect and provides an opportunity for undue pressure). The common law more emphatically denies this avenue, through strict adherence to the right of the accused to stay silent at all times: he need not contribute to (either his own or) the prosecution's case, and nothing can be said about his unwillingness to do so.[48] Changes to the right of silence of the accused are considered in sub-section 4.2 of this review.

The standard of proof

One important safeguard for an accused person in the common law world is the high standard of proof that applies in criminal matters: beyond reasonable doubt. This standard is higher than in civil matters (on the balance of probabilities). The standard in civilian jurisdictions is both universal and also more subjective: it is the standard of *intime conviction*, the inner certainty of the trier of fact (whether judge or jury). Indeed civilian jurists have some difficulty with the concept of different standards of proof in civil and criminal actions: either the judge of fact has an inner or moral certainty or not; there can not be any in-between standard. To achieve inner certainty the trier of fact can only benefit from being in possession of the fullest possible range of information, and thus exclusion of relevant evidence must be kept to an absolute minimum. The standard of moral certainty is obviously less open to appeal, no standard of reasonableness being involved. Whereas the guilty

verdict of a jury in an adversarial trial is open to appeal if it could not reasonably be entertained on the evidence, appeals in civil law jurisdictions will be limited to legal matters or formal defects in proceedings. The *intime conviction* can not be double-guessed by an appeal court. This obviously lends an element of greater certainty and predictability to criminal proceedings in civilian jurisdictions, even though it arguably increases the chance of error and bias to the detriment of the accused.

SIMILARITIES IN CONCERNS, PROBLEMS AND RESPONSES OF ADVERSARIAL AND INQUISITORIAL SYSTEMS

The relevance of what follows below lies in the realisation that *both* inquisitorial *and* adversarial systems face considerable internal criticism, and both are actively engaged in a search for solutions for perceived problems. The following paragraphs only sketch them briefly. They are relevant to any comparison of advantages and disadvantages of the two systems, and it is apparent that whereas the fundamentals of each system are probably difficult to transport, solutions to common problems offer interesting ways forward across jurisdictional boundaries.

Common problems and concerns

Increased demand and stagnant or decreasing resources

The literature concerning difficulties faced by the system of criminal proceedings in inquisitorial and adversarial jurisdictions shows striking similarities. Both clearly face increased case loads due to criminalisation of conduct and greater incidences of urban and white-collar crime, in an environment of decreasing resources available for courts and prosecuting and forensic authorities in general because of fiscal, budgetary and political constraints. Two common concerns result: first, an increased tendency to exercise executive discretion not to prosecute on the part of police and prosecutors; and secondly, considerable delays in adjudication of criminal cases, resulting in unfairness and injury to accused persons, as well as to others. In Australia maybe more than in most civil law jurisdictions (partly because the issue carries less weight because of the non-adversarial nature of those systems), there is also concern about the under-represented accused, ie the lack of private or taxpayer funded resources available to accused persons.

The problem of delay

Delay has been a major concern in civil law as well as common law jurisdictions. In civilian countries excessive terms spent on remand ('preventative detention') as a consequence of delay are regularly condemned. Delays between the commission of an offence and trial are said to be due to the inherent complexity of the system at the pre-trial stage, which is formal and in which duplication of tasks often occurs. On the other hand, delays are also due to the inability of courts to deal with the workload, and the unavoidable prioratisation that flows from it. In common law systems, party prosecution is said to cause delays either through dilatoriness or because of strategic considerations, and the courts are also insufficiently resourced to deal with the case load. Many cases are still dealt with by way of jury trials, that could arguably be dealt with summarily. This is despite the high proportion of accused

persons who plead guilty. The problem of delay is universal, in that it always affects the quality of justice and results in great personal and financial costs.

Municipal criticism of systemic failings

As well as at the resource and efficiency level, both adversarial and inquisitorial systems face systemic criticism from within jurisdictions concerning justice, fairness and effective protection of rights, although with differing emphases. Thus civil law systems are criticised (by courts, academic authors, the media, and agents of the system) for impinging on the rights of the accused, and particularly the rights to silence, the presumption of innocence, excessive reliance on confessions and concomitant pressure to confess (see the maxim '*la confession est la reine des preuves*'), associated long periods in preventative detention, the lack of 'equality of arms', and under-prosecution of certain types of offences. Common law systems face criticism regarding effectiveness of forensic methods both in pre-trial and trial stages; equality of arms, particularly in the case of indigent accused persons; universal right to legal representation; improper prosecution and forensic methods; excessive pressures on witnesses and victims of crime, particularly at trials; lack of pre-trial supervision and judicial management and control; because rules and procedures often impede establishing the truth; and juries being given sanitised and fragmented versions of events in a manner not conducive to identifying the truth, to name but some.

Concerns about victims of crime

Both jurisdictions are typified by increased concern regarding the rights and involvement of victims of crime. At the level of efficiency, both in civil law and in common law jurisdictions there is great concern about the perception of victims that nothing is done to deter re-offending and endemic crime in certain areas. There is also concern at the inadequacy of compensation available to victims of crime. At the level of systems-design, there is concern in common law systems that victims and witnesses are subject to great strains in undergoing cross-examination, and in facing the accused in court. In both jurisdictions, victims complain of a sense of powerlessness and a lack of respect and comprehension in the criminal courts.

Common responses to common problems

Devising a wide spectrum of alternative responses to criminal conduct

Both in civil law and in common law jurisdictions considerable attention has been focused on devising a wide spectrum of alternatives to the 'orthodox' system of criminal procedure (that is, the judicial determination of criminal matters). There is a move away from a unified system where there is one way of doing things, plus some lesser alternatives, to one where the essence of the system is flexibility and the availability of alternatives of equal value that are well adapted to the circumstances of each case (if you like, a holistic approach to criminal conduct). There is a common attempt to devise a system in which the response is more finely attuned to the nature of the offence and the circumstances of a case. At one level that is because such alternative responses may be cheaper and quicker, but there is a genuine belief as well

that the responses can be rendered more effective by such an approach. Only in a minority of cases is the traditional judicial route seen as the most appropriate. Thus the development of alternative response systems is a quality alternative, one that can improve the results of the system as a whole, not one where cheaper but less desirable alternatives are substituted for 'the one right way' in a search for savings.

At the same time both systems have engaged in a search for acceptable *incentives* to take up alternatives, and to find in those incentives, an acceptable balance between the extent of the incentive and respect for the rights and freedom of choice of the accused. Appropriate circumstances for making the choice must be devised. Above, under the heading 'Guilty pleas and abbreviated processes', some of the alternatives used in civil law jurisdictions are mentioned; below under 'Conclusions', some further discussion of alternatives is to be found.

Irrespective of alternatives to the judicial approach (that is, 'diversion'), neither inquisitorial nor adversarial systems are monolithic and without choice. Both common law and civil law jurisdictions have for a long time now been marked by the development of two tiers within the orthodox structure of criminal proceedings (ie, ones that are centred on adjudication by a judicial body). In common law jurisdictions, the full jury trial (with a jury) versus summary proceedings and guilty pleas; in civil law jurisdictions, major cases conducted under the control and supervision of an investigating magistrate versus more summary processes in other cases. The balance between those two systems, and the accessibility of the 'Rolls Royce' system, are a matter of concern in both systems. Naturally that concern cannot be analysed in isolation from consideration of the development of non-judicial methods of dealing with offences.

Underlying the question of alternatives and diversion is the issue of cost. Certainly in common law jurisdictions, the full-blown trial is seen as cost-intensive, and therefore there is pressure to limit the incidence of full-scale trials. In the civilian system, trials themselves are on the whole less expensive, being less time consuming and involving fewer personnel. Jury trials are extremely rare. Nonetheless, the degree of duplication and waste of resources because of the statutorily prescribed involvement of judicial police, prosecutors, and investigating magistrates (the latter at least in major cases) may significantly affect the cost to the state of such a system.

Addressing the problem of delay

There is also a common desire to find solutions for the problem of delay. In common law countries there has been a call for more summary trials. Ways of dealing informally with matters soon after the commission of an offence (diversion) have been introduced in both kinds of jurisdictions. Again, the difficulty experienced in both jurisdictions is how to devise an acceptable

balance in the imposition of diversionary measures between *discretion and legality*. In other words, most systems want to give more discretion to (non-judicial) officers who come into contact with an offender early in the piece, but on the other hand seek to retain judicial and legal control and supervision over those processes. Supervision and control, however, add to delay and cost. In all these matters, the issue of choice is the key, ie to ensure that there is a genuine choice for an alleged offender to have recourse to the courts, and not be under excessive pressure to submit to diversionary measures, which lack judicial supervision and impartiality.

The supervision of the pre-trial stage

One of the main issues in considering reform of the adversarial system, is how to introduce both greater judicial *management*, and also greater judicial *control and supervision*, over the pre-trial stage of criminal procedure. This is both with the aim of avoiding unnecessary costs and delays, and with the aim of improving the forensic process and the protection of the rights of the accused. The difficulty facing us is how to introduce effective change of that nature within the framework of an adversarial system.

Although the extent of judicial control and management in the pre-trial stage is far greater in inquisitorial systems (indeed this is in a sense the essence of the difference between the two), controversy over appropriate judicial supervision of the pre-trial stage rages in inquisitorial nations also. The issue takes the following form: should the position of investigating magistrates (combining investigative and judicial functions) be abolished in favour of a supervising court or judge? The pros and cons of such a move are constantly debated; Italy has abolished the position of investigating magistrate (*juge d'instruction*) in favour of a specialist supervising court (*juge de l'instruction*;).[49] Some argue that there are many benefits in retaining the position of investigating magistrate, as it allows for close supervision of the police investigation of an offence, rather than a hands-off role in which the investigating judge is little more than the puppet of the police.[50] If in an adversarial system one were to introduce greater pre-trial judicial responsibility, it would tend to take the form of the *juge de l'instruction*, rather than that of the *juge d'instruction,* because the latter, with its joining of judicial and investigative functions in a single person, would be so fundamentally incompatible with an adversarial system that its introduction cannot realistically be contemplated. That is not necessarily the case with the former, as is further debated below.

Common interest in different jurisdictions

It is striking to what extent both systems have looked to each other for solutions. The most radical experiment in this regard was probably undertaken in Italy, which in 1988, substituted an adversarial system of criminal proceedings for its old inquisitorial model. However, after a short delay, with realisation dawning about the costs of an adversarial system, because of inherent legal-cultural attitudes, and partly out of a desire to deal with matters in more consensual ways by way of diversion or alternative judicial processes, Italy has

substantially (at least in terms of practice) reverted to its old inquisitorial ways due to recent amendments, as pointed out above. This reversionary trend lends some support to the thesis that there are limitations on the amount of borrowing from an inquisitorial jurisdiction that is possible in Western Australia.

Hybrid models

Of interest is also the development of hybrid models with multinational scope. Presumably such a hybrid model will result from the work undertaken under article 15 of the Rome treaty establishing a permanent international criminal court.[51] A Committee is developing rules of criminal procedure that will apply in the court, and that will presumably borrow from both types of jurisdictions.

In the European Union, uniform provisions of criminal law and criminal procedure are being developed for the purpose of the protection of the financial interests of the European Union (ie, a unified European Union criminal law dealing with fraud).[52] Again the procedures developed borrow from both adversarial and inquisitorial systems. Reference should also be made here to the procedure that applies before the war crimes tribunal concerning the former Yugoslavia, and the Rwanda war crimes tribunal. All these developments are giving rise to the emergence of a body of law with common and hybrid characteristics in criminal procedure that is relevant to the law reform process in any national or sub-national jurisdiction.

Conclusion

The inevitable conclusion flowing from the striking parallels in problems and solutions is that, on the one hand, many of the difficulties that seem restricted to our jurisdiction are in fact generic; and maybe more relevantly in the context of this inquiry, that the adoption of a civil law system, or some elements of a civil law system, may resolve some of our current concerns, but would most likely import a whole new set of different problems, equally pressing. In any case, it should not be forgotten that both jurisdictions are marked by the same history of, and trends towards, the rule of law, respect for human rights and effective administration of justice. In that light, it appears unlikely that either would show fundamental failures that are not replicated in the other system. In the meantime, there is a risk that with the bath water (the adversarial system), some important babies (certain basic rights that the common law has jealously guarded) may be thrown out. That leaves the question open of what advantage could be derived from borrowing some elements from the inquisitorial system. The unanswered question, and one that is inherently difficult to answer, remains as to the differential cost-structure of both systems. It may be that so many factors come into play in making such a comparative calculation anyway, that it will never be very useful to undertake it. Ultimately the matter of cost is one that is closely connected to values, democracy, and political choice, rather than only to efficiency, when one considers criminal

justice, which is so intimately concerned with people's most basic rights and freedoms.

DISADVANTAGES OF THE ADVERSARIAL SYSTEM, WITH REFERENCE TO THE INQUISITORIAL MODEL

Some disadvantages of an adversarial system can be identified. The main themes are as follows:

1. the congruence of party prosecution and the rules of evidence;
2. 'equality of arms' in the adversarial system; and
3. judicial management and supervision of the pre-trial stage.

Results of the congruence of party prosecution and the rules of evidence

It is arguable that the congruence in an adversarial system of, on the one hand, the rules of evidence that require testimonial proof at the trial, and, on the other hand, party prosecution, with its attendant potential for stratagems and delay, have a detrimental effect on the capacity of the system to identify the truth. The fact that both sides are subject to the same handicaps gives scant comfort. The equality of handicaps, if it exists, will not guarantee a fair outcome. It is unsatisfactory at the conceptual level. Furthermore, the actual inequality of means between the parties arguably results in an unfair advantage for the prosecution. On the other hand, concerns are often expressed that the whole trial process, and rules of procedure and of evidence, are in fact heavily weighted in favour of the accused.

The obvious solution, which would in effect result in an approximation of the inquisitorial system, might then to be to abolish party prosecution and oral and continuous trials. Exclusionary rules of evidence would lose their significance as well. A necessary consequence would be the abolition of jury trials. However, it is undeniable that the rules of evidence, although they are to a large extent inspired by the risks inherent in jury systems, also embody important guarantees for an accused. Thus wholesale abolition may have detrimental effects on the rights of the accused; it would also affect the advantages derived from immediacy and reliability-testing.

A more acceptable solution would be one that focuses primarily on accelerating the trial process. The oral presentation of evidence, with its advantages of directness and testability through cross-examination, is less subject to the vagaries of memory and external influences on witnesses, *the closer to the actual events it takes place*. Speedy trials, of course, have important benefits in terms of the accused, certainly where he is on remand, and in terms of the victim and society as a whole. In more ways than one, justice delayed is justice denied.

The point of focus of reform should thus be *party prosecution*, rather than party presentation and orality. Greater judicial intervention at the early pre-trial stage should prevent delaying tactics, clarify issues, allow the identification early on of the most appropriate way to proceed, and speed up trials.

Lack of equality of arms

Maybe the most fundamental reason for the lack of equality of arms in the common law system of criminal procedure, is the major role ascribed to the accused's legal representative. A considerable forensic responsibility rests on the shoulders of lawyers for the accused, unlike in inquisitorial systems, where officialdom takes all such responsibility. The barrister or solicitor is the key to the effective and fair operation of the system, with an obligation both to the client and to the court. Nonetheless this is a potential weakness of the system as well, evidently where the accused is not represented, but also in cases where the accused is under-represented. In such circumstances the accused may be encouraged not to pursue a potential chance of acquittal because this route in some way (eg because of lack of resources, time or other factors) is not in the interest of the legal representative. To simply impose a greater moral obligation on lawyers is not the solution, since the under-funding of a system, be it systemic or fiscal, cannot be solved by exhortations that in truth amount to an obligation to work without adequate reward: the system should not be systematically dependent on professional altruism, even if it may depend substantially on professional ethics.

A further major difficulty that enhances the potential for grave imbalance is that more often than not, for various reasons both social and systemic, the clientele of the criminal justice system, is on average less well resourced and less educated than the population in general. In a period of hardening of attitudes towards law and order, this unfortunate effect is further enhanced, because increased criminalisation, the imposition of more frequent and harsher penalties, and less emphasis on rehabilitation, will have the effect of rendering those likely to come into contact with the criminal justice system even less able to ensure their own fair and just treatment within that system.

It is worthy of note that although the question of equality of arms is a critical issue in adversarial systems, it is equally problematical in inquisitorial jurisdictions (but on different grounds), as is revealed by the jurisprudence of the European Court of Human Rights concerning article 6 thereof. The concern is that the inquisitorial system, which relegates the accused to the second rank, denies the accused the right to put his side of the case. In particular, he or she is not in a position effectively to cross-examine witnesses or test evidence, nor independently to introduce evidence at trial.[53]

So although greater official responsibility for truth finding may solve the problem of inequality of arms that exists in adversarial systems, wholesale importation of the inquisitorial model may also systematically disadvantage the accused.

Ineffective supervision at the pre-trial stage

Because the pre-trial stage is secret and not normally *contradictoire* in a civilian jurisdiction, the accused does not have any great role to play at that stage. Nonetheless there is more judicial supervision of processes and procedures at that stage, and the power of supervision is far more systematised. There

are various layers of pre-trial supervision in the inquisitorial systems, at least in theory: the prosecutor supervises the police; the investigating magistrate supervises the prosecutor; and the *chambre d'accusation* supervises the investigating magistrate (by way of appeals against the judicial determinations of the investigating magistrate). A further move in civil law countries would see the *accused* given a greater role at the pre-trial stage, through the introduction of a *juge de l'instruction* as opposed to a *juge d'instruction*. In effect this would enable the accused to request the ordering of certain investigative measures from a court; however, the result may be a cumbersome and inefficient process.

Such supervision is lacking in adversarial systems. Supervision is, however, more important at the pre-trial stage in inquisitorial systems than in adversarial systems, to ensure the objective composition of the *dossier*, since the latter will be communicated to the trial court in a manner less *contradictoire* than the presentation of evidence in an adversarial trial court. Hence in the inquisitorial system, strict and continuous supervision of the police, both by the *parquet* and by the investigating magistrate, is of crucial importance.

That is less the case in adversarial systems, and a greater focus on judicial *management*, rather than judicial *supervision* may be more appropriate in such systems. Obviously, where an investigating magistrate is involved, there is effective judicial management of the progress of a case. But the Italian model may be of more relevance to Western Australia, with a *juge de l'instruction* who does not conduct the investigation but provides judicial control over various vital steps in the process (eg measures affecting rights or liberty of the accused; classification of offences; appropriateness of diversionary measures or summary procedures), and has a judicial management function.

CONCLUSIONS

Some of the disadvantages of the adversarial system have been discussed earlier in this sub-section. Irrespective of those advantages and disadvantages, the attempts to tackle the common problems of both adversarial and inquisitorial systems have provided interesting comparative insights. Those attempts reveal important contemporary goals of criminal procedure: the development of alternative processes of equivalent value, based on an appropriate taxonomy of cases;[54] the development of an incentive structure to motivate offenders to adopt alternatives to judicial determination of their cases; the maintenance of effective guarantees that the choice of the accused to forgo judicial determination is made freely and competently; and the maintenance of a fair, effective and well adapted system of judicial determination of cases. The broad realisation that *alternative ways of dealing with offenders can be both more effective, cheaper and faster* than the judicial method, underlies the search for more flexibility. But choice and flexibility are subject to the crucial proviso that the accused's right to have his case

considered judicially, with all the guarantees of fairness, civil rights and objectivity that that implies, must be effectively maintained.

The inquisitorial system, with its established level of supervision and judicial control at the pre-trial stage, *theoretically* lends itself better to a more flexible process in which the trial is only one of a number of options of equal value; whether it does so in practice is less certain. Nonetheless, there is no reason in principle why an adversarial system could not adapt, while yet ruling out a wholesale adoption of an inquisitorial model.

In both systems a large number of cases is effectively determined before trial. Considerable discretion has been conferred on non-judicial bodies in the pre-trial stage. In the common law world this occurs, *inter alia*, through guilty pleas and plea-bargaining and in the choice of various diversionary processes made available to non-judicial authorities by statute. In civil law countries this occurs through the development of extra-legal discretion on the part of judicial police and prosecutors, as well as through various statutory diversionary powers (more assumption of discretionary powers than conferral by law).

It is clear though that there is major concern both about the *nature and quality of the choices* available at the early stage of the process, and about the *manner in which the choice is executed*. Given that fact, and certainly if *further* non-judicial alternatives and alternative adjudicative processes are to be developed, there is a greater need for both effective judicial (ie objective and non-partisan) control and supervision of pre-trial decision making, and for greater judicial management. However, the risk of increasing cost unnecessarily through the creation of new supervisory structures must be avoided. Greater judicial management has the potential of saving costs and sparing resources, and greater judicial supervision could result in increased use of cheaper (and possibly more effective) diversionary measures. With those goals and concerns in mind, the *centralisation of existing functions in a pre-trial court, with some additional powers of supervision* is one possible option.

Proposal 3

Adoption of a pre-trial court.

The following brief paragraphs give some indication of how a 'pre-trial court' may be introduced while maintaining some of the advantages of a basically adversarial model. The resulting system would have much in common with the Italian law of criminal procedure.

These suggestions are embryonic and are put forward for consideration and comment.

A pre-trial court

The specialised pre-trial court would effectively have as its exclusive jurisdiction the management, supervision and control of all the incidents of the pre-trial stage. Its powers would be, inter alia, to review decisions about diversionary measures (eg an agreement between the prosecution and accused to resolve a case in a certain way, for instance by the payment of an agreed fine, or performance of community service). Alternatively, it would determine or review a decision to proceed with a case in a certain judicial manner, for instance on the basis of a written file only, or by a summary trial or a full jury trial. It could also determine which court should hear a case.

The court would also be responsible for the *granting of investigative or forensic powers* such as search and seizure, remand, issuing of warrants (all measures that affect the rights and freedoms of the accused) upon the application of the police or prosecution.

The pre-trial court would further have an important role relating to *evidentiary matters*. It could resolve questions relating to the admissibility of evidence at an early stage. It would be responsible for the appointment of neutral experts, maybe even for the taking of evidence in cases where there will be no opportunity to repeat the evidence in oral form if an oral trial is ultimately ordered. Such a court could also have a more extensive management role, with the ability to impose time restraints upon parties, to order the exchange of information between parties and the identification of issues in dispute. The powers of such a court could incorporate the conduct of committal hearings if such proceedings are to be retained.

The advantages of such a specialised pre-trial court would be early and appropriate intervention; preventing the loss of certain forms of evidence; more effective management of cases; judicial supervision of the free choice of the accused, and consistent policy development, amongst others. Early intervention at a judicial level can prevent party dilatoriness. It can also speed up the occurrence of the trial, thus improving the quality of evidence heard at a trial, and also benefiting the accused. Greater judicial supervision may also allow a case to proceed without jeopardising both the rights of the accused to prepare an adequate defence, and the rights of the prosecution to prepare a case thoroughly.

The development of an effective taxonomy of cases (and incentives) would also allow the most appropriate choice between the various courts (if the powers of all those courts over criminal matters at first instance must be retained), and between jury and summary trials.

Forensic responsibility, the rules of evidence, and codification

Adopting a pre-trial court would not necessarily entail the adoption of some of the more debatable aspects of the inquisitorial systems. The insistence in common law systems on the presumption of innocence and right to silence is a healthy aspect of the system which it is in the long term interest of society

to maintain. Nonetheless, in some circumstances certain aspects of the right to silence could be analysed more closely. Further, the opportunity for an accused to challenge the prosecution evidence effectively at a trial is of vital importance. As far as fact-finding and rules of evidence are concerned, some modest changes could probably be made without threatening some of the basic aspects of an adversarial system, even if that would in fact result in bringing the adversarial system a little closer to an inquisitorial model. The forensic responsibility of trial judges could be modestly increased, and the rules of evidence relaxed in some circumstances. The main focus should be on admitting evidence that is taken soon after the facts and is reliable, but that would be excluded at present as hearsay.

Proposal 4

Relaxing the rules of evidence, particularly the rule against hearsay evidence.

It is obvious that a trial judge with ultimate responsibility for fact finding is not an aspect of the inquisitorial systems that is appropriate for introduction in a basically adversarial system. Such a change would amount in effect to a wholesale introduction of an inquisitorial model. Nonetheless, a more interventionist brief could be given to trial judges within the confines of an adversarial model. For instance, by the grant of power and incentive to stop inappropriate or irrelevant cross-examination (even though the power exists, it is too infrequently exercised); of power (though limited and closely circumscribed) to ask questions of a witness; or power to order further forensic measures in cases where there is a clear need.

Proposal 5

Giving judges greater control over the forensic process at trial.

Judges could also be responsible for the appointment of independent experts who can be cross-examined by both sides, and that have to provide expert evidence in written form to both parties prior to trial. The appointment of the expert could be made by the pre-trial court.

Proposal 6

Court-appointed experts.

A further area for reform may concern the general applicability of exclusionary rules of evidence. Naturally, some rules of evidence are the necessary consequence of having oral trials, be they before juries or judges alone; even so, where an oral trial is conducted before a judge it may be that many of the exclusionary rules of evidence could be further relaxed. In other words, there could be, like in some civilian systems, one set of rules applying to jury trials, and one to non-jury trials.

Proposal 7

Introduction of a dual system of rules of evidence and procedure.

A possible model, and a process that is of course typical of inquisitorial systems, is to have at least the option of a documentary summary proceeding (as per the European models discussed above, see 'Guilty pleas and abbreviated processes'). Such evidence may well be open to challenge by the accused, in the form of witnesses, but any disputes about the documentary evidence itself could be resolved at pre-trial hearings. Naturally, proceeding via this route should be subject to the freedom of choice of the accused, even if appropriate incentives could be made available, and to appeal to a court that would re-hear the case on a more adversarial basis.

Proposal 8

Introduction of an abbreviated documentary procedure, along the lines of existing models in certain European jurisdictions.

Development of a code of criminal procedure may also be considered worthwhile.

Proposal 9

Development of a code of criminal procedure.

Further comparative study

The most useful comparative investigations would be into the abbreviated processes being developed in various inquisitorial jurisdictions, such as the *incidente probatorio* and the *guidizio abbreviato* on the basis of the *dossier* alone,[55] or the German or French models mentioned above. In general, a closer study of the Italian model as a whole may provide useful insights, as well as of some of the hybrid multinational models being developed.

Proposal 10

Investigation and possible adoption of abbreviated procedures in certain inquisitorial jurisdictions.

SUMMARY OF PROPOSALS

(Although sub-section 1.3 is primarily concerned with identifying advantages and disadvantages of the adversarial system, a number of proposals have been formulated in the course thereof. A summary of the proposals outlined follows. Major options are found under the heading 'Conclusions'.)

1. Restrict jury trials to the gravest offences.

2. Adopt a code of criminal procedure.

3. Adoption of a pre-trial court.

4. Relaxing the rules of evidence, particularly the rule against hearsay evidence.

5. Giving judges greater control over the forensic process at trial.

6. Court-appointed experts.

7. Introduction of a dual system of rules of evidence and procedure.

8. Introduction of an abbreviated documentary procedure, along the lines of existing models in certain European jurisdiction.

9. Development of a code of criminal procedure.

10. Investigation and possible adoption of abbreviated procedures in certain inquisitorial jurisdictions.

ENDNOTES

1 See further below. See also B De Smet, 'De inquisitoire onderzoeksmethode op de beklaagdenbank' ['The inquisitorial method of investigation in the dock'] (1995) *Panopticon* 341.

2 See the various public submissions made under this reference to the LRCWA.

3 See eg in E Whitton, *The Cartel, Lawyers and Their Nine Tricks* (1998).

4 For a useful recent work describing the various European systems of criminal procedure, see C van den Wyngaert (ed), *Criminal Procedure Systems in the European Community* (Butterworths, 1993). See also for a less theoretical account, B McKillop, *Anatomy of a French Murder Trial* (1997). A useful description in English is also given in Royal Commission on Criminal Justice (L Leigh, L Zedner), *A Report on the Administration of Criminal Justice in the Pre-trial Phase in France and Germany* Research Study No 1 (London: HMSO, 1992). Some detail concerning the distinctions between various systems is also given in JF Nijboer, 'Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective' (1993) 41 *American Journal of Comparative Law* 299 (an article that also reviews William Twining's, *Rethinking Evidence* (1990)). As to the law in Belgium, in Dutch: see C van den wyngaert , *Strafrecht en strafprocessrecht in hoofdlijnen* (MAKLU, 1994). Although Italy is listed here as an inquisitorial system, that is no longer truly the case, since the introduction of the New Code of Criminal Procedure, the *Codice Vassalli*, in 1989, which substituted an adversarial system of criminal proceedings for the inquisitorial model represented by the previous *Codice Rocco* (1930).

5 Although in both systems individuals can set the machinery of the state in motion, eg by launching a private prosecution in common law countries, or by requiring the *juge d'instruction* to undertake an official investigation by a requisition by the *partie civile*, where the prosecutor has refused to take the case any further.

6 The monopolisation of criminal prosecutions, and of the use of force and compulsion in the hands of the state, has as its counterpart the prohibition of the use of retributory force by private citizens.

7 In this context the law of evidence relating to criminal cases, is treated as part of the law of criminal procedure.

8 Note Geoffrey Davies J, 'Fairness in a Predominantly Adversarial System' (1997) 71 *Reform* 47.

9 For an interesting perspective on this question, see WJ Stuntz, 'The Uneasy Relationship Between Criminal Procedure and Criminal Justice' (1997) 107 *Yale Law Journal* 1, and the response by DK Brown, 'Criminal Procedure, Justice, Ethics and Zeal' (1998) 96 *Michigan Law Review* 2146.

10 For instance, a totally inefficient system of criminal procedure will defeat the goal of deterrence that substantive criminal law pursues. Conversely, substantive criminal law that strives for absolute, rather than relative deterrence, will place unbearable strain on the law of criminal procedure.

11 For instance, the standard of proof 'beyond reasonable doubt' is not a standard of absolute certainty; such a standard would have important resource implications; it is also not the same as the civilian standard of proof, the *in time conviction*, which applies in civil and criminal cases alike.

12 For a discussion concerning possible limitations on reform of an adversarial system, see DA Ipp, 'Opportunities and limitations for change in the Australian adversarial system' (Paper presented at the Australian Institute of Judicial Administration Conference, Brisbane, August 1997).

13 See eg Phil, Fennell (ed), *Criminal Justice in Europe: A Comparative Study* (1995), Ch 19 (Conclusion: Europeanization and Convergence: The lessons of Comparative Study). See also CM Bradley, 'The Convergence of the Continental and the Common Law Model of Criminal Procedure (1996) 7 *Criminal Law Forum* 471.

14 Most striking example is the introduction of an adversarial system of criminal procedure in Italy (see above n 4). But other inquisitorial jurisdictions are showing a keen interest in adversarial systems; see eg B De Smet, 'De versnelling van de strafrechtspleging met instemming van de verdachte; is de invoering van een 'guilty plea' naar Angelsaksisch model wenselijk?' ['Accelerating criminal procedure with the consent of the accused; is the introduction of a 'guilty plea' after the Anglo-Saxon model desirable'] (1994) *Panopticon* 420; see also the report of the French parliamentary mission to the UK to look into the functioning of the adversarial system.

15 See, J Pradel, Ch 4 'France'and P Corso, Ch 8 'Italy' in C van den Wyngaert (ed), *Criminal procedure systems in the European Community* (1993) 105-135 and 223-259.

16 A seminal contribution to the understanding, in common law jurisdictions, of this dichotomy was made in S Goldstein and M Marcus, 'The myth of judicial supervision in three 'inquisitorial' systems: France, Italy and Germany' (1977) 87 *Yale Law Journal* 240.

17 Which is what has given rise to major concerns about the divergence from the legal model, for instance in France: see H Haenel, 'Les infractions sans suite ou la delinquence mal traitee' in Commission des finances [of the French Senat], *Rapport d'information* (1997/98) 513; and to calls for a return to the legal model, for instance in Belgium: see De Smet B, *'Le juge d'instruction: obstructionniste ou acteur indispensable dans le proces penal?'* (1996) 67 *Revue Internationale de Droit Pena* 417 [calling for retention and revitalisation of the role of the investigating magistrate (*juge d'instruction*)].

18 See the Italian example, as explained in C van den Wyngaert, above n 15, Ch 8: Italy; and in France, where the old *Code d'instruction criminelle* of 1808 was replaced with the *Code de procedure penale* 1959, which was revised at various times, with two important revisions in 1993, by the laws of 4 January and 28 August of that year. Since then the *Commission Justice penale et droits de l'homme* (otherwise known as the *Commission Delmas-Marty* after its President) has made further proposals for important changes, notably to the role of the investigating magistrate. For a comment in English on some reforms in France, see S Field and A West, 'A Tale of Two Reforms: French Defense Rights and Police Powers in Transition' (1995) 6 *Criminal Law Forum* 473.

19 Some police officers are not judicial police, and some non-police have the status of judicial police (eg some customs officers).

20 In the original Napoleonic code the investigating magistrate was supposed to supervise and control every case, but now he is only involved in about 10% of cases in Belgium, and even fewer in France.

21 Much duplication results, and many reform proposals are aimed at cutting out the duplication by either personal contact or by skipping some of the steps in favour of immediate appearance before a court.

22 Prosecutors are sometimes known as the *Magistrature debout* (standing magistracy), whereas judges are known as the *Magistrature assise* (seated magistracy).

23 In France and Belgium the *Procureurs* are subject to a *Procureur-general*, and ultimately to the *Procureu-General aupres de la Cour de Cassation.* For some comparative information concerning the functions of the prosecution in various jurisdictions, see JE Hall Williams (ed), *The Role of the Prosecutor* (1988). See also J Fionda, *Public prosecutors and discretion, A comparative study* (1995). (England, Scotland, the Netherlands and Germany; with extensive bibliography).

24 Note that there is a *juge d'instruction* in France, Belgium and the Netherlands, but not in the German or Italian system, the latter having abolished the position in favour of a *'juge de l'instruction'*. Supervision of the police investigation in Germany and Italy is thus in the hands of the prosecutor alone.

25 However, as stated, the limited number of jury trials that does occur in certain civilian jurisdictions is subject to special rules or orality, immediacy and continuity, similar to adversarial trials in common law jurisdictions.

26 On this point, see A Palmer 'Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other "Guilty Behaviour" in the Investigation and Prosecution of Crime' (1997) 21 *Melbourne University Law Review* 95. Also RD Friedman 'Thoughts From Across the Water on Hearsay and Confrontation' (1998) *Crim Law Review* 697.

27 It should be noted that decisions in inquisitorial systems are always of the court, and not of individual judges. Thus, although the identity of judges is of course known, and may become widely known to the public via the media, there is probably less of a tendency towards public criticism of individual judges, for instance for perceived inappropriate leniency or inconsistency in sentencing. Adversarial jury trials can give little comfort to individual judges on this score, since sentencing is always a matter for the judges, unlike in the inquisitorial systems.

28 See C van den Wyngaert, above n 15, Ch 8: Italy: 'The trial was [that is, before the introduction of the 1988 *Code of Criminal Procedure*] basically conducted on the basis of this *dossier* and the elements collected in the *dossier* by the public prosecutor constituted the evidence for the prosecution. The new *Code of Criminal Procedure* has abolished this system, and requires all evidence to be produced in court, in front of the trial judge, who must evaluate and assess it on the basis of the initiatives of the parties and of the confrontation between them (*iudici fit probatio*). The legislator wished to avoid the situation in which preliminary investigations conditioned the trial and influenced the trial judge. *However, recent legislative reforms and developments in case-law have greatly mitigated this rule, following the principle that evidence should not be dispersed* (art *500)* [emphasis added]' (art 235). There are two exceptions to this rule. The first is the *incidente probatorio:* this is a procedure 'which can be used if there is a risk that evidence available during the preliminary investigation may be dispersed by the time the case is referred to the trial court. In such cases, the evidence may be produced before the judge for the preliminary investigations, in the same way as the evidence would be produced before the trial judge, with the exception, however, that the *incidente probatorio* takes place *in camera*' (art 235).

29 As to the limitations imposed by the Constitution of the Commonwealth, section 80, in relation to indictable offences against Commonwealth laws, see *Cheatle v The Queen* (1993) 177 CLR 541. Note also that, where separation of powers in enshrined in the Constitution, there may be a limit on the powers of the Parliament to determine the laws of criminal procedure, since such determination may be within the province of the judicial power.

30 See further below; as stated above, such a system applies in inquisitorial jurisdictions that retain trials by jury for major offences (eg Belgium and France).

31 Apparent admiration for this position seems to have swept through the media at the time of the investigation into the death in a motor vehicle accident in France of Diana, Princess of Wales.

32 With the introduction of the new *Code of Criminal Procedure* of 1988; see above n 28. It was felt desirable to maintain a stricter separation between investigative and judicial functions.

33 This term is difficult to translate; the Italian term is *guidici per le indagini preliminari*, or judge for the preliminary investigations, as opposed to the investigating magistrate, the *giudice istruttore* (now abolished). In French, the distinction is made between the *juge d'instruction* (investigating magistrate, as at present), and the *juge de l'instruction* (judge or magistrate of the investigation, as proposed by some).

34 For instance, under this model, police conduct during the investigation is circumscribed not so much by specific statutory rules, but by the - at times uncertain - evidentiary rules applying to the exclusion of illegally or improperly obtained evidence.

35 The *Police Powers and Responsibilities Act 1997* (Qld) is an example of a clarifying statute of limited scope in this area. However, its consequences are not directly related to the trial, but to disciplinary matters; in other words, although it regulates police conduct, it does not regulate criminal proceedings directly.

36 Indeed, even in Italy, where the adversarial system was adopted (see above n 28), the guilty plea was not.

37 See De Smet, above n 14.

38 Ibid.

39 Ibid. See also K Mack and S Roach Anleu, 'Reform of Pre-Trial Procedure: Guilty Pleas' (1998) 22 *Criminal Law Journal* 263.

40 See P Corso, Ch 8 'Italy' in van den Wyngaert above n 15, 223-259.

41 See eg Palmer, above n 26; and Friedman, above n 26. See also Sir Richard Eggleston, *Evidence, Proof and Probability* (1978)

42 The French Commission Delmas-Marty found that if an adversarial system were introduced in France this could only be fair if it was underpinned by a system of generous legal aid for all accused persons.

43 Inquisitorial systems sometimes come in for this latter criticism, since they tend to allow a greater degree of pressure on the accused to confess, through the ready imposition of preventative detention and the right to interrogate an accused after arrest.

44 On rights issues in criminal procedure, see JA Andrews (ed), *Human Rights in Criminal Procedure* (1982). (with chapters on many European national systems).

45 In Europe, a remarkable convergence between systems (that of the UK and those of the civil law jurisdictions) is occurring, through the unified jurisprudence of the European Court of Justice, so that the balance is altering in both kinds of jurisdictions. See eg Jorg, Field and Brants in Phil Fennell (ed), above n 13, ch 3 'Are inquisitorial and adversarial systems converging?'; and Swart and Oung in Phil Fennell (ed), above n 13, Ch 4 'The European convention on human rights and criminal justice in the Netherlands and the United Kingdom'. In Australia as well, there is an increased tendency to refer to individual rights in the context of criminal prosecutions, both at the level of jurisprudence and at the legislative level. Thus there is a degree of congruence between Australia and civil law jurisdictions in terms of certain aspects of the law of criminal procedure as well. See eg *Cheatle v The Queen*, above n 29; and *Dietrich v The Queen* (1992) 177 CLR 292.

46 See for instance, NSW Law Reform Commission, *The Right to Silence,* Discussion Paper 41 (May 1988).

47 On this point the Report by Leigh and Zedner, see above n 4, makes interesting reading. Preventative detention is obviously sometimes (mis-) used to put pressure on an accused to confess.

48 That 'strict adherence' is undermined in some ways, however, by the case law: see J White, 'Silence is golden? The Significance of Selective Answers to Police Questioning in NSW' (1998) 72 *Australian Law Journal* 539.

49 See Corso, above n 40.

50 See for example, De Smet B, above n 17 (in favour of retention of the positions).

51 Rome statute of the international criminal court (adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, 17 July 1998).

52 See Corpus Juris introducing penal provisions for the purpose of the financial interests of the EU, *Direction Generale du Controle Financier*, under the direction of Professor Delmas and M Marty, Economica Paris 1997.

53 But the Court has found that if the accused has the opportunity at least once to question the evidence against him or adduce evidence in his favour, procedural justice is safeguarded, even if the questions are actually put through a judge (as cited in De Smet, above n 17, 436, 73).

54 An appropriate taxonomy of criminal conduct would also allow the more rational expenditure of resources, with an eye to optimal outcomes. For instance, now we may spend the least on a first

offence by a juvenile, the most on a recidivistic violent offender: is this the most rational way of expending resources, ie is the gravity of the potential sentence the only indicator of the amount of resources that should be spent? Or should the chances of rehabilitation, the age etc.. in fact lead to greater resources being allocated (not to less, as so often seems to be the case) whatever form the expenditure of those resources may take?

55 See Corso, above n 40, 235.

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1.4

Measuring the Effectiveness of the Justice System

INTRODUCTION

The apparent simplicity of the title here is misleading. The task of measuring the justice system's effectiveness is an enormous one and, as writers tend to say to excuse the deficiencies of their writing, 'too broad for detailed consideration in a paper of this size'. However, attempts will be made to give a broad overview of:

- What *is* the justice system?
- What would one measure to assess its effectiveness?
- How can one begin to achieve the task of measuring its effectiveness?

It should be noted that the words 'measuring', 'monitoring', 'assessing' and 'evaluating' and their derivatives will be used interchangeably. So too will 'effectiveness' and 'performance'. No significance should be read into the use of different combinations of these words.

On the premise that the justice system does not exist to serve those employed in it, but to serve society as a whole, this sub-section attempts to:

- take a user's view of the judicial system and of the measurement of its effectiveness; and
- address the concerns that a lay person might reasonably have.

A consequence of this approach is that issues which are outside the jurisdiction of the Law Reform Commission of Western Australia ('the Commision') will be raised, in particular those issues which fall within the jurisdiction of the Commonwealth Government. However, they are nonetheless part of the justice system *in* Western Australia.

Given this approach, the conclusions and recommendations proposed may come as little surprise to readers — if they accept the validity of this approach

then they are likely to have reached the same conclusion themselves in the course of reading it.

LITERATURE

Before addressing the three questions outlined above, it may be useful to consider how other jurisdictions attempt to measure the effectiveness of their justice systems.

For a number of reasons, including language difficulties, only literature from English-speaking jurisdictions is considered. More importantly the jurisdictions inherited from the other major colonial powers are so different from those inherited and evolved from the English. As discussed in sub-section 1.2,[1] the common law or adversarial system of justice largely dominates in the English-speaking world because it was propagated by the British Empire. Mainland European countries adopted a different approach, the civil or inquisitorial system, and many of their colonies inherited it from France and Germany, for example.

England and Wales

Criminal justice system — improving performance

In a press release[2] dated 30 December 1998, the United Kingdom government outlined some of its aims for the justice system in England and Wales. This represents a significant development, as the press release was jointly issued by the Home Office, the Lord Chancellor's Department and the Attorney-General's Office. Between them these ministries administer or fund all, or at least the vast proportion, of the criminal justice system. The press release heralds an acceptance that, however it may be administered, for some purposes the criminal justice system should be regarded as a single entity.

Of the major criminal justice functions, the Home Office funds the police and probation services, exerting somewhat more control over the latter, and has responsibility for the prison system. The Home Office also administers the functions of the independent Parole Board, and the probation services supervise offenders on parole and other forms of early release. The Attorney-General's Office has responsibility for the Crown Prosecution Service, which prosecutes all cases. The Lord Chancellor's Department funds legal aid, administers all courts and, notwithstanding their independence, also provides leadership for judicial officers.

These three government ministries have traditionally operated independently of each other, with a consequent lack of focus on the justice system as a system. Previous attempts have been made to promote an integrated approach to justice, such as the Criminal Justice Consultative Committees, national and regional, set up in response to Lord Justice Woolf's inquiry into the 1990 riots in Manchester prison.[3]

The press release is reproduced at Appendix 1. It sets out two 'overarching aims' for the criminal justice system, and eight objectives which are worth repeating here:

- to reduce crime and the fear of crime and their social and economic costs, by
  (i) reducing the level of actual crime and disorder;
  (ii) reducing the adverse impact of crime and disorder on people's lives; and
  (iii) reducing the economic costs of crime.
- to dispense justice fairly and efficiently and to promote confidence in the rule of law, by
  (i) ensuring just processes and just and effective outcomes;
  (ii) dealing with cases through the criminal justice process with appropriate speed;
  (iii) meeting the needs of victims, witnesses and jurors within the system;
  (iv) respecting the rights of defendants and treating them fairly; and
  (v) promoting confidence in the criminal justice system.

Rather than setting out how the government intends to measure performance in achieving these aims and objectives, the press release lists a number of targets. It may be harsh to criticise the targets when the initiative itself is beyond reproach. However, the targets *are* weak, ranging from broad and rather nebulous, eg. '[to reduce] the long-run rate in the growth of crime', to extremely specific, eg. '[to halve] the time from arrest to sentence for persistent young offenders from 142 to 71 days'. The concentration on young offenders belies the fact that some responsibility for youth justice in England and Wales falls to local authorities, the ministerial portfolio being shared between the Home Office and the Department of Health.

Recent reviews of civil justice

The civil justice system in England and Wales largely falls within the jurisdiction of the Lord Chancellor's Department, particularly given its administration of the courts and funding of legal aid. It has been the subject of substantial review, most recently in the reports of Lord Woolf and Sir Peter Middleton.[4] Lord Woolf's report sets out some basic principles that the civil justice system should meet:

- It should be *just* in the results it delivers
- It should be fair and be seen to be so by:
  - ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
  - providing every litigant with an adequate opportunity to state his own case and answer his opponent's;
  - treating like cases alike.
- Procedures and cost should be proportionate to the nature of the issues involved.
- It should deal with cases with reasonable speed.
- It should be understandable to those who use it.

- It should be responsive to the needs of those who use it.
- It should provide as much certainty as the nature of particular cases allows.
- It should be effective: adequately resourced and organised so as to give effect to the previous principles.

Sir Peter Middleton's report provides a 'rough map' of civil justice in England and Wales, illustrating the disparate nature of the civil justice system. However, there has been little apparent attempt to measure the performance of the civil justice system in fulfilling Lord Woolf's principles, or any other objective or subjective aims. The ongoing review and reform is largely concerned with cost, although in fairness this is framed in terms of access to justice and expedition. It is a fact that a slow process is more likely to be expensive, and an expensive and slow process will not encourage or facilitate access.[5]

The report includes some consideration of legal aid, particularly its cost. Legal aid is of course not solely an issue for civil justice, and the debate in Britain over its cost seems confused and confusing, with the emphasis switching unpredictably from criminal to civil legal aid.

Section 95 and other Home Office publications

Section 95 of the *Criminal Justice Act 1991* (UK) commits the government to publish information to monitor sexual and racial discrimination within the criminal justice system, and also to monitor the costs of the administration of justice. (See Appendix 2)

Several publications have been prepared in compliance with section 95 — for example, a recent paper providing information on the treatment of different ethnic groups by the justice system.[6] The publication generally avoids comment on the statistics presented, and leaves readers to draw their own conclusions as to the significance of the figures. There have been several publications on the sentencing of women. Although section 95 is intended to promote the monitoring of costs, as well as discrimination on grounds of gender and race, the former has been little reported upon in publications since the 1992 report on the costs of the criminal justice system.[7] This may well be because of the complexity of the task. The Home Office and the other criminal justice agencies have been engaged for some years in an attempt to 'model' the criminal justice system, so as to be able to accurately assess and assign costs. A publication is expected in the near future.[8]

Another recent publication[9] reports on research which tracked offenders through the justice system. The study was therefore able to report on a number of important decision points, and make inferences about any sexual or racial discrimination in those decisions. The study was mainly file-based, and some of the data were provided by survey of those working in the justice system, with varying levels of cooperation. It took considerable time to complete, and by the time of publication some of its findings were almost

irrelevant having been overtaken by legislative changes (for example changes relating to the right to silence). However, it clearly represents an attempt to measure what goes on in the justice system. Other such ad hoc studies include Hood and Cordovil's seminal work[10] and Flood-Page and Mackie's research.[11]

British Crime Survey

Another publication is the biennial British Crime Survey, most recently published in late 1998.[12] This 'victimisation survey' (sometimes referred to as 'crime and safety' surveys) measures the level of crime more accurately than 'recorded crime', as it is unbiased by changes in victims' propensity to report crime to the police and in the propensity of the police to record it.[13] In this way it also measures one of the less visible behaviours of the police.[14] The Survey's main shortcoming, its concentration on crimes against households and individuals and their property, was addressed in 1994 with a survey of crime against commercial victims.[15] The Survey occasionally covers other difficult issues, such as domestic violence,[16] sexual offences[17] and crime against children aged 12 to 15 years.[18] Another gap in its coverage was filled by the Youth Lifestyles Survey,[19] which gathered information on self-reported offending by young people aged 14 to 25 years. It provided information on the extent of drug use, shoplifting and other offences which often do not come to light unless a person is apprehended (sometimes called 'discovery' offences).

A particularly useful offshoot of the British Crime Survey is the regular and detailed information gathered on public contact with, and attitudes towards, the police, and not just in the context of being a victim of crime.[20] Interviews have also been used to gather data on public attitudes towards punishment, specifically views on sentencing in the courts.[21] However, the Survey has never followed respondents' direct experience of the justice system beyond their own contact with the police.

Summary

Despite these examples, and the publication of substantial quantities of statistics, there is clearly no comprehensive or systematic measurement or monitoring of the performance of the justice system in England and Wales. While it may be possible to compile from some of these publications (and others not specifically mentioned here) an overview of how the criminal justice system is operating in England and Wales, this is currently not the stated intent of the research and statistical monitoring. Furthermore there would be significant gaps, for example the only easily accessible data on courts is on convictions and sentencing, and this lacks a 'customer satisfaction' focus.

The admirable motives of the most recent criminal justice initiatives are somewhat undermined by the lack of any clear mechanism for monitoring their effect. In the area of civil justice, once again, review and reform do not

seem to be accompanied by a commitment to performance measurement and accountability.

Scotland and Northern Ireland

No similar press release appears to have issued from the Scottish Office or the Northern Ireland Office. However, other initiatives have been taken.

In Scotland, the equivalent of the English section 95, section 306 of the *Criminal Procedure (Scotland) Act 1995*, resulted in the publication in March 1998 of information on the cost of the justice system for the financial year April 1996 to March 1997.[22] There appear to have been no publications on race or gender and the criminal justice system. Scotland undertakes no crime surveys. In Scotland, as in England, there appears to be an absence of a commitment to performance measurement.

A separate development in Northern Ireland is the review of the criminal justice system, on which a consultation paper was issued in August 1998.[23] An inevitable consequence of the recent political changes there, the review only really excludes policing from its remit, and only that because it is being dealt with in a separate review. Although the publication contains little material directly relevant to the subject of this sub-section, it sets out to describe the criminal justice system and to establish its overarching aims. It appears to be the only document which has seriously attempted this task. Preparation of the Review was not made easier by any inherent simplicity in the Province's criminal justice system — with a quasi-federal arrangement there are some complex relationships between local and Westminster institutions. The draft guiding principles and values are very much tailored to Northern Ireland and its history. However, such a document would greatly aid understanding of the system, and hence be a guide as to how to measure its performance. A brief attempt at a similar overview for Western Australia is presented below.

The Review specifically excludes the civil justice system, except where it overlaps with the criminal, as it does, for example in the administration of the courts and matters concerning the judiciary.

Northern Ireland has relatively recently begun to conduct crime surveys,[24] and these will inevitably produce more information on the effectiveness of some aspects of the justice system. However, as with Scotland and England and Wales, there is little or no information available on the operation of civil justice.

United States of America

USA Princeton Project

In the United States, the Bureau of Justice Statistics 'Princeton Project' has published papers considering the measurement of the performance of all aspects of the criminal justice system,[25] including prisons, community corrections, trial courts, prosecution, public defenders and police.

In the foreword to the papers, Lawrence A Greenfeld,[26] director of the Bureau of Justice Statistics (BJS), expresses some optimism that his agency already provides much of the information with which the performance of the justice system can be assessed. For example, he submits that by increasing the likelihood of defendants receiving a prison sentence, and by increasing the proportion of prisoners who are serving sentences for drugs offences, some states have achieved the goals set for them by their legislators and the public. However, it is probably precisely these kinds of measures which should be avoided — nowhere is it stated that in the United States the aim of the criminal justice system is to imprison people. By adopting such measures (and to be fair, other authors of the collected papers seem to have deliberated a little more carefully) Greenfeld has his own interpretation of what the public wants. Moreover some of Greenfeld's observations are rather opaque — that the criminal histories of state prisoners in 1991 differ little from those in 1986 and 1979 is interpreted as evidence that 'the system' is fair.

Another paper by John J DiIulio[27] goes so far as to recommend reducing the emphasis on crime rates and recidivism rates as critical measures, a recommendation perhaps regretted given subsequent major reductions in levels of crime, and in particular homicide, in the United States.

Each paper in the collection is independently authored, with no attempt to integrate individual findings or recommendations. In Australian jurisdictions and particularly in Western Australia, the various agencies within the criminal justice system tend to have symbiotic relationships — police currently prosecute the majority of cases; prisons hold and are responsible for the transport of most remand prisoners; community corrections provide pre-sentence reports; and so on. The agencies do not simply handball defendants or offenders on to the next agency in line. The Princeton Project shows no evidence that this is the case in the United States, and implies that agencies there generally deal with a defendant in sequence — for example, police to district attorney and public defender, to courts, to prison, to parole — with little overlap. In summary, the report fails to propose any measures of the performance of the criminal justice *system* as opposed to its constituent parts and agencies.

Trial court performance standards

A useful set of measurement criteria is outlined in the United States publication 'Trial Court Performance Standards'[28] produced in 1990 by the National Centre for State Courts. This project formulated 22 separate performance standards in five different performance areas. The summary table is reproduced as Appendix 3. Though the publication is not explicit on this point, the Commission believes the standards were intended to apply to both criminal and civil trials.

The standards display some evidence of their origins in the United States. For example, in the first Area (1) Access to Justice the first Standard (1.1) is

Public Proceedings. While not denying the importance of the public conduct of court proceedings, there is an unfortunate symbolism to listing it first of all standards and before the more traditional meanings of access to justice, such as those detailed under 1.5 Affordable Costs of Access and 1.3 Effective Participation.

Some of the standards proposed by the Project appear to deserve substantially less weight than others, and no guidance is given as to which should have primacy. It is not known to what extent they have been adopted in the various states, or what measures have been established for assessing performance of the courts in meeting these standards.

Once again, the Trial Court Performance Standards in effect treat the trial court as an isolated part of the justice system. No reference is made to what comes before or what comes after the trial. There is some blending in the standards of the role of the judicial officer and the administration of the court, and this may represent a particularly American orientation, where judges 'run' the court in more senses of the word compared to other jurisdictions.

Nonetheless, the standards proposed in the report are relatively easily applied to other areas of the justice system, and they have been a valuable guide in the preparation of this sub-section.

Canada and New Zealand

No directly relevant literature from Canada or New Zealand has been identified.

Australia

Queensland

In Queensland, the Criminal Justice Commission (CJC) in the role of '[providing] independent information and analysis',[29] conducts and publishes research and statistical studies in a broad range of areas, and produces a regular publication monitoring many aspects of the criminal justice system.[30] The publication collates statistics from all aspects of the justice system, even making (albeit brief) reference to local victimisation surveys and apologising for the absence of cost data because at the time of publication the state budget had not been released. The Monitor presents brief statistics on recorded crime throughout the justice system including community corrections and prisons, as well as suicides, escapes, assaults and complaints in prison. In doing so it covers activity of the Office of the Director of Public Prosecutions and Legal Aid Queensland.

The publication also includes some more subjective discussion of the functioning of the various agencies, including the impact of recent relevant legislation. However, there is no information from surveys of participants in the justice system (apart from a passing reference to a victimisation survey in 1995) and all data seems to be derived from the agencies themselves. The

Monitor draws some comparisons between states, using Australian Bureau of Statistics data, in a similar way to the COAG Report (see below).

Although the CJC is independent and seems to take an objective view of the criminal justice system, its scope extends to more controversial areas, including the conduct of inquiries into official corruption. In addition, the Monitor tends to focus on those aspects of the criminal justice system which watchdogs and pressure groups also tend to concentrate on, for example sentencing and Legal Aid funding, at the expense of more performance-oriented issues such as clearance and conviction rates, cost, timeliness and recidivism.

Victoria

Victoria's 'Project Pathfinder' should be noted here. The report on the Project[31] states that the project was 'established with the objective of re-engineering the Criminal Justice system [sic] to achieve significant improvement in the delivery of Criminal Justice services, as provided by Victoria Police, the Courts, Victoria Legal Aid, Office of Public Prosecutions and Correctional Services'. The report sets out a number of operating principles for criminal justice services:

- focus on the recipient — design services to meet the requirements of the recipient and ensure fair treatment;
- be cost conscious — manage the cost of services to both the individual and the community, ensuring equity and access to criminal justice;
- be cohesive — take a systemic view of the criminal justice process which preserves independence;
- be responsive — anticipate and be accountable for taking the right step at the right time;
- be purposeful — ensure all activities contribute to the provision of an effective justice system and uphold its core principles;
- be impartial — take into account the rights of all involved without bias;
- continuously improve — learn from previous experiences and the experiences of others.

The report notes a number of key performance measures – throughput, process time, elapsed time, resource utilisation, system integrity and continuous improvement – and then proceeds to note some specific aspects of current performance, on its way to making recommendations for improvement. These measures cited are by no means standard, and provide a critical and imaginative analysis of the operation of Victoria's criminal justice system (but bearing in mind that the report is dated 1996 and these may now be out of date). Examples include:

- the relatively long time Victoria Legal Aid take to process applications;
- the proportion of charges withdrawn in Magistrates' Court (20 per cent 'struck out', 5-6 per cent of defendants having all charges withdrawn before hearing); and

- the proportion being returned to a lower court from the committal stage;
- the number of adjournments in Magistrates' Courts and the possible link between this and delays in processing Legal Aid applications;
- the number of adjournments in County Court, including the number caused by late pleas;
- the lack of 'ownership' of cases until assigned to a judicial officer the day before trial;
- long waiting times for trials (40 per cent between 240 days and 785 days, and 10 per cent over 785 days);
- the high cost of managing remand prisoners, and by implication the cost ramifications of court delays;
- the large number of prisoner movements and inefficiencies in this.

The Pathfinder report represents an ad hoc assessment of the performance of the criminal justice system at a particular point in time. It was followed up in 1998 with a further report[32] although this did not update the figures from 1996. There is no indication that the reporting of these performance measures will be regularly repeated, and the value of this Victorian initiative is more in the nature of the measures reported. However, the measures were selective rather than comprehensive, presumably being chosen on the basis of consultations with stakeholders. It is regarded as a deficiency that the measures make no reference to the civil justice system. This omission is particularly surprising given the interest shown in the timeliness of criminal court proceedings, which may be affected by the volume, and other aspects, of civil cases.

Report on Government Services 1998

The most relevant Australian literature is the Report on Government Services 1998 (the COAG[33] Report). The COAG Report represents a benchmarking exercise (it is sometimes referred to as the Government Benchmarking Report) to develop performance measures for each of the states and territories, in all areas of government service provision, so that the performance of each jurisdiction can be compared and, presumably, improved by emulating the best practice of the best performer. However, some fundamental criticisms are possible of the whole concept of benchmarking, which is focused around measuring one's performance against other comparable entities. But even if one is performing best should one be resting on one's laurels, or should one (as set out in the Victorian Pathfinder report above) be aiming for continuous improvement? Benchmarking may lead to continuous improvement, but the link is not automatic.

However, this is not to denigrate the effort and value of the COAG exercise. It has attempted to develop performance measures which cover every area of government activity, and which take into account the differences between jurisdictions in both the organisation of government and the nature of their geography and demography. An example of these differences is that Western

Australia is an exception in having its juvenile justice co-located with it administration of justice for adults in the Ministry of Justice, and is geographically the largest jurisdiction and also the most urbanised.

Volume 1 of the COAG Report[34] describes some measures of the workings of the justice system. Much of the information in the Report is drawn from Australian Bureau of Statistics (ABS) publications, which are discussed in more detail later. However, like the United States' literature, the COAG Report also tends to treat the various functional parts separately. In fact it states: 'Individuals tend to pass through the criminal justice system, interacting in succession with the police, courts and corrections', and presents a simplified flow chart (reproduced as Appendix 4) which overlooks, for example, bail decisions and the contribution of community corrections to court activity through pre-sentence reports. There is no mention of the prosecutorial role of the police, in Western Australia at least, nor of their role in granting bail. Thus the measures presented in that publication overlook several large areas of justice activity. For example, the measure 'outcome of investigations after 90 days' ceases at 'offender proceeded against', and does not attempt to measure the effectiveness of the police in *prosecuting* and *convicting* offenders in Children's and lower courts.

Conversely, some measures are over-inclusive. In contrast to the absence of consideration of bail decisions, comparisons of states' and territories' imprisonment rates include remand prisoners. There are other, more technical, problems with some of the measures, including recidivism of prisoners.

The COAG Report's lack of coverage of juvenile justice is understandable given the national focus and the differing arrangements in each state and territory. However, it further detracts from its usefulness for Western Australia, given the presence of juvenile offenders in the justice system. In Western Australia in 1996/1997 there were over 20 000 charges in the Children's Court compared with about 140 000 in adult lower courts.

As noted earlier, the issue of effectiveness and performance measurement has been considered in greater depth by courts administrators, and this is evident in the chapter of the COAG Report covering the operation of the courts. However, earlier comments about the appropriateness of considering any part of the justice system in isolation still apply. Currently there is no mention of remand/bail hearings, of services provided to the courts by other agencies, nor of the Children's Court. Nonetheless, much of the chapter on court administration is valuable, and is clearly based on the United States Department of Justice publications referred to earlier, as well as Weatherburn's similar discussion in an Australian context.[35] However, the COAG Report does not appear to make any reference to the civil justice system.

Appendix 5 reproduces Figure 6.8 from the COAG Report, which summarises existing and anticipated performance indicators. Perhaps most interesting is the reference to client satisfaction, which a number of states and territories are attempting to measure through surveys of the public. Western Australia is one of those, and a very recent survey conducted by the Ministry of Justice's Court Services Directorate is discussed briefly below. The Report includes details of the Australian Bureau of Statistics survey of the public's satisfaction with the police, but the results are difficult to interpret and the questions seem to have been rather general, and not about specific aspects of police service. There is insufficient analysis of the data, with no reference to specific groups such as young people, women or Aboriginal people, whose experience of the police may differ from the norm. Although more detailed results exist they are not in the public domain, and therefore cannot be discussed further here, but they generally do not answer the possible criticisms of the usefulness of this survey.

Perhaps the problem for the COAG Report will always be that, for the purpose of comparing performance between jurisdictions, the measures will never seem ideal for any one jurisdiction. The Report's apparent adoption of 'key' indicators gives the impression that these are the best measures. While they may well be the best, most convenient or most accessible measures *for comparing across* jurisdictions, they could clearly be improved upon for the purpose of measuring *within* Western Australia.

Australian Institute of Judicial Administration — 'Courts and the Public'

This recently published report[36] adopted a qualitative approach to assessing the functioning of courts. Detailed interviews, some of them group interviews (focus groups), were held with individuals working in or for the courts, as well as others representing interest groups. There were no interviews with the public or lay users of the courts, the views of interest groups being taken as representing the views of the public. By its very nature, being small in scale yet national in focus, the findings coming out of this study are very broad and general.

The study represents a laudable attempt to form views on the degree to which Australian courts are attuned to the needs and wishes of the public. It would be easy to say that as Western Australia represents only 10 per cent of the Australian population, and only one of nine jurisdictions covered by the study in its 100 interviews, even clear and categorical findings from the study might not be true of Western Australia. The existence of a State Family Court in Western Australia is at least one way in which this state differs fundamentally from other jurisdictions.

Nonetheless Parker's study deserves at least brief mention here because it represents a serious attempt at measurement, albeit potentially subjective, of the performance of the courts. It also further illustrates how seriously the

issue of performance measurement and customer focus has been taken in the field of court administration.

WA's courts customer satisfaction survey

The Ministry of Justice's Courts Services Directorate has recently carried out a partly quantitative and partly qualitative survey[37] of its customers. These included judicial officers, legal practitioners, jurors and litigants, this last comprising civil and criminal defendants and civil plaintiffs.

The survey restricted itself, for understandable reasons, to seeking views about 'the help and service [respondents] received from the Court Staff' and 'about the court buildings' and '*not* about the legal and justice system'. As such, this survey falls into the category of a 'niche' study rather than one seeking to assess a broad sector of the justice system. Its findings are useful to the administration of the courts, and add quantitative, relatively objective data to studies such as Parker's. The survey was able to identify particular areas in need of improvement, as well as those where performance was satisfactory to respondents.

Notable problems with the survey, apart from its limited coverage in terms of subject matter, are that each group of respondents is not represented in the survey in the same proportions as in the population of users of the courts. Not surprisingly, judicial officers and other professional users were over-represented, and this is acceptable given their small population. However, among lay users of the courts, civil litigants and civil plaintiffs were over-represented compared to criminal defendants. There are also differences in participation rates between the three groups, with the proportion varying between 13 per cent and 40 per cent of the three groups. Reasons for non-participation included not being contactable, not having had any contact with the court and therefore not being able to answer questions about court services, and refusal. A number of potential respondents were in prison and were not contacted.

There may also have been bias introduced by the availability of telephone numbers of lay users. The draft report on the survey states that a telephone number could be sourced for a third of the identified sample, but does not report whether this varied across the groups. Nor does it state how the two-thirds without a telephone number relates to the other causes of non-participation (ie, are they included in, or do they overlap with, the 60-87 per cent who did not participate).

The views of the three groups of lay users appear not to have been analysed separately, although they may yet be. The relatively small numbers successfully included in the survey also made it impossible for the views of particular sectors of the population to be analysed separately. Thus the survey reports overall findings, and cannot say anything, for example, about the views of

female court users, juveniles or people with limited English, given that the survey was conducted by telephone. Only seven respondents identified themselves as Aboriginal, and bearing in mind that a total of 144 criminal defendants were included in the survey Aboriginal people were clearly very under-represented.

Witnesses were not included in the survey, except to the extent that litigants and defendants would almost certainly be witnesses too. Thus the views of criminal victims and other witnesses have not been surveyed, including child witnesses (whose views and experiences would almost certainly have to be gathered through their carers).[38]

None of this detracts from the important step that has been taken in Western Australia by conducting this survey for the first time. All of these faults have rational and reasonable explanations, and few are not amenable to improvement in the methodology of the survey. The results will no doubt be used to try to target areas for improvement, and future surveys will help assess the effectiveness of those attempts and highlight any new areas where service provision may have slipped below what is acceptable. In fact, as the reader will see, this initiative is central to the recommendations with which this sub-section concludes.

Comparability of jurisdictions

In assessing the literature for relevance, one must have regard to the comparability of the jurisdiction from which the literature emanates. Unsurprisingly perhaps, it is difficult to find a jurisdiction whose justice system is truly comparable to Western Australia's.

Given the multiplicity of justice jurisdictions, both geographical and functional, in the United States, any literature from that source on the criminal and civil justice systems must always be carefully assessed for relevance. In general, it fails this test, though the courts' performance measures seem transferable. Although the Canadian criminal justice system bears more similarity to Australian systems, much of this is superficial — the relationship between provincial and federal systems in Canada is substantially different from the state/federal relationship in Australia. In any case no relevant Canadian literature was located.

The United Kingdom represents three separate geographical jurisdictions, which in general are not organised on a federal basis. Nonetheless, for obvious historical reasons, the Australian justice system bears substantial similarities to the system in England and Wales, which also largely pertains to the situation in Northern Ireland. However, there are major differences from Western Australia. England and Wales has no equivalent of a Ministry of Justice — the Home Office has responsibility for criminal justice policy and for the functions of the police, prison and probation services, each delegated to varying degrees.

It does not have responsibility for the administration of the courts, for which there is a separate ministry. Fines enforcement is largely in the hands of the police, and therefore within the jurisdiction of the Home Office. The Crown Prosecution Service handles all prosecutions by the state (there are plans for a similar system in Western Australia), but is not within the portfolio of the Home Office. Nor is the Legal Aid Board which funds much of the defence, (and legal aid is available in the United Kingdom for civil suits). The Home Office shares policy responsibility for juvenile justice with the Department of Health, although most day to day responsibility is delegated by it to local authorities.

New Zealand also has broad similarities to Australian states' justice systems, though the absence of a federal dimension again undermines comparisons. (No relevant literature from New Zealand was located.)

The most obvious sources of comparative information or example to emulate, are the other states and territories in Australia. However, the different construction of the justice system in each jurisdiction introduces further problems of comparability, and there is limited literature on effectiveness of the *system* rather than of individual components of it. Western Australia seems relatively unique in having most of its justice functions located within just two government ministries, Western Australia Police Service and the Ministry of Justice.

Conclusions from the literature

It is disappointing that there is little literature on the subject from any of the more comparable jurisdictions. Although commendations are due to Victoria for its review of the criminal justice system, and to Queensland for its Criminal Justice Commission, it would seem that Western Australia is alone in considering the issue of measuring the effectiveness of the justice system *as a whole.* However, considering the worldwide body of literature, there is probably sufficient practice to draw upon in developing a strategy.

The fact that the Western Australian justice system is largely administered by just two agencies, the Ministry of Justice and the Western Australia Police Service, perhaps creates an opportunity that may be missing in other jurisdictions. The gradual ceding to the Director of Public Prosecutions (DPP) of the prosecutorial function of the police may strengthen that opportunity.

WHAT IS THE WA JUSTICE SYSTEM ?

Overview

In broad terms, in any jurisdiction there are two conceptually distinct justice 'systems' — civil justice and criminal justice. However, they share a large proportion of their actors, i.e. the people who operate within them, as well as court buildings and other facilities. Because of this, it is difficult to consider them *separately* and it is surprising that this has been attempted in other jurisdictions. Rather it would seem practical and pragmatic to approach the task of measuring effectiveness of the justice system as a whole, while

differentiating between criminal and civil justice where their functions or practices diverge.

In Australia, the Commonwealth and state justice systems are not well differentiated. They both employ many of the same actors and facilities, and it would be difficult to totally disentangle their performance. It would also be contrary to the experiences of lay users of the justice system, for whom it may be of little relevance that the jurisdiction of their criminal or civil case is Commonwealth rather than state. Once again it may be more practical to consider the justice system as a whole, but to differentiate between state and Commonwealth jurisdictions where necessary.

The justice system is a system of laws and procedures for the settlement of disputes. This is actually truer of the civil justice system, which is used for the resolution of disputes between individuals or organisations.

In the criminal justice system, the parties in dispute are generally:

(a) the defendant, who is alleged to have committed some transgression against the laws of the state;[39] and

(b) the state, which is prosecuting the defendant.[40]

How does the justice system operate in WA?

It is worth here outlining the complexity of the justice system in Western Australia, as this will help identify many of the decisions and processes which comprise it. This in turn will show what aspects of the justice system's operation might need to be assessed in any attempt to determine its effectiveness.

Criminal justice system

The criminal justice system first begins to operate when a person reports a crime to the police or other authorities. However, many crimes are not reported. Victims may not report an offence if they feel there is nothing to be gained by so doing, and these events generally remain outside the realm of the justice system. The failure to report an offence often represents an absence of confidence in the justice system's ability to do something about it. However, the victim of a criminal offence may seek other redress, such as through insurance, through the civil courts or criminal injuries compensation. (Criminal offences not reported to the authorities may later come to their attention and feature in clear-up rates.) Furthermore, many offences do not have a clear victim; the so-called 'discovery offences' (possession of drugs and most driving-related offences) are the more common ones that fall into this category. In many types of offence although there are victims, they remain unaware that they have been 'victimised', and these offences only come to light through police or other agencies' investigative actions. Many frauds fall into this category.[41]

The police take action to attempt to identify and apprehend the person they and/or the victim believe was responsible for the offence. If they do identify

such a person, they record the offence as 'cleared up' or 'cleaned up'. They may also attempt to prosecute the person they believe to be the offender. The victim's involvement in this decision may be limited. If the victim is unwilling to give evidence this may prevent a prosecution, though the preponderance of guilty pleas from alleged offenders means that a victim's consent to prosecution is only one factor in the decision to proceed. In the case of discovery offences there is of course no individual victim to be involved in the decision. Having decided to proceed, the police may then grant bail to the defendant while they make further inquiries or prepare the case for its first hearing in court.

For juvenile alleged offenders, and increasingly for some groups of adults, procedures exist to keep offenders out of the courts, as this can be beneficial to all concerned. The most common procedures are a formal caution and referral to a Juvenile Justice Team (JJT). In the case of a caution, the consent of the victim (if any) is not required. However, the victim is consulted before referral of a case to a JJT, not least because he or she will be involved in a 'negotiation' with the offender and his or her family, to achieve an outcome which is satisfactory to both.

Offences to be prosecuted in the Children's Court or Magistrates' Courts (Courts of Petty Sessions) are currently prosecuted by the police (or the agency dealing with the offence), thus no other agency is involved in deciding whether or not to proceed with a prosecution. In the cases of offences to be prosecuted in higher courts (District or Supreme Courts, which in general terms process the more serious offences) the case is prosecuted by the Office of the DPP. (The DPP is expected to take over the prosecution of all cases in the next few years.) The DPP's Office can decide whether or not to proceed with a case, and hence represents a further 'filter'. A substantial proportion of criminal cases is brought to courts by agencies other than Western Australia Police Service, with other Western Australian and Commonwealth agencies contributing large numbers.

The courts provide the physical location for a case to be heard, and all the necessary administrative support, as well as the judge, magistrate or Justice of the Peace (JP). Magistrates and JPs generally make decisions about whether to grant bail. For the less serious offences which make up the vast majority of the business of the criminal justice system[42] magistrates and JPs can also find a defendant guilty of an offence and sentence him or her. For more serious offences they may also rule on whether there is sufficient evidence for a case to proceed, in effect giving the power to halt a prosecution.[43]

A defendant may represent him or herself or may be represented by his or her own solicitor, Legal Aid, Youth Legal Service or Aboriginal Legal Service, or by a duty solicitor. Legal Aid is means-tested, though the other forms of

representation are generally provided free of charge or for a nominal fee. The importance of defendants' legal representation in determining the processing of a case has been highlighted by a number of cases recently.

Judges oversee trials and then sentence defendants who are convicted by a jury or sent to the higher courts by a lower court for sentencing. However, this understates the role of the judiciary, which has the power at some stages in the process to rule on the strength of the prosecution case (for example, directed acquittals) and to rule throughout the trial on the admissibility of important evidence. This and its role in giving guidance to the jury means it may be more than just a passive 'referee' and sentencer.

Sentencing tends to be the focus of most public attention, particularly the use of custodial sentences and the length of the sentence. However, a very small proportion of offenders is sentenced to custody. A slightly larger proportion is sentenced to some sort of order for supervision in the community. Recidivism among imprisoned or supervised offenders becomes an issue of interest to the public, a reasonable position given that the state has the opportunity during their custodial sentence or community order to do something to reduce their likelihood of offending again. Also, since offenders receiving custodial or supervised sentences tend to have been convicted of more serious offences, there is also a reasonable perception that if they do offend again the new offence(s) may be relatively serious.

However, far greater numbers of offenders are sentenced to a fine or an order for restitution or reparation. In contrast to those given a custodial or supervised sentence, these offenders, and their recidivism, tend to be the subject of relatively little public attention. Fines are generally the most used of any sentence, particularly if one takes into account infringement notices (for example, for traffic offences). They also help the state recoup some of the cost of bringing prosecutions. Orders for compensation and restitution may represent the only opportunity to offset some of the injury suffered by the victim, whether financial, physical or emotional. However, this may be supplemented by Criminal Injuries Compensation or by the pursuit of a civil case against the offender. Offenders do not always immediately pay the fine, and there follows a process of enforcement which may result in the fine being paid or the offender 'working off' the fine through a Work and Development Order or imprisonment.

Offenders sentenced to community orders or custody are then respectively supervised and held by the Ministry of Justice's Offender Management Division. Most offenders sentenced to custody will be released early to some form of supervision on the recommendation of the Parole or Supervised Release Boards, and their management in prison and in the community is an important and high profile function of the criminal justice system.

The civil justice system

When a dispute arises between two parties, one or both may decide to take civil action against the other, to reach a resolution. Parties act on their own behalf, though as in the criminal justice system they may have a legal representative acting for them. Also, parties may have an organisation acting on their behalf, such as their union or insurer. However, the essential difference is that the state does not normally take over the victim's or plaintiff's role.

Although the terminology may be different, many of the processes that a civil case goes through are analogous to the processes in a criminal case. In general, a case will proceed to judgement by judicial officer unless the plaintiff agrees to some other solution. The majority of civil cases are settled before judgment, although settlements reached by judgment or by agreement may not actually be fulfilled and may be reactivated.

The settlement of cases before going to a full trial is assisted and encouraged by a number of methods, generally referred to by the global title 'alternative dispute resolution' (ADR). This is analogous to the conferencing approach of JJT in the criminal justice system, which almost certainly evolved from the use of ADR in the resolution of civil disputes. ADR may take the form of mediation or arbitration, perhaps by a tribunal. The aim is to save the parties the time and/or the attendant expense of a full trial, though the motivation for the state to provide this service is probably to save itself the expense of providing the forum for that trial. The civil justice system and ADR are discussed at greater length in other sub-sections of this volume.

Hybrid system

Describing the justice system as two separate systems, civil and criminal, may be deceptive, as there are instances where they appear to overlap, or at least where the distinctions blur.

Private prosecutions, though relatively rare, are possible.[44] In these cases the victim of an offence prosecutes the alleged offender — the case is not appropriated by the state. This may be for a number of reasons, but often arises through the victim's dissatisfaction with a decision by police or state prosecutors not to proceed with a prosecution. Similar standards of proof apply as in a prosecution by the state, and the state may in fact choose to take over the prosecution after it has begun. To a lay person the difference between a private prosecution and a civil case may seem subtle. The prime differences are:

- in the standard of proof, 'beyond reasonable doubt' in a criminal case whether state or private; and
- outcome, with some form of compensation likely to be the main outcome of a successful civil case.

Restraining orders also seem to be evolving into a hybrid of the civil and criminal justice systems, where civil standards of proof are applied to a case,

but the outcome may be quite onerous and intrusive for the defendant (respondent). The same might also be said of child protection cases. (The particular nature of Family Court cases may also mean that they are best assigned to this 'hybrid' category.) The use of counselling and mediation in these contexts is directly analogous to the use of ADR in the more typical civil cases.

It could be said that these three 'hybrids' all represent examples of where the criminal justice system has failed victims, or at least is perceived to have failed them. As a result they are required through the justice system to seek redress for, protect themselves from or be protected by others from, the criminal actions of another. Similarly, criminal injuries compensation or a civil suit against an offender for damages, might also fit this model of a 'hybrid' of criminal and civil justice.

HOW TO BEGIN TO MEASURE EFFECTIVENESS?

Introduction

The United States Trial Court Performance Standards, Lord Woolf's principles for the civil justice system, the 'overarching aims' set out by the three English ministries and the operating principles for the criminal justice system in Victoria's Pathfinder Project, all represent attempts to establish broad criteria by which the criminal and civil justice systems' performance can be measured. For each criterion one could draw up a comprehensive list of measures of effectiveness in meeting the overall aim of the criterion.

For reasons discussed earlier, none of these initiatives is wholly applicable to the Western Australian situation. In an attempt to find a locally valid set of criteria within which to discuss local measurement, those used internally by the Ministry of Justice have been adopted. The Ministry of Justice dominates the justice system in Western Australia, not only in size but in the breadth of its jurisdiction. No other agency operating in Western Australia has an interest and a role in such a range of areas of the justice system, both criminal and civil. Thus its assessment criteria measures are likely to be more relevant to this paper than any other.

However, ultimately they are just labels, and it is the content of each category that is important rather than the title given to it. Nor can any one criterion be considered totally in isolation, as discussion of each will show. At the very least, they are a useful hook on which to hang further discussion.

WA Ministry of Justice's performance criteria

The four criteria used are:

i. Quantity
ii. Quality
iii. Timeliness
iv. Cost

These correspond broadly to the five 'performance areas' in the United States Trial Court Performance Standards, which form the basis for much of the discussion that follows. (See Appendix 3)

Quantity

It could be argued that 'quantity' is the least relevant to the effectiveness of the justice system of the four criteria. However, quantity will often give clues to other aspects of the performance of the system, and certainly gives substantial context to that performance.

If one of the aims of the criminal justice system is to reduce crime, or to control or limit its rise, then the quantity of crime is of major interest. The number of cases 'on the books' of each agency will give context to their timeliness in dealing with those cases, and will also impact on their ability to deal with those cases *effectively*.

One example is clear-up rates. These are considered in more detail under 'quality'. However, it might be considered acceptable for clear-up rates to fall if recorded crime rose, as more police time will be taken up with the necessity of responding to and recording the crime and will be diverted, however unintentionally, from investigating that crime. Another example is waiting times for trial ('listing intervals') in higher courts – these would normally be considered under 'timeliness', but a blow-out in waiting times would be understandable if the quantity of cases being referred to higher courts increased.

In the civil system, it may be that the quantity of cases is totally beyond the control of the system itself. However, the number of cases settled out of court, by ADR or other means, will be a useful guide, and will be reflected in the cost and timeliness of cases being completed.

Quality

It may be that those employed or involved in the justice system are not best placed to define how it should be assessed. This suggestion is returned to later, but for the moment some attempt is made to define what might represent 'quality' or 'achievement' in the justice system.

The justice system must be *fair*. (Often this is expressed as 'fair and equitable' though the two words seem to mean the same thing.) Fairness should permeate every level, so that there is equal treatment for everyone. For example the justice system should respond to people equally, regardless of race, gender, sexual orientation, wealth and so on. This should be true within each group of people who are in contact with the system, and in whatever role. Police, lawyers, judicial officers, court and prison staff should be treated fairly as employees of the justice system, as well as actors in it. Lay people, whether as victims or other witnesses, or litigants, defendants in criminal and civil cases and plaintiffs in civil cases, should be treated equitably.

Access to justice, or more correctly equality of access to justice, is probably subsumed in this concept of fairness. In general this is assumed to mean that regardless of one's personal wealth or influence, or lack thereof, one should have access to the justice system. The implication is that costs should be kept

reasonable. In a state like Western Australia there is probably also a geographical consideration.

The United States Trial Court Performance Standards (the Standards) expand this interpretation of access to justice (in the context of courts, but it is possible to generalise to other areas of the system) to include the *accessibility* and the *safety* of buildings. *Accessibility* would include the geographical location, provision of parking or public transport, ramps or lifts for wheelchairs. *Safety* would include arrangements to keep victims, witnesses and offenders, and their families and friends, or acrimonious civil litigants, separated.

Other obvious areas are the availability of documents in minority languages, and the use of interpreters, not only for those with limited English but also for those with speech difficulties or intellectual disabilities. The Standards also stretch the meaning of *access to justice* to include public access to information. They state that decisions should be *clear*, the implication being that all parties involved should understand why a decision has been made and what is expected of them as a result. They also note that procedures should 'faithfully adhere to relevant laws', classifying this as *integrity*, and staff should be *courteous, responsive and respectful*.

Other aspects of *quality* would include the degree to which the justice system achieves its distinct goals, such as clearing-up a crime or collecting a fine, the appropriateness of sentences, recidivism and so on.

Timeliness

The speed with which the police respond to an emergency call is probably the first experience for a member of the public of the importance of a *timely* response by the criminal justice system. Undoubtedly there are many further points at which *timeliness* is important, and might be measured. Subsequent examples include:

- how soon after an incident a victim was contacted by Victim Support Service;
- how quickly the police identify and apprehend a suspect
- the length of time taken to bring a suspected offender to court;
- how long victims, witnesses and offenders have to wait for their case to be heard on the scheduled day;
- Western Australiaiting times for higher courts (listing intervals).

Some of these issues were considered in the Auditor-General's report 'Waiting For Justice'[45] (OAG, 1997). It is said that 'justice delayed is justice denied'. However, once again it may be that it is the public, the users, who are best placed to rate the importance of timeliness, and at which points in the system. It may be for the users of the justice system to say at what point delay becomes injustice.

Some of these examples apply equally well to the civil justice system, which

competes for court time with criminal cases, and the needs of which may be very similar once a case reaches court.

Cost

Cost is a major factor in the accessibility of the justice system. It need not be solely financial cost to the litigant, but the inconvenience of attending court day after day during working hours, perhaps because of an over-run on the preceding case, or perhaps because the court sits for limited hours during the day.

Equally the *cost* of the justice system to the tax-payer is measurable and should be measured. It will be difficult to assess what is the appropriate cost, but if costs increase and other measures of effectiveness do not improve then that is an important signal. Currently individual agencies publish in their annual report the cost of certain elements of the justice system, but these are heavily qualified and not comprehensive. For example, it is understandable that when the Ministry of Justice publishes the cost of processing a case in the Children's Court, the figure does not include the salaries of judicial officers, nor prosecution and defence costs borne by the state, and is confined to the Children's Court in Perth. Nonetheless, these qualifiers must seem to a lay person to be almost obstructive. The issue is one of transparency. Although all the information may be available from a number of different sources, it would be a challenge to a non-expert to accurately collate it.

In England the Home Office is currently engaged in an exercise to establish the overall costs of the criminal justice system and a publication intended for a lay audience is expected soon.[46]

In sub-section 1.2 of this volume[47] it is pointed out that the public purse currently subsidises civil disputes, so clearly the state has a right to minimise the cost to itself while also having regard to the principle of access to justice for aggrieved parties.

Discussion

Perhaps the four criteria are unsatisfactory, as they seem to overlap and even occasionally conflict with each other. Alternatively perhaps it is not that the criteria are at fault but that the justice system is a complex entity that must establish compromises between cost, speed and fairness (at the very least in terms of access to justice). There can be no one source of the compromise or equilibrium at which the system attempts to operate, as there is no single manager of the system. Accepting that this will always remain so (as it must given the relationship between State and Commonwealth, and to a lesser extent the criminal and civil justice systems) how can we know that the balance we have now is the right one? And if we know that it is not then how can we know which direction to take it in? Clearly there is a potential role for the users and customers of the system, the public, to have a say in this.

WHAT DO WE KNOW ALREADY ABOUT THE WA JUSTICE SYSTEM?

Quantity

There is almost no publicly available information on the operation of the civil justice system (but see later under 'timeliness').

Crime in Western Australia is apparently increasing. In 1997/1998 there was a rise of 12 000 on the level of recorded crime in 1996/1997, the rise being largely in line with the growth of Western Australia's population, but previous years have seen more substantial increases.[48] However, this is recorded[49] crime. When an offence is committed, if there is a victim he or she may choose to report it to the police — in Western Australia in the year 1995 about 60 per cent of victims of household or personal crime reported the offence to the police.[50] The police then choose whether to record it.[51]

There are no estimates available in Australia for the extent of non-recording by police, but in England and Wales in 1997 only 54 per cent of household or personal crime reported to the police was recorded.[52] Thus any rise in recorded crime may result from increased reporting to the police or increased recording by them. Western Australia's crime surveys are too infrequent to be able to know whether crime is increasing.

Public perception of the effectiveness of the justice system may affect reporting of crime. For example, if a victim feels the police can or will do nothing because of a general public perception, he or she is less likely to report it. However, the converse can also be true if the public profile of certain types of offences increases.

In certain other areas of the justice system it is clear that the quantity of business has changed in recent years. This information is available from a number of sources, including the annual statistics from the Crime Research Centre,[53] various ABS publications and the COAG Report and the annual reports from various agencies involved in the justice system.

Legislative changes in late 1996 saw a large increase in the number of cases dealt with by the District Court. Not surprisingly, waiting times for trial have also increased,[54] and have not responded as quickly as expected to the input of greater resources. The number of cases going to Children's Court has decreased, presumably as a result of cautioning and the use of Juvenile Justice Teams. The number of people in prison has increased dramatically in the latter half of 1998, with the number on remand in custody bearing a disproportionate amount of the increase.

These figures provide a context for the consideration of other measures of effectiveness. As the District Court receives more cases, it cannot be expected to dispose of them as quickly with the same resources. As the prison system struggles to manage its overcrowded prisons, it cannot be expected with the same resources to work as effectively in rehabilitating offenders.

There are problems with the comparability of information. As Western Australia Police Service does not come into contact with all the people processed by the courts, there are mismatches between its figures for recorded crime and apprehended persons and figures for Magistrates' and Children's Courts. These two courts processed over 150 000 charges in 1997/1998 while the police recorded around 250 000 offences. However the police *cleared* under 80 000 offences. Other reasons for the difference can be attributed to the fact that the police do not record certain categories of offence, including most discovery offences such as driving offences and those against good order and, until a few years ago, drugs offences.[55]

Quality

Although much information is available on the treatment of Aboriginal people by the justice system, gaps in the available information preclude a firm conclusion as to the fairness of that treatment. Unpublished Crime Research Centre figures suggest that, in Western Australia, Aboriginal people make up 6 per cent of the people arrested (including those summonsed) for their first time in the period 1984 to 1994. This is only twice their representation in the State's population, and probably close to their representation in the age range which comes into most contact with the police. (The fact that they make up a large proportion of all arrests presumably comes from repeat arrests of the same few people.) Yet more than 30 per cent of Western Australia's prison population is drawn from the Aboriginal population of the State.

Information on sentencing of different ethnic groups is not easily available, but it seems that Aboriginal offenders are over-represented among those serving short prison sentences, and are over-represented among fine defaulters.[56] Aboriginal people are also more likely than non-Aboriginal people to be victims of crime, both violent and non-violent.[57]

Sentencing statistics have not been available in Western Australia for some time, except from Crime Research Centre publications where they are heavily qualified (for example, reporting is mostly confined to the sentence *per charge* rather than the aggregate or total sentence *per appearance*). The publication does not include any information on sentencing in lower courts. The Ministry of Justice will soon be making such information publicly available.

In the absence of sentencing information, limited information is available to judge whether female defendants are treated differently from males. Anecdotal evidence suggests that female victims, particularly of sexual offences and violence by perpetrators known to them, do not see the outcomes they might expect from the justice system. It could be argued that the growth in the use of Violence Restraining Orders has resulted from a failure of the justice system to treat violence seriously.[58]

It is impossible to say whether all those people in need of specialist facilities, for example interpreter services, or protective conditions such as cross-examination by CCTV link, do indeed receive access to these facilities. Integrity, courteousness, responsiveness and respectfulness of staff in the justice system cannot currently be assessed, except in the arena of courts, where the customer survey carried out by the Ministry of Justice's Court Services Division will shed some light.

Broader surveys would be necessary to ensure that police and other agencies are also providing good service, for victims and alleged offenders, when they are in contact with them. The ABS survey of public attitudes to the police may be a useful base, but it remains mostly unpublished and therefore the validity of its methodology and its findings cannot be assessed. An unpublished survey of police officers suggests they are not keen to conform with certain aspects of the *Young Offenders Act 1994* (WA), including for example the requirement to contact a responsible adult before interviewing an alleged offender aged under 18.[59] However, the survey is not able to say whether or not police officers *do* conform with the requirements of the Act.

Clear-up rates are currently published, but are undermined by some methodological issues. The ABS has tackled these and now publishes national 90-day clear-up rates,[60] but the perception is that this is too short a period. For example in 1997 in Western Australia 6.9 per cent of burglaries had been cleared up within 90 days, but Western Australia Police report a 13.1 per cent clear-up for burglary in the year 1997/1998.[61]

Although the Western Australia Police Service is responsible for the majority of criminal prosecutions, no conviction rates are published. ABS figures suggest that in 1996/1997 only about 50 per cent of contested cases in Western Australian higher courts resulted in a conviction.[62] Methodological issues suggest this may be an overestimate. Another ABS publication based on police data[63] suggests that only about 4 per cent of charges heard in Courts of Petty Sessions do not result in conviction.[64] In neither report is this information obvious — rather the interested reader must calculate it for him or herself.

Various sources suggest that only around one third of defendants on remand in custody at the time of their higher court trial receive a custodial sentence, with about one third receiving a non-custodial sentence and the remainder not being convicted. For juveniles remanded in custody the proportion convicted and given a custodial sentence may be lower. If supported by statistics these estimates should raise concerns about the appropriateness of the use of remand in custody.

The Ministry of Justice publishes completion rates for offenders sentenced to community orders or released on parole, and recidivism rates for offenders

sentenced to custody or community supervision.[65] However, these also are subject to imprecision. The recidivism measure currently represents the proportion of offenders who come back to Ministry of Justice custody or supervision. However, changes in sentencing practice could cause an increase or decrease in these recidivism rates that do not actually reflect any change in the behaviour of offenders.

The introduction of suspended sentences in November 1996 also undermines the usefulness of the current measure of recidivism — an offender who receives a suspended sentence does not come under Ministry of Justice supervision and would not be counted as a recidivist. Similarly, changes in the practices of the staff of the Parole Board, Supervised Release Board or the Ministry of Justice's Community Based Services, perhaps in response to public opinion, may result in reduced rates of completion of orders, though the behaviour of the offenders may be unchanged. Recidivism would be better measured by reference to further convictions. Until now that information has not been available within the Ministry of Justice, but it may soon begin to be. Other agencies have used re-arrest as a measure of recidivism but this relies on the arrest being justified, and it would be fairer to offenders to allow the evidence to be tested in court before labelling them as recidivists.

Timeliness

Some information on timeliness in the justice system is currently available, though from disparate sources. The ABS figures on 90-day clear-up rates are an attempt to combine a timeliness and a quality measure. The ABS report on higher courts also includes some measures of timeliness.

The Ministry of Justice has tabled in Parliament a report[66] which covers lodgements and listing intervals for the civil and criminal jurisdictions for the Supreme, District and metropolitan Magistrates' Courts, for the three financial years 1995/1996 to 1997/1998. The paper expresses some doubts about the quality of the data it reports. It is also possible that the paper understates the listing intervals, as a higher court case must first proceed through a Magistrates' Court. The listing interval may not actually be representative of the *actual* time between indictment and date of trial, as it is calculated in advance. Significant gaps remain, including information on lower courts outside the metropolitan area, and on other activities of the justice system.

Cost

As alluded to earlier, the agencies of the justice system publish information on costs. For example the Ministry of Justice's annual report details the cost of each prison place, the cost of community orders, and the costs of administering the courts, although some of the figures are heavily qualified. The Western Australia Police Service also includes budgetary information in its annual report, as do most other agencies involved in the system. Much of this is repeated in the COAG Report.

It is probably not surprising that information on costs of the justice system is more complete than any other area, though further integration of the costs in a 'whole of government' report would probably be of benefit to the interested members of the public. An example might be the cost of holding defendants on remand in custody because of delays in bringing the case to trial, as intimated in the Victorian Pathfinder Report.

Summary

Clearly there is substantial information in existence across all the agencies participating in the criminal justice system. However, it is not readily available, even to those working in the area, and may not be published in its most useable form. Integration and comparability of information from different areas of the justice system are also issues. However, it is equally clear that there are major gaps in coverage of available information, and this is discussed further below.

By contrast there is very little information publicly available on the operation of the civil justice system.

DISCUSSION

Aims of the justice system

It is implicit in the literature that there are three very broad aims to the justice system:

1. reducing or influencing the level of criminal behaviour (criminal justice);
2. dispute resolution (civil justice); and thirdly
3. to achieve (1) and (2) in an effective and efficient manner which is satisfactory to the participants.

Agencies involved in the justice system

There is a large and diverse range of agencies which comprise the justice system. To adequately assess how effectively the system is operating, information would be required from each of these agencies. Many but not all of these agencies are part of or are funded by the State government. Improvements in recording and reporting, including the adoption of a 'whole of government' approach to reporting on justice issues, would improve knowledge of the effectiveness of the justice system.

Even if data could be collected and collated from these State agencies, significant gaps would be left. Further data is needed. The absence of any independent measure of crime levels is a major concern, as public reporting practices and police recording practices and the 'counting rules' may cause artificial fluctuations in the crime rate.

Few agencies gather quantitative or qualitative information from their contacts with the public, except for demographics and administrative data. Outcomes are an example of the administrative data collected. There is a relative absence of information on public attitudes towards and satisfaction with the justice system. The 'public' with whom the justice system has contact encompasses victims, witnesses, defendants, relatives of all of these, and employees of agencies within the justice system.

A strategy

Despite shortcomings in the data collection system, a clear strategy is emerging. It seems clear that a full picture cannot be provided by statistics from the justice agencies, as they cannot provide the qualitative information that is required. It is also clear that this has been accepted by some agencies, which are now undertaking a number of surveys to supplement administrative statistics.

Crime is best measured by regular public survey. Therefore the effectiveness of the justice system in influencing levels of crime is best measured by public survey to establish the true level of crime. Specific types of crime are not easily measured in this way, an important category being crimes against businesses. However, surveys can be designed to measure this too. Discovery offences such as drug use, driving offences and frauds can be measured by surveys of self-reported offending, although this methodology has not been tested for measuring *crime* rather than people's behaviour.

If one accepts the need for regular crime surveys, this offers the opportunity to gather experiences and views from the public on their contact with the justice system. In the context of crime, respondents would be asked about their reporting of the offence, the responsiveness of the police and Victim Support, their experience of the investigation and of any prosecution, and their satisfaction with the process and the outcome.

Respondents could also be asked about their experiences on the receiving end of the justice system, i.e. as a defendant. With hundreds of thousands of infringement notices and tens of thousands of more serious charges each year, there is potentially a vast source of respondents to survey for their experiences of the system.

Similarly, the survey could gather respondents' views on their experiences of the civil justice system, whether as plaintiff or defendant.

Many more people will have recent experience of the civil and criminal justice systems as a witness (without having been a victim or litigant) and their views could also be surveyed.

As well as asking for information on the true level of crime and perhaps of unmet demand for access to civil justice (*quantity)*, the survey could ask for information on respondents' treatment, or their perception of their treatment, by the systems and their staff (*quality*). The survey could also gather information on *timeliness* and *cost* to the participants, and their views on these issues.

Although there is some risk that respondents' views may be biased by the actual outcome (that is, whether or not it was nominally in their favour) intelligent analysis and interpretation allows one to control for this kind of confounding factor. Existing surveys, including the Ministry of Justice's Courts

Customer Satisfaction Survey and the ABS survey of Community Satisfaction with Police Services, do not currently make any attempt to control for the possibility of such bias.

The aim of the survey would be to document the experiences of and attitudes to the justice system by members of the public, as victims, witnesses, defendants, relatives of all of these and perhaps even as employees of it. This would also fulfil the role of 'participatory evaluation' as recommended by Western Australian researcher, Rod Underwood, in his 1990 paper for the Crime Research Centre.[67]

Such a public survey could be supplemented by, and cross-validated with, some of the system's internal measures, including clear-up rates, conviction rates, take-up rates for victim support, listing intervals and recidivism rates. In the spirit of 'participatory evaluation' the survey could establish on an ongoing basis what information the public wants about its justice system and how it operates, and this could guide the statistical outputs of the justice agencies.

The challenge

Interpretation

Interpreting the results of the survey, and integrating those results with the system's internal measures, would need to be carried out with intelligence and sensitivity. It is unlikely that a few simple 'indicators' could be distilled from the data collected. Key performance indicators are susceptible to unintentional as well as deliberate manipulation. Reporting on discrete indicators also does not adequately represent the symbiosis and circularity of much of the justice system. For example, it is little understood that a welcome increase in clear-up rates is also likely to have the effect of an unwelcome (apparent) increase in recidivism rates, as re-offenders become more likely to be caught and convicted for their offences.

Development

To undertake such a large-scale public survey would require preliminary research with the public and those professionals involved in the justice system to establish its extent, for the scope of the survey extends well beyond the police, courts and corrections. Such a consultation process would also help identify the issues, within the broad criteria of quantity, quality, timeliness and cost, which are of most importance to the public.

The regular survey might need to 'over-sample' certain groups. This might include sectors of the population whose members make up a small proportion of the general population but are numerous among the clients of the justice system. The obvious example is Western Australia's Aboriginal people — in a survey of 5 000 people only around 150 would be Aboriginal. However, a great proportion of those 150 would have had recent contact with the justice system, many as victims and many as offenders or alleged offenders, and it might be judged unnecessary to increase their number in the sample.[68]

Conversely, groups well-represented in the population but under-represented among clients of the justice system may present a more difficult problem. For example, women are under-represented among alleged offenders, and a random sample of the population might include few who had recent experience of being a defendant. A methodology would also need to be developed for gathering information on the experiences of businesses which have been victims of offences.

Special arrangements may need to be made for surveying juveniles (children aged 10 to 17), traditionally excluded from most surveys, and for assessing the experiences of children aged under 10.

In the consultative stages of developing the survey, some attention would need to be paid to the public's understanding of what comprises the justice system. It is possible that knowledge of the justice system's scope and complexity, and understanding of how it functions, may be flawed. It may prove necessary to map the justice system, that is, to fully describe it perhaps including some basic statistics, and to preface survey interviews with a description of it, much in the way of a deliberative poll.[69] For example, it would be pointless to ask for opinions on sentencing without first ensuring that the respondent's knowledge of sentencing was reasonably accurate.

Additional attention will need to be paid to developing a survey methodology that adequately distinguishes between respondents' experiences of being processed by the system, and the final outcome of their particular case. Of course outcomes are of interest, but there is a risk that a respondent for whom the outcome was in his or her favour would regard the justice system differently to another who experienced an unfavourable outcome. It is more likely that an unsuccessful defendant or plaintiff would find fault with all aspects of the system. Given that customer satisfaction surveys are now a way of life for many justice agencies and organisations, this issue represents a methodological challenge rather than an absolute obstacle.

Cost and frequency

Special arrangements would also be needed to distinguish between respondents' experiences of the state and Commonwealth justice systems, though as noted earlier they share many of their actors and facilities.

The survey sounds like an expensive exercise. However, it might replace several existing regular surveys, including:

- the ABS Crime and Safety Survey, currently conducted in Western Australia twice every five years;
- the ABS-conducted but police-funded survey of community attitudes to the police, conducted quarterly;
- courts' customer satisfaction survey;
- Victim Support Service's client surveys.

Ideally, the funding for each of the above surveys would be reallocated to the global survey. Other agencies with an interest in the area might also be asked to contribute to funding (including Commonwealth agencies). While it is unlikely that the exercise could be 'cost neutral' its benefits should justify the cost. As time goes on and development costs are left behind, such a survey could become routine and the cost would fall.

Currently recorded crime figures are published at least annually. Ideally 'survey crime figures' should be available equally as often. Other performance measures emanating from the survey would be required frequently and promptly. It is unlikely that agencies' reporting requirements could be met by surveying less frequently than every year. Timing could be fixed so that preliminary results would be available for agencies' annual reports.

Conduct

Ideally such a survey would be commissioned, and perhaps conducted but definitely reported on, by an independent agency, perhaps an academic body. Inevitably such an agency would be funded by government, and the advantages of being a non-governmental agency might only be perceptual and not necessarily real. As such it could operate as a government agency, perhaps as an arm of the Office of the Auditor-General which has already expressed substantial interest in measuring the performance of justice agencies and has some experience in interpreting their internal measures and surveys. The Queensland Criminal Justice Commission offers an alternative structure.

However, the organisation with responsibility for the conduct or analysis of the survey, and its integration with data from justice system agencies, would primarily need to have the knowledge and understanding of the justice system to be able to reach an overall judgement on the effectiveness of its operation and, perhaps more importantly, year on year changes in effectiveness. It may be that this knowledge base could not be achieved, or maintained, outside the relevant arms of government. At least initially, it may be preferable for a survey to be commissioned from a contractor, and managed cooperatively by interested government agencies, though in the long term a more cohesive organisation would be advantageous.

CONCLUSION

In this sub-section existing models and methods of measuring the effectiveness of the justice system have been considered and the conclusion has been reached that they are inadequate and probably cannot be adapted and improved to a degree that would make them truly useful. As a measure of reform it is proposed that existing information from justice agencies needs to be supplemented by information from the users of the justice system. Information from the two sources — the system and the survey — should be analysed and integrated by a single organisation or agency. It is esssential that the organisation or agency should have appropriate depth of knowledge and understanding of the justice system to be able to form a judgement on

the whether the system is operating satisfactorily and in what areas improvements should be made.

ENDNOTES

1 'Advantages and Disadvantages of the Adversarial System in Civil Proceedings' which, despite its title, at many points could be discussing the criminal rather than civil justice system.
2 See Appendix 1.
3 Lord Woolf & Stephen Tumim, *Prison Disturbances April 1990* (Cmnd 1456, 1991).
4 Lord Woolf, *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996); Peter Middleton, *Report of a Review of Civil Justice and Legal Aid* (1997).
5 Middleton's report 'rough map' contains statistics on the number and total costs of civil cases.
6 Home Office, United Kingdom, *Statistics on Race and the Criminal Justice System* (1998).
7 Home Office, United Kingdom, *Costs of the Criminal Justice System* (1992).
8 Interview with Richard Harries, economics analyst, Home Office, December 1998.
9 Coretta Phillips and David Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and Their Outcomes* (1998) Home Office Research Study 185.
10 R Hood and G Cordovil, *Race and Sentencing: A Study in the Crown Court* (1992).
11 C Flood-Page and A Mackie, *Sentencing Practice: An Examination of Decisions in Magistrate's' Courts and the Crown Court in the Mid-1990's* (1998) Home Office Reseach Study 180.
12 C Mirrlees-Black, et al, 'The 1998 British Crime Survey England and Wales' (1998) 21 *Home Office Statistical Bulletin*. Most other countries also publish regular victimisation surveys, but the British Crime Survey is by far the most comprehensive.
13 For example, the 1998 British Crime Survey found that police recorded as little as 29% of attempted burglaries reported to them.
14 The Australian Bureau of Statistics' Crime and Safety Survey differs in a number of ways: see below.
15 C Mirrlees-Black and A Ross, *Crime Against Retail and Manufacturing Premises: Findings from the 1994 Commercial Victimisation Survey* (1995) Home Office Reseach Study 146.
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18 N Aye-Maung, *Young People, Victimisation and the Police* (1995) Home Office Research Study 140.
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20 For example, C Mirrlees-Black and T Budd, *Policing and the Public: Findings from the 1996 British Crime Survey* (1997) Home Office Research Findings 60.
21 M Hough and J Roberts, *Attitudes to Punishment: Findings from the British Crime Survey* (1998) 179 Home Office Research Study.
22 Scottish Office, *Costs, Sentencing Profiles and the Scottish Criminal Justice System 1996* (1998).
23 Northern Ireland Office, *Review of the Criminal Justice System in Northern Ireland: A Consultation Paper* (1998).
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25 US Department of Justice, *Performance Measures for the Criminal Justice System: Discussion Papers from the BJS-Princeton Project* (1993).
26 Ibid.
27 John J Dilulio, *Rethinking the Criminal Justice System: Toward a New Paradigm* (1993).
28 US Department of Justice, *Trial Court Performance Standards* (1990).
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30 Queensland Criminal Justice Commission, *Criminal Justice System Monitor* (April 1998) vol 3.
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32 Victoria Department of Justice, *Project Pathfinder Reengineering the Criminal Justice System: Stage 2 – Design* (1998).
33 Council of Australian Governments.
34 Steering Committee for the Review of Commonwealth/State Service Provision, *The Report on Government Services 1998: Volume 1 – Education, Health, Justice, Emergency Management* (1998).
35 D Weatherburn, 'Measuring Trial Court Performance: Indicators for Trial Case Processing' (June 1996) *New South Wales Crime and Justice Bulletin.*

36 S Parker, *Courts and the Public* (1998).

37 Donovan, 'Customer Survey for Court Services Division' (unpublished paper prepared for WA Ministry of Justice, 1998).

38 Victim Support Service carries out routine customer satisfaction surveys of its clients, but these represent a minority of criminal victims. It would probably not be appropriate for its survey to cover clients' views and experiences of court services except to the extent that Victim Support offers support for that experience.

39 The uncapitalised word 'state' is used in its generic sense, and does not mean the State of Western Australia.

40 Although the victim is a major participant in the process, common law and legal tradition have resulted in the role of the victim of a criminal offence being reduced to the role of a witness to the offence.

41 The result of this is that, if one asks people in a victimisation survey (see later reference to the ABS Crime and Safety Surveys) whether they have been the victim of an offence, the number of offences will in fact be much fewer than the authorities are aware of. Conversely, many of those offences the victim tells of in the survey will not be known of by the authorities.

42 In WA in 1997/8 of at least 108 500 charges resulting in a conviction, just 5 100 were heard or sentenced in District or Supreme Court. 15 300 were heard in Children's Court: Ministry of Justice (unpublished, 1999).

43 Although this is no bar to another attempt being made in the future to prosecute the person on that charge.

44 Although there are some restrictions on private prosecutions of indictable offences.

45 WA Office of the Auditor General, *Waiting for Justice: Bail and Prisoners in Remand* (1997).

46 Interview with Richard Harries, above n 8.

47 Above n 1.

48 Western Australia Police Service, *Annual Report* (1998).

49 The Western Australia Police Service uses the phrase 'reported crime' but this is not strictly accurate.

50 ABS, *Crime and Safety Western Australia,* (1995).

51 The ABS survey estimated there were 159 000 crimes against people, households or their car in the 12 months preceding the survey – in the following financial year Westerb Australia Police Service recorded 95 000 such offences, about 60% of 159 000, so their may be little "non-recording" in Western Australia.

52 Above n 12.

53 A Ferrante, N Loh and J Fernandez, *Crime and Justice Statistics for Western Australia: 1997* (1998).

54 Ministry of Justice *Court, Lodgements and Listing Intervals – Three Year Trends for the Years 1995/6, 1996/7 and 1997/8,* (1998).

55 In statistical terminology, these differences are the result of counting rules.

56 Offender Management Division, Ministry of Justice of Western Australia, *Adult Offender Statistical Report 1995/96* (1998).

57 ABS, *Law and Justice Issues, Indigenous Australians* (1998).

58 A Violence Restraining Order is a court injunction to deter a specified person from being violent towards the applicant for the Order – yet such violence, and the threat of it, is already illegal.

59 R Cant and R Downey, *Evaluation of the Young Offenders Act (1994)* (1998) – *Police perceptions of the operation of the Act*. In general officers seemed to feel that the requirement was a hindrance to any investigation and that momentum was lost through delay in contacting a responsible adult.

60 ABS, *Recorded Crime Australia 1997* (1998).

61 See above n 48.

62 ABS, *Higher Criminal Courts 1996/7* (1998).

63 Also see earlier comments on comparability of court and police data.

64 ABS, *Courts of Petty Sessions Western Australia 1996/7* (1998).

65 Ministry of Justice of WA, *Annual Report* (1998).

66 See above n 54.

67 R Underwood, *Models of Evaluation in the Criminal Justice System* (1990).

68 In a survey in 1994, a little under one in seven Aboriginal people in WA said they been attacked or threatened in the preceding year, and one in seven Aboriginal households had experienced a burglary with theft. A quarter reported having been arrested in the preceding five years, most more than once. See above n 57.

69 In an ordinary opinion poll, people are asked to make snap judgments. In a deliberative poll people have a chance to consider the issues in depth before answering questions, having first been provided with an appropriate and balanced briefing. After deliberation, people's responses to a questionnaire (hopefully) represent what the public would think, if they had the time and opportunity to consider the issues in depth.

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WESTERN AUSTRALIA

Young Offenders Act 1994 (WA)

UNITED KINGDOM

Criminal Justice Act 1991

Criminal Procedure (Scotland) Act 1995

Appendix I

Press Notice from UK Government

ISSUED ON BEHALF OF THE HOME OFFICE, THE LORD CHANCELLOR'S DEPARTMENT, AND THE ATTORNEY-GENERAL'S OFFICE

512/98 30 December 1998

JOINT PRESS NOTICE ON THE CRIMINAL JUSTICE SYSTEM PUBLIC SERVICE AGREEMENT

CRIMINAL JUSTICE SYSTEM - IMPROVING PERFORMANCE

The Home Secretary, the Lord Chancellor and the Attorney-General have set out joint aims for the criminal justice system in England and Wales.

The overarching aims, objectives and performance measures for the criminal justice system have been published for the first time in a cross-departmental Public Service Agreement.

The three Departments and their respective services, will be working more closely than ever before to ensure that the criminal justice system protects the public and delivers justice. Inter-agency co-operation will be promoted at regional, local, as well as at the national level. Ministers believe that these arrangements are a good example of "joined-up government" in practice.

Aims and objectives

The three Ministers have set two overarching aims to provide a strategic direction for the system as a whole. They have made clear that every part of the criminal justice system (including the police, courts, Crown Prosecution Service, prison and probation services) should work together so as to best serve and protect the public.

The two overarching aims are: -

- to reduce crime and the fear of crime and their social and economic costs; and
- to dispense justice fairly and efficiently and to promote confidence in the rule of law.

Supporting the aims are the following eight objectives:-

- in support of the first aim:
  1. to reduce the level of actual crime and disorder;
  2. to reduce the adverse impact of crime and disorder on people's lives;
  3. to reduce the economic costs of crime;
- in support of the second aim:
  4. to ensure just processes and just and effective outcomes;
  5. to deal with cases throughout the criminal justice process with appropriate speed;
  6. to meet the needs of victims, witnesses and jurors within the system;
  7. to respect the rights of defendants and to treat them fairly;
  8. to promote confidence in the criminal justice system.

Performance targets

The three key departments (Home Office, Lord Chancellor's Department and Crown Prosecution Service) are committed to overarching performance measures and targets to improve the performance of the criminal justice system in serving the public.

Key targets include:

- a target to reduce the long-run rate of the growth of crime, to include a reduction in vehicle crime from its current level by 30% within 5 years;
- co-operation between departments to reduce delays throughout the criminal justice system, including:
- a reduction in the time from arrest to sentence or other disposal; and
- halving the time from arrest to sentence for persistent young offenders from 142 to 71 days;
- an improvement in the satisfaction level of victims, witnesses and jurors with their treatment in the criminal justice system.

A Ministerial Group on the criminal justice system chaired by the Home Secretary and including the Lord Chancellor, the Attorney General and, initially, the Chief Secretary to the Treasury will steer the programme set out in the public service agreement for the criminal justice system. The Ministerial group is supported by a Strategic Planning Group of senior officials drawn from the Home Office, Lord Chancellor's Department, Her Majesty's Treasury, Crown Prosecution Service and the Legal Secretariat to the Law Officers. A new Criminal Justice Joint Planning Unit is staffed jointly by the Home Office, Lord Chancellor's Department, Crown Prosecution Service and Treasury.

In March 1999 a three-year strategic plan for the whole of the criminal justice system will be published covering the three years 1999-2000 to 2001-02 together with a forward business plan for 1999-2000. This will be followed by an annual report in autumn 2000 reporting back on progress in achieving these plans.

Notes for Editors

1. There are separate public service agreements (PSAs) for the Home Office, Lord Chancellor's Department, Law Officers' Departments and for the inter-departmental action on Illegal Drugs. The Home Secretary, Lord Chancellor and Attorney General are individually responsible for the commitments in their own PSAs, but are jointly responsible for commitments related to the overall performance of the Criminal Justice System set out in this PSA.

2. The PSAs were published by the Treasury on 17 December 1998 in a White Paper entitled Public Services for the Future: Modernisation, Reform and Accountability (Cm 4181), available from HMSO bookshops priced 428. # = pounds sterling

Appendix 2

Criminal Justice Act 1991 (England and Wales)

SECTION 95

(1) The Secretary of State shall in each year publish such information as he considers expedient for the purpose of:

(a) enabling persons engaged in the administration of justice to become aware of the financial implications of their decisions; or

(b) facilitating the performance of such persons of their duty to avoid discriminating against any persons on the ground of race or sex or any other improper ground.

(2) Publication under subsection (1) above shall be effected in such a manner as the Secretary of State considers appropriate for the purpose of bringing the information to the attention of the persons concerned.

Appendix 3

Trial Court Performance Areas and Standards*

Area	Title	Standard	Title	Summary of description
1	ACCESS TO JUSTICE	1.1	Public Proceedings	The court conducts its proceedings and other public business openly (except in strictly specified exceptions).
		1.2	Safety, accessibility and convenience	Court facilities are safe, accessible and convenient to use.
		1.3	Effective participation	All who appear before the court are given the opportunity to participate effectively without undue hardship or inconvenience.
		1.4	Courtesy, responsiveness and respect	Judges and other court personnel are courteous and responsive to the public, and accord respect to all they come in contact with.
		1.5	Affordable costs of access	Costs - in terms of time, money or procedures - of access to the courts' proceedings and records are reasonable fair and affordable.
2	EXPEDITION AND TIMELINESS	2.1	Case processing	The court establishes and complies with recognised guidelines for timely case processing, while also keeping current with its incoming caseload.
		2.2	Compliance with schedules	The court disburses funds promptly, provides reports and information, and responds to requests for information and other services on an established schedule.
		2.3	Prompt implementation of law and procedure	The trial court promptly implements changes in law and procedure.
3	EQUALITY, FAIRNESS AND INTEGRITY	3.1	Fair and reliable judicial process	Trial court procedures faithfully adhere to relevant laws, procedural rules and established practices.
		3.2	Juries	Jury lists are representative of the jurisdiction from which they are drawn.
		3.3	Court decisions and actions	The trial court gives prompt attention to cases, deciding them without undue disparity among like cases and upon legally relevant factors.
		3.4	Clarity	Decisions of the trial court unambiguously address the issue presented to it and make clear how compliance can be achieved.
		3.5	Responsibility for enforcement	The trial court takes appropriate responsibility for the enforcement of its orders.
		3.6	Production and preservation of records	Records of all relevant court decisions and actions are accurate and properly preserved.
4	INDEPENDENCE AND ACCOUNTABILITY	4.1	Independence and comity	A trial court maintains its institutional integrity and observes the principle of comity in its governmental relations.
		4.2	Accountability for public resources	The trial court responsibly seeks, uses and accounts for its public resources.
		4.3	Personnel practices and decisions	The trial court uses fair employment practices.
		4.4	Public education	The trial court informs the community of its programs.
		4.5	Response to change	The trial court anticipates new conditions or emergent events and adjusts its operations as necessary.
5	PUBLIC TRUST AND CONFIDENCE	5.1	Accessibility	The trial court and the justice it delivers are perceived by the public as accessible.
		5.2	Expeditious, fair and reliable court functions	The public has trust and confidence that the basic trial court functions are conducted expeditiously and fairly and that its decisions have integrity.
		5.3	Judicial independence and accountability	The trial court is perceived to be independent, not unduly influenced by other components of government, and accountable.

* Adapted from chart produced by the US Department of Justice (1990).

Appendix 4

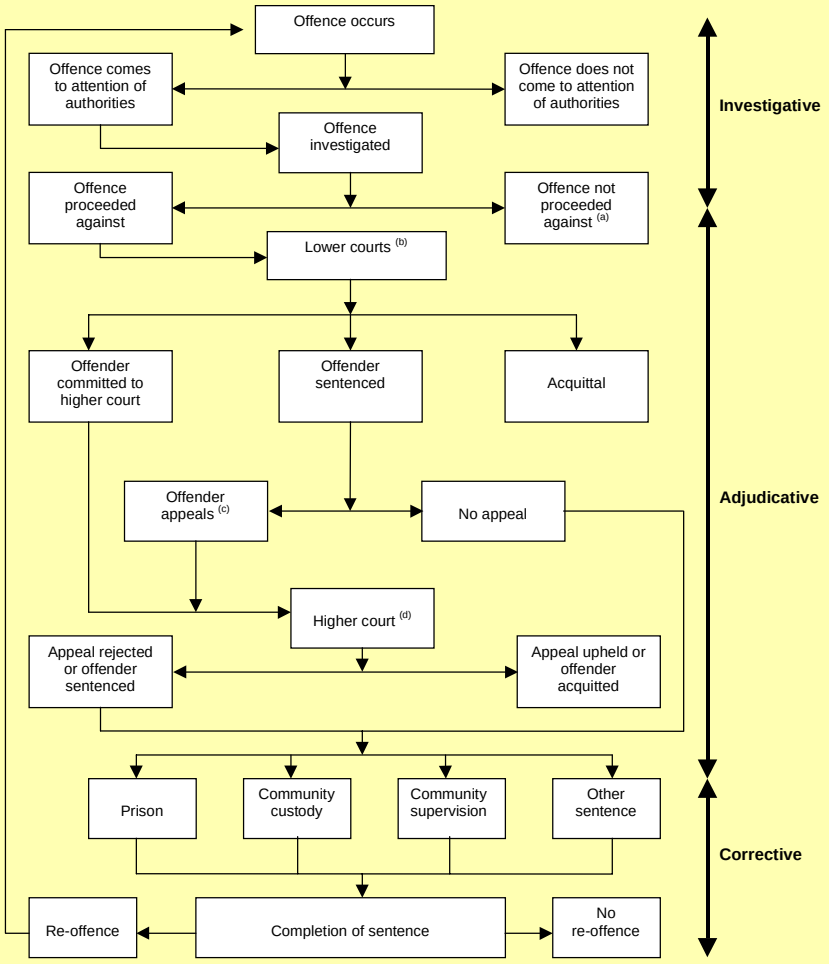
Flows Through the Criminal Justice System*

(a) No offender found, police caution offender or decide not to prosecute.

(b) Lower courts include Local Courts, Courts of Petty Sessions, Magistrates' Courts, Children's Courts.

(c) Appeals may be against the judgment or the sentence.

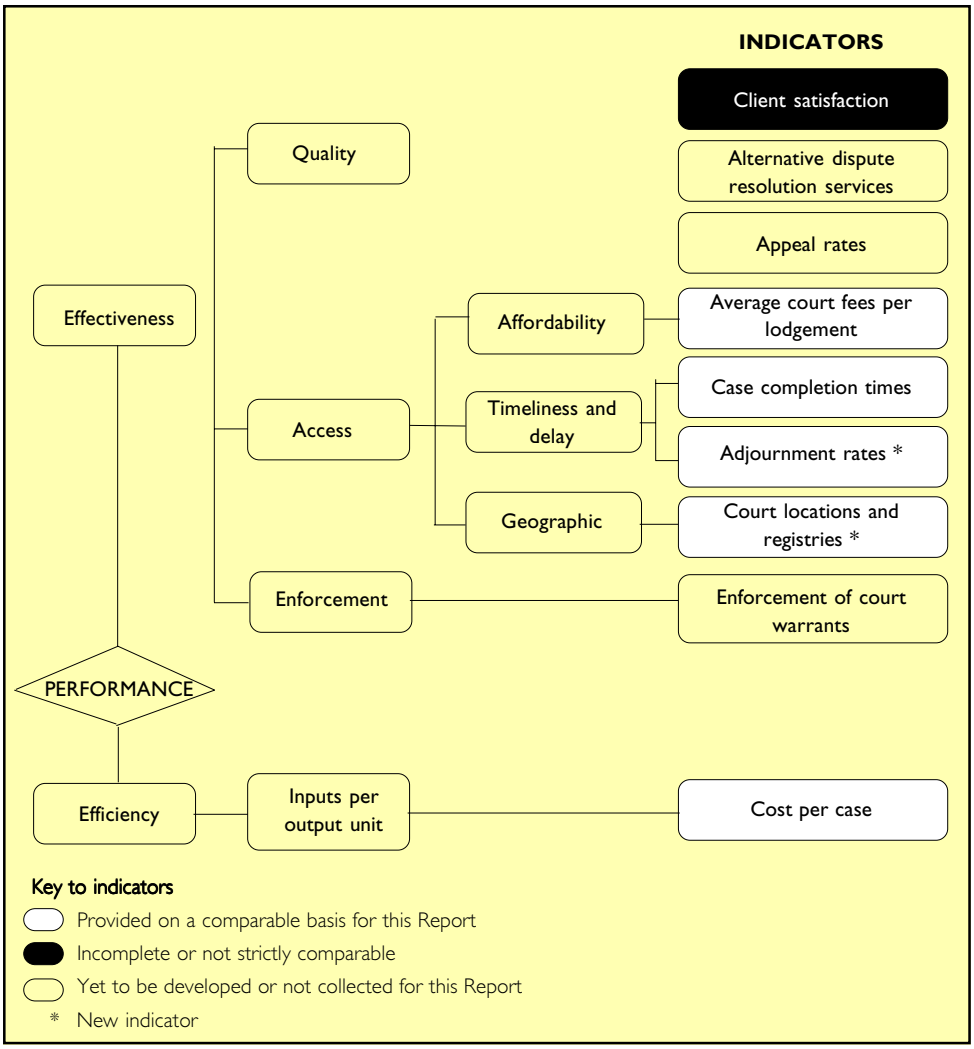
(d) Higher courts include District Courts, County Courts, Supreme Courts, Appeal Courts and the High Court.



* From Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Services* (Melbourne: Industry Commission, 1998) Vol 1, 251 – Commonwealth of Australia copyright reproduced by permission.

Appendix 5

Performance Indicators for Court Administration[+]



+ Figure 6.8 from Steering Committee for the Review of Commonwealth/State Service Provision *Report on Government Services* (Melbourne: Industry Commission, 1998) Vol 1, 352 – Commonwealth of Australia copyright reproduced by permission.

SECTION 2

Civil System

Section 2: Civil Overview

2.1

The Civil Justice System in Western Australia — An Overview

INTRODUCTION: THE ENGLISH COMMON LAW SYSTEM

The nature of civil disputes

It is an inevitable characteristic of our society that disputes or conflicts will arise amongst its citizens. The range and the nature of these disputes or conflicts is so broad that they defy definition. However, many situations will be familiar:

(a) claims to recover debts;[1]

(b) claims to enforce obligations arising under a contract;[2]

(c) monetary compensation claims for breaches of contract;[3]

(d) claims by consumers for injuries suffered through the use of defective products;[4]

(e) claims for compensation for injuries suffered at work, in a public place,[5] in a motor vehicle accident[6] or through medical malpractice;

(f) claims for injunctions;[7]

(g) claims arising out of disputes concerning deceaseds' estates;[8]

(h) claims for compensation arising out of the breaches of statutory obligations imposed by state or federal legislation such as the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987*(WA).[9]

All of these disputes and many others can be similarly classified as 'civil disputes'. The system that deals with the resolution of these disputes is known as the 'civil justice system', which is the subject of this review.

As has been observed:

> The administration of civil justice plays a role of crucial importance in the life and culture of a civilised community. It constitutes the machinery for attaining … 'justice between man and man'.[10]

Whilst it is difficult to define the entire nature and range of the disputes which can be encompassed within the expression 'civil dispute', it is relatively simple to exclude certain types of disputes that either are not part of this review or form part of the review of the criminal justice system. Disputes not part of this inquiry include those arising out of the breakdown of a marriage or what is commonly referred to as a 'defacto relationship' which are Family Court matters. Disputes between employers and employees are commonly dealt with by Industrial Commissions or tribunals operating in Western Australia. Administrative or quasi-judicial tribunals deal with a wide variety of other disputes such as those arising under the *Workers' Compensation & Rehabilitation Act 1981* (WA), the *Guardianship Administration Act 1990* (WA), the *Mining Act 1978* (WA), the *Liquor Licensing Act 1988* (WA), the *Small Claims Tribunals Act 1974* (WA), and the *Dividing Fences Act 1961* (WA).

Which law or laws are applicable to the resolution of civil disputes?

To resolve civil disputes judges and other decision makers in the civil justice system rely upon legal rules, principles and doctrine[12] developed, in part, from a body of law known as the 'common law' and in part, on what is known as 'statute law'. The expression 'statute law' includes laws, referred to as legislation, made by the Australian Parliament and the Parliament of Western Australia. However, the expression 'statute law' can also refer to laws made through the use of delegated or subordinate legislation.[13] These laws or rules are legislation made by a non-parliamentary body acting pursuant to an act of Parliament.[14] Whilst it is difficult to define the range of applicable 'delegated' legislation, in the context of the administration of civil justice, the Rules of Court which regulate the operation of the various courts and tribunals operating in Western Australia are the most important. We shall discuss the Rules of Court below.[15]

The other important source of law, the 'common law', has two meanings. One meaning refers to a system of law where legal principles are identified and developed through the decisions judges make when resolving disputes.[16] This method is generally referred to as developments through case law.[17] However, another meaning refers to the operation of our legal system, where the method for resolving disputes within the court system is adversarial.[18] Of course, the common law, upon which our system of civil justice is based, was originally English law and the reception of this law into Australia was described for the High Court by Brennan J in *Mabo v Queensland (No 2):*

> According to Blackstone, English law would become the law of a country outside England either upon first settlement by English colonists of a 'desert uninhabited' country or by the exercise of the Sovereign's legislative power over a conquered or ceded country. Blackstone did not contemplate other ways by which the sovereignty might be acquired. In the case of a conquered country, the general rule was that the laws of the country continued after the conquest until those laws were altered by the conqueror. The Crown had a prerogative

> power to make new laws for a conquered country although that power was subject to laws enacted by the Imperial Parliament. The same rule applied to ceded colonies, although the prerogative may have been limited by the treaty of cession. When 'desert uninhabited countries' were colonised by English settlers, however, they brought with them 'so much of the English law as [was] applicable to their own situation in the condition of an infant colony'. English colonists were, in the eye of the common law, entitled to live under the common law of England, which Blackstone described as their 'birthright'. That law was not amenable to alteration by exercise of the prerogative. The tender concern of the common law of England for British settlers in foreign parts led to the recognition that such settlers should be regarded as living under the law of England if the local law was unsuitable for Christian Europeans...
>
> When British colonists went out to other inhabited parts of the world, including New South Wales, and settled there under the protection of the forces of the Crown, so that the Crown acquired sovereignty recognised by the European family of nations under the enlarged notion of terra nullius,[19] it was necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies, for sovereignty imports supreme internal legal authority. The view was taken that, when sovereignty of a territory could be acquired under the enlarged notion of *terra nullius*, for the purposes of the municipal law that territory (though inhabited) could be treated as a 'desert uninhabited country'. The hypothesis being that there was no local law already in existence in the territory, the law of England became the law of the territory (and not merely the personal law of the colonists). Colonies of this kind were called 'settled colonies'. Ex hypothesi, the indigenous inhabitants of a settled colony have had no recognised sovereign, else the territory could have been acquired only by conquest or cession. The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organisation...
>
> The common law thus become the common law of all subjects within the colony who were equally entitled to the law's protection as subjects of the Crown.[20]

His Honour's comments are equally applicable to the State of Western Australia and the introduction of the common law to Western Australia which occurred when Captain Fremantle took formal possession 'of the whole of the West Coast of New Holland in the name of His Britannic Majesty, and the union jack was hoisted on the South Head of the River' on 2 May 1829.[21]

On 18 June 1829, Captain Stirling, who was also lieutenant governor of the settlement of Western Australia, issued a proclamation declaring that the '[L]aws of the United Kingdom as far as they are applicable to the circumstances of the case do … immediately prevail and become security for the Rights, Privileges and Immunities of all His Majesty's Subjects found or residing in [the] Territory' of Western Australia.[22]

The British Parliament enacted the *Swan River Act 1829* which provided for the making of Orders in Council authorising the appointment of three or more persons resident in the settlement to enact laws and to constitute courts for the peace, order and good government of persons in the settlement.[23]

Of course, by the time the common law was received in the State of Western Australia, it had undergone some eight centuries of development and refinement through the centralisation of justice in England following the Norman Conquest.[24]

During these several centuries a system for the administration of civil justice, covering the organisation of the civil courts and their practices and procedures, was also developed. The present justice system operating in Western Australia cannot be fully understood without some appreciation of the civil justice system which operated in England at the time of the establishment of the colony of Western Australia and, in particular, a system which existed in 1861. It was this date, as we shall come to see, which grounded the jurisdiction of the first most important civil court in Western Australia.[25]

The administration of civil justice prevailing in England in 19th century

At the commencement of the 19th century in England, the system of civil justice operated with two separate and distinct systems of judicature or courts. The Court of Chancery administered 'equity' in Lincoln's Inn. The Courts of Common Law administered law in Westminster Hall.[26] It has been observed that the '...two jurisdictions had no common historical origin and administered justice on principles which were essentially unlike and which went far beyond their requirements of a rational division of labour.'[27]

Furthermore, the legal principles in systems of procedure applying in each of these courts were quite different and could give rise to completely different decisions on the same set of facts![28] Moreover, litigants seeking redress could find themselves in the wrong court because of a technicality and uncertainty over these courts' respective jurisdictions and powers.[29]

As one historian observed:

> The conflict between the two systems, and their respective modes of redress, was one which, if it had not been popularly supposed to derive a sanction from the wisdom of our forefathers might well have been deemed by an impartial observer to be expressly derived for the purpose of producing delay, uncertainty and untold expense.[30]

The superior courts of common law

The three superior courts of common law were the Court of King's Bench, the Court of Common Pleas and the Court of Exchequer. Each court had its own origins and historical development and, when first established, performed different functions. At the commencement of the 19th century they all operated and sat in Westminster Hall.[31]

Each of these courts depended upon the revenue generated by the law suits commenced in the courts and they actively competed for litigation. Eventually, the courts acquired equal and concurrent jurisdiction in civil matters.[32] As one historian observed, at the commencement of the 19th century:

> No practical necessity was left for the maintenance side by side of three independent channels of justice, in each of which the streams ran in similar fashion and performed the same kind of work.[33]

Nevertheless, some important differences remained between the three courts.

The Court of King's Bench, exercised both civil and criminal jurisdiction and supreme supervisory authority over all inferior tribunals such as Justices of the Peace and the Admiralty and Ecclesiastical Courts.[34] The supervisory jurisdiction was based upon the use of prerogative writs such as mandamus and prohibition.[35] The King's Bench was constituted by the Chief Justice and three puisne judges.[36]

The Court of Common Pleas, which was the most ancient of the three courts, retained jurisdiction over legal actions for the recovery of land,[37] although it also handled legal actions for remedies against persons, known as 'personal actions'.[38] The Court of Common Pleas also was constituted by a Chief Justice and three puisne judges.[39]

The Court of Exchequer retained exclusive jurisdiction over revenue cases although it had acquired power over all personal actions as well. It operated as a court of equity assisting the Court of Chancery.[40] The Chief Baron and three barons of the Exchequer[41] constituted this court.

The common law procedure at this time has been described as antiquated, technical and obscure.[42] As one historian has observed:

> From the beginning of the century, the population, the wealth, the commerce of the country had been advancing by great strides, and the ancient bottles were but imperfectly adapted to hold the new wine. At a moment when the pecuniary enterprises of the Kingdom were covering the world, when railways at home and steam upon the seas were creating everywhere new centres of industrial and commercial life, the common law courts of the realm seemed constantly occupied in the discussion of the merest legal conundrums which bore no relation to the merits of any controversy except those of pedants and in the direction of a machinery that belonged already to the past.[43]

These three courts sat during only four short terms of three weeks each, after which they travelled to the chief hall of the city or borough-town for holding courts. The judges would individually go on circuit throughout England and Wales to hear actions before juries.[44]

Apart from the difficulties that litigants experienced having access to these

courts, their procedure has been variously described as cumbersome, pedantic, technical, harsh, inflexible and harassing, all of which resulted in expensive delay, vexation and disgust for litigants.[45] Some examples of the procedure will illustrate the considerable problems facing litigants:

1. In actions between persons, there were a number of quite different and very technical methods of commencing proceedings.[46]

2. A person wishing to commence an action, known as a 'plaintiff' had to choose the correct 'form of action'.[47] For example, if a plaintiff wished to bring an action upon a contract there were at least six different forms of actions from which the plaintiff had to choose. If the plaintiff made an incorrect choice, a judge could order what was known as a 'non-suit', which meant that the plaintiff had failed to make out a legally recognisable claim and would have to pay the opposing party, known as a 'defendant', costs. Although a non-suit order permitted the plaintiff to choose another 'form of action', it obviously caused considerable delay and cost.[48]

3. A plaintiff had to restrict the action to one ground of claim. The plaintiff was not allowed to join two or more causes of action or complaint[49] in an action.

4. A plaintiff was not allowed to join another plaintiff in an action nor to bring one action against two or more defendants or to raise separate claims by the plaintiffs or against the defendants arising out of the same transaction. In other words, common law courts had no procedural mechanisms to avoid a multiplicity of proceedings arising out of a similar set of facts or common transaction.[50]

5. A defendant was not entitled to raise a counterclaim against the plaintiff nor was a defendant permitted to join another party, now known as a 'third party', to whom he or she could ultimately transfer liability for the plaintiff's claim. In each of these situations, a defendant was required to bring separate proceedings against either the plaintiff or the third party, depending upon the circumstances of the case.

6. Once an action was commenced and it was not defeated by the wrong choice of the 'form of action' or by the other difficulties already described, the parties were required to present their cases in a formal manner known as 'pleading'. Pleadings had developed from an oral process, where litigants or their representatives appeared in a court before a judge who listened to the alternate contentions between the parties, until a question was identified which both parties agreed required a decision. The parties were then said to be 'at issue'. A record of the party's contentions was kept by officers of the court on what was known as the Record. Apparently, by the time of the reign of Edward I (1272-1307) oral pleadings had been replaced by written pleadings which were cultivated as a 'science' and experts made their living at being able to draft these

pleadings.[51] This system of pleading did not permit a party to the litigation to allege the facts upon which they intended to prove their case, it only permitted them to plead to the conclusion of law which was to be drawn from those facts.[52] Consequently, parties could go to trial not knowing which facts would be alleged to give rise to a particular conclusion of law.[53] Furthermore, if a party wanted to amend a pleading, there were significant restrictions.[54]

7. These courts had very restricted powers to grant discovery and inspection of any relevant documents prior to the trial.[55] Moreover, the party could not interrogate the opposing party prior to trial.[56]

When the matters referred to in paragraphs 4 to 7 are considered, the 'result was that the parties would proceed to the trial of issue of fact very much in the dark and subject to whatever surprise may be sprung by the opposite party'.[57]

When the matter proceeded to trial, the parties themselves and anyone remotely interested in the result of the case, including members of the family, were strictly excluded from giving any testimony before the court.[58] Ultimately, these courts of common law could grant very limited remedies and were not able to grant any of the remedies granted by the Court of Chancery, which included important remedies such as injunctions and declarations or order for specific performance, rectification and rescission.[59]

After trial, a dissatisfied party could not appeal the decision but, in restricted circumstances, could bring the case before the Court of Exchequer.[60] If no appeal was permitted, then the judgment of the court could be enforced against the goods or land of the judgment debtor[61] or his person.[62]

The Court of Chancery

Although the Court of Chancery and the body of law that it administered, which became known as 'equity', is popularly understood to have corrected many of the injustices of the Courts of Common Law, at the beginning of the 19th Century, the system was also described as 'inflexible'.[63] To be sure, equity provided remedies where the common law remedies were either inadequate or non-existent.[64] However, as Lord Eldon, perhaps the Court of Chancery's most famous Lord Chancellor, stated in *Gee v Pritchard*, a case reported in 1818:

> The doctrines of this court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot.[65]

Furthermore, the practice of the Court of Chancery has been described as 'dilatory and vexatious as its standard of right and wrong was noble and accurate'.[66]

The essential features of Chancery procedure included the following:

1. With the exception of oral hearings in court, the whole of the operation was in writing and conducted in secret.[67]

2. The court had no effective mechanisms for the examination or cross-examination of witnesses or resolving conflicting testimony.[68]

3. Whilst the Court had a simple procedure for the commencement of a proceeding, known as a 'bill', the content of the document and the answer made by the defendant to the bill contributed to voluminous proceedings.[69]

4. In almost every case there was a need for an average of two hearings, which were often separated by periods of up to two years.[70] It was not uncommon for four years to pass without any activity in the case whatsoever. Extremely long delays were not uncommon.[71]

5. Strict rules relating to the joinder of parties meant that all parties interested in the result had to be parties to the proceedings.[72]

6. The staff of the Court of Chancery, and in particular its masters, their officers and their staff of clerks were notoriously dilatory and often protracted proceedings for their own financial reward.[73] Even its own famous Lord Chancellor, Lord Eldon, who held office from 1802 to 1827 has been described as dilatory.[74] A reported remark by an author of a well known work on equitable jurisdiction made in 1839 stated:

> No man, as things now stand, can enter into a chancery suit with any reasonable hope of being alive at its termination if he has a determined adversary.[75]
>
> Although much of the business of the Court of Chancery was non-contentious, that is, there was no real dispute between the parties, elaborate chancery procedures still involved considerable delay, uncertainty and untold expense.[76]

Other English courts

In addition to the Courts of Common Law and the Court of Chancery, at the beginning of the 19th century there were many other courts operating in England and Wales. These other courts has different origins, distinct practices and procedures, specialist jurisdictions and they operated with regard to local needs and customs.[77] However, these courts are of little relevance to what occurred in the system of civil justice operating in Western Australia after its foundation.[78]

REFORMS AND CHANGES TO THE ENGLISH CIVIL JUSTICE SYSTEM DURING THE 19TH CENTURY

The principal changes to the system of civil justice existing at the commencement of the 19th century, mainly occurred during a period of 45 years from 1830 to 1875.[79]

The process of change and, indeed, reform commenced with the *Uniformity of Process Act 1832* (Imp)[80] which required personal actions commenced by different processes in the Courts of Common Law to be commenced by one process applicable to all three courts. This legislation introduced the mechanism for the commencement of proceedings known as a 'writ of summons', which is still the principal method of commencing proceedings in the Supreme and District Courts of Western Australia.[81]

Further changes were made to the procedure of the Courts of Common Law by the *Common Law Procedure Acts* of 1852, 1854 and 1860 (Imp). These Imperial statutes were passed by the English Parliament principally to amend the process and mode of pleading in the superior Courts of Common Law at Westminster.[82] There were also changes made to the jurisdiction and practice of the Court of Chancery by the three *Chancery Practice Amendment Acts* of 1850, 1852 and 1858 (Imp).[83]

However, the singularly most important reform was the passage of the *Judicature Acts* of 1873 and 1875 (Imp) from which the basic and essential features of our present system of civil justice take their form.[84]

The Judicature Acts

The legislative proposal or Bill, which became the *Judicature Act 1873* (Imp) was introduced into the British Parliament on 13 February 1873. It ultimately came into operation on 1 November 1875.[85] Whilst many fundamental changes were effected by this legislation, clearly the most important concerned the 'fusion'[86] in the administration of common and equity and the abolition of the Courts of Common Law and the Court of Chancery.[87] Section 16 of the *Judicature Act 1873* (Imp) 'transferred to and vested in' the new High Court of Justice all of the jurisdiction which at the commencement of the act 'was vesting in or capable of being exercised by' the former Courts of Common Law and the Court of Chancery.[88] Consequently, the division of functions and legal principles which found expression in the Courts of Common Law and the Court of Chancery were abolished. Moreover, the *Judicature Act 1873* provided for the concurrent administration of common law and equity in the new High Court under a unified code of procedure which was contained in the schedule to the Act.[89] The new procedures introduced by this code, abolished the common law system of pleading and introduced a system of pleading with essential features that still operate in many common law jurisdictions including the District Court and Supreme Court of Western Australia.

The process which led to the introduction of the significant reforms effected by the *Judicature Act 1873* (Imp) is an instructive and enlightening perspective

on the process of law reform. As has been observed: 'it should be stressed that the impetus for the reform of the administration of civil justice did not come from the general body of the legal profession or judiciary; it came in despite (sic) of them'.[90]

Indeed, influential members of both the legal profession and the judiciary opposed reforms and eulogised the existing system.[91] In particular, Lord Eldon, the Lord Chancellor, 'absolutely opposed all change in his own court as well as the common law court ... and resisted reforms in the common law procedure as encroachments upon equity'.[92]

To be sure, the drive for reform was as a result of the rapidly changing social and economic conditions in England during the 19th century due to the industrial revolution. These changes included the growth of manufacturing, industry, trade and population.[93] Almost concurrently, significant advances were made in science and the social sciences, which inevitably influenced the operation of the traditional system of the administration of civil justice.[94]

However, perhaps the most significant contributions for reform came from the towering intellectual influence of Jeremy Bentham and a number of his followers, which included Lord Brougham, Samuel Romilly, James Mill and John Stuart Mill.[95] Jeremy Bentham had described the system of civil justice as 'a fathomless and boundless chaos made up of fiction, tautology, technicality and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery which maximises delay and denial of 'justice'.[96]

Whilst these intellectual contributions were crucial in effecting reform, the push for reform was much more wide spread and generally supported by the British public. As one commentator has stated:

> The striking characteristic of the British revolt against the apotheosis of legal formalism was its popular origin and support.… One is amazed by the violence of the attack which the public directed and maintained for at least two generations through the press. It was not only a war against legal abuses, but a class struggle against a profession which was believed to be responsible for them.[97]

The pressure for reform was considerably assisted by the work of the Society for Promoting the Amendment of the Law and the National Association for the Promotion of Social Science, which was founded in 1857.[98] The work of these societies reflected the scientific age of the time and utilised an approach which is perhaps more compatible with modern approaches to reform. For example, in its reports of 1857, reliance was placed upon civil judicial statistics.[99] The report stated:

> Such statistics afford the best, if not the only means of noting the practical workings of laws and tribunals of listing the principles of legal

> reform, and of estimating the utility of any system of jurisprudence by the testimony of actual fact.[100]

The reference to 'utility' echoed the theory of utility which was central to the philosophy of Jeremy Bentham.[101]

The movement for reform has been said to have been inaugurated by the celebrated speech of Henry Brougham in the House of Commons on 7 February 1828.[102] At the conclusion of this speech Lord Brougham proposed the appointment of a commission to enquire into the defects of the law. Two commissions were appointed. One of these commissions enquired into the practice and procedure of the courts of common law and issued six reports between 1829 and 1834.[103]

Two further commissions were appointed in 1850. One commission enquired into the practice and procedure of the superior Court of Common Law and issued three reports in 1851, 1852/53 and 1860. The other commission enquired into the procedure of the Court of Chancery and its main recommendations found their way in the three *Common Law Procedure Acts* of 1852, 1854 and 1860 and the four *Chancery Practice Amendment Acts* of 1850, 1852, 1858 and 1860.[104]

Ultimately, the Judicature Commission was appointed. This commission issued two reports in 1868 and 1869. These reports led to the passing of the *Judicature Acts* of 1873 and 1875.[105] These Acts, together with the Rules of Court which were contained in the schedule to the 1873 Act, are the foundation of the civil justice system which prevails in Western Australia.

New Civil Court formed by the Judicature Acts

As noted above, a single system of courts was effected by the *Judicature Acts*' reforms, which also operated on the basis of a uniform code of procedure.

The *Judicature Acts* created the Supreme Court of Judicature, consisting of the Court of Appeal and one single High Court of Justice in which were joined the former Courts of Chancery, the three superior Courts of Common Law, the Court of Probate, the Court of Divorce and the High Court of Admiralty. The Court of Probate had been established in 1857 and a new court for Divorce and Matrimonial Causes was created in 1858. The *Judicature Acts* created new tribunals under the style of 'divisions' of the High Court, consisting of the Chancery Division, the Queen's Bench Division and the Probate, Divorce and Admiralty Division.[106] Initially, the new High Court of Justice also included a Common Pleas and Exchequer Division. These were both amalgamated into a single Division, called the Queen's Bench Division by an Order in Council in 1881.[107]

It has already been stated that the single most important contribution of the *Judicature Acts* was to fuse the different systems of common law and equity.[108]

The effect of this reform was that every division and every judge of the High Court was vested with the same jurisdiction and powers. The common law and equity were required to be administered equally by the judges in every civil cause or matter.[109]

The *Judicature Acts'* reforms also led to the decentralisation of the work of the High Court by the creation of district registries[110] and the appointment of other personnel to assist in the administration of the work of the Court.[111]

Rules of court

At the commencement of this sub-section, Rules of Court were given as an example of 'delegated' legislation.[112] The Courts of Common Law assumed jurisdiction to make general rules for the regulation of their practice.[113] In 1833 the judges of the Courts of Common Law were conferred power to make rules, which had statutory form, for the reform of pleading.[114] The power to make rules was extended by the *Common Law Procedures Act* of 1852 and 1854 and power was also conferred on the Court of Chancery to make rules in statutory form by the *Chancery Practice Amendment Acts* 1850 and 1858.[115] As indicated above, rules to regulate the practice and procedure of the High Court of Justice were part of the *Judicature Act 1873*.[116] However, these rules were replaced by the *Rules of the Supreme Court 1883*.[117] Despite many additions and alterations these Rules continued in operation in England for about 80 years, until they were completely revised, re-written and replaced by the *Rules of the Supreme Court 1965*, which were published and came into force on 1 October 1966.[118] These new Rules form the basis of the *Rules of the Supreme Court of Western Australia* introduced in 1971.[119]

THE DEVELOPMENT OF A CIVIL JUSTICE SYSTEM IN WESTERN AUSTRALIA

The first settlers in the Swan River Colony established courts similar to those which administered the common law in England.[120] Soon after the establishment of the Swan River Colony, in December 1829, Governor Stirling appointed a Chairman of Quarter Sessions and a number of Justices of the Peace to administer the criminal law in the colony. There is no record of any civil court sitting before 1832.[121] An Imperial act in 1829[122] established a local three-man Legislative Council and empowered this body to 'constitute such courts and officers as may be necessary for the peace order and good government' of the colony. The first legislation passed by this Council was an Act 'establishing a Court of Civil Judicature'.[123]

This Act established the Civil Court with jurisdiction to deal with all pleas and jurisdictions as fully as the Courts of Common Law in England. It conferred on that court authority to deal with the property of 'infants, idiots and lunatics'. The Civil Court could also exercise full ecclesiastical jurisdiction in granting probate of wills and letters of administration. It could order the distribution of the estates of those who died intestate, that is, without wills. The Civil Court generally had the same equitable jurisdiction as that exercised by the Lord Chancellor of England.[124]

The Supreme Court of Western Australia

In 1861, the *Administration of Justice (Civil) Ordinance Act 1861* (WA)[125] was passed and the old Court of Civil Judicature and the Court of Quarter Sessions[126] were abolished and a new Supreme Court was established. This new Supreme Court is the one which presently exists in the State of Western Australia.

The new Supreme Court was transferred all of the jurisdiction of the old Civil Court and was conferred with the common law Jurisdiction of the English Courts of Common Law, the ecclesiastical jurisdiction of the English Courts of Probate and the equitable jurisdiction of the Lord Chancellor in England.[127] However, it appears that this one court continued to separately administer common law and equity as was the position in England.[128] Eventually, the *Judicature Acts'* reforms were adopted in Western Australia and found expression in the *Supreme Court Act 1880* (WA). In fact the English legislation of 1873 was copied word for word and sections 7 and 8 of the Western Australian Act were the counterparts of sections 24 and 25 of the English Act.[129]

The *Supreme Court Act 1880* (WA) has been amended on numerous occasions and was consolidated by the *Supreme Court Act 1935* (WA).[130]

The *Supreme Court Act 1935* (WA) has also been amended on a number of occasions but the basic jurisdiction of the Supreme Court is still defined in terms of the jurisdiction of the courts at Westminster in 1861. Consequently, to examine the present jurisdiction of the Supreme Court it is necessary to look at the jurisdiction of the English courts in 1861 and then to consider the extensions of and the restrictions to that jurisdiction which have since occurred in Western Australia. Of course, as has been indicated, the courts which existed in 1861 were abolished in 1875 by the *Judicature Acts'* reforms. To be sure, the *Judicature Acts'* reforms were reflected in the 1880 amendments to the *Supreme Court Act* but the present situation can hardly be described as satisfactory when the basic jurisdiction of the Supreme Court of the State of Western Australia is defined with reference to English courts which disappeared in a reconstruction in 1875.[131]

Other courts in Western Australia

Following the establishment of the Supreme Court of Western Australia, other courts which now form part of the civil justice system in Western Australia were created. These are called 'courts of inferior jurisdiction' because they do not have all of the powers of the Supreme Court. The two most important of these are the Local Court of Western Australia, which was established in 1904[132] and the District Court of Western Australia, which came into operation in 1970.[133]

All of these courts play an integral role in the administration of civil justice in Western Australia. However, before their respective roles can be fully

understood, it is necessary to identify and describe some of the basic concepts and principles which apply to the operation of the civil justice system in these courts, as well as the Supreme Court of Western Australia. When considering the operation of the civil justice system in Western Australia and, in particular, the role of the three principal courts within that system, a distinction should be drawn between the 'constitution' of each court, its 'jurisdiction' and its 'powers'.

The 'constitution' of a court refers to a number of matters most of which are set out in the establishing legislation for the court. These include a description of the nature of the court, the personnel who make up the court and their necessary qualifications for appointment of their court positions.[134] The 'powers' of a court refers to the right of a court to perform a particular act, for example, an administrative act or the right of a court to grant a particular remedy to resolve the dispute. The expression 'power' or 'powers' should be distinguished from 'jurisdiction' although, unfortunately, they are often used interchangeably. While the complexities of this issue are beyond the scope of this sub-section, the conferral of a 'power' or 'powers' on a court will not normally enable it to extend its 'jurisdiction'.[135]

JURISDICTION

The expression 'jurisdiction' refers to the authority conferred on a particular court to adjudicate or decide upon a dispute, which is presented to the court for resolution by parties in dispute. The 'jurisdiction' of the court will normally be defined by the legislation which created the particular court. For example, one of the ways in which the jurisdiction of the Supreme Court of Western Australia is defined is by reference to the Courts of Common Law which existed in England in 1861.[136] It should also be borne in mind that the courts exercising civil jurisdiction in Western Australia derive jurisdiction not only from the legislation which established the courts but also from the Western Australian state, Commonwealth federal and Imperial legislation from the English Parliament.[137]

The jurisdiction of a court can be defined by reference to either the amount or value of the claim which is in dispute between the parties.[138] Jurisdiction can also be defined by reference to the nature of the remedies, which a court may be permitted to grant in the resolution of a dispute.[139] Where the jurisdiction of a court is limited, it is called a court of 'limited jurisdiction', as opposed to a court of 'general jurisdiction'. Sometimes a court of general jurisdiction is also referred to as a court of 'unlimited jurisdiction'. The Supreme Court of Western Australia, is a court of 'general' or 'unlimited jurisdiction' subject to limits imposed by of the federal system of government[140] or because certain courts or tribunals have been established with specialist jurisdiction.[141]

Jurisdiction can also signify the district or geographical limits within which the court's judgments can be enforced or orders executed. This is sometimes

called 'territorial jurisdiction'. In this context, a court may not allow an action to be brought against a person who is out of the geographical limits of the court, unless the property which is the subject of the dispute is within the geographical limits of the court, or unless some part of the dispute arose and has some connection with the geographical limits of the court.

The court is said to have 'original' jurisdiction in a particular matter when the dispute can be initiated in that court. A court is said to have 'appellate' jurisdiction when it deals with the dispute on appeal, after matters have been determined by a lower court or tribunal previously hearing the dispute.[142]

When a particular type of dispute can only be brought in one court, that court is said to have 'exclusive' jurisdiction.[143] When a litigant can choose between any one of several courts to have the dispute resolved, these courts are said to have 'concurrent' jurisdiction.[144]

Consequently, one of the most important decisions to be made by someone wishing to have a civil dispute resolved is the choice of court based upon the 'jurisdiction' of that court. The question is: 'does this particular court have the jurisdiction to resolve this particular type of dispute?' Unfortunately, at times this can prove to be a complex issue.

For example, following the establishment of the Federal Court of Australia in 1977, for almost a decade confusion existed as to the limits of the jurisdiction of the Federal Court of Australia. Since federation, certain disputes had traditionally been within the jurisdiction of the Supreme Courts of the various states of Australia. Whilst the nature and extent of this confusion is beyond the scope of this sub-section, it was sufficient to prevent litigants having the substance of their dispute resolved because the wrong choice of court easily could be made. In other words, considerable delay and costs could occur simply because the incorrect court was chosen through no fault of the litigant. In 1987 this problem was largely resolved, although from time to time problems can still arise.[145]

With respect to jurisdiction, this can be summarised with respect to each of the relevant courts.

Jurisdiction of the Local Court of WA

The *Local Courts Act 1904* (WA) confers what is known as 'subject matter'[146] jurisdiction and also confers jurisdiction as to locality.[147] Presently, all personal actions in which the amount claimed is not more than $25 000 may be commenced in a local court.[148] If a person wishes to commence an action in the Local Court and has a claim in excess of $25 000, then this claim can be reduced either by payment by the opposing party or otherwise or by deducting any sum for which the plaintiff gives the defendant credit when the action is being entered for trial.[149]

However, a local court does not have jurisdiction to hear or determine an action:

(a) in ejectment;[150]
(b) in which the title to land is in question;[151]
(c) in which a devise,[152] bequest[153] or limitation under a will or settlement is in question;[154]
(d) for libel or slander;[155]
(e) for personal injury caused by or arising out of the use of a motor vehicle;[156]
(f) for seduction.[157]

When considering the upper limit of $25 000, claims for interest which are in addition to the claim can be excluded.[158] In other words, the upper limit of $25 000 can be exceeded by an amount which relates to the interest calculated as applying to the original value of the claim.[159]

The place of proceedings or 'venue' for local court matters

With respect to the jurisdiction relating to 'locality', a person wishing to commence an action in a local court can commence that action in any local court and in the absence of a any objection to the choice of the locality of the court, that person will be deemed to have selected the proper court.[160] However, a defendant who wishes to object to the choice of the locality of the court can object to the choice and request that the action be transferred to a court which is nearest to where the defendant resides.[161] If the person who originally chose the court does not take steps to justify the choice of court, the action will be transferred to the court requested by the defendant.[162]

If the party who brought the case, the plaintiff, files an affidavit justifying the choice of court, the clerk of the Local Court is obliged to consider the facts justifying the choice of court and deciding whether or not the action should continue in the court that has been chosen or whether or not it should be transferred.[163] The facts which are sworn to in the affidavit must be within the personal knowledge of the person swearing the affidavit.[164] If there are more defendants than one, then each of them can object to the locality chosen by the plaintiff. If more than one locality is proposed then the plaintiff has the right to choose the particular locality.[165] While the *Local Courts Acts 1904* (WA) contemplates that the clerk of the court makes the decision as to locality, a decision can also be made by the chief judicial officer in the local court, who is known as a 'magistrate'.[166]

If both parties to an action agree in writing, then any specified local court can have jurisdiction to try any action which might otherwise be brought in the Supreme Court.[167]

Local Court: small disputes division

A party may elect to have an action for a small debt heard in the Small Disputes Division of the Local Court, where the claim does not exceed $3 000.[168] The court hearing the matter will be constituted by a 'Stipendiary

Magistrate'[169] and normally, the parties in the proceedings will not be entitled to representation by an agent without legal qualifications or experience without permission of the court. With respect to agents who do have legal qualifications or advocacy experience, representation by such an agent is not permitted unless all of the parties to the action agree and the court is satisfied that the parties, other than the party who has sought approval for such representation, shall not be unfairly disadvantaged.[170]

Once a decision has been made in the Small Disputes Division or a settlement is effected, there is no avenue of appeal[171] or review by prerogative writs.[172]

District Court jurisdiction

The civil jurisdiction of the District Court is entirely dependant upon legislation[173] and must be conferred by express words.[174] The District Court has inherent power but its authority for its acts must be found in the legislation or implications properly drawn from the legislation.[175]

Unless the jurisdiction of the District Court is delegated to its registrars, its jurisdiction is exercised by single judges sitting in court or in chambers.[176] However, within the limits of the District Court's jurisdiction, it has the same jurisdiction and may exercise all of the powers and authority the Supreme Court has and may exercise from time to time.[177] Although, if the Supreme Court has been conferred with 'exclusive' jurisdiction in civil matters, then the District Court may not exercise this jurisdiction.[178]

The District Court of Western Australia has jurisdiction in relation to personal actions[179] where the amount claimed or the value of the claim is not more than $250,000,[180] after any reduction for contributory negligence.[181]

In practice, one of the most significant areas of jurisdiction conferred on the District Court is in relation to all personal actions making a claim for damages in respect of death or bodily injury to a person and in relation to proceedings arising in respect to those personal actions under the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*.[182] With respect to these actions, the District Court has the same jurisdiction as the Supreme Court, which means that it has 'concurrent' and 'unlimited' jurisdiction with respect to these types of claims.

Special areas of District Court jurisdiction

The District Court of Western Australia also has the following jurisdiction within its $250 000 limits:

(a) actions to recover the whole or part of the unliquidated[183] balance of a partnership account;[184]

(b) actions to recover a distributive share under an intestacy[185] or legacy[186] under a will;

(c) actions for replevin,[187] specific performance[188] of or for the rectifying,[189] delivering up[190] or cancelling of any agreement[191] whatever;

(d) actions of ejectment[192] to recover possession of any land where the value of the land does not exceed $125 000 by the year or where rent exclusive of ground rent,[193] if any, paid in respect of the land does not exceed the sum of $125 000 by the year;[194]

(e) actions in which the amount, value or damages sought to be recovered exceeds $250 000 in which the parties agree by memorandum signed by them or their respective solicitors that the District Court has power to hear and determine;[195]

(f) actions or matters in respect of which jurisdiction is given to the court by the Act or any other act;[196]

(g) An action brought claiming an indemnity where the action arises from or relates to another action that is before the District Court or that has been heard and determined by the District Court.[197]

As was the case with the Local Court, the financial limits to the District Court's jurisdiction are not affected by additional claims for interest.[198]

Equitable jurisdiction of the Local Court and District Court

As has already been indicated,[199] the District Court and Local Court of Western Australia are the creatures of statute. Furthermore, each of these courts only has the statutory jurisdiction conferred by the express words of the relevant statutes.[200] Prior to 1982 none of the statutory provisions relating to these courts[201] directly conferred jurisdiction on the courts to grant equitable remedies.[202] By contrast, every judge in the Supreme Court in Western Australia had the jurisdiction to grant equitable remedies.[203]

In 1981, the *District Court of Western Australia Act 1969* (WA) was amended to confer jurisdiction on the District Court to grant certain specified equitable remedies. Significantly, this amendment contained no conferral of jurisdiction on the District Court to grant perhaps the most frequently utilised equitable remedy namely, the injunction.[204]

A series of decisions by the District Court and the Supreme Court of Western Australia have interpreted the position to be that the District Court does in fact have the jurisdiction and power to grant equitable remedies but only by way of ancillary relief.[205] In other words, the main relief that is sought in the proceeding, sometimes also referred to as the 'primary' relief, must otherwise be within the jurisdiction of the District Court before it has either the jurisdiction or power to grant an equitable remedy, in addition to any other remedy that might be sought by the litigant in resolution of the civil dispute.[206]

Federal sources of jurisdiction — the District Court

The District Court of Western Australia is also conferred jurisdiction under various Commonwealth Acts of Parliament by virtue of the system of cross-vesting of jurisdiction effected in 1987.[207]

Appellate jurisdiction of District Court

A party dissatisfied with a final judgment,[208] order[209] or the decision[210] or determination[211] of the Local Court may appeal to the District Court of Western Australia. However, permission[212] of the District Court to appeal is required in respect of judgments, orders, other decisions and determinations which are not final and in the absence of this permission a purported appeal to the court is incompetent.[213]

The District Court of Western Australia is also given appellate jurisdiction by a number of other statutes.[214]

Supreme Court of Western Australia

The jurisdiction of the Supreme Court of Western Australia is derived from Imperial, federal and state sources.

State statutory surces of jurisdiction

The Supreme Court of Western Australia has unlimited general jurisdiction subject to statutes conferring exclusive jurisdiction in some areas on other tribunals.[215] As has already been discussed, and commented upon as being unsatisfactory, the basic jurisdiction of the Supreme Court is defined in terms of the jurisdiction of the courts at Westminster in 1861, together with extensions of and restrictions to that jurisdiction which have since occurred in Western Australia.[216]

Federal jurisdiction conferred on Supreme Court of Western Australia

Since Federation, the Supreme Court of Western Australia has enjoyed jurisdiction which is concurrent with the Federal Courts created under the Australian Constitution.[217] However, it was not until 1977 that the Federal Court of Australia was established. Prior to its establishment, the only Federal Courts in operation were the Federal Court of Bankruptcy and the Australian Industrial Court.[218] When the Federal Court of Australia was created, it was also conferred exclusive jurisdiction with respect to certain civil matters arising under certain federal legislation.[219] This gave rise to considerable problems of identifying the correct court in which to commence proceedings[220] and consequently, the cross-vesting scheme was introduced in 1988 to avoid the problems of confusion created by conferring exclusive jurisdiction on the Federal Court of Australia.[221] Certainly, some exclusive jurisdiction is still conferred on the Federal Court of Australia.[222] However, the jurisdiction of the Supreme Court of Western Australia has reverted to a position where it now exercises significant jurisdiction concurrent with the Federal Court of Australia.[223]

One of the significant areas of concurrent jurisdiction is that conferred with respect to Admiralty actions commenced on or after 1 January 1989.[224]

The Admiralty jurisdiction of the Supreme Court of Western Australia was formerly conferred on the Supreme Court of Western Australia by the *Colonial Courts of Admiralty Act 1890* (Imp) which was repealed by the *Admiralty Act 1988* (Cth).[225] The Admiralty jurisdiction of the Supreme Court of Western

Australia is concurrent with the jurisdiction of the Federal Court of Australia involving both *in personam*[226] and *in rem*[227] actions.

Imperial

Reference has already been made to an variety of Imperial statutes which were adopted by the Supreme Court of Western Australia as conferring jurisdiction.[228]

Consequently, considering the commencement of a action for the resolution of a civil dispute must take into consideration a complex patch work of jurisdiction and identify the correct court in which to commence the proceeding.

If the analysis of the various bases of jurisdiction is considered, it will be apparent that in some cases a litigant may in fact choose any of the courts in which to commence an action. Theoretically, as the Supreme Court of Western Australia is a court of general unlimited jurisdiction, a person wishing to recover, for example, a debt for less than $25 000 could choose to commence the action in either the Local Court, District Court or Supreme Court of Western Australia. Similarly, an action to recover a debt in excess of $25 000 but less than $250 000 could be commenced in either the District Court or Supreme Court of Western Australia. There are many other examples of overlapping jurisdiction.[229]

In order to combat litigants commencing actions in a superior court when it could have as easily been commenced in an inferior court, various legislative provisions provide for the 'remittal' or 'transfer' of an action.[230] The 'remittal' or 'remitting' an action usually refers to the process of sending an action from a superior court to an inferior court, for example, a remittal from the Supreme Court to the District Court of Western Australia.

A 'transfer' generally refers to transferring an action from one place in which the court sits to another place in which the same court may sit.

Consequently, an action or matter brought in the Supreme Court of Western Australia, that might have been brought in the District Court of Western Australia, may, by order, be remitted to the District Court without the consent of the defendant. The Supreme Court of Western Australia may exercise its power whether or not an application to remit is made by one of the parties to the action.[231]

Similarly, when an action is brought in the District Court of Western Australia that might have been brought in a local court, the District Court may, by order, with or without an application, remit the action to a local court without the consent of the defendant.[232]

In Western Australia, the power of remittal also encompasses the process of transferring actions or matters from inferior courts to superior courts.[233]

An action commenced in the District Court of Western Australia may be remitted to the Supreme Court of Western Australia.[234]

An action can also be remitted or transferred from a local court to the District Court[235] or from the District Court to the Local Court or from the Supreme Court to the Local Court.[236]

A 'transfer' of an action can also occur pursuant to the provisions of the cross-vesting scheme.[237] The provisions of the cross-vesting legislation would permit a transfer from the Supreme Court of Western Australia to the Federal Court of Australia or the Family Court of Australia.[238] Furthermore, an action can be transferred from the Supreme Court of Western Australia to the Supreme Court of another State or Territory.[239] A transfer can also occur between the Supreme Court of the State of Western Australia and the Family Court of the State of Western Australia.[240] A transfer can also be effected from the Federal Court of Australia or the Family Court of Australia to the Supreme Court of Western Australia.[241]

With respect to certain matters known as a 'special federal matter,' specific provisions govern the transfer from the Supreme Court of Western Australia to the Federal Court of Australia.[242]

The High Court of Australia also has power to remit any matter within its original jurisdiction to the Supreme Court of Western Australia.[243]

Consequently, a person seeking to resolve a civil dispute, first, must choose the correct court, by virtue of the court's jurisdiction in which to commence an action. Having chosen the appropriate court, the litigant must consider how the proceedings are actually commenced.

OPERATIVE ASPECTS OF THE CIVIL JUSTICE SYSTEM

The adversarial system of dispute resolution has been the distinctive and traditional feature of the civil justice system in Western Australia.[244] It is the system which was inherited from England. Even with the introduction of administrative tribunals or other tribunals where strict rules of evidence are relaxed, the system of dispute resolution in Western Australia is based upon adversarial principles and techniques.

The adversarial aspect

The adversarial system traditionally involves the court as a disinterested party taking no part in the process, save in assessing the question put to it by the opposing parties and ultimately, deciding the dispute which is put to it by the opposing parties. The parties initiate and prosecute the litigation, investigate the pertinent facts and present the proof of the facts and any relevant legal argument to the court.

Traditionally, the court's function generally has been limited to deciding upon the issues in dispute submitted to it by the parties, on the proof presented by

the parties and applying any relevant procedural sanctions as may be appropriate on the application to the court of either of the opposing parties.[245]

This aspect of the adversarial principle involves the parties controlling the litigation and ensuring that the court remains detached and passive.[246]

One of the assumptions of the adversarial system is that both parties are represented. Consequently, each of the party's representatives has the opportunity to present competing claims and defences and competing proof of facts.

The adversarial system is also dependant upon the parties moving the dispute along through its stages of initiation, the gathering of evidence and ultimately, presenting the dispute to a judge for adjudication. As a consequence, the quality, speed and efficiency with which an action is prosecuted very much depends on the parties themselves through the actions of their legal representatives. Traditionally, the court did not involve itself in the prosecution of a party's case. The courts traditionally do not get involved with the speed or the efficiency with which an action is prosecuted, this very much depends on the action of the parties and their legal representatives. Indeed, it is fair to say that courts have often given the respective parties in the proceeding considerable latitude with respect to the pace that the litigation proceeded.

Mechanisms for dealing with delay

Often, parties in proceedings were guilty of delay and considerable inefficiency in the manner in which an action was prosecuted but it could be expected that the consequences were more often reflected in the costs of an action rather than having the effect of either terminating or striking out the action altogether. However, because of the inevitable costs of inefficient prosecution of litigation and the considerable delay that was often caused because of poor management of litigation on the part of parties, in recent years the Supreme Court of Western Australia and District Court of Western Australia have stepped in to take a more active role in the monitoring and management of the prosecution of civil litigation.[247]

The expedited list

The first phase of reform commenced operation on 1 March 1990 with the introduction of the 'expedited list'.[248]

The expedited list is a procedure for bringing cases of an urgent nature to trial more speedily than usual. The concept of the expedited list evolved from procedures used in England since 1985 and in New South Wales since 1970 with respect to commercial cases which required expedition.[249]

The Western Australian expedited list is unique in that it is not confined to commercial cases and is open to any civil disputes that deserve expedition. The Rules of Court which govern the expedited list procedure enable the involvement of a nominated judge of the Supreme Court of Western Australia

in almost all of the important stages of the prosecution of a civil dispute after its commencement by a party.[250] The rules which govern the operation of the expedited list are designed to ensure that every aspect of the various stages is dealt with as expeditiously as the nature and the extent of the dispute permits.[251]

Case flow management

The next important phase of reform occurred with the introduction of a delay elimination goal into the *Supreme Court Rules.* Ultimately, further revision of the *Supreme Court Rules* came into operation on 1 November 1996, which brought into full operation a system of controlling the various stages of a civil action known as 'case flow management'.

Another assumption that underscores the process of the representation of opposing parties is that lawyers representing each party are efficient and equally matched.[252] Undoubtedly, some lawyers are better than others. The differences of experience and skill will effect the outcome of litigation.[253]

Legal representation and the justice system

Perhaps more importantly, not all litigants are able to afford legal representation and increasingly unrepresented parties are before the courts.[254] The poor, underprivileged and disadvantaged cannot be assumed to have the benefits of access to a system of dispute resolution without the assistance of legal aid, which is increasingly becoming difficult to obtain and continues to be under funded in Australia.[255]

Finally, an assumption which is coming under increasing scrutiny is that lawyers will strive primarily to promote their clients' interests.[256] However, in promoting these interests, it is clear that lawyers also owe duties to the court. These duties include the general duty of disclosure owed to the court, the general duty not to abuse the court process, the general duty not to corrupt the administration of justice, and the general duty to conduct cases efficiently and expeditiously.[257] These various assumptions or features of the adversary system will play a part in a variety of the stages of the resolution of a civil dispute.[258]

PROCEDURES IN WESTERN AUSTRALIAN COURTS

Rules

The stages relating to the resolution of a civil dispute are well established, defined and regulated by procedures set out in the various Rules of Court. Reference has already been made to a uniform set of rules which were introduced by the *Judicature Act* reforms in 1873 and 1875.[259] Rules of Court regulating procedure have been made by all of the principal civil courts in Western Australia. The most comprehensive set of rules is that utilised in the Supreme Court of Western Australia which, save for some exceptions noted below, also apply to the District Court of Western Australia.[260]

The Local Court of Western Australia has its own extensive set of rules which, in broad terms, cover the same stages in the resolution of a dispute as those of the Supreme Court of Western Australia.[261]

Stages of a civil action

Generally, the stages of a civil action can be identified as follows:

1. Commencement of proceedings;
2. Service;
3. Appearance;
4. Pleadings, including counterclaim and third party proceedings;
5. Procedures governing applications for injunctive relief;
6. Procedures regulating disposition of a dispute before trial;
7. Procedures protecting against bad or improper claims and defences;
8. Discovery and disclosure between parties;
9. Settlement of disputes;
10. Trial and costs;
11. Enforcement of judgments;
12. Appeals.

For a lay person, each of these stages requires considerable explanation. And it is important to clarify from the beginning that not all of these stages will always apply to a civil action. For example, once an action is commenced it may not proceed to a trial because the dispute is settled between the parties. Indeed, the vast majority of civil disputes are settled without proceeding to a trial.[262] Even if a dispute proceeds to a trial, it may not be necessary for the successful party to utilise the procedures available for the enforcement of a judgment. Often the unsuccessful party will voluntarily comply with orders made by the court in resolution of the dispute. Furthermore, an unsuccessful party may not always utilise a right to appeal the decision.

Pre-trial procedures

With respect to pre-trial procedures specifically, whilst there will be some which are common to almost all civil disputes, some procedures which apply to certain stages, will not need to be utilised or cannot be utilised given the nature of the particular dispute.

For example, an opposing party may not comply with the rules of court by failing to meet the requirements of a particular stage of the proceedings. In these cases, the opposing party may obtain a judgment because of the other party's failure to comply with the rules. This is generally described as a 'default' situation. The party who has been in default may have a judgment entered against him for non-compliance with the rules.[263] However, the particular set of procedures relating to default will not apply to cases where a party complies with the requirements of the various rules.

Another example is provided where a party is seeking a particular type of remedy to resolve the dispute. A good example would be an injunction,[264] ordering a party to abstain from doing something or to do something. In any case where a litigant is seeking this type of remedy, procedures exist for a court to order an injunction very shortly after the commencement of an action or indeed, in some extreme situations, before a civil action has even

been commenced. The Rules of Court provide for special procedures in these circumstances which will only be utilised in cases requiring this type of urgent action.[265]

HOW A CIVIL ACTION IS COMMENCED IN WESTERN AUSTRALIA

A person wishing to have a civil dispute adjudicated by court initially has two decisions to make. In which court should the proceedings be commenced and how to validly commence proceedings. What is the correct documentation to be used to commence the proceedings in which court?[266]

Commencement of proceedings

The first question relates to the 'jurisdiction' of the court, a concept which has already been discussed above.[267]

The second question relates to the actual process, sometimes referred to as the 'form' which needs to be filed in the court and as we shall see, needs to be 'served' on the opposing party or parties, to enable the proceedings to continue to the next stage.[268]

The Local Court, District Court and Supreme Court of Western Australia, within the limits of their jurisdiction, have a variety of methods for the commencement of a civil action.

Local Court

Fortunately, the only means by which a civil action can be commenced in the Local Court is by means of a 'plaint', which, depending upon the circumstances of the claim, should comply with Form 6 of Form 6A of the Forms[269] which are part of the *Local Court Rules*.[270]

The *Local Court Rules* contemplate that once the clerk of the Local Court has been informed of the names and places of abode or business of the proposed parties to the action and of the amount claimed and of the general nature of the cause of action, then the clerk is to issue in duplicate a summons according to Form 14.[271] However in practice, litigants seeking to commence an action in the Local Court, will complete the relevant details in Form 14 and submit this to the clerk of the Local Court for issue from the court.[272]

The summons contains important detail about the nature of the claim, value of the money or property claimed and the nature of the relief claimed against the opposing party.[273]

The summons (Form 14) also contains a standard set of information for the defendant, although some of the language and references in the form could be described as archaic or arcane.[274]

District Court and Supreme Court of Western Australia

As has been previously indicated, the *Rules of the Supreme Court of Western Australia* apply to the District Court of Western Australia, except in situations where the District Court of Western Australia has made its own rules.[275] As a consequence, the methods of commencing an action in the District Court

of Western Australia should be the same as those for the commencement of an action in the Supreme Court of Western Australia.

An action in the Supreme Court of Western Australia can be commenced as follows:

(a) by a document known as a 'Writ of Summons';
(b) by a document known as a 'Originating Summons';
(c) a document known as an 'Originating Motion';
(d) a document known as an 'Application'.

Each of these documents has a prescribed form set out in the *Rules of the Supreme Court 1971* (WA).[276]

Whilst all of these 'forms or documents' are utilised in the Supreme Court of Western Australia, because of the limits of the jurisdiction of the District Court of Western Australia, in practice, the principal forms utilised in the District Court are the 'Writ of Summons', 'Originating Summons' and 'Originating Motion'.[277]

Whilst the description of these methods of commencing an action is relatively simple, the utilisation in practice can sometimes be confusing.[278] The position should be contrasted with that of the Federal Court of Australia which only has one method of commencing an action in that court.[279]

Service

Whichever method is used to commence a civil action, it will be presented to the relevant of the office of the particular court where it will be given a number and the appropriate issuing fee is paid to the court.[280] A copy of the originating process[281] is retained in the Registry where a court file for the new action is opened. The originating process is embossed with the court's seal and is returned to the plaintiff or the plaintiff's solicitor who must proceed to the next stage in a civil action, namely service, on the defendant or defendants.

'Service' refers to the operation of bringing the contents or effect of a document to the knowledge of the person concerned.[282] In the case of originating process it will be the plaintiff bringing the contents or effect of the originating process to the knowledge of the defendant. This should be an obvious and logical requirement of any system of procedure.

Service can require either direct or what is known as 'substituted service'.[283] Direct service is effected by actually bringing the document to the person or thing to be served.[284] In the case of a person, such service is called personal. Consequently, in an action commenced by a writ of summons, personal service is effected by handing a copy of the writ to the defendant and showing the defendant the original writ, if the defendant asks to see the original.[285]

An example of direct service on a thing (which is also referred to as 'real' service) occurs in an Admiralty action *in rem* against a ship, where service of the writ of summons is effected by affixing the original writ for a short time to the mast of the vessel, and taking it off, leaving a copy affixed in its place.[286]

If personal service is impracticable,[287] then a plaintiff may have resort to the method of service known as 'substituted' service.

The object of substituted service is to provide the best means available under the circumstances for bringing the effect of the document to the knowledge of the party, when the particular party is evading or avoiding service or the party's whereabouts are not known.[288] The usual method of effecting substituted service is by directly serving the document on some person likely to bring it to the knowledge of the particular party or by advertising notice of the document or by sending a copy by post to the party's last known address.[289]

A procedure which is analogous to substituted service is the practice of accepting service. This is done by a solicitor acting for the party to be served endorsing on the originating process a statement that the solicitor accepts service of the process on behalf of the defendant.[290]

Particular provisions for service also apply to particular parties. For example, there are particular rules which apply to service upon a defendant which is a partnership[291] or which is a body corporate[292] or is a person suffering from a disability.[293]

If proceedings are commenced in the Supreme Court of Western Australia, it is at this stage that a party may need to give consideration as to whether an application should be made for the dispute to be entered onto the Expedited List.[294]

Appearance by the defendant

Once the originating process has been validly served on a defendant or defendants, it is the defendant or defendants who must take the next step in the proceedings. Indeed, if the next step is not undertaken, as we shall see later, a plaintiff may obtain a judgment against the defendant or defendants by default.[295]

Entry of appearance in the Supreme and District Courts

In the District Court and Supreme Court of Western Australia, the formal step taken by a defendant to an action after the defendant has been served with the originating process is known as 'entering an appearance'.[296] The object of the entry of an appearance is to notify the plaintiff that the defendant intends to contest the plaintiff's claim.[297] However, in some actions which are commenced without any intention that the action be contentious, it indicates to the plaintiff that the defendant is to take part in the proceedings in the action.[298]

In practice, the defendant will ordinarily arrange for the defendant's solicitor to enter an appearance. The entry of appearance is effected by filing at the court, within the requisite time period,[299] a memorandum setting out the title of the action,[300] stating that the defendant appears in person or by the defendant's solicitor, as the case may be, giving the address of the defendant or defendant's solicitor.[301] The form of an appearance is prescribed by Form 6 of the *Rules of the Supreme Court 1971* (WA). In practice, a duplicate memorandum of appearance is also filed and this is embossed with the seal of the court and a copy of this memorandum is then served on the plaintiff or the plaintiff's solicitor.[302] Under the *Rules of the Supreme Court 1971* (WA), a defendant may enter what is known as a 'conditional' appearance or an 'unconditional' appearance.[303]

When a defendant files an unconditional appearance, it will have the effect of a defendant submitting to the jurisdiction of the court[304] and the effect of such an appearance will be that it will waive procedural irregularities that may have existed when the proceedings were commenced. The practical effect of entering an unconditional appearance is that a civil action will proceed to the next stage of the proceedings. It will invariably mean that the defendant will not be able to rely upon any procedural irregularities or any irregularities relating to service to prevent the action from proceeding to the next stage.

However, where a defendant wishes to object to the regularity of the commencement of the proceeding, regularity of the service, or where the defendant wishes to deny the jurisdiction of the court in which the proceeding has been commenced,[305] the defendant may enter a 'conditional' appearance. It usually follows that if a conditional appearance is entered by a defendant then the defendant will proceed to apply to set aside the commencement of the proceedings.[306] Indeed, a defendant has the right to apply to set aside the service of the originating process without entering an appearance.[307]

Local Court of Western Australia — appearance by defendant

If a defendant in an action commenced in the Local Court of Western Australia wishes to defend the proceedings, then the defendant is required to file a document known as a 'notice of defence'.[308] The form or notice of defence is found in Form 14 and when it is filed it must be accompanied by the appropriate fee.[309] If a defendant wishes to object to the Local Court's jurisdiction, then the defendant may include with the Notice of Defence, a Notice of Objection to the jurisdiction.[310] There is no prescribed form for giving notice of objection to jurisdiction[311] and it will be sufficient if an endorsement is made on the printed form on the reverse of the summons, or as part of the text and the document prepared for the purpose of giving notice of intention to defend.[312]

Whether a defendant is required to enter an appearance in the District or Supreme Courts of Western Australia or a notice of defence in the Local

Court of Western Australia, the most important consideration is that a failure to either enter an appearance or file a notice of defence will entitle the plaintiff to proceed to enter a default judgment against the defendant.[313]

Pleadings

The expression 'pleadings' is capable of having two meanings in the context of the civil action. The expression 'pleadings' is the generic term referring to the documents which contain the formal allegations of fact and law which pass between the parties to a civil action.[314] Documents or pleadings would usually include:

- the plaintiff's formulation of the claim known as the 'statement of claim';[315]
- the defendant's formulation of its defence, which logically is known as 'defence'; and
- on some occasions when a plaintiff makes a response to the defence, the document known as a 'reply'.

When a defendant wishes not only to defend a claim against a plaintiff but also to make a 'cross-claim',[316] then the document containing a formulation of this cross-claim is known as a 'counterclaim'.[317]

Whilst other documents containing formulations of the respective party's cases can also pass between the parties, it is unusual to have formulations of claims beyond a plaintiff's reply utilised in a civil action and indeed these documents cannot be utilised without permission of the court.[318]

When the expression 'pleading' is used, it can also refer to the process or method used to draft the respective formulations of the parties cases. Pleadings must comply with a set of rules which regulate the permissible content of such formulations. In other words, a plaintiff must comply with certain rules when drafting the statement of claim and, similarly, a defendant must do so when drafting a defence. The exchange of pleadings and the process of pleading is at the heart of a civil procedure.

Pleadings perform many important functions.[319] Firstly, the documents define the nature and the essence of the civil dispute. Secondly, if the civil dispute is properly defined, this gives notice to the opposing party of the relevant issues, thereby preventing surprise at a trial.[320] Thirdly, pleadings which properly define a dispute also identify the range of material which will be relevant and which must be disclosed between the respective parties during the discovery or disclosure stage of the proceedings. Fourthly, the pleadings determine the scope of the dispute between the parties. Once judgment is given, this prevents the same matter from being heard twice in separate actions.[321]

It should also be noted that pleadings and the pleading process are only relevant to actions which are commenced by a writ of summons.[322] As indicated previously, these are actions in which it is anticipated that substantial issues of fact will exist between the parties. Consequently, the allegations of

fact and any conclusions of law need to be properly formulated before a defendant can respond.

As the writ of summons procedure is not utilised in the Local Court of Western Australia, it is popularly said that the Local Court is not a 'court of pleading'. The *Local Court Rules 1961* (WA) do not set out any procedures or rules relating to the formulation of pleadings or the pleading process. However, the *Local Court Rules 1961* (WA) provide for the provision of Particulars after the commencement of an action.[323] In practice, actions conducted by lawyers in the Local Court of Western Australia often rely upon a process of exchanging pleadings, although there is no requirement to expressly do so under the *Local Court Rules* 1961 *(WA).*

The plaintiff's claims

In the District Court and Supreme Court of Western Australia, a plaintiff has the choice of either endorsing a full statement of claim on the writ of summons or serving a writ of summons with what is commonly referred to as a 'general endorsement'[324] and once the defendant has entered an appearance, filing a separate document containing the statement of claim.[325]

The statement of claim sets out the material facts on which the plaintiff relies to establish the plaintiff's claim.[326] A statement of claim not only will contain the material facts relied upon but also the conclusions of law that the plaintiff wishes to draw on the assumption that the alleged 'material facts' are proved at trial.[327]

The defence

If the statement of claim was endorsed on the writ of summons, the defendant, after having entered an appearance, takes the next step by filing and serving a defence.[328]

If the statement of claim was not endorsed on the writ of summons, then after the defendant has entered an appearance, the plaintiff is obliged to file and serve a separate document containing a statement of claim and then the next step must be taken by the defendant who is obliged to file a document setting out a formulation of the defence.[329]

In the defence, the defendant admits or denies the facts alleged by the plaintiff and also sets up any further facts which are relevant to the defendant's defence.

The reply

As has already been indicated, if after receiving the defence the plaintiff wishes to raise any further facts, which, for example, would have the effect of negating a defence raised by the defendant, the plaintiff then files a pleading known as a 'reply'. As has been indicated, no further pleadings are permitted except with the permission of the court and in any event, it is unusual in practice to have any subsequent pleadings beyond the reply.

Further particulars

If either a plaintiff or a defendant is not satisfied with the level of clarity or precision with which a claim or a defence has been formulated, then the

respective parties are entitled to apply to the court for what are known as 'further particulars' of the pleadings.[330]

Amendments of pleadings

Furthermore, a court may permit a pleading to be amended in certain circumstances permitted by the rules of court. However, extensive amendment to either claims or defences can give rise to considerable delay and cost and in the context of a civil action controlled by case law management principles, courts are becoming less amenable to permitting amendments.[331] Certainly, the closer a civil action comes to trial, the more reluctant a court will be to permit an amendment of pleadings. Moreover, a stricter approach to amendment is adopted by the Supreme Court with respect to actions which have been entered on the expedited list.[332]

Counterclaim

As indicated, a defendant may not only have a defence to the plaintiff's claim but may also wish to raise a separate claim against the plaintiff.[333] If so, the defendant, instead of merely filing a defence may also choose to file a claim which is known as a 'counterclaim' in the same proceedings.[334] The plaintiff is entitled to defend the counterclaim which has been brought by the defendant.[335] The action which was commenced by the plaintiff will be known as the 'original' action and the action which is commenced by the defendant filing a counterclaim will be known as the 'action on the counterclaim'.[336] Both the original action and the action on the counterclaim will go forward as separate actions in the same proceedings.[337]

Third party notice

Apart from any counterclaim against the plaintiff, the defendant may have a claim against another person, called a 'third party'. An example of this may occur where a defendant is faced with a claim for damages for either personal injuries or loss of property suffered by a plaintiff. If a defendant expected the plaintiff's loss to be covered by an insurer, who denies liability for the defendant's claim, for whatever reason, the defendant may join the insurer in the action, which has been commenced against the defendant by the plaintiff. In effect the defendant is saying 'if I am liable to the plaintiff, you are liable to indemnify[338] me against the plaintiff's claim. If the defendant wishes to involve a third party in this way in the action which has been commenced by the plaintiff, the defendant does so by commencing what are known as 'third party' proceedings against the insurer.

These third party proceedings are commenced by the defendant filing and serving a 'third party notice', which complies with Form 11 of the *Rules of the Supreme Court 1971* or Form 57 of the *Local Court Rules 1961* and having the relevant notice filed in the relevant court issued and served on the intended third party.[339] In other words, the procedure is equivalent to the procedure for the filing, issuing and serving of other forms of originating process.[340]

If an intended third party is served, the third party will be obliged to enter an appearance, as the defendant was required to do when the action was

commenced against the defendant by the plaintiff.[341] If the third party does not enter an appearance, then the defendant may enter a default judgment against the third party.[342]

As the joinder of third parties and any subsequent parties joined by those third parties[343] has the potential to delay a trial of the original action commenced by the plaintiff against the defendant, once third party proceedings have been commenced, it is mandatory for the parties in the third party proceedings to obtain orders from the court regulating the future conduct of the proceedings.[344] In other words, the court becomes directly involved in setting a time table for the future conduct and progress of the civil action.

Joinder of parties generally

Once of the defects of both the common law system and equity system prior to the *Judicature Acts* reforms was either that more than one plaintiff or defendant could not be joined by the same proceeding[345] or that every person who might be remotely interested or affected by the outcome of a dispute was required to be joined in the proceedings.[346]

One of the important reforms of the *Judicature Acts* was that a civil action which had been commenced could not be defeated by either the non-joinder or mis-joinder of parties.[347]

The pre-*Judicature Acts* common law system also prevented a plaintiff or indeed a defendant from joining different claims in the same action.[348] Furthermore, as has been discussed, a defendant not only could not bring more than one claim against a plaintiff but was also obliged to bring what we have described as a 'counterclaim' in separate proceedings.

All of these restrictive rules as to the joinder of parties and joinder of causes of action inevitably led to a multiplicity of disputes and the consequential delay and costs would be obvious.

The reforms introduced by the *Judicature Acts* can be summarised as follows:

(a) As between the same parties to a civil action, different claims can be joined in the same action.[349]

(b) The same applies to counterclaims made by the defendant against the plaintiff.[350]

(c) Different plaintiffs can join in the same civil action against the same defendant, provided common questions of law and fact arise and the issues arise out of the same transaction or series of transactions.[351] Indeed, where the claim involves what is known as 'joint liability', all of the jointly interested parties must be joined.[352]

(d) A plaintiff has the ability to sue two or more defendants where liability against one is likely to arise but it is unclear as to which defendant is

liable.[353] In the case of a counterclaim, a defendant can sue two co-plaintiffs or a co-plaintiff and an additional party.[354]

(e) In certain circumstances, different actions which have been commenced can be consolidated to avoid the need for separate trials.[355]

PROCEDURES GOVERNING APPLICATIONS FOR INJUNCTIVE RELIEF

Not all procedures which are available to a civil litigant will be utilised in the resolution of a civil dispute.[356] Furthermore, not all of the stages of a civil dispute necessarily or logically follow each other. In other words, a litigant may require some form of urgent action immediately following the commencement of an action or, in some cases, even before an action has been commenced.

If the court which the plaintiff has chosen is able to grant the plaintiff a remedy against the defendant on a provisional basis, this can prove to be a very powerful tool in the resolution of a civil dispute.[357] Moreover, where a party seeks to ensure any remedy or relief it ultimately wins will not be thwarted by action the opposing party may take prior to trial, an application can be made to the court to preserve the 'status quo' pending the hearing and determination of the civil dispute.

There is a wide range of orders that a court can make in order to preserve the status quo including injunctions,[358] 'Anton Piller' orders,[359] 'Mareva' injunctions,[360] orders for the interim preservation, management or custody of property,[361] orders for security for costs,[362] and the appointment of receivers or provisional liquidators.[363] These orders, when they are granted by a court, are known as 'interlocutory' orders.

A proceeding in an action can be described as 'interlocutory' when it is incidental to the principal object of the action, namely the obtaining of a judgment.[364] Consequently, interlocutory applications in an action would include all steps taken for the purpose of assisting either party in the prosecution of their case, whether before or after final judgment.[365] The granting of injunctive relief, either before or after the commencement of proceedings, but certainly prior to the trial of the civil dispute is a good example of an interlocutory step in the proceeding and the granting of any order in these circumstances as an example of an interlocutory order.[366]

The identification of whether an order made by a court is an interlocutory order or a final order can be of significant importance when it comes to the determination of a party's right of appeal.[367]

PROCEDURES REGULATING DISPOSITION OF A DISPUTE BEFORE TRIAL

Although the trial process is often thought of as the principal method by which civil disputes are resolved, only a relatively small number of disputes are actually brought to trial. The bulk of civil disputes are disposed of before reaching trial. This is an essential feature of our system of civil justice as courts could not cope with the load of resolving all disputes by trial.[368]

The rules of procedure in the various courts and tribunals exercising civil jurisdiction in Western Australia recognise this aspect of our system by facilitating and encouraging the pre-trial disposition of civil disputes. Indeed, a civil dispute may be amenable to resolution without recourse to the commencement of proceedings in any of the courts exercising civil jurisdiction in Western Australia.[369]

However, if proceedings are commenced to resolve the civil dispute, then the various rules of court contain a number of procedures which will enable a dispute to be resolved without trial. These include:

- discontinuance and withdrawal of an action,
- stay of an action,
- striking out pleadings,
- dismissal of an action,
- settlement of an action,
- obtaining a judgment on admissions by a defendant,
- default judgment,
- summary judgment for a plaintiff, and
- summary judgment for a defendant.

Discontinue or withdrawal

In the District Court and Supreme Court of Western Australia, a plaintiff may discontinue an action or withdraw any part or parts of the alleged claim by serving written notice on the defendant.[370] The plaintiff may discontinue before receipt of the defendant's defence or after receiving the defence but before taking any further step, without obtaining the permission of the court.[371] Thereafter, the plaintiff requires the leave of the court in order to discontinue an action.[372] A defendant may only withdraw an appearance or the whole or part of a defence or counterclaim with the permission of the court.[373]

In the Local Court of Western Australia, a plaintiff may not only discontinue an action but may also be subject to a 'non-suit' procedure.[374]

A plaintiff who discontinues an action against a defendant will be liable to the defendant for any costs incurred by the defendant up to the stage of the discontinuance.[375] In practice, it is often the case that a discontinuance by a plaintiff will be part of an overall settlement of the claim.[376] This may occur in situations where a defendant does not wish to have a judgment recorded against the defendant and the settlement terms include having the plaintiff filing a discontinuance of the action. In these circumstances, normally, the parties agree the plaintiff will not be liable to the defendant for the defendant's costs, which a defendant would normally have the right to claim because of the plaintiff's discontinuance.

Stay of an action

A 'stay of proceedings' or 'stay of an action' refers to an order of a court suspending the continuance of the action or proceeding.[377] Consequently, if a plaintiff is ordered to do something and fails to do it, the proceedings may be ordered to be stayed until the plaintiff complies with the order of the court.[378] The rules of court may provide for a stay to be automatic[379] in certain circumstances but also provide for a stay to occur where courts orders a stay.[380] Indeed a person who is not a party to an action may also apply for a stay.[381]

Striking out pleadings

As discussed above, the *Judicature Acts'* reforms introduced a new system of pleading[382] that relied upon a party pleading the facts relevant to the particular claim which formed the basis of the entitlement to the remedy being sought by the plaintiff.[383] In order to ensure that this system of pleading was followed, a number of rules were introduced by the *Judicature Acts* which are found in the present rules of the Supreme Court.[384] If a party does not comply with rules of pleading, the opposing party will have an opportunity to apply to strike-out the pleadings which have been drafted by the opposing party.

The effect of striking out a party's pleadings can have the effect of dismissing the party's action or in the case of a defendant, having judgment entered against the defendant. In practice, however, this is unusual as a court will provide the offending party with an opportunity to amend the pleading in order to cure any defects or objections which can be sustained.[385]

A court can order the striking out of a pleading at any stage of the proceedings, although usually parties seeking to object to the content of the pleading will do so at an early stage in the proceedings. In the case of a defendant objecting to a statement of claim, this will usually take place after the statement of claim has been served on the defendant. Similarly, a plaintiff will usually object to the content of a defence pleading, if there are grounds to do so, shortly after a defendant has served the defence.

The grounds upon which a court can order that a pleading be struck out are that the pleading:

(i) discloses no reasonable cause of action or defence;[386]
(ii) is scandalous, frivolous or vexatious;[387]
(iii) might prejudice, embarrass or delay the fair trial of the action;[388] or
(iv) is otherwise an abuse of process.[389]

These grounds of challenge are available to either the plaintiff or the defendant. However, in practice the right to strike out is particularly valuable to defendants.[390] The right to strike out provides the defendant an opportunity to resist a bad claim, especially where the claim is obviously wrong, in the sense that it is not a claim which is recognised by law in Western Australia.[391]

During the era when a plaintiff was required to bring an action in compliance with a particular form,[392] there could be supervision by an official of the claims and its recognition at law.[393] However, the adversarial system, which relies entirely upon a party bringing and prosecuting a claim, will allow the claim to stand until a defendant applies for it to be struck out as not being a claim recognised at law. Consequently, the process of striking out is a process for the supervision of the manner in which a claim can be properly framed within the civil justice system.[394] However, consistent with the adversarial principles previously described, a court will not strike out an objectionable pleading on its own motion but only upon the consideration of the opposing party's application.[395]

The process of striking out has both private and public benefits.[396] It enables a successful applicant to be relieved of the task of having to contest an untenable claim or defence and, from a public point of view, 'striking out unrecognised claims or defences ensures consistency and predictability'.[397]

No reasonable cause of action or defence

The first ground under Order 20 rule 19A of the *Supreme Court Rules* permits the court to strike out a pleading for failing to present a reasonable cause of action or defence. A contravention of this rule can arise in two circumstances:

- where the facts pleaded by the plaintiff or the defendant fail to disclose a claim or defence recognised by the law in Western Australia,[398] and
- where the pleading does not comply with the rules of pleading and in particular, fails to set out the facts in the form required by the rules,[399] the Court may order struck out.

The problem can usually be cured by affording the offending party an opportunity to amend the pleading where the pleading does not comply with the rules or the facts supporting the claim have not been set out in the proper form. In these circumstances the court will not strike out the entire action or enter judgment against a defendant but will permit the offending party to present a freshly drafted pleading.[400] If this new pleading complies with the rules, the action will proceed to the next stage of the resolution of a civil dispute.[401]

However, where the party alleges that the facts pleaded, no matter whether they comply with the rules or not, would not give rise to a claim or a defence recognised in Western Australia, a court may strike out the pleading, although only in 'plain or obvious' cases.[402] An application for striking out a pleading in these circumstances will normally take place before the party has had an opportunity to present the evidence. Furthermore, legal argument concerning the basis of the claim cannot take place without a full trial. Consequently, the court will usually not strike out a pleading in these circumstances unless it is 'obviously unsustainable', 'unarguable', or it is 'plain and obvious' that it is

defective in law.[403] As has been stated 'a man is entitled to his day in court with anything other than a vexatious piece of litigation'.[404]

Striking out a pleading that is scandalous, frivolous or vexatious

In practice, these words are given their ordinary meaning. Consequently, a claim can be considered to be frivolous when it is one not worth serious attention.[405] Similarly, 'vexatious' refers to a situation where the action or the defence has been instituted for the purpose of harassment.[406] 'Scandalous' can have a number of meanings. It can refer to an allegation which is 'unbecoming to the dignity of the court'[407] or 'is contrary to good manners or which charges some person with a crime', which is not necessary to bring to the attention of the court.[408] It can also be an allegation which relates to the 'moral character of an individual' irrelevant to the proceedings between the parties.[409]

A defendant wishing to strike out a plaintiff's claim on the grounds that it is frivolous or vexatious can also apply for summary judgment against the plaintiff, which will be later discussed below.[410]

Striking out on the grounds that an action may prejudice, embarrass or delay the fair trial of an action

This rule is directed to pleadings which may contain immaterial allegations, which if permitted to remain in the pleadings may delay the trial with unnecessary evidentiary issues. A wide range of matters can be covered by this rule and it usually deals with issues of bad drafting rather than matters of substance. The main grounds which can be relied upon to attack a pleading under this head are as follows:

(i) the pleading is unintelligible;
(ii) the pleading is ambiguous;
(iii) the pleading does not inform the opposing party what it is that is actually being alleged;
(iv) the pleading contains irrelevant material or makes a claim that the party pleading is not entitled to make.[411]

The pleading is otherwise an abuse of process

This recognises the general power of the court to control its own processes and see that its processes are not misused or abused by litigants. It particularly relies upon the concept which is known as 'inherent jurisdiction'.[412]

Dismissal of action

As noted above, the adversarial principle underlies the operation of the civil justice system in Western Australia. One feature of this principle is that once an action has been commenced, the plaintiff has the responsibility of keeping the action moving through its various stages until the dispute is resolved.[413]

However, if a plaintiff does not prosecute the claim and causes delay which is inexcusable or causes prejudice to the opposing party, then the plaintiff's action can be struck out for want of prosecution.[414]

Prior to the introduction of delay elimination goals in the *Supreme Court Rules* and the full introduction of the case flow management system, an action could be dismissed for want of prosecution either under the provisions of the *Supreme Court Rules* or the inherent power of the court to dismiss an action for want of prosecution. However, an action would not normally be dismissed unless the delay which had been caused by the plaintiff could be treated as 'inexcusable'[415] or 'inordinate and inexcusable'.[416] Furthermore, the defendant had to show that the delay either caused the defendant prejudice or that it was highly unlikely a fair trial could not take place.[417] In other words, the defendant needed to demonstrate a connection between the plaintiff's delay and prejudice to the defendant or the defendant's ability to properly conduct a defence of the action.[418] For example, the defendant might be able to show that a particular witness had died or was otherwise unavailable.[419]

However, with the introduction of the case flow management system, the Supreme Court of Western Australia took a new approach. The 'prejudice' to the defendant which previously needed to be shown before an action would be dismissed for want of prosecution was broadly interpreted to include 'the prejudice to the public interest in the expeditious progress of litigation….'[420] In other words, the Supreme Court of Western Australia held the view that an action could be dismissed for want of prosecution even in the face of a finding of no prejudice to a defendant.[421] However, such a rigorous approach may not be endorsed by the High Court of Australia.[422]

Settlement and compromise of an action

The vast majority of civil disputes in Western Australia are resolved without resort to litigation. Indeed, litigation is often a last resort and even if it is commenced, it is rarely pursued to trial.[423] Furthermore, most litigation is settled before the dispute reaches trial. Many cases are in fact settled during the course of a trial. Although some statistics are available which indicate the rate of settlement of civil disputes in Australia, the available information remains unsatisfactory.[424]

Settlement of matters reduces the pressure on the legal system and enables disputes to be brought to a conclusion more quickly than having the dispute resolved at a trial. Some commentators suggest that the parties who settle may be '…less disillusioned with the legal system than they would be were they to pursue the matter to trial'.[425]

Consequently, the various rules of court operating in Western Australia promote and encourage settlement. This is accomplished in various ways:

(i) settlement or compromise of proceedings;

(ii) affording parties the opportunity to negotiate a civil dispute before proceeding to a trial;

(iii) imposing penalties on parties who do not settle, through the operation of costs rules.

These three alternatives are facilitated by recent amendments to the *Rules of the Supreme Court 1971* (WA).

Settlement or compromise

The settlement or compromise of an action refers to the process whereby one party in an action concedes benefits in return for or immunity from further action on the same subject matter by the other party.[426]

Usually, a settlement or a compromise is enforceable as a contract.[427] Indeed, a civil dispute which has already been commenced can be settled through the use of a formal written document, in which the party who commenced the action can agree to discontinue the action against the defendant.[428] In these circumstances, a judgment of the court would not be recorded against the defendant.[429]

However, the parties to a civil dispute may agree to settle the dispute for a particular sum of money, which is less than the amount originally claimed and a judgment may be recorded to effect that settlement. That is, the parties may 'consent' to a judgment being entered for an agreed sum on particular terms and conditions.[430]

The rules of the Supreme Court and District Court of Western Australia provide for a procedure which can lead to a compromise of an action.[431] This procedure enables either a plaintiff or a defendant, at any stage of the proceedings, to make an offer to the opposing party to settle the claim on particular terms and conditions.[432] If the offer is accepted, any party to the compromise can apply to the court for a judgment.[433] As we shall see later, if a party to whom an offer is made rejects that offer and proceeds to a trial, then if the trial judge, who will not be made aware of the offer, awards an amount equal to or less than the amount offered, the party who did not accept the offer will be penalised by having to pay the opponent's costs.[434]

Affording parties an opportunity to negotiate

The Local Court, District and Supreme Courts all have procedures available to enable parties to meet face to face and negotiate a settlement. Indeed, in the Local Court and District Court of Western Australia[435] the procedure is compulsory and in practical terms in the Supreme Court of Western Australia also can be made compulsory.[436]

In the Local Court and District Court of Western Australia, parties to a civil dispute are required to attend a compulsory pre-trial conference, at which an attempt is to be made to settle the dispute between the parties.[437] Indeed, in practice, there may be more than one pre-trial conference. Usually, a matter will not be listed for trial unless the court is satisfied that the parties have exhausted any possibility of settlement.

In the Supreme Court of Western Australia, mediation is available by order of the court in both the expedited list and in the list of cases which are generally controlled by the case flow management principles.[438]

Although mediation is not compulsory in the expedited list, it is invariably ordered before a dispute is permitted to proceed to trial.[439] With respect to other cases which are generally controlled by the case flow management principles, mediation and mediation conferences can be ordered by the court.[440] However, unlike a pre-trial conference in the District Court of Western Australia, it is not mandatory for the parties to proceed to a mediation and in some cases the Supreme Court may not order the parties to attend mediation before permitting the matter to proceed to a trial.[441]

Cost sanctions

One means by which settlement is encouraged is by the imposition of penalties as to costs. If a party does not settle an action and proceeds to a trial, at which the party is awarded an amount equal to or less than the offer which was made in an attempt to settle the dispute, a court can award costs against the party although, in a sense, they have been successful.[442]

The following illustrates how the process can operate. If a plaintiff commences an action claiming damages which need to be assessed by a court, a defendant may make an offer to settle the dispute for a specified amount. If the plaintiff accepts the offer, then the plaintiff can proceed to a judgment and have, in addition, costs paid based upon the settlement.

However, if the plaintiff does not to accept the offer and proceeds to a trial and is awarded a sum of money either equal to or less than the amount offered before (or even during) trial by the defendant, then the plaintiff will only be entitled to costs for the period from the commencement of the action up until the date the offer was made by the defendant. Thereafter, the defendant will be entitled to costs and, in most cases, including the costs of the trial. As the most substantial costs of an action usually relate to the costs of a trial, the plaintiff may be penalised by having the amount of damages reduced by the sum or by the amount of costs that the plaintiff has to pay to the defendant. Consequently, when parties to an action are negotiating a settlement, a plaintiff must make a realistic assessment of its claim and any decision to proceed to a trial.[443]

In most cases, settlement will be negotiated through the party's legal representatives and the parties will rely heavily on the advice and recommendations of their legal representatives.[444] When parties are not represented the balance inherent in the adversarial system is upset and the burden of explaining and cautioning a litigant is unsatisfied.[445]

Judgment on admissions

In certain circumstances, which are not often met in practice, a defendant responding to a plaintiff's claim may make sufficient admissions either in the pleadings or otherwise in writing which would enable the plaintiff to obtain a judgment without proceeding to a trial of the issues in dispute.[446]

Default judgment

The expression 'default' generally refers to an omission of that which a party to a civil dispute ought to do in accordance with the Rules of Court. It also refers to a party's 'neglect'.[447]

In the description of the pleading process, we noted that a defendant after having been served with a statement of claim was required to enter a memorandum of appearance.[448] If a defendant did not enter the required memorandum of appearance, the plaintiff had the option of obtaining a judgment against the defendant by default. This type of judgment is known as a 'default judgment'.

Consequently, generally, when a defendant neglects to take certain steps in an action which are required by the Rules of Court, the court may give judgment against the defendant by default.[449] The scope of the default judgment will be determined by the relief which has been sought in the originating process.[450]

A defendant may allow a judgment by default either intentionally, or through mistake, or neglect.[451] A defendant may allow a judgment to be entered by default intentionally where the defendant has concluded there is no merit to the claim or where there is a previous agreement to do so with the plaintiff.[452] These situations are unusual in practice. Where a defendant has agreed with the plaintiff to have a judgment entered, this is usually through the device of a consent judgment.[453]

More commonly, a judgment will be entered against the defendant by default where the defendant has, through mistake or neglect, failed to take the required step in an action. If a defendant has failed to file a memorandum of appearance after having been served with a statement of claim attached, then a judgment can be entered in default of appearance.[454] However, if the defendant has filed a memorandum of appearance but subsequently fails to file a defence, then judgment can be entered in 'default of defence'.[455] A default judgment, either in default of appearance or default of defence can be entered for claims monetary compensation,[456] possession of land,[457] detention of goods[458] or other claims.[459]

There can be restrictions in obtaining a default judgment against parties who are under a disability.[460]

Summary judgment for plaintiff

It is often the case that a defendant enter a memorandum of appearance to an action commenced by a plaintiff. In many cases, the defendant's objective is no so much to contest the claim of the plaintiff but to delay and frustrate the attempts of the plaintiff to obtain the relief or remedies sought in the action. This can be particularly so in cases where a plaintiff is seeking to recover a debt.[461]

If a plaintiff has formed an opinion that a defendant has in fact no defence to the action but has entered an appearance purely for the purposes of delay, a plaintiff may apply for what is known as 'summary judgment'. This procedure has its origins in England in the latter half of the 19th century, where the procedure was introduced in the Common Law Courts. Following the *Judicature Acts'* reforms, the procedure was preserved and it continues in the Local Court,[462] District Court[463] and Supreme Court [464] of Western Australia.

In the Local Court of Western Australia, an application for summary judgment can only be brought for a claim for a 'debt or liquidated demand'[465] whereas in the District Court and Supreme Court of Western Australia, summary judgment can be sought in most situations, within the jurisdiction of the respective courts.[466]

An application for summary judgment is required to be brought within 21 days after appearance or at any later time permitted by the court.[467] In the Supreme and District Courts of Western Australia, a plaintiff can apply for summary judgment only after the service of a statement of claim on the defendant and the defendant's entry of appearance.[468] The application for summary judgment will be made in the chambers' jurisdiction[469] of the applicable court. The plaintiff is required to file an affidavit[470] verifying on oath the facts necessary to establish the plaintiff's claim and in the belief of the person making the affidavit there is no defence to the claim or relevant part of the claim for which judgment is sought.[471]

A defendant who receives an application for summary judgment may consider whether a claim has been properly pleaded and attack the opponent's application on this basis.[472] If the attack is successful, inevitably the application will be adjourned, if not dismissed, and costs awarded against the plaintiff.[473]

However, if a defendant is not able to attack the application on the basis of any defect in the application or statement of claim, then the defendant may defend the application by in turn filing an affidavit setting out the defence. In other words, the defendant must depose to facts in the affidavit which would be sufficient to defeat the plaintiff's application.[474] There will be certain rules

of evidence which will control the content of affidavits which can be filed in the Local Court, District Court and Supreme Court of Western Australia.[475]

A number of principles guide a court in determining whether summary judgment should be granted against a defendant.[476] Judgment at this early stage in proceedings is being sought against a defendant in circumstances where the defendant is deprived of the opportunity a defendant would otherwise have to test the plaintiff's case by discovery procedures as well as cross examination of the plaintiff's witnesses at a trial.[477] It may be that facts fatal to the plaintiff's claim are initially not known to the plaintiff.[478] If summary judgment is given in such a case, the defendant is deprived of the opportunity of discovering the flaw in the plaintiff's case through the usual pre-trial procedures.[479] Consequently, the award of summary judgment is discretionary and a court will only give summary judgment if it is clear that there is no triable issue.[480]

Summary judgment for the defendant

The District Court and Supreme Court of Western Australia permit a defendant to also apply for summary judgment.[481] It is generally accepted that an application by a defendant for summary judgment will not be successful unless a defendant can show that the plaintiff's claim is 'absolutely hopeless'.[482] As has already been stated,[483] a procedure for summary judgment by a defendant also encompasses the notion of a plaintiff's claim being 'frivolous or vexatious'.[484]

Once again, if a defendant wishes to apply for summary judgment, it should be made within 21 days after an appearance has been entered or at any later time permitted by the court.[485] The application by the defendant will usually be supported by an affidavit which is then served on the plaintiff.[486]

The plaintiff can defend the defendant's application by filing an affidavit setting out facts which would dispute the defendant's right to summary judgment. Applications of this nature are not frequently met in practice as it is clear that the court's jurisdiction to strike out a plaintiff's claim and have a summary judgment entered for the defendant should be used sparingly and only in very exceptional cases.[487] An action will not be struck out unless it is perfectly clear that it cannot succeed.[488]

DISCOVERY AND DISCLOSURE BETWEEN PARTIES

This topic is the subject of sub-section 2.6. Consequently, discovery will be dealt with here only in general terms.

Process of discovery

The term 'discovery' is used to refer to the various procedures available to a party in a civil dispute to require the opposing party to provide information. The objective of discovery is to assist in assuring that the party requesting discovery is sufficiently apprised of the case to be met at trial.[489] Discovery may also assist that party in supporting its case.[490]

The term 'discovery' encompasses various processes by which a party may require an opposing party to disclose the existence of relevant documents and, subject to certain restrictions,[491] make those documents available for inspection.[492]

However, the term can also refer to a process which enables a party to an action to ask the other party a series of written questions, known as 'interrogatories' which the other party is obliged to answer upon oath.[493] Consequently, the term 'discovery' refers to the process of discovery of documents (and their subsequent inspection) and discovery by their administration of a series of written questions to the opposing parties.

The process of discovery, whether of documents or the administration of written questions, is regulated by the rules of court. Any disputes between the parties concerning the process can be submitted to the court for resolution.[494]

The process of discovery can take place even before an action is commenced. Indeed, a specific form of discovery has been developed so that a party proposing to commence legal action can obtain access to documents from a potential party, in order to determine whether that party should be sued[495] or from a non-party in order to determine whether that party has any documents in existence which might assist an existing party to the dispute.[496]

Discovery of documents

However, discovery as a process is much more important once an action has been commenced. Once the action has been commenced there are a number of matters which need to be considered. First, what constitutes a 'document'?[497] Secondly, which document or documents is a party required to disclose? The leading statement of the test for disclosure is as follows:

> Any document must disclosed which it is reasonable to suppose contains information which may enable the party applying for discovery either to advance his own case or damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of these two consequences. Discovery is not necessarily limited to documents which would be admissible in evidence.[498]

This statement is the test of 'relevance'.[499] It is generally wide enough to enable an extensive range of documents to be caught within the scope of the test.[500] Once it is established that a document is in existence and it is relevant to the dispute between the parties, then a party is obliged to reveal the existence of documents which are, or have been, in the party's 'possession', 'custody' or 'power'.[501]

'Possession' and 'custody' refer to situations where a party has physical control of a document.[502] The expression 'power' refers to a right which a party may have to regain or obtain control over a document.[503]

Legal practitioners representing parties in civil disputes, have an onerous obligation not only to fully explain to their clients their duties with respect to discovery of documents but also to certify that the explanation has been provided.[504]

The parties to a civil dispute who provide discovery of documents do so by presenting a list of the documents to the opposing party.[505] The list ought to adequately describe the documents so that the opposing party can appropriately identify the documents.[506] Although a party providing discovery is required to list all relevant documents, it can resist production of some of the documents on certain grounds.[507] That is, the party must tell the opposing party that the documents are in existence but at the same time the party can assert grounds for not producing the document for physical inspection by the opposing party.[508]

In order to ensure the accuracy of lists of documents which are exchanged through the discovery process, the rules require that the party providing discovery verify the list of documents upon oath through the use of an affidavit.[509] Once the other party has received the list of the documents, it can request to physically inspect the documents at a reasonable time and place.[510] As part of the process, the party inspecting the documents can obtain copies at their own expense.[511]

Although a party is required to list the existence of relevant documents, a party can resist production and the subsequent physical inspection of those documents on a number of grounds. The principal ground is that known as 'legal professional privilege'.[512] However, there are a number of other bases upon which a party can resist production. These include the 'public interest, immunity or privilege'[513] and 'privilege against self-incrimination'.[514]

All aspects of the discovery process can give rise to disputes.[515] Indeed, disputes regarding the discovery process are frequently met in civil litigation.[516] The process of discovery is subject to the control of the court. Any disputes arising with respect to any aspect of discovery process can be submitted to the court for resolution.[517]

With respect to cases in the expedited list and cases which are controlled by the case flow management principles, court procedures have been developed to deal with disputes relating to discovery as quickly as possible.[518] These procedures are extremely important as the stage of discovery in a civil dispute has the potential to delay the resolution of a civil dispute more than any other stage in a proceeding.[519]

Interrogatories

In addition to the process of discovery of documents, the process of administering questions to the opposing party has been mentioned.[520] The purpose and objects of interrogatories are:

(a) to obtain admissions as to facts which will support the case of the interrogating party;

(b) to obtain admissions which will destroy or damage the case of the party interrogated;

(c) in the nature of a request for further and better particulars; and

(d) to obtain accounts from a party occupying a fiduciary position.[521]

The process of administering written questions by one party to another party in a dispute originated in the Court of Chancery and in recent years has had somewhat of a chequered history not only in Western Australia but also in other states in Australia and in England.[522]

Presently in Western Australia the view is taken that the extensive use of interrogatories can lead to costs and delays.[523] Furthermore, as case flow management principles now permit a court to order an exchange of witness statements,[524] this may obviate the need to administer interrogatories.[525] Consequently, the permission of the court is now required to administer interrogatories in the Supreme and District Courts of Western Australia.[526] Once again, parties seeking to submit a list of written questions to the opposing party must ask questions which are relevant to the proceedings, although the test of what is 'relevant' is quite wide.[527]

If a court grants permission to administer a set of interrogatories, the party receiving interrogatories has a duty to provide an answer to the interrogatories but may raise objections in answers to the interrogatories, on grounds specified in the rules of court.[528] These grounds include:

(a) the interrogatory or interrogatories are scandalous or irrelevant,[529] not *bona fide* for the purpose of the proceeding,[530] unreasonable,[531] prolix,[532] oppressive[533] or unnecessary[534];

(b) that the matters inquired into are not sufficiently material at that stage;[535]

(c) privilege;[536]

(d) any other ground on which objection may be taken;[537]

Of course, similar to the process of discovery of documents, disputes often arise regarding either the scope of interrogatories or objections taken by a party required to answer a set of interrogatories.[538] These disputes need to be resolved during the course of the proceedings by the court.[539]

Once a party has answered a set of interrogatories, either in whole or in part, the answers provided can be used in evidence at the trial of the action.[540] However, it is important to appreciate that unless the answers are specifically tendered in evidence at the trial of the action, the answers will not be before

the court and will not be taken into account as part of the resolution of the dispute.[541] Consequently, in many situations, interrogatories, once administered and answered, do not perform the role for which they may have been administered.[542]

TRIAL

The expression 'trial' refers to the hearing of a civil dispute before a judge who has jurisdiction over the dispute and who can adjudicate upon the dispute.[543] Consequently, a 'trial' is the step in an action by which the questions of fact and law which are in dispute between the parties are decided.[544] Prior to a civil dispute being able to be submitted for adjudication, known as 'entering a matter for trial' or 'entry for trial,'[545] the court must be satisfied that all matters relevant to the preparation for a trial have been satisfactorily completed.[546] Another way of describing this level of preparation is to state that all of the relevant stages of a civil action, that are applicable to that particular action, have been satisfactorily completed.[547] A party wishing to enter a matter for trial is required to certify to the court that the dispute between the parties is in a fit state and ready to be adjudicated.[548]

For centuries, civil trials in the common law system took place before juries. However, in Western Australia, civil actions which can be tried before a jury are significantly curtailed. In practice, the only civil actions which are tried before juries are those involving either allegations of libel or slander or both.[549]

The trial is divided into the following stages:

(a) the plaintiff's opening address;
(b) examination-in-chief of plaintiff's witnesses;
(c) cross-examination of plaintiff's witnesses by defendant's counsel;
(d) re-examination of plaintiff's witnesses by plaintiff's counsel;
(e) defendant's opening address;
(f) examination-in-chief of defendant's witnesses by defendant's counsel;
(g) cross-examination of the defendant's witnesses by plaintiff's counsel;
(h) re-examination of defendant's witnesses by defendant's counsel;
(i) defendant's counsel closing address;
(j) plaintiff's counsel closing address; and
(k) judgment.

Various aspects of the conduct of a trial are the subject of other sub-sections in this review.[550]

It should not be thought that a judgment will be delivered immediately after a conclusion of the abovementioned stages (a) to (j). Frequently, in even what are relatively straight forward cases, a judge will reserve judgment to be delivered at a later time.[551]

Judgment can have a number of meanings. It can refer to the decision of the court which resolves the dispute.[552] The judgment is entered on the records

of the court.[553] The term 'judgment' can also be used to denote the reasons which the court gives for its decision.[554] In some cases a court can consist of several judges, as when a matter proceeds on an appeal.[555] Consequently, if a court consists of several judges, it may be and it often does happen that each of the judges gives a separate judgment or statement of reasons, although there can only be one judgment of the court in the technical sense of the word.[556]

The judgments of a particular court either by a single judge or by a group of judges sitting on appeal can be reported and subject to the doctrine of precedent be used as authorities for subsequent cases.[557] Once a judgment has been pronounced, the issue of costs usually becomes relevant.

COSTS

The issue of costs is dealt with in sub-section 2.9. However, costs can in broad terms refer to:

- the charges which a solicitor is entitled to make and recover from the client or person employing him as the remuneration for professional services.[558] This would include such things as providing legal advice, attendances upon the client or witnesses, drafting and copying documents, conducting legal proceedings etc.[559]
- the expenses which a successful party is entitled to recover from the unsuccessful party in a civil dispute.

In some cases, costs which have been recovered by a successful party from an unsuccessful party may be equivalent to the costs which are charged by the solicitor for the successful party. More often than not, however, the charges of a solicitor including the costs of counsel, will be in excess of the costs which will be recovered from the unsuccessful party and the successful party will be liable for its own costs to its own solicitor.[560]

The general rule in Western Australia with respect to costs is that 'costs follow the event'.[561] This means that the unsuccessful party not only has to pay its own costs but also has to pay the costs of the successful opposing party.

APPEALS

If a dispute can only be resolved by trial, inevitably, the unsuccessful party will be dissatisfied with the result. Indeed, even a successful party may be dissatisfied with the result. This is particularly so in cases where a party has sought an award of damages and the award made by a judge is less than the amount sought or anticipated by the party. Consequently, any proper consideration of the dispute resolution system in Western Australia must consider the rights of the parties after judgment has been given and either or both of the parties are dissatisfied with the result. A consideration of these rights necessarily leads to an examination of the right of appeal.

The English origins of the right of appeal

As with other aspects of the dispute resolution system in Western Australia, the right of appeal originally developed in England.[562] Originally, decisions of the superior common law courts, which have already been described above, were final and without appeal.[563] Where a decision was reached by a single judge and jury, the judgment had to be recorded in the court from which the judge came.[564] At the stage of recording the judgment, a party could seek to stop the judgment having effect by seeking what is known as 'arrest of judgment' or a new trial.[565] The other party might then be called upon to show cause why an application for a new trial or an arrest of judgment should not succeed.[566] This was a type of appeal before all the judges of the court but it took place before, rather than after, the formal decision of the court.[567]

The only way a party could upset a decision, once it was recorded, was by a procedure commenced by a 'writ of error'.[568] This procedure was an original proceeding before another court. For example, if the action had been commenced in Common Pleas, the writ of error would have to be issued in the Kings Bench division and if the action was commenced either in the exchequer or Kings Bench division, then the writ of error would need to be obtained in the Exchequer Chamber.[569] The procedure commenced by a writ of error was a very limited form of review and it was restricted to errors which were apparent in the formal record of the decision.[570] It was not until the 19th century that the writ of error procedure was replaced by more satisfactory procedures of appeal which enabled the substantive decision and in particular, any legal issues involved, to be considered.[571]

As has been explained above, a separate jurisdiction and system of law was administered by the Court of Chancery.[572] In the Court of Chancery there was no formal record kept of the judgment. However, a review on the merits of the case had always existed in the form of a re-hearing by the chancellor.[573] By the 17th century a further appeal lay to parliament.[574] This appeal jurisdiction of Parliament was exercised by the House of Lords.[575]

As with other major reforms of the common law systems, the appeal jurisdiction was substantially reformed in 1875 by the *Judicature Acts* reforms. A single Court of Appeal was established for all civil cases.[576] When the *Judicature Act* came into effect, appeal by way of re-hearing became the normal method of reviewing decisions.[577]

Consequently, it can be seen that the right to appeal on the merits of a decision is purely a statutory creation. That is, the right to appeal is a creature of statute. It was not something that was known to the common law. Furthermore, the nature of a right of appeal depends on a statutory provision that creates the right. This was explained by Glass J A in *Turnbull v New South*

Wales Medical Board.[578] As his Honour explained, the term 'appeal' is used in different senses in various statutes. In ascending order they were:

(a) Appeals as to supervisory jurisdiction. They concern only jurisdictional errors or the denial of natural justice, presumably in proceedings before statutory tribunals.[579]

(b) Appeals on questions of law only. Such appeals sometimes lie from the decisions of statutory tribunals.

(c) Appeals after a trial before a judge and jury. Appeals in this sense concern the judge's errors of law or the jury's errors as to fact. Except for the assessment of damages, issues of fact must be redetermined at a new trial.[580]

(d) Appeals from a judge in a strict sense. In a strict appeal the appellate court can only give judgment as ought to have been given at first instance.

(e) Appeals to a judge by way of re-hearing. An appeal by way of re-hearing permits the appellate court to try the case again on the evidence used at first instance together with any further evidence the appellate court sees fit to receive.[581]

(f) Appeals involving a re-hearing *de novo*. A re-hearing *de novo* requires a new trial or hearing before the appellate court. All the issues must be retried and evidence must be called before the appellate court.[582]

When considering the right of appeal in Western Australia, in practical terms, it takes only one of two forms, depending on the statutory provision creating the right of appeal.[583] Appeals to the Full Court of the Supreme Court of Western Australia are by way of re-hearing and appeals to the High Court of Australia[584] and the Full Court of the Federal Court of Australia[585] are strict appeals.

Strict appeal

When determining a strict appeal, the appellate court decides whether the judgment under appeal was correct when it was given.[586] New circumstances cannot be taken into account.[587] The appellate court is confined to consider the law and the circumstances which existed when the judgment was given. Whilst the appeal court can review the evidence presented before the lower court, it cannot admit new evidence,[588] unless it is expressly permitted to do so by statute.[589] As has been stated by one learned author:

> [A] judgment that was correct when it was given, cannot be set aside or varied on appeal. The rights and liabilities of the parties are considered as of the date of the judgment under appeal, rather than at the date of the hearing of the appeal.[590]

Appeal by way of re-hearing

In this type of appeal, the appeal court determines the legal rights and obligations of the parties as at the date of the re-hearing.[591] The Court of Appeal is permitted to consider new circumstances and admit further

evidence.[592] The Court of the Appeal can review the evidence before the trial judge and reach its own conclusions.[593] The Court of Appeal is not confined to a determination of whether the trial judge was wrong on the evidence presented at the trial.[594] An appeal by way of re-hearing is a new determination of the rights and liabilities of the parties, rather than the correction of errors made by the lower court.[595] Furthermore the appeal is conducted on the basis of the law as of the date of the appeal.[596] Consequently, an appeal by way of re-hearing does not involve calling oral evidence at the appeal. Rather, the appellate court proceeds on the transcript of the evidence given at the trial and any further evidence which is allowed to be admitted in documentary form, such as an affidavit or deposition.[597]

Once it is recognised that the right to appeal is a creature of statute, in order to establish the rights of parties to appeal from the various courts in which proceedings can be commenced in Western Australia, it is simply a matter of examining the various statutes which constitute the courts. An analysis of the rights of appeal established by these statutes shows that if a matter is commenced in the Local Court of Western Australia then an appeal lies to a single judge of the District Court of Western Australia and from there to the Full Court of the Supreme Court of Western Australia.[598]

With respect to matters commenced in the District Court of Western Australia, the proper route of appeal will depend upon whether the decision being appealled is a decision of a judge or a decision of a registrar. A person affected by a judgment, order or decision of a registrar may appeal that decision to a judge, exercising jurisdiction in chambers.[599]

If the action was originally heard by a judge of the District Court of Western Australia, then an appeal will normally lie to the Full Court of the Supreme Court of Western Australia.[600] However, as discussed later in this sub-section, whether the appeal will lie as of right or only by leave of the Full Court of the Supreme Court of Western Australia, will depend upon whether the decision of the judge of the District Court of Western Australia can be classified as either final or interlocutory. If the decision of the judge of the District Court of Western Australia is final, then an appeal will lie as of right. Otherwise, leave of the Full Court of the Supreme Court of Western Australia will be required before the appeal can proceed.

The appeal routes for actions commenced in the Supreme Court of Western Australia are much more complicated.

The correct route of an appeal will depend upon factors such as the nature of the decision which is being made, for example, whether the decision is final or interlocutory; the status of the person who has made the decision within the court hierarchy, for example, whether the decision has been made

by a registrar, master or judge and also, whether the decision was made in an exercise of federal or state jurisdiction.

The 'interlocutory'/ 'final' distinction

Prior to examining the various routes of appeal in the Supreme Court of Western Australia, it would be useful to comprehend the distinction between interlocutory and final decisions. A proceeding in an action can be described as 'interlocutory' when it is incidental to the principal object of the action, namely the obtaining of a judgment.[601] Interlocutory applications were described as applications which included all steps taken for the purposes of assisting either party in the prosecution of its case, whether before or after final judgment.[602] Consequently, applications attempting to compel discovery or to obtain further and better particulars or answers to interrogatories are all examples of interlocutory applications which could be made during the course of the conduct of a civil dispute. When an application of this nature is made, it is known as an interlocutory application. Any decision made by a member of the court with respect to any of these matters is an interlocutory decision.

However, when the word 'interlocutory' is used in the latter sense, it means that the member of the court, whilst determining the application between the parties, was not actually making a final determination of the rights of the parties in the dispute. In other words, a member of the court was making a decision as to whether or not, for example , discovery should be compelled, by order or answers to interrogatories be provided. Any decision as to these matters did not finally determine all of the dispute between the parties; the decision only determined an aspect of one of the stages in the dispute resolution process.

When a party seeks to appeal from such an interlocutory decision it will normally require the leave of the court. Interlocutory decisions are made by a court on a daily basis and if all these decisions were sought to be appealed, it would create enormous delays in the hearing of appeals and the conduct of civil disputes. It is also a matter of common sense, in the pursuit of an expeditious system of justice that not every decision should be able to be appealed when it may not affect the final determination of the rights between the parties.

Unfortunately, the distinction between a final or an interlocutory decision is not always easily identified. This is particularly so in situations where applications whilst interlocutory in nature may have the effect of appearing to finally determine the rights between the parties, once a decision has been made with respect to the application. For example, a decision dismissing an action for want of prosecution appears to finally determine the rights of the plaintiff who commenced the action. However, such a decision is considered to be an interlocutory decision because a plaintiff has a right to recommence the

action. Of course, this may only be a theoretical right as sufficient time may have passed to defeat the plaintiff's fresh action because it is outside any relevant limitation period. A further example concerns applications for the setting aside of default judgments. Once again, if a default judgment can not be set aside, it will have the effect of finally determining the rights between the parties. Because the person making the application to set aside judgment has a theoretical right to continue making applications, even after the first application has been dismissed, such a decision is considered to be an interlocutory decision.

In practical terms, in order to determine whether or not a judgment is final or interlocutory the starting point is an examination of the order made by the relevant member of the court. The consequences of the order must be examined with the view to deciding whether it finally determines the rights of the parties in the principal cause (dispute) pending between the parties. It is not sufficient that it disposes of their rights in the actual application in which the order was made or the matters out of which the application arose. The order is interlocutory if it does not finally determine the rights of the parties as between themselves and the cause of action. An order which concludes only the application in which it is made is interlocutory. Once this distinction between interlocutory and final decisions is appreciated, the system of appeals between the Supreme Court of Western Australia can be examined.

Supreme Court Appeals in Western Australia

Appeals of registrar's decisions

The starting point is to consider decisions of a registrar or case management registrar of the Supreme Court of Western Australia. Pursuant to *Supreme Court Rules* Order 60A rule 4 the person affected by an order or decision of a registrar of the Supreme Court of Western Australia may appeal to a master of the Supreme Court of Western Australia, except where the appeal is from a direction made by an appeals registrar under *Supreme Court Rules* Order 65B. Under these circumstances the appeal is to be made to a judge.

A decision of a master on an appeal from a 'procedural decision' of a registrar is final.

A 'procedural decision' is defined by *Supreme Court Rules* Order 60A rule 4(5) as:

(i) a Case Management Direction made under *Supreme Court Rules* Order 29A;
(ii) a decision as to the time for compliance with an interlocutory order;
(iii) an enforcement order made under *Supreme Court Rules* Order 29A, other than a self-executing order for judgment, striking out pleadings or otherwise.

A decision of a judge on an appeal from a decision of a registrar is final. However, this rule does not apply to an order or decision of a registrar defined by *Supreme Court Rules* Order 60A rule 4 (6), as follows:

(i) an order or decision made or given in relation to a cause, matter, question or issue referred to or tried by the Registrar under section 50 or 51 *Supreme Court Act 1935*;
(ii) an order or decision made or given in proceedings to which *Supreme Court Rules* Order 61; or
(iii) an order or decision when acting as a Taxing Officer; (*Supreme Court Rules* Order 60 rule 4 (6)).

An appeal from a registrar needs to be commenced within three days after the date of the decision and the appeal is commenced by filing a notice of appeal. The notice of appeal needs to include the following:

(i) the order or direction appealed against;
(ii) briefly, but specifically, the grounds of the appeal;
(iii) the orders or directions to be sought at the appeal.[603]

All the parties to the appeal need to file written submissions within three days after the filing of the notice of appeal.[604] No appeal books are required for the appeal and the appeal needs to be entered for hearing within seven days after it has commenced and if it is not so entered it shall be taken to have been discontinued.[605]

All documents filed with respect to the appeal pursuant to the appeal rules need to be served within 24 hours on the other parties to the appeal.[606] The appeal shall be by way of re-hearing.[607] A judge or master hearing the appeal has the powers and the duties of the Full Court and may cancel or amend any interlocutory order or case management direction made by the registrar.

A registrar or case management registrar has also been conferred fresh powers pursuant *Supreme Court Rules* Order 60A and consequently, the powers previously conferred under *Supreme Court Rules* Order 67 rule 19 have been repealed. Furthermore, the references to the court from a registrar and appeals from a registrar under Order 67 rules 20 and 21 have been repealed.[608]

The Supreme Court also makes separate provision for appeals to the Full Court from an interlocutory order or interlocutory judgment of a judge or master. An appeal also includes an application for a leave to appeal.

Appeals of judges' and master's decisions

A party wishing to commence an appeal must do so within 21 days after the order of judgment and must file the following:

(a) notice of appeal;
(b) if necessary, application for leave to appeal and a draft notice of appeal;
(c) two copies of the appeal papers.

Copies of each of the documents mentioned above is required to be served on each other party to the appeal.[609]

The notice of appeal or draft notice of appeal needs to include the following;

(a) the order or judgment appealed against;
(b) briefly, but specifically, the grounds of the appeal; and
(c) the orders to be sought at the appeal.[610]

As with appeals from a registrar, an appeal book is not necessary. But the appeal papers need to consist of all those papers that the appellant considers are necessary for the judge to determine the appeal, including an extracted copy of the order or judgment under the appeal.[611]

If a respondent to the appeal considers additional papers are necessary for the court to determine the appeal, the respondent has a right to file two copies of additional papers. The respondent must serve a copy of additional papers on each other party to the appeal within 14 days after being served with a notice of appeal and the appeal papers.[612]

Once an appeal has commenced, it is mandatory to refer the appeal to a directions hearing in chambers. The hearing ought to be before the judge or master who made the order of judgment under the appeal, but if that judge or master is absent it can be referred to another judge or master.[613] At the directions hearing, the judge or master has wide powers conferred pursuant to *Supreme Court Rules* Order 63A rule 4 (2).

At the directions hearing, if leave to appeal is granted, a draft notice of appeal can stand as the notice of appeal and if any order is made ex parte, the applicant is required to serve any other parties to the appeal with details of the order within 24 hours.[614] The appeal is also required to be entered for hearing within seven days after the directions hearing, and if it not entered then it is taken to have been discontinued.[615]

Generally *Supreme Court Rules* Order 63 applies in respect of appeals under *Supreme Court Rules* Order 63A.[616] As has been stated, pursuant *Supreme Court Rules* Order 65B an appeals registrar appointed by the Chief Justice may give directions as to any proposed appeal. The appeals registrar may also by direction limit the time to be taken by party in presenting its case, if such a direction is made, the parties to the appeal are required to file written submissions of not more than 20 pages unless the appeals registrar directs otherwise.[617]

The appeals registrar, in deciding whether to make a direction imposing a time limit on the parties to an appeal, must have regard to the following matters in addition to any other relevant matters pursuant to *Supreme Court Rules* Order 65B rule 3 (3):

(i) the complexity or simplicity of the appeal;
(ii) the state of the Court lists;
(iii) the time expected to be taken for the appeal;
(iv) the importance of the issues and the case as a whole.

Appeals from the decisions of a judge or a master that are not interlocutory in nature are governed by *Supreme Court Rules* Order 63. Under the provisions of this Order, a notice of appeal must be served and filed within 21 days from the date of the judgment, or verdict.[618]

The contents of the notice of appeal are determined by *Supreme Court Rules* Order 63 rule 2. Furthermore, a respondent who does not appeal may seek to vary the decision in whole or in part, but must give notice of the grounds upon which it seeks to do so.[619]

An appeal must be entered for hearing and appeal books lodged before the expiration of 12 weeks from the institution of the appeal.[620] An extension of time can be permitted although numerous decisions of the Full Court of the Supreme Court of Western Australia clearly indicate that an extension of time will not be automatically granted, and a party who does not promptly prosecute an appeal may find that the appeal will be dismissed.[621] .

A respondent to an appeal is also permitted to cross appeal.[622]

The powers of the Full Court of the Supreme Court of Western Australia on appeal are provided for pursuant to section 59 of the *Supreme Court Act 1935* (WA). In particular, the Full Court may order a new trial or vary or set aside a verdict or reduce damages awarded[623] before a judge and jury.[624]

Not all decisions will be amenable to appeal. In particular, the provisions of the *Supreme Court Act 1935* (WA) restrict the right to appeal in a number of situations.[625] However, in certain situations a right of appeal is partially restricted and cannot be exercised without the leave of either the relevant judge, master or the Full Court of the Supreme Court of Western Australia.[626] If an appeal can only be bought by way of leave, then the relevant application for leave will have to be made to the appropriate member of the court.[627]

Appeals to the High Court of Australia

If a party is dissatisfied with the decision of the Full Court of the Supreme Court of Western Australia (the ultimate court of appeal within the hierarchy

of courts in Western Australia) then a party may be able to appeal to the High Court of Australia. However, appeals to the High Court of Australia are by way of special leave only. In other words, appeals as of right to the High Court of Australia have been abolished.[628]

The criteria for granting special leave to appeal are set out in section 35A of the *Judiciary Act 1903* (Cth). The Act permits the High Court to have regard to any matters that it considers relevant but the High Court shall have regard to:

1. Whether the proceedings involve a question of law:
   (a) is of public importance; or
   (b) in respect of which a decision of the High Court, is required to resolve differences of opinion between different courts, or within one court, as to the state of the law; and
2. Whether the interests of justice, either generally or in a particular case, requires consideration by the High Court of the judgment to which the application relates'.[629]

Applications for special leave can be brought by video link .[630]

Current State and Federal jurisdiction and Federal Court appeals

It was noted above that the Supreme Court of Western Australia often has concurrent jurisdiction with respect to a range of matters with the Federal Court of Australia.[631] In situations where a single judge of the Supreme Court of Western Australia is exercising federal jurisdiction under specific federal legislation, then an appeal will lie to the Full Court of the Federal Court of Australia and not the Full Court of the Supreme Court of Western Australia.[632]

Whilst the majority of appeals from the Supreme Court of Western Australia to the Full Court of the Federal Court of Australia will be as of right, there will be some where the appeal will be only with leave.[633]

An appeal must be lodged within 21 days after judgment.[634] The contents of the appeal must comply with Order 52 rule 13 of the Federal Court rules, and a copy of the appeal is to be filed at the Supreme Court of Western Australia.[635] The other procedures and requirements of the procedure in the Federal Court of Australia are governed by Order 52 of the *Federal Court Rules*.

Until 1986, decisions of the Full Court of the Supreme Court of Western Australia could also be appealed to the Judicial Committee of the Privy Council. Indeed, an appeal could be brought either from a single judge or from the

Full Court of the Supreme Court of Western Australia. These appeals have been abolished.[636] Further more, any appeals from the High Court of Australia to the Judicial Committee of the Privy Council also have been abolished.[637]

The nature of appeals

Generally, appeals may be brought on points of law or mixed questions of law and fact, either alone or in conjunction with appeals on findings of fact of the lower court. An appeal on a matter of law, as a rule, has a greater chance of success than an appeal on questions of fact. If matters of fact are involved, appeal judges, are naturally very reluctant to disturb the findings of the judge who saw and heard the witnesses and had the opportunity of judging their credibility or demeanour in the witness box. A court of appeal, not having the advantages of seeing and assessing the witnesses, must decide whether the trial judge was plainly wrong. If the appellant convinces the appeal court, even though the judge relied upon demeanour in deciding facts, the decision will be reversed. However, if any doubt exists, an appeal court will generally not alter the decision. Nevertheless, an appeal court is entitled to draw its own inferences from findings of fact and can overrule a trial judge on inferences made by that trial judge.[638] Indeed, an appellate court can review a trial judge's finding on the credibility of a witness to assess whether the primary judge 'had too fragile a base to support his relevant findings'.[639]

Courts of appeal are even more reluctant to interfere with a trial judge's decision which involves an exercise of discretion. There is a presumption that a discretionary judgment has been properly exercised and an appellant must show that the decision was clearly wrong. In other words, the trial judge acted, for example, on some incorrect principle of law or gave weight to extraneous or irrelevant matters or did not give weight or sufficient weight to relevant considerations or was mistaken as to the correct facts.[640] An appeal court will be even slower in interfering with an exercise of discretion which has been exercised with respect to an application on interlocutory matters. In this context, a distinction is usually made with respect to matters of procedure and decisions which determine the rights of the parties.[641]

As a matter of general principle, matters of procedure should be dealt with at first instance as quickly, efficiently, and cheaply as possible.[642] Consequently, generally an appeal court will not review decisions on a matter of procedure. However, if an important matter of principle is at stake and an injustice would be caused by the appeal court not interfering, then this general principle is not followed.[643]

CONCLUSION

The system for the resolution of civil disputes in Western Australia has evolved over several centuries, however, its principal features can be traced back to the significant reforms which took place in the latter part of the 19th century. These reforms, resisted at the time by many members of the legal profession nevertheless occurred because of the pressure of the profound social, cultural and industrial changes which developed throughout the 19th century. Whilst important reforms have occurred since the *Judicature Acts*, fundamental changes have not been effected. The various stages and procedures relating to the resolution of civil disputes remain largely the same as those introduced by the *Judicature Acts'* reforms.

To be sure, the introduction of case management principles has had an effect on the efficiency of the civil justice system, although it is not without its critics[644] and arguably judges have been overzealous in the application of its principles.[645] Even the much heralded reforms introduced by the English labour government, through the Lord Woolf reform package, have been subject to trenchant criticism.[646] The call for reform has at its core the objectives to reduce cost and delay. However, the eagerness to effect these goals must not be at the expense of justice.

A fair and proper assessment of the present system of dispute resolution will recognise that it presents a carefully structured and integrated approach to the definition, presentation and adjudication of civil disputes. Of course, many improvements can and should be made. However, any proposed reforms must recognise and respect the considerable strengths of a system which has evolved and been carefully refined over a considerable period of time. Furthermore, changes may take many years and considerable litigation to establish their meaning.[647] Too often, reform is an end in itself appeasing reactionary notions of justice. One of the principal difficulties is that little research has been undertaken into the operation and effects of the civil justice system. By contrast, considerable effort and research has been undertaken with respect to the criminal justice system. Consequently, there is a danger that reform of the civil justice system is based upon idealistic and impressionistic evaluations rather than carefully researched and reasoned arguments.[648]

Reform must be a means to an end. The end must be to preserve a rational, coherent system of dispute resolution with its principal goal the achievement of justice between parties involved in civil disputes.

ENDNOTES

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1 A debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). W Jowitt, *Dictionary of English Law* (2nd ed, 1977) 562. In practice, it is important to distinguish an action for the recovery of a debt and an action for the recovery of damages, arising from a breach of contract. There are a number of procedural advantages which attached to the recovery of a debt, JW Carter and DJ Harland, *Contract Law in Australia* (3rd ed, 1996) 819-820. The expression 'debt' is used when a person claims the recovery of a liquidated or certain sum of money rather than a claim where the amount that would be ordered by a court needs to be assessed. *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436.

2 These obligations will be enforced either by use of the remedy known as 'specific performance' or the use of an injunction. For a description of these remedies: see below n 59.

3 These claims are referred to as claims for 'damages'. Indeed, where a breach of contract occurs, the party not in breach would generally be entitled to recover damages. The ability to claim damages is implied by law. *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849.

4 Depending upon the relationship between the consumer who was injured and the party wh0 has caused the injury, liability for injuries suffered through the use of a defective product can be grounded either in tort, contract or statute. The law of 'tort' refers to the body of common law which establishes liability for civil wrongs. Negligence, which refers to the doing of an act which a reasonable person would not do or the failure to undo an act which a reasonable person would do, is the most common basis for tortious conduct. A 'contract' refers to a legal enforceable agreement entered into by two or more persons. A wide range of state and federal legislation imposes liability for defective products. See, generally, E Beerworth, *Product Liability: Australia* (1995) Vols 1 and 2. In almost all cases, the consumer who establishes a claim will be compensated by an award of damages.

5 See *Occupiers Liability Act 1985* (WA).

6 See *Motor Vehicle (Third Party Insurance) Act 1943* (WA).

7 An 'injunction' refers to an order or judgment of a court upon which a party to an action is required to do, or refrain from doing, a particular thing. Injunctions are further explained below n 59.

8 A variety of disputes can arise with respect to deceased's estates. However, the principal disputes will relate to the validity of a deceased's will; disputes relating to the proper interpretation or construction of the will and disputes relating to the adequacy of any provision made under a will or indeed in circumstances where no provision has been made at all and a claim for provision is made. These latter disputes will normally be dealt with under the provisions of *Inheritance (Family and Dependants Provision) Act 1972* (WA).

9 A claim which is frequently met in practice is one which alleges that a party has been engaging in 'misleading or deceptive' conduct contrary to the provisions of the *Trade Practices Act 1974* (Cth) s 52 or the *Fair Trading Act 1987* (WA) s 10.

10 Jack IH Jacob, *Then and Now 1799-1974* (1974). The reference to 'justice between man and man' can be found in the *Speeches of Lord Brougham with Historical Introduction* (1838) Vol II, 324.

11 The Industrial Relations Commission is constituted pursuant to the *Industrial Relations Act 1979* (WA) and has jurisdiction restricted to industrial matters defined pursuant to s 23. Pursuant to s 90, an appeal lies from decisions of the Commission to the Industrial Appeal Court. However an appeal lies only where the decision is erroneous in law or in excess of jurisdiction. Pursuant to s 81, an Industrial Magistrate's Court has also been established, with both 'general' jurisdiction and 'prosecution' jurisdiction (s 81CA).

12 Modern legal theory distinguishes 'rules' and 'principles'. This issue is beyond the scope of this sub-section. See, generally, RM Dworkin, *Taking Rights Seriously* (1977) chs 2-4; Stephen Guest, *Ronald Dworkin* (1992); JW Harris, *Legal Philosophies* (1980) ch 14; N MacCormick, *HLA Hart* (1981) ch 10; NE Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (1986) ch 6; J Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 824; M Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (1984) 301-302. For a larger bibliography see C Tapper, 'A Note on Principles' (1971) 34 *New Law Review* 628-634; W Twining and D Miers, *How to do Things with Rules* (3rd ed, 1992) 132-135. These references were taken from Neil Andrews, *Principles of Civil Procedure* (1994) 11.

13 See, generally, DC Pearce, *Delegated Legislation in Australia and New Zealand* (1977).

14 Ibid chs 1 and 9.

15 See p 158.

16 Jowitt, above n 1, 391-392.

17 Ibid.

18 For a more detailed discussion of the characteristics of the adversarial system: see pp 167-168.

19 This Latin expression refers to the notion that a particular territory belongs to no State, that is, it is not inhabited by a community with a social and political organisation. See the *Macquarie Dictionary* (3rd ed, 1997). As applied to Australia, it particularly refers to the concept that Australia before European settlement was without legal owners.

20 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 35.

21 *Western Australia v The Commonwealth* [1994] 183 CLR 373, 424.

22 Ibid 425.

23 Ibid.

24 There are numerous histories of the development of the common law. Perhaps the most famous is Sir William Holdsworth, *A History of English Law* (6th ed, 1938) which consists of 16 volumes, however, there are shorter and more accessible histories. These include: E Jenks, *A Short History of English Law* (3rd ed, 1924); JH Baker, *An Introduction to English Legal History* (3rd ed, 1990); SFC Milsom, *Historical Foundations of the Common Law* (1981); Theodore FT Plucknett, *A Concise History of the Common Law* (4th ed, 1948).

25 *Supreme Court Act 1935* (WA) s 16.

26 Jacob, above n 10, 195.

27 Ibid.

28 W Blake Odgers, 'Changes in Procedure and in the Law of Evidence' in *A Century of Law Reform* (1901) 203-240.

29 Jacob, above n 10, 195-196.

30 Lord Bowen, 'Progress in the Administration of Justice during the Victorian Period' in TH Ward (ed), *The Reign of Queen Victoria: A Survey of Fifty Years of Progress* (1887) Vol 1, 281-329, and reprinted in Association of American Law Schools (eds) *Select Essays in Anglo-American Legal History* (1907) Vol 1, 517-557.

31 Jacob, above n 10, 196.

32 Ibid.

33 Bowen, above n 30, 518.

34 Jacob, above n 10, 196.

35 Ibid.

36 Ibid.

37 Ibid.

38 In the division of actions, a personal action originally referred to an action which was brought to enforce a remedy against a person, while a 'real action' referred to a situation where the remedy was to recover a thing, the *res* itself. Therefore, an action on a contract or tort was a personal action, while an action to recover land was a real action, because the land itself could always be recovered. Sometimes a reference is made to an action being *in personam*, referring to a personal action and an action *in rem* referring to a real action. The distinction remains important and the jurisdiction of courts in Western Australia is defined by reference to these concepts. See eg *Local Courts Act 1904* (WA) s 30, *District Court of Western Australia Act 1969* (WA) s 50. See also, Jowitt, above n 1, Vol II, 1355.

39 Jacob, above n 10, 196.

40 Ibid.

41 Ibid.

42 Ibid.

43 Bowen, above n 30, 520.

44 Jacob, above n 10, 197. These jury actions were said to be at *nisi prius*. In practice, a trial at *nisi prius* occurred where an action was tried by a jury before a single judge, either at the sittings held for that purpose in London and Middlesex, or at the assizes. Formerly, all common law actions were tried before the Full Court, consisting of several judges and therefore, the writ for summoning the jury commanded a sheriff to bring the jurors from the county where the cause of action arose to the court at Westminster. However, it was provided by Magna Carta, 1215, that certain remedies should instead of being tried at Westminster, in the Superior Courts, be taken in their proper counties and for this purpose justices were sent into every county once a year to hear actions at the location where the cause of action arose. The verdict itself was then returned to the

court at Westminster. This occurred pursuant to the Statute of *nisi prius*, 1285. 'Assize' is an ancient term for a legislative enactment. The legislative enactment could indicate the means by which any issue arising under legislative enactment was to be tried. Consequently, the proceedings and the method of trial by jury became known as the 'assizes'. The two famous assizes were the assize of novel disseisin, which was a real action to recover land of which a person had been recently disseised and assize of mort d'ancestor which was a real action which later recovered land of which a person had recently been deprived on the death of an ancestor by the abatement or intrusion of a stranger. Magna Carta provided that the assizes of novel disseisin and mort d'ancestor could only be taken in the shires where the land in dispute was situated. For this purpose, justices were sent into the country once a year and they came to be called justices of assize. Consequently, trials of civil actions before judges and circuit were set to take place at the assizes. (Jowitt, above n 1, 148-149 and 1239-1240).

45 Odgers, above n 28, 212.

46 The Common Law Commissioners, Parliamenatry Papers, *First Report,* Parliamentary Article (1829) summarise these as follows: in the King's Bench by Original Writs adapted to the Action or by Bill which could be by (1) Attachment of Privilege, (2) Bill of Middlesex, (3) Latitat, (4) Bill and Summons, the first three methods being either bailable or not bailable; in the Common Pleas (1) by Original Writ adapted to the Action, (2) by Original Writ of *Quare Clasum Fregit*, (3) by *Common Capias* which was bailable or not bailable, (4) by Bill of Attachment of Privilege or (5) by Bill and Summons; in the Exchequer by (1) *Venire ad Respondendum* (2) *Subpoena ad Respondendum* (3) *Quo Minus Capias*, (4) *Venire of Privilege*, (5) *Capias of Privilege* and (6) Bill and Summons.

47 See generally, FW Maitland, *The Forms of Action at Common Law: A Course of Lectures* (1936). Immediately before 1875 the following were the several forms of action known to the law: on contract, there were (a) covenant, being on a deed alone; (b) assumpsit, being on a simple contract only; (c) debt, being either on a deed or on a simple contract; (d) scire facias, being on a judgment; (e) account; (f) annuity: On tort, they were (a) trespass, quare clausum fregit, to real property and trespass, *de bonis asportatis,* to goods; (b) case; (c) trover; (d) detinue; and (e) replevin: and finally, the mixed action of ejectment. Furthermore, prior to 1875, the expression 'action' generally meant a proceeding in one of the common law courts, as opposed to a suit in equity. See, Jowitt, above n 1, Vol I, 39-40.

48 Jacob, above n 10, 199.

49 Ibid.

50 Ibid.

51 Jowitt, above n 1, Vol II, 1371; Jacob, above n 10, 199. A rather unsympathetic portrayal of Edward I, referred to as 'Edward Longshanks', was presented in the popular contemporary film 'Braveheart'. However, Edward I undertook a number of legal reforms and, continuing the work of Henry II, established a centralised government and a common law.

52 Jacob, above n 10, 199.

53 Ibid.

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid 200.

59 An 'injunction' refers to an order or judgment of a court by which a party to an action is required to do, or refrain from doing, a particular thing. An injunction can either be restrictive or preventative in nature or mandatory. Consequently, an injunction restraining a party from causing a nuisance is an example of a restrictive injunction. However an injunction ordering a person to take down or remove a wall is an example of a mandatory injunction. An injunction can either be awarded by a court on an interim basis which can also be referred to as an interlocutory injunction or an injunction can be perpetual. With respect to 'interlocutory' injunctions, see below.

A 'declaration' refers to an order or a judgment of the court which gives the decision or opinion of the court on a question of law in a case. For example, in an action raising a question as to the proper construction (interpretation) of a will, the judgment or order can declare that according to the true construction (interpretation) of the will the plaintiff has become entitled to a particular disposition under the will.

The expression 'specific performance' refers to a judgment or order of the court where a party will be compelled to perform specifically what they have agreed to do pursuant to an agreement. The common law only gave damages to a party for the non-performance of an agreement. In other words, a common law court could grant a remedy of damages for non-performance. However, in

equity, it is possible to obtain an order that a party perform his or her obligations as specified in the contract, for example, for the sale or purchase of property. It is an order that can compel a sale or purchase of property in accordance with any obligations imposed by the relevant agreement.

'Rectification' refers to a judgment or order of the court which permits the parties to an agreement to rectify a written document which, as drawn, does not express the mutual or concurrent intention of the parties.

'Rescission' or the act of 'rescinding' can refer to the act of the party putting an end to a contract. However, it can also and perhaps more properly refer to an order or judgment of a court to put an end to a contract and, consequently a party's obligations pursuant to that contract, because of factors such as fraud or misrepresentation.

60 Jacob, above n 10, 200.

61 The expression 'judgment debtor' refers to a person against whom a judgment to pay a sum of money has been ordered and the payment has not been made or remains unsatisfied. See, Jowitt, above n 1, Vol 1, 1028.

62 This process enabled a debtor to be imprisoned. 'The imprisoned debtors (unless they could afford to pay extortionate sums for slightly better accommodation) were confined in small dark, damp, crowded rooms – rooms with no ventilation and often full of vermin. No bed was provided; the sexes were not separated; moral corruption and physical disease were the inevitable results. The misery which they suffered is powerfully described in the pages of Dickens and Thackeray.' (Odgers, above n 28, 219).

63 Jacob, above n 10, 200.

64 Ibid.

65 *Gee v Pritchard* (1818) 2 Swans 402, 414.

66 Bowen, above n 30, 524.

67 Jacob, above n 10, 201.

68 Ibid.

69 Ibid. Apparently, John Wesley described a Chancery Bill as 'that foul monster'. See, Agustine Burrell, 'Changes in Equity, Procedure and Principles' in *A Century of Law Reform* (1901) 177-202, 182. The Chancery Bill contained nine parts: 181.

70 Jacob, above n 10, 201.

71 Ibid.

72 Ibid 202. The picture of the Chancery suit of *Jarndyce v Jarndyce* depicted by Charles Dickens in *Bleak House* is based upon genuine history. In the mid 19th century, a boxing hold was even known as 'to get in Chancery'. It consisted of an opponent getting the other's head locked under one of his arms while he pounded it with his other fist. The Jennings case, which inspired Jarndyce in *Bleak House* began in 1798 with the death of an old man who left £1 500 000. The case had still not been settled by 1915, by which time the costs had risen to £250 000. See, Daniel Pool, *What Jane Austen Ate and Charles Dickens' Knew* (1998) 107.

73 Jacob, above n 10, 202.

74 Ibid 202. Jeremy Bentham, the famous 19th century reformer, referred to Lord Eldon as the 'Lord of Doubts'.

75 Odgers, above n 28, 223; Bowen, above n 30, 529 reports this remark of Mr George Spence, the author of a well known work on the equitable jurisdiction of the Court of Chancery.

76 Jacob, above n 10, 203.

77 These included ecclesiastical courts. There were four church courts, referred to collectively (along with Admiralty Courts) as Doctors' Commons. These courts exercised authority over the personal estates of deceased persons whether or not they left a will upon death. The Court of Arches was the court of the archbishop of Canterbury, and also had a Court of Faculties, which was in charge of giving special permission to do things, like hold plural livings. The Consistory Court was the court of the local bishop of London, and it handled divorces and wills. The Prerogative Court handled the wills of bishops and of people who died in one bishop's diocese but left property worth more than £5 in another bishop's diocese. The operation of the Doctors' Commons and the ecclesiastical officials are described by Charles Dickens in *David Copperfield*. David Copperfield, fiction's most famous articled clerk, served his apprenticeship in law amid the advocates and proctors who practised in the Church and Admiralty Courts at Doctors' Commons. Advocates in Doctors' Commons, that is the persons who actually worked in the court room, were sometimes referred to as 'civilians', because to appear in court one needed a doctorate in civil laws from either Oxford or Cambridge. (Pool, above n 72, 111).

Other courts included the 'Welsh Judicature' consisting of the Courts of Great Sessions, which had

existed since the reign of Henry VIII. There are also the three ancient Palatine Courts of the Duchy of Lancaster, the County of Chester, and the County of Durham. Furthermore, there were numerous borough and local inferior courts of record, of which the more important were the Lord Mayor's Court in the City of London, the Tolzey Court of Bristol, the Liverpool Court of Passage, the Salford Hundred Court and the Norwich Guild Hall Court; and the courts held by the Sheriff and courts of Cinque Ports. There were other ancient courts but they were almost obsolete by 1800 (Jacob, above n 10, 204).

78 The relevant date for assessing the jurisdiction of the earliest court in Western Australia, the Supreme Court of Western Australia, is 1861.

79 Jacob, above n 10, 205.

80 2 WM 4, C 39.

81 The method of commencement of proceedings in courts exercising civil jurisdiction in Western Australia is described later and also in sub-section 2.4.

82 These statutes were mainly passed for the amendment of the process and mode of pleading in the superior Courts of Common Law at Westminster.

83 The *Chancery Practice Amendment Act 1858* (Imp), was introduced by Mr Cairns who later became Lord Cairns. At the time he introduced the amendment, he was solicitor general and a member of the House of Commons. The amendment, for the first time, enabled the Court of Chancery to award damages in addition to, or in substitution for, a decree for specific performance, or in addition to, or in substitution for, an injunction in certain circumstances. The effect of the amendment is reproduced in the *Supreme Court Act 1935* (WA) s 25(10): see Jowitt, above n 1, 1 and 392.

84 For a history of the period prior to the introduction of the *Judicature Acts* and the judicature system introduced by these Acts, see, RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrine and Remedies* (3rd ed, 1992) Part 1.

85 Ibid 37.

86 Ibid.

87 Ibid.

88 Ibid.

89 Ibid 38.

90 See also WS Holdsworth, 'The Movement for Reforms in the Law (1793-1832)' (1940) 56 *Law Quarterly Review* 33; WS Holdsworth, 'The Principal Pioneers of Law Reform' (1940) 56 *Law Quarterly Review* 208; WS Holdworth, 'Brougham's Speech of 1828' (1940) 56 *Law Quarterly Review* 340. See, especially, Edson R Sunderland, 'The English Struggle for Procedural Reform' (1925-1926) 39 *Harvard Law Review* 725.

91 Jacob, above n 10, 206.

92 JM Zane, 'The Five Ages of the Bench and Bar of England', in Association of American Law Schools (eds), *Select Essays in Anglo-American Legal History,* above n 30, 724; and see Sunderland, above n 90, 728 'as the Political Head of the Legal Cult, Lord Eldon sat on the woolsack for almost a generation (1802-1827) keen, alert, steadfast, tireless, fearful of innovations, devoting all the resources of a powerful and technical mind to the preservation of a current practice of the day.'

93 Jacob, above n 10, 207.

94 Ibid.

95 Ibid.

96 See, JF Dillon, 'Bentham's Influence in the Reforms of the Nineteenth Century,' in Association of American Law Schools (eds), *Select Essays in Anglo-American Legal History,* above n 30, 494.

97 Sunderland, above n 90, 729-731.

98 For a review of law reform during the 19th century: see Cecil Carr, 'A Victorian Law Reform's Correspondence' (Paper presented at the Selden Society Annual Lecture, 1955).

99 Jacob, above n 10, 208.

100 Cited in the Report of the Committee on Civil Judicial Statistics (1968) Cmnd. 3684, 2.

101 See Jeremy Bentham, *A Fragment on Government and an Introduction to the Principles of Morals and Legislation* (1948).

102 Jacob, above n 10, 209; see also, *Speeches of Lord Brougham with Historical Introduction*, above n 10, 319-486. Apparently, Lord Brougham spoke for six hours during which he ate a hatful of oranges — the only refreshment then permitted by the rules of the House. A summary of the speech can be found in Holdsworth, above n 90, 340. The main subjects dealt with in the speech were the court's procedure, pleading and evidence. Following the speech Bentham is reported as remarking 'Mr Brougham's mountain is delivered, and behold, a mouse. The wisdom of the reformer could

not overcome the craft of the lawyer.' Jacob, above n 10, 209. The members of the commission to enquire into the practice and procedure of the Courts of the Common Law were Bosanquet Parker Alderson and Stephen and on the first three of these being elevated to the bench, they were replaced by Pollock, Starkie, Evans and Wightman. A commission to enquire into the work of the Court of Chancery had earlier presented two reports in 1826 and 1828 but no legislation had resulted until 1830.

103 Jacob, ibid.

104 Above n 83.

105 The Judicature Commission was appointed in 1867: see Jacob, above n 10, 209-210.

106 Meagher et al, above n 84, 39.

107 Jacob, above n 10, 210.

108 Above n 84.

109 *Supreme Court of Judicature (Consolidation) Act 1925* (Imp) s 36.

110 See *Judicature Act 1873* (Imp) s 60 as amended by *Judicature Act 1875* (Imp) s 13 and see *District Registry's Order in Council 1899*.

111 The *Judicature Acts* created the office of 'Official Referee' to enable prolonged or detailed enquiries and accounts to be dealt with by separate officers. This was intended to relieve the main body of the judges from performing their ordinary judicial duties. However, the office has now been abolished.

112 Above n 13.

113 See *Bartholomew v Carter* (1841) 3 Man & G 125; S Rosenbaum, *The Rule-Making Authority in the English Supreme Court* (1917) 4.

114 Under this power, the Hilary Rules were made in 1834. The word 'Hilary' referred to the terms or 'sessions' during which the superior courts of common law held court. These terms or sessions were Michaelmas Lent, Easter and Hilary. For a criticism of the operation of these Rules: see WS Holdsworth, 'The New Rules of Pleading of the Hilary Term 1834' (1923) 1 *Cambridge Law Journal* 261.

115 *Common Law Procedure Act 1852* (Imp) ss 223-225; *Common Law Procedure Act 1854* (Imp) ss 97-98; *Chancery Practice Amendment Act 1850* (Imp) ss 30-32; *Chancery Amendment Act 1858* ss 11-12, by virtue of which the beneficial Consolidation Orders of 1860 were issued. (Jacob, above n 10, 213).

116 Above n 88.

117 Jacob, above n 10, 213.

118 Ibid 213-214.

119 See Lawrence Jackson, *Foreword to the Rules of the Supreme Court 1971* (WA). See also GJ Boylson, *Commentary on the Rules of the Supreme Court 1971*. Regrettably, this foreword and commentary were omitted from later reprints of the rules.

120 Meagher et al, above n 84, 17-18. For a history of the development of the legal system in Western Australia: see also A Castles, *An Australian Legal History* (1982) ch 12; E Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (1980).

121 Meagher et al, above n 84, 17-18. .

122 10 Geo IV c 22.

123 2 Wm IV No 1, which was later amended by 6 Wm IV No.1.

124 Meagher et al, above n 84, 18.

125 Ibid.

126 Ibid.

127 Ibid.

128 Ibid.

129 Ibid.

130 Ibid.

131 John Fiocco, Marion Brewer, Stephen Owen-Conway QC and Gresley Clarkson QC, *Civil Procedure in Western Australia Practice Manual for 1998* (1998) 6.

132 *Local Courts Act 1904* (WA) came into operation 1 January 1905.

133 The *District Court of Western Australia Act 1969* was proclaimed on 17 November 1969.

134 *Supreme Court Act 1935* (WA) Part II, ss 6-15.

135 Fiocco et al, above n 131 [2.120].

136 *Supreme Court Act 1935* (WA) s 16(1)(a) refers to jurisdiction of the Courts of Queens Bench, Common Pleas and Exchequer and of the Lord Chancellor.

137 *Supreme Court Act 1935* (WA) s 16(1)(a).

138 Eg *Local Courts Act 1904* (WA) ss 30-35.

139 Eg *District Court of Western Australia Act 1969* s 50(1)(bb).

140 Eg *Trade Practices Act 1974* (Cth) s 86(4), *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 8-9, and *Workplace Relations Act 1996* (Cth) s 414.

141 Eg *Workers' Compensation and Rehabilitation Act 1981* (WA).

142 In Western Australia, both the District Court and Supreme Court of Western Australia have appellate jurisdiction.

143 Above n 140.

144 Eg, an action for the enforcement of remedies under the *Copyright Act 1968* (Cth) Part V can be brought in either the Federal Court of Australia or the Supreme Court of Western Australia.

145 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); eg *Ex parte Anthony Gordon Oates* (Unreported, Supreme Court WA, Anderson J, 1997, Lib No 970350).

146 *Local Courts Act 1904* (WA) ss 30-35.

147 *Local Courts Act 1904* (WA) ss 36-38B.

148 *Local Courts Act 1904* (WA) ss 30(1); *Scroll Nominees Pty Ltd v McDermott* (1996) 16 SR (WA) 373 (Healy J).

149 *Local Courts Act 1904* (WA) s 30(1).

150 *Local Courts Act 1904* (WA) s 30(2)(a): 'Ejectment' is an action for the taking of possession of land.

151 If the title to land incidentally comes into question in the proceedings, the court can still deal with the dispute but any judgment of the court is not to be evidence of title between the parties or their privies who have an interest in the land through the party in any other proceedings in the court or in any other court. *Ellis v Dunlop Olympic Ltd* (1984) 2 SR (WA) 68. Title to land can be obtained by registering the property under the Torrens Systems. A feature of the Torrens System is that there is no title until registration: *Breskvar v Wall* (1971) 126 CLR 376.

152 A gift or disposition by will; Jowitt, above n 1, vol 1, 610.

153 A gift by will; Jowitt, ibid 207.

154 *Local Courts Act 1904* (WA) s 30(2)(c).

155 *Local Courts Act 1904* (WA) s 30(2)(d); 'Libel': a defamatory material in a permanent form: *Forrester v Tyrell* (1893) 9 TLR 257; 'Slander': a false and defamatory statement concerning a person, made by word of mouth or in other transient form.

156 *Local Courts Act 1904* (WA) s 30(2)(e); see *Motor Vehicle (Third Party Insurance) Act 1943* (WA).

157 *Local Courts Act 1904* (WA) s 30(2)(f); 'seduction': inducing a girl or woman to part with her virtue — not used in a modern context.

158 *Commissioner of State Taxation v Mark Chew Holdings Pty Ltd* (1987) 4 SR (WA) 129 (Kennedy J).

159 Above n 148.

160 *Local Courts Act 1904* (WA) s 36A(1); *Kresta Blinds Ltd v Whitford* (1991) 7 SR (WA) 313 (Keall J).

161 *Local Courts Act 1904* (WA) s 36A(3).

162 *Local Courts Act 1904* (WA) s 36A(4).

163 *Local Courts Act 1904* (WA) s 36A(5).

164 *Local Courts Act 1904* (WA) s 36A(6).

165 *Local Courts Act 1904* (WA) s 36A(7).

166 *Local Courts Act 1904* (WA) s 36A(8).

167 *Local Courts Act 1904* (WA) s 39. Logically, this would not apply to actions which have already been excluded from the jurisdiction of the Local Court, eg, actions for damages arising out of injuries suffered in motor vehicles which have been excluded by s 30(2).

168 *Local Courts Act 1904* (WA) s 106C.

169 See *Stipendiary Magistrates Act 1957* (WA).

170 *Local Courts Act 1904* (WA) s 106L.

171 *Local Courts Act 1904* (WA) s 106N(1); *De Vries v Smallridge* [1928] 1 KB 482, 487; an 'appeal' is the judicial examination by a higher court of the decision of an inferior court.

172 *Stipendiary Magistrates Act 1957* (WA) s 106N(2)(a); *Dunbar & Co v Scottish County Investment Co Ltd* [1920] SC 210, 216, 218; 'prerogative writs' are court orders providing remedies of a particular

character for different kinds of administrative action. There are six types: (1) mandamus; (2) prohibition; (3) procedendo; (4) certiorari; (5) quo warranto; (6) habeas corpus. In this particular context it refers to the ability of a superior court to review a decision of an inferior court to the use of prerogative writs. Prerogative writ procedure enables a superior court to review the decision of the inferior court without a recourse to appellate procedures. However, if appellate procedures ought to be followed, then a superior court will not normally grant a prerogative writ. For the use of prerogative writs in Western Australia see P Seaman, *Civil Procedure in Western Australia* (1990) 11009-11014.

173 *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992* (WA); see *Palmer v Clark* (1989) 19 NSWLR 158, 167; Seaman, above n 172, 52,958.

174 *District Court of Western Australia Act 1969* (WA) ss 50-63; Seaman, above n 172, 52,958.

175 Seaman, above n 172, 52,958.

176 Ibid.

177 Ibid.

178 Ibid; and see eg *Putnin (as Liquidator) v Jenka Pty Ltd (1994)* 11WAR 467, 470 (FC).

179 Seaman, above n 172, 52,958.

180 Ibid 52,959.

181 Ibid; and see *District Court of Western Australia Act 1969* (WA) s 50(1).

182 Seaman, above 172, 52,959 and see *District Court of Western Australia Act 1969* (WA) s 50(2).

183 *District Court of Western Australia Act 1969* (WA) s 50 (1)(b); see above n 1.

184 *District Court of Western Australia Act 1969* (WA) s 50(1)(b).

185 *District Court of Western Australia Act 1969* (WA) s 50(1)(ba); 'intestacy' is the situation where a person dies without leaving a will.

186 *District Court of Western Australia Act 1969* (WA) s50(1)(ba); 'legacy' is a gift of personal property by will.

187 *District Court of Western Australia Act 1969* (WA) s 50(1)(c); Part V, ss 94-98; 'replevin' is a common law remedy by which a person deprived of the possession of his goods or property may recover them from another who is unlawfully detaining them.

188 With respect to specific performance, see above n 59.

189 *District Court of Western Australia Act 1969* (WA) s 50(1)(bb); With respect to 'rectifying' an agreement see above n 59.

190 *District Court of Western Australia Act 1969* (WA) s 50(1)(bb); 'delivering up' is a court order that requires goods to be returned to the person entitled to their possession.

191 *District Court of Western Australia Act 1969* (WA) s 50(1)(bb); 'cancelling agreement' means to make an agreement null or void. The cancellation of an agreement can also refer to the 'rescission' of an agreement, with respect to which see above n 59.

192 Above n 150.

193 *District Court of Western Australia Act 1969* (WA) s 50(1)(d); 'ground rent' is the rent paid under a building lease or generally for the use of vacant land upon which a building is intended to be constructed.

194 *District Court of Western Australia Act 1969* (WA) s 50(1)(d).

195 *District Court of Western Australia Act 1969* (WA) s 50(1)(e); This jurisdiction is similar to that conferred on the Local Court of Western Australia pursuant to s 39 of the *Local Courts Act 1904* (WA). See, also above n 167.

196 *District Court of Western Australia Act 1969* (WA) s 50(1)(f).

197 *District Court of Western Australia Act 1969* (WA) s 50(1)(aa) — gives the court jurisdiction without financial limitation in respect of an action claiming an indemnity where it arises from or relates to another action that is before the court. It remains to be decided whether the court possesses the increased jurisdiction whenever the proceedings were commenced upon the basis that the enactment is procedural; See obiter dicta in *Ex parte Palmer; Re McCabe* (1967) 69 SR (NSW) 140, 142-144.

198 *District Court of Western Australia Act 1969* (WA) s 50(1a).

199 Above n 146 and 173.

200 *District Court of Western Australia Act 1969* (WA) ss 50-63; *Local Courts Act 1904* (WA) ss 30-35, 94, 99,100, 103; *Gladstone Enterprises Pty Ltd v Shortis* (1989) 5 SR (WA) 123.

201 *District Court of Western Australia Act 1969* (WA) s 50(1) amended in 1981 allowing equitable remedies to be granted as secondary relief to personal actions where the amount of the claim does not exceed $250 000.

202 *District Court of Western Australia Act 1969* (WA) s 50(1).

203 *Supreme Court Act 1935* (WA) ss 24-25.

204 *Hondros and Tholet v Chesson* [1981] WAR 146 (Burt CJ); with respect to the meaning of 'injunction': see above n 59.

205 *Green & Co v Cooper & Oxley Construction Co Pty Ltd* (Unreported, Supreme Court of WA, Adams M, 1991, Lib No 8709).

206 *Local Courts Act 1904* (WA) s 107(1)(a).

207 *Ebsary v Radam Pty Ltd* (1991) 7 SR (WA) 209.

208 A final judgment refers to a judgment which puts an end to an action which has been commenced for the resolution of the civil dispute by declaring that the plaintiff is or is not entitled to the remedy that has been sought. That is, nothing remains to be done but to execute (enforce) the judgment, if the defendant does not voluntarily satisfy the terms of the judgment. The identification of a final judgment is extremely important in determining whether a party has a right of appeal. If a judgment is not a final judgment it is referred to as 'interlocutory judgment'. An interlocutory judgment is one which does not terminate the action because it is not complete and definite. In practice, it is not always easy to determine whether a judgment is a final or interlocutory judgment. See eg *Hughes v Gales* (1995) 14 WAR 434 (FC); *Carr v Finance Corporation of Australia Ltd No 1* (1981) 147 CLR 246; *No 2* (1982) 150 CLR 139. See also 'Current Topics – A Judicial Call for a Statutory Definition of Interlocutory' (1984) 58 *Australian Law Journal* 125.

209 A judgment is a final decision obtained in an action and every other decision is an order. See *Moore, Ex parte; In re Faithfull* (1885) 14 QBD 627.

210 The expression 'decision' refers to a 'judgment'. In this context, a decision could be either a final judgment or interlocutory judgment. See above n 208.

211 Seaman, above n 172, 52,973. The word 'determination' is not used in the *Local Courts Act 1904* (WA) and in this context it is difficult to distinguish it from the word 'decision'. Consequently, in this context it could refer to a final or interlocutory judgment.

212 The formal word which is used in a legal context is the word 'leave'.

213 *Local Courts Act 1904* (WA) s 107(1)(b).

214 These statutes include: *Architects Act 1921* (WA) s 16, *Builders Registration Act 1939* (WA) s 14, *Building Societies Act 1976* (WA) s 68, *Commercial Tribunal Act 1984* (WA) s 20, *Credit Administration Act 1984* (WA) s 24, *Criminal Injuries Compensation Act 1985* (WA) s 41, *Finance Brokers Control Act 1975* (WA) s 23, *Land Valuers Licensing Act 1978* (WA) s 16, *Medical Act 1894* (WA) s 21, *Securities Industry Act 1975* (WA) s23, *Settlement Agents' Act 1981* (WA) s105, *Strata Titles Act 1985* (WA) s23, *Travel Agents Act 1985* (WA) ss 62 and 118, *Veterinary Surgeons Act 1960* (WA) s 22, *Real Estate and Business Agents Act 1978* (WA) s 23, and *Retirement Villages Act 1992* (WA) s 51.

215 *Supreme Court Act 1935* (WA) ss 16 and 18; see above n 141.

216 *Supreme Court Act 1935* (WA) s 16(1)(a); see above n 131.

217 See above n 144.

218 The Federal Court of Australia has exclusive jurisdiction over bankruptcy pursuant to the *Bankruptcy Act 1966* (Cth) s 27 and has exercised bankruptcy jurisdiction in Western Australia since 11 March 1985. The jurisdiction and powers of the Industrial Relations Court of Australia, or a judge of that court, were vested in the Federal Court of Australia under Part 3 Provision 2 of Schedule 16 to the *Workplace Relations and other Legislation Amendment Act 1966* (Cth) on 26 May 1997.

219 *Trade Practices Act 1974* (Cth) s 86.

220 See eg *Trade Practices Act 1974* (Cth) s 86.

221 Fiocco et al, above n 131 [2.600]. The *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) was assented to on 26 May 1987, at the same time as the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth). Parallel legislation was an enacted in each of the States and the Northern Territory. The *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth) came fully into operation on 1 September 1987, whilst each of the other various Acts came into operation on 1 July 1988.

222 See above n 140.

223 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) s 4(1).

224 *Admiralty Act 1988* (Cth).

225 *Admiralty Act 1988* (Cth) ss 44 and 45.

226 *Admiralty Act 1988* (Cth) s 9.

227 *Admiralty Act 1988* (Cth) s 10.

228 *Supreme Court Act 1935* (WA) s 16(1)(a).

229 *Admiralty Act 1988* (Cth) s 16(1)(a). One important area of 'overlapping' or 'concurrent' jurisdiction is with respect to all personal actions making a claim for damages in respect of the debt or bodily injury to a person and in relation to proceedings arising in respect of those personal actions under the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) . Actions of this kind can be brought either in the Supreme Court or the District Court of Western Australia. However, as a matter of practice actions of this kind are commenced in the District Court of Western Australia: *District Court of Western Australia Act 1969* (WA) s 50(2).

230 *District Court of Western Australia Act 1969* (WA) s 73.

231 *District Court of Western Australia Act 1969* (WA) s 73(1)(b).

232 *District Court of Western Australia Act 1969* (WA) ss 76 and 77.

233 *District Court of Western Australia Act 1969* (WA) ss 76 and 77.

234 *District Court of Western Australia Act 1969* (WA) ss 76 and 77.

235 *District Court of Western Australia Act 1969* (WA) s 75.

236 *District Court of Western Australia Act 1969* (WA) s 74; *Local Court Rules 1961* (WA) O 34

237 *Jurisdiction of the Courts (Cross-vesting) Act 1987* (Cth) s 5; see also *Rules of the Supreme Court 1971* (WA) O 81E.

238 *Jurisdiction of the Courts (Cross-vesting) Act 1987* (Cth) s 5(1).

239 *Jurisdiction of the Courts (Cross-vesting) Act 1987* (Cth) s 5(2).

240 *Jurisdiction of the Courts (Cross-vesting) Act 1987* (Cth) s 5(3).

241 *Jurisdiction of the Courts (Cross-vesting) Act 1987* (Cth) s 5(4).

242 *Jurisdiction of the Courts (Cross-vesting) Act 1987* (Cth) s 6; 'special Federal matter' defined by *Jurisdiction of the Courts (Cross-vesting) Act 1987* (Cth) s 3(1).

243 *Judiciary Act 1903* (Cth) s 44.

244 See sub-section 2.3.

245 Ibid. See generally Andrews, above n 12, ch 3.

246 Andrews, above n 12, 34.

247 See D Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part I' (1995) 69 *Australian Law Journal* 705 and 'Reforms to the Adversarial Process in Civil Litigation – Part II' (1995) 69 *Australian Law Journal* 790. In these articles, written by Justice David Ipp of the Supreme Court of Western Australia his Honour reaches the conclusion shared by others that 'there has been a quiet "but enormously significant revolution" that has occurred as courts have moved away from a passive role in civil litigation to one in which judges actively manage cases in an attempt to minimise delays, encourage early settlement and reduce costs' quoting from P Sallmann, 'Managing the Business of Australian Higher Courts' (1992) 2 *Journal of Judicial Administration* 80.

248 *Rules of the Supreme Court 1971* (WA) O 31A.

249 Fiocco et al, above n 131, [9.500].

250 *Rothwells Ltd (In liq) v Peng* (1990) 1 WAR 380 (Ipp J).

251 *Rules of the Supreme Court 1971* (WA) O 31A, O1 r 4A; *Silbert v Smith & Anor* (Unreported, Supreme Court of WA, Ipp J, 1990, Lib No 8401).

252 Andrews, above n 12, 34.

253 Ibid.

254 PW Young, 'Unrepresented Litigants' (1993) 67 *Australian Law Journal* 629.

255 Fiocco et al, above n 131 [9.600].

256 Andrews, above n 12, 35.

257 D Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.

258 Andrews, above n 12, 35.

259 Meagher et al, above n 84, 38.

260 *District Court of Western Australia Act 1969* (WA) s 57.

261 *Local Court Rules 1961* (WA).

262 See eg the statistics for settlement referred to in S Colbran, G Reinhardt, P Spencer, S Jackson and R Douglas, *Civil Procedure: Commentary and Materials* (Sydney: Butterworths, 1998) 656-657.

263 Eg *Rules of the Supreme Court 1971* (WA) O 13 and O 22.

264 *Rules of the Supreme Court 1971* (WA) O 52; with respect to 'injunction' see above n 59.

265 *Rules of the Supreme Court 1971* (WA) O 52 r 2.

266 Originating processes are described in *Rules of the Supreme Court 1971* (WA) O 4 and 81G.

267 See pp 160-167.

268 'Service' in the context refers to 'service of process'. In procedure, services refers to the operation of bringing the contents and effect of a document to the knowledge of the party concerned. Jowitt, above n 1, 1638.

269 *Local Court Rules 1961* (WA) requires a plaint — Forms in Appendix, Part I.

270 *Local Court Rules 1961* (WA) O 5 r 3.

271 *Local Court Rules 1961* (WA) O 5 r 2(2).

272 See Seaman, above n 172, 220-961.

273 *Local Court Rules 1961* (WA) O5 r 15.

274 *Local Court Rules 1961* (WA) Part I, Appendix, eg the form refers to the defence of 'Coverture', which refers to the condition of a woman during marriage, or the fact of her being married. In particular, it referred to a rebuttable resumption that a married woman was under the influence of her husband, so as to be excused from punishment for crimes committed in his presence except treason, murder and manslaughter.

275 Above n 260. The District Court of Western Australia has in fact made a number of rules which commenced on 31 March 1996 and have been since amended by *District Court Amendment Rules 1996* and *District Court Amendment Rules 1997*. The former came into operation on 1 January 1997 and the latter on 24 April 1997.

276 *Rules of the Supreme Court 1971* (WA), Second Schedule, forms 1, 2, 3, 4, 64, 74 and 75; Seventh Schedule, form 15.

277 For example, an application to compromise an infant's claim prior to proceedings having been commenced in the District Court of Western, would be commenced by the use of an 'originating summons' pursuant to the *Rules of the Supreme Court 1971* (WA) O 70 r 11.

278 For example, when O 26A was introduced to the *Rules of the Supreme Court 1971* (WA) it permitted discovery from non-parties and potential parties to an action. If discovery was sought prior to an action having been commenced in either the District or Supreme Court of Western Australia, it was not clear whether an application for a discovery prior to commence an action should be commenced by either an 'originating summons' or 'originating motion'. On occasion, legal practitioners can be confused as to whether to commence an action by way of an 'originating summons' or by a 'writ of summons'. This confusion is not confined to Western Australia: see eg *Re Sir Lindsay Parkinson & Co Ltd Settlement Trusts* [1965] 1 WLR 372.

279 All actions in the Federal Court are commenced by Application – *Federal Court Rules of Australia 1979* (Cth) O 4, r 1, Form 5. Application requirements – O 4 rr 4, 6, 8, 9.

280 *Rules of the Supreme Court 1971* (WA) O 5.

281 *Rules of the Supreme Court 1971* (WA) O 4 r 1(a), (b) and (c); O 81G r 6(a).

282 *Rules of the Supreme Court 1971* (WA) O 9 and O 72.

283 *Rules of the Supreme Court 1971* (WA) O 72 r 4.

284 *Rules of the Supreme Court 1971* (WA) O 72 r 2.

285 *Rules of the Supreme Court 1971* (WA) .

286 *Admiralty Rules* (Cth) r 30 – Consolidated to 11 October 1996.

287 *Rules of the Supreme Court 1971* (WA) O 72 r 4(1).

288 *Rules of the Supreme Court 1971* (WA) O 72 r 4(3).

289 See eg forms 15 and 16 of the 'Common Forms' used in the Supreme Court of Western Australia.

290 *Rules of the Supreme Court 1971* (WA) O 9 r 1(2).

291 *Rules of the Supreme Court 1971* (WA) O 71 rr 1 and 3.

292 *Rules of the Supreme Court 1971* (WA) O 72 r 3 and s 220(1)-(6); *Corporations Law 1990* (WA) s 363; *Interpretation Act 1984* (WA) s 31.

293 *Rules of the Supreme Court 1971* (WA) O 70 r 13.

294 *Rules of the Supreme Court 1971* (WA) O 31A.

295 *Rules of the Supreme Court 1971* (WA) O 13.

296 *Rules of the Supreme Court 1971* (WA) O 12; Jowitt, above n 1, 118.

297 Jowitt, above n 1, 118.

298 Ibid.

299 *Rules of the Supreme Court 1971* (WA) O 5 r 11.

300 *Rules of the Supreme Court 1971* (WA) 2nd schedule, form 6.

301 *Rules of the Supreme Court 1971* (WA) O 12 r 2(2).

302 Seaman, above n 172, O 12 commentary.

303 *Rules of the Supreme Court 1971* (WA) O 12 r 6.

304 Memorandum of Appearance under *Rules of the Supreme Court 1971* (WA) O 12 r 2. Seaman, above n 172 [12.1.6].

305 Conditional Appearance under *Rules of the Supreme Court 1971* (WA) O 12 r 6.

306 For example *Rules of the Supreme Court 1971* (WA) O 12 r 6(2).

307 *Rules of the Supreme Court 1971* (WA) O 12 r 7.

308 *Local Court Rules 1961* (WA) O 10 r 1.

309 Form 14, Appendix, Part I; Fee is $34.00 irrespective of the value of the claim.

310 *Local Court Rules* O 7 r 1, Form 1.

311 Seaman, above n 172 [7.0.6].

312 Ibid.

313 *Rules of the Supreme Court 1971* (WA) O 13, *Local Courts Act 1904* (WA) s 46.

314 *Rules of the Supreme Court 1971* (WA) O 20; see Andrews, above n 12, 107.

315 The statement of claim usually will need to include introductory matters, material facts and supporting particulars and claims for relief – see requirements under *Rules of the Supreme Court 1971* (WA) O 20.

316 A 'cross claim' can also be referred to as a 'cross-action'. It refers to the bringing by a defendant in the same action as has been commenced by the plaintiff, another action against the plaintiff in respect of the same subject matter. One of the restrictions of the common law system which operated prior to the introduction of the *Judicature Acts* reforms was the inability of the defendant to raise a cross-action in the same action. Where a defendant had a cross-action, it was required to commence separate legal proceedings. Following the *Judicature Acts* reforms, a 'cross-action' by a defendant could be brought in the same proceedings and was known as a 'counterclaim'.

317 *Rules of the Supreme Court 1971* (WA) O 18 r 2(1).

318 *Rules of the Supreme Court 1971* (WA) O 20 r 6.

319 Andrews, above n 12, 107-108.

320 *Smith v Carbone Bros Pty Ltd* (Unreported, Supreme Court WA, 1996, Lib No 960369) citing *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, 758 (Lord Somerville), and referencing Bullen and Leake, *Precedents and Pleadings* (13th ed, 1990) 6-9.

321 Bullen and Leake, above n 320; Andrews, above n 12, 108.

322 *Rules of the Supreme Court 1971* (WA) O 20.

323 *Local Court Rules 1961* (WA) O 5 r 15.

324 *Rules of the Supreme Court 1971* (WA) O 6.

325 Above n 315.

326 When the law is uncertain the elements of an action will be uncertain and make material facts difficult to determine. If there is doubt as to whether a fact is material to the claim it is safer to plead the fact. Eg *Perpetual Trustees Victoria Ltd and Ors v Marti Pty Ltd* (Unreported, Full Court, Supreme Court WA, 1995, Lib No 950724).

327 *Rules of the Supreme Court 1971* (WA) O 20 r 12, O 20 r 13(1) and O 20 r 9.

328 *Rules of the Supreme Court 1971* (WA) O 20 r 4.

329 *Rules of the Supreme Court 1971* (WA) O 20 r 9.

330 *Rules of the Supreme Court 1971* (WA) O 20 r 13; Seaman, above n 172 [21.5.27].

331 *Rules of the Supreme Court 1971* (WA) O 21 rr 3 and 5.

332 *Rules of the Supreme Court 1971* (WA) O 31A r 6; see *Crafter v Singh* (1990) 2 ASCR 1; 8 ACLC 601 (Seaman J) aff'd sub nom *Singh v Crafter* (1992) 10 ACLC 1365 (Full Court).

333 This separate claim is known as a 'counterclaim'. A counterclaim is a cross-action and a court may give judgment in the one action on both the plaintiff's claim and the defendant's counterclaim. The counterclaim may relate to any matter 'whenever and howsoever arising': *Rules of the Supreme Court 1971* (WA) O 18 rule 2(1).

334 *Rules of the Supreme Court 1971* (WA) O 18 r 2(1).

335 *Rules of the Supreme Court 1971* (WA) O 20 r 18.

336 See eg *Rules of the Supreme Court 1971* (WA), Second Schedule, Form 10 (2).

337 Andrews, above n 12, 120-121.

338 *Rules of the Supreme Court 1971* (WA) O 19 r 1.

339 *Rules of the Supreme Court 1971* (WA) O 19; O 5 r 5.

340 Above n 281.

341 *Rules of the Supreme Court 1971* (WA) O 19 r 3.

342 *Rules of the Supreme Court 1971* (WA) O 19 r 5.

343 *Rules of the Supreme Court 1971* (WA) O 19 r 9 and O 18 r 6.

344 *Rules of the Supreme Court 1971* (WA) O 19 r 4, Summons for directions.

345 See above.

346 See above.

347 *Rules of the Supreme Court 1971* (WA) O 18 r 6; Seaman, above n 172, [18.6.1]-[18.6.22].

348 Joinder is permitted under *Rules of the Supreme Court 1971* (WA) O 18 r 4 as long as there are common questions of law or fact to be decided; *Candish Nominees Pty Ltd v Colaw Pty Ltd* (1987) 4 SR 242 (practice note) (Keall J).

349 *Rules of the Supreme Court 1971* (WA) O 18 r 1, Andrews, above n 12, 114.

350 *Rules of the Supreme Court 1971* (WA) O 18 r 1.

351 *Rules of the Supreme Court 1971* (WA) O 18 r 4; Andrews, above n 12, 114.

352 *Rules of the Supreme Court 1971* (WA) O 18 r 4 (2); Andrews, above n 12, 114.

353 Andrews, above n 12, 115.

354 Ibid.

355 *Rules of the Supreme Court 1971* (WA) O 83.

356 See p 170.

357 For example, in a marketplace where parties may be competing to exploit the commercial value of a product, a competitor may be able to delay or prevent the exploitation of this product, pending the resolution of a dispute as to which party is entitled to exploit the product in the marketplace: see *Beecham Group Ltd v Bristol Laborotories Pty Ltd* (1968) 118 CLR 618.

358 An injunction is an order directing a party to *do* something or to *refrain* from doing something. Injunctions can be the final relief granted in an action or can be ordered at an interlocutory stage of the proceedings to preserve the status quo until the hearing of the main action: *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 3 WLR 143; [1983] 2 All ER 770. For commentary on injunctions see: Meagher et al, above n 84.

359 An Anton Piller order authorises plaintiffs and their solicitors to enter defendants' premises to inspect documents and for the plaintiffs' solicitors to take custody of documents prior to discovery in the action: *Anton Piller KG v Manufacturing Processes Limited* [1976] 1 Ch 55. This type of order is mainly seen in the context of copyright infringments. For commentary see: DJ Harris, 'The eclipse of Anton Piller orders?' (1992) 66 *Law Institute Journal* 489.

360 A Mareva injunction is an order, in anticipation of judgment, restraining a party from disposing of or dealing with its assets: *Mareva Compania SA v International Bulkcariers SA, The 'Mareva'* [1980] 1 All ER 213; *Wickham v Autingo Pty Ltd* (1993) 8 WAR 376; *Chew v Satay House of WA Pty Ltd* (Unreported, Supreme Court of WA, Parker J, Lib No 970570, 29/10/1997).

361 An interim injunction is a type of interlocutory injunction. It is limited to a set period of time or further order rather than being effective until the final hearing on the merits of the case: *Millars v Holman* [1907] 9 WAR 125.

362 The grant of an interlocutory injunction requires an undertaking as to damages by the successful party: *Rules of the Supreme Court 1971* (WA) O 52 r 9. This provides security for the party against whom the injunction was granted in the event that they are ultimately successful in the action and suffered loss as a result of the granting of the injunction. The court can assess the undertaking as to damages: *Rules of the Supreme Court 1971* (WA) O 52 r 10; *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249; 55 ALJR 107; 33 ALR 578. 'Security for costs', however, usually refers to a situation where a plaintiff may be required to provide security for the payment of the defendants costs, in the event that the plaintiff's claim against the defendant will be unsuccessful. Another way of looking at it is that the defendant will successfully defend the claim against the plaintiff and will possibly be put to a heavy burden as to costs. The court can order a plaintiff to provide security for a defendant's costs at any stage of the proceedings, although such application should be made promptly and any delay in making an application might be a factor taken into account militating against the making of an order. See, Seaman, above n 172 [25.3.2]. There are different legal principles applying to applications for security for costs against plaintiffs who are natural persons and plaintiffs which are corporations.

363 *Rules of the Supreme Court 1971* (WA) O 51, allows a receiver to be appointed to preserve property or by way of equitable execution. O 51 r 1, Form 62; *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (1990) 169 CLR 271; as to the appointment of a 'provisional liquidator' see *Australian Corporation Law: Principles and Practice* (1991-) Vol 2 [5.4.0407].

364 Jowitt, above n 1, 999.

365 Ibid.

366 In Australia, the standard for granting interlocutory injunctive relief is that articulated by Gibbs CJ *Australian Coarse Grains Pool Pty Ltd v The Barley Marketing Board of Queensland No 1* (1982) 57 ALJR 425. The proper approach, in considering whether an interlocutory injunction should be granted, is first to enquire whether there is a serious question to be tried, and then to determine the matter on the balance of convenience. In other words, we incline to the view taken by the House of Lords in *American Cyanamid v Ethicon Ltd* [1975] AC 396 rather than to some of those expressed obiter in *Beecham's* case.'

367 Generally, an interlocutory order will require the leave of a court before permitting an appeal, whereas, a final order will usually permit an appeal as of right. See further *Hughes v Gales*, above n 208; *Carr v Finance Corporation of Australia Ltd,* above n 208.

368 Colbran et al, above n 262.

369 Above n 244.

370 *Rules of the Supreme Court 1971* (WA) O 23.

371 *Rules of the Supreme Court 1971* (WA) O 23 r 2(1); *Costanho v Brown & Root (UK) Ltd* [1980] 3 WLR 991, and Seaman, above n 172, [23.2.3] for the meaning of 'any other step in the action'.

372 Terms are set out in *Rules of the Supreme Court 1971* (WA) O 23 r 2; Discontinuance by the plaintiff is no defence to a subsequent action: *Brown v Parker* [1961] WAR 194.

373 *Rules of the Supreme Court 1971* (WA) O 23 rr 1 and 2(4).

374 *Hamzah v Stephenson* (1983) 2 SR 40 (Samuel J); *Local Courts Act 1904* (WA) s 90.

375 *Rules of the Supreme Court 1971* (WA) O 23 rr 2(2), 3 and 4.

376 A defendant may choose to settle with a plaintiff but the defendant may not wish to have a judgment entered against it. In these circumstances, the defendant may request a plaintiff to discontinue proceedings against the defendant. This is often a term of settlement in medical negligence cases which are settled without admission of liability on the part of the defendant medical practitioner.

377 Distinction between a stay of proceedings and the stay of an order: *Ex parte Australian Building Construction Employees' and Builders Labourers Federation* (1981) 55 ALJR 395. A court may stay an *action* which is frivolous, vexatious, or an abuse of process: *Burton v Shire of Bairnsdale* (1908) 7 CLR 76.

378 *Rules of the Supreme Court 1971* (WA) O 25 r 6.

379 *Rules of the Supreme Court 1971* (WA) O 6 r 4 and O 25 r 6.

380 *Rules of the Supreme Court 1971* (WA) O 28 r 1(3), O 20 r 19(1) and O 63 r 15; *Crafter v Singh,* above n 332.

381 *Supreme Court Act 1935* (WA) s 24(5); *Billing v Lovell* (Unreported, Supreme Court WA, Adams M, 1992, Lib No 920166).

382 See above pp 155-157.

383 Above n 328 and 329.

384 *Rules of the Supreme Court 1971* (WA) O 20.

385 *Rules of the Supreme Court 1971* (WA) *Rules of the Supreme Court 1971* (WA) O 21 rr 3 and 5.

386 *Rules of the Supreme Court 1971* (WA) O 20 r 19(1)(a); *Bridgetown Greenbushes Friends of the Forest Incorporated v Executive Director of the Department of Conservation and Land Management* (Unreported, Supreme Court of WA, J Parker, 1995, Lib No 950415, further proceedings Lib No 950506); *South-West Forest Defence Foundation Inc v Executive Director of the Department of Conservation and Land Management* (Unreported, Supreme Court of WA, 1996, Lib No 960196).

387 *Rules of the Supreme Court 1971* (WA) O 20 r 19(1)(b); *Callinan v West Australian Newspaper Limited* [1988] WAR 212 (Seaman J), 214-215; *Coolgardie Gold NL v Minister for Mines* (Unreported, Supreme Court of WA, Ng M, 31 May 1996, Lib No 960306).

388 *Rules of the Supreme Court 1971* (WA) O 20 r 19(1)(c); *ZS Jemielita v Medical Board of WA* (Unreported, Supreme Court WA, Bredmeyer M, 3 September 1993, Lib No 930486).

389 *Rules of the Supreme Court 1971* (WA) O 20 r 19(1)(d).

390 Andrews, above n 12, 258.

391 Ibid.

392 Ibid 260.

393 Ibid.

394 Ibid.

395 Ibid.

396 Ibid.

397 Ibid.

398 See DB Casson, *Odgers on High Court Pleading and Practice* (23rd ed, 1991) 185-186.

399 Ibid.

400 *Costa Carrera Nominees Pty Ltd v Chelsford Pty Ltd* (Unreported, Supreme Court of WA, Adams M, 1994, Lib No 940077) illustrates the patience of the court for litigants with a serious complaint and very defective pleadings.

401 For example, discovery, settlement, negotiation or trial, etc.

402 Andrews, above n 12, 260.

403 The principal authorities are cited at *Lonrho plc v Fayed* (1992) 1 AC 448, 468-470 (HL).

404 *Tudor Grange Holdings Ltd v City Bank N.A.* [1992] Ch 53, 71 (Browne-Wilkinson V-C).

405 'Frivolous' is insupportable in law, groundless or disclosing no cause of action: *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91. See also Casson, above n 398, 186-188.

406 Casson, above n 398, 186-188; Seaman, above n 172 [20.19.9].

407 Seaman, above n 172, [20.19.9].

408 Ibid.

409 *Legal Practice Board v Said* (Unreported, Supreme Court of WA, Seaman J, Lib No 940003, 1994).

410 See below: 'Summary judgment for the defendant'.

411 For an excellent discussion of these various grounds: see Jacob, above n 10; Bullen and Leake, above n 320; and Jacob, *Precedents of Pleadings* (12th ed, 1975) 146-148.

412 'Inherent jurisdiction' is the authority to adjudicate vested in a court as a consequence of it being a court of a particular description, notably a superior court of unlimited jurisdiction: *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7; see IH Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 40.

413 See sub-section 1.2: 'Advantages and Disadvantages of the Adversarial System in Civil Proceedings'.

414 *Rules of the Supreme Court 1971* (WA) O 33 r 2(2); Andrews, above n 12, 266-267.

415 The defendant's application to dismiss should contain a detailed chronology of the events of the case and other factual matters relied upon to show this; Seaman, above n 172, [3.0.3].

416 Ibid.

417 Ibid; see *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 2 WLR 578 (Lord Griffiths).

418 Ibid.

419 Andrews, above n 12, 267-268.

420 *Hughes v Gales*, above n 208, 450.

421 Ibid.

422 *Queensland v JL Holdings Pty Ltd* (1997) 71 ALJR 294.

423 Colbran et al, above n 262.

424 Ibid. Sub-section 1.4 of this review considers the need for performance measures for the justice system. The problem is particularly acute for civil matters.

425 Colbran et al, above n 262.

426 Jowitt, above n 1, vol. 1, 404.

427 See Carter and Harland, above n 1, 123-125.

428 Ibid.

429 See, above n 376.

430 *Rules of the Supreme Court 1971* (WA) O 42 rr 7 and 8 and O 43 r 16.

431 *Rules of the Supreme Court 1971* (WA) O 24A.

432 *Rules of the Supreme Court 1971* (WA) O 24A r 2.

433 *Rules of the Supreme Court 1971* (WA) O 24A r 3(9).

434 *Rules of the Supreme Court 1971* (WA) O 24A r 10.

435 *District Court Rules 1996* (WA) O 4 and O 5; *Local Courts Act 1904* (WA) s 45B.

436 A case management registrar can order a mediation under the provisions of *Rules of the Supreme Court 1971* (WA) O 29A r 7(4)(b).

437 Above n 435.

438 Expedited list – *Rules of the Supreme Court 1971* (WA) O 31A r 10; Case Management principles – O 29A rr 3(2)(j), (k) and 11.

439 *Rules of the Supreme Court 1971* (WA) O 31A r 10(1).

440 *Rules of the Supreme Court 1971* (WA) O 29A rr 3(2)(k) and 7 (4) (b).

441 A party to the litigation may take the view that the claim is such that it is incapable of being settled at a mediation and the dispute will only be resolved by adjudication of a judge. However, the Case Management principles are such that disputes which are not ordered to be first dealt with by mediation should be the exception.

442 The party will have been 'successful' in that it has either established liability against the defendant or an award of damages will have been made against the defendant. However, that award of damages may be less than the offer that was made by the defendant prior to the matter proceeding to trial.

443 *Rules of the Supreme Court 1971* (WA) O 24A r 10.

444 Andrews, above n 12, ch 13.

449 Sub-section 2.10 deals with self-represented litigants.

446 *Rules of the Supreme Court 1971* (WA) O 30 r 3.

447 Jowitt, above n 1, vol 1, 578.

448 Above n 296.

449 Judgment can be given for a default of appearance (under *Rules of the Supreme Court 1971* (WA) O 13) or default of pleadings (under O 22).

450 *Putland v Camton* (Unreported, District Court of WA, Wickens DR, Lib No 1757, 1987).

451 Jowitt, above n 1, vol 1, 78.

452 Ibid.

453 *Rules of the Supreme Court 1971* (WA) O 43 r 16 and O 42 rr 7 & 8.

454 *Rules of the Supreme Court 1971* (WA) O 13.

455 *Rules of the Supreme Court 1971* (WA) O 22.

456 *Rules of the Supreme Court 1971* (WA) O 13 r 2 and O 22 r 2.

457 *Rules of the Supreme Court 1971* (WA) O 13 r 5 and O 22 r 5.

458 *Rules of the Supreme Court 1971* (WA) O 13 r 4 and O 22 r 4.

459 *Rules of the Supreme Court 1971* (WA) O 13 r 6 and O 22 r 7.

460 For example, the party seeking a judgment in default of appearance must apply to the court for an order appointing a guardian *ad litem* of the person under disability and giving consequential directions: *Rules of the Supreme Court 1971* (WA) O 70 r 5.

461 Although in most commercial situations interest may be granted pursuant to the provisions of the *Supreme Court Act 1935* (WA) to compensate for delayed payment, this will not always assist a creditor whose business depends upon the life-blood of a good cash flow.

462 *Local Court Rules 1961* (WA) O 11; *Local Courts Act 1904* (WA) s 47A.

463 *Rules of the Supreme Court 1971* (WA) O 14.

464 *Rules of the Supreme Court 1971* (WA) O 14.

465 *Local Court Act 1904* (WA) s 47A(1).

466 *Rules of the Supreme Court 1971* (WA) O 14 r 1(2); Mortgage Actions: O 62A; *Rural and Industries Bank v Wright* (Unreported, Supreme Court of WA, Adams M, Lib No 920144, 20 March 1992).

467 *Rules of the Supreme Court 1971* (WA) O 14 r 1(1).

468 *Rules of the Supreme Court 1971* (WA) O 14 r 1(1); *McLardy v Slateum* (1890) 24 QBD 504.

469 The expression 'chambers jurisdiction' refers to the exercise of the jurisdiction of the court in less formal circumstances than at a trial. Historically, chambers jurisdiction developed from the need for parties to see judges other than on occasions when judges would formally sit at a trial in open court. Initially, the parties would attend the judge at his private home, but quickly the practice developed that parties would see the judges at their offices which were referred to as 'chambers'. Parties would appear before the judge for the purposes of any application at the judge's chambers. The proceedings in chambers were private and only the parties or the solicitors and counsel were

admitted. This practice continued in Western Australia until the mid-1970s. A change occurred where, whilst applications were still heard in chambers appearances were in fact in open court and chambers jurisdiction was no longer exercised in private except in appropriate cases, e.g. mental health applications. Applications in chambers, being less formal, did not require counsel to robe or wear a wig. Applications in chambers in the Supreme Court of Western Australia are heard either by a judge or a master, whereas in the District Court of Western Australia they will be heard either by a judge or a registrar. In the Local Court of Western Australia all chambers applications are heard by a magistrate. *Rules of the Supreme Court 1971* (WA) O 14 r 2(1); Jurisdiction of District Court Registrar: *District Court Rules 1996* (WA) O 6, *Rules of the Supreme Court 1971* (WA) O 60A.

470 An affidavit is a written statement in the name of a person, called the deponent, which is voluntarily signed and sworn or affirmed. It is a statement usually made in an action or judicial proceeding and is the means by which evidence will be admitted in an action without the necessity of calling the party who has made the affidavit to actually give *'viva voce'* evidence. The expression *'viva voce'* refers to the party actually physically attending and giving evidence and being made subject to cross-examination. *Banning v MJ & PD Pustkuchen Pty Ltd t/as Central Wheatbelt Fuels* (Unreported, District Court WA, Charters J, Lib No 3963).

471 *Muntz v Elkington* (1891) 17 VLR 23, 24.

472 *Australian Can Co Pty Ltd v Levin & Co Pty Ltd* [1947] VLR 332, 334-335 (Herring CJ and Lowe J).

473 *Symon & Co v Palmer's Stores (1903) Ltd* [1912] 1 KB 259, 264, 267.

474 *Rules of the Supreme Court 1971* (WA) O 20 r 14; defendants should deal with the merits and procedural matters when opposing summary judgments: *Shell Company of Australia v Fergos Pty Ltd; GC Fearn, JE and RC Fearn* (Unreported, District Court WA, Kennedy J, Lib No 3795, 12 August 1993).

475 *Rules of the Supreme Court 1971* (WA) O 37 rr 6 & 7; *Local Court Rules 1961* (WA) O 11 r 2. Commentary on drafting Affidavits: JP Bryson, 'How to Draft an Affidavit' (1985) 1 *Australian Bar Review* 250; *Rules of the Supreme Court 1971* (WA) O 14.

476 Seaman, above n 172, [14.3.1-14.3.4].

477 Fiocco et al, above n 131, [10.900].

478 Ibid.

479 Ibid.

480 Ibid.

481 *Rules of the Supreme Court 1971* (WA) O 16.

482 *Dey v Victorian Railways Commissioners*, above n 405, 90; and see 23 ALJ 48 (Dixon J).

483 Above n 405.

484 *Rules of the Supreme Court 1971* (WA) O 16 r 1.

485 *Rules of the Supreme Court 1971* (WA) O 16 r 1(1).

486 *Rules of the Supreme Court 1971* (WA) O 16 r 1(2).

487 *Lawrence v Lord Norreys* (1890) 15 App Cas 210; *Howden v 'Truth' and 'Sportsman' Ltd* (1937) 58 CLR 416; *Love v Garvey* (Unreported, Supreme Court of WA, Seaman J, Lib No 6089, 1985).

488 Above n 481.

489 See generally, Bernard Cairns, *The Law of Discovery in Australia* (1984) and SD Simpson, DL Bailey and EK Evans, *Discovery and Interrogatories* (2nd ed, 1990).

490 Ibid.

491 Ibid; those restrictions will be discussed later.

492 *Rules of the Supreme Court 1971* (WA) O 26 r 8(2). Note that the concept of 'documents' is an expansive one defined below n 497.

493 *Rules of the Supreme Court 1971* (WA) O 27.

494 For example, *Rules of the Supreme Court 1971* (WA) O 26 r 7 provides for an order for discovery to be made by the court if a party fails to give discovery on request.

495 *Rules of the Supreme Court 1971* (WA) O 26A. *Norwich Pharmacal v Customs and Excise Commissioners* [1973] 3 WLR 164; *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1972] RPC 743.

496 *Rules of the Supreme Court 1971* (WA) O 26A r 4.

497 *Rules of the Supreme Court 1971* (WA) O 26 r 1A; a document is any record of information including tape, soundtracks, and computer databases.

498 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55, 62-63 (Brett LJ).

499 The expression 'relevance' or 'relevant' is a concept in law which refers to a fact applying to the dispute in question. In the context of evidence it usually refers to a fact which supports the contention of a party to a dispute. See, Jowitt, above n 1, vol 2, 1533.

500 Andrews, above n 12, 295. *George Ballantine & Son Ltd v FER Dixon & Son Ltd* [1974] 2 All ER 503.

501 *Rules of the Supreme Court 1971* (WA) O 26 r 1(1).

502 Andrews, above n 12, 295. Eg, the Court has the power to obtain documents in the custody of third parties: *Biltoft Holdings Pty Ltd v Casselan Pty Ltd* (Unreported, Supreme Court WA, Anderson J, Lib No 940252, 20 May 1994).

503 Andrews, above n 12. In the context of documents held by a parent of a subsidiary company involved in litigation: see *Solartech SBN BHD & Strategic Technologies SBN BHD v Solarhart Industries Pty Ltd* (Unreported, Supreme Court WA, Sanderson M, Lib No 970538, 22 October 1997).

504 *Rules of the Supreme Court 1971* (WA) O 26 r 15A; *Rockwell Machine Tool Co Ltd v Barrus Practice Note* [1968] 1 WLR 693, [1968] 2 All ER 98.

505 *Rules of the Supreme Court 1971* (WA) O 26 r 1(3) and (4);

506 *Rules of the Supreme Court 1971* (WA) O 26 r 4.

507 *Rules of the Supreme Court 1971* (WA) O 26 r 12 and 14.

508 *Kadlunga Propietors v Electricity Trust of South Australia* (1985) 39 SASR 410.

509 *Rules of the Supreme Court 1971* (WA) O 26 r 4, Forms 17 and 18; *Australian Broadcasting Commission v Parish* (1981) 48 FLR 293.

510 *Rules of the Supreme Court 1971* (WA) O 26 r 8.

511 *Rules of the Supreme Court 1971* (WA) O 26 r 8 (5).

512 *Rules of the Supreme Court 1971* (WA) O 26 r 12; Seaman, above n 172, [26.4.5] and [26.4.7].

513 This was formally referred to 'crown privilege'. However, this terminology was unsatisfactory. Firstly, questions of 'public interest' cannot be confined to matters relating to the Crown but embrace a much broader band of interested parties; secondly, a claim to the present 'privilege' cannot be waived. This latter point was acknowledge by Viscount Simon LC in *Duncan v Cammell Laird & Co* [1942] AC 624, 641 (HL). The expression 'public interest' is used in *Rules of the Supreme Court 1971* (WA) O 26 r 14.

514 The danger of self incrimination must be real and appreciable not imaginary or insubstantial for this privilege to apply: *Reid v Howard* (1995) 184 CLR 1.

515 The range of disputes can be very wide and their resolution can cause considerable delay during the conduct of a civil litigation action.

516 This has been recognised in the formulation of a number of rules in the context of the application of case management principles and the operation of the expedited list.

517 *Rules of the Supreme Court 1971* (WA) O 26 r 7 which should be read in conjunction with the provisions of Order 29A which governs the operation of case management principles to actions in the Supreme Court of Western Australia. With respect to the expedited list, see O 31A r 5. See also the special procedures set out in *Monitronix Ltd v KMG Hungerfords* (Unreported, Supreme Court WA, Seaman J, Lib No 8349, 1990).

518 *Rules of the Supreme Court 1971* (WA) O 26 r 7.

519 The delay can be caused not only regarding disputes as to discovery of documents but also as to interrogatories.

520 Above n 493.

521 *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, 190 (Lockhart J).

522 Other jurisdictions in Australia and England take a variety of approaches with respect to interrogatories. For example, prior to the 5 February 1990 leave was required to administer interrogatories in England. In England, leave is now no longer required. In Victoria, Tasmania, and New South Wales a party may serve interrogatories on another party relating to any question between the parties in the proceedings, where the pleadings are closed, without leave of the court. However, in New South Wales, rules require leave to interrogate in proceedings for damages arising out of death or bodily injury. Leave to interrogate is not given in South Australia unless interrogatories are necessary for the fair trial of the action or to save expense after less costly alternatives of discovery have been exhausted. In the Federal Court of Australia, and in Queensland and South Australia, the rules require leave of the court before a party may administer interrogatories. In Queensland 'it has always been the practice of the court to insist that the answers to interrogatories must be intelligible without reference to the interrogatories.' *Bristow & Anor v Australia Chemical Co Pty Ltd* (1957) QWN 13 (Stanley J). In England, Victoria and South Australia 'yes' and 'no' are accepted as correct forms of answers. In Western Australia there is no established practice.

523 See Ipp, Part II, above n 247, 794 where he observes: 'Interrogatories may also cause serious problems. They are generally easier to formulate than to respond to. In an era of boiler plate interrogatories formulated by young solicitors and spewed out by word processors, masses of questions can be churned out at low cost to the initiating party but at a high cost to the responding party.'

524 *Rules of the Supreme Court 1971* (WA) O 29A r 2(m).

525 Ipp, Part II, above n 247.

526 *Rules of the Supreme Court 1971* (WA) O 27 r 1 (1).

527 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company,* above n 498.

528 *Rules of the Supreme Court 1971* (WA) O 27 r 5.

529 See, above nn 406,407,408 & 409.

530 Seaman, above n 172, [27.5.3].

531 Seaman, ibid [27.5.4].

532 Ibid.

533 Ibid [27.5.5].

534 Ibid [27.5.4].

535 Ibid.

536 Ibid [27.5.6] - [27.5.7].

537 Ibid [25.7.8].

538 *Rules of the Supreme Court 1971* (WA) O 27 r 7.

539 In the Supreme Court of Western Australia, any such dispute would be resolved within the context of the rules based upon the case management principles under *Rules of the Supreme Court 1971* (WA) O 29A.

540 *Rules of the Supreme Court 1971* (WA) O 27 r 9.

541 It appears that the practice in Queensland referred to in n 522 is based partly on the fact that *answers* may be tendered as evidence. However, the rules do not say interrogatories may be tendered. Once again, practices with respect to interrogatories can vary from jurisdiction to jurisdiction. As to the difficulties that may be encountered when relying upon interrogatories which have been permitted in other jurisdictions, *Chan v West Australian Newspapers Ltd & Ors* (Unreported, Supreme Court WA, Anderson J, Lib Nos 980020, 980021, 1997), where some interrogatories based on a New South Wales authority, where they were permitted, were held to be inadmissible in Western Australia.

542 See Ipp, above n 247.

543 Jowitt, above n 1, vol 2, 1805.

544 Ibid.

545 *Rules of the Supreme Court 1971* (WA) Or 33; *District Court Rules* (WA) O 4; *Local Courts Act 1904* (WA) s 45A.

546 The Local Court, District Court and Supreme Court of Western Australia all require a document known as a 'certificate of readiness' to be filed when entering an action for a trial. This certificate requires the party entering the matter for trial to certify that the various steps relevant to the resolution of that civil dispute have been completed.

547 E.g., the certificate of readiness utilised in the Supreme Court of Western Australia requires a solicitor for the party entering the matter for trial to certify that ' The action is in all respects ready for trial as far as is known to the Plaintiff (or the defendant).'

548 See above n 547.

549 See *Supreme Court Act 1935* (WA) s 42.

550 See sub-sections 4.5, 4.7 and 4.8.

551 It is the normal practice for a judgment to be reserved after the hearing of a civil dispute. This provides the judge concerned an opportunity to review the evidence given by all of the witnesses and the submissions of law made by counsel before handing down judgment.

552 Jowitt, above n 1, vol 1, 1025.

553 Ibid; eg Supreme Court is a 'court of record' pursuant to *Supreme Court Act 1935* (WA) s 7; see also *Rules of the Supreme Court 1971* (WA) O 42.

554 Jowitt, above n 1, vol 1, 1025.

555 Pursuant to *Supreme Court Act 1935* (WA) s 57 a Full Court may be constituted by any two or more judges of the Supreme Court sitting together.

556 Jowitt, above n 1, vol 1, 1025.

557 Ibid.

558 Jowitt, above n 1, vol 1, 481-482.

559 Ibid.

560 These costs will be referred to as 'solicitor and client' costs. However, whether this excess of costs can be claimed will depend upon whether a solicitor and the client have entered into a written costs agreement pursuant to the provisions of the *Legal Practitioners Act 1893* (WA); see further, *Rules of the Supreme Court 1971* (WA) O 66 r 1 (3).

561 *Rules of the Supreme Court 1971* (WA) O 66 r 1 (1).

562 James Crawford, *Australian Courts of Law* (3rd ed, 1993) 14.

563 Ibid.

564 Ibid. It has been described above how judges would go on circuit at *nisi prius* at n 44.

565 Ibid.

566 Ibid.

567 Ibid.

568 Ibid.

569 Ibid.

570 Ibid.

571 Ibid.

572 Above pp 150-154.

573 Crawford, above n 562.

574 Ibid.

575 Ibid.

576 That *Judicature Act 1873* (Imp), which established the Court of Appeal, abolished the Appellate jurisdiction of the House of Lords. However a reprieve was given by the *Judicature Act 1875* and the abolition never came into effect. Instead the Appellate *Jurisdiction Act 1876* provided for judges, called Lords of Appeal in Ordinary, to sit as an Appellate Committee of the House of Lords to hear appeals. See further, R Stevens, 'The Final Appeal: Reform of the House of Lords and Privy Council 1867-1876' (1964) 80 *Law Quarterly Review* 343.

577 Crawford, above n 562.

578 [1976] 2 NSWLR 281, 297. See also the classification of appeals of Gavan Duffy CJ and Starke J in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 85.

579 Appeals of this nature are discussed in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 and in the Victorian Appeal Division decision in *Avco Financial Services Ltd v Abschinski* [1994] 2 VR 659, 663 (Fullagar J) and 669-672 (Southwell J).

580 Appeals of this nature in Western Australia are rare. Civil trials before juries are usually only held in defamation actions.

581 This is the normal type of appeal in Western Australia whether appealing from the Local Court of Western Australia to the District Court of Western Australia or to the Supreme Court of Western Australia. See eg *Rules of the Supreme Court 1971* (WA) O 63.

582 This is the nature of an appeal from a registrar of the District Court to a judge of the District Court of Western Australia: see *Hazart Pty Ltd v Rademaker* (1993) 11 WAR 26 (FC).

583 Cairns, above n 489, 636

584 *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan,* above n 578.

585 *Duralla Pty Ltd v Plant* (1984) 2 FCR 342; *Teoh v Minister for Immigration* (1994) 49 FCR 409, 416.

586 Cairns, above n 489, 637; *Mickelberg v The Queen* (1989) 167 CLR 259, 267-269, (Mason C J).

587 *Petreski v Cargill* (1987) 18 FCR 68, 77.

588 *Mickleberg v The Queen,* above n 586.

589 For example, *Federal Court of Australia Act 1976* (Cth) s 27. See further *Duralla Pty Ltd v Plant*, above n 585, 350 (Smithers J) and 364 (Northrop J).

590 Cairns, above n 489, 637.

591 Ibid.

592 Ibid.

593 Ibid.

594 Ibid.

595 Ibid.

596 See above n 584.

597 *Warren v Coombes* (1979) 142 CLR 531, 537; *Ex Parte Currie; Re Dempsey* (1969) 70 SR (NSW) 443.

598 The constitution of the full court of the Supreme Court of Western Australia is defined by the *Supreme Court Act 1935* (WA) s 57.

599 See above pp 188-199. The appeal is a complete re-hearing de novo by the Judge, which is dealt with by way of an actual re-hearing of the application which led to the order under the appeal. See *Hazart Pty Ltd v Rademaker*, above n 582.

600 *Rules of the Supreme Court 1971* (WA) O 64.

601 See above n 364.

602 See above n 365.

603 *Rules of the Supreme Court 1971* (WA) O 60 r 5 (2).

604 *Rules of the Supreme Court 1971* (WA) O 60 r 5 (3).

605 *Rules of the Supreme Court 1971* (WA) O 60A r 5 (4 &5).

606 *Rules of the Supreme Court 1971* (WA) O 60A r 6.

607 *Rules of the Supreme Court 1971* (WA) O 60 A r 6.

608 There is no appeal against an extension of time granted by a case management registrar: see *Dobra v Brennan* (Unreported, Supreme Court WA, Full Court, Lib No 970481, 25 September 1997).

609 *Rules of the Supreme Court 1971* (WA) O 63A rule 3 (1).

610 *Rules of the Supreme Court 1971* (WA) O 63A r 3 (2).

611 *Rules of the Supreme Court 1971* (WA) O 63A r 3 (3) & (5).

612 *Rules of the Supreme Court 1971* (WA) O 63A r 3 (4).

613 *Rules of the Supreme Court 1971* (WA) O 63A r 4 .

614 *Rules of the Supreme Court 1971* (WA) O 63A r 4 (3)

615 *Rules of the Supreme Court 1971* (WA) O 63A r 5 (2)

616 *Rules of the Supreme Court 1971* (WA) O 63A r 5. However, O 63A does not apply to an appeal that has been directed to proceed under *Rules of the Supreme Court 1971* (WA) O 63. If the appeal is to a Judge or the Full Court, then the appeal may also be affected by the provisions of O 65. This order, effective from 28 October 1996 enables the registrar appointed by the Chief Justice as an appeals registrar to give to parties to an appeal leave to attend a conference with a mediator for the purpose of identifying, resolving and narrowing the points of difference between the parties to the appeal. The appeals registrar may not without the consent of the parties direct that a conference take place where a party to the appeal would become liable to remunerate a mediator. See O 65 B r 3 (1) (a).

617 *Rules of the Supreme Court 1971* (WA) O 65B rr 3 (1) (b) and 3 (2).

618 *Rules of the Supreme Court 1971* (WA) O 63 r 4.

619 *Rules of the Supreme Court 1971* (WA) O 63 r 9.

620 *Rules of the Supreme Court 1971* (WA) O 63 r 7.

621 See *Boomalli Ltd v Hake* [1985] WAR 7. The court usually takes into account four factors as to whether to extend time for an appeal: length of delay, reason for delay, arguable case on the merits, and extent of prejudice to the respondent

622 *Rules of the Supreme Court 1971* (WA) O 63 r 9.

623 *Supreme Court Act 1935* (WA) s 59(1).

624 *Supreme Court Act 1935* (WA) s 58(1)(a).

625 *Supreme Court Act 1935* (WA) s 60(1) (a) – (e).

626 *Supreme Court Act 1935* (WA) s 60 (1)(e)-(f).

627 Seaman, above n 172 [63.0.21].

628 *Judiciary Act 1903* (Cth) s 35.

629 Harry Gibbs, 'Appellate Procedures In the High Court' (1986) 2 *Australian Bar Review* 1; CT Barry 'Appellate Review of Procedural and Factual Error' (1991) 65 *Australian Law Journal* 720.

630 'Practice Direction No 2 of 1987' (1988) 76 *Australian Law Reports* 511; CCH, *Australian High Court and Federal Court Practice* (1991) vol 1, [9-530].

631 See above pp 165-166.

632 *Federal Court Rules 1979* (Cth) O 52.

633 *Income Tax Assessment Act 1936* (Cth) s 196(5)(a).

634 *Federal Court Rules 1979* (Cth) O 52 r 15: see Form 55.

635 *Federal Court Rules 1979* (Cth) O 52 r 16.

636 *Australia Act 1986* (Cth) s 11, which came into operation on 3 March 1986.

637 *Privy Council (Limitation of Appeals) Act 1968* (Cth) and *Privy Council (Appeals from High Court) Act 1975* (Cth).

638 See *Warren v Coombes*, above n 597; Cairns, above n 489, 667-668.

639 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* [1999] HCA 3; (1999) 73 ALJR 306.

640 Cairns, above n 489, 667-668.

641 Ibid.

642 Ibid.

643 Ibid.

644 Michael Zander, 'The Government's Plans on Civil Justice' (1998) 61(3) *Modern Law Review* 382-389.

645 See, for example, comments of the High Court in *Queensland v J L Holdings Pty Ltd*, above n 422. See also RW Richardson, 'Case Flow Management: Court Efficiency v Justice' (1997) 24 (2) *Brief* 8.

646 Above n 644, 386.

647 For example, a commentator has noted that when the new *Rules of the Supreme Court 1971* (WA) were introduced following the *Judicature Act* reforms'… it took some twenty years for the wrinkles to be ironed out.' See RL Turner, 'Middleton-the cloud with the silver lining?' (1997) 147 *New Law Journal* 1727, 1734.

648 Above n 644, where the learned author opines 'the fact is that judges and court officials simply do not know enough about what is happening in solicitors' offices for them to be regarded as a credible source of authority on detailed timetabling for the mass of cases'.

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2.2

Case Management

INTRODUCTION

The case management process is designed to promote a system 'characterised by the fair and just treatment of litigants, the prompt and economic disposal of cases, a quality litigation process, maintenance of public confidence in the courts, and the efficient use of judicial, legal and administrative resources'.[1]

In his review of the English civil justice system, Lord Woolf identified the specific objectives of case management as being,

(a) achievement of an early settlement of the case or issues in the case where this is practical;
(b) the diversion of cases to alternative methods for the resolution of the dispute where this is likely to be beneficial;
(c) the encouragement of a spirit of co-operation between the parties and the avoidance of unnecessary combativeness which is productive of unnecessary additional expense and delay;
(d) the identification and reduction of issues as a basis for appropriate case preparation; and
(e) when settlement cannot be achieved by negotiation, the progression of cases to trial as speedily and at as little cost as is appropriate.[2]

In recent years in Australia there has been a significant move away from wholly, or largely, lawyer/client driven litigation towards case management by the courts. The traditional non-interventionist role of the courts is progressively being replaced by a system where courts play an active role in the management and progression of civil proceedings. The object is to achieve a better result for litigants and a more effective use of publicly funded resources in the court system. The critical question, however, is how case management itself is best structured to achieve that. There is growing evidence that in some cases

judicial intervention in litigation does not significantly reduce delay and actually increases costs. Indeed, extensive recent research in the United States casts doubt upon the cost effectiveness, at least in that country, of individualised case management systems.

It is also obviously imperative that in any case management process a proper balance be struck between the implementation and operation of case management principles and the ultimate objective of ensuring that justice is attained. As the High Court of Australia observed in *The State of Queensland v JL Holdings Pty Ltd.*[3]

> Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, 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.[4]

PRINCIPLES AND BASIC MODELS OF CASE MANAGEMENT

Case management seeks to effect two fundamental objectives: to achieve a speedy, economical and just disposal of individual disputes, and to make the most appropriate and effective use of the finite judicial and administrative resources of the court system.

Principles underlying case management

It has been suggested that the fundamental elements of a caseflow management system include:

- judicial commitment and leadership;
- court consultation with the legal profession;
- court supervision of case progress;
- the use of standards and goals;
- a monitoring information system;
- listing for credible trial dates;
- court control of adjournment.

Those principles, first enunciated in the USA in 1973[5], have provided the foundation for many of the case management processes that have since evolved both in that country and elsewhere, including Australia.

Models of caseflow management

There are many forms of case management. However, the two basic models of pre-trial case management have been identified as:

- management involving continuous control by a judge, who personally monitors each case on an ad hoc basis (individual list model); and
- management where control is exercised by requiring the parties to report to the court at fixed milestones and where the court exercises routine and structured control (master list model),[6]

of which the various case management techniques currently in use are, in some form or another, adaptations.

It has been suggested that the first model is usually expensive, requiring constant attention by the Judge and frequent interlocutory appearances by the parties, and is normally suited only to complex cases. The second is effective and relatively cheap to operate and reduces the incidence of interlocutory appearances. It is the model most jurisdictions are likely to adopt.[7]

The Australian Law Reform Commission has identified some of the basic variables that exist between case management systems as being:

- Whether there is management of cases based on individual case characteristics, for example through designated procedural 'tracks' (differential case management);
- Whether the system features management of cases by a single judge, a team of judges, a team of judges and other judicial officers, or on a court wide basis;
- The way in which cases are allocated to judges or teams, for example randomly or randomly after being classified by type, to ensure judges receive a reasonable mix of different case types or to enable specialisation among judges;
- The extent of involvement in particular case management events by judges, judicial officers or other court staff;
- Whether an 'individual list' or a 'master list' system is used to allocate case management events to particular judges or teams.[8]

Most Australian jurisdictions have adopted a variant of the master list model, where matters are assigned from time to time to different judicial officers and for different purposes, rather than an individual list model where each case is assigned to an individual judge at an early point and that judge manages those cases until they are concluded.

The differential case management concept is becoming increasingly incorporated into case management models. The rationale of that concept is that different types of cases require different types and levels of judicial management. Advocates of the scheme argue that allocation of cases early to different tracks ensures that judicial resources are not wasted on cases that require minimal management but rather, are concentrated on those that because of their size or complexity, justify more detailed attention.

THE PRESENT SYSTEM IN WESTERN AUSTRALIA

The *Rules of the Supreme Court 1971* (WA) provide the basis for the Supreme Court's current case management procedures.

In 1993, the *Rules of the Supreme Court 1971* were amended in order to reflect the importance of positive case flow management. Order 1 rule 4A of the Rules was inserted to provide as follows:

> Elimination of delays:
>
> The practice, procedure and interlocutory processes of the Court shall have as their goal the elimination of any lapse of time from the date of initiation of proceedings to their final determination beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial.

Order 1 rule 4B was inserted to provide as follows:

> System of case flow management
>
> 1. Actions, causes and matters in the Court will, to the extent that the resources of the Court permit, be managed and supervised in accordance with a system of positive case flow management with the objects of –
>
> (a) promoting the just determination of litigation;
>
> (b) disposing efficiently of the business of the Court;
>
> (c) maximising the efficient use of available judicial and administrative resources; and
>
> (d) facilitating the timely disposal of business at a cost affordable by parties.
>
> 2. These Rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the objects referred to in paragraph (1).

The 1993 amendments did make some impact on the efficiency of the litigation process, however it was widely considered that they did not bring about as much change as had been hoped.[9] Significant changes to the Rules were subsequently introduced in 1996 with the ideal of having 'a system which reduces the delays and costs involved in resolving disputes while preserving such processes as are considered necessary to ensure that, as far as possible, 'justice' is done to the disputing parties'.[10]

The new system of positive case flow management was created in order to fulfil the objects of Order 1 rule 4B and was developed in consultation with members of the court and the legal profession. The procedure was designed to secure efficient and timely disposal of matters by way of continued supervision by the court.

Status conference

Order 29A provides that a status conference must be convened before a case management registrar within 21 days after the first appearance to the originating summons is entered or after an affidavit of service has been filed.[11]

The object of the status conference is to have all parties before an officer of the court at the earliest possible point in time. Parties to the litigation are required to attend status conferences unless the case management registrar orders otherwise. That affords the parties an opportunity to understand and become involved in the court process and even to discuss settlement at an early stage. At the status conference the timetable for the case can be reviewed. Long and complex matters can be transferred to a long causes list for a judge to manage. The status conference provides an opportunity for the Registrar to obtain early indications about the nature and complexity of the proceedings and to make enquiries about the need for discovery and inspection, interrogatories, length of the trial and any other matter relevant to ensuring the case is managed in accordance with Order 1 Rule 4B.

Case evaluation conference

A case evaluation conference must be convened before a registrar within 28 weeks after the initial appearance to the summons to the status conference.[12] The case evaluation conference is to enable the parties and their legal representatives to review the progress of the matter. The possibility of settlement can be canvassed and an evaluation of all outstanding programmed events should be made.

Listing conference

As soon as practicable after the case is entered for trial or, in the case of an originating summons, after an application is made for a hearing date, a listing conference must be held before a judge in chambers.[13] At the listing conference the judge may review the documents on the court file and enquire into whether the case can be settled, which documents will be omitted at trial by consent, the number and availability of witnesses and the time they will take, and in all respects whether the matter is ready for trial. The judge can also give any necessary pre-trial directions and may, after giving notice to the parties, determine any question of law or procedure arising in the proceeding. It would seem that such a determination would bind the trial judge on that issue.

Case management directions

The case management registrar may make 'case management directions' at the status and evaluation conferences.[14] That power is extensive. A case management direction may:

(a) dispense with all or any of further pleadings;

(b) order specified pleadings to be filed;

(c) dispense with any interlocutory pleadings or steps;

(d) direct that a certificate of readiness for trial is not required;

(e) direct the parties or counsel to file and exchange memoranda before the hearing of any interlocutory application in order to clarify the matters in issue before the hearing;

(f) direct that an interlocutory application be dealt with, or a conference

be held, by telephone, videophone or other similar means of communication;

(g) direct that an interlocutory application be dealt with, and any evidence in relation to it be provided, by fax, telegram, telex, courier post or other similar means;

(h) give directions as to the use of videotapes, films, computers and other equipment in any interlocutory proceedings;

(i) give directions for the speedier and more effective recording of evidence at any interlocutory proceedings;

(j) direct any or all of the parties to confer on a 'without prejudice' basis for the purpose of identifying, resolving and narrowing the points of difference between them;

(k) direct that a conference directed under sub-paragraph (f) be conducted by a mediator; but shall not, without the consent of the parties, direct that a conference take place where a party would later become liable to remunerate a mediator;

(l) in relation to a conference directed under sub-paragraph (f), set the terms or conditions for the conference and deal with anything in relation to the conference;

(m) direct that experts, whose reports have been exchanged under Order 36A confer on a 'without prejudice' basis for the purpose of identifying, resolving and narrowing the points of difference between them;

(n) direct a party ('A') intending to produce a plan, photograph, model or other object (the 'object') at trial to serve on the other party ('B'), at a time specified, a written notice:
   i. describing the object;
   ii. stating where and when it may be inspected; and
   iii. requiring B to serve A, within 7 days after the service of the notice, a written notice agreeing or refusing to agree to admission in evidence of the object without further proof of it;

(o) direct a solicitor for a party to give the party a memorandum stating:
   i. the approximate cost and disbursements of the party to the date of the memorandum;
   ii. the estimated future costs and disbursements of the party to but not including the trial;
   iii. the estimated length of the trial and the estimated costs and disbursements of the trial;
   iv. the estimated party and party costs that would be payable by the party if the party were unsuccessful at trial;

(p) in exceptional circumstances direct that an application by a party operate as a stay of proceedings;

(q) in exceptional circumstances, or if not to do so would frustrate the

appeal, direct that an appeal against a case management registrar's decision operate as a stay of proceedings;

(r) direct that an application for an adjournment of any proceedings be supported by affidavits of specified people;

(s) give directions to assist the convenience of the parties or witnesses;

(t) give directions as to the manner in which the parties shall defray the costs of giving effect to any case management directions;

(u) direct that a specified case management direction be complied with by a set date.

Documents must be served within 24 hours after they are filed.[15] A party must file and serve a notice of non-compliance as soon as its opponent fails to comply with the case management direction or interlocutory order. A case management registrar may then reconvene the status or evaluation conference.[16] Cases in which the entry for trial is countermanded or which are struck out of the list are again brought before a case management registrar in an evaluation conference.[17]

Appeals

Appeals may be made from procedural decisions of registrars to a master, and to a judge from other decisions.[18]

Other case management rules

The Court also has extensive powers under Order 29, either on its own initiative or on the application of any party, to give such directions in a proceeding as it considers appropriate to achieve their timely and efficient disposal. That Order also makes provision for standard times for the achievement of specific milestones in proceedings and empowers the case management registrar to monitor compliance with those timetables and to vary the times or impose sanctions in the case of non-compliance, as the circumstances justify.

CASE MANAGEMENT MODELS IN OTHER JURISDICTIONS

The form of case management varies for each jurisdiction.

Federal Court

The Federal Court adopted caseflow management from its establishment in 1977. To commence a proceeding in the court's original jurisdiction, an application is necessary.[19] Every application must state a date for a directions hearing.[20] On a directions hearing the court may make a wide range of directions in accordance with Rule 1 and in the interests of proper case management. Directions include:

(a) discovery and interrogatories;
(b) admissions;
(c) pleadings and affidavits standing as pleadings;
(d) parties;
(e) service;
(f) cross-claims;
(g) filing of affidavits;

(h) time, place and mode of hearing;
(i) evidence, including evidence given by way of affidavit;
(j) disclosure of expert reports;
(k) costs
(l) exchange of proofs of evidence.[21]

The Full Court has, on a number of occasions, stressed the importance of the court's system of case management as supported by the court's wide powers to give directions with respect to the conduct of proceedings.

In *Lenijamar Pty Ltd and Ors v AGS (Advances) Limited*,[22] the Full Court said:

> That the Court follows the case management approach is well known to the legal profession. The practice was adopted immediately upon the establishment of the Court in 1977. It was, at that time, a radical innovation in Australian superior courts; and was recognised as such. It is reasonable to suppose that all litigious solicitors and all barristers are aware that if they choose this Court for the litigation of a claim ... they go to a court which seeks to minimise the delays of litigation by issuing procedural directions for the parties which they are expected to observe. In return, the Court does its best to provide to the parties an early hearing date.[23]

In appropriate cases, the court may direct the parties to attend a case management conference with a judge or registrar to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial. At that conference the judge or registrar may give further directions. The parties may also be ordered to attend before a registrar for a conference with a view to satisfying the registrar that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in preparation for and at the trial.

On a directions hearing, each party must apply for any interlocutory orders or directions required.[24]

If an applicant fails to comply with the directions the Court may stay or dismiss all or part of the proceedings.[25] Judgment can be given against a respondent who fails to comply with the directions.[26]

There is a formal power for the court to dispose of a proceeding at a directions hearing.[27]

Section 53A of the *Federal Court of Australia Act 1976* (Cth) provides that the court may, with the parties' consent, refer all or part of a proceeding to a mediator or arbitrator.

Reform in the Federal Court

The Federal Court is moving towards the introduction of a system of individual case management.[28]

The reforms are being developed to address the following two problems identified in the Australian Law Reform Commission Report:

- The judge responsible for conducting directions hearings is usually not the trial judge. Lack of continuity in the transition from directions hearings to trial may mean that some issues best dealt with at the directions stage are left unresolved or are not resolved in the way the trial judge would have preferred. It also inevitably means that at least two judges, rather than one, must understand the issues in the case.
- No trial date is allocated until a case is ready or nearly ready for trial. This means that the parties and their lawyers lack the enforced discipline of a fixed hearing date to govern preparation for trial and provides an incentive to achieve settlement.

The Australian Law Reform Commission has proposed that all new cases be allocated to one judge who will be responsible for the matter during the interlocutory stage until final disposition. It further proposed that the Federal Court initiating process include information relevant to the management of the case including:

- the source of the court's jurisdiction;
- whether alternative dispute resolution has been explored and, if not, why not;
- whether any other court has jurisdiction;
- whether the case is linked to any other litigation; and
- the value of the claim, where appropriate.

The information will be used to allocate cases to judges.

It is proposed that the main case management events in the Federal Court will be:

- directions hearings (held not more than two months after commencement) aimed at early filtering of cases by removal, referral to alternative dispute resolution and settlement or disposal if possible. Appropriate directions are made in preparation for the case management conference where the focus moves more towards managing the progress of a case to trial.
- case management conferences (held not more than four months after commencement) to encourage settlement, referral to assisted dispute resolution or disposal, if possible. Directions are otherwise made for case progress and a trial date range is provided to the parties.
- evaluation conferences (held not more than 10 months after commencement) to focus on the disposition of the case at trial and evaluate preparation for the trial.

- trial management conferences (held not more than 13 months after commencement) which are held only when necessary, to establish ground rules for the conduct of the trial.

New South Wales

A system of differential case management ('DCM') applies to cases in the Common Law Division in New South Wales if Sydney is nominated as the place of trial. The DCM scheme is prescribed in a court Practice Note.[29]

DCM is a system of individualised case management. The scheme operates by differentiating between cases according to their complexity and the need for pre-trial activity. The aim is to give each case no more than the necessary degree of management and to this end cases are placed on an appropriate case management track. Cases are assigned to a standard case management track, an individual case management track or a special case management track early in the proceedings, according to the amount of supervision appropriate for the timely disposition of the case. This approach is designed to ensure that whilst most cases do not require numerous directions hearings, cases which require closer supervision are appropriately managed.

Where a plaintiff opts for the standard case management track the registry issues a notice that contains uniform directions and assigns to each a date for compliance. This track is suitable for cases that require little or no supervision.

Alternatively, where cases are destined for the individual case management track or the special case management track the court appoints a status conference. In order to ensure that the initial status conference is efficient and effective, the plaintiff must file DCM documents with the statement of claim. The plaintiff's DCM document must contain *inter alia*:

(a) a concise narrative of the facts the plaintiff intends to prove on the issue of liability, so drafted as to expose the specific matters of fact upon which liability is likely to depend;

(b) a description of any person from whom the defendant may be entitled to an indemnity;

(c) the identity of any insurer who may be liable to indemnify the defendant;

(d) details of any earlier relevant proceedings;

(e) in a personal injury claim, a copy of police and accident reports and details of any prior relevant injury;

(f) a statement as to whether discovery and interrogatories will be required and a statement as to any special features of the plaintiff's claim that might affect the complexity or length of the trial; and

(g) a statement as to why the action is appropriate to be brought in the Supreme Court.

The defendant must file and serve DCM documents before the conference. The defendant's DCM documents must contain similar material to that required from the plaintiff.

A judge, master or registrar conducts the status conference. It is expected that the parties will have discussed the case before the status conference and they are encouraged to bring to the conference draft timetables for the future management of the case.

At the status conference, on the basis of information provided by all parties, the proceedings are allocated to either the individual case management track or the special case management track.

Under the individual case management track the proceedings are managed according to directions determined appropriate to the specific case by the court.

Cases will be allocated to the special case management track if they are of unusual urgency such that fast and cost-effective management is warranted or if they are unlikely to be able to be brought to trial within the time limit applicable to the individual case management track because of intrinsic complexity, multiplicity of parties or any other good reason.

Cases in the individual case management track and the special case management track must be ready for trial within 290 days from the status conference. For the matters in the standard case management track there is a final conference for consideration of a trial date allocation within 365 days of the plaintiff's election to proceed in that track.

Alternative dispute resolution procedures may be considered by the court at the status conference in which case the court will endeavour to secure the parties consent for the necessary referral. In some circumstances, the court can compel a reference to arbitration.

Case management directions, whether given at the status conference, or issued automatically under the standard case management track, may be varied by consent of the parties (with some limitations) or by the Court.

Where a party does not comply with a direction, the status conference will be re-opened and the court may make appropriate orders, including an order striking out any pleading of a party in default.

A plaintiff files a certificate of compliance once all directions made at the status conference are complied with. The court will then appoint a Final conference. The parties must attend the final conference in person. Settlement is once again considered and offers of compromise are expected. If settlement

cannot be reached, the court attempts to facilitate agreement between the parties on as many issues as possible. The matter may then be set down for trial.

The court may appoint a compliance conference at which the court examines the conduct of the parties and their solicitors and gives any direction necessary to bring the proceeding to a final conference.

Commercial cases, building construction cases, equity cases, probate cases, and defamation cases in New South Wales are regulated by different rules.

Victoria

The Victorian Supreme Court in 1996 introduced new arrangements for the management of civil cases that were not managed in one of the specialist lists. The general scheme is to provide for the court to give directions for the conduct of the proceeding twice — first, soon after it has started and second, when the case is ready for trial. At the first directions hearing a date is fixed for the second directions hearing. At the second directions hearing, a trial date will be fixed not more than 12 weeks from the second directions hearing. A party knows early in the proceedings the time by which it must be ready for trial. Parties and practitioners are expected to take all reasonable steps to ensure that the momentum of the case is maintained and that the trial date does not have to be adjusted. If a party or practitioner is responsible for delaying the progress of the case to trial, that party or practitioner will be penalised in costs.

The management of cases is undertaken by a 'litigation support group' which comprises the Chief Justice, two justices of the court (the judge in charge of the civil list and the judge administrator of the litigation support group), two masters and two other members.

In most cases, directions are given without hearing from the parties or receiving any written submissions. In some cases the court requires parties to make some written submissions in particular aspects of the matter or, in cases of unusual complexity, may require the parties to attend a directions hearing.

If a party reasonably concludes that the initial direction should be given at a hearing the party may issue a summons returnable before the judge administrator and must do so before the expiration of 42 days after the first filing of appearance in the matter. The initial directions fix times for all interlocutory steps that are to be undertaken before the case is given a date for trial.

If a party fails to comply with the timetable fixed in the directions, the opposing party may take any step that is open to it under the rules when a party defaults in taking a step. If a party is still in default after the expiration of seven days from the date fixed for the taking of the steps, the party in default

may not take that step without first obtaining consent of all parties and leave of a judge or master. Such applications are normally heard and determined on the papers.

The trial directions date is fixed in initial directions and on that date directions are given concerning the arrangements for fixing cases for trial. Parties may not vacate or vary the trial directions date except by discontinuing the proceedings or by order of a judge or master. Good cause must be shown.

The court encourages the use of mediation. If mediation has not been attempted earlier, then in appropriate cases, orders for mediation will be made on the trial directions date.

The court has set target dates for the completion of interlocutory steps. The target dates are the latest time by which the steps should be completed in all but very complex cases. In giving directions, the court will usually direct that interlocutory steps are taken at the times fixed by the rules of court.

The parties are primarily responsible for monitoring compliance with the directions that are given. If steps are not taken by the times that are fixed, any party may take any step that is open to it under the rules of the consequence of that default.

In addition to the specific case management regime, Order 34 of the Rules confers on the court, on the application of a party or of its own motion, the power to, at any stage of a proceeding, give any direction for the conduct of the proceeding 'which it thinks conducive to its effective, complete, prompt and economical determination.'

South Australia

South Australian Supreme Court supervises cases through a series of scheduled conferences and fixes a date for trial which generally cannot be vacated.[30] Proceedings are assigned to one of three managements tracks — the expedited track, the normal track and the long/complex track.[31]

The expedited track is designed to accommodate two broad classes of case, namely:

- Matters which are summary or urgent in nature and will generally come to a conclusion quickly; and for which an appointment in chambers is given when proceedings are issued; and
- Matters which have 'short trial' characteristics such as limited and well defined issues or few parties.

The normal track encompasses the numerical bulk of civil cases. Cases not meeting other defined track class characteristics are designated to the normal track. The long/complex track is designed to accommodate cases which clearly require special treatment and/or the abnormal commitment of judicial

or other resources. Cases are initially assigned to the normal track and are only transferred to the expedited or long/complex track by order of the court.

Each matter in the long/complex track is, so far as is feasible, supervised by only one master throughout its interlocutory stages, in consultation and/or in concert with the proposed trial judge. Track events are specially mapped out to meet realistic timeline requirements on an individual case basis.

The timeline for cases in the normal track is divided into macro and micro events. The court, by computer-generated notices, automatically lists macro events which are the only occasion upon which the court will intervene. They are the status conference, the case evaluation conference, the pretrial conference, the trial and judgment. The court does not intervene in micro events except on the application of a party. Micro events are the interlocutory steps and the preparation for which the parties are responsible between the macro events.

The status conference

The status conference takes place within seven weeks after the first appearance is filed. The aim of the status conference is to provide an early opportunity for the court to review the action in detail. The normal track timeline envisages this conference taking place in most instances when the pleadings have been closed. It is convened by computer generated notice and requires the personal attendance of each party. Each party must, seven days prior to the conference, lodge with the court a short statement of relevant facts and issues identified by that party. The purpose of this is to facilitate a rapid understanding by the master of the issues arising between a party so that the conference can be more effectively conducted. Issues to be addressed at the conference include alternative dispute resolution, confirmation of appropriate track assignment, special interlocutory processes for complex litigation, the state of file documentation, discovery, expert reports and any other special or specific directions.

Case evaluation conference

The case evaluation conference occurs within 28 weeks after the status conference. The purpose of the conference is to review the progress of the preparation for trial at a point at which time still remains available in which to resolve outstanding issues. The rules prescribe the matters to be examined at this conference.

Pretrial conference

The pre-trial conference must occur within eight weeks after the case evaluation and approximately six weeks before the trial date. The purpose of the conference is to provide a final opportunity for alternative dispute resolution and to enable the master to conduct a final check and to ensure that there are no outstanding matters requiring attention before the assignment of a certain trial date.

The South Australian system 'contemplates a number of positive, but in depth, interventions by the court at a critical time during the progress of the action, for very specific and important purposes — but avoids the waste of judicial time and resources and the legal costs associated with what has been the former, repetitive AFD (application for directions) approach'.[32]

THE WOOLF REPORT

Lord Woolf in his *Access to Justice* report concluded that judicial case management was crucial to the changes necessary to that system. In his view, ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the courts.[33]

The elements Lord Woolf considered essential for a case management scheme included:

(a) allocating each case to the track and court at which it can be dealt with most appropriately;
(b) encouraging and assisting the parties to settle cases or, at least, to agree on particular issues;
(c) encouraging the use of alternative dispute resolution;
(d) identifying at an early stage the key issues which need full trial;
(e) summarily disposing of weak cases and hopeless issues;
(f) achieving transparency and control of costs;
(g) increasing the clients' knowledge of what the progress and costs of the case will involve;
(h) fixing and enforcing strict timetables for procedural steps leading to trial and for the trial itself.[34]

Essentially Lord Woolf proposed a new system of tracks which would involve the court allocating cases of different values and levels of complexity to specific procedures involving differing amounts of court involvement in the progress of the case. Lord Woolf proposed that the tracks should be:

- A small claims track for cases worth up to £3 000 involving little procedural formality, with judicial intervention at hearings to assist litigants in person. The cost of legal representation would not be recoverable between the parties;
- The fast track, for straightforward cases up to £10 000 involving a standard timetable, some limitations on procedure and evidence and scales of fixed *inter partes* costs; and
- The multi-track, which will involve more 'hands-on' judicial management tailored to the needs of individual cases and suitable for most complex cases.

Lord Woolf recommended that all cases should be scrutinised by a master or judge after a defence is filed. The claim would then be allocated to the

appropriate track. The decision would have to be made by the judge in the individual case, based on information in the claim and defence and taking into account the wishes of the parties.

The fast track

The fast track was designed to improve access to justice by providing a strictly limited procedure involving taking cases to trial within a short but reasonable time scale. The fast track is intended for claims which are above the small claims financial limit but which are simple and straightforward matters, for example, straightforward personal injury claims or simple building, consumer or neighbourhood disputes. Cases which raise issues of public interest importance, test cases, cases involving oral expert evidence and cases involving substantial documentary evidence, lengthy legal argument or significant oral evidence would not be considered suitable for the fast track.

On receipt of a defence, the judges will consider the papers and (if appropriate in consultation with the parties) allocate a 'trial week'. They will give directions for the preparation of the case, including a timetable for the steps to be taken to ensure the case is ready for trial by the trial week.

In addition to the formal directions the judge will, in appropriate cases, suggest that the parties discuss settlement or consider alternative dispute resolution mechanisms. The procedure envisages a pro active role for the Judge in communicating with the parties, or their legal advisors, by informal means, to resolve any difficulties.

The timetable will include an automatic sanction for non-compliance unless an extension has been granted prospectively. In order to confirm that the parties have complied with the directions before the case is allocated a final fixed trial date and time, the court will issue a listing questionnaire to the parties 10 weeks after service of the directions order. Parties must return the questionnaire within 14 days, otherwise the court will fix a hearing to resolve any difficulties and to ensure that the case is back on schedule for trial. Once the listing questionnaire has been returned from both parties the court will give a fixed date for trial at a set time.

Lord Woolf recommended a regime of fixed recoverable costs for fast track cases. The straightforward procedure of the fast track will make it possible to introduce standard fixed costs so that:

(a) parties know their maximum liability whether they succeed or fail;
(b) there will be no need for taxation; and
(c) solicitors will be able to work to a known budget.

The multi-track

The multi-track is intended to cover the broad class of litigation above the fast track. It covers the spectrum of cases from relatively straightforward cases to cases which are complex, weighty, of high financial value or of significant

public interest. The essential principle in this track is that the court manages every case according to the individual needs of the case. When a judge allocates a matter to the multi-track they will consider the appropriate degree of management required. In simpler cases a case management conference may not be necessary and the judge may:

(a) issue directions in writing for the preparation of the case;
(b) fix a date for the trial;
(c) specify a period within which it is intended that the trial shall take place;
(d) fix a pre-trial review.

In more complicated cases, a case management conference will be held to set the agenda for the case before significant costs have been incurred. Such a conference will not be held unless it would clearly be of value. At the conference the judge may narrow the issues, decide on future case management issues, set a trial date and a timetable for the case, and consider alternative dispute resolution and costs.

The pre-trial review is for the judge to settle the statement of issues to be tried and set a program for the trial. This review should take place about 8 to 10 weeks before the hearing.

The court will be able to call for information as to the views of the parties on how the case should be managed by way of a questionnaire. This action will avoid the court having to hold a case management conference and will enable the parties to play a part in the management of the case. Questionnaires relating to the parties' views on listing the matter may also be useful later in the proceeding. The questionnaire could indicate such information as:

(a) whether specific disclosure will be sought;
(b) what the principal issues are and whether they are of construction, fact, expert evidence or law;
(c) whether any directions relating to factual or expert evidence would be helpful at an early stage;
(d) whether alternative dispute resolution has or will be attempted;
(e) whether the Court can assist the parties in any way to resolve their disputes other than by trial;
(f) the time needed for specific disclosure, witness statements or expert reports;
(g) when the case will be ready for trial;
(h) the estimate of the length of the trial;
(i) costs to date and an estimate of total costs;
(j) whether there should be a case management conference and if so, when it should be held.

All cases will proceed by way of a timetable, whether a standard timetable or a tailor made timetable drawn up by the procedural judge. The timetable will specify dates for each stage and generally there will be no adjournments. Certain 'milestones' will be established at the outset and will not be able to be moved except with the leave of the court. These key stages are the case management conference, the pre-trial review and the trial date. Apart from these stages the parties will be able to change the timetable by agreement subject to the overriding power of the court to intervene where appropriate. If any such agreement is reached to vary the timetable, notification must be sent to the court with reasons. If an application to vary the timetable has not been made within the relevant time limits, a sanction will apply automatically unless relief is applied for.

UNITED STATES FEDERAL COURT SYSTEM

The *Federal Rules of Civil Procedure* enable the court of its own motion to order a pre-trial conference. At such a conference the court has extensive powers to make any appropriate programming orders and to deal with any other matters appropriate to the circumstances of the case. At the pre-trial conference the possibility of settlement and the need for any special procedures for managing the case may be considered. The parties may be required to submit a conference statement in advance, summarising the essentials of the case in simple terms, stating their position on the matters in issue and proposing a litigation plan.

At a final pre-trial conference, which will usually be held 7 to 14 days before the actual trial, orders will be made governing the conduct of as much of the trial as possible including the witnesses to be called, questions of admissibility and defining the nature and extent of the evidence of each witness. The parties may be required to set out the findings of fact and conclusions of law they will be asking the court to make in order to identify the matters truly in issue. Issues which are capable of being disposed of prior to trial, including discrete questions of law, may be disposed of prior to the trial.[35]

COMPARATIVE RESEARCH IN CANADA

In 1994, the Ontario Court of Justice's Civil Justice Review was established with a mandate to 'develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximise the utilisation of public resources allocated to civil justice'.[36] The Review released its first report in March 1995 with civil case management a centrepiece of the recommendations made.

Recommendations regarding a province-wide civil caseflow management system were made with the following essential features being recommended:

- responsibility for case management should reside with teams consisting of judges, judicial support officers (called 'case management masters') and case management co-ordinators;

- one set of case management rules should apply to all actions and applications;
- court monitoring should occur only after a defence has been entered to reduce the time and cost expended by the court in administering cases;
- there should be two 'tracks' of cases — 'standard' and 'fast';
- only the following time limits should be applicable:
  - attendance at an alternative dispute resolution session within two months after the close of pleadings;
  - a settlement conference to be held within three months after the close of pleadings for fast track cases and within eight months for standard track cases;
  - cases to be at trial within two months of settlement conference.
- mandatory mediation for all civil cases once an adequate body of qualified alternative dispute resolution providers is established.
- three types of conferences — case conferences,[37] settlement conferences[38] and trial management conferences,[39]
- sanctions for failure to comply with case management time lines;

The Review developed the above recommendations after considering the results of three caseflow management pilot projects. The conclusion was reached that rules providing for detailed time limits were cumbersome, led to too much administration and too many motions to extend time at the judicial level. Accordingly, the rules proposed by the Review provided principally for only a few mandatory time limits.

It was suggested that the time, energy and cost expended by the court in administering cases would be significantly reduced by:

- monitoring the time by which a settlement or pre-trial conference must be arranged; and
- providing that cases not advanced or resolved within a fixed period of time be automatically dismissed.

Sanctions suggested by the Civil Justice Review for failure to comply with case management timelines included:

- dismissal of the action;
- a costs award;
- striking out of any document;
- a case conference being convened;
- the creation or amendment of a case timetable.

COMPARATIVE RESEARCH IN THE UNITED STATES

In 1990 the *Civil Justice Reform Act* (CJRA) was introduced in the United States. The legislation was passed in response to concerns that cases in federal courts took too long and cost litigants too much. The legislation required each federal district court to conduct a self study with the aid of an advisory group and to develop a plan for civil case management to reduce costs and delays. The CJRA created a pilot program that required 10 federal district courts to incorporate certain case management principles into their plans and to consider incorporating certain other case management techniques.

The Act directed each pilot district to incorporate the following principles into its plan:

- differential case management;
- early judicial management;
- monitoring and control of complex cases;
- encouragement of cost effective discovery through voluntary exchanges and cooperative discovery devices;
- good faith efforts to resolve discovery disputes before filing motions; and
- referral of appropriate cases to alternative dispute resolution programs.

The Act also directed each district to consider incorporating the following techniques into its plan, but no district was required to incorporate them:

- joint discovery/case management plan;
- party representation at each pre-trial conference by an attorney with authority to bind that party regarding all matters previously identified by the court for discussion at the conference;
- required signature of attorney and party on all requests for discovery extensions or trial postponements;
- early mutual evaluation;
- party representatives with authority to bind and be present or available by telephone at settlement conferences; and
- other features that the court considered appropriate.

The evaluation of the pilot program used both qualitative and quantitative data (including court records, surveys and interviews) to compare cases managed in different ways to determine how such management practices affected litigants' costs, time to disposition, participants' satisfaction with the process and the views of fairness.

The research (which covered 20 districts and compared over 12 000 cases over four years), tended to show that case management as implemented by the pilot program had little effect on time to disposition, costs, or attorney satisfaction or views of fairness. However, it was found that four specific case

management procedures did show consistent statistical effects on time to disposition:

- early judicial management;
- setting the trial schedule early;
- reducing time to discovery cutoff; and
- having litigants personally present or available by telephone for settlement conferences.

The study found that whilst early judicial management[40] played some part in reducing time to disposition, it was also associated with significantly increased costs to litigants, as measured by attorney work hours. The research suggests that only judicial management of discovery produces the desired effect of reducing litigation costs.

The RAND evaluation[41] identified the following implementation factors that may have contributed to the pilot program having little effect:

- the fact that some judges, lawyers and others viewed the procedural innovations imposed by Congress as curtailing judicial independence accorded judges under Article III of the Constitution;
- the fact that the program unduly emphasised speed and efficiency at the possible expense of justice; and
- the lack of effective mechanisms for ensuring that the policies contained in district plans were carried out on an ongoing basis.

The RAND evaluation suggested that the following guidelines could overcome the problems identified above and substantially enhance the civil justice system:

- leadership and commitment to change should be embedded in the system;
- appropriate education should be provided about what the change entails;
- relative performance should be communicated across parts of the organisation;
- all supporting elements in the organisation must also make changes; and
- sufficient resources must be available.

The RAND research is one of the few empirical studies available on the effects of case management on cost, delay and perceptions of fairness. For this reason, despite differences in procedures and culture between the legal systems in Australia and the United States, the RAND results sound a note of caution in relation to the indiscriminate adoption of intensive case management systems for all civil litigation. Of particular interest is the suggestion that an uncontrolled individual docket system for all cases increases, rather than decreases, costs.

The study also indicates the desirability of subsequent empirical analysis of the effectiveness of any case management systems, once introduced.

WHO SHOULD MANAGE CASES?

In his report Lord Woolf expressed the following view:

> I do not see the active management of litigation as being outside a judge's function. It is an essential means of furthering what must be the objective of any procedural system, which is to deal with cases justly. Case management includes identifying the issues in the case; summarily disposing of some issues and deciding in which order other issues are to be resolved; fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence. These are all judicial functions.[42]

In the Commission's view there is much to be said for the argument that the day to day management of large or complex litigation should be conducted by the judge who is allocated to hear the case at an early stage after proceedings have been initiated.

The post of procedural judge as suggested by Lord Woolf is another example of a case management system supervised by designated judges or masters with extensive experience in civil litigation.

SANCTIONS

Lord Woolf points out that the new emphasis on court control of case progression gives added importance to devising sanctions which aid positive case management. Sanctions must not, of course, in seeking to enhance efficiency, offend against the fundamental principles of justice.

Plainly, however, a lack of clear and appropriate sanctions will detract from the level of compliance with case management directions which is essential to the efficient running of the courts and the achievement of the objectives which case management promotes.

An automatic financial sanction (in favour of the non-defaulting party) for non-compliance with case management directions and orders is one sanction suggested by the Lord Chancellor's Department in a review of Lord Woolf's proposals.

Automatic sanctions are inflexible and may be inappropriate. However, a wide range of sanctions should be available for non-compliance so that they can be tailored to the specific nature and magnitude of any particular default. Costs orders against the defaulting party should normally be made payable forthwith and greater use should be made of indemnity costs orders where there has been demonstrated continuous default. The deterrent effect of an order for costs to be payable immediately is likely to be significantly greater than an order that may be paid 'in any event'. Most cases are settled, many without taking into account outstanding interlocutory costs orders. Thus,

the latter form of costs order often acts as no real sanction at all. In any event, there is no good reason why the innocent party should have to bear their costs of a successful application until the proceedings are finally resolved. Parties brought before a court because of a failure to comply with deadlines or case management orders should, in ordinary circumstances, be liable to pay the costs of the application immediately.

COMMENTARY

In a recent paper, Justice Davies of the Queensland Supreme Court expressed the view that many of the problems with our existing system of civil litigation are attributable to the 'labour intensiveness of litigation and in turn to the adversarial imperative'. Justice Davies suggested that extensive judicial case management was an example of judge-driven reform where too much attention may have been focussed on the increased efficiency it brings to the processing of cases to trial and too little on the overall cost to the parties.

> Case management is, I think, a good example of the need to match the extensiveness of the procedure with the magnitude of the dispute. Small and medium-sized cases cannot afford extensive judicial management. It is likely, in my view, that it is only in large and complex cases that extensive judicial case management will not significantly increase costs.[43]

While Justice Davies acknowledged that early court intervention of some kind reduces cost by isolating and limiting the real issues in dispute, by referring appropriate cases to alternative dispute resolution and by setting a program for the future conduct of actions, he also believed that statistical analysis of case management schemes in Australia would produce the same results as in the United States study, that is, that an uncontrolled individual docket system for all cases increases costs.

There seems little doubt that the current trend towards increased judicial involvement has the potential to absorb more resources of the courts and to increase the costs of the parties by subjecting the pre-trial stage of litigation to constant intervention. It also appears clear that the most expensive case management schemes are those which involve multiple hearings.

The alternatives are first, to keep the system presently used in the Supreme Court, although there are issues as to whether it is the most cost effective system, or to adopt the Federal Court system, which would necessitate the allocation of much greater resources.

In order effectively to administer a case management system the court must plainly have extensive powers to give such directions as it may consider reasonably necessary to effect a speedy, economical and just determination of the dispute.

In the view of the Law Reform Commission of Western Australia extensive judicial case management should be reserved for larger and more complex

matters usually in the Supreme Court but on occasion in the District Court — where warranted.

Otherwise, it would propose that automatic intervention by all courts in a proceeding should be limited to two stages in the course of the proceedings; a case conference timed to occur after the defence has been filed and a case evaluation conference when the matter has been entered for trial.

In the view of the Law Reform Commission of Western Australia those conferences should follow the form of the current status conference and the listing conference. The powers of the court which are currently set out in Order 29A are sufficient to enable the court to manage the progress of a proceeding.

It is proposed that the status conference should, in the case of proceedings commenced by writ, take place within 4 weeks after the statement of claim is filed. At that stage the defence should have been filed and the issues defined so far as the parties have been able to define them on the pleadings.

As soon as practicable after a case is entered for trial a listing conference should be held. That listing conference should follow the procedure currently contained in Order 29A rule 8. A party should not, however, be at liberty to enter a matter for trial or seek a hearing date where there has been non compliance with any earlier case management direction, unless compliance has been excused by the court.

That is not intended, however, to be the inflexible metes and bounds of case management in the ordinary case. Part of the purpose of the status conference will be to assess the extent of judicial intervention appropriate to the case. Ultimately, the nature of the management in any particular case must be moulded to the needs of the case. What is proposed is the minimum requirement for the ordinary case. Beyond that intervention must be justified by demonstrable need.

If the progress of cases is not continuously monitored there needs to be a system to take out of the court lists matters which are inactive.

Where neither party has taken any step in a proceeding for six months, except where that is authorised by an order of the court, there should be an 'inactive case' list to which the case would automatically be transferred. While a matter is on the inactive case list neither party would be able to take any step in the proceeding. A matter could only be removed from the list with the leave of the court.

The court would notify the parties, or where they were represented, their solicitors, when the matter was placed on the inactive case list. Where the

parties were represented, the solicitors would be required to notify their clients in writing that the matter had been placed on the inactive case list and that it had been placed on that list because no steps had been taken in the matter for at least six months. After six months on the inactive case list it is proposed that a proceeding would automatically be struck out.

The court resources should be available only for the benefit of litigants who are willing to prosecute their cases with reasonable dispatch.

There will of course always be a proportion of cases that will die a natural death because the initial heat has gone out of the dispute and the parties have lost any real interest in it. Those cases should be resolved at a lesser cost to the parties, and with a lesser utilisation of court resources and should not be artificially resuscitated by the court from time to time through a case management system.

Fundamentally, it is proposed that the scarce resources of each court should be used where they will do the greatest good by allocating resources towards litigation which the parties have demonstrated an interest in pursuing.

PROPOSALS

The Law Reform Commission of Western Australia recommends that the system of case management for civil cases in Western Australia have at least the following essential elements:

1. There should be uniform case management procedures for both the Supreme and District Courts.

2. In the usual case there should be only two mandatory case management conferences. Judicial intervention beyond that should be restricted to large or complex matters or on the basis of demonstrable need. A special list should be established for cases requiring intensive case management.

3. In all cases a case status conference in a matter should be held within four weeks of the filing of the statement of claim. That conference would follow the form of the current status conference in the Supreme Court. At that hearing the court would consider what level of continuing management was appropriate and give such case management directions as the court thinks fit.

4. A listing conference should be held once a case has been entered for trial. That conference would follow the procedure of the current listing conference in the Supreme Court. A party would not be entitled to enter a case for trial where any previous case management directions had not been complied with, except with the leave of the court.

5. At any case management conference, evidence, submissions, or attendance by the parties should be received by telephone, video link or by any other proper means of communication.

6. An inactive case list should be established. Any matter in which no steps had been taken by any party for a period of six months would be transferred to the Inactive case list. No step in the proceeding could be taken while a case was on the inactive case list. A case could be removed from the list only by order of the court. After six months on the list a proceeding would be administratively dismissed for want of prosecution.

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1 M von Dadelszen, 'Caseflow Management – In Search of the "Meaningful Event"' (1997) 6 *Journal of Judicial Administration* 171, 178.

2 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

3 (1997) 189 CLR 146.

4 Ibid 154.

5 M Solomon and D Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* (1987).

6 David Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part II' (1995) 69 *Australian Law Journal* 790, 790.

7 Ibid 791.

8 ALRC, *Judicial and Case Management*, Background Paper 3 (December 1996) 8.

9 John Chaney, 'Editorial' (1996) 23 *Brief* 4.

10 Steven Penglis and Craig Sanderson, 'Major Changes to the Supreme Court Rules' (1996) 23 *Brief* 7.

11 *Rules of the Supreme Court 1971 (WA)* O 29A r 6.

12 *Rules of the Supreme Court 1971 (WA)* O 29A r 7.

13 *Rules of the Supreme Court 1971 (WA)* O 29A r 8.

14 *Rules of the Supreme Court 1971 (WA)* O 29A r 3.

15 *Rules of the Supreme Court 1971 (WA)* O 29A r 9.

16 *Rules of the Supreme Court 1971 (WA)* O 29A r 4.

17 *Rules of the Supreme Court 1971 (WA)* O 29A r 15.

18 *Rules of the Supreme Court 1971 (WA)* O 60A, r 4.

19 *Federal Court Rules 1979* (Cth) Form 5.

20 *Federal Court Rules 1979* (Cth) O 4, r 8.

21 As outlined in Bernard C Cairns, *Australian Civil Procedure* (4th ed, 1996).

22 (1990) 98 ALR 200.

23 Ibid 206.

24 *Federal Court Rules 1979* (Cth) O 10 r 5.

25 *Federal Court Rules 1979* (Cth) O 10 r 7.

26 *Federal Court Rules 1979* (Cth) O 10 r 7.

27 *Federal Court Rules 1979* (Cth) O 10 rr 3 and 4.

28 ALRC, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (April 1997) 52.

29 Supreme Court of NSW, Practice Note No 88 (1996).

30 *Supreme Court Rules 1987* (SA) r 2.04.

31 See discussion of LT Olsson, 'Civil Caseflow Management in the Supreme Court of South Australia: Winds of Change' (1993) 3 *Journal of Judicial Administration* 3.

32 Ibid.

33 Woolf, above n 2, 2.

34 Ibid 18.

35 See the discussion by Ipp, above n 6, 791.

36 Civil Justice Review, *Supplemental and Final Report* (November 1996).

37 A case conference may be convened at any time by a case management judge or case management master on their own initiative or at a party's request, for the purpose of, for example, resolving issues, creating or amending timetables, and considering referral to alternative dispute resolution.

38 A settlement conference must be held for the purpose of settling the case or issues in the case according to the following prescribed timelines: 3 months after the close of pleadings for fast track cases; and 8 months for standard track cases.

39 A trial management conference may be convened by a case management judge or case management master on their own initiative or at a party's request, for the purpose of streamlining the use of trial time by, for example, exploring the most expeditious way to introduce evidence and by defining issues.

40 Early judicial case management principles and techniques included ongoing judicial control of pre-trial processes, having counsel jointly present a discovery/case management plan at the initial pre-trial conference, parties being represented at pre-trial conferences by an attorney with authority to bind them, requiring the signature of the attorney and the party on all requests for discovery extensions or postponements of trial, requiring party representatives with authority to bind to be present or available by telephone at settlement conferences.

41 In 1996 RAND completed the independent evaluation mandated by the *Civil Justice Reform Act of 1990* (US) for the Judicial Conference of the United States: see See JS Kakalik, T Dunworth, LA Hill, D McCaffrey, M Oshiro, NM Pace and ME Vaiana, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, (USA: RAND, 1996).

42 Lord Woolf, above n 2, 14.

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2.3

Court Based or Community ADR and Alternative Forums for Adjudication

ADR — THE THEORY

'ADR' stands for alternative dispute resolution.

> In a dispute, people have certain interests at stake. Moreover, certain relevant standards or rights exist as guideposts toward a fair outcome. In addition, a certain balance of power exists between the parties. Interests, rights and power then are three basic elements of any dispute. In resolving a dispute, the parties may choose to focus their attention on one or more of these basic factors. They may seek (1) to reconcile their underlying interests, (2) determine who is right, and/or (3) determine who is more powerful.[1]

What is ADR and how is it different to the system of adjudication by the courts?

When a court decides a dispute, it is by way of adjudication as to who is right. The judge or magistrate makes a decision by determining what the law is with regard to the dispute based upon the evidence presented to the court. The decision is usually intended to resolve all of the matters that are in dispute between the parties who have entered the court process to resolve the matter. The decision leads to enforceable orders being made which will put the parties in the required position as a result of the judgment. In almost all cases, the orders made will include provision for the 'losing' party to pay the legal costs of the 'winning' party.

Dispute resolution which is an alternative to that process includes a variety of methods of resolving the dispute by the parties meeting together with a neutral third party to discuss the dispute and come to a resolution upon which they agree (with or without input from the third party).

Because the parties themselves agree in the resolution of the dispute, there is less likely to be a 'winner' and 'loser'. Because the dispute may be resolved with resort to issues wider than that which a court can consider within the

strict confines of the law, it may provide greater satisfaction to the parties by reconciling the underlying interests of the parties.

The difference between the two approaches is often referred to as being 'rights based' or being 'interest based'. Apart from the manner in which the dispute is resolved, the difference between the two approaches requires the neutral third party (the neutral) to have different training. An 'interests based' approach requires the neutral to have skills in drawing out from the parties exactly what the dispute is about including the underlying issues and what resolutions may be acceptable to the parties.

Courts in Western Australia presently include a form of ADR process before the dispute is allowed to proceed to a hearing. The process is usually assisted by an officer of the court[2] and generally a 'rights based' approach is used in that the parties are encouraged to resolve their dispute within the confines of the subject matter before the court. However, a wider approach is sometimes used which may accommodate the wider interests of the parties.

The principles by which a dispute resolution process should be measured

Within the last five years or so, many governments have been looking at the effectiveness of the court process in an attempt to improve efficiency and reduce the increasing costs of providing a civil justice system.

The Australian Law Reform Commission has produced a series of issues and background papers reviewing the effectiveness of the adversarial system.[3] Similarly in Canada[4] and the United Kingdom[5] the process has been examined and many reports have been published reviewing their civil justice systems.

General principles developed by Lord Woolf [6] to ensure a civil justice system provides access to justice are:

(a) it should be *just* in the result that it delivers;

(b) it should be *fair* and seen to be so by:
- ensuring that litigants have an equal opportunity, regardless of their resources, to assert or define their legal rights;
- providing every litigant with an adequate opportunity to state his own case and answer his opponent's;
- treating all like cases alike.

(c) procedures and cost should be *proportionate* to the nature of the issues involved;

(d) it should deal with cases with reasonable *speed;*

(e) it should be *understandable* to those who use it;

(f) it should be *responsive* to the needs of those who use it;

(g) it should provide as much *certainty* as the nature of particular cases allows;

(h) it should be *effective:* adequately resourced and organised so as to give effect to the principles above.

Any proposal with regard to reforming the civil justice system (including the role played by ADR) should be measured against these principles.[7]

Disputes should therefore be resolved quickly, fairly, in a manner in which parties understand the process which should be appropriate to their needs and at a cost proportionate to the nature of the dispute.

Different models of alternative dispute resolution

As ADR was developing in the USA, Australia and elsewhere, difficulties were observed in the labelling of the various models used to resolve disputes. To counter this, the National Alternative Dispute Resolution Advisory Council (NADRAC) defined various dispute resolution processes involving third party intervention and which would otherwise be subject to judicial determination.[8]

Processes were categorised into:

1. facilitative processes,
2. advisory processes,
3. determinative processes which are non enforceable, and
4. determinative processes which are enforceable.

Processes which are facilitative

Facilitative processes involve a third party providing assistance in the management of the process of dispute resolution. Generally the third party has no advisory or determinative role in the content of the dispute or the outcome of its resolution, but may advise on or determine the process whereby resolution is attempted. These processes fall into three categories: mediation, conciliation and facilitation.

- *Mediation*

A process in which the parties to the dispute, with the assistance of a neutral third party (the mediator) identify the disputed issues, develop options, consider alternatives and endeavour to reach agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

- *Conciliation*

A process in which parties to the dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and further may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

- *Facilitation*

A process in which the parties (usually a group), with the assistance of a neutral third party (the facilitator), identify problems to be solved, tasks to be accomplished, or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

Processes which are advisory

Advisory processes involve a third party who investigates the dispute and provides advice as to the facts of the dispute, and, in some cases, advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.

- *Investigation*

A process in which a third party (investigator) investigates the dispute and provides advice (but not a determination) as to the facts of the dispute;

- *Expert appraisal*

A process in which a third party, chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert appraiser) investigates the dispute and provides advice as to the facts of the dispute and advice regarding possible, probable and desirable outcomes and the means where by these may be achieved;

- *Mini-trial*

A process in which the parties present arguments and evidence to a neutral third party who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means where by these may be achieved. This process may be more suited for disputes between corporations whose senior management can treat disputes as part of the business environment. Once the case has been presented it is up to the senior executives to negotiate a settlement based on the information disclosed by the hearing. In Canada this technique has been used successfully in a number of large multi-million dollar disputes.[9]

- *Reference to a special referee*

Supreme Court Rules[10] provide for a reference for decision or opinion to be provided by a technical expert. Special referees avoid the necessity of a judge having to become acquainted with the intricacies of a particular science or trade or cases where a detailed examination is required of large numbers of items such as accounts or building items. A reference can be heard in private rather than a public forum and is less formal than court proceedings.[11] Additional benefits may include reducing time delays in obtaining a trial date,

reducing the cost of litigation, producing a quicker resolution, better determination of complex technical issues and avoiding the need for discovery. A referee is required to give reasons for the opinion and be impartial. However, unless and until the referee's report is adopted by the court, it does not constitute a determination final and binding upon the parties. Adopting the opinion of the referee on a question of fact or law constitutes the opinion of the court and is thus its judgement on that fact or matter.[12]

Processes which are determinative and are not enforceable

Processes which are not enforceable are those in which the determination does not provide a basis for an action for enforcement.

- *Fact finding*

A process in which the parties to the dispute present arguments and evidence to a neutral third party (the investigator) who makes a determination as to the facts of the dispute but who does not make any finding or recommendation as to outcomes for resolution.

- *Determinative case appraisal*

A process in which the parties to a dispute present arguments and evidence to a neutral third party (the appraiser) who makes a determination as to the most effective means whereby the dispute may be resolved, without making any determination as to the facts of the dispute.

- *Early neutral evaluation*

A process in which at an early stage, the parties to a dispute present arguments and evidence to a neutral third party who makes a determination as to the key issues in dispute, and most effective means whereby the dispute may be resolved.[13]

- *Summary jury trial*

A process used in the United States of America in which the parties to a dispute present argument and a summary of evidence to an empanelled jury presided over by a judge or magistrate. Attorneys for each party present their case in the form of a narrative to a six-member jury who returns a non-binding verdict. The jury is informed that the hearing is a summary jury trial but is not told that its verdict is non-binding until afterwards.[14] Following the announcement of the verdict, the jury is debriefed enabling the attorneys and the parties insight as to the jurors' thought processes and comprehension of the case.

The primary purpose of the summary jury trial is to facilitate a settlement by the parties observing the jurors' response to the arguments which assists the parties in settlement negotiations. This process is used in a number of states and has been hailed as successful. In one jurisdiction, of 70 summary jury

trials conducted 68 settled before trial.[15] The summary jury trial has been criticised as an expensive device in that it requires the attention of a judge and a jury as well as a courtroom.[16]

Processes which are determinative and enforceable

Determinative processes involve a third party investigating the dispute (which may include the hearing of formal evidence from the parties) and making a determination, which is potentially enforceable, as to its resolution.

- *Arbitration*

A process in which the parties to the dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination. The parties must agree the process by which the arbitrator proceeds and the method may or may not include processes such as discovery.

- *Expert determination*

A process in which the parties to the dispute present arguments and evidence to a neutral third party chosen on the basis of his or her specialist qualification or experience on the subject mater of the dispute, (the expert) who makes a determination.

- *Private judging (sometimes called Rent-a-Judge)*

A process in which the parties to the dispute present arguments and evidence to a neutral third party chosen on the basis of experience as a member of the judiciary, (the private judge) who makes a determination in accordance with his or her opinion as to what decision would be made if the matter was judicially determined. In the United States of America a number of states allow for the process of using a retired jurist to settle disputes in private. The impetus for some is to avoid public scrutiny but for others it is that the process is far quicker than waiting for four to five years to be able to bring their matter to trial. In California at least, the outcome of a privately judged case may be challenged in a public court of appeals.[17]

The multi-door-courthouse

In the United States of America the *multi-door-courthouse* was conceived by Professor Frank E A Sander, of the Harvard Law Centre. Instead of one door leading to a courtroom, there is provision for many doors through which litigants may pass to engage in the most appropriate form of dispute resolution for the circumstances of the particular dispute. The key feature is the initial procedure of intake screening and referral. Disputes are analysed according to various criteria to determine which dispute resolution mechanism would be best suited for the problem. Factors considered include; the nature of the case; its complexity; the relationship of the parties; any disparity in bargaining power; the history of the negotiations between the disputants; the nature of the relief sought; and the relative size of the claim. Pilot projects

have been commenced in a number of US jurisdictions with the projects in Houston and Washington being permanently adopted.[18]

Should all disputes be compelled to attempt ADR?

The majority of disputes are resolved prior to the commencement of a trial. Usually the settlement is attained by the court facilitating an ADR process during which the parties are encouraged to compromise. Pressure is placed on the parties to consider the cost of proceeding with the litigation including the risk of party/party costs and the non-economic cost to the parties if the matter is not resolved.

Courts invest varying degrees of resources into this process, but the cost of diverting matters from litigation is less than the cost of matters proceeding through the court system to trial. Prior to ADR being introduced in courts, many matters settled on the day of the trial, representing a wasteful use of allocated resources. Court-annexed ADR attempts to resolve disputes at an earlier date with commensurate savings to court expenditure.

It is useful to consider if resources should be allocated to all matters in such a way as to encourage settlement by a method other than adjudication, or whether there are some disputes which should not be diverted from adjudication.

The various methods of dispute resolution vary by the degree of control that remains with the parties. For example, adjudication by a judge following trial leaves no control by the parties over the determination reached, and no control by the parties as to the process. Court procedure is fixed and the individual parties have very little influence upon how the matter will proceed. Alternatively, with mediation the parties retain not only control over the determination reached, but also control the process. Between these two extremes is arbitration, over which the parties retain control over the process (which must be by way of agreement) but have no control over the determination.

Where there is a power imbalance between the parties, the less control in the hands of the parties will afford a greater degree of fairness in the outcome.[19] It is therefore not desirable to resolve a dispute between parties inequitably balanced by means other than adjudication.

Apart from a situation of power imbalance, there are other disputes which by their nature will not be resolved by an alternative means of resolution and therefore should not be diverted. They include:

- the situation where the parties cannot agree the interpretation of the rules that govern the dispute and the outcome will depend upon statutory interpretation;
- where the matter involves the litigation of a test case; and

- where a party is seeking to enforce an undisputed right against the other party such as in debt collection.

In the above situations the matter will not resolve prior to adjudication by a judge or magistrate.

Guidelines can be developed to indicate whether a particular dispute is best suited to be resolved by adjudication or an alternative method. Considerations in the development of such guidelines could include:

- *The degree of privacy required by the parties*

If the matter is one of some sensitivity, commercial or otherwise, the parties would seek to control the release of information concerning the dispute and therefore the matter would be best resolved outside the public record of a court.

- *Whether the parties are individuals or organisations*

The individual acts upon the basis of feelings, values and perceptions and the issues that might influence a compromise of a claim are different from that of an organisation. The organisation tends to have a more political decision-making process, based upon balancing goals among internal power groups.[20] Disputes where all parties are organisations tend to be resolved best by arbitration or negotiation assistance which allows the parties to make commercial decisions. It may be desirable to have an arbitrator make a determination rather than an individual within the organisation taking responsibility for the determination as would be the case by way of mediation.

- *Where there is an ongoing relationship between the parties*

Because of the inevitable 'winner' and 'loser' outcome of adjudication by courts and the public nature of such method, such a dispute resolution process is likely to be destructive of the relationship between the parties. Where it is desirable that the relationship should be not further damaged, an alternative method of resolving the dispute which has an emphasis on cooperation is desirable. Additionally the skill of the neutral in stripping the messages of its vituperative content is of assistance in the rehabilitation of a relationship. Such a matter would be better dealt with by an alternative ADR method.

- *Where the dispute arose as a result of a misunderstanding between the parties or the result of negotiations where one party may have failed to disclose necessary information*

Negotiated assistance processes are best suited to deal with communication and strategy problems. In such a case adjudication should be used only if the mediation process cannot resolve the matter.

- *The dispute may have arisen due to a problem with lack of information*

In such a case, the dispute resolution process must provide the necessary information to solve the dispute. Where the gathering of further information is within the capacity of the parties, that can be facilitated by the ADR process. An arbitration process may be better designed for garnering technical information to add to that possessed by the parties and for generating options not already considered by the parties. Given that arbitrators are usually selected for their expertise with regard to the subject matter of the dispute, they may have the best potential to solve disputes where the problem is inadequate information or the need for more options.

- *Whether the litigation is to enforce an undisputed right such as in debt collection*

If the litigation has been commenced to obtain a judgment which will force a debtor to deal with the reality of the debt, then adjudication – (albeit usually undefended) is the only means of resolving the matter.

- *Whether the litigation is a test case*

This can only be resolved by adjudication.

- *Whether the litigation is seeking statutory interpretation*

This can only be resolved by adjudication.

ADR IN WESTERN AUSTRALIA — THE PRACTICE

How is ADR presently used in courts in Western Australia?

Local Court of Western Australia

The Local Court of Western Australia has jurisdiction with regard to civil disputes to a maximum value of $25 000 in the General Division, $3 000 in the Small Disputes Division and rental matters to the value of $6 000 in the Residential Tenancy Division.

Representation in the Small Disputes Division and the Residential Tenancy Division is not generally permitted.[21]

Parties to litigation in the General Division of the Local Court are able to request that a pre-trial-conference be listed following the filing of a defence to a claim.[22] In practice, if the parties do not request a pre-trial conference, it is usual for a magistrate to direct that such a conference be held.

The conference is presided over by the managing registrar of the Court, or in the Perth Local Court by a special court officer who has undertaken training in ADR processes. The majority of parties are represented at the pre-trial conference, although more plaintiffs are represented than defendants. It is common for junior practitioners or articled clerks to attend the conference, rather than the solicitor who has the conduct of the file.

If the matter is not resolved at the first pre-trial-conference then a further conference will be held prior to the matter being listed for hearing, following

all preliminary steps requisite to a trial being completed. If the matter does not settle at this subsequent conference, listing for trial proceeds.[23]

Matters filed in the Small Disputes and Residential Tenancy Divisions are also required to proceed to a conference. As the parties involved in litigation in these divisions are generally unrepresented, the conference includes an explanation of the process to be followed and often result in a settlement. If a Small Disputes matter does not settle, it proceeds to hearing that day. If a Residential Tenancy matter does not settle, it is listed for a hearing on another day.

The introduction of pre-trial conferences has assisted the Local Court with better management of trial listings. Previously each magistrate was listed to hear 21 hours of hearings each court day in the knowledge that a significant number would settle prior to the actual hearing day. The present system provides more certainty with each magistrate being listed one hearing that is likely to proceed to trial and a further matter that is likely to settle (debt or motor vehicle accident with no significant issues for determination). Despite the pre-trial options for settlement, a significant number of matters settle on the day of the hearing.[24]

Local Court officials observe that if parties were able to settle their disputes without proceeding to trial, then they should have been able to settle at an earlier date. The main deterrent to this was considered to be that the pre-trial-conference was seen merely as a step in the process of the litigation, rather than an important opportunity to resolve the matter. This attitude is often reflected in a junior practitioner attending the conference who is not sufficiently in control of the litigation to be able to finalise the dispute. It was further observed that parties only settle the dispute when the court process provides a climate whereby their case has been fully appraised by the parties and their representatives with consideration of the possible outcomes.

In the 12 months to 30 June 1996 there were 46 925 plaints filed in the Local Court throughout the state, 30 167 were at the Perth Local Court. There were 8 266 Residential Tenancy applications state-wide with 3 487 of them at the Perth Local Court. In Perth 2 728 pre-trial conferences were held with 4 220 held state-wide.

In the Local Court at Perth, 24 884 plaints in the General Division were filed in the year ended 30 June 1998 and 1 320 plaints in the Small Disputes Division making a total of 26 204 matters filed not including Residential Tenancy matters. In 3 231 matters (12.33 per cent) a Notice of Intention to Defend was filed.

These figures would tend to indicate that a large proportion of plaints filed in Perth were undefended matters that were resolved by default or summary

judgment. The court does not keep statistics with regard to the subject matter of litigation and it is not possible to quantify debt collection as a proportion of the total.

In 1996, 38 per cent of all defended matters state-wide were resolved during the course of a pre-trial conference. A further 19 per cent settled shortly after the pre-trial conference and 7 per cent settled at the court room door or within a very short time of the commencement of the trial. Of all plaints filed in 1996, 12 per cent proceeded to trial. The balance remaining can be assumed to have been settled outside the court process as the plaint did not proceed further. In Perth, 23 per cent of matters were listed for hearing following a first pre-trial conference and the incidence of late settlement continues to be of concern.[25]

District Court of Western Australia

The District Court of Western Australia has jurisdiction for civil disputes up to $250 000 and for personal injuries matters regardless of quantum. Approximately 7 000 civil matters are commenced each year.

All parties involved in civil litigation in the District Court are required to attend a pre-trial conference listed following filing of entry for trial.[26] Between twenty and twenty-five conferences are listed each day at 9.15 am. The parties are required to attempt to resolve the dispute unassisted by using the conference rooms provided. If the parties are unable to resolve the matter unaided, they seek assistance from one of the two or three registrars available. If the matter is not resolved by 1 pm and all efforts have not been exhausted, the conference will be adjourned to another date when the procedure will be repeated.

All registrars have been trained in ADR and the method used in the pre-trial-conference varies from being facilitative to that of a neutral evaluator depending upon the convenor and the particular dispute.

Approximately 50 per cent of matters are resolved without the assistance of a registrar and approximately a further 30 per cent resolve with that assistance. Only between 2 per cent and 5 per cent of matters initiated commence and complete a trial.

If a party fails to make a bona fide effort to resolve the dispute, the registrar records a comment which may have cost implications at the conclusion of the matter.

In addition to the pre-trial conference system, the Court provides a rarely used mediation service that the parties can request at any time.

Although at least 95 per cent of all matters are resolved or discontinued prior to the completion of a trial, considerable Court resources are used in

getting to the point of settlement, with the greater the resource use the later the point of settlement.

The Insurance Commission of Western Australia has recently developed a policy (with the support of the legal profession) of offering to negotiate a settlement of matters relating to motor vehicle personal injury claims whereby they will attempt to negotiate the claim for a period of 90 days prior to a writ being issued. In the event that the negotiations are successful, legal costs are offered equivalent to that which would have been allowed had a writ issued and the matter proceeded to a pre-trial conference. In the event that the negotiation fails following a reasonable offer by the Insurance Commission being refused, the Insurance Commission will at a later date argue against costs being awarded to the plaintiff where the matter is resolved within the range of the offer.

Supreme Court of Western Australia

The Supreme Court of Western Australia introduced mediation in 1993 by the case flow management powers of the Court[27] in an attempt to reduce the backlog of matters in the civil list awaiting trial. This became known as the 'August Blitz'. Initially the procedure was used only in the expedited list but is now used throughout the civil list.

The Court may at any time, of its own motion, on notice to the other parties, or upon the hearing of a summons for directions, or on any other application, review any progress of the proceedings and make whatever orders or direction it considers to be necessary to lead to the efficient and timely disposal of any action in a manner that it considers just and expedient.[28] Included in these powers is the power to order mediation for the purpose of resolving or narrowing the points of difference between the parties.

Mediation may be ordered by the case managing registrar as early as following the filing of a notice of appearance to a writ, or in the case of an originating summons prior to the filing of supporting affidavits. Mediation may be ordered before discovery or later before listing for trial, and may be ordered on more than one occasion.

The parties may attend court-annexed mediation undertaken by one of the registrars or may attend external mediation by a mediator approved by the Chief Justice. There is no power to order external mediation as the parties must bear the cost involved. Very few of the parties undertaking mediation have elected to proceed with external mediation.

The mediation model used by the registrar varies according to the type of dispute and the parties involved. The process may commence with facilitation and progress through to evaluation where necessary.[29]

For the calendar year 1997, 997 writs were issued from the Supreme Court, 22 originating summons and 147 originating motions. The numbers have

remained constant in the past three years with a total of some 1300 civil proceedings per year. The number of mediations conducted in the calendar year 1997 was 283 with 25 matters proceeding to trial and 184 matters resolved prior to trial. If the number of on-going mediations at the end of the year (20) are not taken into account, then the settlement rate of matters that had been mediated is 82.2 per cent.[30]

Registrars are all trained in ADR methods.

No court-annexed mediation can occur without an order. The only compulsion is to attend and to cooperate, at least to the extent of exploring the possibility of narrowing the issues in the dispute, once a mediation order has been made.[31] Where a party fails to cooperate at mediation a report of such failure can be provided to the trial judge after reasons for judgment have been delivered. In one such case the effect was that no costs were awarded following the trial.[32]

The *Supreme Court Rules* allow for experts whose reports have been exchanged to consult on a 'without prejudice' basis and thus narrow any points of difference.[33] The experts may be ordered to attend a formal mediation conference before a registrar.

There is considerable flexibility in the processes provided by the Supreme Court in an attempt to reduce delays and to have parties resolve their disputes prior to proceeding to a trial. The appropriate level of resources has been provided to the Supreme Court allowing one mediation listed before a mediation registrar each day (in addition to other duties) compared to the resources allocated to the District Court.

What avenues are presently available in the community for disputes to be resolved other than by courts?

Many lawyers in Western Australia have been trained by Lawyers Engaged in Alternative Dispute Resolution (LEADR) methods and are members of the organisation to which enquiries about mediation are referred. Given the privacy consideration of parties undertaking mediation, no reliable statistics are available about mediation undertaken by LEADR.

LEADR

LEADR is an Australasian non-profit membership organisation formed in 1989. Its aim is to serve the community by promoting and facilitating consensual dispute resolution processes. It has chapters in all Australian states and territories as well as New Zealand. It currently has a membership of approximately 3 000 members of whom approximately 75 per cent are lawyers and 25 per cent are non-lawyers. LEADR is the largest ADR membership organisation in the southern hemisphere.[34]

Arbitration

For the very reason that a considerable number of disputants resort to arbitration because of privacy reasons, statistics about arbitration are not

available. Many commercial contracts allow for disputes to be resolved by arbitration. The *Commercial Arbitration Act 1985* sets out the procedure with regard to arbitration in Western Australia.

Community Mediation Services

In 1995 a Ministry of Justice working party developed a model of best practice for pilot Community Justice Centres as a means of dispute resolution to complement existing systems.[35] The working party recommended that the Ministry of Justice resource pilots to be established in regional centres, being any one or more of Bunbury, Albany, Kalgoorlie and Port Hedland with two pilots to be established in the Perth metropolitan area. The working party recommended that the pilots be evaluated after 12 months and that an ongoing monitoring process be established.

The report set out the results of the working party's deliberations on:

- the types of matters to be undertaken at the centres
- how the mediation services should be provided
- the standards of practice to be adopted
- the minimum requirements including:
  - accreditation of mediators
  - face to face service and telephone service to those enquiring about mediation
  - screening of parties to ensure suitability of the dispute for mediation
  - pre-mediation contacts
  - parties to enter a mediation agreement
  - promotion of the service
  - performance indicators
- location of pilots
- the need for legislative protection
- evaluation of the pilots

At the time the working party commenced meeting, three community mediation centres had already been established being: Gosnells Community Mediation Service, Bunbury Community Mediation Service and the Citizens Advice Bureau. Funding had been provided by the Ministry of Justice totalling $100 000 initially divided between the Gosnells and the Bunbury centres, but later divided between those two centres and the Citizens Advice Bureau. Each centre has continued to receive the sum of $32 500 per annum.

The proposals with regard to the establishment and funding of pilot Community Justice Centres did not proceed.

- *Gosnells Community Mediation Service*

This service has been operating since about 1989 and receives funding of $32 500 from the Ministry of Justice. A part-time mediation supervisor is employed and mediation is undertaken by the supervisor and voluntary

sessional mediators. The majority of the disputes mediated are family law oriented. Community disputes include neighbourhood issues such as dividing fences and nuisance. The Gosnells experience is that neighbours are more reluctant to enter into negotiation and prefer the Service to provide a conciliation or dispute counselling service where the parties do not come face to face but are assisted in the resolution of their dispute.

Referrals are from the Armadale Court, police and local government agencies. From the beginning of January until late September 1998, there were 118 enquiries about mediation. Of these, 74 related to neighbourhood disputes and 43 related to family law. From those enquiries, 63 files were opened to commence the mediation process and 29 matters have proceeded to mediation.

- *Bunbury Community Mediation Service*

Bunbury Community Mediation Service has been operating since 1993, with initial Ministry of Justice funding of $55 000 reduced to $32 500 since 1994. Initially the intention was to operate with 20 volunteer sessional mediators but presently all mediation is undertaken by the part-time coordinator/ mediator. Most of the mediations involve family law and other family problems such as parent/adolescent conflict. Fewer involve general civil disputes such as workplace, property and committee disputes. Of the 90 mediations undertaken in the 1996/97 year, 88 related to family (separation/divorce). Of 58 closed files, 42 proceeded to mediation and of these 48 per cent reached agreement on all issues, another 26 per cent reached agreement on some issues and the balance of 26 per cent reached no agreement. The remaining 16 files concluded at pre-mediation stage and did not go on to mediation, the majority were unsuitable for mediation.[36]

Referrals to the service are from lawyers, courts and by word of mouth from people who have themselves had disputes mediated.

A future direction forecast in the 1996/7 Annual Report was the request by a local primary school to assist with a peer mediation training programme. The coordinator of the programme reported the success of this training and that feedback indicated a lessening of bullying in the school following the training session.[37]

- *Citizens Advice Bureau*

The Citizens Advice Bureau mediation service has been operating since 1992 and currently receives funding of $32 500 per year from the Ministry of Justice. The centre operates with a part-time mediation coordinator and 17 volunteer mediators. The majority of disputes mediated involve neighbourhood disputes. Additionally there are some family mediations,[38]

and disputes involving local government issues, small trader/consumer issues, intra committee issues and occasionally small commercial disputes.

Whilst the number of actual mediations conducted was only 30 in 1996/97, the initial enquiries concerning mediation totalled 1 250.[39] From these, 160 interviews were conducted prior to the matter progressing to mediation. Many disputes were resolved by the parties by the process of communicating about the procedure and did not continue on to mediation for that reason.

Referrals to the Bureau were from local government authorities, police, other community groups, Ministry of Fair Trading, Small Business Development Commission, lawyers and from efforts made by the Bureau to inform the public about the service such as pamphlets and a column in the Sunday Times. There were no apparent referrals from the Local Court.

Whilst no fee is charged for community mediation, parties are encouraged to make a donation of $15 each. With family mediation, parties are charged $250 each, although the fee is waived in appropriate circumstances. The service is subsidised by the Citizens Advice Bureau in provision of accommodation and facilities and by mediators providing their services on a voluntary basis.

- *Relationships Australia*

Relationships Australia does not undertake any community dispute mediation. Apart from family law matters, they undertake between four and eight workplace mediations per year which involve local or state government departments or public hospitals. A fee is charged which is usually met by the employer.

- *Centrecare*

Centrecare provide a number of ADR programmes mainly related to family issues funded by the Commonwealth Government. Enquiries for community mediation can be accommodated on a full cost recovery basis of a fee of $80 per hour for a single mediator or $140 per hour for co-mediation. Very few community mediations are conducted.

- *Aboriginal Dispute Resolution Group*

The Aboriginal Alternative Dispute Resolution Group was established as a pilot to assist with the resolution of inter and intra familial disputes in the Aboriginal community. The service was suspended in April 1998,[40] but received funding for 1999/2000.

Models of Community ADR in other jurisdictions

- *New South Wales*

New South Wales was the first Australian jurisdiction to introduce mediation as a dispute resolution process. A pilot project in 1980 commenced with three Community Justice Centres (CJCs) to be located at Redfern, Bankstown

and Wollongong. It also provided for three very different models for comparisons to be made. The Redfern Centre was located at the Redfern Court and law students from Sydney University acted as mediators. The Bankstown Centre accepted referrals from police, courts and community welfare agencies. The Wollongong Centre was more like the San Francisco Community Board programme taking self-referrals only and having few links with police or the courts.[41]

Following evaluation of the pilot by the Law Foundation of New South Wales the *Community Justice Centres Act 1983* was enacted.

There are currently six fully operational CJCs in New South Wales located at Newcastle, Penrith, Campbelltown, Wollongong, Bankstown and Sydney. A partial service is provided to the communities at Bourke, Moree and Wagga Wagga. There are 29 full time members of staff and over 300 mediators. A director who is in charge of administration of the various centres reports to the Director General, NSW Attorney General's Department. The budget allocation for 1996/97 was $1 866 000.[42]

The *Community Justices Centre Act 1983* provides that mediations are conducted with as little formality as possible, the rules of evidence do not apply and neither adjudication nor arbitration is permitted at a mediation centre. The Act provides protection for the mediators with regard to the confidentiality of the process. All mediation sessions are conducted in private and the parties are unable to be represented by a third party unless it is in the interests of the mediation.

The CJCs are staffed with a core of full time staff but mediators are sessional employees who are paid an hourly rate of $17.81 with two mediators being present at all sessions. Mediators are chosen from a wide cross section of society.

In the year 1986/7, 5 462 mediation files were opened and an additional 6,000 enquiries about mediation were dealt with. The major source of referrals were chamber magistrates (23.1 per cent). The total referrals from legal sources including magistrates, Legal Aid, solicitors and police totalled 48 per cent.

Neighbourhood disputes represented 58 per cent of the matters referred and family disputes represent 25 per cent of the work of the CJCs. Resolution may be by way of mediated agreement or assisted settlement.

Of the 2 456 matters which proceeded to mediation in 1996/97, over 86 per cent ended in agreement.[43]

It appears unlikely that matters other than neighbourhood disputes are diverted from the civil courts to be dealt with by the processes available.

- *Victoria*

In 1993 the Department of Justice restructured the previously existing seven Dispute Resolution Centres to now operate from one location in Melbourne. All administration is carried out from the one centre using local mediators in locations around the state. Approximately 11 000 enquiries are made to the Dispute Advisory Service which deals with such enquiries as dispute prevention, negotiation counselling, referral to other organisations as well as taking in matters for the Mediation Service. Approximately 2 000 matters are referred to the Mediation Service and of those approximately 500 proceed to mediation with agreement reached in 85 per cent of cases.

The Dispute Settlement Centre assists in all disputes other than family law matters. A large proportion are neighbourhood disputes and about half of the referrals are from Magistrates' Courts.

A pilot is presently operating for the Supreme, County and Magistrates' Courts in Melbourne to refer matters to the Dispute Resolution Centre for mediation. Each matter referred is assessed as to its suitability for mediation. Where at least one party is unable to afford private mediation, then the mediation is provided by the Centre at no cost. Where the parties can afford private mediation, the dispute is referred elsewhere.

Additionally the Centre provides a mediation service for other tribunals such as the Anti Discrimination Tribunal and the newly formed Victorian Civil and Administrative Tribunal.[44]

Section 21 of the *Evidence Act 1958* (Vic) provides a statutory basis for protection of the mediator.

- *South Australia*

Community mediation services provided by community based agencies are funded by the Attorney General's Department. The *Evidence Act 1929* (SA) has been amended to ensure confidentiality of information provided during the mediation sessions. The total cost of the programme is $213 000 with each centre receiving $56 000 and a further $45 000 is used to support the network.

- *Queensland*

The Queensland Community Justice programme is almost identical to that of New South Wales with similar legislative provisions. The ADR Division of the Queensland Department of Justice and Attorney General operates from offices in Brisbane, Cairns, Rockhampton and Townsville and provides services to Cairns, the Gold Coast, Mt Isa, South East Queensland, the Sunshine Coast and Townsville. The programme was established in 1990 and costs approximately $1 000 000 per year.

In 1995/96 there was a total of 2 165 files opened from 2 263 initial contacts. Of the files opened, 41.6 per cent related to neighbourhood disputes, 15.5 per cent related to family law, 10 per cent related to business, 8 per cent to other family disputes and 6 per cent to workplace related disputes. In that year, 834 mediations and facilitation sessions were completed with an 85 per cent agreement rate.

Referrals were from state government departments, courts, the police who most commonly refer neighbours who are in dispute, solicitors, local government, Legal Aid and friends or family members.

ISSUES CONCERNING ADR AND PROPOSALS — THE FUTURE

Issues concerning ADR in courts

What information is available from the courts?

It is apparent that no court in Western Australia is able to draw from their files information that would assist with planning a system of dealing with disputes in a manner alternative to that of adjudication. For example, no court is able to ascertain the proportion of matters initiated according to subject matter, only with regard to the actual number of proceedings commenced. It is estimated that a large proportion of process commenced in the Local Court relates to debt collection and this is assumed from anecdotal evidence and the fact that many matters are not defended. For the courts to access any differential data, a manual count has to be undertaken which is unsatisfactory.

> Analysis of the details of the disputes will assist in determining the changes which could be made to remove specific categories of disputes from the court system.[45]

Proposal 1

All courts should develop a data base for the collection of appropriate statistical information to assist with the administration of the court.

What form of ADR should be used?

Presently in Western Australia the types of ADR used in courts are mediation, conciliation, neutral evaluation and expert appraisal with various combinations. During a court-annexed mediation in the Supreme Court, the process may commence with a facilitative approach, move to a therapeutic approach and finally as a last resort to an evaluative approach.[46] A different process is dictated by the type of dispute and by the nature of the relationship between the parties. There is no one model that is suitable for all types of disputes.

Proposal 2.1

ADR processes used in courts should be flexible to allow an appropriate model to resolve a particular dispute between particular parties.

Should there be a multi-door option?

Proposal 2.2

Guidelines should be developed which will be of assistance to neutrals undertaking ADR in courts as to which method may be best suited to particular parties having consideration for the subject matter of the dispute, how it arose and the relationship between the parties.

The major component of a multi-door option is the initial procedure including intake and screening to analyse the various criteria to determine which dispute resolution method is best suited to the problem. The American Bar Association Journal refers to this process as a matter of 'fitting the forum to the fuss'.[47]

Proposal 3

Whether the function be called multi-door or case-management, there should be a system of considering each matter that is filed in the various courts as to which method of dispute resolution is best suited to the subject matter of the dispute, how it arose and the relationship between the parties. This information will not be apparent from the filing of the court process and will require either a questionnaire to be completed or preferably a case management conference to determine.

If a multi-door option, how to decide what matters should be referred to which model?

As discussed above, guidelines would be of assistance to the case manager to determine the most appropriate manner in which a dispute should be resolved.

> Cases should be screened by a registrar or judge, experienced in mediations or assessing cases appropriate to mediation. The conference should be informal (not in open court or in chambers) with the parties present.[48]

Proposal 4

The guidelines developed should allow the case manager to consider the particular dispute and the parties involved with regard to a number of matters including the following:

- the degree of privacy desirable
- whether the parties are individuals or organisations
- whether there is an ongoing relationship between the parties

- whether the dispute arose due to a misunderstanding between parties or the result of failure to disclose information
- whether there is a need for further information of a technical nature to be able to resolve the dispute
- whether the dispute concerns the interpretation of a statute
- whether the claim filed is a test case
- the degree of power imbalance between the parties
- whether the matter is simply a debt collection claim.

Should ADR in courts be compulsory?

In the purist sense of mediation, there can be no degree of compulsion involved. However, when parties seek the resources of the state to assist them with the resolution of a dispute, it should be possible for the state to insist that the parties attempt to resolve the dispute by an appropriate method. Unless the matter is one where it could not be resolved prior to adjudication by a court, such as a test case or interpretation of statute law; or where it is one which should not be resolved other than by adjudication such as where there is an inequitable power imbalance, then the parties should be required to make a bona fide effort to resolve the dispute by ADR.

Disputes only come to a resolution when the parties concentrate their efforts at looking at the options to resolve them. Often with litigation, this does not occur until the parties and their representatives are forced to do so either in preparation for the trial, when it may be realised for the first time that the case is not as strong as the party would have hoped, or when the parties and their representatives are required to attend an ADR process and are compelled to consider the possible outcome at adjudication and the cost of attaining this. Often bluff and bluster dissipate at the conference table when the parties are forced to defend their position.

A crucial factor in reducing the cost of court administration is to provide a climate at the earliest possible stage for parties to appraise the strength of their case and give consideration to the possible outcomes.

Proposal 5

Unless the case manager certifies that a dispute either could not or should not be resolved other than by adjudication, then the parties should be required to make a bona fide effort to resolve the dispute by an appropriate method of ADR.

Should parties have resorted to ADR before they can litigate?

When a party to a dispute seeks assistance in the management of that dispute, all too often the lawyer launches into litigation without any attempt to resolve the dispute by any other method. There are good reasons why this is so. Firstly, litigation is what lawyers do. Secondly, until litigation has commenced, there is little opportunity to be able to claim costs for work done on behalf of a client from the other party should the negotiation be successful. However, by commencing litigation, the client is launched on an expensive treadmill, difficult to stop, with the costs escalating out of control. It is possible that the unrecoverable cost to the client of attempting to resolve the matter by negotiation or mediation prior to litigation will be less than the difference between party/party costs and solicitor/client costs even if the client is eventually successful.

What if the claimant agrees to attempt to negotiate the dispute but the other party is not interested and will not participate in any proposed process? In such a case, should the writ be permitted to issue, but the defendant not be permitted to defend the matter until a bona fide effort has been made to resolve the dispute?

Provision would have to be made to exempt a matter from being referred to ADR prior to litigation in circumstances where an injunction is sought as a matter of urgency, or where limitation periods are about to expire. Such matters should be referred to a case manager following proceedings being issued and should the matter have been commenced without the appropriate reason, provision be made to stay the action for a period of time by way of punishment for attempting to subvert the system, followed by an order that the parties attend ADR.

Many public submissions were received in support of a proposal for compulsory ADR prior to litigation:

> Maximum use of conciliation and arbitration prior to enlistment … litigation as a last resort … A form of official arbitration (with teeth) should be conducted to reconcile parties prior to a court system provisional to there being no legal interpretation required of the complaint. Lawyers often want to re-write the case in their own jargon and then present the case without actually knowing the full story. The complainant is the one who knows the complaint and can tell the truthful facts as he sees them.[49]
>
> It may be appropriate to have legal practitioners certify that they have attempted ADR.[50]
>
> [T]he provision of dispute resolution mechanisms that must be followed before the judicial powers of the court are invoked.[51]
>
> In certain specified types of cases there should be legislation requiring a form of ADR to be 'the' dispute resolution process … even complex civil litigation benefits from early intervention in order to, at very least, reduce and isolate the issues.[52]

More dialogue sessions between warring parties *before* they go to court, if ever.[53]

The first step should always be a structured attempt at mediation.[54]

Professional Conduct Rules of each jurisdiction should be enhanced so that it is a duty of the solicitor to the client to advise on ADR.[55]

Proposal 6

(1) Prior to a party being able to commence litigation, he or she must make a bona fide attempt to resolve the dispute by the assistance of an approved organisation (including the court) undertaking ADR, and file a certificate to that effect with the court.

(2) Where the plaintiff has made a bona fide effort to resolve the dispute but the matter remains unresolved due to the defendant failing to respond or make a bona fide effort, then the defendant should be unable to defend the claim until such an effort is attempted. Certification by an approved organisation (or the court) undertaking the ADR must be filed with the court.

(3) Where the subject matter of the litigation is such that ADR would not or should not resolve the matter, or if the matter is one of extreme urgency due to injunctive relief being sought or the expiration of limitation periods, then exemption from this process should be granted. In such a case, the matter should be reviewed by the case manager following the issue of litigation and if the matter is one which should have gone to ADR prior to litigation, the action should be stayed for a period of time to be followed by an order that the parties attend ADR prior to the matter being permitted to progress.

(4) Consideration should be given to amending litigious cost scales to allow for reasonable costs incurred prior to litigation.

(5) Consideration should be given to effecting a change of culture in the manner in which lawyers manage their client's disputes. Litigation should be seen as the last resort rather than the first.

Should there be a disincentive if parties have not availed themselves of ADR before or during litigation?

The recommendations above provide for considerable disincentive; parties would be unable to commence or defend litigation where a genuine effort has not been made to resolve a dispute. Should there be a further disincentive when parties fail to resolve the matter during ADR processes provided by the courts? Should costs be used as a disincentive in the form of:

- indemnity costs
- security for costs
- full recovery costs in addition to parties' legal costs?

Such a process would require certification by a court officer of the parties' failure. Where provision presently exists for such a comment to have implications for costs awarded at the conclusion of a matter,[56] court officers would likely to be reluctant to provide certification except in the most brazen circumstances if the effect would have such drastic financial implications.

Alternatively, the parties who seek to have a matter determined by adjudication by a court could pay the full costs or at least a reasonable proportion of actual cost for a trial to proceed. This would be inequitable unless provision was made for a means test to be applied, together with consideration of some matters being in the public interest to be litigated and would require the establishment of a bureaucracy to determine who should pay, and deal with appeals from that process.

In consideration of the detriment to parties with regard to either of the above situations, the principles of natural justice would have to be followed in that the party liable for the additional cost burden must have the opportunity to address such an outcome.

Proposal 7

Consideration should be given to cost disincentives in the event that parties fail to genuinely attempt to resolve a dispute during an ADR process. Such consideration to include the principles of natural justice, the inequity of parties who may be in differing financial circumstances and the cost of imposing such a scheme including the cost of dealing with appeals.

What information should be kept confidential and what should be placed on the court file following ADR?

The only information presently kept on court files concerning court-annexed ADR processes is that the parties attended and the matter was not resolved. Where adverse comment is intended to be made by the court officer concerning the failure of one or both parties to genuinely attempt to resolve matters, that is kept away from the court file until after the judgment has been handed down. This procedure would appear to be appropriate.[57]

Proposal 8

The practice of the court officer entering on the court file only that an ADR process has been concluded without settlement being attained is appropriate.

Should the ADR process be dealt with differently if one or both of the parties are unrepresented?

If one of the parties is unrepresented, a power imbalance may prevent the matter from being appropriate for ADR. However, a skilled neutral acquainted with the law relating to the subject matter of the dispute can be of assistance to the unrepresented party without providing any advice. This can be by way of asking the unrepresented party questions to elicit appropriate information to better balance the parties in the dispute.

Where both parties are unrepresented, the balance is more even and the neutral may be required to elicit information from both parties to enable the dispute to be resolved.

Where the neutral is court-annexed, it is more likely that the he or she will be acquainted with the law relating to the subject matter than if the process is being carried out in community ADR.

Provision should be allowed for the process to be interrupted for the parties to obtain further information, including legal advice.

Proposal 9

(1) Where one or more parties to a dispute are unrepresented, the neutral should have experience in the area of law relating to the subject matter of the dispute to ensure that appropriate questions are asked of the unrepresented party so that the dispute is more likely to be resolved on an appropriate footing.

(2) Where one or more parties to a dispute are unrepresented, the process may be interrupted to allow the parties to obtain further information, including legal advice.

Can the ADR process deal with power imbalance between the parties?

Power in relationships takes many different forms, and power is a relative thing. A power imbalance may exist due to a number of inequalities such as financial or commercial imbalance; physical or emotional imbalance such as a relationship involving domestic violence.[58]

Although generally the view is expressed that where an inequitable power imbalance exists ADR is not suitable, safeguards and techniques can be employed by a skilled mediator to address the issues of power imbalance such as:

- the presence of a skilled, knowledgeable and reasonable mediator
- mediators should encourage the disputants to seek independent legal advice concerning a proposed mediation agreement before the parties sign it

- the mediator's innate capacity should address power imbalance as mediation is an empowering process
- the mediator must be alert to see that one party does not settle out of fear of violence or retaliation by the other party
- the mediator should not try to rush an agreement through
- the mediator should identify each person's entitlement and help him or her negotiate for his or her own interests
- ethics of mediation require the mediation to be terminated in certain circumstances.

> Mediation which requires both parties reaching an agreement is fair as long as both parties have roughly equal strength. An inequality, such as would arise between an experienced insurance assessor or claims manager and a claimant is something that the mediator will have to deal with.[59]

Who should fund the process — state or parties, or a mixture of both?

The State of Western Australia presently invests $70 000 000 per year on the various courts and tribunals. The desired result of parties being required to attempt to resolve their disputes prior to being able to litigate or defend litigation will be that disputes are resolved more quickly and at less expense to the community as well as to the individuals. The parties presently pay a minor contribution towards the cost of the court system by way of filing fees. The present system of court-annexed ADR within the various courts is without fee.[60] It follows that the cost of the proposed compulsory ADR prior to litigation is at no cost to the parties, but should be borne by the state.

At present in the Supreme Court, where parties decide to avail themselves of an external mediator from an approved list, the parties share the cost of the mediator equally. Should the parties wish to use a private mediator, for compulsory pre-litigation ADR, they should bear the associated costs equally.

Proposal 10

The state should bear the cost of compulsory ADR pre-litigation and during the course of litigation but the parties may avail themselves of private mediators from an approved list by bearing the costs equally.

Should the ADR process be court annexed or referred out?

A debate has reigned as to whether ADR can be appropriately carried out by courts, with Sir Laurence Street being the main protagonist.[61] The main argument is that

> [I]t presents a real threat to the very foundation of public confidence in the integrity and impartiality of the court system. It is said that

> private access to a representative of the court by one party (as occurs in a typical mediation caucus, or private single party meeting), in which the dispute is discussed and views expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the court observe. This view holds that if the dispute is not settled in the mediation and proceeds to hearing and determination by the court the party who loses is likely to feel that the court, as an integrated institution, including all of its judges, registrars and other personnel, was, or may have been, prejudiced by poison privately fed in by the other side during mediation. It is further said that if it becomes known that a litigant can have private access to a judge or registrar in order, behind the other side's back (and unfettered by the rules of evidence), to tell the whole story as that party sees it, an expectation could well be built up in the community that it is a normal part of the court procedures.[62]

The further arguments against court-annexed ADR are:

- Mediation seeks to empower parties to a dispute and the presence of a court officer can inhibit the parties from being able to fully express their concerns and/or emotions by being overawed by the court procedure.
- Whilst an independent neutral may canvass what alternatives exist to resolving the dispute in terms of possible court outcomes, where those alternatives are being raised by an official of a court seized with the matter, greater weight may be given than would otherwise be the case.
- Mediation is the antithesis of litigation and should be conducted in an environment away from the court premises associated with adversarial litigation.
- Whether judges, registrars or court personnel have appropriate qualifications to be mediators depends upon the particular individual and not upon their position
- The subject matter of some disputes may not be within the experience of court officials whereas an external neutral will be able to be accommodated from a wider variety of experience.

> Most court-connected mediations by registrars do not involve preliminary conferences to set the ground rules to explain the process and to mould it to suit the dispute or to provide for issues statements. Time constraints are a significant problem for registrars but not so much for private mediators who can meet with the parties at more flexible hours and without having to adjourn for the next case. Private mediators will invariably caucus with the parties. Caucusing is less frequently used by courts, in which case courts are conducting pre-trial settlement conferences, not mediations. Not to caucus impacts on the quality of service and the reputation of the mediation process.[63]

The alternative view is that court-annexed ADR takes place by informed consent within a structure and according to rules that are obvious for all to

see, that there is nothing clandestine about mediation and the parties are aware that the mediator will maintain strict confidentiality.

Additional arguments for court-annexed ADR include:

- The status of a court official neutral can inspire the parties to serious participation.
- The court must be satisfied that the matter is an appropriate one to be resolved by ADR before referral to that process. This mitigates against the possibility that a significant power imbalance could result in an unjust settlement reached external to the court.
- Distancing mediation from the court can be a problem for quality control over the process. This can extend to mediator selection, training, supervision over the mediator's conduct (given the private nature of the process) and accountability of mediators who do not conduct themselves appropriately.

  > There should be a supervising mediator to whom parties could refer if they were unhappy about the way 'their' mediator is proceeding.[64]

- Parties may be more satisfied by a matter being resolved during the course of a court-annexed ADR process, in that they may perceive that they have had their 'day in court'.

In Victoria the Department of Justice has replaced the seven previous dispute resolution centres with a central body providing ADR from a central based location in Melbourne, using local mediators in the necessary localities. An interesting pilot relating to this centre requires the Supreme Court, the County Court and the Magistrates' Court in Melbourne to refer matters suitable for ADR to the centre.

Proposal 11

(1) The state should provide a free court-annexed process for matters appropriate for ADR, but should the parties wish to avail themselves of external ADR, they may do so at their own cost, such neutral having been approved by the court.

(2) Any court officer engaged in ADR should be appropriately trained in ADR techniques.

Should the same models be provided in all civil courts from Local Court to Supreme Court?

To adhere to the tenets set out by Lord Woolf, the procedure and costs should be proportionate to the nature of the issues involved.[65]

Presently all civil courts have a process whereby parties are encouraged to resolve the dispute prior to the matter being adjudicated by a judge or

magistrate. The system provided by the courts varies considerably with the greatest resources providing an appropriate level of service to the 1 300 litigants in the Supreme Court. By comparison, the District Court which deals with some 7 000 reasonably similar matters is starved of resources. There is an urgent need to increase the level of resources to the District Court.[66]

Although the volume of litigation in the Local Court far exceeds the other jurisdictions, by considering the number of pre-trial-conferences held state-wide (4 220) and in the Perth Local Court (2 728)[67] the volume of defended matters is between that of the District Court and the Supreme Court. Should the Local Court seek a reduction in matters settling on the day of trial, effort must be expended to facilitate the parties and their representatives to seriously consider settlement at an earlier time. If the pre-trial conference is presently seen as being merely a step in the process of litigation,[68] then greater status than is presently accorded is required.

The neutral convening the pre-trial conference in the Local Court needs to be a person whose knowledge of the law relating to the subject matter of the dispute is respected by the parties and their representatives and who can force the parties to defend their position. It is essential that the parties themselves attend the conference and that any representative attending is the lawyer with the conduct of the file, or at least with authority to settle the dispute.

> An observation frequently made by workers involved in the system is that the parties are happy to have been able to appear and have their say rather than be just the pawns in a legal argument.[69]

The pilot commenced in Victoria where matters from the Supreme Court, County Court and Magistrates' Court in Melbourne are referred to the Dispute Resolution Service run by the Department of Justice should be reviewed.

Proposal 12

(1) The level of resources available to the District Court should be increased to provide an appropriate level of service, allowing for individual case management to consider whether the dispute is one better resolved by ADR, and if so, to permit the appropriate model to be provided at a time optimum for the individual dispute.

(2) The Local Court should review its pre-trial conference system to afford a greater status to the process, that the neutral be a person with legal qualifications, whose knowledge of the law in relation to the subject matter of the dispute is respected by the parties and

their representatives and who can force the parties to defend their position. The parties must attend the conference and the legal representative attending, must be either the lawyer with the conduct of the file, or with authority to settle the matter.

(3) The pilot commenced in Victoria undertaking ADR processes for the Supreme, County and Magistrates' Courts should be reviewed.

At what time in the litigation process should matters be referred to ADR?

There are arguments that disputes should be referred to ADR at the earliest possible time before the parties' positions become too entrenched to be easily resolved. Alternatively, in some disputes, it is necessary for some level of discovery to have taken place before the parties can usefully attempt to resolve the matter. The parties must have come to the point in a dispute where the issues can be defined, otherwise the process could be likened to 'wrestling with a bowl of jelly'.[70]

ADR can be attempted as soon as the parties are aware of a dispute, and it is proposed elsewhere in this sub-section that in most cases ADR must occur prior to litigation being commenced. However, if the matter is not resolved and litigation ensues, then the case manager should be able to refer the matter again to ADR at an appropriate stage, the time of which differing with each type of litigation. For example, litigation concerning inheritance matters should be referred to ADR prior to affidavits being filed as otherwise evidence recorded in such affidavits may itself prevent the dispute from being resolved. With regard to other litigation, it may be suitable, because of the subject matter, to refer to ADR prior to a defence being filed, where in another case it may not be suitable until after discovery is complete.

> Independent person to look at strength of case in very early stages of investigation.[71]

A risk in permitting a dispute to be referred to a number of ADR sessions is that the parties and their counsel will treat early attempts as merely steps in the process without each being considered as the final step requiring all effort, other than a trial, to resolve.

Proposal 13

Disputes must be referred to ADR prior to litigation being commenced and if litigation ensues, the case manager should have a discretion to refer the parties again to ADR at any later time considered appropriate. However, parties are to be discouraged from considering the ADR process as being one of many steps in the procedure.

Who should carry out the ADR — Judges, Registrars or other court staff?

In Western Australia, the only provision for a judge to be involved in the ADR process is in the Federal Court. In the Supreme and Districts Courts, ADR is undertaken by a registrar whereas in the Local Court it is by the managing registrar or special court officer. All of the court officers undertaking ADR in the courts have received ADR training.

The neutral must be of sufficient stature in the court system to be respected with regard to his or her knowledge of the law relating to the subject matter of the dispute, particularly where any form of conciliation or evaluation is used in the event that mediation is not successful.

If the neutral is called upon during the process to inform the parties what the likely outcome of a dispute would be following adjudication, the neutral must have sufficient confidence to be able to do so. A judge (other than the judge who would ultimately hear the matter) would appear to be an appropriate neutral on this reasoning. However, the qualities required to be a judge are not necessarily the qualities required to be a successful mediator.

> In the Supreme Court of Western Australia, the mediation registrar, being an officer of the court, has full access to the court file and is able to make an assessment as to what the legal costs to date might be, how the matter might be resolved and when the matter might be entered for trial. Generally the mediation registrar is also able to predict the estimated length of a trial on the issues in dispute. This type of information may be a relevant, or even decisive, consideration in the parties' discussions….[72]

Likewise, in the District Court the registrars are more able to carry out this role.

Proposal 14

The neutral undertaking ADR must be of sufficient stature in the court system to command the respect of the parties, and have knowledge of the likely outcome should the matter proceed to an adjudication. The neutral should be appointed to the position for his or her suitability for ADR as well as for other qualities.

What protection should be afforded the neutral and is it presently in place?

An essential ingredient of ADR is that it proceeds on a 'without prejudice' basis to enable the parties to talk fully and frankly about the dispute in an effort to have it resolved. It is therefore necessary to provide that neither party can use information gleaned in the process against the other party at a trial of the dispute. There is a need to ensure that the neutral is not subject to a summons to give evidence of what had transpired during the process.

> A mediator should be entitled, by statute, to absolute privilege and not exposed to any action by a party.[73]

ADR processes presently carried out by courts are said to be on a 'without prejudice' basis. The general form of order in the Supreme Court sets out that the mediation shall be conducted on a confidential basis and that the parties to the mediation shall take no steps to compel the mediator to give evidence in any proceedings or to produce any documents relating to any issue mediated.

It has been argued that it would be against public policy to find that discussions during a conference held in an attempt to promote settlement of a dispute were not without prejudice.[74]

In other Australian jurisdictions legislation has provided immunity by either special legislation such as in New South Wales[75] or in other states by amendment to the relevant *Evidence Acts.*

Proposal 15

Legislative change should be effected, possibly in the *Evidence Act*, to ensure the confidentiality of the conference and to afford neutrals protection from being required to give evidence of what had transpired during the course of an ADR process.

Should ADR be used in appellate jurisdiction?

A draft position paper prepared by the Australian and New Zealand Council of Chief Justices briefly discussed that the courts extend the use of mediation to the appellate jurisdiction.[76]

It would appear logical to extend the use of ADR to include those matters being taken on appeal, if for no other reason than for the parties to agree the issues which are to be taken on appeal which would reduce the court hearing time.

Proposal 16

Consideration should be given to amending the *Supreme Court Rules* to extend ADR to matters in the appellate jurisdiction to at least resolve the issues being taken on appeal.

What training and accreditation should the neutral require?

A plethora of courses in mediation are available but the problem of lack of accreditation persists both throughout Australia and the USA. Well accepted courses are those provided by LEADR, ACDC, Harvard University, Bond and other Australian universities.

Presently all court officers who undertake court-annexed ADR have completed training in one of the above courses.

Proposal 17

Court officers who undertake court-annexed ADR must have successfully completed training in ADR in a course of an appropriate level.

Issues about ADR in the community

Commercial disputes — mediation and arbitration

ADR in the community is undertaken by Community Mediation Centres and by private mediators and arbitrators. While statistics are available from Community Mediation Centres funded by the Ministry of Justice, no reliable statistics are available from private mediators and arbitrators who undertake the preponderance of commercial ADR. One of the major reasons why such parties choose to use ADR methods is due to the privacy afforded.

Very few matters of a commercial nature are mediated by Community Mediation Services.

The *Commercial Arbitration Act 1985* (WA) sets out the procedure with regard to arbitration within Western Australia.

- *Who uses it?*

Many commercial agreements include provision for a dispute to be resolved by arbitration. In addition, where the dispute between contracting parties is of a technical nature, it is likely that the parties will submit themselves to arbitration before a neutral with expertise in the subject matter of the dispute rather than litigate through the courts.

- *Does it save costs?*

Little information is available with regard to commercial ADR as by its very nature it is private. It can only be assumed that such a process is less expensive than litigation with its associated expenses of pleadings, discovery and other interlocutory procedures. It can be agreed that evidence be provided to the arbitrator by way of affidavit rather than oral evidence which can further reduce the cost involved.

> I am a retired public accountant. I have observed in civil litigation that legal procedures and tactics create enormous repetitive paperwork and costs, at variance with the procedures of arbitration.[77]
>
> In WA, mediators' fees will range between about $125-$250 per hour or between $400 to $2500 for daily rates. They are negotiable. In the context of Supreme Court litigation, a $500-$1500 outlay per party for a day's mediation (including preparation) or even double those figures would hardly be a disincentive towards private mediation. This is especially so if an informed decision based on information about the advantages and disadvantages of both private and institutional mediations is considered.[78]

- *Confidentiality and protection issues*

Parties undertaking mediation are required to enter into a mediation agreement which provides inter alia for the information gleaned during the course of the process to remain confidential and for the protection for the mediator against being required to give evidence of what transpired during the course of the process. There is no legislative protection for mediators in Western Australia as provided in other Australian jurisdictions.

Arbitrators are protected from negligence but not fraud pursuant to section 51 of the *Commercial Arbitration Act 1985* (WA). Parties are able to agree rules as to the arbitration process.

- *What expertise should the Arbitrator/Neutral have?*

With regard to arbitration, the agreement dictating that a dispute be arbitrated may indicate the person holding a particular position would be the arbitrator of the dispute. It is assumed that such a person would have appropriate qualifications. If there is no prescribed arbitrator, the parties are free to choose and would usually select someone who is an expert in the subject matter of the dispute and who is experienced in arbitration.

Where parties decide to attempt to resolve a dispute by mediation, they agree a mediator who is either known to the parties to have expertise in commercial mediation or who is accredited by an appropriate body such as LEADR.

Other than commercial matters — community mediation centres

What service should they provide?

Presently mediation centres funded by the Ministry of Justice provide an alternative method of resolving the following type of disputes:

- isues between neighbours such as fencing, encroaching trees, pets, noise,
- issues between members of incorporated associations,
- issues such as local government planning matters,
- issues involving parent/teen conflict,
- family disputes,
- issues in schools involving peer mediation – bullying, rumours.

The main disputes that are diverted from civil courts to community mediation involve neighbourhood issues. These issues are more appropriately dealt with by ADR than by court adjudication.

The New South Wales experience indicates that despite the large number of matters mediated, there is no sizeable diversion from court processes dealing with other than neighbourhood type disputes. The Victorian pilot, in taking referrals from the Supreme, County and Magistrates' Courts, will be interesting to observe with regard to the successful resolution of matters.

There would appear to be no reason why many matters that presently are litigated could not be resolved by community mediation. Few matters are presently referred by courts other than dividing fences and neighbourhood restraining order matters.

Should parties be required to attempt resolution of a dispute by ADR prior to litigation being commenced, there would appear to be no reason why better resourced Community Mediation Centres could not assist. It is however, preferable that the neutral involved has a reasonable degree of understanding of the likely result of litigation if the dispute is not resolved. This is more readily achieved in a simple matter of a neighbourhood dispute than in other matters the subject of litigation where the neutral is not legally qualified.

> These sessions should take place in the local community. Provision should be made for night sessions and training should be available to lay people as well as those in a legal role.[79]

Where litigation is commenced because the respondent to a claim has declined to attempt ADR, a compulsory process is more suited to be undertaken by a court-annexed process as the court is already seized with the matter and that party may consider the court process more authoritative.

Who should fund mediation centres?

In other Australian jurisdictions, considerable resources are devoted to Community Mediation Centres.[80] In Western Australia funding is restricted to $100 000 divided between three services, not allowing for funding for mediators who all work on a voluntary basis, nor appropriate funding of a coordinator or infrastructure. One of the problems with getting parties to seek mediation is that centres have been unable to afford to advertise their service and, if successful in such a campaign, to cater for the influx of parties seeking resolution of their disputes.

> Parties must be made aware of the availability and benefits of alternative dispute resolution at the very early stage of a dispute developing … Awareness raising and education of alternative dispute resolution are critical to their success.[81]

Proposal 18

Consideration should be given to providing the appropriate level of funding for Community Mediation Centres in Western Australia to cover the cost of infrastructure, coordination, support services, mediators and promotion of the service provided.

What role should legal aid play in ADR?

Legal Aid Western Australia commenced a civil law mediation pilot in October 1997. The pilot is conducted in conjunction with LEADR with the provision

of a mediator at a reduced rate. Presently most civil grants of aid are for disbursement only purposes and the grant in such a case is for one half of the cost of the mediator, with the other party bearing the remaining half. Where the matter is a full grant of aid, additionally lawyers' fees will be paid for one hour preparation time and for attendance at the mediation at the rate of $115 per hour. As Legal Aid has been unable to compel the other party to a dispute to attend mediation, there has not been significant success in diverting matters to mediation.

Parties seeking to litigate civil disputes are required to consider mediation before their application for legal aid will be processed. However, as most civil grants of aid are 'disbursement only', Legal Aid has less control over the management of the matter than would otherwise be the case.

The proposal that parties be required to resort to ADR prior to litigation may mean that parties who are unrepresented are required to undertake settlement negotiations without an awareness of their rights with regard to the dispute. It is undesirable that such a party be required to attempt a bona fide effort to resolve a dispute without having accessed legal advice.

An important role could be played by Legal Aid in providing the required advice prior to the ADR process. Such request for assistance may well exceed the 20 minutes limit in advice bureaux provided by Legal Aid and community law centres and would require an extension of the minor assistance programme.

It is conceivable that a conflict of interest could arise by both parties seeking assistance and the second party would need to be referred elsewhere, either to a community law centre or to a private solicitor. If community law centres were required to provide more than the present 20 minutes advice session as delivered by volunteer solicitors, then the centres would require increased funding from the state to provide such a service.

Proposal 19

(1) Legal Aid Western Australia may provide minor assistance to parties undertaking community ADR to ensure that they are aware of their legal rights. Where a conflict emerges, the other party may be referred to a community law centre or to a private solicitor.

(2) Community law centres required to provide additional service should receive additional funding from the State to ensure that parties undertaking community mediation are acquainted with their rights.

What protection for the neutral should be available?

As discussed above, no legislative protection is available for parties undertaking ADR processes. Parties are required to enter into a written agreement covering privacy issues. [See Proposal 15 above]

What training/ accreditation should the neutral require?

Currently there is no system of accreditation for the many different training programmes for ADR.

A debate continues as to the appropriate training for neutrals. One school of thought is that legal qualifications are desirable and another that the better qualification is that the neutral is from the community generally but is skilled in ADR methods.

If the ADR process is to be rights based, then it is essential that the neutral have the appropriate legal skills. If the ADR process is to be interest based then the neutral need only have skills that will be of assistance in the ADR process.

Proposal 20

Mediation presently carried out by Community Mediation Centres is interest rather than rights based and the majority of disputes mediated are neighbourhood disputes. The training required to carry out such mediation does not necessarily require legal qualifications. However, should the type of dispute change and parties are compelled to use ADR processes prior to litigation, further consideration needs to be given to this issue.

How can the performance of ADR be measured

It is easy to say that the performance of ADR can be measured by its success rate. However, it is necessary to consider wider issues such as whether the amount of resources put into such a process are appropriate and the degree of satisfaction of the parties.

It may be useful to return to the criteria outlined by Lord Woolf for the measurement of justice afforded by a civil justice system as being:

(a) it should be *just* in the result that it delivers.

(b) It should be *fair* and seen to be so by:
- ensuring that litigants have an equal opportunity, regardless of their resources, to assert or define their legal rights
- providing every litigant with an adequate opportunity to state his own case and answer his opponent's
- treating all like cases alike

(c) Procedures and cost should be *proportionate* to the nature of issues involved

(d) It should deal with cases with reasonable *speed*

(e) It should be *understandable* to those who use it

(f) It should provide as much *certainty* as the nature of the case allows

(g) It should be *effective*; adequately resourced and organised so as to give effect to the previous principles.

SUMMARY OF PROPOSALS

1. All courts should develop a data base for the collection of appropriate statistical information to assist with the administration of the court.

2.1 ADR processes used in courts should be flexible to allow an appropriate model to resolve a particular dispute between particular parties.

2.2 Guidelines be developed which will be of assistance to neutrals undertaking ADR in courts as to which method may be best suited to particular parties having consideration for the subject matter of the dispute and how it arose and the relationship between the parties.

3. Whether the function be called multi-door or case-management, there be a system of considering each matter that is filed in the various courts as to which method of dispute resolution is best suited to the subject matter of the dispute, how it arose and the relationship between the parties. This information will not be apparent from the filing of court process and will require either a questionnaire to be completed or preferably a case management conference to determine.

4. The guidelines developed should allow the case manager to consider the particular dispute and the parties involved with regard to a number of matters including the following:

- the degree of privacy desirable
- whether the parties are individuals or organisations
- whether there is an ongoing relationship between the parties
- whether the dispute arose due to a misunderstanding between the parties as a result of failure to disclose information
- whether there is a need for further information of a technical nature to be able to resolve the dispute
- whether the dispute concerns the interpretation of a statute
- whether the claim filed is a test case
- the degree of power imbalance between the parties
- whether the matter is simply a debt collection claim

5. Unless the case manager certifies that a dispute either could not or should not be resolved other than by adjudication, then the parties be required to make a bona fide effort to resolve the dispute by an appropriate method of ADR.

6.1 Prior to a party being able to commence litigation, he or she must make a bona fide attempt to resolve the dispute by the assistance of an approved organisation (including the court) undertaking ADR, and file a certificate to that effect with the court.

6.2 Where the plaintiff has made a bona fide effort to resolve the dispute but the matter remains unresolved due to the defendant failing to respond or make a bona fide effort, then the defendant should be unable to defend the claim until such an effort is attempted. Certification by the assistance of an approved organisation (or the court) undertaking ADR must be filed with the court.

6.3 Where the subject matter of the litigation is such that ADR would not or should not resolve the matter, or if the matter is one of extreme urgency due to injunctive relief being sought or the expiration of a limitation period, then exemption from this process should be granted. In such a case, the matter should be reviewed by the case manager following the issue of litigation and if the matter is one which should have gone to ADR prior to litigation, the action should be stayed for a period of time to be followed by an order that the parties attend ADR prior to the matter being permitted to progress.

6.4 Consideration should be given to amending litigious cost scales to allow for reasonable costs incurred prior to litigation.

6.5 Consideration should be given to effecting a change of culture in the manner in which lawyers manage their clients' disputes. Litigation should be seen as the last resort rather than the first.

7. Consideration should be given to cost disincentives in the event that parties fail to genuinely attempt to resolve a dispute during an ADR process following commencement of litigation. Such consideration should include the principles of natural justice, the inequity to parties who may be in differing financial circumstances to the other party, and the cost of imposing such a scheme including the cost of dealing with appeals.

8. The practice of the court officer entering on the court file only that an ADR process has been concluded without settlement being attained is appropriate.

9.1 Where one or more parties to a dispute are unrepresented, the neutral should have experience in the are of law relating to the subject matter of the dispute to ensure that appropriate questions are asked of the unrepresented party so that the dispute is more likely to be resolved on an appropriate footing.

9.2 Where one or more of the parties to a dispute are unrepresented, the process may be interrupted to allow for the parties to obtain further information including legal advice.

10. The state should bear the cost of compulsory ADR pre-litigation and during the course of litigation, but the parties may avail themselves of private mediators from an approved list by bearing the costs equally.

11.1 The state should provide a free court-annexed process for matters appropriate for ADR but if the parties wish to avail themselves of external ADR, they may do so at their own cost, the neutral in such a case having been approved by the court.

11.2 Any court officer engaged in ADR must be appropriately trained in ADR techniques.

12.1 The level of resources available to the District Court should be increased to provide an appropriate level of service, allowing for individual case management to consider whether the dispute is one better resolved by ADR, and if so, to permit the appropriate model to be provided at a time optimum for the individual dispute.

12.2 The Local Court should review its pre-trial-conference system to accord a greater status to the process. The neutral should be a person with legal qualifications, whose knowledge of the law in relation to the subject matter of the dispute is respected by the parties and their representatives and who can force the parties to defend their position. The parties must attend the conference and the legal representative attending must be either the lawyer with the conduct of the file or have authority to settle the matter.

12.3 The pilot commenced in Victoria undertaking ADR processes for the Supreme, County and Magistrates' Courts should be reviewed.

13. Disputes must be referred to ADR prior to litigation being commenced and if litigation ensues, the case manager must have a discretion to refer the parties again to ADR at any later time considered appropriate. However, parties are to be discouraged from considering the ADR process as being one of many steps in the procedure.

14. The neutral undertaking ADR must be of sufficient stature in the court system to command the respect of the parties and have knowledge of the likely outcome should the matter proceed to an adjudication. The neutral should be selected to the position for his or her suitability for ADR as well as for other qualities.

15. That legislative change should be effected, possibly in the *Evidence Act*, to ensure the confidentiality of the conference and to afford neutrals protection from being required to give evidence of what had transpired during the course of an ADR process.

16. Consideration should be given to amending the Supreme Court Rules to extend ADR to matters in the appellate jurisdiction to at least resolve the issues being taken on appeal.

17. Court officers who undertake court-annexed ADR must have successfully completed training in ADR in a course of an appropriate level.

18. Consideration should be given to providing the appropriate level of funding for Community Mediation Centres in Western Australia to cover the cost of infrastructure, coordination, support services, mediators and promotion of the service provided.

19.1 Legal Aid Western Australia may provide minor assistance to parties undertaking community ADR to ensure that they are aware of their legal rights. Where a conflict emerges, the other party may be referred to a community law centre or to a private solicitor.

19.2 Community Law Centres required to provide additional service should receive additional funding from the State to ensure that parties undertaking community mediation are acquainted with their rights.

20. Mediation presently carried out by Community Mediation Centres is interest rather than rights based and the majority of disputes mediated are neighbourhood disputes. The training required to carry out such mediation does not require legal qualifications. However, should the type of dispute change and parties be compelled to use the ADR process prior to litigation, further consideration needs to be given to this issue.

ENDNOTES

* The Law Reform Commission of Western Australia engaged Ms Margaret Jordan to prepare this sub-section. The views expressed are those of the Commission.

1 William Ury, Jeanne M Brett and Stephen B Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict* (1988) 4-5.

2 In the Local Court, the parties are assisted by either the managing registrar or a special court officer; in the District Court, if the parties cannot reach resolution at a pre-trial-conference, they are then assisted by a registrar; in the Supreme Court, the parties may be referred to mediation which is usually assisted by a Registrar, but there is provision for the parties to be assisted by an approved external mediator.

3 ALRC, *Review of the Adversarial System of Litigation,* Issues Papers Nos 20- 24 (1997/98), Background Paper Nos 1- 3 (1996).

4 Ontario Civil Justice Review, *Supplemental and Final Report* (1996).

5 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1995).

6 Ibid 2.

7 See also D Ipp, 'Opportunities and Limitations for Change in the Australian Adversary System' (Paper presented at the Australian Institute of Judicial Administration Conference, Brisbane, August 1996) in which he discusses the objectives of a judicial system as being: ready access; at reasonable cost; to an independent tribunal which applies the law without fear or favour; operating fairly; with efficient procedures; before a suitably qualified judicial officer; who delivers judgement in accordance with sound legal principle; with the proceedings being completed within a reasonable time.

8 NADRAC, *Alternative Dispute Resolution Definitions* (1997).

9 Paul J Davidson, 'Book Review: Ernest G Tannis, Alternative Dispute Resolution That Works!' [1990] 16 *Canadian Business Law Journal* 502-7.

10 *Rules of the Supreme Court 1971* (WA) O 35; *General Rules of Procedure in Civil Proceedings 1996*

(Vic) O 50; *Supreme Court Rules 1970* (NSW) Pt 72; *Supreme Court Act 193*5 (WA) ss 65-70; *Supreme Court Rules 1987* (SA) r 76.

11 See Geoffrey Cohen and Leigh Duthie, 'The Role of the Special Referee' (1993) 67 *Law Institute Journal* 1056. See also Bruce M DeBelle, 'Arbitration, Expedition and ADR' (1990) 3 *Corporate and Business Law Journal* 69.

12 *Skinner & Edwards (Builders) Pty Ltd v Australian Telecommunications Corporation* (1992) 27 NSWLR 567, 575C.

13 A pilot programme of early neutral evaluation was introduced in the WA Registry of the Federal Court. A number of senior counsel agreed to act as evaluators and the cost on an hourly basis was shared equally between the parties. In some cases, where limited means was an issue, some evaluators provided their services on a *pro bono* basis.

14 Annesley H DeGaris, 'The Summary Jury Trial; Judicial Alternative Dispute Resolution' (1991) 2(1) *Australian Dispute Resolution Journal* 51.

15 France, 'Aggressive Use of ADR Helps Michigan Court Attack Case Backlog' in *Inside Litigation* (April 1990) 12, quoted in DeGaris, ibid.

16 George W Adams and Naomi L Bussin, 'Alternative Dispute Resolution and Canadian Courts: A Time for Change' (Paper presented at the Cornell Lectures, New York, July 1994).

17 BA Beaumont, 'US Systems of Court-based ADR, Including Rent-a-Judge' (1994) 1 *James Cook University Law Review* 103.

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2.4

Means of Commencing Civil Proceedings

INTRODUCTION

There are currently a number of different methods of instituting civil proceedings in Western Australia.

In the Supreme and District Courts proceedings may be commenced by writ, originating summons or originating motion. The correct form of interlocutory process is largely determined by the nature of the dispute in question. The different forms of originating process generally invoke different interlocutory processes.

Lord Woolf in his review of the English civil justice system[1] expressed the view that having many different methods to initiate proceedings introduced needless complexity into the system at the outset. He proposed that all proceedings should begin by a single claim form.

That view has received support in Australia although at the present time only the Federal Court has a single form of originating process — an Application. We propose that the same approach be adopted in Western Australia.

In each of the Australian states, there are in substance, if not in form, different forms for commencing proceedings, depending upon the nature of the matter to be determined. A brief review of the position in Western Australia and in other jurisdictions follows.

MEANS OF COMMENCING CIVIL PROCEEDINGS IN WA

Supreme Court

Section 41 of the *Supreme Court Act 1935* (WA) grants jurisdiction in causes[2] and matters[3] to a single judge in court or in chambers, except where the Act or rules require them to be determined by the Full Court. The means by which such civil litigation is to be commenced is to be found in the *Rules of the Supreme Court 1971* (WA) Order 4 of which provides:

(1) Subject to the provisions of any Act and of these Rules —
  (a) every action in the Supreme Court must be commenced by writ;
  (b) civil proceedings between parties to be heard in chambers must be commenced by originating summons;
  (c) all other civil proceedings must be commenced by originating motion.

Order 4 rule 1(a) — Writ of Summons

Section 4 of the *Supreme Court Act 1935* (WA) defines 'action' as 'civil proceedings commenced by writ or in such other manner as may be prescribed by Rules of Court.' Whilst the legislation does not expressly require it, actions which involve factual disputes to be determined in open court are usually commenced by way of writ of summons. The processes of pleadings and discovery flow automatically from the Rules of Court when proceedings are commenced by way of writ.

The rules prescribe the general form of the writ of summons.[4] A writ must be indorsed with a concise statement of the nature of the claim made, and of the relief or remedy sought.[5] In most actions commenced by way of writ, a statement of claim may, at the option of the plaintiff, be indorsed on the writ.[6] A statement of claim may not be indorsed where the claim is based on fraud, libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage.

Order 4 rule 1(b) — Originating Summons

The originating summons procedure was intended to provide a simpler, less complicated means of dealing with matters in which there are no significant issues of fact.

Order 58 provides that civil proceedings between parties which may be heard in chambers, must be commenced by originating summons. An originating summons must contain a concise statement of the nature of the claim made.[7]

Order 59 rule 1 specifies the proceedings which are to be heard in chambers. They include proceedings under Order 58, namely, questions as to the administration of any trust or estate, or declarations as to the construction of any statute or written instrument.

The court has power, at any stage, to order that proceedings commenced by originating summons be heard in open court, and may give all necessary directions for the further conduct of the cause or matter.[8] The court may in any event give such directions as may be necessary to ensure the just, expeditious and economical disposal of the proceedings.[9] That may include directions for interlocutory steps such as discovery of documents and for the administration of interrogatories. It is not uncommon for the court to order

that a matter commenced by originating summons shall proceed as if begun by writ and to give appropriate interlocutory directions.

Proceedings commenced by way of originating summons are usually tried on affidavit and without pleadings. For this reason proceedings by way of originating summons are inappropriate where there are likely to be contested disputes of fact.[10]

Order 4 rule 1(c) — Originating Motion

All other civil proceedings to be heard in open court under the Supreme Court Rules are commenced by way of originating motion. An originating motion must be used if the proceedings are neither an action commenced by writ nor civil proceedings between parties to be heard in chambers.[11] Appeals[12], applications to determine questions of law under the *Commercial Arbitration Act 1985* (WA),[13] applications for prerogative relief and contempt proceedings are matters to be commenced by originating motion.

District Court

Section 87 of the *District Court of Western Australia Act 1969* provides that until provision is made by the *District Court Rules of Western Australia 1996* or when no special provision is made in the Rules of the Court, the *Rules of the Supreme Court*, so far as applicable, apply to the District Court. Section 52 of the *District Court of Western Australia Act 1969* further provides that the practice and procedure of the District Court shall be the same as the practice and procedure of the Supreme Court in like matters. No special provision has been made by the *District Court Rules* in relation to the form of originating proceedings and, accordingly, the forms of commencing civil proceedings in the District Court are the same as those in the Supreme Court.

Local Court

In the Local Court proceedings are commenced by way of plaint, which is the entry in the Court's books of information given to the clerk by the plaintiff. The plaintiff then provides the necessary particulars to the defendant by presenting a summons form. The basic form of summons is prescribed by the *Local Court Rules 1961*.[14]

MEANS OF COMMENCING CIVIL PROCEEDINGS IN OTHER JURISDICTIONS

The means of commencing civil proceedings are different in each Australian state and in the Federal Court. No significant degree of uniformity has been achieved in the practice and procedure of the superior courts in the various jurisdictions in Australia, despite moves to a greater degree of integration of the Australian legal system in recent years, as evidenced, for example, by the cross vesting legislation, the increasing use of uniform legislation and the removal of many of the barriers to admission of legal practitioners from other states and territories. Each jurisdiction provides a different approach to the means of commencing civil proceedings.

New South Wales

A plaintiff in New South Wales may commence proceedings by way of a statement of claim or summons. Proceedings must be commenced by a statement of claim:

(a) where a claim is made for any relief or remedy for any tort;
(b) where a claim is made by the plaintiff based on an allegation of fraud;
(c) where a claim is made by the plaintiff for damages for breach of duty and the damages claimed consist of or include damages in respect of death or personal injuries or damage to property;
(d) where a claim is made for relief in respect of any trust other than an express trust wholly in writing.[15]

The content of a statement of claim must generally be verified on affidavit.

Proceedings where there is no defendant must be commenced by summons.[16] Otherwise, proceedings may be commenced in either form.[17] Generally speaking, a summons is issued in urgent matters and in matters in which there is unlikely to be a substantial dispute of fact.

Victoria

Following a substantial review of the practice and procedures in the Supreme Court, new Rules of Court were introduced in 1986. Those Rules provide that civil proceedings between parties in Victoria are commenced by way of writ or originating motion.[18] The Rules control the choice of originating process. Unless the Rules otherwise provide, every proceeding must be commenced by writ.[19] A proceeding must be commenced by originating motion:

(a) where there is no defendant;
(b) where by or under any Act an application is authorised to be made to the court; and
(c) where specifically required by the rules.[20]

A proceeding may be commenced by originating motion where it is unlikely that there will be any substantial disputes of fact and for that reason it is appropriate that there be no pleadings or discovery.[21]

The processes of pleadings and discovery flow automatically from the Rules when proceedings are commenced by way of writ. A writ is therefore to be used where it is likely that the proceedings will involve contested questions of fact. In contrast, where proceedings are commenced by originating motion there are no pleadings,[22] discovery can only be obtained by leave[23] and evidence is on affidavit.[24] The interlocutory processes invoked by an originating motion are therefore designed for matters where there will not be any substantial issues of fact.

The Court may order a proceeding commenced by originating summons to continue as if it had been commenced by writ; that is, in effect, to invoke the gamut of interlocutory processes such as pleadings, discovery and interrogatories. Equally, a proceeding commenced by writ may be ordered to be tried on affidavit and the Court may vary the interlocutory processes which would otherwise have applied to the proceedings.

South Australia

In South Australia all proceedings are commenced by summons. There is, however, a form of summons for proceedings *ex parte* and another form for proceedings *inter partes*. The form of the *inter partes* summons does not differentiate between cases where there are substantial issues of fact to be determined and those where there are not. The distinction lies in whether or not there is a defendant to the proceeding.

An *ex parte* summons must be supported by an affidavit which sets out the facts relied on for the relief sought. An *inter partes* summons must be supported by an affidavit or a statement of claim. An *ex parte* summons can be converted to an *inter partes* summons. It is significant, therefore, that although in South Australia the form of originating process is described simply as a summons, in fact it is in two distinct forms.

Queensland

Causes and matters in the Supreme Court may presently be commenced by writ of summons, motion, petition, originating summons, or order to show cause. Statutory and miscellaneous applications are disposed of at chambers on originating summons.[25]

The plaintiff must decide at the outset whether to proceed in court or in chambers, according to the nature of the issue to be resolved. An action commenced by writ is to be determined in court. The choice of originating process is therefore dependent on whether the matter is to be determined in open court or in chambers.

There are some guidelines as to when it is appropriate to proceed in court or in chambers. Order 65 sets out applications that should be made in the exercise of chambers jurisdictions.

If an originating summons commences proceedings between parties, it is an action. A cause is defined to include an action and therefore an originating summons between parties is also a cause. A proceeding is a matter when the proceedings are not between opposing parties but are in the nature of a statutory application.

The *Civil Justice Reform Act 1998* (Qld), which recently became law, is intended to facilitate the making of reforms to the Supreme, District and Magistrates' Courts of Queensland, including the simplification of procedures for commencing civil proceedings. The Act is essentially enabling legislation – it contains sufficient authorisation for the making of new rules to reduce complexity and uncertainty and to allow for the more efficient use of court resources. It is envisaged that new Uniform Civil Procedure Rules will be in place by July 1999.

The enabling legislation has abolished the distinction between court and chambers. All cases are to be dealt with in court and there is to be no separate jurisdiction exercisable by judicial officers in chambers.

Once the Rules are enacted, proceedings will be commenced by either a claim or by an application. The claim will replace the writ of summons in the Supreme Court and the plaint in the District and Magistrates' Courts. The application will replace the originating summons, summons, notice of motion and all other means of bringing a proceeding before the various courts.

Proceedings to be determined by trial where there will be any substantial dispute of fact will be commenced by way of claim as the rules for pleadings and disclosure will automatically apply. All proceedings are to be started by claim unless certain factors apply. Applications are intended to be used for cases where faster access to the courts is required and the fact-finding tools associated with a trial are unnecessary.

If a proceeding is:

- brought under an act;
- one with no opposing party;
- one where the main issue is one of law; or
- one where a substantial dispute of fact is unlikely;

then an application may be the appropriate means of commencement.

A proceeding started by claim in a District or Magistrates' Court must attach a statement of claim. A plaintiff in the Supreme Court may also attach a statement of claim.

Tasmania

In Tasmania a plaintiff can commence a proceeding either by writ or application, the form of which depends on whether the application is to be served or is *ex parte*.[26] The rules differentiate as to proceedings which are to be brought as an action (that is, by way of writ), by application to the court or by application to a judge in chambers.

Federal Court

Proceedings in the Federal Court are commenced by an application which must be in, or substantially in, the form provided for in the Rules.[27] An applicant must file and serve with his or her application either a statement of claim or an affidavit stating the nature of the claim and the material facts upon which it is based. It is for the applicant to decide whether to serve an affidavit or statement of claim. Generally speaking, if a proceeding involves a dispute of fact it should proceed on pleadings and will be commenced by way of statement of claim.[28] If the dispute involves substantially only questions of law, an affidavit should be served and filed.

The first step in a proceeding after the application is issued is a mandatory directions hearing at which the nature and form of the initial interlocutory steps are dealt with.[29] If, in the opinion of the Court, an applicant's decision on whether the matter should proceed on pleadings is incorrect, it may at the directions hearing make orders to rectify that. At the directions hearing

the court may also fix a date for a further directions hearing, fix a date for trial, stand the matter out of the list, hear and determine the matter, or summarily dispose of the proceedings.

The interlocutory processes which follow the commencement of proceedings are not programmed in the Federal Court Rules as they are in the Rules of the various Australian Supreme Courts. After an application has been filed, the matter comes before a judge for directions before any other step is taken. Each case requires an initial directions hearing and the progress of the case involves continuing court involvement in it. The nature and timing of the procedural steps will be largely prescribed by the Court, not by the Rules.

Such a system is obviously heavily dependent on adequate judicial resources to ensure that the initial directions hearing is listed promptly and the subsequent directions hearings listed at appropriate times for each proceeding. The progress of a proceeding is essentially court driven. It owes much less to steps or time limits expressly specified by the Rules of Court. It follows that such a system, if the court is not endowed with the necessary resources to manage it, will simply not function efficiently.

Of course, the ordinary jurisdiction of the Federal Court is more limited in its range than the state Supreme Courts and, for instance, many of the sorts of matters that may come before the Supreme Court of Western Australia on an originating summons would not ordinarily reach the Federal Court.

United Kingdom

Presently in the United Kingdom, there are four different ways of starting proceedings in the High Court, and another four in the County Court. In the view of Lord Woolf, the introduction of a single claim form to be used for every case would be an important step towards achieving simplicity in civil litigation. Lord Woolf suggested that the necessary degree of uniformity could be achieved by having the same first page for every claim, containing exactly the same information (the name of the parties and of the issuing court, and of the case number) with the following pages varying according to the type of claims. The form would then go on to the claimant's statement of case.

In Lord Woolf's view the basic requirements for a claim are that it should:

(a) set out a short description of the claim and a succinct statement of the facts relied on;

(b) certify that the claimant believes the contents to be true;

(c) indicate the remedy claimed;

(d) specify any document on which the case depends;

(e) certify the claimant's belief, where he is claiming money, that he reasonably expects to recover [an amount within one or other of certain stipulated ranges].[30]

COMMENTARY

Form of originating process

Examination of the relevant procedures in the other Australian states reveal a significant common feature — all recognise (in one way or another) that broadly speaking there are two 'streams' of proceedings;

- proceedings between parties which involve significant contested issues of fact and which may need therefore be subject to interlocutory processes such as pleadings, discovery and so forth, and
- proceedings in which there are no, or at least no substantial, issues of fact and which should be more amenable to being dealt with in a more summary manner. The latter category includes proceedings in which there is no defendant.

If stipulated interlocutory processes are to apply to a proceeding, at least in the first instance, by the Rules of Court rather than being selectively determined at the outset through the active involvement of the Court, it seems highly desirable that the interlocutory processes which are intended to apply to a particular proceeding are readily identifiable at the time the proceedings are commenced. Proceedings can then be allocated to the appropriate 'track' from their commencement and the interlocutory processes appropriate to a proceeding of that kind can be invoked immediately, without a need for any active early judicial intervention. Immediate identification of the appropriate track is effectively accomplished in the first instance by distinguishing the track on the face of the originating process by which the proceeding is commenced.

Thus by issuing an 'originating application' (or whatever it may be called) the plaintiff (or applicant, to use the nomenclature of the Federal Court) will by the choice of track indicate at the outset that a substantial trial on disputed facts is anticipated, so that the gamut of interlocutory processes appropriate to the determination of disputed factual issues is likely to be the best way of defining the issues and preparing the matter for trial. The Rules of Court will prescribe both the interlocutory steps which are usually appropriate to the determination of factual issues and the timing of those steps (with power in the Court of its own motion or on application of any party to omit or vary any of them), so that the interlocutory processes can get under way immediately, without the need for active judicial intervention at the outset — unless, of course, the plaintiff's choice of that course is challenged or a party applies to vary the prescribed interlocutory processes.

Conversely, where the originating application on its face indicates that the plaintiff does not anticipate there will be any substantial contested issues of fact (or that the areas of disputed fact are confined and discrete) the matter may be more appropriately dealt with in a more summary fashion involving a truncated form of interlocutory process — but subject once again to any

challenge to the appropriateness of that course — with the least cost and as quickly as is reasonably practical. It would also usually suggest a hearing substantially, if not wholly, on affidavit, rather than oral evidence.

It is inevitable there will be some cases which are commenced on the wrong track or in which subsequent developments dictate that they should be pursued in another form. In those cases, the Court should have power, at the initiative of a party or of its own motion, to order that the matter proceed as if it had been commenced on the other track. The Court should, moreover, be able to order any interlocutory processes which may be appropriate to a proceeding, regardless initially of the chosen track.

Proposal 1

There should be one form of originating process in Western Australia which will, on its face, distinguish between two distinct categories of case, namely:

(a) proceedings between parties where it is anticipated there will be substantial issues of fact; and

(b) proceedings where there is unlikely to be any substantial dispute of fact.

Content of originating process

The *Rules of the Supreme Court 1971* (WA) currently provide that a writ may contain either a statement of claim or a concise endorsement providing notice of the grounds and nature of the claim and relief sought ('general endorsement'). A writ must contain only a general endorsement, and not a statement of claim, where the writ contains a claim for fraud, defamation, malicious prosecution or false imprisonment. The purpose of the latter Rule is to prevent the general publication of unproven allegations of certain conduct and to prevent the further dissemination of defamatory material. That issue arises because the writ, and any statement of claim endorsed on it, is available for inspection by any person on payment of the prescribed fee.[31] However, the policy rationale for the retention of such a distinction seems questionable. Reputations can be severely affected by allegations in a commercial case asserting, for instance, breach of contract or oppression against minority shareholders. It is therefore proposed that this distinction be removed for all cases. Instances of abuse can be catered for by the usual remedies otherwise available to meet situations of abuse of process.

It is desirable that any defendant be given reasonable details of the claim made against it at the earliest possible opportunity. The current procedure for a general endorsement of the claim on the writ seems somewhat

inadequate to do that, albeit that in some cases, circumstances of great urgency such as the looming expiry of a limitation period need to be accommodated. In the main however, where urgency is not a consideration, the subsequent service of a statement of the claim simply adds another, unnecessary step to the process and is productive of delay. It is proposed that it should, in ordinary cases, be dispensed with.

The Court should be empowered to dispense with the requirement to endorse the originating process with a full statement of claim, or to serve it with the writ in cases of genuine urgency.

It is proposed that there should also be annexed to the statement of claim any documents referred to in it, except where their bulk makes that impracticable, in which case the documents should be served separately but at the same time as the originating process. Once again the Court should be given power in appropriate cases to dispense with that requirement.

Proposal 2

In the usual case, the originating process will be required to be endorsed with a concise statement of the facts relied on for the claim and of the relief sought. In the exceptional case such a statement should be required to be served separately with the originating process. Copies of any documents referred to in a statement of claim should be served with the statement of claim.

Verification of contents of claim

The traditional rule is that pleadings are not to be regarded as positive allegations of the truth of what they contain but only as a statement of the case of that party, to be admitted or denied by the other party and, if denied, to be proved to the satisfaction of the Court. Where a pleading is not verified on oath, and is not required to be verified, it does not amount to an assertion of belief in the correctness of the facts pleaded.[32] Accordingly a party is entitled to plead facts even though at the time of pleading they may not know whether those facts can be proved. However parties are not permitted to allege a fact which they know to be untrue and if they do they may be penalised in costs.[33] Similarly, a party who raises unnecessary factual issues by 'tactical' pleas where in fact there is no real dispute may also be penalised in costs.[34]

Notwithstanding the existence of cost sanctions, unverified claims invite tactical pleading and the advancement of unmeritorious claims and allegations. Lord Woolf's recommendations include a requirement that the claimant or his or

her legal representative certifies that he or she believes the contents of the claim to be true. We propose that similar certification should be required of claimants in this state.

Proposal 3

The originating process be required to contain a statement on oath that the claimant believes the contents of the claim to be true.

SUMMARY OF PROPOSALS

1. There should be one form of originating process in Western Australia which will, on its face, distinguish between two distinct categories of case, namely:

(a) proceedings between parties where it is anticipated there will be substantial issues of fact; and

(b) proceedings where there is unlikely to be any substantial dispute of fact.

2. In the usual case, the originating process will be required to be endorsed with a concise statement of the facts relied on for the claim and of the relief sought. In the exceptional cases such a statement should be required to be served separately with the originating process. Copies of any documents referred to in a statement of claim should be served with the statement of claim.

3. The originating process be required to contain a statement on oath that the claimant believes the contents of the claim to be true.

ENDNOTES

1 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).
2 Defined in the *Supreme Court Act 1935* (WA) s 4 as 'any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding by the Crown'.
3 Defined in the *Supreme Court Act 1935* (WA) s 4 as 'every proceeding in the Court, not in a cause'.
4 *Rules of the Supreme Court 1971* (WA) O 5 r 1; Form 1 or 2.
5 *Rules of the Supreme Court 1971* (WA) O 6 r 1.
6 *Rules of the Supreme Court 1971* (WA) Or 6 r 3.
7 *Rules of the Supreme Court 1971* (WA) O 58 r 14, Forms 74, 75.
8 *Rules of the Supreme Court 1971* (WA) O 59 r 2.
9 *Rules of the Supreme Court 1971* (WA) O 58 rr 27, 29.
10 *Martin-Smith v Woodhead* [1990] WAR 62, 65.
11 *Rules of the Supreme Court 1971* (WA) O 4 r 1(c).
12 *Rules of the Supreme Court 1971* (WA) O 63.
13 *Rules of the Supreme Court 1971* (WA) O 81D r 3(1).
14 *Local Court Rules 1961* (WA) O 5.
15 *Rules of the Supreme Court 1970* (NSW) Pt 4 r 2.

16 *Rules of the Supreme Court 1970* (NSW) Pt 4 r 2A.
17 *Rules of the Supreme Court 1970* (NSW) Pt 4 r 3.
18 *Rules of the Supreme Court 1996* (Vic) Ch 1, O 4.01.
19 *Rules of the Supreme Court 1996* (Vic) Ch 1, O 4.04.
20 *Rules of the Supreme Court 1996* (Vic) Ch 1, O 4.05.
21 *Rules of the Supreme Court 1996* (Vic) Ch 1, O 4.06
22 *Rules of the Supreme Court 1996* (Vic) Ch 1, O 14.02, 14.04.
23 *Rules of the Supreme Court 1996* (Vic) Ch 1, O 29.07(2), 30.02(3).
24 *Rules of the Supreme Court 1996* (Vic) Ch 1, O 40.02(c).
25 *Rules of the Supreme Court of Queensland* O 64.
26 *Civil Process Rules 1985* (Tas) sch 1.
27 *Federal Court Rules 1979* (Cth) O 4 r 1; Form 5, sch 1.
28 Bernard C Cairns, *Australian Civil Procedure* (4th ed, 1996) 96.
29 *Federal Court Rules 1979* (Cth) O 10 r 1.
30 Woolf, above n 1, 118.
31 *Rules of the Supreme Court 1971* (WA) O 67 r 11.
32 See eg, *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 85 and the cases cited therein.
33 *Degman Pty Ltd v Wright (No. 2)* 2 NSWLR 354.
34 *Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No. 2)* (1997) 18 WAR 190, 193.

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Federal Court Rules 1979 (Cth)

NEW SOUTH WALES

Rules of the Supreme Court 1970 (NSW)

QUEENSLAND

Rules of the Supreme Court of Queensland
Civil Justice Reform Act 1998 (Qld)

TASMANIA

Civil Process Rules 1985 (Tas)

VICTORIA

Rules of the Supreme Court 1996 (Vic)

WESTERN AUSTRALIA

Commercial Arbitration Act 1985 (WA).
District Court of Western Australia Act 1969
Rules of the Supreme Court 1971 (WA)
Supreme Court Act 1935 (WA)

Cases

Degman Pty Ltd v Wright (No. 2) 2 NSWLR 354.
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70.
Martin-Smith v Woodhead [1990] WAR 62.
Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No. 2) (1997) 18 WAR 190.

2.5

Pleadings — Sacrificing the Sacrosanct

> This case reminds me of a saying of the late Mr Jacob, that the importance of questions was in this ratio: first, costs; second, pleadings; and third, very far behind, the merits of the case.[1]

INTRODUCTION

If these sentiments reflect the true order of priorities in modern litigation in Western Australia, they are an indictment of the administration and attainment of justice. Whenever form prevails (or has the potential to prevail)[2] over substance, or the cost of administration operates to relegate the merits of a litigant's cause behind the mechanics of the civil justice system adherence to that system must be scrutinized. Justice should never be subordinate to the procedure designed to achieve it.[3]

For more than five centuries[4] the production of formal written pleadings has been perceived as integral to the procedure by which legal disputes between parties are determined in common law courts. Following the fundamental changes introduced in the United Kingdom by the *Judicature Acts 1873-1875*,[5] mirrored in Australian jurisdictions, the impetus for major procedural reform has been limited. Minor revisions of the rules of court relating to pleading have left substantially intact in Australia the system of written pleas initiated more than a century ago in the United Kingdom. The rules under which Australian courts operate are based on the same concepts as those introduced under the 1875 legislation as revised in 1883. The differences between late 19th century and contemporary litigation and society notwithstanding, the legal profession has adhered resolutely to a procedural system and regime of rules elevated over time to sacrosanct status. Generally speaking, modernization of the system of common law pleadings is achievable without the assistance of the legislature.[6] That the profession has not been motivated

to initiate analysis and significant change may permit a conclusion that the system of written pleadings and the governing principles are functioning adequately according to their design or that the profession does not perceive there to be a practice or design flaw. Both conclusions are vulnerable. Lack of change in a system is often simply a product of inertia. Familiarity breeds a degree of comfort. It has in this context. Lawyers, and their clients (certainly the corporate class), have acclimatized to a litigious environment with the formal written plea. Insufficient attention has been focused on whether that system meets the legitimate expectations and rights of those who must use it and those who will use it in the new millenium.

Pleadings are the written statements of the parties in actions commenced by writ served by each party in turn on the other which set out in a summary form the material fact on which reliance is placed to support the claim and defence.[7] In a civil context, unverified pleadings[8] do not amount to a personal assertion by the party of the facts pleaded; they do not represent a statement of belief in the existence of the facts pleaded. Statements of claim, (including those indorsed on a writ of summons),[9] defences, replies, rejoinders, surrejoinders, rebutters, surrebutters, counterclaims, and defences to counterclaim are 'pleadings'. A general indorsement on a writ of summons,[10] a petition, an originating summons,[11] a notice of appeal[12] an affidavit and, in Western Australia, particulars,[13] are not.

For many lawyers the exchange of written pleadings is of 'cardinal'[14] or 'pervasive importance'.[15] There are 'those who assume that because a procedural system is pretty old, it is probably pretty right'.[16] The view is not infrequently expressed that the permanent place of the written plea in the civil justice system is, or should be, assured:

> Pleadings do not only define the issues between the parties for the final decision of the court at trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars or the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making. They limit the ambit and range of the discovery of documents and the interrogatories that may be ordered. They show on their face whether a reasonable cause of action or defence is disclosed. They provide a guide for the proper mode of trial and particularly for the trial of preliminary issues of law or of fact. They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They act as a measure for comparing the evidence of a party with the case which he has pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial. They delimit the relief which the court can award. They provide the basis for the defence of res judicata in subsequent proceedings by reference to the record in the earlier proceedings....

> [I]t is abundantly apparent how pervasive is the influence and importance of pleadings throughout all the stages of an action. It may, indeed, fairly be claimed that pleadings play a central, if not predominating, part in civil litigation....[17]

> The very nature and character of pleadings demonstrates their significant and overwhelming importance, for the attention of the parties as well as the court is naturally focused on and riveted to the pleadings as being the nucleus around which the whole case revolves throughout all its stages. The respective cases of the parties can only be considered in the light of and on the basis of the pleadings, which act as fetters upon them, binding and circumscribing them closely and strictly to their own cases as pleaded, subject only to the power of amendment to free them from such fetters so as to put forward the real questions in controversy between the parties. Each party may thus be assumed to have put forward the best case he has in the best way he can in his pleading, and in this sense the pleadings manifest the true substantive merits of the case. Thus pleadings continue to play an essential part in civil actions, and their primary purpose is to define the issues and thereby inform the parties in advance of the case they have to meet....
>
> The system of pleadings … is also designed to fulfil some of the fundamental principles of natural justice, such as: that each party should have fair and due notice of what case he has to meet; that each party should have a reasonable opportunity of answering the claim or defence of his opponent; and that each party should have a reasonable opportunity of preparing his case on the basis of the issues disclosed in the pleadings. On this basis the fundamental right of each party to a fair trial is well founded.[18]

No feature of the civil justice system should be considered inviolate from scrutiny. The true test of the vitality and maturity of the common law of a modern society is its preparedness to examine regularly and, if necessary, discard the vestiges of bygone times and acknowledge the new needs of the community. The same is true of the procedural rules by which the common law is administered and justice is attained.

WHAT IS THE CURRENT SYSTEM DESIGNED TO ACHIEVE?

The objectives designed to be achieved by the system of written pleading are central to the evaluation of the efficacy of that system and the need for its reform. The system is primarily directed to empower the parties to a dispute to define for the purposes of a judicial decision the issue or issues between them. Stephen described the peculiarities of the unique branch of the common law known as the law of pleadings in this way:

> The object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England is to ascertain it by the production of an issue. And this appears to be peculiar to that system … In all courts indeed the particular subject for decision must of course be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs

> to the English law. By the general course of all other judicatures the parties are allowed to make their statements at large … and with no view to the extrication of the precise question in controversy; and it consequently becomes necessary before the court can proceed to decision to review, collect, and consider the opposed effect of the different statements, when completed on either side – to distinguish and extract the points mutually admitted, and those which, though undisputed, are immaterial to the cause – and thus, by throwing off all unnecessary matter, to arrive at length, at the required selection of the point to be decided. This retrospective development is, by the practice of most courts, privately made by each of the parties for himself, as a necessary means to the preparation and adjustment of his proofs; and is also afterwards virtually effected by the judge in the general duty of decision; while in some other styles of proceeding the course is different – the point for decision being selected from the pleadings by an act of the court or its officer; and judicially promulgated prior to the proof or trial. The common law differs from both methods by obliging the parties to come to issue; that is, to plead or to develop some question (or issue) by the effect of their own allegations and to agree upon this question as the fact for decision in the cause; thus rendering unnecessary any retrospective operation on the pleadings for the purpose of ascertaining the matter in controversy. [19]

By the introduction of the regime of the *Judicature Acts 1873-1875* it was intended that the achievement of this common law objective would be facilitated. Written pleadings are prepared by the parties' legal advisers. If the pleadings accord with the procedural code of rules designed to assist in the statement of the issues for decision[20] their formulation is conclusive. The Court may correct the pleadings to accord with these rules, but it will not assume the role of the pleader. It is interested to know the issues it is called upon to decide, but, under the current system, the Court assumes no primary responsibility for the formulation of those issues.

A preliminary issue arises: is it essential for the efficient administration of the modern civil justice system to ensure that the issues for decision are defined prior to trial? If not essential, is this desirable? It is our opinion that a formulation of defined issues prior to trial is essential for four reasons, properly characterised as subsidiary objectives of the current system of written pleadings:

(1) To ensure that both parties are fully informed of the issues in dispute between them in order to provide each with fair and proper notice of the case he or she has to meet and to allow for the preparation of the evidence to support his or her own case. [21] Unacceptable surprise at trial[22] is thereby avoided. Unnecessary expense is not incurred in relation to matters irrelevant to the issues in dispute;

(2) To provide a defendant with an understanding of the plaintiff's claim in aid of the defendant's right to make a payment into court;[23]

(3) To provide both parties with an understanding of the other's claim in aid of the compromise of the dispute between them;

(4) To provide a permanent record of the issues decided so as to prevent future litigation upon matters adjudicated between the parties or those privy to them.[24]

Under the current system there is a direct relationship between the pleadings and the remaining pre-trial process and the conduct of the trial. Boundaries are marked by the issues defined for the provision of particulars, interrogatories and the discovery process. The especially important association between the pleadings and the entitlement to and ambit of discovery has been described as follows:

> [T]he areas of dispute as to discovery will be limited by the precision with which the pleadings properly define the issues. A pleading which raises issues too largely, will give rise to too large a discovery. A pleading which raises the issues too narrowly or which says too little will give rise to a discovery which is found to be inadequate in the fullness of time. The prolix pleading may produce arguments as to relevancy. The pleading which does not separate out the questions of law and fact may create uncertainty and disputes as to the ambit of proper discovery.
>
> Many of the problems of discovery are, in the final analysis, problems of pleading.'[25]

THE PROCEDURAL CODE OF RULES GOVERNING THE FORMULATION OF PLEADINGS

A procedural code of rules designed to assist in the statement of the issues for decision has developed which emphasizes the overriding principle that the Australian system of pleading, modeled as it is on the *Judicature Acts 1873-1875*, is a system of fact pleading. This central feature distinguishes it from those procedural systems prevailing in other jurisdictions like the United States (where the Federal jurisdiction and most State jurisdictions utilize 'notice pleading' designed to avoid technicality in pleading)[26] and Germany where, in addition to extensive fact, extensive law and evidence are pleaded.[27] Order 20 r 8 of the *Rules of the Supreme Court 1971* (WA) embodies the principal rules of pleadings enunciated in the common law authorities.[28] It provides that every pleading must:

(1) state material facts only;

(2) state all material facts;

(3) state the material facts in summary form and briefly;

(4) not state the evidence by which the material facts are to be proved;

(5) not state the law.[29]

The original rationale underlying this procedural code of rules was that pleas of law, argument, reasons, theories, conclusions, and evidence produce documents which are lengthy and obtuse and which are apt to confuse rather than clarify the issues in dispute between the parties. Excision of such material,

it was thought, ensures that pleadings define these issues with maximum clarity and certainty. As with the status afforded to written pleadings themselves, the procedural code of rules governing their formulation has been elevated in the post-*Judicature Acts* era to a status considered by many members of the profession and judiciary now to be sacred. However, the continuing failure of written pleadings to meet the standards required[30] raises the legitimate question whether the orthodox distinctions between fact and law and fact and evidence should be maintained for procedural purposes. This is not a concession to incompetence, laxity or ignorance of pleaders. It is an acknowledgment that critical evaluation of the merits and cost of strict insistence on historical rules foreign to, and deliberately avoided by, lawyers in other developed countries and of the alleged detrimental impact of their relaxation or abolition on modern Australian litigation is overdue. It has been acknowledged at the highest level that it may well be 'the accumulation of technical rules over many years, both legislative and case-based, [which] has contributed to obscuring the basic requirement' of pleadings[31] and that many of the pleading points which lawyers have required courts over the decades to determine are 'reflections of the over-technical approach which is … a consequence of the adversarial system'.[32] The preservation of rules which lend themselves to, indeed encourage, this approach to modern litigation is highly questionable. It is our opinion that the procedural code of rules governing the formulation of written pleadings should not be considered unassailable.

IS THE CURRENT SYSTEM ACHIEVING ITS OBJECTIVES?

Informal random survey of pleadings filed in the District and Supreme Courts of Western Australia confirms our professional experience that in many instances written pleadings are not achieving the objectives outlined above.[33] We do not share the recent opinion of the Law Council of Australia that, generally speaking, 'written pleadings serve the purposes for which they were intended.'[34] We agree with the views expressed by the New South Wales Law Reform Commission,[35] by the Winn Committee[36] and by the Evershed Committee,[37] more than 20, 30 and 45 years ago respectively, that written pleadings have for decades, in many instances, failed this test. The continued criticism referred to by the Australian Law Reform Commission in its current review of the adversarial system of civil litigation in Australia is, in our opinion, well-founded.[38] We consider the continuing pleading problems encountered in the English civil justice system identified recently by Lord Woolf in his extensive review of that system to be equally problematic in the Western Australian context.[39] Adverse judicial commentary on the standard of pleadings with which courts are expected to deal[40] reveals that historical deficiencies have not been remedied, continue to obfuscate rather than clarify the issues for determination and that, in relation to an unacceptable number of proceedings, the current system is not efficacious.

A number of criticisms and observations of the current system of written pleadings can be made:

(1) It is rare for pleadings to identify an issue, as distinct from a multiplicity of issues, in dispute between the parties. Under the current civil justice system litigants are not obliged to minimize the issues raised by their pleadings. It is permissible, and often advisable, for a party to keep his or her options open by pleading various versions of the case which could possibly emerge or be established during the course of trial. For the same reason, there is a reluctance to admit the accuracy of the pleadings of an opponent.[41]

The pleadings filed in relation to the most frequent common law claim are illustrative: the claim for personal injury arising out of a car accident. Almost invariably, the relevant cause of action is negligence. Typically, the allegations of negligence are framed so widely as to be of marginal assistance in formulating any issue. Most, if not all, firms whose instructions in such claims form the bulk of their practices keep standardized pleadings on computer systems which are reproduced as a matter of course. Modification is minimal. Almost always, the defence effectively puts in issue every allegation in the statement of claim. Distinctions are usually drawn between those matters which are apparently genuinely in dispute (which are 'denied') and other matters (which are 'not admitted'). Contributory negligence is routinely, and often inappropriately, pleaded and particularized in extravagant terms.

Similar observations can be made in relation to claims for personal injuries suffered in the workplace. Particulars of negligence and breaches of statutory duty are commonly imprecise. Typically, the only allegation not traversed, either by denial or non-admission, is the incorporation of the defendant company.

(2) The pleading rules stop short of requiring the parties to be frank about what they allege.[42] There is a tendency of parties to make allegations which they do not believe to be true or which they cannot reasonably expect to be able to prove at trial, and to deny allegations which they know to be true or which reasonable inquiry would reveal to be true.[43] There is, in other words, a lack of 'truth' in pleadings which, in most Australian jurisdictions, do not have to be 'verified'.[44]

(3) There is a tension between the professional duty of lawyers to advance the interests of their clients to the fullest extent possible and the objective of the system of written pleadings to refine the issues in genuine dispute between the parties with, inter alia, a view to reducing the length and cost of litigation. The fear of suits for professional negligence for the failure to protect or advance clients' interests to the fullest extent permitted by the law, has created a 'leave no stone unturned' approach to litigation. There is an overuse of alternative positions.

(4) The pleading of surplus allegations precipitates applications for particulars, notices to admit, discovery of documents and interrogatories in attempts to eliminate them. This necessitates the expenditure of considerable resources and gives rise to delay in the administration of justice.

(5) Even when supplemented by particulars, notices to admit, discovery of documents and interrogatories, it is not uncommon that pre-trial conferences or directions hearings are required to ascertain the true nature of the case intended to be advanced at trial.

(6) The reality of the present litigious process is that knowledge of the issues in dispute is greater at the conclusion of the trial than when the pleadings are drawn. The body of knowledge develops prior to trial (for example, through the discovery process) and grows during the course of the trial. Because this is commonly understood, in practice, pleadings are afforded an ambiguous role. In theory, they are the framework of and control the proceedings. In practice, they often do not fulfil this task. Pleadings are not infrequently superseded in substance by information obtained subsequent to their preparation (for example, the exchange of witness statements). As a consequence they become less relevant for the purposes of trial agenda. In some instances, by the time the Court adjourns to consider its decision the documents which theoretically establish the legal basis for judgment and a record of the matters decided have been rendered, for all practical purposes, irrelevant. The need for pleadings to establish the issues for the trial of certain actions (for example, for personal injuries arising from car accidents) is highly debatable. Practitioners do not, in truth, require a formal pleading to identify the issues of negligence, contributory negligence and quantum of damages. The same can be said of many proceedings following applications for interlocutory relief: for example, the need for and benefit of formal pleadings following application for an interlocutory injunction (supported by extensive affidavit evidence and legal argument) are open to serious question.

(7) Pleadings are not infrequently amended, often at late stages including during the trial itself, to reformulate the issues in dispute or to add new ones. This alters, to varying degrees, the bases upon which the parties have prepared to meet the cases against them, substantially increases the costs of litigation and gives rise to delay in the administration of justice.

(8) In larger complex cases (for example, major building disputes) the requirement to prepare and exchange written pleadings substantially increases the costs of litigation and gives rise to delay in the administration of justice.

(9) In many instances pleadings continue to incorporate arcane legal nomenclature (for example, those involving real property, trusts, wills and intestacy).

(10) The procedural code of rules governing the formulation of pleadings is, in many instances, not adhered to. In particular, it is evident that pleaders are experiencing difficulty in adhering to the rules that material fact and not matters of law or evidence be pleaded.

(11) The procedural code of rules governing the formulation of pleadings encourages an over-technical approach to litigation and, in many cases, operates as an impediment to the attainment of justice. 'Forensic fire'[45] is directed increasingly at pleading rather than substantive issues. There is a plethora of applications to strike out pleadings for allegedly failing to adhere to these rules. Many involve applications based on the alleged impermissible pleas of matters of law or evidence. Often repeated applications are made. There are examples where as many as ten applications to strike-out have been made in relation to single sets of repeatedly amended pleadings. This necessitates the expenditure of considerable resources and gives rise to delay in the administration of justice.

(12) Generally speaking, the courts appear loath to deprive forever litigants the opportunity to pursue claims and usually allow time to file an amended pleading for the price of an adverse costs order.[46] This necessitates the expenditure of considerable resources and gives rise to delay in the administration of justice.

(13) The system of written pleadings and the procedural code of rules governing their formulation present the unrepresented litigant with formidable, and in some cases, insurmountable, barriers to the attainment of justice.[47]

THE HISTORY OF PLEADINGS

In determining the reasons why the current system of written pleadings is, in many instances, failing to achieve the objectives for which it was designed and in the search for the best method to remedy this failing, brief examination of the historical background of modern pleading is instructive.

The modern common law system of pleading bears little resemblance to the original procedure by which a litigant stated his or her case against another. In the Middle Ages pleadings took the form of oral altercations between parties in court. They were not preliminaries. Nor were they part of process. They were a distinct and central part of the litigant's progress. The procedure has been described as follows:

> The writ by which the action was commenced used to be brought into court with the sheriff's return on it, and the plaintiff's counsel, after

> it had been read, proceeded to expand the charge contained in it, in a connected story, by adding time, place and other circumstances. Thus, if the writ mentioned the cause of action to be trespass, the plaintiff's counsel stated where, when and how the trespass was committed and what special damage had resulted from it … This statement was called the count from the French *conte*, a tale or story. The defendant's counsel, on his part, stated the defence with similar precision, and this was called the plea. The plaintiff's counsel replied; the defendant's counsel if necessary, rejoined; and so on until they had come to a contradiction either in law or fact. If either conceived that the last pleading of the opposite side was untrue in fact, he positively denied it, and then was said 'to take issue with it' … thus was an issue produced either of fact or law. If of law it was decided by the court; if of fact, tried in most cases, by a jury.
>
> While the proceedings were going on, the officer of the court sat at the feet of the judges, entering them on a parchment roll of record. When the pleadings were only in process of being entered on it, it was called 'the plea roll'; when the issue had been joined and entered on it, it was called 'the issue roll'; and when the judgment had been recorded on it, it was called 'the judgment roll'.[48]

The main object of the count was to amplify the matter outlined in the writ and to reveal a full cause of action. Before the middle of the 13th century a new profession of counters (or narrators or *advocatus*) had emerged whose business it was to compose counts and pronounce them before the judges in the proper set forms of the king's courts.

Many of the fundamental rules of the common law system of pleading were made for and adapted to this system of oral pleading. Modern litigants are required to come to issue in the same manner as when opposed to each other in verbal altercation at the bar table. But the system of oral pleading had a major advantage over the later strict system of written pleadings: it provided for greater freedom in the statement of the case. It was the duty of the judge to superintend or 'moderate' the oral contention advanced before him. His aim was to arrive at some specific point or matter affirmed by one party and denied by the other which both agreed was the question requiring decision. Counsel, with the assistance of the Court, 'licked the plea into shape'[49] to achieve this result. At that point the parties were *at issue ad exitum*. The pleadings were over and, if the issue to be decided was of fact, the parties were ready to go before a jury. Holdsworth has described the process by which the issue in dispute was formulated:

> [W]hen all objections to the writ and process had been disposed of, and when the parties were fairly before the court, the debate between the opposing counsel, carried on subject to the advice or the ruling of the judge, allowed the parties considerable latitude in pleading to the issue.[50] Suggested pleas will, after a little discussion, be seen to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled.[51]

In the mediaeval society contemporaneous with the system of oral pleading the ability to read and write was rare. It was common to make claims publicly. As literacy skills and litigation increased and the nature of causes became more complex, the oral system was superseded, it seems, between the late 15th century and the beginning of the 16th century[52] by a system of written pleadings exchanged by the parties or their legal advisers out of court. When first introduced 'paper' pleadings were regarded as highly suspect by a judiciary which favoured the convenience of the oral practice. Prisot CJ lamented:

> It is not the practice to put in such papers when the party is represented by counsel without pleading them at the bar openly; for if this be allowed we shall have several such papers in time to come which will come in under a cloak, and matter which a man's counsel will not plead can be said to be suspicious.[53]

With the abandonment of the oral pleading, the Court no longer supervised the initial procedure. Judges heard nothing of pleading until issue or demurrer. As was the position under the oral system, if the action was a real action, the pleading began with a count. Personal actions were commenced with a declaration. The term 'declaration' (what we now know as a statement of claim) became commonly used when referring either to real or personal actions, the term 'count' being retained to refer to a claim in the declaration. In the declaration the plaintiff stated the nature and quality of his case which the defendant learned for the first time: the writ of summons did not contain any reference to the cause of action as the original writ formerly did. The defendant filed a demurrer if he claimed that the declaration did not disclose a case sufficient on the merits. If he could not dispute that the declaration was on the face of it good in substance, he answered it by matter of fact by filing a plea. Eventually, the litigants were made to come to issue in the same manner as when opposed to each other in verbal altercation at the bar table.

As this system of written pleading developed it became increasingly complex. The science[54] of pleading came to make the skilful construction of pleadings a specialty of much legal learning. Clerks trained in the offices of the prothonotaries called 'special pleaders' were employed to formulate the case by reference to a litany of strict rules.[55] This task became one distinct from the art of the advocate. Initially, the objective of raising a single issue was achieved: a defendant was only permitted to raise a single issue in his pleas. This meant, however, that he could not deny other allegations with which he in fact disagreed. The written system became intolerably rigid and technical. Errors which were able to be overcome or ignored in the courtroom within the earlier flexible oral system of pleading doomed to failure cases pleaded under the written system. Mistakes were not uncommon: the developments of the various forms of action gave rise to differences both in the writ by which they were commenced and in the mesne process upon that writ. From the 14th century the kinds of pleas open to the parties also differed.

The mass of detailed rules required to be observed by pleaders and the consequences of the failure to do so inevitably lead to an abstruse system which failed the objectives it was designed to achieve and those who sought to use it.[56] The great jurist, Hale CJ, attributed the decline of the common law system to the introduction of paper pleadings:

> [A]nciently pleading was at the bar, and then it did appear plainly what was stood upon; and if the party did demur, he knew what he did. But pleading is now got all into paper and since that, of late, men make it but a snare and trap and piece of skill.[57]

Maitland was equally scathing:

> [The introduction of written pleadings] forced our common law into a prison-house from which escape was difficult. Instead of being able to ascertain the opinion of the judges about the various questions of law that are evolved in the case, the pleader, without any help from the court, must stake his reputation and his client's fortune upon a single form of words.[58]

Attempts were made to remedy the defects of the strict system of written pleadings. Rigid rules were relaxed. The most effectual mitigation was the common law rule as to the manner in which the old plea of general issue could be used to prevent the necessity for any special pleading.[59] By 4 Anne c 16 s 4 (1705) a defendant, with the leave of the Court, was permitted to plead several pleas in his defence. Subsequent legislation permitted several pleas to be pleaded without leave. These reforms, designed to make the system more 'user-friendly', operated, in part, to defeat the main objective of the pleading — to define the issue of dispute between the parties. Rather than identifying a precise issue, pleadings began to contain numbers of general allegations framed as widely as possible. Defendants began to plead series of general denials. The words of Cotton LJ in *Spedding v Fitzpatrick* highlight the problem which had been created by the end of the last quarter of the 19th century:

> The old [that is, pre-*Judicature Acts*] system of pleading at common law was to conceal as much as possible what was going to be proved at the trial.[60]

The *Judicature Acts 1873-1875* abolished the old names and forms of action and many of the technical rules of pleading which plagued the earlier written system, but they did not introduce a system which operated to define the issues in dispute between the parties. In this context, the legislation proved a disappointment for its failure to bring about marked improvement.[61] The failings of the 'new' system of pleading, the one on which the modern Australian regime is modelled, were identified as early as 1880 by a Committee on Procedure presided over by Lord Coleridge CJ. It is significant in the context of the current debate concerning reform of the system of written pleadings

to observe that the efficiency of the 'modern' law of pleadings has been seriously questioned for twelve decades. The pleadings being drawn in the late 19th century were so unsatisfactory that the Committee opined that:

> [A]s a general rule, the questions in controversy between litigants may be ascertained without pleadings. In the 20 804 cases which, as appeared from the statistics of 1879, were either settled or abandoned without being taken into court it may reasonably be supposed that pleadings were of little use. Of the cases which go to trial it appears to the Committee that in a very large number the only questions are: [w]as the defendant guilty of the tortious act charged, and what ought he to pay for it; or did the defendant enter into the alleged contract, and was it broken by him? And in a great many others the pleadings present classes of claims and defences which follow common forms. We may take, for instance, the disputes arising out of mercantile contracts for sale, of affreightment, of insurance, of agency, of guarantee. The cases of litigants are usually put forward in the same shape, the plaintiff relying on the contract and complaining of breaches; the defendant, on the other hand, denying the contract or the breaches, or contending that his liability on the contract has terminated. The questions in dispute are, as a general rule, well known to the plaintiff and the defendant. It is only when their controversies have to be reproduced in technical forms that difficulties begin.[62]

The Committee accordingly recommended that no pleadings should be permitted in any action except with the leave of the Court.[63] Others opposed the call for fundamental change.[64]

There were numerous attempts to improve the system of pleadings between 1880 and 1950. They are remarkable for their lack of success. The failings are illustrated by the criticisms made of 'modern pleadings' in 1953 by the Evershed Committee which found:

> (a) that statements of claim tend to prolixity including matters of history etc;
> (b) that in some classes of case, eg 'running down' actions, the pleadings follow set forms and are useless;
> (c) that defences make common the practice of putting every alleged matter of fact in issue without regard to common sense or reality;
> (d) that … matters of law, though they may surprise the other party, are not commonly pleaded;
> (e) that generally, pleadings being formal in style have the effect of creating a kind of ritual in which the litigant himself is involved, to his own pecuniary loss.[65]

Two major recommendations were made by the Evershed Committee. The first recommendation was that there be introduced a procedure whereby, in appropriate cases, the parties should be encouraged to go to trial without pleadings.[66] The underlying rationale was that, in certain cases, the issues between the parties had already or could be stated with clarity and precision and that because the objective of pleadings was or could thereby be achieved,

pleadings could be dispensed with. This recommendation was embodied in a new order in 1955.[67] This was replaced with a simplified procedure in 1962 which provides that the Court may, on the application of a party, order that proceedings be tried without pleadings or further pleadings.[68] There is an equivalent provision in the *Rules of the Supreme Court 1971* (WA) for trial of actions begun by writ (save for limited exceptions) without pleadings with the leave of the Court.[69] The Court is able to direct the parties to prepare a statement of the issues in dispute or, in default of agreement by them, it may settle the statement itself. The Court must then, or if it refuses to dispense with pleadings it may, give directions for the further conduct of the action as if on a summons for directions. Experience reveals that the Supreme Court of Western Australia is seldom asked to sanction the dispensation of pleadings. This fact may reflect cultural predilection of the profession or ignorance of the option.[70] Dispensation may also be made the subject of case management[71] or expedited list directions.[72]

The second major recommendation of the Evershed Committee was that there be more extended use of the procedure by way of originating summons. No pleadings are used under this procedure. Where facts are contested, affidavits are filed by both parties, each of whom can, if necessary, obtain an order that the deponents attend the trial for cross-examination. This procedure is widely used in the Chancery Division and is said to have the advantage that actions are determined quickly and more cheaply and, importantly, that before trial, each party knows the whole of the evidence to be adduced by the other, subject to cross-examination. Some have questioned the efficiency of this procedure.[73] Others, most notably, the New South Wales Law Reform Commission, support permitting all non-jury actions to be commenced by summons and to proceed to trial without formal written pleadings.[74]

In 1968 the Winn Committee, commenting on pleadings in road accident cases, observed:

> [T]he statement of claim … tends to be a shoddy product. Far too many pleadings follow a stock form of which the dominant characteristic is that no cause of collision known to practitioners is omitted. In this type of litigation superfluity and irrelevance are rampant vices....
>
> We have no hesitation in saying it is in defences that the current practice of pleading calls for its harshest criticism. One of the most experienced Queens Bench Masters told us that at present: 'The defence is a blot on our procedure … The chief defect of our system', he avers, 'is that a defendant is permitted to make wide denials'.[75]

As noted above, the same valid 30 year-old criticisms can be made of the modern personal injury pleadings filed every day in the District Court of Western Australia.

IS THERE AN INHERENT FLAW IN THE NATURE AND CULTURE OF THE CIVIL JUSTICE SYSTEM?

In contrast to the position in jurisdictions modelled on the civil law tradition, legal proceedings in Australia are adversarial. It is the parties rather than the Court which have the primary responsibility for defining the issues in dispute and for progressing that dispute, although, certainly, they do not have complete freedom.[76] Pleadings are a reflection of this system: they are formulated by the parties who are therefore at liberty to define the issues; once issue is joined, the pleadings confine both the Court and the parties. In a very real sense, therefore, notwithstanding the modern move away from passive judicial participation to active case management,[77] the parties are required to 'set the court's agenda'.[78]

Advantages and disadvantages of the common law adversarial system as a dispute-resolving regime is the subject of another sub-section of this review.[79] It suffices to observe that an adversarial system encourages an adversarial culture in which there is a tendency of litigants to intensify rather than economize the litigation process; pleadings become increasingly long and complex, discovery becomes ever more extensive, the resort to the expert witness is more frequent and witness statements grow in length and detail.[80] It seems that there is a sound basis to support an argument that it is the nature and culture of the civil justice system generally which has caused, or contributed in large part to, the failure of written pleadings to achieve their objectives. The view was expressed six decades ago that:

> The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleaders' allegations and denials. They might rest upon the soundest evidence, or they might rest upon nothing at all. The parties could assert or deny whatever they chose. But whether the pleadings represented fact or fancy was something with which the rules of pleading had nothing to do. That was a matter to be dealt with at trial, not at a preliminary stage.[81]

More recently, Justice Davies has alluded to the unproductive pleading practices induced by the adversarial system:

> Our traditional system of pleadings allows, and the adversarial imperative encourages, each party to allege facts generally rather than with particularity, to deny generally all allegations not in the party's interests to admit and even deny specifically facts known to be true. By making general rather than specific allegations a party may avoid the risk, however slight, that a specific fact, which later turns out to be important, has not been alleged. And by denying all the opponent's allegations a party may require the opponent to prove facts which are known to be true or of marginal relevance but which may not be easily proved. By such tactics the parties are playing a very expensive game rather than getting to the real issues in dispute.[82]

The modern system of case management ensures that, while the primary responsibility for what is advanced rests with the parties, courts are concerned

with what is put forward. This interest and the judicial supervisory role notwithstanding, while the onus of proof lies on the party advancing an allegation, there is little incentive to avoid simplifying that party's task by way of admission. The onus of proof has often been said to justify the traverse of allegations of fact by general denial or non-admission.[83]

Attempts to reform pleading practices through changes to the governing rules have been spectacularly unsuccessful. This is not surprising: amending the rules will not alter the mind-set of the Australian profession trained to view litigation in an adversarial setting. The South Australian experience demonstrates this. A new set of rules was introduced in that jurisdiction in 1987 designed to compel pleaders to address each and every allegation of fact so as to narrow the issues between the parties, to prevent surprise and reduce delays caused by late amendments. These objectives were not achieved. Further amendments were made in 1993. Still further changes are contemplated.[84] Far from producing the desired reform, the new pleading rules have been employed as tactical weapons and as a means of oppressing opponents. Costs have increased without any consequential benefit to litigants. Justice Lander has observed that the mechanisms by which it was hoped pleadings would become tailored to isolate the specific issues in a case have been misused such that, paradoxically, pleadings in South Australia 'have become longer and longer and … so particularized as to become almost unintelligible'.[85]

THE FUTURE PATH

The need for fundamental reform

It is our opinion that for so long as the Australian litigation system is based on the adversarial tradition and the onus of proof lies on the party advancing an allegation, attempts to bring about *substantial* reform of the current system of written pleadings with a view to facilitating the more efficient administration of justice will fail.

There are a number of refinements which could be made to 'improve' the present regime. Opining that pleadings have a 'valuable' function, the Law Council of Australia has suggested that they could be improved by, inter alia, a greater resort to plain English, less use of arcane legal nomenclature, clearer 'tagging' of legal propositions, the abolition of bare denials, the introduction of a 'conduct' rule which requires practitioners to have a reasonable foundation for pleadings (and other pre-trial action), greater circulation of 'model' forms of pleading and early judicial management.[86] Each of these suggested measures is, in itself, worthy of support, but will not, in our opinion, bring about the procedural reparation required.

A number of beneficial changes to pleading rules have been embodied in the Consultative Draft of the *Uniform Civil Procedure Rules* governing civil litigation in Queensland without endorsing more basal reformation of the general approach advocated by the now defunct Queensland Litigation Reform

Commission. The Chairman of the Commission, Justice Davies, has expressed the view that the Consultative Draft 'has some serious defects'. His Honour considers that it has 'failed to grasp the opportunity to make some worthwhile changes which would make litigation cheaper and fairer. In this it appears to have yielded too much to the interests of practising lawyers and too little to those of their clients. Lawyers tend to be more adversarial than their clients and their financial interests are often inconsistent with those of their client'.[87]

Care must be taken to ensure that in seeking to reform the civil justice system of Western Australia opportunity is not wasted and attention is not misplaced. We endorse the comments of Lord Woolf:

> A number of commentators have observed that the defects in pleadings do not arise from defects in the rules of court, but from the repeated failure of parties and lawyers to observe those rules and of the court to police them. While I accept that compliance with existing rules would improve the position, the fact that they are so often ignored only accentuates the need for a completely new approach and a change of culture. I therefore believe that it is now necessary to go further to achieve real progress.[88]

We are of the opinion that the long history of failure of the modern pleading system gives rise to the high probability that minor refinement will produce marginal improvement only and will not cure inherent deficiencies. More fundamental reform measures should be introduced.

The experience in other jurisdictions

We are not convinced that written pleadings are integral and indispensable to the civil justice system or to those proceedings involving complex and important issues of fact. Those who consider written pleadings to be the 'nucleus' of civil litigation requiring difficult decisions of fact to be made ignore the experience of the criminal jurisdiction. There are no pleadings in criminal prosecutions.[89] Yet, in dealing with the liberty of the individual, they give rise to the most fundamental and important issues of fact. These difficult decisions of fact are made daily in the District and Supreme Courts of Western Australia without the aid of the written plea, and it would appear, without harm to the administration of criminal justice.

Supporters of entrenched systems should consider whether those systems have been widely mirrored: ideas viewed as having worked well tend to be imitated by those at liberty to choose. New and competing systems of determining disputes between citizens have not tended to utilize traditional formal pleading methods in order to isolate the issues for decision.[90] Jurisdictions other than the criminal jurisdiction function, it appears, quite adequately in the absence of the exchange of formal written pleadings. Disputes are resolved in the Administrative Appeals Tribunal without this procedural step. An application for review of a decision under the *Administrative Appeals Tribunal Act 1975* (Cth) must be in writing, must set out a statement of the

reasons for the application and may be initiated by the filing of a prescribed form.[91] As the grounds of review are not mentioned in the Act and must be inferred, it can be presumed that this refers only to a statement, in lay terms, containing the factual reasons why the application should succeed on its merits.

The Federal Court has experimented with proceedings shorn of formal written pleadings. In taxation cases in that jurisdiction pleadings have been replaced by statements of facts and issues in contention.[92] Parties are directed at an early stage to prepare these.

Prior to 2 October 1989, in proceedings in the Family Court of Australia and the Family Court of Western Australia issues were developed and tried without formal written pleadings on the exchange of affidavits. The flirtation with a formal system of written pleadings appears to have been regarded by most family law practitioners as a disappointing disaster.[93] Within three years of the introduction of the regime, the judiciary acknowledged that pleadings had not achieved the desired objectives of simplification and cost-reduction.[94] That experience is consistent with the experience of the pleading-based civil justice system generally.[95] Significantly, in the context of the issue under consideration, the Family Court experiment with the formal written pleading was abandoned. Pleadings were abolished in all cases, simple and complex, and simplified procedures for initiating proceedings were introduced on 8 January 1996.[96] Proceedings are now initiated by completing a standard form which requires that the order sought be set out briefly and precisely.[97] The comparative merits of this system of 'initiation by form' are currently the subject of examination by the Australian Law Reform Commission.[98]

We anticipate that the view that efficient administration of the civil justice system is not dependent on the exchange of formal written pleadings and, indeed, in many instances is hindered by that requirement and the governing procedural code of rules, will meet considerable opposition from some quarters. Those who venerate pleading as the quintessential 'science' or the ultimate legal art will, we expect, be loath to entertain the abandonment of the prevailing litigation framework or traditional culture. But there are others who are senior members of the profession who have equally strongly held views that the civil justice system is in 'crisis' and in need of 'radical surgery' and that pleadings are a chief culprit.[99]

We agree that a complete change to the law of pleadings should be contemplated subject to this vital qualification. We wish to stress that while we do not consider the system of formal written pleadings itself to be of cardinal importance to the efficient administration of civil justice, we consider its primary objective to be central: the formulation of defined issues to ensure that both parties are provided with due notice of the claim or defence they

have to meet. The formulation of defined issues and provision of due notice 'at the earliest possible stage'[100] must be the foundation upon which any procedural scheme is based.

It is our opinion that the system of formal written pleadings and the procedural code of rules by which it is governed should be abolished if an alternative procedural scheme can be identified which is capable of achieving the stated objective. It is the underlying primary objective of the current system of pleading rather than the system itself or the historical 'scientific' or 'artistic' rules of pleading which is integral to the efficient administration of civil justice. Identification of an alternative method of disclosure of parties' cases and the true nature and scope of the dispute must be the price of abolition.

Proposal 1

The system of formal written pleadings and the procedural code of rules by which it is governed should be abolished if an alternative procedural scheme can be identified which is capable of achieving the objective of the early formulation of defined issues and provision of due notice.

The originating process

The complexity of the present system is reflected, in part, in the fact that there are different ways of instituting different proceedings in different courts. In our opinion this may operate as an obstacle to access to justice. This complexity, introduced into the civil justice system at the outset of proceedings, is unnecessary and unavoidable.

Under the Consultative Draft of the *Uniform Civil Procedure Rules* governing civil litigation in Queensland five originating processes have been reduced to two: the Claim (which replaces the writ of summons (Supreme Court), the plaint (District Court) and the plaint and summons (Magistrates' Courts)) and the Application (which replaces the originating summons and notice of motion). In our opinion, it is preferable for all proceedings in the superior courts of Western Australia to be commenced by the one species of originating process. Reform of this nature would accord with the recommendation of Lord Woolf that all proceedings in the United Kingdom be commenced by means of a single claim form.[101]

Proposal 2

All proceedings in the superior courts of Western Australia should be commenced by the one species of originating process.

Terminology

Consistent with our view that the system of formal written pleadings and the procedural code of rules by which it is governed should be abolished if an alternative procedural scheme can be identified which is capable of achieving the early formulation of defined issues and provision of due notice, we propose that the terms 'pleadings' and 'statement of claim' be abolished and that the sole originating process be known as a 'Complaint' which will contain the information outlined below. The term 'Defence' can be retained to refer to the defendant's response to the Complaint. The suggested change in terminology is not cosmetic. Just as the failures of the current system of written pleadings have become ingrained, so too has the associated terminology. The term 'pleadings', although familiar to lawyers, has acquired 'an unfortunate flavour of obfuscation rather than clarity.'[102] To a lesser extent the same can be said of the term 'statement of claim'. We believe that in order to achieve the reform proposed, it is desirable to signify to all concerned (the profession, the judiciary, and the general public) that a fundamental change should be made and that a break with tradition is overdue. We consider that this will be aided by a change in nomenclature.

Proposal 3

The terms 'pleadings' and 'statement of claim' should be abolished and the sole originating process should be known as a 'Complaint'.

The distinction between fact and law

We are unconvinced that insistence on the rigid distinction between fact and law in the formulation of pleadings assists in any significant way the administration of civil justice. On the contrary, not only has the distinction proved difficult to adhere to in practice, increasing resort to pleas for interlocutory relief,[103] it is our opinion that this orthodoxy lends itself to the obfuscation rather than clarification of the real issues in dispute between the parties. It has the potential to delay comprehensive analysis of the legal issues to which a dispute gives rise. Practitioners, content in the knowledge that conclusions of law should not figure in the formulation of pleadings and mindful of the additional cost involved, may leave appropriate assessment of these issues for a later day closer to any trial. Experience reveals that in some instances the full legal consequences of facts pleaded are not adequately or comprehensively understood or advanced until counsel commences his or her final address after the close of evidence. On occasion this is even delayed to the appellate process.[104] Much time and expense have to be outlaid by parties in anticipating issues which an opponent may raise and in positioning themselves 'to hose down flames which may never be kindled.'[105] This piecemeal approach to the preparation and presentation of cases must be discouraged. Failure to identify, analyze and assert at the earliest stages of proceedings the relevant legal issues to which a claim or defence gives rise

has a number of potential adverse consequences for the administration of justice. It reduces substantially the likelihood of earlier compromise and consequent saving in resources. It inevitably leads to applications to amend the pleadings as time is eventually devoted to the identification and analysis of the true legal issues. Such refinement of and addition to the legal issues comes at an avoidable cost and delay.

Lord Woolf has recommended that a flexible approach be taken to the statement of matters of law. His Lordship advocates the introduction of a statutory requirement that the parties state any matters of law arising out of the pleaded facts which entitle them to a remedy and the legal nature of the claim in circumstances where it is not otherwise clearly identifiable. This reflects a recognition that in many cases the legal basis for the claim will be clear if facts are stated adequately.[106] As noted, there has been relaxation of the strict rule against the pleading of law to the very limited extent that in both the Supreme Court of Western Australia and the Federal Court of Australia parties may raise points of law, as distinct from pleading legal conclusions or consequences of law.[107] In the latter jurisdiction taxation cases are now determined by reference to statements of facts and issues prepared by the parties.[108] The same strategy has been utilized with positive results in the Trade Practices Tribunal.[109]

In our opinion, it is highly desirable to force the parties at the outset of proceedings to focus their minds on the relevant legal issues and potential legal consequences of their allegations of fact. The suggestion has been advanced that it be made optional for parties to include some reference to the legal categories into which it is asserted the alleged material facts fall.[110] We see considerable merit in requiring, rather than permitting, parties to state the legal nature of the claim or defence and the contentions of law on which they intend to rely. Moreover, we are of the opinion that a statement of the legal nature of the claim should be a requirement in all cases and not just those where it is thought the legal basis of the claim is unclear from the facts alleged. This proposal has the support of members of the judiciary of the superior courts in Queensland[111] and South Australia.[112] Reference to any statutory provisions relied on and statements of the general nature of the legal causes of action or defences would suffice to distil the dispute to its essence and facilitate the prospects of early compromise. This identification would not, of course, bind the Court in any way: it would remain at liberty to apply whatever legal principles it considered appropriate to determine the dispute. Similarly, specification of the relief sought should not in any way limit the power of the Court to grant any remedy to which a party might be entitled. This overriding caveat and early judicial supervision of proceedings and scrutiny of documentation filed[113] would operate to ensure that the unrepresented litigant is not defeated by the requirement to state the legal nature of the claim or defence and the contentions of law relied on.

So as to preserve order, parties should be required to present Complaints and Defences which are divided into separate parts which clearly identify the legal nature of the claim or defence and the contentions of law (including any statutory provisions) relied on and, in relation to plaintiffs, the relief sought.[114]

Proposal 4

Parties should be required in all cases to state:

(1) the legal nature of the claim or defence;

(2) the contentions of law on which they intend to rely, including any statutory provisions; and

(3) in relation to plaintiffs, the relief sought.

Distinction between fact and evidence

We are similarly unconvinced that insistence on rigid distinction between material fact and evidence in the formulation of pleadings assists in any significant way the administration of civil justice. As with the distinction between fact and law, some confusion has always been evident as to the distinction between a material fact and the evidence by which that fact is to be proved, also giving rise to regular resort to pleas for interlocutory relief. Of greater significance in our opinion is the fact that, for the same reasons sufficient analysis of the relevant legal issues and potential legal consequences of allegations of fact are able to be deferred under the current system and rules of pleading, parties are not required to direct attention at an early stage to determine what allegations they will be able to prove and, most importantly, by what evidence this will be achieved. The opportunity to divide proceedings into separate stages of investigation and analysis must also be eliminated.

There is another flaw in the traditional system: an illogical distinction is drawn between the disclosure of documentary evidence and the disclosure of viva voce evidence. The requirement for the former has generated over-disclosure at unacceptable cost. The latter is not required to be disclosed except to the extent that interrogatories may unearth it. It is true that the general power of the Court to order the exchange of witness statements prior to trial has gone some way to eliminating this dichotomy.[115] We share the view expressed that this is an anomaly and that the failure to require disclosure of oral evidence results in unfairness and unnecessary cost.[116] It hinders rather than assists in the identification, formulation and provision of notice of the contentious issues between the parties.

Almost 25 years ago some members of the profession in the United Kingdom recommended a substantial change to the current system of distinction and division in order to facilitate the earliest attention to the true merits of cases. The British section of the International Commission of Jurists was of the view

that, in all cases, the originating process (the 'Complaint') should set out the entire case in a narrative form; that is, with far more detail than permitted under the current rules. It was suggested that litigants be required to state how each allegation of fact will be proved and the names, addresses and occupations of witnesses who can be called to give viva voce evidence, the substance of that evidence, together with copies of any documents to be relied on. Under this proposal the defendant was required to comply with similar rules within 21 days.[117] Lord Woolf revisited this issue in his recent review of the civil justice system of the United Kingdom. The rationale, his Lordship observed, for requiring the annexure to pleadings of evidence, particularly witness statements and documents, 'would be to force parties to consider precisely what allegations they were likely to be able to substantiate and to state them exactly.'[118] This would help to counter the practice, particularly common in defences, of relying on a series of standard allegations or denials (for example, 'the plaintiff failed to keep a proper lookout') without indicating whether any of those allegations, or if so which, can be substantiated. His Lordship considered that there was a need to 'avoid unduly front-loading simpler cases' which might not be defended.[119] Two recommendations were advanced:

(1) It be possible, but not compulsory, for a party to identify the witnesses he or she intends to call to give viva voce evidence and to provide an outline of their evidence which would be annexed to the pleading; and

(2) A party be obliged to refer in his or her pleadings to the 'principal' documents on which reliance will be placed. Where documents are limited in number, a party may, but would not be required to, attach them to the pleading. Lord Woolf defined 'principal' documents to mean not only those obvious documents required to make the pleading intelligible but also documents of a more evidentiary nature.[120]

We have considerable doubt that, given the nature of the adversarial system and prevailing culture,[121] parties would voluntarily identify the witnesses they intend to call or provide an outline of their evidence in pleadings. Indeed, we would go so far as to suggest that, in the absence of some identifiable tactical reason for adopting this approach, practitioners would, for all practical purposes, ignore such an amendment to the pleading rules.[122] A proposal by the Queensland Litigation Reform Commission that the names and addresses of persons known by parties to be able to give evidence directly relevant to an allegation in issue be disclosed prior to trial was, predictably, 'vehemently opposed' by the Law Society of that State and omitted from the Consultation Draft of the *Uniform Civil Procedure Rules* published in 1997.[123] By implication, the strong likelihood that practitioners will not co-operate in the disclosure of witnesses and their evidence unless compelled appears to have been acknowledged by Lord Woolf who recommended that the possibility be

preserved of making it mandatory, having had the opportunity of assessing how the first recommendation operated in practice.[124]

In our opinion, it is highly desirable to force the parties at the earliest possible time to focus their minds on precisely what it is they allege, whether those allegations can be proved and, if so, how they will be proved. As matters now stand these issues have to be addressed at some stage. We see considerable merit in requiring them to be addressed sooner rather than later. Moreover, frank early exchange of information should be required. This is the great advantage of proceeding by way of originating summons: the parties know the whole of the evidence to be adduced by the other prior to trial, subject to cross-examination. Reform of this type would have the effect of amalgamating steps which are currently separate and distinct stages of the litigation process: pleading, discovery and the exchange of witness statements would be required to be undertaken contemporaneously. This obligation would compel parties to concentrate at the earliest possible stage on the documentary evidence supportive of their claims: this vital part of the progress of proceedings could not be left to discovery as it can be now. Early forced concentration on matters of evidence would promote early and realistic evaluation of the strengths and weaknesses of a case sought to be advanced and what precisely is required to meet a case. The proposed procedure would have the dual advantage of better crystallizing the issues in dispute between the parties at an earlier stage of proceedings and increasing the prospects that early compromise will be seriously entertained by the parties. As Justice Davies has observed, 'the longer [the pre-trial] phase continues without full mutual disclosure of material facts and some attempt to reach an agreed solution, the more likely it is that the parties will reach positions of entrenched prejudice.'[125] Considerable saving in resources could be expected to flow from the elimination of the need to otherwise amend pleadings and from timely settlements consequent upon the conversion of the pre-trial phase from battleground to a process conducive to compromise.

The approach proposed would contrast sharply with the American system of 'notice pleading' under which pleadings need not allege facts or causes of action.[126] Litigants in most United States jurisdictions must simply give opponents notice of the claim or defence. The rationale is that all parties, as participants in the event leading to the litigation, are aware of the facts. Their formal allegation in a pleading is regarded as unnecessary.[127] The pre-trial procedure is based on the acknowledgement that the pleadings will not present to the Court the real issues in dispute between the parties.[128] 'Fishing' discovery has been fully legitimated in the United States: it is entirely permissible for a party to employ the discovery processes, oral and documentary, to ascertain facts which until then were unknown and which will establish or support a claim.[129] Any system which prolongs isolation of the relevant facts,

issues and evidence and permits shapeless proceedings should not be emulated.

Changing fundamentally the nature of the statement of claim (the 'Complaint' under our proposal) and defence by requiring the exchange of both allegations of fact and evidence has attracted a measure of support in principle in Australia, some of it judicial.[130] Justice Blackburn has expressed this view:

> The statement of claim is the crucial document. Much more time and trouble ought to be taken over it than is often the case now. It ought to be a larger and more elaborate document, which contains not only the facts pleaded as they are now, but the plaintiff's contentions of law, and the names and addresses of his witnesses, together with the substance of their evidence. There is no reason why all this material cannot be included in the statement of claim – the time, expense and trouble of preparing it would not be additional to what is done now. The work would simply be done at an earlier stage, with the result that the real issues would be defined earlier. There is no real hardship or inconvenience involved in requiring a litigant to prepare his case fully before he commits himself and other parties to the process of litigation … I would make it obligatory for the plaintiff to include in the statement of claim a submission on general damages, giving a figure and supporting it with facts and reasons....
>
> Similar considerations apply [to the defence] - pleaded facts, contentions of law, witnesses and their evidence should be set out. By the time a statement of claim and defence are prepared, filed, and delivered, the parties should be in the position of having exposed all the possibilities of compromise.
>
> It may be objected that litigants who are relatively clear about their points of dispute at the time when they resort to litigation, (such as commercial men and corporations who seek, above all, certainty and expedition in the resolution of their disputes) will be unduly burdened by my suggestion that so much work be required at the early stage of procedure. I do not think this will be so … [T]he effect of the proposal will be to require work to be done at an earlier stage which is now done at a later stage … There are really no procedural problems for litigants who are actively co-operative![131]

We agree with these sentiments. It is undoubtedly the case that in many instances insufficient attention and work is devoted to a claim prior to the delivery of pleadings and the consequent commitment of parties to the litigious process at their cost and that of the community. That practice must be discouraged. The proposed procedural regime requires little more of practitioners than that already undertaken after the receipt of instructions by the most diligent, organized and efficient members of the profession. Early preparation of draft proofs of evidence and draft discovery and detailed attention to the legal consequences of facts alleged prior to the institution of proceedings are hallmarks of actions commenced on behalf of clients of the best litigation solicitors.

Indicative of the adversarial culture, some have complained that if the obligation of disclosure is extended from written evidence to oral evidence (and if legal arguments are required to be exchanged), the indolent or incompetent litigant will reap the advantage of the work of his or her more diligent or capable opponent.[132] Far from this being an argument justifying non-disclosure, it could be said that measures which may go some way to even the contest between those litigants with resources and those without them will inevitably produce a fairer result and are to be encouraged. 'Nuisance' suits and 'try-ons' would be dramatically reduced, potentially eliminated, by the proposal outlined given that considerable resources will be required to be expended from the outset as the price for participation in the litigious process. We do not consider this to be in any way a denial or reduction of access to justice; it is entirely appropriate in our opinion to require the parties to demonstrate their commitment to determination of the dispute between them in the most efficient, timely and, ultimately, cost-effective manner.

We are not persuaded that the need to properly 'research' a plaintiff's case to provide the information outlined would result in matters 'lying in counsel's chambers' for long periods or that any potential for delay of this nature is a valid reason for rejecting the proposal that evidence be disclosed.[133] If modern Australian civil litigation were reformed in this manner so that early, thorough, efficient preparation and full disclosure became mandatory standard practice the profession would adapt accordingly. Consistent with the spirit of modern case management,[134] we do, however, consider it essential to allow the defendant an appropriate period of time to decide whether to defend the Complaint and, if this is intended, to state his or her Defence with the same degree of particularity as required in the Complaint. We propose that the defendant be required to file and serve a Notice of Intention to Defend the Complaint within 14 days of its service. We consider that a 21 day time limit from the service of the Complaint within which the Defence is to be filed (the period recommended by the British section of the International Commission of Jurists) would be inadequate in the context of the proposed regime. Twenty-one days from the delivery of the Complaint would almost certainly be insufficient in many cases, particularly those involving medical negligence or other highly technical matters. In our opinion, a maximum of 42 days should be allowed. Extension should only be possible by Court order. A defendant seeking extension of the period within which to file and serve a Defence to a Complaint should be required to provide the Court with:

(1) the documentation which he or she has been able to prepare;
(2) a detailed outline of the additional documentation it is alleged is required to properly defend the Complaint;
(3) an explanation of the basis upon which the extension is sought; and
(4) an indication of the length of the extension required.

The question arises whether, if reform of this nature is adopted, and proceedings are instituted by the filing and serving of a 'Complaint' (which must contain the information outlined above), there needs to be retained some method which allows proceedings to be instituted very quickly. We do not consider the looming expiration of limitation periods a reason justifying the retention of a simple originating process such as the writ of summons. A change in modern Australian litigation practice and culture to ensure that sufficient time is allocated to prepare, file and serve the Complaint prior to the expiration of known applicable limitation periods should be encouraged. In our opinion, allowing the institution of proceedings by way of writ of summons or the filing of a simple application or form would compromise the objectives to which the reform process is directed. The only purpose to be served by such a preliminary step could be to inform the defendant that a claim is made of him or her and, in the most general terms, its nature and to foreshadow the filing of the Complaint. That, in our opinion, is unnecessary and would add little to the process. It would be counterproductive in that there would be delay between the filing and serving of the two documents.

Any hardship which may otherwise have arisen as a consequence of the receipt of late instructions shortly before the expiration of limitation periods unable to be extended in Western Australia[135] will be alleviated by the adoption of the regime we recommended in January 1997 to amend the outdated *Limitation Act 1935* (WA).[136] We favour the introduction of a scheme under which (save for isolated special cases) all claims to which the limitation legislation applies are governed by two periods only: the discovery and ultimate periods. The former period should run for three years after the date on which the plaintiff first knew or, in the particular circumstances, ought to have known of certain matters.[137] The latter period should be 15 years running from the date on which the claim arose. There should be a judicial discretion to extend either limitation period in the interests of justice in exceptional circumstances. The introduction of a primary limitation period based on actual or constructive knowledge of the plaintiff and a judicial discretion to extend that period will render it unnecessary to modify the proposed procedural regime by the incorporation of mechanisms designed to achieve the same objective (for example, by permitting the filing of a 'Notice of Pending Complaint' sufficient to stop the running of time on the condition that it will be retrospectively validated only if the documentation required to be filed as part of the Complaint is filed within a 21 day period).

Proposal 5

The Plaintiff should be required in all cases to file and serve a Complaint which:

(1) states how each allegation of fact will be proved;

(2) states the names, addresses, occupations and qualifications of the witnesses who will be called to give viva voce evidence;
(3) annexes an outline of the evidence of the witnesses;
(4) identifies the principal documents on which reliance will be placed; and
(5) annexes copies of the principal documents on which reliance will be placed.

Proposal 6

'Principal' documents should be defined to mean both those obvious documents required to make the Complaint intelligible and those of a more evidential nature.

Proposal 7

The Defendant should be required in all cases to file and serve a Notice of Intention to Defend the Complaint within 14 days of its service.

Proposal 8

Within a maximum of 42 days from the service of the Complaint, the Defendant should be required in all cases to file and serve a Defence which provides the same information required to be provided by the Plaintiff in the Complaint.

Proposal 9

Extension of the period within which the Defence must be filed and served should only be possible by Court order.

Proposal 10

A Defendant seeking extension of the period within which to file and serve a Defence to a Complaint should be required to provide the Court with:
(1) the documentation which he or she has been able to prepare;
(2) a detailed outline of the additional documentation it is alleged is required to properly defend the Complaint;
(3) an explanation of the basis upon which the extension is sought; and
(4) an indication of the length of the extension required.

Verification of the complaint and defence

The suggestion has been made that reform of the current system should hold pleaders more accountable for inaccurate or unsupportable pleadings by requiring that there be a declaration as to the truth of the matters they contain. It could be argued that such a declaration would be 'more likely to bring about an accurate statement of the party's position' and, it follows, that

'an accurate statement of a party's position is more likely to lead to a just and expeditious conclusion'.[138] Two alternatives present themselves:

(1) The parties could be required to verify their pleadings on oath;
(2) The solicitor or counsel for each party could be required to sign the pleading.

Verification by the parties would require them to swear to the belief in the truth of allegations of fact, to the falsity of facts which are denied, and to being unable to ascertain the truth of facts not admitted despite having made all proper inquiries. If the party is a body of persons, verification should be by an officer of that body having knowledge of the relevant facts. It has been suggested that practitioners be required to explain the nature and effect of a pleading to clients and their obligations in relation to it. The party would then be required to swear to having received and understood this explanation.[139]

Execution by a solicitor or counsel would constitute certification that the pleading is correct according to his or her instructions.[140] It has been suggested that execution also constitute certification that:

(1) the pleading has not been presented for any improper purpose;
(2) any legal claim or defence asserted in the pleading is supportable by reference to existing law or is not frivolous to the extent that it relies on a modification to or extension of the law;
(3) any factual allegations or contentions made in the pleading have or, after a reasonable opportunity for further inquiry, are likely to have evidentiary support; and
(4) any denials of factual allegations are warranted on the evidence or reasonably based on a lack of information or belief.[141]

Those who advocate reform of this nature acknowledge that a party's position or state of knowledge or belief may change between the institution of proceedings and any trial. To combat this, they propose that opportunity be afforded for revision of pleadings accompanied by verification or re-certification closer to trial.[142]

Clearly, if mechanisms were introduced to provide for greater accountability of pleaders within the current regime, procedures would also need to be introduced to allow judicial penalization of both parties and representatives if pleadings are falsely verified or certified.

A proposal of the Queensland Litigation Reform Commission that parties verify their pleadings and solicitors certify them was, again, 'strongly opposed' by the Law Society of that State and omitted from the Consultation Draft of the *Uniform Civil Procedure Rules*.[143] Justice Davies suggests that there was opposition because the reform proposed 'required [the Law Society's]

members to exercise greater care in advising their clients and in signing pleadings than they are now obliged to exercise.'[144] The proposal, his Honour opines, 'required parties to stand by the allegations they made in order to stop them making speculative allegations', 'ensured that parties would make only allegations for which there was evidence and solicitors would not permit claims or defences to be made which had no substance' and was 'surely' required for fairness.[145]

We accept that the introduction of mechanisms designed to achieve greater truth in pleadings is desirable. On balance, we are convinced that such reform is appropriate in the context of the general regime we propose. The arguments which have been raised against compulsory verification or certification of existing written pleadings lack persuasive force in the context of a regime which merges the present pre-trial processes and requires extensive analysis of merits and preparation of evidence prior to the institution of proceedings: under the proposed regime a party will be required to have identified the evidence to prove all facts alleged in his or her Complaint or Defence at the time it is filed and served. In contrast to the present experience which typically sees actions change course and direction as the pre-trial steps progress, under the proposed regime there will be far less scope or need for litigants to move the boundaries of an action set at its outset and to revise the Complaint or Defence.[146] It appears to us to be entirely appropriate, following their thorough assessment and preparation, to require parties to verify a Complaint and Defence on oath to:

(1) a belief in the truth of allegations of fact;

(2) the falsity of facts which are denied; and

(3) being unable to ascertain the truth of facts not admitted despite having made all proper inquiries.

This is consistent with the requirement that the parties demonstrate their commitment to determination of the dispute between them in the most efficient, timely and, ultimately, cost-effective manner. Nor do we consider it to be inappropriate or unfairly burdensome to insist that a Complaint and Defence be executed by a solicitor or counsel if execution is taken to constitute certification that:

(1) the document is correct according to his or her instructions provided by the plaintiff or defendant; and

(2) the document has not been presented for any improper purpose.

We consider it appropriate to also introduce procedures to allow judicial penalization of both parties and representatives if Complaints and Defences are falsely verified or certified.

Proposal 11

The parties should be required to verify a Complaint and Defence on oath to:

(1) a belief in the truth of allegations of fact;

(2) the falsity of facts which are denied; and

(3) being unable to ascertain the truth of facts not admitted despite having made all proper inquiries.

Proposal 12

A solicitor or counsel should be required to execute a Complaint and Defence, such execution to be taken to constitute certification that:

(1) the document is correct according to his or her instructions provided by the plaintiff or defendant; and

(2) the document has not been presented for any improper purpose.

Proposal 13

Procedures should be introduced to allow judicial penalization of both parties and representatives if Complaints and Defences are falsely verified or certified.

Closer judicial supervision — the compulsory conference

The primary foundation on which the far-reaching Woolf proposals are based is the imposition of external controls. His Lordship states:

> Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court.[147]

As part of a shift to a system of managed litigation, Lord Woolf has proposed that there be specific judicial management of the manner in which parties plead their cases and defences. Under this proposal, the courts will bear a significant part of the burden to ensure that litigants 'plainly state the factual ingredients of their case so that the true nature and scope of the dispute can be identified.'[148] A similar approach has been endorsed in New Zealand where the identification of the issues in dispute has been recognized as integral to effective case management.[149] Judicial participation in the pre-trial process has long been a feature of civil litigation in the United States. Pursuant to rule 16 of the *Federal Rules of Civil Procedure* (US), the court may of its motion order a pre-trial conference to assert early control over the conduct of the proceedings. The formulation and simplification of the relevant issues in dispute is a major focus of this judicial intervention.

A range of case flow management schemes has been adopted in Australian jurisdictions. It has been observed that a tendency has emerged to treat pre-

trial appearances as little more than a scheduling or time-tabling exercise. Focus, it has been argued, is misplaced on case processing rather than actual management of individual cases:

> It is sometimes assumed that caseflow management is a technique simply for speeding up the processing of cases through the system. In fact, far more than this is involved … More specifically, the various processes and interventions involved in an effective caseflow management scheme will be aimed at narrowing the key issues between the parties.[150]

A variety of reasons may be advanced to explain misplaced emphasis of current caseflow management schemes on the monitoring of cases as they proceed to trial and the scheduling of pre-trial steps: concerns as to the cost effectiveness of case management, lack of court resources, and the disinclination to 'front-load' cases, doubtless, play a part. Some judges may be reticent to interfere to an extent greater than those courts before whom they appeared,[151] although, it must be acknowledged that any reluctance, if it does exist, is fast disappearing. The efficiency of the current caseflow management models and techniques is the subject of examination elsewhere. It suffices to say for present purposes that inadequate attention has been directed to the role of the courts in the formulation and definition of the issues in dispute in the lead up to trial.

The current level of pre-trial judicial supervision is a shadow of that exercised in the Middle Ages.[152] We consider that there is much to commend in the early procedure by which courts actively participated with both parties to ensure actions proceeded on the right footing from the outset. The former Chief Justice of Australia recognized the advantages, notwithstanding the different natures of 15th and 20th century trials:

> [A] procedure which involves all the principal dramatis personae of the litigation in an early court procedure designed to settle the issues for trial offers interesting possibilities; early settlements, instant definition of issues, early compulsory education of Court and counsel in the facts and relevant law. These possibilities were lost by the introduction of the system of written pleadings.[153]

We consider greater judicial supervision of proceedings, and of the formulation and definition of relevant issues in particular, to be highly desirable. We see great advantage in requiring the parties in all cases, shortly after the filing of the Defence to the Complaint, to appear before a judge assigned as responsible for the case[154] with a view to the scrutiny of the documentation filed, identification of the true nature and scope of the dispute, and exploration of the prospects of compromise. This appearance should be referred to as the 'compulsory conference'. The duration of the compulsory conference will be commensurate with the likely length and complexity of any trial of the dispute

between the parties. Intervention at this stage by an independent judge who analyses the facts, evidence and contentions of law identified and the relief sought and highlights the difficulties faced by the parties (now prepared) and how they may be resolved will further operate to refine the issues and to facilitate compromise. An efficient system is thereby promoted from the earliest stage. This process of examination and guidance will be particularly important in those cases involving unrepresented litigants. Powers of issue confinement and to finalize the mode and extent of evidence should be extended to and exercised by courts. It is noteworthy that the Consultative Draft of the *Uniform Civil Procedure Rules* governing civil proceedings in Queensland gives very wide supervisory and management powers to the Court including the express power to call a witness on its own initiative.[155] It is proposed that proceedings in that State may be decided without pleadings and that the Court may direct the parties to prepare a statement of facts and issues which it may settle itself.[156] As noted, this underused option already exists in Western Australia.[157]

Under our proposed regime, the burden of the precondition to the institution of proceedings — proper preparation — will not permit parties to cut corners in hope of 'leaving matters to the Court to sort out'. We do not consider that it would be efficacious to permit parties to attend the compulsory conference with a view to the judicial formulation of a written statement of issues and the parties' positions before the parties have taken the steps outlined and provided the information required.[158] Considerable attention will have been required to be devoted by the parties to claims and defences, the means by which they will be proved and the legal issues they raise prior to their attendance before the supervising judge. This prior focus of the parties on the pertinent issues will provide a desired direction for the compulsory conference. It must be stressed that it is not proposed that the Court do this preparatory work for lazy litigants. Rather, it is proposed that, once the parties have demonstrated their commitment to proceedings by the preparation and filing of the required documentation, the Court should then assume an immediate close supervisory and management role analyzing the facts, evidence and law identified and the relief sought and highlighting the difficulties faced by the parties and how they may be resolved. The prospects of compromise can be explored by reference to a meaningful body of information. In the context of the proposed regime, we do not see this proactive role for the Court as likely to threaten judicial dignity or impartiality. On the contrary, we consider judicial policing of pre-trial procedure rather than judicial passiveness as an integral feature of a contemporary civil justice system.

We accept that our proposal that there be early closer judicial supervision of proceedings, and of the formulation and definition of issues in particular, will place an increased strain on existing resources, at least in the short-term while the profession adapts to the change in practice and, it may be hoped,

litigation culture. Adequate resources must be made available. Only with such provision can there be commitment to substantial reform of the civil justice system. In the long-term it can be anticipated that the system proposed, which caters for all types of action, will make more efficient use of available resources than is currently the position.

Proposal 14

Shortly after the filing of the Defence to the Complaint, the parties should be required to attend a compulsory conference before a judge assigned as responsible for the case with a view to the scrutiny of the documentation filed, identification of the true nature and scope of the dispute, and exploration of the prospects of compromise.

Professional responsibilities and sanctions

While we do not view the proposed regime as requiring substantially more of practitioners than that currently undertaken after the receipt of instructions by the most diligent, organized and efficient members of the profession, we accept that it will place greater demand on practitioners to prepare properly and to do so in a timely manner. It is our opinion that the ramifications of the change in practice and, it may be hoped, litigation culture, should be reflected in the Law Society of Western Australia's Professional Conduct Rules ('the Professional Conduct Rules').

We consider that it should be recognized formally that:

(1) It is appropriate professional conduct for a solicitor to decline an instruction to prepare and file a Complaint or a Defence if he or she knows that the demands of his or her practice do not allow sufficient time and attention to be devoted to prepare that document properly and in a timely manner. No professional sanction should be levied against a solicitor who declines an instruction on this basis;

(2) It is appropriate professional conduct for a solicitor who, on this basis, declines an instruction to prepare and file a Complaint or a Defence to refer a client to another solicitor who is in a position to devote the requisite time and attention to prepare that document properly and in a timely manner. No professional sanction should be levied against a solicitor who refers a client on this basis;

(3) If a solicitor accepts an instruction to prepare and file a Complaint or a Defence he or she undertakes that the demands of his or her practice are such that sufficient time and attention can be devoted to prepare that document properly and in a timely manner; and

(4) If, having accepted an instruction to prepare and file a Complaint or Defence, a solicitor fails to prepare that document properly and in a timely manner, he or she breaches the Professional Conduct Rules. A professional sanction may be levied against a solicitor for this breach.[159]

We do not anticipate that any significant difficulty will be experienced by defendants in retaining competent solicitors to prepare and file Defences due to the limited period within which such documents will be required to be prepared. Any short-term resistance on the part of practitioners during the period of adaptation to the new system can be expected to dissipate, particularly in a deregulated legal profession.

Proposal 15

It should be recognized formally in the Professional Conduct Rules that:

(1) It is appropriate professional conduct for a solicitor to decline an instruction to prepare and file a Complaint or a Defence if he or she knows that the demands of his or her practice do not allow sufficient time and attention to be devoted to prepare that document properly and in a timely manner. No professional sanction should be levied against a solicitor who declines an instruction on this basis;

(2) It is appropriate professional conduct for a solicitor who, on this basis, declines an instruction to prepare and file a Complaint or a Defence to refer a client to another solicitor who is in a position to devote the requisite time and attention to prepare that document properly and in a timely manner. No professional sanction should be levied against a solicitor who refers a client on this basis;

(3) If a solicitor accepts an instruction to prepare and file a Complaint or a Defence he or she undertakes that the demands of his or her practice are such that sufficient time and attention can be devoted to prepare that document properly and in a timely manner; and

(4) If, having accepted an instruction to prepare and file a Complaint or Defence, a solicitor fails to prepare that document properly and in a timely manner, he or she breaches the Professional Conduct Rules. A professional sanction may be levied against a solicitor for this breach.

The German experience

We anticipate that the regime we propose be introduced will be considered by some as undesirably radical. That term has a pejorative connotation which we reject as appropriate to describe the modernization advocated. Assessment of international regimes governing the institution of civil proceedings reveals that interpretation to be flawed. The system for the institution and progress

of civil proceedings which we propose resembles most closely that prevailing in Germany. We accept that cross-cultural comparison is fraught with risk.[160] However, the incontrovertible fact that no one judicial system has a monopoly on excellence makes consideration of foreign experience profitable.

Broadly speaking, in Germany the facts, the law and the evidence are together the subject of a statement of case which transcends the function of pleadings as known in Australia.[161] Analysis of German procedure must acknowledge the fundamentally different role performed by the German judiciary. In contrast to their Australian counterparts, German judges prepare and set down cases and oral hearings, set time limits for filing defences and replies, and decide whether, and if so what, evidence will be taken and in what order. Witnesses may not be heard, notwithstanding the objections of counsel, if their testimony is thought irrelevant. The judges question the witnesses first. Only then are lawyers given the opportunity to ask their witnesses questions.[162] Hearings are generally much shorter. There is, consequently, no highly developed technique of pleading. The objective of the written pleadings is not merely to confine the issues in dispute, but to convince the judge.[163] Although the German judge is in charge of the proceedings, the system is not a 'pure' inquisitorial system. Leopold advises:

> [I]t is not true (and in this point foreign descriptions of … German civil procedure are not always correct) that the German civil procedure is an inquisitorial system. We also call our system a party system, which means that the objective of the litigation, the issues and also the evidence are first and foremost determined by the parties. But the judge has to help the parties if necessary and he has to take evidence, whereas the duty of the parties is to bring forward the evidence (to name witnesses and so on).[164]

The German equivalent of originating civil proceedings is by filing of a *Klageschrift* (writ) which states the parties to the proceedings, the amount and the grounds of the claim. Any documents in support of the writ are attached to the *Klageschrift*. The court documents served on the defendant together with the *Klageschrift* lay down the action required on the part of the defendant. The defendant will either be requested to attend a preliminary hearing or to file within a period of two weeks from the date of service a notice of an intention to defend the case and to file his or her defence within two weeks thereafter. The defendant's reply to the plaintiff's statement of case is called a *Klageerwiderung* or a *Klagebeanwortung* which must be filed within the time period prescribed by the Court. The parties may then exchange further written pleadings. All relevant documentary evidence must be attached to the pleadings at an early stage. Failure to do so may result in one party being precluded from doing so later. The defendant in his or her *Klageerwiderung* must either deny or admit every fact alleged in the *Klageschrift*

and state every material fact upon which he or she intends to rely. The defendant is deemed to admit any facts alleged which are not challenged.

Significantly, in the context of the issues under consideration, the rules which dictate the way pleadings must be structured in Australia do not apply in Germany:

(1) Facts are set out, not merely in summary form or briefly, but often in great detail;

(2) The evidence by which the facts are to be proved is included;

(3) Matters of law are pleaded, often involving lengthy discussions on particular points.

These elaborate statements of case reduce considerably the need for oral argument by counsel.

Just as Australian appellate courts in recent years have recognized the benefits of cross-jurisdictional analysis in the formulation of legal principle, reformers should look beyond the borders of their own states and countries, receptive to developments and ideas elsewhere. While the significant differences between the two legal systems cannot be overlooked, in our opinion there is much to commend aspects of the German civil system of justice, and the method of instituting and progressing claims to trial in particular, to reformers in Western Australia.

AN OPPORTUNITY

Reform of the civil justice system has been on various agenda in recent times. The number of inquiries and reports directed to identifying and curing defects in the administration of justice and facilitating cheaper and more efficient access to Australian courts has been remarkable.[165] A recurring feature of the burgeoning literature is that recommendations for reform have tended to focus on the participants in the administration of the existing system: almost without exception various changes to the structure of the legal profession have been proffered as, at least part of, the panacea to undeniable problems which plague Australian civil justice. Minimal attention has been directed to the existing system itself, a system which has operated virtually unchanged for nearly two centuries.

It is our opinion that when scrutinized objectively and dispassionately, some seemingly sacred hallmarks of that system are found to be failing those who have no choice but to rely upon it when seeking civil justice. The law surrounding pleadings as currently applied seems to be denying the civil justice system the capacity to achieve its fundamental purpose. Dispute resolution by reference to formal written pleas and technical archaic rules governing their formulation has operated to frustrate rather than facilitate the litigation

process. It is a dated device. Restoration of the original objectives of pleadings by way of a preferable procedure is paramount.

Change for change's sake is as unacceptable as stagnation. In our opinion, however, it is clear that continuing inertia will erode the efficacy of a system intended to serve the community. An 'almost religious belief'[166] of some lawyers in the concept of the written plea and related technical rules inhibits reflection and reassessment. Adequate reparation can only be achieved by way of a substantial re-evaluation of the traditional framework upon which the legal claim is instituted, erected and progressed to trial. A true opportunity now presents itself: the opportunity to participate in major modification of the administration of civil justice as we approach the new millenium. It must not be squandered by seeking to tinker with rules which no longer serve a modern society and which should now be rejected and replaced with a regime better designed to manage the demands of civil litigation in the 21st century. There will be resistance to fundamental change. There always is. But litigants, not lawyers, must be the focus of the reform process. Those charged with this responsibility would do well to remember the words of the first Chief Justice of Australia:

> Rules and forms of procedure are not ends in themselves, but means to an end, which is the attainment of justice.[167]

SUMMARY OF PROPOSALS

The Commission's proposals are as follows:

1. The system of formal written pleadings and the procedural code of rules by which it is governed should be abolished if an alternative procedural scheme can be identified which is capable of achieving the objective of the early formulation of defined issues and provision of due notice.

2. All proceedings in the superior courts of Western Australia should be commenced by the one species of originating process.

3. The terms 'pleadings' and 'statement of claim' should be abolished and the sole originating process should be known as a 'Complaint'.

4. Parties should be required in all cases to state:

(1) the legal nature of the claim or defence;

(2) the contentions of law on which they intend to rely, including any statutory provisions; and

(3) in relation to plaintiffs, the relief sought.

5. The Plaintiff should be required in all cases to file and serve a Complaint which:

(1) states how each allegation of fact will be proved;

(2) states the names, addresses, occupations and qualifications of the witnesses who will be called to give viva voce evidence;

(3) annexes an outline of the evidence of the witnesses;

(4) identifies the principal documents on which reliance will be placed; and

(5) annexes copies of the principal documents on which reliance will be placed.

6. 'Principal' documents should be defined to mean both those obvious documents required to make the Complaint intelligible and those of a more evidential nature.

7. The Defendant should be required in all cases to file and serve a Notice of Intention to Defend the Complaint within 14 days of its service.

8. Within a maximum of 42 days from the service of the Complaint, the Defendant should be required in all cases to file and serve a Defence which provides the same information required to be provided by the Plaintiff in the Complaint.

9. Extension of the period within which the Defence must be filed and served should only be possible by Court order.

10. A Defendant seeking extension of the period within which to file and serve a Defence to a Complaint should be required to provide the Court with:

(1) the documentation which he or she has been able to prepare;

(2) a detailed outline of the additional documentation it is alleged is required to properly defend the Complaint;

(3) an explanation of the basis upon which the extension is sought; and

(4) an indication of the length of the extension required.

11. The parties should be required to verify a Complaint and Defence on oath to:

(1) a belief in the truth of allegations of fact;

(2) the falsity of facts which are denied; and

(3) being unable to ascertain the truth of facts not admitted despite having made all proper inquiries.

12. A solicitor or counsel should be required to execute a Complaint and Defence, such execution to be taken to constitute certification that:

(1) the document is correct according to his or her instructions provided by the plaintiff or defendant; and

(2) the document has not been presented for any improper purpose.

13. Procedures should be introduced to allow judicial penalization of both parties and representatives if Complaints and Defences are falsely verified or certified.

14. Shortly after the filing of the Defence to the Complaint, the parties should be required to attend a compulsory conference before a judge assigned as responsible for the case with a view to the scrutiny of the documentation filed, identification of the true nature and scope of the dispute, and exploration of the prospects of compromise.

15. It should be recognized formally in the Professional Conduct Rules that:

(1) It is appropriate professional conduct for a solicitor to decline an instruction to prepare and file a Complaint or a Defence if he or she knows that the demands of his or her practice do not allow sufficient time and attention to be devoted to prepare that document properly and in a timely manner. No professional sanction should be levied against a solicitor who declines an instruction on this basis;

(2) It is appropriate professional conduct for a solicitor who, on this basis, declines an instruction to prepare and file a Complaint or a Defence to refer a client to another solicitor who is in a position to devote the requisite time and attention to prepare that document properly and in a timely manner. No professional sanction should be levied against a solicitor who refers a client on this basis;

(3) If a solicitor accepts an instruction to prepare and file a Complaint or a Defence he or she undertakes that the demands of his or her practice are such that sufficient time and attention can be devoted to prepare that document properly and in a timely manner; and

(4) If, having accepted an instruction to prepare and file a Complaint or Defence, a solicitor fails to prepare that document properly and in a timely manner, he or she breaches the Professional Conduct Rules. A professional sanction may be levied against a solicitor for this breach.

ENDNOTES

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1 *Hall v Eve* (1876) 4 Ch D 341, 344-345 (James LJ). His Lordship was probably referring to Mr Edward Jacob QC, a Bencher of Lincoln's Inn and editor of *Jacob's Reports* and Walker's *Reports, Chancery*. Note also *The Attorney-General v The Earl of Lonsdale* (1870) 23 LT 794, 794-795 (James LJ).

2 The current system of written pleadings does countenance the exercise of a power to amend, and, by convention, pleaded issues are ignored by courts when it is deemed convenient or appropriate to do so. There are, however, more cases than may be thought which turn on an issue of pleading.

3 Note *Union Bank of Australia v Harrison, Jones & Devlin Ltd* (1910) 11 CLR 492, 504 (Griffith CJ); *Williams v Australian Telecommunications Commission* (1988) 52 SASR 215, 216 (King CJ); *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 154 (Dawson, Gaudron and McHugh JJ).

4 See pp 328-329.

5 The *Supreme Court of Judicature Act 1873* (UK) as supplemented by the *Supreme Court of Judicature Act 1875* (UK).

6 Note *Supreme Court Act 1935* (WA) ss 167, 168. See also s 170.

7 In all jurisdictions other than Queensland, Tasmania and the High Court of Australia, pleadings are filed in court and copies served. In these three jurisdictions pleadings are not filed in court (unless, in the case of the statement of claim, they are specially indorsed on the writ) until the case is brought before the court or set down for trial. Pleadings in those jurisdictions are viewed as the parties' documents and not court process.

8 Note that in some cases parties in New South Wales are required to file affidavits 'verifying' their pleadings: see *Supreme Court Rules 1970* (NSW) Pt 15 r 23.

9 See eg, *Anlaby v Praetorius* (1888) 20 QBD 764.

10 See eg, *Murray v Stephenson* (1887) 19 QBD 60.

11 See eg, *Lewis v Packer* [1960] 1 WLR 452.

12 See eg, *Re Beldam's Patent* [1911] 1 Ch 60, 63.

13 But note *Rules of the Supreme Court 1971* (WA) O 20 r 13(3). In Victoria, South Australia and the Northern Territory particulars have been reclassified as an aspect of pleadings with the result that an opponent has to plead to them: see *General Rules of Procedure in Civil Proceedings 1996* (Vic) rr 13.10-13.11; *Supreme Court Rules 1987* (SA) rr 46.04, 46.12-46.19; *Supreme Court Rules 1995* (NT) rr 13.10-13.11. Note *Trade Practices Commission v David Jones (Aust) Pty Ltd* (1985) 7 FCR 109.

14 See J Jacob and IS Goldrein, *Pleadings: Principles and Practice* (1990) 10.

15 See IH Jacob, 'The Present Importance of Pleadings' (1960) 13 *Current Legal Problems* 171, 175.

16 See CW Pincus, 'Pleadings' in *Civil Justice Reform: Streamlining the Process* (Paper presented at the Queensland Litigation Reform Commission Conference, Brisbane, March 1996) 2.

17 See Jacob, above n 15, 175-176.

18 See Jacob and Goldrein, above n 14, 11-12.

19 HJ Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (5th ed, 1824) 137-138.

20 See below pp 323-324.

21 See eg, *Thorp v Holdsworth* [1876] 3 Ch D 637, 639; *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490, 517; *Dare v Pulham* (1982) 148 CLR 658, 664; *Banque Commerciale SA (en liq) v Akhil Holdings Ltd* (1990) 169 CLR 279, 286-288; *Tyson v Brisbane Market Freight Brokers Pty Ltd* (1994) 120 ALR 1, 8-9; *Palmer v Guadagni* [1906] 2 Ch 494, 497; *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218, 238.

22 Under the current system which excludes matters of evidence from pleadings, there is always potential to surprise an opponent as to the oral evidence which may be adduced to support or defend a case. The power of the Court to direct that parties exchange witness statements prior to trial diminishes this potential. See also below n 115.

23 See *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)*, above n 21.

24 See eg, *Outram v Morewood* (1803) 3 East 346; 102 ER 630; *Hoystead v Commissioner of Taxation* [1926] AC 155; *Williams v Australian Telecommunications Commission*, above n 3.

25 FG Brennan, 'Written Pleadings' (1975) 12 *The University of Western Australia Law Review* 33, 40-41. Justice Marks has observed that questions of relevance for the purposes of pleading are dictated by the pleadings, but that pleadings are often drawn widely and regularly amended. His Honour has asked: 'In cases where statements of claim plead a vast array of facts in aid of numerous causes of action and all manner of alternative relief and are met by equally prolix defences and counterclaims, can discovery be usefully limited by reference to pleadings? Or to issues, when they are difficult to identify and become even more elusive with the inevitable amendment of pleadings?': see KH

Marks, 'Voluminous, Limited and Multiple Action Discovery' in A Zariski (ed), *Evidence and Procedure in a Federation* (1993) 124.

26 See pp 347-348.

27 See pp 353-355.

28 See also *Federal Court Rules* (Cth) O 11 rr 2, 3.

29 The provision does not state this expressly. It follows from the express requirement that a pleading must only contain a statement of the material facts that statements of law are excluded. This is the position at common law: see, for example, *Williamson v L & NW Railway Co* (1879) 12 Ch D 787, 793. Despite this prohibition, a convention has developed in this jurisdiction of pleading conclusions of law if the material facts supporting it are pleaded. Indeed, a corollary of this convention has been for defendants, most commonly in personal injury suits, to complain and threaten interlocutory action if plaintiffs refuse to articulate the causes of action on which they base their claims. It is beyond question that under the current system there is no requirement for a plaintiff to do this: see, for example, *Lever Brothers Ltd v Bell* [1931] 1 KB 557, 582-583; *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936, 941; *Re Vandervell's Trusts (No 2)* [1974] Ch 269. There are limited apparent exceptions to the prohibition on pleading matters of law. Foreign law, for example, must be pleaded as it is a matter of fact: see *Ascherberg, Hopwood & Crew Ltd v Casa Musicale Sonzogno di Petro Ostali SNC* [1971] 1 WLR 173; *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4)* [1985] 1 Qd R 127, 141. Note also that parties may raise points of law, as distinct from pleading legal conclusions or consequences as facts: see *Rules of the Supreme Court 1971* (WA) O 20 r 12; *Federal Court Rules* (Cth) O 11 rr 9, 10.

30 See pp 324-327.

31 See Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 155.

32 Ibid 158.

33 See pp 322-323.

34 See Law Council of Australia, *Submission to the ALRC, Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (November 1997) [7.1.1], [7.4.2].

35 NSW Law Reform Commission, *Working Paper on Procedure (Common Law Pleadings, Scott Schedules)*, Working Paper No 14 (1975) [1.2].

36 Roger Winn, *Report of the Committee on Personal Injuries Litigation* (Cmnd 3691, 1968) [254], [266]. See p 332.

37 Committee on Supreme Court Practice and Procedure, *Final Report of the Committee on Supreme Court Practice and Procedure* (Cmnd 8878, 1953) 42. See pp 331-332.

38 See ALRC, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (April 1997) 58.

39 See Woolf, above n 31, 153-155.

40 There are numerous Western Australian examples. For two examples of criticism by Burt CJ see *McDonald v Hall* (Unreported, Supreme Court of WA, Full Court, Appeal No 86 of 1977, 21 December 1977) 1; *Willoughby v Barrett-Lennard* [1979] WAR 167, 170. For a recent example of severe judicial flagellation see the reported comments of Olsson J in relation to a multi-billion dollar professional negligence claim commenced against auditors following the collapse of the State Bank of South Australia: see A Main, 'Almighty serve from His Honour', *The Australian Financial Review*, 19 May 1997, 59. The judge is reported to have described the statement of claim as 'facile', 'a parody of the principles of pleading', 'incomprehensible', 'containing factual gaps' leaving 'one in a state of mental confusion as to precisely how any direct losses were suffered', 'quite impossible to discern' and as containing a 'dearth of pleading of essential facts' giving rise to 'inherent frailties'. The plaintiff was also criticized for claiming damages of $3.125 billion knowing this sum could never be fully recovered.

41 See M Aronson and J Hunter, *Litigation: Evidence and Procedure* (6th ed, 1998) 105. It is true that proceedings which warrant inclusion in the expedited list are conducted on the basis that the parties will make genuine effort to isolate and contest only the true matters in dispute. The sanction of indemnity costs may be appropriate in relation to such proceedings where a party insists on putting an opponent to strict proof for reasons of tactics: see, for example, *Polygram Records Inc v Raben Footwear Pty Ltd* (1996) 140 ALR 617, 619.

42 Note GL Davies and JS Leiboff, 'Reforming the Civil Litigation System: Streamlining the Adversarial Framework' (1995) 25 *Queensland Law Society Journal* 111, 118.

43 One distinguished commentator has described this practice as surrounding 'the kernel of material facts … by a pulp of gratuitous allegations, all of them being propounded as issues for trial': see Brennan, above n 25, 36.

44 New South Wales is the exception. In some cases parties there are required to file affidavits 'verifying' their pleadings: see *Supreme Court Rules 1970* (NSW) Pt 15 r 23.

45 *Tyson v Brisbane Market Freight Brokers Pty Ltd*, above n 21, 10 (McHugh JA).

46 The implications of an opportunity to replead for the limitation of an action is one reason advanced for the refusal to be lenient.

47 Note for example, the observations of Kirby P in *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 536 in relation to the duty of the court to an unrepresented litigant on a strike-out application: 'Persons unfamiliar with the rules of pleading and the technicalities which surround the drafting of a statement of claim in adequate and permissible legal form are inevitably, if unrepresented, at a disadvantage. Courts should approach the peremptory termination of the litigation with special care to ensure that, within the possibly ill-expressed and unstructured statement of the legal claims sought to be ventilated, there is no viable cause of action which, with appropriate amendment of the pleadings and a little assistance from the court, could be put in proper form. If this can be done, the court should avoid the summary termination of the proceedings for this will prevent the court from examining any merits of the case, once the statement of claim is struck out.' See also *Morton v Vouris* (1996) 21 ACSR 497, 513-514 (Sackville J). Compare *Corporate Affairs Commission v Solomon* (Unreported, NSW Court of Appeal, Mahoney AP, No 40248 of 1989, 1 November 1989) 8: 'The court must … have regard not merely to the litigant in person but also to the position of the other party or parties concerned and to what is required, in justice, to prevent the unnecessary expenditure of public and private resources.'

48 HD Nims, *Pre-Trial* (1950) 6-7.

49 A description attributed to Maitland: see TFT Plucknett, *A Concise History of the Common Law* (4th ed revised, 1948) 380.

50 Note YB 3 4 Ed II 42: 'It is not right that every word a man says should bear force' (Bereford CJ).

51 WS Holdsworth, *A History of English Law* (3rd ed, 1923) Vol 3, 635.

52 Holdsworth gives 1460 as the year of the first record of a 'paper' pleading: ibid 646.

53 See YB 38 Hy VI Pasch pl 13.

54 Note the words of Littleton to his son: 'It is one of the most honourable, laudable and profitable things in our law to have the science of well pleading in actions real and personal; and therefore I counsel thee especially to employ thy courage and care to learn this': see *Tenures*, s 534.

55 See Holdsworth, above n 51, 650-651.

56 See WS Holdsworth, *A History of English Law* (3rd ed, 1944) Vol 9, 309-316.

57 *Anon* (1672) Treby Rep, MS in Middle Temple, 717.

58 Cited by Holdsworth, above n 51, 655, n 3. No reference is provided by Holdsworth.

59 Ibid 315, 319-327.

60 (1888) 38 Ch D 410, 414. The archaic and costly procedure prior to the introduction of the *Judicature Acts 1873-1875* even invoked the ire of Dickens who in *Bleak House* (1852) Ch XXXIX, wrote: 'The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.'

61 Note Lord Bowen, 'The Law Courts Under the Judicature Acts' (1886) 2 *Law Quarterly Review* 1, 8: 'The Judicature Acts … placed within the reach of every litigant a very complete weapon, but one far too elaborate and precise for the necessities of every case. The first result was to increase by something like 20 per cent the ordinary expenses of a common law action.'

62 See 'The Legal Procedure Committee's Report' (1881) 25 *Solicitors Journal* 911, 911-912.

63 Ibid 912. This recommendation resulted in the introduction in 1897 of such a rule. The rule was rendered ineffective because leave was granted in virtually every case. The clear implication is that the judiciary, trained to view pleading as an indispensable legal art and the bedrock of civil litigation, was not prepared to embrace fundamental reform. Otiose, the rule was revoked in 1933.

64 Note the comment of the *Law Times* on 31 December 1881: 'The appearance of a new edition of a work devoted to nothing but precedents of pleadings shows that some people refuse to believe in the abolition of pleading. Lord Coleridge's Committee we should imagine will regard the publication as an ill-timed satire upon their sagacity. We are not surprised, however, that the venerated Bullen and Leake should refuse to be snuffed out by a Committee': see (1881) 27 LT 145. For debate concerning the 'sweeping' and 'drastic' recommendations of the Coleridge Committee see also 'The Procedure Committee's Report' (1881) 26 *Solicitors Journal* 69; 'The Procedure Committee's Report' (1881) 26 *Solicitors Journal* 90.

65 Committee on Supreme Court Practice and Procedure, above n 37.

66 Ibid 32.

67 See *Rules of the Supreme Court 1965* (UK) O 14B.

68 See *Rules of the Supreme Court 1965* (UK) O 18 r 21.

69 See *Rules of the Supreme Court 1971* (WA) O 20 r 21. The rule does not apply to claims for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage or those based on an allegation of fraud.

70 One wonders, for example, why applications are not made regularly in relation to the future conduct of proceedings following the grant or refusal of interlocutory injunctions. Extensive affidavit evidence having been filed and legal argument having been advanced in order to ground applications for such relief, formal written pleadings serve no significant purpose in the final determination of disputes of this nature.

71 See *Rules of the Supreme Court 1971* (WA) O 29A r 3(2)(a).

72 See *Rules of the Supreme Court 1971* (WA) O 31A r 5(4)(a).

73 See Jacob, above n 15, 181-182; EM Heenan, 'General Rules of Pleading' in Law Society of Western Australia (ed), *Aspects of Pleading* (1983) 8-9; AJ Templeman, 'A Practical Guide to Pleading' in Law Society of Western Australia (ed), *Aspects of Pleading* (1983) 2. Note also *Re Camkin's Questions* [1957] 1 WLR 255; *General Electric Co (USA) v General Electric Co Ltd* [1972] 1 WLR 729, 735.

74 See NSW Law Reform Commission, above n 35, [4.9].

75 Winn, above n 36, [254], [266].

76 For example, time limits are imposed on the bringing of actions and the performing of procedural steps in the litigation process. Actions must be commenced within the limitation period, a defence must be served after a set period following service of the statement of claim, discovery must take place so many days after the close of pleadings, proceedings must be instituted in certain courts and specialized tribunals dependent on the nature of the claim advanced etc.

77 The judiciary has been forceful in its support of its changing role: see, for example, CW Pincus, 'Court Involvement in Pre-Trial Procedure' (1987) 61 *Australian Law Journal* 471; GL Davies, 'The Survival of the Civil Trial System: A Judicial Responsibility' (1989) 5 *Australian Bar Review* 277; KH Marks, 'The Interventionist Court and Procedure' (1992) 18 *Monash University Law Review* 1; M Moynihan, 'Towards a More Efficient Trial Process' (1992) 2 *Journal of Judicial Administration* 39; LT Olsson, 'Civil Caseflow Management in the Supreme Court of South Australia – Some Winds of Change' (1993) 3 *Journal of Judicial Administration* 3; A Mason, 'The Role of the Courts at the Turn of the Century' (1993) 3 *Journal of Judicial Administration* 156; GL Davies and SA Sheldon, 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' (1993) 3 *Journal of Judicial Administration* 111; AJ Rogers, 'The Managerial or Interventionist Judge' (1993) 3 *Journal of Judicial Administration* 96; BA Beaumont, 'Legal Change and the Courts' (1994) 12 *Australian Bar Review* 29; Davies and Leiboff, above n 42; GL Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale' (1995) 5 *Journal of Judicial Administration* 201; D Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part 1' (1995) 69 *Australian Law Journal* 705, 722-723; GL Davies, 'The Changing Face of Litigation' (1996) 6 *Journal of Judicial Administration* 179; Lord Woolf, above n 31; Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

78 See Aronson and Hunter, above n 41, 104.

79 See also ALRC, above n 38; ME Frankel, 'The Search for Truth: An Umperial View' (1975) 123 *University of Pennsylvania Law Review* 1031; WD Brazil, 'The Adversary Character of Civil Discovery: A Critique and Proposals for Change' (1978) 31 *Vanderbilt Law Review* 1295; DL Rhode, 'Ethical Perspectives on Legal Practice' (1985) 37 *Stanford Law Review* 589; JH Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823.

80 See Woolf, above n 31, 7; Ipp, above n 77, 726-727; Marks, above n 25, 123-127; AAS Zuckerman, 'Reform in the Shadow of Lawyers' Interests' in AAS Zuckerman and R Cranston (eds), *Reform of Civil Procedure: Essays on 'Access to Justice'* (1995) 75.

81 See ER Sunderland, 'Theory and Practice of Pre-Trial' (1937) 21 *Journal of the American Judicature Society* 125.

82 See Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale', above n 77, 205. Note also Davies and Leiboff, above n 42, 112-113.

83 Note *Regina Fur Co Pty Ltd v Bossom* (1958) 2 Lloyd's Rep 425, 428 (Lord Evershed MR): 'I think a defendant – whether he is an underwriter or any other kind of defendant – is entitled to say by way of defence, 'I require this case to be strictly proved, and admit nothing''. See also *Casey v Australian Broadcasting Commission* [1981] 1 NSWLR 305, 307-308 (Hunt J).

84 See B Lander, 'Pleadings' in *Civil Justice Reform: Streamlining the Process* (Paper presented at the Queensland Litigation Reform Commission Conference, Brisbane, March 1996) 2-5; B Lander, 'Pleadings: Changes, Risks and Justice' (1996) 18(8) *Law Society Bulletin (South Australia)* 32.

85 See Lander, 'Pleadings', above n 84, 3.

86 See Law Council of Australia, above n 34, [7.2.4], [7.3.4]–[7.3.6], [7.4.2].

87 See GL Davies, 'The Uniform Civil Procedure Rules: A Judicial Overview' (Paper presented at the Uniform Civil Procedure Rules Conference, Queensland University of Technology, November 1997) 10.

88 See Woolf, above n 31, 154.

89 The issues in relation to summary and indictable matters in the criminal jurisdiction are discussed in sub-sections 2.7 and 4.7.

90 Note Pincus, above n 16, 1.

91 See *Administrative Appeals Tribunal Act 1975* (Cth) ss 29(1)(a)(b)(c), 30(1A); *Administrative Appeals Tribunal Regulations 1976* (Cth) regs 5(1), 6(1).

92 See ALRC, above n 38, 59; R Sackville, 'Case Management: The Australian Experience' (Paper presented at the Working Group on Courts Commission Case Management Conference, Dublin, 16 November 1996).

93 See eg, I Kennedy, 'Change to Pleadings Rules' (1990) 6(1) *Australian Family Lawyer* 40; G Watts, 'Family Law Pleading – 12 months on' (1990) 28(11) *Law Society Journal* 22; I Kennedy, 'Pleadings – Moves for Reform' (1992) 8(2) *Australian Family Lawyer* 22. Note also R Hogan, 'Family Law Pleadings in Historical and Practical Perspective' (1990) 12(9) *Law Society Bulletin (South Australia)* 264.

94 See eg, Barblett CJ, 'Simplifying Procedures under the Family Law Act'(Paper presented at the Judicial Development Conference, Queenscliff, February 1992).

95 See pp 324-327.

96 See SR O'Ryan, 'Overview of New Procedures in the Family Court of Australia' in *Civil Justice Reform: Streamlining the Process* (Paper presented at the Queensland Litigation Reform Commission Conference, Brisbane, March 1996) 1.

97 *Family Law Rules 1985* (Cth) O 8 r 3.

98 ALRC, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, Issues Paper 22 (1997) [10.2]-[10.3].

99 See eg, the reported recent scathing, and it could well be argued, accurate comments of Mr Peter Hayes QC who, in a paper to the litigation section of the Law Institute of Victoria, opined: 'I think that pleadings are a big heap of crap, essentially. Pleadings are important to know the case you have got to meet, but the rules – call it anal retentiveness – … are nonsense, are all an impediment these days to justice': see B Pheasant, 'Civil law Needs Radical Surgery: Top Silk', *The Australian Financial Review*, 11 September 1998, 24. Philips CJ rejected this view: see B Pheasant, 'Vic Chief Justice in Defence Mode', *The Australian Financial Review* 11 September 1998, 4.

100 See RA Blackburn, 'Updating Civil Court Procedures for the 1980s' (1975) 49 *Australian Law Journal* 374, 375.

101 See Woolf, above n 77, 116.

102 See Woolf, above n 31, 162.

103 Justice Pincus has given the examples of pleas of agency and rescission: see Pincus, above n 16, 2.

104 See MA Wilson, 'Pleadings' in *Civil Justice Reform: Streamlining the Process* (Paper presented at the Queensland Litigation Reform Commission Conference, Brisbane, March 1996) 3.

105 Ibid.

106 See Woolf, above n 31, 159.

107 See *Rules of the Supreme Court 1971* (WA) O 20 r 12; *Federal Court Rules* (Cth) O 11 rr 9, 10.

108 See pp 335-336.

109 See, for example, the approach adopted by the Tribunal, presided over by Lockhart J, in *Re QIW Ltd* (1995) 132 ALR 225, 230-232. This 'large and complex matter' was able to be disposed of in a 'short time' due in part 'to the procedures adopted by the Tribunal' which it considered helpful to mention as a guide to participants before it in future applications for review.

110 See Pincus, above n 16, 2.

111 See Davies and Leiboff, above n 42, 118.

112 See Lander, 'Pleadings', above n 84, 3.

113 See pp 349-353.

114 Note Wilson, above n 104, 3.

115 See *Rules of the Supreme Court 1971* (WA) O 29 r 2(1)(n); *Supreme Court Practice Direction No 4 of 1995: Witness Statements* (5 October 1995). There are other exceptions to the general position. Pursuant to O 36A, in relation to actions for personal injury, there is a requirement that, unless the Court directs otherwise, parties must serve on each other copies of medical reports the substance of which they intend to rely on at trial. The Court may direct that, in lieu of serving copies of medical reports, the substance of all or any of the medical evidence intended to be relied on be disclosed in writing. When this is ordered the names of the witnesses are usually not revealed by the disclosing party and the summaries of evidence are inevitably brief. The Court may also direct that copies of reports of expert witnesses other than medical experts or the substance of such evidence be disclosed. In actions on building or engineering contracts which will exceed one day, the party seeking to enter the matter for trial must seek directions in relation to, inter alia, the evidence generally and in particular the exchange of plans, documents, photographs and the reports or statements of expert and other witnesses: see *Supreme Court Practice Direction: Actions on Building and Engineering Contractst* (27 November 1974).

116 See Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale', above n 77, 213.

117 See International Commission of Jurists, British Section, *Going to Law – Reform of English Civil Procedure* (1974).

118 See Woolf, above n 31, 161.

119 Ibid.

120 Ibid. The following example was given: where a party was relying on things said at a meeting of which he had a meeting note, he would have to refer to the note in his pleading and (optionally) attach it.

121 See pp 332-334.

122 Lawyers do not, generally speaking, like putting their cards on the table. The nature of the summaries of evidence to be led from medical experts (who usually remain anonymous) ordered, pursuant to *Rules of the Supreme Court 1971* (WA) O 36A, to be exchanged by parties in actions for personal injury supports this prediction. Experience reveals that these summaries tend to be as scant as permissible.

123 See Davies, above n 87, 6.

124 See Woolf, above n 31, 161.

125 See Davies and Sheldon, above n 77, 112.

126 This system is embodied in the *Federal Rules of Civil Procedure* (US) r 8.

127 Note CB Whittier, 'Notice Pleading' (1918) 31 *Harvard Law Review* 501, 502-505.

128 See Nims, above n 48, 10.

129 Note eg, *Hickman v Taylor* (1946) 329 US 495.

130 See Blackburn, above n 100, 376-377; and JD Davies QC, 'Updating Civil Court Procedures for the 1980s' (1975) 49 *Australian Law Journal* 380, 383-384 commenting on the report of the International Commission of Jurists, British Section, above n 117; Davies and Leiboff, above n 42, 118.

131 See Blackburn, above n 100, 377.

132 Note Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale', above n 77, 208.

133 Note Davies, above n 130, 384.

134 Note *Queensland v JL Holdings Pty Ltd*, above n 3.

135 In Western Australia the only provision in the *Limitation Act 1935* (WA) under which ordinary limitation periods running from the date of accrual of the cause of action can be extended is where a person is suffering from 'a latent injury that is attributable to the inhalation of asbestos': see s 38A (inserted by the *Acts Amendment (Asbestos Related Diseases) Act 1983* (WA)).

136 See LRCWA, *Limitation and Notice of Actions*, Report, Project No 36, Pt II (1997) 15-31. Note also LRCWA, *Limitation and Notice of Actions*, Discussion Paper, Project No 36, Pt II (1992).

137 That: (1) the injury in respect of which he or she brings proceedings had occurred; (2) the injury was attributable to the conduct of the defendant; and (3) the injury, assuming liability on the part of the defendant, warrants bringing proceedings.

138 See eg, Lander, above n 84, 1.

139 See Wilson, above n 104, 3; Davies and Leiboff, above n 42, 119.

140 See Wilson, above n 104, 1-2.

141 Ibid 2-3. This proposal is based on the *Federal Rules of Civil Procedure* (US) r 11.

142 See Wilson, above n 104, 1-2.

143 See Davies, above n 87, 5.

144 Ibid 6.

145 Ibid 5-6.

146 See Wilson, above n 104, 1-2.

147 See Woolf, above n 77, 14.

148 See Woolf, above n 31, 155.

149 See M von Dadelszen, 'Caseflow Management – In Search of the 'Meaningful Event' (1996) 6 *Journal of Judicial Administration* 170, 175.

150 See PA Sallmann, 'The Impact of Caseflow Management on the Judicial System' (1995) 18 *University of New South Wales Law Journal* 193, 196-197.

151 Note von Dadelszen, above n 149; PA Sallmann, 'Life Beyond Caseflow Management' (1993) 3 *Journal of Judicial Administration* 143.

152 See pp 327-329.

153 See Brennan, above n 25, 45.

154 We support the introduction of an 'individual docket system' under which one judge is assigned responsibility for the case, including the hearing of all interlocutory matters until final determination. See ALRC, above n 38, 52-53.

155 See *Uniform Civil Procedure Rules* (Qld) r 440.

156 See *Uniform Civil Procedure Rules* (Qld) r 545.

157 See *Rules of the Supreme Court* (WA) O 20 r 21. Note also O 29A r 3(2)(a), O 31A r 5(4)(a). See pp 331-332.

158 Note ALRC, above n 38, 59.

159 In addition to such breach and possible sanction, common law remedies may be available to the client.

160 Ever present is the danger of incompleteness of knowledge and understanding and absence of full appreciation of local influences and conditions.

161 See generally Langbein, above n 79; G Dannemann, *An Introduction to German Civil and Commercial Law* (1993).

162 Compare eg, *Yuill v Yuill* [1945] P 15, 20; *Jones v National Coal Board* [1957] 2 QB 55.

163 In Germany the burden of proof lies on the plaintiff in relation to facts upon which his or her claim is asserted. However, the German civil burden of proof is higher than in Australia. In Germany a plaintiff succeeds only if he or she proves his or her case to the full satisfaction of the judge and not simply on the balance of probabilities. It should be emphasized, however, that German law allocates the burden of proof differently in relation to certain types of action.

164 See D Leipold, 'Limiting Costs for Better Access to Justice – The German Experience' in Zuckerman and Cranston, above n 80, 266. See also Langbein, above n 79, 840; W Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *Modern Law Review* 380, 390.

165 These include ALRC, above n 38; Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994); Trade Practices Commission, *Study of the Professions: Legal,* Final Report (1994); Independent Committee of Inquiry, *National Competition Policy,* Report (1993); Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform,* Report (1993); Australian Institute of Judicial Administration, *The Cost of Civil Litigation Before Intermediate Courts in Australia* (1992); WD Scott, *Report on a Review of the New South Wales Court System* (1989); R Cranston et al, *Delays and Efficiency in Civil Litigation* (1985).

166 See GL Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale' above n 77, 219.

167 *Union Bank of Australia v Harrison, Jones & Devlin Ltd*, above n 3, 504. See also *Williams v Australian Telecommunications Commission*, above n 3, 216; *Queensland v JL Holdings Pty Ltd*, above n 3, 154 (Dawson, Gaudron and McHugh J): 'Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, 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.'

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2.6

Discovery — Should the Whistleblowers Stop the Train of Inquiry?

> In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible 'Why', they ask 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties, and, if the Court does not have all the relevant information, it cannot achieve this object.[1]

DISCOVERY

In plain language, the problem confronting our legal system today in the context of discovery is to face up to the extent to which cards ought to be placed on the table, when and in what manner in order to do real justice between opposing parties.

In the foreword to an English text on discovery[2] Lord Justice Steyn stated:

> The discovery process often ran riot. It is the experience of commercial judges that usually 95 per cent of the documents contained in the trial bundle are wholly irrelevant and never mentioned by either side. The discovery process adds greatly to the duration and cost of litigation, and helps a defendant (or plaintiff) to put off the day of financial reckoning. It contributes to the tyranny of modern civil litigation.

The City of London Law Society recently stated in a submission in relation to the process of discovery:

> One of the major factors responsible for long delays and significant expense in the current procedural system is discovery of documents. In major commercial litigation in particular, discovery can be a huge task and the resources required to be deployed in carrying it through are often the single most costly item for which the litigant will have to pay in bringing his case to trial … Discovery is peculiar to common law

> jurisdictions and the present consultation on the efficiency of our procedural systems is bound to raise, as a key issue, whether the value of discovery, as we know it, justifies the disadvantage it brings.[3]

Lord Woolf in his Interim Report states that suggestions for reform are largely restricted to modifying the scale of discovery in relation to the more complex litigation, and that most of the contributors who made submissions in relation to discovery reform accepted that in the straightforward case there were no significant problems.[4]

> The difficulties associated with the process of discovery have given rise to a wide range of suggested reforms. At the one extreme are the proponents who seek to eliminate discovery, who believe that discovery is out of control and is uncontrollable.[5] At the other extreme are those who seek to extend discovery in the interests of justice and the search for the truth.[6]
>
> Within Australia at present there exist widespread variations in relation to the process of discovery, ranging from no discovery as of right[7] to full discovery as of right.[8]

The purpose of this sub-section is to:

(a) ascertain what problems in fact exist in relation to the process of discovery;
(b) analyse whether the existing *Supreme Court Rules* adequately address those difficulties, and if not, whether law reform would be desirable; and
(c) analyse the position in other jurisdictions and ascertain whether the position in other jurisdictions or aspects thereof could usefully be utilised in order to reform the law in Western Australia.

THE PURPOSE OF DISCOVERY

To most common law lawyers the rationale of discovery procedures is self-evident. The main function of discovery is to provide the parties to civil litigation with relevant documents before trial to assist them in preparing their cases for trial or in determining whether or not to settle before trial. Discovery is seen as having a number of beneficial aspects. It may enable an early appraisal of the respective cases of the parties and promote settlement, thereby saving time and costs and relieving pressure on court lists. It may reduce or save costs by promoting settlement or reducing the issues in dispute and limiting the scope and length of the trial. It may prevent a party being taken by surprise at trial and enable the dispute to be determined upon its merits rather than on mere tactics.[9]

HISTORICAL BACKGROUND

Discovery originated in England in the ecclesiastical courts and the Court of Chancery.[10] Under the common law, discovery was not required to be provided. However, in the Courts of Equity a party could be ordered to produce documents relevant to a dispute for inspection by his opponent,

and to discover facts. The modern law of discovery is the product of the *Judicature Acts* and rules which drew upon the previous equitable rules and some statutory modifications of them.[11] Common Law Courts had no general inherent power to order discovery, but were only conferred with that power created by statute.[12]

The history of discovery is significant because although the practice of discovery is governed by the rules, the substantive right to discovery still exists as a principle of equity.[13]

An important Chancery reform prior to 1873 empowered the Court to order a defendant to produce upon oath all the documents in his power or possession relating to the matters in question in the suit. Originally, cross-examination was permitted 'to search the conscience of the party putting in the affidavit of documents'. It was decided that the affidavit of documents could not be made the subject of cross-examination. This was seen to be cheaper and more expedient.[14]

SALIENT FEATURES OF THE EXISTING DISCOVERY REGIME IN WA

Discovery of documents is governed by Orders 26 and 26A of the *Rules of the Supreme Court 1971* (WA) (hereinafter *Supreme Court Rules*). Order 26A was an amendment introduced into the *Supreme Court Rules* in October 1996 to elicit discovery to identify a potential party, to obtain discovery from a potential party and to obtain discovery from a non-party.

Ambit of discovery

Pursuant to *Supreme Court Rules* Order 26 rule 1, any party upon providing notice in writing to any other party is entitled to discovery of all documents in a cause or matter which are or have been in the possession, custody or power of that party relating to any matter in question therein.

In *Compagnie Financiere Du Pacifique v Peruvian Guano Co*[15] Brett LJ defined what documents relate to any matter in question when he said:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which *must* — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

In *Mulley v Manifold,* Menzies J put the matter in this way:

> I now turn to the pleadings to determine what are the matters at issue between the parties, because discovery is a procedure directed towards

> obtaining a proper examination and determination of these issues — not towards assisting a party upon a fishing expedition. Only a document which relates in some way to a matter in question is discoverable, but it is sufficient if it would, or would lead to a train of inquiry which would, either advance a party's own case or damage that of his adversary.[16]

Pursuant to *Supreme Court Rules* Order 26 rule 7(3)(b) (introduced in October 1996), the Court may make a number of orders to limit the ambit of discovery, including:

(a) order that discovery be given of only certain specified documents or specified classes of documents;

(b) order that discovery be given of documents that are directly relevant to any specified matter in question or to all matters in question; and

(c) order that discovery be given of all documents relating to any specified matter in question or to all matters in question.

Since its introduction, it would appear that sub-rule 7(3)(b) has been sparingly used.[17] In fact, it would appear to be the position that at present the 'discovery culture' which exists in this State is not to make use of that procedure.

As will be seen later, it appears to be the position that the ambit of discovery is thought to occasion most expense, inconvenience and delay in the litigation process.[18] Accordingly, the major thrust of this sub-section will be to deal with the ambit of discovery and recommended law reform.

Timing of discovery

Prior to the introduction of *Supreme Court Rules* Order 26 rule 7, discovery was usually required to take place after the pleadings had closed. The introduction of Order 26 rule 7, however, has empowered the Court to order discovery to take place at any time, in accordance with principles of positive caseflow management. It would still appear to be the position, however, that normally discovery is given after the close of pleadings.

Continuing obligation to give discovery

Pursuant to *Supreme Court Rules* Order 26 rule 2 a party has a continuing obligation to give discovery.

Manner of giving discovery

Pursuant to *Supreme Court Rules* Order 26 rule 4 a list of discoverable documents is to enumerate the documents in a convenient order and as shortly as possible, describing each document or each bundle of documents to enable identification. In relation to any documents over which privilege is claimed there needs to be a sufficient statement of the grounds of privilege.

Inadequate discovery

Pursuant to *Supreme Court Rules* Order 26 rule 6, the Court may, upon application supported by affidavit evidence, order a party to make an affidavit stating whether any document or class of documents is within that party's possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

Pursuant to *Supreme Court Rules* Order 26 rule 15, if any party fails to give discovery of documents or produce documents for inspection, the Court may make such order as it thinks just, including in particular:

(a) an order that the action be dismissed or the defence be stuck out and judgment entered accordingly; and/or

(b) failure to comply with an order for discovery or production shall render a party liable to attachment.

It is unclear whether the remedies prescribed by *Supreme Court Rules* Order 26 rule15 are of application in circumstances in which a party fails to discover a document that should have been discovered.

The consequences of a failure to discover a document that ought to have been discovered are stated in Seaman, *Civil Procedure Western Australia* as follows:[19]

(a) the failure to discover the document does not render it inadmissible but may give rise to a successful application by the opponent for an adjournment with an order that the costs of the adjournment be paid by the party who made the inadequate discovery;[20]

(b) there could be an order for a new trial if justice requires it;[21] and

(c) in the event of a serious dereliction of duty by a solicitor or his or her staff, the solicitor could be ordered to pay the costs of an adjournment.

A further potential consequence is that a practitioner may face disciplinary proceedings before the Legal Practice Board.[22]

Certificate by a solicitor

The Rules provide that at or immediately before the trial the solicitor having the conduct of the action on behalf of a party must deliver to the Court or a judge at the trial or hearing a certificate signed by that solicitor and addressed to the Court stating that the duty of discovery has been fully explained to that party and, if that party is a corporation, identifying the individual, or individuals to whom it was explained.[23]

DIFFICULTIES ASSOCIATED WITH THE EXISTING PROCESS

A multitude of prominent jurists and legal writers have identified the process of discovery as giving rise to major expense and delay associated with the conduct of litigation. The discovery process has therefore been the focal point of considerable criticism.[24]

Criticisms levelled at the process that currently exists

Justice David Ipp identified the key areas of criticism to be as follows:

> Because much of the cost and delays of litigation are caused by discovery, the discovery process has been the focal point of considerable criticism.
>
> The purpose of the discovery system is to provide each side with all of the relevant documentary information in each party's possession so as to avoid trial by ambush. Although discovery, generally speaking, may

have served that aim, its cost is often prohibitive. Some litigants impose costly, even crushing burdens on their opponents either by excessive demands for documents or by offloading an avalanche of unassorted files on the party demanding discovery, hoping that the searcher will be so exhausted that the damaging items will be overlooked or never reached. Instead of discovery being an essential element in the pursuit for justice it is too often a crippling obstacle to the speedy resolution of disputes.

Unnecessary intrusions into the privacy of individuals, high costs to the litigants and correspondingly unfair use of the discovery process have come to be a ready part of some lawyers' strategy. When winning a case may turn on a party's ability to endure discovery, rather than the merits of the claim or defence, costly and time-consuming discovery activities including evasive answers become tactical weapons with which to delay and harass. Sanctions have little effect on delay and evasiveness. Economic pressures give economic incentives to delay.

Discovery abuse is more frequent in complex cases. Most of such behaviour falls into three categories; first, making unnecessarily broad discovery requests; secondly, withholding information to which the requesting party is entitled; thirdly, providing many irrelevant documents to overwhelm the other side.

The first type of abuse often results from a desire to wear down an opponent who has inferior litigating resources, or to exert settlement leverage unrelated to the merits of the dispute. It may include broad requests for unnecessary information, threats to reveal embarrassing or commercially detrimental information, or to entangle suppliers, customers, investors, or corporate officers personally in the litigation. Parties may attempt to force favourable settlements by driving up costs beyond the value of the case.

Withholding discovery is much harder to spot. Although this tactic is also often part of an effort to exhaust the other side it may be motivated by concerns going to the merits of the case. A party may wish to hide damaging material as long as possible. Common tactics include spuriously narrow construction of relevance of discovery requests, frivolous withholding on grounds of privilege, and deliberately unresponsive answers to interrogatories. Providing an unnecessary mass of documents is also sometimes part of the tactic of 'warehousing', that is, concealing a prejudicial document in a vast pile of innocuous material in the hope that it will not be noticed.

Of course a significant number of lawyers play by the rules at all times and are impervious to the temptation to engage in abusive tactics. Nevertheless, prohibitive costs and delay may be caused by discovery when there is no wish to abuse the system at all. In cases where many documents exist that may possibly be relevant, even indirectly, the practice is when in doubt discover. This results in mountains of documents being produced (sometimes hundreds of thousands) that require weeks or even months to read, analyse and digest, and then to copy and index. *In the end, the usual result is that the number of those*

> *documents that are critical to the result of the trial are substantially less than fifty.*[25]

The cost of executive and management time involved in complying with discovery may be as great as, or greater than, legal costs.[26]

It would appear to be the position that even where discovery is properly carried out and there exists no abuse, the cost of discovery is related, in large part, to the number of documents that are discovered. This is because of the operation of the *Peruvian Guano* test.[27]

There is evidence to suggest that the general and unstructured use of discovery is often disproportionate to the benefit.[28]

An overly broad ambit of discovery tends to give rise to large bundles of trial documents.[29] That results in a waste of resources such as court time and time spent by the parties' representatives in determining what documents to include in the bundle of documents.

Some responses to the criticisms

There are those who state that the above-mentioned criticisms are invalid or alternatively are only appropriate to a limited range of situations, particularly large, complex litigation, and that generally the discovery process is not necessarily in need of major reform.

The Law Council of Australia in its submission to the Australian Law Reform Commission in response to Issues Paper 20 states that the English, American and the Australian Institute of Judicial Administration studies have found that discovery is not a problem in the vast majority of cases. The Law Council states that studies have shown that discovery in large, complex cases does pose problems and needs to be closely managed in order to overcome cost 'blowouts' and timetabling clashes when hearing dates are vacated.[30]

The Law Council goes on to state:

> The Law Council accepts that discovery may be a component of the litigation process in large, complex cases which involve very high cost. The question is whether this cost can be reduced without affecting the issue of justice between the parties. This is particularly relevant given that the objectives of discovery are to learn what the case is about, to give full warning of documentary evidence, to obtain admissions and to avoid ambush. But the fact that it may be a problem in large and complex cases, *does not mean that discovery is a problem in all cases*'.[31]

The Law Council further states that the difficulty it has in providing constructive comments on discovery is that 'there is a dearth of empirical data about the cost and benefit of either of the major forms of discovery' (meaning discovery and interrogatories).[32]

In other words, it would appear to be the contention of the Law Council of Australia that only discovery in large, complex cases needs to be addressed, in the absence of empirical data suggesting that discovery poses any problems in other sorts of matters.

There are indeed schools of thought that suggest that in the absence of sound, persuasive empirical studies, reform should not be undertaken. In the American context, where discovery reform has been extensive, a scholar went so far as to state:

> Finally, this article suggests that reform of Federal Civil Discovery may not have been necessary at all: there is no strong evidence documenting the alleged mass of discovery abuse in the Federal Court. The rulemakers never established the existence of discovery abuse before embarking on their crusade to revamp discovery. Indeed, existing empirical studies challenged the perceived notion of pervasive discovery abuse. The message of this article is simple and not new: sound, persuasive empirical study ought to undergird every rule reform effort; in particular, there must be convincing evidence that a problem exists before any rule making group begins the process of rule revision.[33]

Whether there exists empirical data in relation to the perceived difficulties

It is undoubtedly the position that in large, complex cases there are many judicial pronouncements in support of the view that many of the difficulties alluded to above in fact exist and have taken place.

One case in which discovery was thought to be a major cause of delay was *Trade Practices Commission v Santos Limited & Sagasco Holdings Limited.*[34] The process of discovery lasted for about a year, prior to the commencement of the trial. The trial commenced in the Federal Court on 4 October 1993 and continued until 20 October 1993 when the application was, by consent of the parties, dismissed. It would appear that the delay of one year caused through the process of discovery rendered the relief sought nugatory. Justice Heerey's focus of criticism (Justice Heerey was the presiding judge) was that it was a mistake to have a general, unqualified order for discovery — in accordance with the test of relevance propounded by the *Peruvian Guano* case. The circumstances pertaining to discovery in this matter resulted in practitioners being 'recruited into a burgeoning army engaged in discovering, inspecting, filing, listing, copying, storing, carrying about and otherwise dealing with 100 000 documents which had been accumulated for the purposes' of this litigation. An expression that developed amongst junior practitioners who had been ensnared in the discovery process was 'I have been Santossed'.

A more recent case in which discovery has proved to be extraordinarily costly, wasteful and unmanageable is *BT Australasia Pty Ltd v State of New South Wales & Telstra.*[35] The discovery process has apparently to date involved the parties expending many millions of dollars. In a recent judgement arising out of an application for further and better discovery, Sackville J stated:

> I have repeatedly said that all parties to this litigation have given insufficient attention to the need to control their own request for discovery in the interests of keeping the discovery process within manageable bounds. One consequence of the approach taken by the parties is that discovery in this case has assumed mammoth proportions. A second is that the parties are in continuous disputation as fresh discovery issues are raised, each said to require the time of the Court to resolve. Not only is this extraordinarily costly and, in my opinion, wasteful, but it diverts attention from the need, in a case that has now been going for three years, to prepare for trial. It also imposes a disproportionate burden on the Court.[36]

In Australia there appears to be no recent empirical data that has been assembled in relation to the process of discovery.

In 1990 the Australian Institute of Judicial Administration Incorporated decided to conduct a specific study of discovery of documents and interrogatories with the view to determining whether the cost and delay associated with the process could be reduced.[37] The study was carried out by BC Cairns in co-operation with a steering committee appointed by the Institute.

The following random statistics are included hereunder as revealed by that study:[38]

(a) Queensland General Civil Jurisdiction — the cost of discovery and interrogatories commonly accounted for up to 30 per cent of total costs.

(b) Sydney sample — the cost of preparing an affidavit of documents was typically less than 10 per cent of the total costs, the cost of preparing interrogatories was usually less than 10 per cent of the total costs, and the cost of answering interrogatories was usually less than 10 per cent of the total costs.

In conclusion, Cairns states that the cost of discovery and interrogatories, while significant, is not high as a proportion of total legal costs.[39]

Whilst this study appears to be the only study carried out in Australia providing empirical data of costs associated with discovery and interrogatories, it is fundamentally unreliable in the Western Australian context for reasons which include:

(a) the study was conducted in the mid to late 1980s and accordingly is outdated; and

(b) the study does not include Western Australia.

Should the absence of empirical data preclude reform?

In the context of large, complex cases, there is in fact sufficient information to suggest that discovery has become an unmanageable and costly task.[40]

In our view, whilst it is correct to say that there exists a dearth of empirical data about the costs and benefits of discovery in relation to cases not falling

within the category of large, complex cases, that of itself does not mean that one ought not contemplate reform and the benefits that might confer. Even if in a medium sized matter discovery was limited by a test of direct relevance, instead of the *Peruvian Guano* test, that could, for example, result in two lever arch files of discoverable documents being discovered instead of, say, 12. This must have a bearing on the efficiency and cost-effectiveness of the litigation process, thereby making justice more accessible.

DO OUR CURRENT RULES ADEQUATELY ADDRESS THESE DIFFICULTIES?

As mentioned above, at present, general discovery is required to be given in accordance with the *Peruvian Guano* test unless the court limits the ambit of discovery pursuant to *Supreme Court Rules* Order 26 rule 7. This mechanism is very rarely used, however. The culture of general discovery appears to be deeply engrained in the profession. In any event, if the starting point is that general discovery is required to be given, parties may not be sufficiently pro-active to invoke the Rules to limit the ambit of discovery.

Ambit of discovery

Sanctions for failing to discover a document that is directly relevant

The *Supreme Court Rules* appear to be unclear in relation to what sanctions exist if a party fails to discover a relevant document. *Supreme Court Rules* Order 26 rule 15 appears to be of application in some circumstances, but is not drafted in a way that clearly signifies to a practitioner — 'if my client fails to discover a relevant document, my client could be arrested'. In any event, how can a corporation be 'attached', or alternatively if a sanction of inadequate discovery given by a personal litigant is 'attachment', what equivalent sanction exists for inadequate discovery given by a company?

Within the profession there appears to exist insufficient regard to, and awareness of, available sanctions that can be imposed if a party fails to discover a relevant document. Furthermore, in practice, the consequences of a failure to discover a relevant document are relatively minor.[41]

Order for discovery of particular documents

The test appears to be too narrow. It does not cover the situation in which the deponent referred to in *Supreme Court Rules* Order 26 rule 6(3) has reasonable grounds to suspect that a discoverable document has not been discovered, but cannot affirmatively state on oath that the other party has or has had the document within that party's possession, custody or power.

THE POSITION (AND PROPOSED LAW REFORM) IN OTHER JURISDICTIONS

Prior to the *Civil Procedure Rules 1998* (UK) coming into force, the English rules of discovery closely resembled our current rules.[42]

The United Kingdom

The *Peruvian Guano* test was operative and there existed limited scope to narrow the ambit of discovery, except by agreement between the parties. Lord Woolf in his Interim Report sets out what he considers to be a principal difficulty with the *Peruvian Guano* test:

> The result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable)

> documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents would affect the outcome of a case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.[43]

Lord Woolf does not go so far as to advocate the abolition of discovery. He states:

> My starting point is an acceptance of the desirability of retaining discovery, because of its contribution to the just resolution of disputes. However, the benefits of a system of discovery will only outweigh the disadvantages if substantially greater control over the scale of discovery is exercised than at present. The solution therefore lies in finding a satisfactory form of control and then ensuring that it is enforced.[44]

One aspect of Lord Woolf's proposal for reform is to distinguish between the following categories of documents:

> (1) the parties' own documents: these are documents which a party relies upon in support of his contention in the proceedings;
>
> (2) adverse documents: these are documents of which a party is aware and which to a material extent adversely affect his own case or support another party's case;
>
> (3) the relevant documents: these are documents which are relevant to the issues in the proceedings, but which do not fall into categories 1 or 2 because they do not obviously support or undermine either side's case. They are part of the 'story' or background. The category includes documents which, though relevant, may not be necessary for the fair disposal of the case. Lord Woolf considers this category to produce proportionately the greatest number of documents disclosed and to the least effect;
>
> (4) train of inquiry documents: these are the documents referred to by Brett LJ in the *Peruvian Guano* case.[45]

Lord Woolf refers to the documents contained in categories 1 and 2 as 'standard discovery'. He refers to categories 3 and 4 as 'extra discovery'. Having regard to the categorisation identified above, his proposal can be summarised as follows:

(a) In 'fast track' cases (which equates to cases in our expedited list) one should only be required to make standard discovery, but with leave to apply for further discovery (leave would only be granted if a party shows very strong grounds).

> In 'fast track' cases, lists or photocopies of the documents would be required to be delivered in accordance with standard directions following service of a defence. A party would, however, be entitled to confine his list or copies of documents to the principal documents if

he can also certify that this restriction is necessary because of the number of documents involved. Detailed descriptions of the documents would not be required. The defendant would be entitled to copies of any documents disclosed in the pleading before serving his defence. In light of the fact that complex cases are not included on the fast track, an obligation of this sort was thought by Lord Woolf not to be unduly burdensome.[46]

(b) In relation to all other matters, referred to by Lord Woolf as the 'multi-track' there exists a wide range of cases and the general approach would need to be varied according to the circumstances of the particular case. The number of documents involved could affect the appropriate approach. Where a large volume of documents is involved, the procedural judge would require to know the scale of costs involved in the proposed discovery. The procedural judge would decide on a program for discovery which is appropriate for the particular case. Prior to the case management conference, the parties would be required either to agree a program or, failing agreement, to set out their respective approaches in draft programs. It would be the responsibility of the procedural judge to decide whether any extra discovery in addition to standard discovery should be ordered. The procedural judge would have a discretion to direct category 3 or even category 4 documents to be disclosed but Lord Woolf anticipates that it would be extremely rare for category 3 or 4 documents to be disclosed except perhaps where allegations of dishonesty are involved. It would also be open to the procedural judge to order discovery in waves, if he thought appropriate.[47]

One problem identified by Lord Woolf in adopting this approach is:

> The core of the problem is that conscientious lawyers and their clients might feel obliged to trawl through all category 3 documents in order to eliminate the possibility of overlooking category 2 documents. To do so would defeat the aims of controlled discovery. It is therefore necessary to find a practical test by which to limit the search for category 2 documents.[48]

Whilst that is a relevant matter, one ought not overlook the advantage to the inspecting party by adopting the abovementioned approach. Even if the party providing discovery is required to trawl through category 3 documents to ensure that no category 2 documents are omitted, the inspecting party would be spared the process of having to trawl through category 3 documents in the process of inspection (category 3 documents are identified by Lord Woolf as giving rise to the most documents in the discovery process). Accordingly, we are in disagreement with Lord Woolf's observation that the requirement to trawl through category 3 documents would defeat the aims of controlled discovery.

A further recommendation of Lord Woolf is that one copy of the same document ought not to be required to be disclosed unless the copy contains any modification, obliteration or other marking or feature likely to affect the outcome of the action.[49]

In Lord Woolf's Final Report[50] he states that extra disclosure (ie, category 3 and 4 documents) will be by Court order only. He further states that when ordering extra disclosure, the Court would have to be satisfied not only that it was necessary to do justice but that the cost of such disclosure would not be disproportionate to the benefit and that a party's ability to continue the litigation would not be impaired by an order for specific disclosure against it.

A further matter addressed in Lord Woolf's final report is the response of the public that the formulation of being required to make discovery of category 1 and 2 documents only (unless good reason existed to the contrary) would 'positively encourage parties to turn a blind eye to the documents which might damage their case or at least would encourage a slap dash approach to disclosure; and that the line drawn by the test of awareness is artificial and unsatisfactory, depending as it does on the chance recollection of available individuals'.[51]

In response to that criticism Lord Woolf states:

> I have no doubt that these views are sincerely held. However, following this advice would mean making no recommendation to improve a state of affairs generally acknowledged to be unsatisfactory for domestic litigants and for the international competitiveness of the English legal system.
>
> Discovery depends at present on the honesty and diligence of the parties. Withholding documents cannot necessarily be detected so the temptation to do this already exists; the facts of decided cases and comments which I have received confirm that it is not unknown in practice. It has to be recognised that the alternatives to my proposal would be to dispense with disclosure entirely (like the Continental systems) or to limit initial disclosure to documents on which a party intended to rely. Both of these go too far; the latter would be inefficient because it would simply increase the volume of routine applications for disclosure. My proposal has the effect of preventing a party, if he acts reasonably honestly, from putting forth a case which he knows to be inconsistent with his own documents. It thus offers not a perfect, but a realistic, balance between keeping disclosure in check while enabling it still to contribute to the achievement of justice.
>
> Despite its imperfections, I therefore have no doubt that a solution on the lines I have indicated is necessary and will bring about some improvement. If the principle of disclosure is to be retained at all, it is important not to make the non-existent ideal the enemy of the better-than-nothing solution. It should of course be kept in mind that standard disclosure can be supplemented by applications for specific disclosure; if it is apparent in a particular case that documents disclosed on such

an application should plainly have been produced by way of standard disclosure, the Court can impose appropriate sanctions.[52]

The new civil procedure rules

It would appear to be the position that Lord Woolf's proposals have been radically departed from in relation to the new proposed discovery regime in the United Kingdom.

In April 1999 new *Civil Procedure Rules* were implemented in the United Kingdom. Part 31 of the Rules, entitled 'Disclosure and Inspection of Documents' contains the following salient features:

(a) The term 'discovery' will be replaced by 'disclosure'.

(b) Disclosure will not take place as of right, but will be ordered if shown to be 'necessary in order to dispose fairly of the claim or to save costs'.[53]

(c) The test for disclosure will require a party to disclose:
  (i) all documents on which that party relies; and
  (ii) all documents which could:
    (aa) adversely affect that party's own case;
    (bb) adversely affect another party's case; or
    (cc) support another party's case; and
  (iii) all documents which that party is required to disclose by any practice direction.

  (This test is referred to as 'standard disclosure'). [54]

(d) Parties will have a duty to effect a 'reasonable' search in any standard disclosure. Four factors are expressly set out in the new draft rules to enable the parties and the Court to decide upon the reasonableness of the search. Disclosing parties and their solicitors will therefore need to be able to justify the extent of the search carried out by reference to these factors. They are:
  (i) the number of documents involved;
  (ii) the nature and complexity of the proceedings;
  (iii) the ease and expense of retrieval of any particular documents; and
  (iv) the significance of any document which is likely to be located during the search.[55]

(e) Mere duplicates — that is copies without obliteration, modification or other marking or feature — need not be listed if disclosure and inspection is made of the originals. If the copy bears some modification, obliteration, marking or other feature upon which the disclosing party intends to rely or which could adversely affect his/her own case, that of another party or support another party's case then disclosure will need to be made.

Queensland

On 1 May 1994 *Supreme Court Rules Amendment Order (No 1) 1994* came into force in Queensland substantially transforming the existing 'ancient rules' in relation to discovery and interrogatories.[56]

The salient features of the new rules in relation to discovery are as follows:

(a) The term 'disclosure' has replaced the term 'discovery'.

(b) Most importantly, the ambit of discovery has been limited to discovery of documents that are directly relevant to an allegation in issue and the *Peruvian Guano* test has been abolished.[57] It is interesting to note that there appears to be no discretionary mechanism to enlarge the ambit of discovery.

(c) The obligation to disclose arises automatically without any order in all actions. It is a continuing one until the cause is determined. Documents need only be disclosed which are in the possession or under the control of the party giving discovery.[58]

(e) The duty of disclosure does not apply to an additional copy of a document already disclosed if it is reasonable to suppose the additional copy contains no modification, obliteration or other marking or feature likely to affect the outcome of the action.

(f) Disclosure may be effected in one of two ways. The primary way is by delivery to the other party of copies of the documents. Where it is effected in this way the copies of documents are to be accompanied by a list descriptive of the documents and identifying by whom they were made. Disclosure may also be made by the production of the original documents for inspection by the other party. The disclosing party must notify the other party of a convenient place and time at which the documents may be inspected. Disclosure may be effected in this way where:

    (i) the first party requires the other party to produce original specified documents; or

    (ii) it is not convenient for the party to deliver copies because of factors such as the number, size or quantity of documents.[59]

(g) Where disclosure is made by the production for inspection of original documents, they must be contained together or arranged in a manner so as to be readily accessible for inspection, and identified in a way to facilitate their retrieval. However, they must not be disturbed more than is necessary; and not at all if the inspecting party so requires. Mechanical and computerised facilities must be made available by the disclosing party to facilitate inspection and copying, and a person must be made available to explain the arrangement of the documents and to assist in locating and identifying documents.[60]

(h) There is no longer any obligation to explain away the absence of any document which may have been in the party's possession or power but which is no longer in the party's possession.

(i) A document consisting of a statement or report of an expert is not privileged from disclosure even if obtained solely for the purposes of the litigation.[61]

(j) There exists a residual discretion for the court or a judge to order that delivery, production or inspection of a document or class of documents for the purposes of disclosure:
  (i) be provided; or
  (ii) not be provided; or
  (iii) be deferred.

(k) The consequences of failing to make disclosure of a document are that the party:
  (i) may not tender the document or adduce evidence of its contents, without leave of the Court or a Judge at trial;
  (ii) is liable to process of contempt or sequestration for the failure; and
  (iii) may be ordered to pay the costs or a part of the costs of the cause.

(l) Disclosure may take place in stages.

As mentioned above, the most salient feature of the new discovery regime in Queensland is that the train of inquiry test has been abolished and replaced with a test of direct relevance.

Justice White of the Supreme Court of Queensland has commented as follows in relation to that development:

> The limitation sought to be imposed on the ambit of discovery, namely, the *Peruvian Guano* or 'train of inquiry' discovery, by making the test 'directly relevant to an allegation that is an issue' will, no doubt, bring forth much criticism from practitioners. One of the more obvious difficulties will be to identify at that early stage what will be of direct relevance to an allegation in issue. It might be suggested that documents 'likely to affect the outcome' of the cause would focus the process more effectively. Either formula requires the lawyers to have a clear understanding of what the issues in contest are and how they may be resolved from an evidentiary point of view.
>
> In effect the draft rules (at that time they were draft rules) will require the lawyers to exercise the skill and judgment for which they are retained to a higher degree than has hitherto been necessary under the traditional discovery rules. The draft rules also demand a level of integrity and honesty of practitioners which the public, the Courts and their opponents are entitled to expect given their exclusive right to do legal work and their level of remuneration.[62]

The new discovery regime in Queensland has attracted much favourable attention. Lord Woolf in his interim report refers to those rules, albeit in a minor respect, approving of the term 'disclosure' and the requirement not to disclose more than one copy of the same document unless there are features on the copy likely to affect the outcome of the action.

Justice David Ipp of the Supreme Court of Western Australia has commented as follows in relation to the Queensland Rules:

> The realisation of these problems have led to several proposals for discovery reform. In Australia the most significant are those being considered by the Queensland Litigation Reform Commission. Under these proposals, the obligation to discover will be narrowed to documents that are directly relevant to the issues, rather than 'relating to any matter in question in the action'. The present test for discovery is wide and loose. Documents are discoverable even if they would not be admissible in evidence, as long as they contain information that may, not must, either directly or indirectly enable the parties requiring discovery to advance their case or damage the case of their adversaries. It is sufficient under the *Peruvian Guano* test if a document may 'fairly lead [the party] to a train of inquiry which may have either of those two consequences'. The Queensland proposals therefore represent a fundamental change in principle.
>
> There are other ways in which, under the Queensland proposals, the obligation to discover is simplified and made less onerous. Documents which are delivered or produced must readily be accessible to and capable of convenient inspection by the party to whom they are delivered or produced. The party discovering is required not to interfere with the existing arrangement of documents and to provide assistance in locating documents. Discovery may be ordered to be given in waves in regard to particular issues; and discovery may be limited where it is not likely to be productive in proportion to cost.
>
> Discovery in waves may prove to be a most helpful technique. It is analogous to an American proposal for a two stage discovery process. According to such a process the first stage would establish the essential or minimal discovery needed before a realistic assessment of the strengths and weaknesses of the case can be made. Ordinarily discovery in regard to only a few issues would be required. Later more extensive discovery could be ordered if necessary.[63]

Justice Ipp has further stated:

> There is no reason for the legal system to remain in a state of passive helplessness about discovery excesses. Many of the proposals, including those presently being considered in Queensland, are highly significant and if implemented are capable of remedying many of the current problems. The need for careful experimentation is pressing.[64]

In our view, the following features of the new discovery regime are of particular interest:

- The abolition of the train of inquiry test and replacement of a test of direct relevance. It should, however, be possible to obtain leave, if necessary, to broaden the ambit of discovery but leave should only be granted upon good cause being shown.[65]
- Discovery in waves.
- The consequences of non-disclosure are clearly spelt out and expressly attract consequences as serious as contempt proceedings or sequestration.
- Additional copies of a document already disclosed need not be disclosed unless there are features superimposed on such copies which are likely to affect the outcome of the action.

The new discovery rules appear to be working well and the Queensland Rules Committee has not received any submissions suggesting anything to the contrary.[66]

Victoria

Save for the County Court (as to which see below), parties are required to give general discovery of all documents which are or have been in their possession, custody or power relating to any question raised by the pleading.[67] Accordingly, the *Peruvian Guano* test is still of general application in Victoria.

The courts, however, have a power to limit the scope of discovery.[68]

Accordingly, the general position in the Supreme Court of Victoria is similar to the existing position in Western Australia in relation to the ambit of discovery.

County Court of Victoria

Order 34A, Case Management, was inserted by the *County Court (Chapter I Amendment No 24) Rules 1995* (Vic) and came into operation on 1 January 1996. A central feature of the procedure under Order 34A is judge-control of every civil proceeding in the Court at a directions hearing.

Pursuant to Order 34A r17, unless the Court otherwise orders, a party shall not be required to make discovery of documents.

Where discovery is sought, the party applying must specify the documents or class of documents of which discovery is sought. Where it appears that general discovery of documents is appropriate, the Court may order the other party to make such discovery. It is expected, however, that general discovery will be permitted only rarely.[69]

The Court will not make an order by consent of the parties for the making of discovery of documents or the answering of interrogatories except in circumstances deemed appropriate by the Court.

It appears to be the position in practice that although general discovery is still able to be ordered at the discretion of the Court, it does not occur in many cases.[70]

Some of the factors underlying the Court's shift away from general discovery have been spelled out by Judge David Jones:

(a) general inefficiencies in the Court, cost considerations and delays which led to dissatisfaction with the Court's processes;

(b) uncontrolled discovery being misused;

(c) an increase in interlocutory applications relating to discovery; and

(d) practitioners appearing to be more concerned about process than substance.

In a joint submission, the Law Institute and the Victorian Bar expressed concerns about the practice adopted by the County Court.[71] The submission pointed out that the practice 'reverses the onus in discovery by placing the burden of identifying relevant documents on the party without access to them'. Some of the issues highlighted in the submission were that:

(a) it is difficult for a party seeking discovery to know which documents or class of documents are in existence and this could affect the outcome of the litigation;

(b) the trial of an action may be disrupted or a re-trial may be ordered because of the emergence of a relevant document which has not previously been disclosed to the other side;

(c) full discovery can significantly assist in the settlement of matters;

(d) full discovery reduces the risk of the basis for a settlement subsequently being questioned because of the failure to disclose a document not contained within a requested class; and

(e) the practice introduces further potential for disputes regarding whether or not there has been compliance with the list in respect of which discovery was sought.

The Law Institute of Victoria and Bar submissions suggested that unlimited discovery of documents, which is consistent with the practice in the Supreme Court of Victoria, is preferable.[72]

The Federal Court of Australia

The following are the salient features of discovery in the Federal Court:

(a) a party may, unless the Court otherwise orders, by notice of discovery filed and served on any other party, require any other party to give discovery of documents;[73]

(b) the Court may order that discovery shall not be required or shall be limited to such documents or classes of documents, or to such of the matters in question in the proceeding, as may be specified; furthermore, the Court shall, on application, make such orders as are necessary to prevent unnecessary discovery;[74]

(c) an order for general discovery (*Peruvian Guano* test) appears to be more the exception than the norm and the trend in the Federal Court is to narrow the scope of discovery unless good reason exists to the contrary.[75]

A new practice direction is shortly to be published in the Federal Court. The salient features of the new practice direction are:

(a) prior to a directions hearing in relation to discovery, parties are to ascertain whether discovery is necessary;

(b) if discovery is necessary, it will be confined to categories of documents;

(c) discovery is to take place in stages, with liberty to apply; and

(d) identification of the relevant categories of documents may be facilitated by random sampling of documents.[76]

The position in New South Wales

The process of discovery and inspection of documents is governed by Part 23 of the *Supreme Court Rules 1970* (NSW). Part 23 was significantly amended in July 1996. Prior to that date, the procedure for discovery closely resembled that of Western Australia.

The following are the salient features of the new rules:

(a) An automatic entitlement to discovery by notice exists only:

(i) in relation to documents specified in any process such as an originating process, pleading, affidavit or witness statement (other than a privileged document); and

(ii) where any other specific document is clearly identified in the notice, relevant to a fact in issue (other than a privileged document).[77] A document is taken to be relevant to a fact in issue if 'it could, or contains material which could, rationally affect the assessment of the probability of the existence of that fact (otherwise then by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence.[78]

(b) The Court may on application of a party or of its own motion order any party to give discovery to any other party of:

(i) documents within a class or classes specified in the order;

(ii) one or more samples (elected in such manner as the Court may specify) of documents within such a class.

(c) A class of documents is not to be specified in more general terms than the Court considers to be justified in the circumstances.

A class of documents may be specified:

(i) by relevance to one or more facts in issue;

(ii) by description of the nature of the document and the period within which they were brought into existence; or

(iii) in such manner as the Court considers appropriate in the circumstances.[79]

(d) The party giving discovery pursuant to any such order made against that party is within 28 days required to:

(i) provide a list to the inspecting party of all documents or samples specified in the order, in the possession, custody or power of the party giving discovery, or alternatively the list is to specify those documents that were within that party's possession, custody or power within six months prior to the commencement of the proceeding, but are no longer;

(ii) provide an affidavit stipulating that the deponent has made reasonable inquiries and that there exist no documents other than those documents specified in the list that are relevant (as defined);[80]

(e) where the party giving discovery is represented by a solicitor, a certificate is to be provided by the solicitor stating:

(i) that the solicitor has advised that party as to the obligations arising under an order for discovery (its officers if it is a corporation); and

(ii) that the solicitor is not aware of any documents within any of the classes specified in the order (other than excluded documents).[81]

(f) Documents that are to be discovered are to be physically kept and arranged in a way that makes the documents readily accessible, and capable of convenient inspection, and identified in a way that enables particular documents to be readily retrieved. Furthermore, upon request by the inspecting party, a person is to be made available who is able to explain the way the documents are arranged and assist in locating and identifying particular documents or classes of documents.[82]

(g) The rules make no provision as to when discovery may be ordered. Accordingly an order may be made at any stage of the proceedings.[83]

(h) The present rules also say nothing about whether the other party may challenge the sufficiency of the discovery or the contents of any verifying affidavit. Notwithstanding this omission it is likely that the Court will permit an application for further discovery to be made provided that the party making application specifies the documents, or class of documents, in respect of which further discovery is sought.[84]

(i) The failure by a party to comply with an order for discovery attracts the following discretionary sanctions:
  (i) the Court may dismiss or limit any claim made by that party;
  (ii) the Court may strike out or amend any pleading filed by that party;
  (iii) the Court may strike out, disallow or reject any evidence which that party has adduced or seeks to adduce;
  (iv) the Court may require that party to pay the whole or part of the costs of another party to the proceeding;
  (v) the Court may make such order as the Court considers appropriate in the circumstances; or
  (vi) in addition, such failure could attract proceedings for contempt of Court.[85]

The position in New Zealand

Discovery may be obtained as of right by filing and serving a notice on any other party who has filed a pleading, requiring that party to give discovery of the documents which are or have been in that party's possession or power relating to any matter in question in the proceeding.[86]

The Court may, however, at any time order that discovery by any party shall not be required or shall be limited to such documents or classes of documents as may be specified, and the Court shall, on application, make such orders as are necessary to prevent unnecessary discovery.[87] The general rule is that a party requesting discovery is entitled to receive a comprehensive list of the relevant documents, subject to the overriding consideration that the Court will not order discovery unless it considers it to be necessary.[88]

Parties who consider general discovery unnecessary accordingly bear the burden of bringing an application to limit or exclude general discovery.[89]

A person who fails to comply with an order of Court in relation to discovery is guilty of contempt if the person wilfully and without lawful excuse disobeys the order or fails to ensure that the order is complied with.[90]

The New Zealand Rules relating to discovery and interrogatories are said to have many similarities with the Rules of the Supreme Court of New South of Wales and the Federal Court of Australia.[91]

European continental systems

It would appear to be the position that the continental systems have disposed with discovery in its entirety.[92]

The position in the United States of America

The *United States Federal Rules* permit very brief pleadings and pre-trial discovery is regularly and openly used to 'find' a case.[93]

Each State has its own rules governing discovery, however many have chosen the Federal Rules as a model.

The methods of discovery include depositions by oral examination or on written questions, written interrogatories, procedures for production of documents or things, physical examination, and requests for admission. The various methods may be used alone or in combination. Use of the one device will not prevent subsequent use of another provided that the intent is not to harass the party.[94]

There have been recent changes to the law of discovery. Federal Rule 26(a) is probably the most important, albeit controversial, of the recent changes. Rule 26(a) requires parties to voluntarily disclose documents and the names of witnesses with knowledge of the action without a discovery request. Parties who defy Federal Rule 26(a) face stiff sanctions including loss of the opportunity to present at trial any witness or information not disclosed.[95] The problem with discovery abuse in the United States has proved to be endemic. Many attorneys and judges believe that the discovery process consumes too much time and expense and, more generally, that it frustrates the adversary system's larger purpose of promoting the search for truth.[96]

Canada

The discovery, inspection and production of documents is provided for by the Rules of Court of the various provinces which, in general, tend to parallel each other. These rules, insofar as documentary discovery is concerned closely resemble the process of discovery in Western Australia.

The Rules appear to make provision for three separate and distinct discovery procedures, namely:

(a) discovery and inspection of documents;

(b) examination for discovery; and

(c) discovery by interrogatories.

The process of examination for discovery has been described as 'a microscopic trial within a trial'.[97]

The discovery process is also under review in Canada. The discovery process is said to lengthen the litigation process and add considerably to costs.[98]

Reform measures enunciated by the Canadian Bar Association include:

(a) limiting discovery through strict timelines;

(b) restricting the scope of discovery, moving toward a narrower standard of relevance;

(c) using sanctions to penalise duplicative or cumulative discovery.[99]

The procedure known as discovery by oral examination which exists in most Canadian jurisdictions is akin to oral interrogatories.[100]

PROPOSED LAW REFORM IN WA

Ambit of discovery

As mentioned above, it would appear that Western Australia is one of the few remaining states in which the *Peruvian Guano* test still applies. (Although there exists a mechanism to limit the ambit of discovery pursuant to *Supreme Court Rules* Order 26 rule 7, it is rarely used if at all).

It is abundantly clear that the cost of discovery (i.e. the process of providing discovery and taking inspection of documents) is related, in large part, to the number of documents that are discoverable.[101] It is also clear that particularly in large, complex cases, discovery has the tendency to become uncontrolled, both in relation to expense and delay.[102] Even in circumstances in which there exists no discovery abuse, that appears to be the position.[103]

As mentioned above, the Law Council of Australia and others advocate that law reform should not take place in the absence of empirical data demonstrating difficulties with the existing process. In relation to large complex cases, it would seem that the matters earlier referred to provide a sufficient basis for reform. Whilst there exists no recent and relevant empirical data in relation to delays and costs associated with the existing discovery regime in medium sized or smaller cases, that ought not to deter any aspirations to improve the existing regime in those types of cases. The important aspiration in this regard is to reduce costs and delays, but not to do so in a manner that is at odds with the attainment of a 'just' or 'fair' result.[104]

It needs to be recognised that each case is unique and must be dealt with in a manner best suited to its own individual circumstances. It also needs to be recognised that Rules of Court dealing with the ambit of discovery should set out a position that ought usually prevail to expeditiously achieve the attainment of justice in a cost effective manner, subject to leave provisions to depart from such a position in appropriate circumstances. These two considerations dictate a recognition of two coefficients operative in an effective discovery regime, namely:

(a) appropriate rules pertaining to discovery, prescribing the position that ought usually to prevail; and
(b) effective case management.

This then gives rise to the following considerations:

(a) We do not believe that discovery should be abolished. Discovery plays too important a role for the attainment of justice between the parties. The solution appears to lie in effective control, but not in 'discoverectomy'.

(b) We are of the view that in most cases, discovery should be confined to documents that are directly relevant to the issues in dispute, subject to the Court having a residual discretion to enlarge the ambit of discovery where necessary. This is similar to the Queensland model,

but unlike the Queensland model there should exist a residual discretion to enlarge the ambit of discovery.

(c) One difficulty in adopting a test of direct relevance is that it will be more difficult to detect failure to provide adequate discovery. It is often the position that 'train of inquiry' documents during the process of inspection alert a party to the existence of documents that are directly relevant that have not been discovered. It will be more difficult to monitor the adequacy of discovery and greater reliance will need to be placed upon the integrity of the parties and the manner in which the parties' obligations are explained to them by their solicitors. Accordingly, sanctions for inadequate discovery may need to be revised, to address this concern (as to which see below). The culture of the profession will need to change to recognise the enormous responsibilities that exist on both the solicitor and the client in relation to the process of providing discovery.

(d) A further question that arises is whether the New South Wales model might also be helpful insofar as it seeks to limit the ambit of discovery to categories of documents. This would also seem to accord with the proposed Federal Court Practice Direction and with what in practice seems to occur in the Federal Court. There exists no reason in principle why discovery should not be limited to categories where appropriate. One argument against such an approach is that if the party seeking discovery is to apply to obtain discovery of specified categories of documents, a 'smoking gun' may be concealed in a category not specified. This, however, is unlikely to occur in practice. If this aspect of the New South Wales model was to be incorporated into our system, the ambit of discovery would in practice be curtailed by effective case management.

(e) It may well be the position that a combination of the Queensland and New South Wales models could be best suited to our system. In that regard, the following proposal could achieve a cost effective, yet just result:

(i) the right to obtain discovery be limited to documents that are directly relevant, with the Court retaining a residual discretion to enlarge the ambit of discovery upon good cause being shown by the party seeking wider discovery. For example, general discovery may be appropriate in cases involving allegations of dishonesty;[105]

(ii) at an early directions hearing, perhaps after the filing of a defence, the parties specify categories of documents in relation to which discovery is to be provided, the Court ordering discovery only in relation to those categories considered to be necessary to

fairly dispose of the action. Cases can be imagined in which the Court will not consider it necessary at all to give discovery;

(iii) the Court ought to retain a discretion to order that discovery take place in stages. That would ensure that parties are not swamped by a mass of documents. In particular, that may be appropriate in relation to a division between liability and damages.

One attraction of the abovementioned proposal is that it forces the parties to focus on the true issues or the most important issues at the earliest of stages, thereby eliminating unnecessary discovery. Another attraction is that there exists a residual discretion to tailor discovery to suit the circumstances of each matter.

The abovementioned model is not dissimilar to the Federal Court model, as modified by the soon-to-be-published practice direction. It may be argued that such practice is likely to work well in the Federal Court, because of the docket system pursuant to which discovery issues are judicially controlled. In the Supreme Court, however, the only interlocutory matters that attract constant judicial control are matters in the long causes list.[106]

The matters in the long causes list, however, are most likely to be the very sorts of matters that require judicial control over the discovery process. That being the position, the discovery process in large complex cases will be judicially controlled in the Supreme Court (it being the position of necessity that large, complex cases will automatically fall within the long causes list). Matters not in the long causes list are generally unlikely to attract complex considerations in relation to the ambit of discovery and accordingly will not generally require judicial control over discovery.[107] This is likely to also be the position in most District Court actions.[108]

A further question which arises is whether the test of direct relevance is likely to result in documents being omitted from being discovered that may have a material impact upon the outcome of a matter. Whilst this would appear to be a rhetorical question, it is nevertheless a matter that needs to be looked at. It is our view that if a document is not directly relevant to an issue in dispute, it is unlikely to have a material bearing on the outcome of a matter. It is inconceivable that the 'documents that are critical to the result of the trial' that are 'substantially less than 50' in large complex cases, as alluded to by Justice David Ipp[109] are not documents that are directly relevant to the issues in dispute.

Of perhaps greater concern in this context are differing perceptions as to what documents are likely to be directly relevant to an issue. In our view, there ought not to be differing perceptions in that regard as the test of direct relevance is a narrow test, capable of being objectively applied. In any event,

as may be seen below it is recommended that the sanctions for inadequate discovery be enlarged. This will ensure that if parties are in doubt, they should discover.

Discovery of copies of documents ought to be substantially limited in accordance with the Queensland model. There exists no good reason to insist upon discovery of copies of documents in circumstances in which there exist no notations on the copies that are relevant to any issue.

The process of giving discovery

If the ambit of discovery is to be limited, in our view it becomes all the more important that a list of documents be verified by affidavit. In Queensland it is still regarded as a prudent practice for a list of documents to be prepared, notwithstanding that there is no longer a formal requirement to do so.[110]

In accordance with proposed changes in the United Kingdom and the New South Wales model, we are of the view that there is merit in the system pursuant to which it is stipulated in the affidavit sworn by the deponent that the deponent has made reasonable inquiries and that there exist no documents other than those documents specified in the list that are relevant.

We are further of the view that tight and strictly enforced deadlines should be imposed for complying with orders for discovery, as that tends to restrict costs associated with the process of giving discovery.[111] The time limits imposed should not be departed from, unless there exists very good cause.

The discovery process where privilege is claimed

In our view, no good reason exists to make any changes where privilege is claimed within the context of discovery.

Certificate given by a solicitor

If the ambit of discovery is too narrow, it becomes all the more important for a solicitor to explain the obligations of discovery to a client. Our current rules do not require a solicitor to do anything further than to certify that the obligations of discovery have been explained to the client.[112] In our view it also ought to be necessary for a solicitor to certify that the solicitor is not aware of any discoverable documents, which have not already been discovered. The adoption of the New South Wales Rules would be appropriate in this context.[113]

The process of providing inspection

The existing rules appear to adequately cater for the inspection process.

Applications for further and better discovery

If the class of discoverable documents is to be narrowed, it should be made easier to apply to obtain further and better discovery if a document or class of documents is thought to not have been discovered, which ought to have been discovered. In that regard, we recommend the adoption of the Federal Court Rules. Pursuant thereto, if an opponent's affidavit of documents appears to be sufficient in point of form, application may still be made if there are grounds for belief that a document or class of documents has not been

discovered, to compel the other party to file an affidavit stating whether that document or class of documents is or has been in that party's possession, custody or power, and if it has but is no longer, then to compel that party to state when he parted with it and what has become of it.[114]

Sanctions for inadequate discovery

As mentioned above, if the ambit of discovery is to be narrowed, sanctions for inadequate discovery or failing to discover a relevant document ought to be increased. The profession needs to be made aware of the enormous responsibility associated with the process of discovery.

Cross examination on discovery affidavit

In exceptional circumstances where it is clear that inadequate discovery has been made, the Court ought to be vested with a discretion to permit cross-examination on an affidavit of discovery. This ought only to be permitted in circumstances in which the party giving discovery appears to be misinterpreting or shielding behind the test of direct relevance.

Adapting the submissions to fundamental reform

Consideration is also being given to reform of the pleading process in sub-section 2.5. In this regard, a major proposal under consideration is to reform the process of civil litigation so that at the commencement of an action, a complaint will be filed and served together with supporting documentation. In response, it is proposed that a defence be filed and served together with supporting documentation. If that proposal is to be implemented, all of the abovementioned proposals could still be implemented. At an early case management conference, it could be determined whether discovery is necessary in light of documents that have been exchanged. If discovery is still thought to be necessary, the proposals referred to above could be implemented.

DISCOVERY TO IDENTIFY A POTENTIAL PARTY AND DISCOVERY FROM A NON-PARTY[115]

There is no evidence to suggest that any of the newly enacted provisions have been anything other than helpful since their introduction.[116] It ought to be borne in mind, however, that if modifications are made to the ambit of discovery in the context of *Supreme Court Rules* Order 26, more particularly in relation to the test of relevance, that test ought to be accordingly modified in *Supreme Court Rules* Order 26A.

SUMMARY OF PROPOSALS FOR DISCOVERY

1. Discovery should be confined to documents that are directly relevant to the issues in dispute, subject to the Court having a residual discretion to enlarge the ambit of discovery where necessary. Application for leave to enlarge the ambit of discovery is to be made by the party seeking wider discovery. Leave should only be granted where the interests of justice clearly require that to occur.

2. An early directions hearing should be held after the filing of a defence. At the directions hearing the parties should specify categories of documents in relation to which discovery is sought, the Court ordering

discovery only in relation to those categories considered to be necessary to fairly dispose of the action. In many cases it may not be necessary to give discovery at all.

3. The Court retain a discretion to order discovery in phases. The Court should be particularly amenable to that approach in drawing a distinction between discovery of documents relating to liability, and discovery of documents relating to damages.

4. Strict time limits should be imposed for complying with orders for discovery, which should not be departed from unless there exists very good cause.

5. Discovery of documents on oath verifying a list of documents should be retained. In the affidavit of discovery the deponent should swear that reasonable inquiries have been made and that there exist no documents other than those documents specified in the list that are relevant.

6. In every case in which discovery is provided, a solicitor's certificate ought to be provided wherein it is stated that:

(a) the obligations of discovery have been fully explained to the client; and

(b) the solicitor is not aware of any discoverable documents, which have not already been discovered.

7. Applications for further and better discovery ought to be facilitated by a more relaxed test, namely that there exist grounds for belief that a document or class of documents has not been discovered.

8. Sanctions for inadequate discovery ought to be increased. In particular, the failure to provide adequate discovery should expressly be stated to attract the possibility of proceedings for contempt of Court (both against the client and the solicitor). The sanction of indemnity costs ought to be more freely exercised in circumstances in which there has been failure to discover a material relevant document.

9. In circumstances in which it is clear that a party providing discovery appears to be misinterpreting the test of direct relevance, or shielding behind that test, the Court ought to be vested with a discretion to permit cross-examination on an affidavit of discovery.

INTERROGATORIES[117]

Interrogatories are a method of discovery of material facts by which written questions are delivered by one party to another party relating to a matter in question between them in the cause or matter. The procedure relating to interrogation is under the control or supervision of the Court. For example, in some jurisdictions the Court will determine matters such as whether or not interrogatories should be delivered at all, what interrogatories should be

allowed and whether or not the party interrogated may take and sustain an objection to answering particular interrogatories. It should be distinguished from the Canadian and United States practice of pre-trial oral examination usually called and known as depositions. The function of interrogatories was described succinctly in the Victorian case of *Adams v Dickeson*, in these terms:

> The prime objective of interrogation is to enable the party to litigation to obtain discovery of material facts in order either to support or establish proof of his own case, or to find out what case (but not the evidence) he has to meet; or to destroy or damage the case brought by his opposition.[118]

It has also been stated:

> Similar advantages may be claimed for interrogatories as for discovery. Interrogatories assist in determining the extent of the dispute by narrowing the necessary proof of the matters raised in the pleadings and by doing this at an early stage. They may also elicit likely difficulties that the parties will encounter in proving their cases at trial. The major disadvantage is that in some cases the benefit to be obtained is outweighed by the inconvenience in terms of the time-consuming and expensive procedure involved. In some cases the nature of the litigation tends to indicate that interrogatories are useless and a party may be tempted to deliver interrogatories for mere tactical reasons to harass or delay the other party. The American critics have indicated that abuse of the interrogatory procedure is also all too evident in American jurisdictions.[119]

The purpose of this part of the sub-section is to:

(a) ascertain what problems in fact exist in relation to the process of interrogatories;

(b) analyse whether the existing *Supreme Court Rules* adequately address those difficulties, and if not, whether law reform would be desirable; and

(c) analyse the position in other jurisdictions and ascertain whether the position in other jurisdictions or aspects thereof could usefully be utilised in order to reform the law in Western Australia.

THE PURPOSE OF INTERROGATORIES[120]

It is necessary to deliver interrogatories where a party having the onus of proof must depend upon the other party as the only source of information from which a party can hope to establish facts to set up a prima facie case. For example, in a case in which a plaintiff is injured in circumstances where the plaintiff has no recollection of the accident and no independent witnesses, interrogatories will assume critical importance. Another example is afforded by the typical defective consumer product case where the plaintiff suffers injuries in circumstances which suggest that the product had inherent defects

of manufacture. The plaintiff will be forced to prove the case out of material held by the defendant and the knowledge of the defendant's servants and agents.

Where both parties are in possession of information and knowledge about the circumstances giving rise to the cause of action, but their versions differ, the role of interrogatories is directed to obtaining admissions, narrowing the issues in dispute and seeking particulars which will support the party's case or weaken that of the opponent. This may apply in matters equally as diverse as running down actions, contested wills or patent cases.

In particular, interrogatories may be useful or indeed critical to procure the admissibility of documents in a matter.

Answers to interrogatories may be tendered by a party at trial as evidence.

HISTORICAL BACKGROUND[121]

The right to discovery of an opponent's documents and the right to interrogate him are both part of the process of discovery, having common origins in the old Chancery practice. In a Chancery action all the evidence was documentary, so that it was necessary that there should be stringent powers of getting the truth out by interrogatories. In a common law action all the evidence was oral and subject to cross-examination. The powers of discovery first given to the Courts of Common Law by *Evidence Act 1851* (UK) and then by the *Common Law Procedure Act 1854* (UK) were of a different nature. In those Courts interrogatories were confined to the purpose of obtaining admissions to save expense. The *Judicature Acts* (UK) introduced a practice which was a modification of the old Chancery practice and an expansion of the new common law practice. This is the foundation of the modern law and practice of interrogatories, which Edward Bray in *The Principles and Practice of Discovery* 1885 described in this way:

> The right of discovery is the right by which a party to some proceedings (actually commenced or contemplated) before a civil Court is enabled, before the determination of any matter in questions in those proceedings, to extort on oath from another party to those proceedings (1) all his knowledge, remembrance, information and belief (of facts … not of matters of law …) concerning the matter so in question; (2) the production of all documents in his possession or power relating to such matter. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes or thinks in relation to the matter in question … In fact, one of the chief purposes of discovery is to obtain from the opponent an admission of the case made against him.[122]

SALIENT FEATURES OF THE EXISTING REGIME IN WA

The procedure for interrogatories is governed by *Supreme Court Rules* Order 27.

Leave is required to interrogate in all matters in the Supreme Court.[123] In the District Court, leave is also required to interrogate except in specified categories relating to actions involving a claim for personal injury.[124]

There are no express provisions contained in Order 27 as to the manner in which the Court should exercise its discretion to grant leave to interrogate (save for disallowing interrogatories that are scandalous or irrelevant etc).

The Court's discretion to order interrogatories appears to be governed by:

(a) the system of positive case flow management which is to be applied by virtue of Order 1 rule 4B;[125]

(b) if in the particular circumstances it is unreasonable to interrogate rather than to use other modes of proof, the Court is unlikely to make an order.[126] Grounds for objection to answering an interrogatory are numerous and accordingly great care is to be taken in drafting interrogatories so as to prevent any objection being taken on a technical ground.

SHOULD INTERROGATORIES BE ABOLISHED?

No express limit is contained in the *Supreme Court Rules* as to the number of interrogatories that may be administered.

Justice David Ipp summarised the principal difficulty with interrogatories as follows:

> Interrogatories may also cause serious problems. They are generally easier to formulate than to respond to. In an era of boilerplate interrogatories formulated by young solicitors and spewed out by word processors, masses of questions can be churned out at low cost to the initiating party but at high cost to the responding party.[127]

The question arises as to whether the process of interrogatories is useful and relevant to modern litigation. General resort to interrogatories has been questioned in various quarters. Some judges have remarked that interrogatories are used without regard as to whether they are appropriate or necessary to particular proceedings.[128]

In England there appears to have existed a curious turn of events in relation to views as to the utility of interrogatories. Prior to 5 February 1990 interrogatories were only allowed with leave. At a time when interrogatories were only allowed with leave, Sir Jack Jacob said that in England interrogatories are rarely allowed as a matter of practice and that they have largely fallen into disuse.[129] The English Rules, apparently in response, were then amended with effect from February 1990 so as to allow the delivery of interrogatories without leave.[130] The only restriction on administering interrogatories was

the imposition of the requirement that they were only to be asked where they were necessary for fairly disposing of the cause or matter or for saving costs. This elicited a judicial pronouncement in the relatively recent decision of *Det Danske Hedeselskabet v KDN International Plc,*[131] in which Coleman J alluded to 'some very specific yardsticks worth bearing in mind' when administering interrogatories:

(a) unless the answers are essential for the preparation of the requesting party's case for trial and cannot reasonably be expected to emerge from requests for further and better particulars and further discovery or witness statements, interrogatories will not normally be ordered. Interrogatories before the exchange of witness statements will almost always therefore be premature;

(b) information which is relevant to the matters in issue only in the sense that it may lead to further inquiry or that questions about it should be asked in cross examination at the trial will not be essential information for the purposes of the first consideration;

(c) requests for information which, although it may be relevant to matters in issue, can be provided only by means of detailed research or investigation which the party interrogated would not otherwise carry out for the purpose of preparing for trial will hardly ever qualify as being necessary either for disposing fairly of the cause or matter or for saving cost;

(d) hypothetical questions should not normally be asked; and

(e) requests for information ascertainable by cross-examination at the trial are inappropriate unless the party questioning can establish that it is essential for the proper preparation of his case that such information is made available to him before trial, in the sense that if the matter is left until cross examination at the trial that party will, or probably will be irremediably prejudiced in the conduct of the trial or the trial may be unduly interrupted or otherwise disorganised by the late emergence of the information.[132]

In her article 'Discovery — Justice for Whom?',[133] Justice Margaret White of the Supreme Court of Queensland had this to say about interrogatories:

> Generally, however, interrogatories are ill-regarded by practitioners who have to draft them and even more by practitioners who have to settle the answers. Interrogatories have been so curtailed by technical objections that their value is questionable.[134]

King CJ of the Supreme Court of South Australia has remarked that:

> Any abuse of the interrogatory process would therefore be strongly discouraged. Nevertheless the evils flowing from such an abuse should

> not lead to the discouragement of the proper and reasonable use of interrogatories in cases where they are warranted. They have an important and useful part to play in pre-trial procedures in aid of settlement of cases and of the fair and economical resolution.[135]

Overall, judges appear to be saying that there is still a place for interrogatories, provided that interrogatories are properly used. In that particular regard, it is interesting to note further the views of Lord Woolf and Justice Heerey, as set out below.

In Lord Woolf's Interim Report he states:

> Used sensibly, interrogatories can be an effective and efficient way in which to reduce issues. The submissions made to the Inquiry indicate that the present rules, which allow one interrogatory (ie, one set) to be administered without the leave of the Court, are being abused. It is all too easy with the assistance of word processors to produce standard interrogatories which result in unjustified expense. As the contents of pleadings will now be required to be verified, I can see no role for interrogatories in proceedings on the fast track. There are cases where they may still have a role in cases on the multi-track. However, their appropriateness should be considered at the case management conference and they should be the subject of directions in the absence of agreement'.[136]

In relation to the *Santos* litigation, it was suggested by Justice Heerey that the proper use of interrogatories might obviate some of the problems encountered in cases where there are massive numbers of documents. They could be used as a partial substitute for discovery of documents in such cases.[137]

In the United States, limits on the use of interrogatories (such as restricting the types of questions permitted, sometimes the number thereof and even whether they are allowed at all) have proved to be useful techniques in limiting expense associated with discovery. Reduction in the time taken for discovery and interrogatories has been a major feat in the success of case flow management, which is now being actively studied and promoted in some Australian jurisdictions.[138]

A survey conducted by the Australian Institute of Judicial Administration recommended that:

(a) interrogatories should not be allowed to be used without leave in personal injury litigation;

(b) the grounds of objection to answering interrogatories should be set out in the Rules; and

(c) interrogatories should not be used as a substitute for a request for further and better particulars.[139]

All of the abovementioned observations appear to be usefully summarised by David Bailey[140] who stated:

> The views on interrogatories that appear from judicial comments in various recent cases are mixed. The courts are rightly concerned about containing the costs of litigation and unnecessary delays caused in litigation by interlocutory processes. Yet judges seem reluctant to do away with interrogatories where they are useful when properly used.
>
> A survey conducted under the auspices of the Australian Institute of Judicial Administration in 1990 concluded that interrogatories were declining in popularity, although they were quite extensively administered. Increasingly, practitioners do not regard them as essential. The conclusion drawn by the report was that interrogatories are useful if applied in the right kind of case and if they are used for a proper and achievable purpose. They are costly to administer and often the responses are of limited utility. Drafting interrogatories requires skill and judges increasingly are critical of interrogatories generated automatically by word processing precedents.
>
> There is a strong case for requiring leave to be obtained before any interrogatories are delivered in any type of proceeding. The rules should spell out with more particularity the types of interrogatories that will not be permitted. Perhaps the yardsticks adopted by Coleman J in the *Det Danske Hedeselskabet case* would be usefully incorporated, along with other restrictions based on the rules in the cases. The emphasis should be on utility, the need to avoid needless cost and expense and the aim of promoting settlement of cases that ought not to proceed to trial.
>
> Interrogatories should not, however, be abolished. They are useful where appropriate. They are particularly useful where the information in issue is in the exclusive possession of the opponent.

THE POSITION IN OTHER JURISDICTIONS

As with discovery there exists a range of procedures in other jurisdictions in relation to interrogatories, ranging from the position of being permitted to request interrogatories without leave, to only being permitted to request interrogatories by the grant of leave and in circumstances in which leave is only granted if stringent conditions are satisfied.

Within Australia, the most interesting model appears to be that of Queensland. The salient features of that regime are as follows:

(a) leave is required to interrogate;[141]

(b) leave may only be granted to deliver interrogatories if the Court is satisfied that there is not likely to be available to the applicant at the trial any other reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory (the application must be accompanied by a draft of the interrogatories intended to be delivered unless the Court otherwise directs);[142]

(c) the number of interrogatories is to be no more than 30 unless the Court otherwise directs, and the number of interrogatories is to be determined by treating each distinct question as one interrogatory;[143]

(d) an answer to an interrogatory must be given directly and without evasion or resort to technicality;[144]

(e) the only grounds upon which a person may object to answering an interrogatory are:

(i) the interrogatory does not relate to a matter in question, or likely to be in question between the person and the interrogating party;

(ii) the interrogatory is vexatious or oppressive; or

(iii) privilege;[145]

(f) the failure to comply with an order directing a party to answer an interrogatory is capable of attracting numerous consequences including an order that the cause be stayed or dismissed, judgment against the person, any other consequence specified in an order in the event of a failure to answer the interrogatory, and a power to punish for contempt;

(g) the application for leave to deliver interrogatories may be made *ex parte*.

The position in the Federal Court is also of some interest. The salient features of that regime are:

(a) leave is required to deliver interrogatories;[146]

(b) the Court shall, on application, make such orders as are necessary to prevent unnecessary interrogatories or unnecessary answers to interrogatories;[147]

(c) a party is only entitled to object to answering an interrogatory on the following grounds, but no other:

(i) where the answer is not required by an order, or that the interrogatory does not relate to any matter in question between him and the party requiring the answers;

(ii) that the interrogatories are vexatious or oppressive; and

(iii) privilege;[148]

(d) answers to interrogatories may be tendered as evidence;[149]

(e) the procedures on default are equivalent to the procedures in relation to the Queensland model.[150]

In an interview conducted with Justice Christopher Carr of the Federal Court, Justice Carr indicated that within his own personal experience, he did not consider there to be any form of widespread abuse in relation to the procedure

of interrogatories in the Federal Court. Interestingly, Justice Carr stated that in his five years to date of judicial office, answers to interrogatories have only once been sought to be tendered.

In Victoria, interrogatories are allowed as of right when pleadings have closed, without leave of the Court. With leave, an interrogating party may serve further interrogatories.[151]

In the County Court, the position is that unless the Court otherwise orders, a party shall not serve written interrogatories.[152]

There exists a procedure in Victoria pursuant to which a party may be interrogated by oral examination.[153] The position is that where a party may serve interrogatories on another party relating to any question between them in the proceeding, that party may instead orally examine the other party, provided that the other party so consents.[154] Examination is to take place by way of the examination in chief and is not to be in the nature of cross-examination.[155]

The advantage of oral examination is said to be that procedure would be speedy in that answers would be given to questions and any answers which are not satisfactorily answered could be followed up with supplementary questions until a satisfactory answer was given.[156] That reasoning may have some merit in circumstances in which interrogatories are freely available, such as in Victoria. If interrogatories are limited in nature, scope and extent, then it is questionable whether such a procedure could result in a saving of time and costs.

In New South Wales, interrogatories are allowed as of right, but a party is limited to 30 questions (unless the Court otherwise specifies).[157] The Court retains an overriding discretion, however, on application being made to direct that interrogatories be not required or to limit interrogatories to certain classes or matters in question.[158]

As earlier mentioned, in Canada interrogation takes place by oral examination (similar to Victoria if a party so consents, but unlike Victoria, compulsory). See for example *Rules of the Supreme Court of British Colombia* — rule 27. This procedure, called 'Examination for Discovery', is available when an action is commenced by writ. As mentioned above, the Canadian Bar Association is critical of the process and says that 'oral discovery is the target of much dissatisfaction under the current litigation process. It is seen as an expensive and sometimes wasteful exercise'.[159]

In New Zealand interrogatories may be requested without leave[160] but the Court may on application of the party required to answer interrogatories order that answers to interrogatories shall not be required or shall be limited

to such interrogatories or classes of interrogatories or to such of the matters in question in the proceeding as may be specified in the order.[161] On any such application, the Court shall make such orders as may be required to prevent unnecessary or oppressive interrogatories or unnecessary answers to interrogatories.[162]

The position in the United Kingdom is as referred to above, namely that a party is allowed to administer interrogatories without order of the Court, with the right of the parties preserved to apply to the Court for leave to serve interrogatories which have not previously been sought without order.[163]

PROPOSED LAW REFORM IN WA

We do not believe that interrogatories should be abolished. There still exists a proper place for interrogatories. Interrogatory abuse, however, should be curtailed.

Manner in which the procedure may be curtailed

Admissibility of documents

As mentioned above, interrogatories may be useful or indeed critical to procure the admissibility of documents in a matter, in circumstances in which the only means of the document being admissible is through a witness not readily available to that party. In our view, the rules of evidence and/or procedure should be amended so that discovered documents may automatically be tendered into evidence, unless the authenticity of the document is disputed. Weight considerations can be adjudicated upon appropriately. If the ambit of discovery is curtailed, this becomes a workable proposition.

Section 79C of the *Evidence Act 1906* (WA) does not go far enough in that the requirements for admissibility of documents are too rigorous. From time to time judges of the Supreme Court have informally expressed this view.

Section 48 of the *Evidence Act 1995* (Cth) goes some distance further to facilitate admissibility of documents, but still imposes requirements that may be difficult to comply with.

One of the reasons why interrogatories may not be such a pressing problem in the Federal Court may be because of the fact that admissibility of documents into evidence is facilitated by the operation of the provisions of the *Evidence Act 1995* (Cth).

Limiting the ambit and number of interrogatories

The Queensland model appears to be particularly attractive. Whilst in our present system there exists a discretion whether to grant leave to interrogate, there ought to be more certainty in regard to the manner in which that discretion is exercised. This ought to be addressed by express incorporation into the rules of a test akin to the Queensland test. There should, however, be liberty to apply to extend the ambit in an appropriate case, where a party could be otherwise unfairly disadvantaged if not permitted to interrogate on that matter.[164]

Another particularly attractive aspect of the Queensland and New South Wales model is that interrogatories are limited to 30 questions, with leave to increase that number in an appropriate case. This will cause the parties to focus on the true issues and to formulate interrogatories with precision.

Limit ambit of objections

We also consider it to be a good innovation for it to be expressly provided in the rules that where interrogatories are ordered, an answer must be given directly and without resort to undue technicality.

Sanctions for failing to answer interrogatories

If interrogatories are to be severely curtailed, parties failing to answer or properly answer interrogatories should at least face the sanction of being required to attend an oral examination. The existing default procedures are otherwise adequate.

In what manner should application for leave be made?

In accordance with the Queensland model, application may be made without notice to any other party,[165] and the application must be accompanied by a draft of the interrogatories intended to be delivered.[166] The advantage of applying *ex parte* is that it eliminates unnecessary costs. The disadvantage is that the respondent is not present to resist such an application and to demonstrate to the Court why leave should not be granted. It should be borne in mind, however, that pursuant to the Queensland model there is still scope for the respondent to resist answering the interrogatories by taking a legitimate objection.[167] We agree with the Queensland approach.

Whether the abovementioned recommendations might interfere with early settlements being achieved

As mentioned earlier herein, one of the advantages of interrogatories is that they may be of assistance in promoting settlement by enabling the parties to assess the strength or weaknesses of their respective cases. If a strict approach is to be taken to interrogatories by severely curtailing the circumstances in which interrogatories may be administered, this advantage is likely to be eliminated. It would seem to be the position, however, that early settlements through administering interrogatories only occur in the minority of cases in which interrogatories are administered. Accordingly, the benefit of achieving early settlements through administering interrogatories appears to be outweighed by the attendant inconvenience of a more lenient approach.[168] The effect of the abovementioned reforms would be to quite fundamentally change the purpose of interrogatories from broad discovery of facts relating to the other party's case to discovery of facts critical to matters of proof (save in exceptional circumstances where the Court is satisfied that the interrogating party will be at an unfair disadvantage if interrogatories of a broader nature are not permitted).

SUMMARY OF PROPOSALS FOR INTERROGATORIES

1. Interrogatories should not be abolished but should be curtailed.

2. All discovered documents should be automatically capable of being tendered without reference to a witness. The weight to be given to any such documents will be a matter for the judge. This is likely to materially reduce the need to administer interrogatories.

3. Leave may only be granted to deliver interrogatories if a Court is satisfied that there is not likely to be available to the applicant at the trial any other reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory. Leave should also be granted if the applicant can demonstrate an unfair disadvantage if leave is not granted. The application must be accompanied by a draft of the interrogatories intended to be delivered unless the Court otherwise directs.

4. The number of interrogatories is to be no more than 30 unless the Court otherwise directs, and the number of interrogatories is to be determined by treating each distinct question as one interrogatory.

5. An answer to an interrogatory must be given directly and without evasion or resort to technicality.

6. If parties fail to properly answer interrogatories, they may face the sanction of being required to attend an oral examination.

ENDNOTES

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1 *Davies v Eli-Lilly & Co* [1987] 1 All ER 801, 804 (Donaldson MR).

2 P Matthews & HM Malek, *Discovery* (1992) in the Litigation Library Series.

3 See Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 164.

4 Ibid 165.

5 Loren Kieve, 'Discovery Reform' (December, 1991) *American Bar Association Journal* 79. See further D Downey, 'Discoverectomy — A Proposal to Eliminate Discovery' (1992) 11 *Review of Litigation* 475.

6 See observations contained in M White, 'Discovery — Justice for Whom?' (Paper presented at the 28th Australian Legal Convention, September 1993) 121.

7 *County Court Rules of Procedure in Civil Proceedings 1989* (Vic) O 34A.

8 *Supreme Court Rules 1995* (NT) O 29 r 2(1); *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 29 r 2(1). Some jurisdictions such as WA provide initial discovery as of right: *Rules of the Supreme Court 1971* (WA) O 26 r 1, subject to curtailment of that right by operation of O 26 r 7.

9 See DL Bailey and EK Evans, *Discovery and Interrogatories in Australia* (1997) 5028, para 1010.

10 See Bernard C Cairns, *Australian Civil Procedure* (4th ed, 1996) 359.

11 See Seaman, *Civil Procedure Western Australia* (1990-) para 26.0.1.

12 *Commonwealth v Miller* (1910) 10 CLR 742, 752.

13 See Cairns, above n 10, 360.

14 See White, above n 6, 123.

15 (1882) 11 QBD 55, 63.

16 (1959) 103 CLR 341, 345.

17 During the course of an interview with Master Bredmeyer of the Supreme Court of WA, he indicated that in his experience r 7(3)(b) is seldom used to limit the ambit of what discovery is

required to be made at first instance.

18 See pp 349-352.

19 Seaman, above n 11, para 26.0.5.

20 *Cooke v Australian National Railways Commission* (1985) 39 SASR 146, 149.

21 *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 2 NSWLR 340, 345. See further *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 wherein the High Court held that where the successful party has failed to discover relevant documents, and that is not ascertained until after judgment, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that the opposite result would have been reached had the documents been discovered.

22 See Marnie Costello, 'The Legal Practitioners Disciplinary Tribunal: A Solicitor's Duty Regarding Discovery' (November 1996) 23(10) *Brief* 26-27.

23 See *Rules of the Supreme Court 1971* (WA) O 26 r 15A.

24 See ALRC, *Review of the Adversarial System of Litigation — Rethinking the Federal Civil Litigation System,* Issues Paper No 20 (April 1997) 60; see further D Ipp, 'Reforms to the Adversarial Process in Civil Litigation — Part II' (1995) 69 *Australian Law Journal* 790, 793; Woolf, above n 3, 164; SA Sheldon, 'Some Proposed Changes in Civil Procedures: Their Practical Benefits and Ethical Rationale (1993) 3 *Journal of Judicial Administration* 111; The Allen Consulting Group, *Trends in the Australian Legal System Avoiding a More Litigious Society*, 29-30.

25 Ipp, above n 24, 793-794 (emphasis added).

26 See ALRC, above n 24, 60.

27 Ibid. See further Woolf, above n 3, 167 where it was stated: 'The result of the P*eruvian Guano* test was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.'

28 See eg survey of British lawyers undertaken by David Mackie for Lord Woolf in D Mackie, 'Discovery in Commercial Litigation' in Zuckerman & Cranston (eds), *Reform of the Civil Procedure: Essays on Access to Justice* (1995) 138 ff.

29 Interview with Justice Steytler, Supreme Court of WA (Perth, 17 November 1998).

30 Law Council of Australia, *Submission to the ALRC: Review of the Adversarial System of Litigation, Issues paper No 20* (November 1997) para 7.6.1.

31 Ibid para 7.6.2 (emphasis added).

32 Ibid para 7.7.1.

33 Linda S Mullenix, 'Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rule Making' (July 1994) 46 *Stanford Law Review* 1393, 1396.

34 (1992) ATPR 41. See P Heerey, 'Some Lessons from Santos' (4 May 1994) 29 *Australian Lawyer* 24.

35 (Unreported, Federal Court of NSW, District Registry NG572 of 1995).

36 *BT Australasia v New South Wales* (Unreported, Federal Court NSW, District Registry, 7 May 1998).

37 Australian Institute of Judicial Administration Incorporated, *The Use of Discovery and Interrogatories in Civil Litigation* (1990).

38 Ibid 51.

39 Ibid 2.

40 This is in itself indicated by the exasperation of the judges in *Santos,* above n 34, and *BT v Telstra,* above n 35.

41 See above n 19.

42 *Rules of the Supreme Court* (UK) O 24.

43 Woolf, above n 3, 167, para 17.

44 Ibid para 18.

45 Ibid 168, para 22.

46 Ibid 170, para 29.

47 Ibid 170-171, paras 30-32.

48 Ibid 171, para 33.

49 Ibid 172, para 40.

50 Woolf, Lord, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 125.

51 Ibid 126, para 43.

52 Ibid 126, paras 44-46.

53 It is submitted that it will not be difficult to obtain an order for discovery pursuant to the former part of that test, and that accordingly discovery is likely to be ordered in the majority of actions.

54 The criterion for disclosure included in the original draft but now omitted is that of 'materiality' from Lord Woolf's second category. Some authors consider that the loss of this part of the test does make all the difference and results in the current width of discovery being re-stated: see Margaret Hemsworth, 'Disclosure under the new Civil Procedure Rules' (September 11, 1998) 148 *New Law Journal* 1300. Margaret Hemsworth goes on to state that 'there has been a considerable cooling of

the feet about the extent of the reforms first proposed. One of the intentions of the original proposals was to seek to reduce one party's ability to use the disclosure process as a tactical means to over-burden his opponent and to run his opponent's case into the ground before trial. These original proposals were designed to ensure that so far as is possible, parties should conduct the litigation on a "level playing field". This objective seems now to be reflected in the revised draft rules relating to the extent of the duty to carry out a search for potentially relevant documents'.

55 Ibid 1331: Margaret Hemsworth comments that whilst the first three factors may easily be evaluated without attempting the search, it may be argued that the significance of many documents may not be known until a search is actually made, the documents located and their contents considered. No specific guidance is yet given on this or on any of the other factors, particularly whether the presence of a particular factor points in favour of a search or not.

56 The ancient rules were not entirely dissimilar from our current rules. The term 'ancient rules' appears in 'Practice and Procedure' (1995) 25 *Queensland Law Society Journal* 119.

57 *Rules of the Supreme Court* (Qld) O 35 r 4(1)(b).

58 *Rules of the Supreme Court* (Qld) O 35 r 4(1)(a).

59 *Rules of the Supreme Court* (Qld) O 35 r 9.

60 *Rules of the Supreme Court* (Qld) O 35 r 11.

61 *Rules of the Supreme Court* (Qld) O 35 r 5(2).

62 White, above n 6, 132-133.

63 Ipp, above n 24, 794-795.

64 Ibid 797.

65 In accordance with Lord Woolf's proposal.

66 Williams J (Qld Supreme Court Rules Committee) in a letter to Master Bredmeyer (Supreme Court of WA).

67 *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 29 r 2.

68 *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 29 r 5.

69 Neil James Williams, *Civil Procedure: Victoria* (1987) [I 34A. 01.45].

70 Voula Konstantopoulos, 'Reform of Discovery in the County Court' (September 1998) 72 *Law Institute Journal* 40.

71 Ibid.

72 Ibid.

73 *Federal Court Rules* O 15 r 1.

74 *Federal Court Rules* O 15 rr 3(1) and (2).

75 Observations of Justice Carr of the Federal Court during a telephone conference.

76 The new practice direction has not yet been published. Justice Carr states that the new practice direction is to be published shortly.

77 *Supreme Court Rules 1970* (NSW) pt 23 r 2. The intention underlying this sub-rule is that parties are not to be subjected to any kind of general discovery obligation unless an express order for discovery is made by the Court. See A V Ritchie, *Supreme Court Procedure: NSW* (1972) para 23.2.2.

78 *Supreme Court Rules 1970* (NSW) pt 23.1(d). Note that this test is slightly narrower than the *Peruvian Guano* test. Pursuant to the *Peruvian Guano* test, any document is discoverable not only if it would tend to advance either party's case but also if it might reasonably be regarded as leading to a train of inquiry that might have that effect. See Ritchie, above n 77, para 23.2.3.

79 *Supreme Court Rules 1970* (NSW) pt 23.3. Discovery is accordingly limited to classes of documents and the classes are not to be specified more widely than the Court considers just in the circumstances. The purpose of the rule is to permit the proper determination of the issues between the parties while avoiding discovery that is unnecessary or unjustified. Ritchie, above n 77, para 23.2.3]

80 *Supreme Court Rules 1970* (NSW) Pt 23 r 3(5).

81 *Supreme Court Rules 1970* (NSW) Pt 23 r 3(5)(c).

82 *Supreme Court Rules 1970* (NSW) Pt 23 r 3(9)-(10).

83 Ritchie, above n 77, para 23.3.8.

84 Ritchie, above n 77, para 23.3.20.

85 *Supreme Court Rules 1970* (NSW) pt 23 rr 4(c) and 6. It is interesting to note that the obligation on a solicitor in New South Wales in relation to the process of discovery appears to be far more rigorous than in any other jurisdiction referred to above. It would undoubtedly therefore appear to be the position that a solicitor who fails to comply with these obligations could more easily attract contempt proceedings, depending of course upon the circumstances of the matter.

86 *New Zealand High Court Rules* HR 293.

87 *New Zealand High Court Rules* HR 295.

88 *New Zealand High Court Rules* HR 312.

89 *New Zealand High Court Rules* HR 295. See further *McGechan on Procedure: High Court Rules* (1988) HR 293, Intro 03.

90 *New Zealand High Court Rules* HR 317A.

91 See *McGechan on Procedure*, above n 89, HR 293, Intro 1. One difference, however, is that general discovery pursuant to the *Peruvian Guano* test will be required to be made unless the Court otherwise directs: see *McGechan on Procedure,* ibid HR 293.08 and HR 293, Intro 03.

92 See Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 126. In Germany, the major documents in the plaintiff's possession that support his claim are scheduled and often appended to the initiating complaint, and the defendant's answer follows the same pattern. Neither the plaintiff's nor defendant's lawyer will have conducted any significant search for witnesses or for other evidence unknown to his client. Digging for facts is primarily the work for the judge. See JH Langbein, 'The German Advantage in Civil Procedure' 52 *University of Chicago Law Review* 823, 827.
93 See White, above n 6, 129.
94 See Arthur Ian Miltz, *Art of Advocacy – Discovery* (1982) para 2.01. It is further stated therein 'to fulfil the purpose of discovery — to assemble information and to expose the merits of claims and defences — it is imperative that the scope of discovery be broad'.
95 Greg M Zipes, 'Discovery Abuse in the Civil Adversary System: Looking to Bankruptcy Regime of Mandatory Disclosure and Third Party Control Over the Discovery Process for Solutions' (1997) 27 *Cumberland Law Review* 1107, 1126-1127.
96 Ibid 1125.
97 See Gordon D Cudmore, *Choate on Discovery* (2nd ed, 1993) para 2.1(a).
98 See Canadian Bar Association, *Task Force on Systems of Civil Justice* (August 1996) 43, para 5.2.
99 Ibid.
100 Oral discovery is however said to be the target of much dissatisfaction in the Canadian process and is seen as an expensive and sometimes wasteful exercise: see Canadian Bar Association, above n 98, 43.
101 See ALRC, above n 24, para 7.18.
102 See eg *Santos,* above n 34, and the decision of *BT v Telstra*, above n 35. See further Law Council of Australia, above n 30, para 7.6.1.
103 See Ipp, above n 24, 793.
104 The retention of a 'just' or 'fair' system is an ideal frequently referred to by Lord Woolf.
105 See Woolf, above n 3, 171.
106 Seaman, above n 11, para 1.4B.2.
107 As mentioned earlier, the Law Council of Australia suggests that discovery is really only a problem in relation to large complex cases.
108 See V Konstontopoulos, above n 70, 40 wherein it is stated 'conversely, it can be argued that 'many County Court actions do not necessarily involve large numbers of documents and the excesses and problems caused in the larger commercial disputes will not usually be encountered in County Court litigation'.
109 Ipp, above n 24, 794.
110 See GN Williams, *Supreme Court Practice: Queensland* [35.9.1] wherein it is stated: 'However, it is suggested that, in all but the simplest of cases, good practice will dictate that a list of documents be prepared so as to avoid arguments at a later time as to what documents were or were not disclosed'.
111 See JS Kakilk, 'Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data' <http:// WWW.rand.org/publications/MR/MR941>. This was an independent evaluation commissioned in the United States of America, mandated by the *Civil Justice Reform Act 1990*. Empirical data was collected in relation to the discovery process in the USA. At p 12 it is stated 'shortening discovery cutoff significantly reduces lawyer work hours and thus litigation costs, and reduces time to case disposition'. See further Ipp, above n 24, 796 wherein it is stated 'It is contended that strict and tight deadlines will eliminate abuses in most cases. The key to controlling discovery abuse in most cases is strict enforcement of tight discovery deadlines and prompt judicial resolution of discovery disputes … The eastern district of Virginia is a model for eliminating discovery abuse, simply by the utilisation of strict, tight, deadlines. A discovery period is fixed after discussion with the parties and rarely altered thereafter. The Court compels the parties to adhere to the period that is determined. Arguments as to discovery issues are disposed of weekly and seldom take longer than 10 minutes a hearing. This approach, coupled with preclusionary sanctions, appears to have had a singular effect on discovery abuse. … Further, tight discovery deadlines will not work without swift judicial resolution of disputes, and arrangements should be made to ensure that motions to compel proper discovery are heard within no later than 2 weeks after filing'.
112 *Rules of the Supreme Court 1971* (WA) O 15A.
113 *Rules of the Supreme Court 1970* (NSW) Pt 23 r 3(5)(c): pursuant to which a solicitor is required to provide a certificate stating that the solicitor is not aware of any documents within any of the classes specified in the order for discovery (other than excluded documents).
114 *Federal Court Rules* O 15 r 8.
115 *Rules of the Supreme Court 1971* (WA) O 26A.
116 During an interview with Master Bredmeyer he indicated that no difficulties appear to be experienced in relation to the application of the new rules and that they appear to be working reasonably well.
117 These observations are for the most part taken directly from Bailey & Evans, above n 9, 1045.
118 [1974] VR 77, 79.
119 Steven M Umin, 'Discovery Reform: A New Era or Business as Usual' (1979) 65 *American Bar Association Journal* 1050.

120 These observations are for the most part extracted from Bailey & Evans, above n 9, [1050].
121 The observations set out are derived from Seaman, above n 11, [27.0.1].
122 Edward Bray, *The Principles and Practice of Discovery* (London: Reeves & Turner, 1885) 1.
123 *Rules of the Supreme Court 1971* (WA) O 27 r 1.
124 *Rules of the District Court 1996* (WA) O 3 r 2.
125 *Rules of the Supreme Court 1971* (WA) O 1 r 4B sets out systems of case flow management with objects of inter alia promoting the just determination of litigation, disposing efficiently of the business of the Court, maximising the efficient use of available judicial and administrative resources and facilitating the timely disposal of business at a cost affordable by parties.
126 *Lang v Australian Coastal Shipping Commission* [1974] 2 NSWLR 70, 73.
127 Ipp, above n 24, 794.
128 Bailey & Evans, above n 9, [1050]. See further *Hughes v Western Australian Cricket Association Inc* (1986) ATPR 40-726.
129 J Jacobs, *The Reform of Civil Procedural Law* (1982) 76.
130 The new rules are stated to be among the first fruits of the Civil Justice Review of 1988 (Cmnd 394) which recommend that a party should have an automatic right to administer interrogatories subject only to a contrary order of the Court made following an application by the party to be interrogated. The new Rules are said to implement this recommendation. See *Supreme Court Practice* 26/1/1.
131 [1994] Lloyd's Rep 534.
132 See *Det Danske Hedeselskabet v KDN International Plc,* above n 131, 537.
133 White, above n 6.
134 Ibid 135.
135 *Barbarian Motor Cycle Club Inc v Koithan* (1984) 35 SASR 481, 485.
136 Woolf, above n 3, 173.
137 Heerey J, above n 34.
138 Bailey & Evans, above n 9, [1055].
139 Ibid.
140 David Bailey, 'Are Interrogatories Necessary?' (June 1995) *Law Institute Journal* 522-524.
141 *Rules of the Supreme Court* (Qld) O 35 r 20.
142 *Rules of the Supreme Court* (Qld) O 35 r 21.
143 *Rules of the Supreme Court* (Qld) O 35 r 20.
144 *Rules of the Supreme Court* (Qld) O 35 r 23(3).
145 *Rules of the Supreme Court* (Qld) O 35 r 24.
146 *Federal Court Rules* O 16 r 1. The 'leave requirement' of Rule 1 was introduced into the *Federal Court's Rules* in 1986. As was stated in *Abduramanoscki & Anor v Aidan Nominees Pty Ltd* (Unreported, Federal Court, French J, 2 November 1997) the sub-rule confers a broad discretion on the Court which enables the Court to regulate the availability of the facility of interrogation. Particularly the important attribute of the proposed interrogatory will be its contribution to achieving a fair and expeditious conduct of the proceedings. See CCH Australian Ltd, *High Court and Federal Court Practice* (1978-) para 60, 861.
147 *Federal Court Rules* O 16 r 3(3).
148 *Federal Court Rules* O 16 r 6(3).
149 *Federal Court Rules* O 16 r 10.
150 *Federal Court Rules* O 16 r 9.
151 *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 30 r 2.
152 *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 34A r 17.
153 *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 31.
154 *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 31 r 2.
155 *General Rules of Procedure in Civil Proceedings 1996* (Vic) O 31 r 11.
156 A Bates, 'Should Discovery by Oral Examination be Adopted in Queensland?' (December 1995) 16 *Queensland Lawyer* 92.
157 *Supreme Court Rules 1970* (NSW) pt 24 O 1.
158 *Supreme Court Rules 1970* (NSW) pt 24 O 3.
159 Canadian Bar Association, above n 98, 43.
160 *New Zealand High Court Rules* HR 280.
161 *New Zealand High Court Rules* HR 280.
162 *New Zealand High Court Rules* HR 280.
163 *Rules of the Supreme Court 1965* (UK) O 26 r 1.
164 Circumstances may be envisaged in which the Court should grant leave to interrogate, notwithstanding that the proposed interrogatory does not relate to proof of a matter that is difficult or expensive to prove. For example, when acting for a defendant to an alleged breach of the *Trade Practices Act 1975* (Cth) s 52 involving oral representations only, it may often be difficult in cross-examination to meaningfully test the plaintiff's version of events. This is particularly so in circumstances in which the plaintiff's clear evidence is that the alleged representations were made, but the defendant in all honesty cannot precisely recall what was said, but is fairly certain that a representation of the nature alleged would not have been made. Interrogatories provides a mechanism pursuant to which the

plaintiff is committed evidentially to a version of events at an early stage which can then be tested in cross-examination. In such circumstances it is likely to be in the interests of a fair resolution of the dispute to grant leave to interrogate.

165 *Rules of the Supreme Court* (Qld) O 35 r 21(1)(a).
166 *Rules of the Supreme Court* (Qld) O 35 r 2(2).
167 *Rules of the Supreme Court* (Qld) O 35 r 24.
168 Interview with Justice Steytler, above n 29.

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2.7

Summary Judgment, Preliminary Issues and Written and Oral Submissions

INTRODUCTION

As Lord Woolf recognised in his review of the civil justice system in England and Wales,[1] in order to ensure access to justice the civil justice system should:

(a) be *just* in the results it delivers;
(b) be *fair* in the way it treats litigants;
(c) offer appropriate procedures at a reasonable *cost*;
(d) deal with the cases at a reasonable *speed*;
(e) be *understandable* to those who use it;
(f) be *responsive* to the needs of those who use it;
(g) provide as much *certainty* as the nature of particular cases allows; and
(f) be *effective*: adequately resourced and organised.[2]

In recent years the paramount concern in the reform of the administration of justice has been to improve the provision of these demands in relation to the cost and speed of civil litigation.

Summary judgment and trials of preliminary issues are particularly effective tools for disposing of litigation in a timely and cost effective manner. Both forms of proceeding, particularly summary judgment, are mechanisms whereby disputes between litigants may be resolved without the need for a full hearing and without the need for the usual pre-trial processes associated with civil litigation. The potential for these procedures to produce a final judgment[3] as to the rights of the parties in a summary manner indicate that their reform may be crucial to any long-standing reform of civil justice.

Of course, procedures designed to reduce time and cost in litigation carry the risk that a determination is reached too hastily, or without proper regard

for the rights of the parties. The courts have always been alive to the risks associated with summary or preliminary determination of issues, an approach that has produced tests for both summary judgment and trials of preliminary issues which are difficult to meet. While there are certainly signs that the approaches taken to summary determination of civil disputes have been affected by the modern approach to civil litigation, particularly that reflected in the systems of case flow management operating in both the District and Supreme Courts of Western Australia,[4] an assessment needs to be made whether the traditional approaches to such procedures have been too heavily weighted in favour of caution and certainty.

Our purpose here is to explore the ways in which both the law relating to summary judgment and trials of preliminary issues may be reformed to improve the speed and cost efficiency of the civil justice system without sacrificing the need for fairness and just results. While related, each procedure is discussed separately by analysing the existing procedures and proposing areas in which those procedures may be reformed.

Finally, we look at the area of oral and written submissions and the extent to which measures to improve the efficiency and timeliness of litigation are either lacking or insufficiently utilised.

SUMMARY JUDGMENT

Summary judgment is the principal mechanism whereby a litigant may obtain a final judgment without trial. From their very beginnings, rules enabling a plaintiff or defendant to apply for summary judgment have been designed to avoid the time and expense of litigation by obtaining judgment at an early stage in proceedings. The origin of modern rules for obtaining summary judgment can be found in the *Summary Procedure on Bills of Exchange Act 1855* (Imp) ('Keating's Act'), legislation passed by the British Parliament directed to avoiding unmeritorious defences being raised in relation to dishonoured bills of exchange.[5] Since that time, summary procedures have been gradually extended to other causes of action and to the benefit of both plaintiffs and defendants.

In Western Australia, summary judgment in the Supreme and District Courts is governed by Orders 14 and 16 of the *Rules of the Supreme Court 1971*[6] ('*Supreme Court Rules*'). Similar procedures exist in the Local Court.[7] In relation to the superior courts it should be noted that reforms introduced by the Supreme Court in 1996,[8] both expanded and rationalised the procedures in relation to summary judgment. Prior to 1 November 1996, a plaintiff could not apply for summary judgment on a writ which included a claim by the plaintiff based on an allegation of fraud or in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage.[9] Additionally, Order 15 provided separate rules for a plaintiff bringing an application for summary judgment for specific performance of

certain agreements in relation to property and rescission of, or forfeiture of deposits under such agreements.

The amendments made in 1996 repealed Order 15 and expanded the scope of Order 14 to enable summary judgment to be sought by a plaintiff in any action begun by writ other than a probate or admiralty action.[10] It remains the case, however, that separate rules in the *Supreme Court Rules* govern applications for summary judgment depending upon whether the application is made by the plaintiff or the defendant.

Existing procedures

Order 14 of the *Supreme Court Rules* enables a plaintiff[11] to apply for summary judgment. Summary judgment may be sought in relation to the whole of the claim in a writ of summons or in relation to a part of a claim.[12] A plaintiff applying for summary judgment must first satisfy a number of preconditions.

Summary judgment by the plaintiff

Firstly, the Plaintiff must have served a statement of claim. Secondly, the defendant must have entered an appearance and, thirdly, the application must be brought within 21 days after the date of appearance, or otherwise by leave of the Court. The requirement to bring the application within 21 days of the date of appearance is a reflection of the policy that summary judgment applications are designed to save costs, and accordingly should be brought before significant expense has been incurred.[13]

The effect of these requirements is that most applications for summary judgment will be made in the absence of a defence filed by the defendant, the time for filing which is automatically extended by the service of the application for summary judgment.[14]

An application for summary judgment must also be supported by an affidavit verifying the facts upon which the claim is based and stating that in the deponent's belief there is no defence to the claim.[15] The facts to be verified will be those necessary to sustain the cause of action as pleaded by the statement of claim. The affidavit may contain statements of information and belief with sources of those beliefs;[16] indeed the deponent is required to depose to his or her belief in the absence of a defence to the claim.

In determining an application for summary judgment the powers of the Court are extensive. The Court may give the defendant leave to defend either unconditionally or on such terms as it thinks fit, as to security, time or mode of trial or otherwise.[17]

Order 14 also contains specific provisions in relation to costs. Order 14 rule 8(1) provides that if it appears to the Court that the plaintiff knew that the defendant relied upon a contention that would give the defendant unconditional leave to defend, the Court may dismiss the application with

costs and order that the costs be paid by the plaintiff forthwith. Notwithstanding the clearly cautionary purpose of Order 14 Rule 8(1), the Full Court in Western Australia has held that the usual order for costs on an unsuccessful application for summary judgment be costs in the cause.[18]

There is nothing in Order 14 itself to prevent more than one application being made by a plaintiff during the course of an action and the courts will allow a further application where the interests of justice require it.[19]

Summary judgment by the defendant

A defendant to an action may apply for summary judgment pursuant to Order 16 of the *Supreme Court Rules*. The application may be made on the grounds that the action is frivolous or vexatious or that the defendant has a good defence on the merits. Proceedings may also be determined in a summary manner under Order 16 where the parties consent to such a course. Given the similarity of the tests to be applied, applications for summary judgment may be made as an alternative to, and often in conjunction with, applications to strike out the indorsement on a writ or statement of claim, either pursuant to the rules of the Court[20] or the Court's inherent jurisdiction.[21]

As in the case of applications under Order 14, an application for summary judgment by a defendant is to be supported by affidavit verifying the facts upon which the application is based,[22] which affidavit may contain statements of information and belief.[23] Unlike an application by a plaintiff seeking to establish a cause of action, a defendant applying for summary judgment may simply wish to argue that the case, as pleaded by the plaintiff's statement of claim cannot as a matter of law succeed, an argument which may require no evidence at all. In such a case it may in fact be more appropriate for the defendant to apply to strike out the plaintiff's pleadings on the basis that they disclose no reasonable cause of action and have judgment entered accordingly. In such an application evidence is not only not required but inadmissible.[24]

As in the case of Order 14, an application for summary judgment by a defendant must be made within 21 days after appearance or such other time by leave of the Court.[25]

The test to be applied

The test to be applied in an application for summary judgment by a plaintiff or defendant, while often expressed in different terms, is essentially the same. The applicant for summary judgment must demonstrate that his right to judgment is so clear that there is no real question to be tried between the parties.

The leading authority in Australia in relation to summary judgment is the decision of the High Court in *Dey v Victoria Railways Commissioner*[26] and the judgment most often cited in support of the strictness of the test is that of Dixon J. In that case, his Honour stated:

> A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.[27]

While reflecting the standard test applied in applications for summary judgment, it is immediately apparent that his Honour's formulation of the correct approach is cast in terms of whether the action is 'frivolous' or an 'abuse of process'. The language of the test itself carries with it the recognition that summary determination of civil disputes is regarded by the courts as both exceptional and not to be encouraged.

The general approach reflected in *Dey v Victoria Railways Commissioner*, has been expressed in a great variety of ways in the decided cases, a matter recognised by Barwick CJ in this judgment in *General Steel Industries Inc v Commissioner for Railways (NSW)*:

> The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense.[28]

Both *Dey v Victoria Railways Commissioner* and *General Steel Industries Inc v Commissioner for Railways (NSW)* were concerned with applications by defendants for claims to be summarily dismissed. The test is expressed in the same terms where an application for summary judgment is made by a plaintiff:

> The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.[29]

The 'exceptional' nature of the jurisdiction to grant summary judgment is particularly emphasised where the facts are in dispute and it is often remarked that factual disputes should not be resolved on an application for summary judgment and particularly not on a conflict between affidavit evidence. In *Webster v Lampard*,[30] Deane & Dawson JJ confirmed this view:

> 'Nowhere is [the] need for exceptional caution more important than in a case where the ultimate outcome turns upon the resolution of some disputed issue or issues of fact. In such a case, it is essential that

> 'great care ... be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal.[31]

Nevertheless, the approach formulated by Dixon J in *Dey v Victoria Railways Commissioner* applies equally to disputed questions of law as to disputed questions of fact.[32] In this regard judicial opinion has not always been of the same view. Indeed in *Dey v Victoria Railways Commissioner* itself Latham CJ appears to have adopted a less stringent approach to determining questions of law to that of Dixon J[33] and in some jurisdictions a contentious question of law appears more likely to be determined in a summary judgment application.[34] The preponderance of authority, however, favours the cautious approach in relation to disputed questions of law.[35]

The cautionary approach against conclusively deciding discrete questions of law in summary judgment applications would appear to have a two fold rationale. Firstly, there is a perception that a party's case in a summary judgment application may not be thoroughly and ably presented, on account of either the time available or the quality of submissions by counsel.[36] Secondly, there is a concern that the court should not risk stifling the development of the law where there is a real possibility that, in the future development of the law, the question of law may be decided in favour of the party opposing the summary judgment application.[37]

Proposals for reform

The 1996 amendments to the *Supreme Court Rules* which repealed Order 15 and expanded the scope of Order 14 went some way towards rationalising the summary judgment procedures available in the Supreme and District Courts. That rationalisation can be taken further. As is demonstrated by the above discussion, the current procedures in relation to summary judgment are substantially the same, in terms of the timing and procedural requirements and in terms of the ultimate test to be applied, whether the application is made by the plaintiff or the defendant. There is no reason why provision could not be made for a unified summary judgment procedure permitting applications by both plaintiffs and defendants. Such a rationalisation would serve to make the procedure more understandable and improve its efficiency.

The Woolf Report recommended that a single procedure be implemented in place of both summary judgment by plaintiffs, summary determination of a point of law and strike out applications by defendants.[38] In Western Australia the procedure for preliminary determination of points of law,[39] outside the context of summary judgment, should more properly be combined with the procedure for trials of preliminary issues generally discussed at pages 388-391. Nevertheless, the existing rule in Order 20 rule 19(1)(a) for striking out pleadings that disclose no reasonable cause of action or defence could also be incorporated into a combined procedure.

Proposal 1

That a single procedure for summary judgment replace the existing procedures enabling plaintiffs and defendants to bring an application for summary judgment or to strike out pleadings disclosing no reasonable cause of action or defence.

The potential for disputes to be resolved speedily and in a cost effective manner through the summary judgment procedure should not be underestimated. In so far as the current rules of court and judicial authority provide for such a difficult test for summary judgment, it is suggested that that potential is underutilised. The current approach to summary judgment applications reflect a view that, as a matter of principle, litigants should not be 'denied their day in court' and that to dispose of a matter summarily is to subvert that principle.

Both assumptions are open to question. Firstly, it may be questioned whether a prima facie right to have all civil disputes determined by trial in open court with oral evidence is a luxury that the civil justice system can continue to afford. Secondly, in any event, there is no reason to suppose that matters which are properly capable of being determined on affidavit material deny litigants an appropriate opportunity to properly and thoroughly present their case.

Zuckerman,[40] in this regard, makes an important point which can often be forgotten, that is, that the existing civil justice system in general, and summary judgment procedures in particular, are already the product of a compromise between accuracy, on the one hand, and efficiency, on the other. Moreover, the existing balance between accuracy and efficiency achieved by the civil justice system is simply one of a number of possible ways of striking that balance. While persons operating within the civil justice system, particularly lawyers and judges, are more likely to be inclined to the view that the balance currently achieved is necessarily the optimum one, this is not necessarily so. As Zuckerman states:

> In today's conditions, civil procedure may be criticized for striking a compromise which tilts too far towards accuracy at the expense of economy. Our procedural arrangements demonstrate a willingness to tolerate high costs for the sake of high accuracy in judgments.…
>
> Even if it does turn out that summary adjudication provides inferior accuracy, the case for summary adjudication would not necessarily founder. For we would then be presented with the question of principle of whether a loss in accuracy may be justified by the savings that will be made. This question cannot be answered in the abstract. Rather,

> it has to be considered in the context of the prevailing economic and social circumstances.... [A] system which offers affordable justice to a multitude, albeit at some lower level of accuracy, is to be preferred to a system which restricts justice, albeit of a higher quality, to the few who can afford it and to that shrinking proportion of the poor whom the taxpayer can still bear to support.[41]

Such a change in the approach to summary judgment requires, in a real sense, a change of culture in the civil justice system from a philosophy whereby most disputes are prima facie entitled to be resolved by a full trial to one which accepts that only truly deserving cases are tried in accordance with a full trial procedure.[42] It is suggested that that change of culture is, in the final analysis, inevitable and that procedures should be put in place to make that change as equitable as possible.

The first way in which the use of the summary judgment procedure could be expanded is in relation to disputed questions of law. Where in a summary judgment application, the dispute between the parties can be reduced to a question of law, even a complex question, it is appropriate that the court hearing the application should determine finally that question of law. As Lord Donaldson MR remarked in *R G Carter Ltd v Clarke*:

> If a judge is satisfied that there are no issues of fact between the parties, it would be pointless for him to give leave to defend on the basis that there was a triable issue of law. The only result would be that another judge would have to consider the same arguments and decide the issue one way or another.[43]

The concern that a party's case on a point of law may not be as thoroughly or as competently argued in a summary judgment application would seem to be a self-fulfilling prophecy. Were the rules such that complex and arguable questions of law are routinely determined in summary proceedings, no doubt the approach of litigants' advisers would adapt accordingly. Moreover, the risk that by determining questions of law summarily the Court may stifle the development of law is in most cases illusory. Rather, the vast majority of questions of law arising in civil disputes ought to be able to be determined with sufficient certainty as they presently are in trials of actions.

Proposal 2

Where on a summary judgment application the only question arising between the parties is a question of law, the court hearing the application be required to determine finally the question of law and give judgment accordingly.

Most summary judgment applications, however, are not reducible to a single question of law. The reality is that most applications involve in some combination disputed questions of fact and law. The unwillingness of the courts in such cases to resolve conflicts of fact or to make an assessment of the relative strengths of the parties' cases will tend to discourage applications for summary judgment by litigants where the real likelihood is that they will ultimately be successful.

In those circumstances, there is a case to be made for changing the test applied in summary judgment applications to one more designed to achieve finality between the parties. As stated above, any change in the test applied in relation to summary judgment which is designed to make summary judgment easier to obtain requires a change of culture in the civil justice system. Such a change is not easily brought about by simple modification of the verbal formula to be applied.

The Woolf Report, for example, proposed the following test for summary judgment:

> The test for making an order would be that the court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue. A party seeking to resist such an order would have to show more than a merely arguable case; it would have to be one which he had a real prospect of winning.[44]

Whether or not in practical terms a test that a 'real prospect of winning' would, in its practical application, produce different results to a test based on 'an arguable case' is open to question. The expression 'real' is used in other contexts to mean 'not far fetched or fanciful'.[45] A 'real' prospect of winning may be no more than an 'arguable' prospect. This view is supported by the remarks of Malcolm CJ,[46] a different context,[47] in *Dempster v National Companies and Securities Commission*:[48]

> It was contended on behalf of the appellant that the expression 'arguable case' in section 187(1) meant 'capable of being arguable': see *The Shorter Oxford Dictionary*. In my opinion, having regard to the context, an arguable case is one that is not merely capable of being argued, but one that is reasonably capable of being argued in the sense that it has an argument which has some prospect of success. In this context, 'arguable case' necessarily has the same meaning as 'reasonable case', as that expression is used in Order 20, rule 19 of the *Rules of the Supreme Court* 1971. The case must be one which has 'some' chance of success: see *Republic of Peru v Peruvian Guano Co.*[49]

Essentially a test for summary judgment based on whether there is a 'real' prospect of success of a party's case would not take into account the likelihood or probability that the case will be successful[50] and as such would not be appreciably different to the test which currently prevails. The test for summary

judgment would only be fundamentally changed by being formulated in such a way that it required the Court to critically assess both the factual and legal case of each party and to make a determination as to the likely outcome.

A reformulation of the test for summary judgment which fully takes into account the relative strengths of the plaintiff's and defendant's case would therefore have to focus on the 'likelihood' or 'probability' of success rather than, at present, on the 'possibility' of success. Under such a test, the Court would order summary judgment unless it were satisfied that the opposing party's case had a 'reasonable prospect of success' or is 'reasonably likely to succeed'. A party would not necessarily have to show that it is probable that they will succeed (in the sense of more likely than not), but would have to demonstrate that their prospect of success is more than a chance or possibility.

A test requiring the respondent to an application for summary judgment to demonstrate a reasonable prospect of success would have the effect of, and indeed would be designed to, deprive more litigants of the right to have the merit of their case determined at trial. Such an approach must therefore be approached cautiously, lest the interests of efficiency outweigh the provision of justice to the parties.

It should also be noted that while summary judgment procedures are designed to reduce delay and expense they have the potential, even with the currently high threshold test, to have the opposite effect. Lengthy and expensive appeal processes following a successful application for summary judgment may result in the judgment being overturned in circumstances where the disputed facts between the parties have not been resolved and must be remitted to the trial court for determination in the ordinary manner. This was the case for example in *Webster v Lampard*[51] where summary judgment given by a Master of the Supreme Court, and upheld on appeal to the Full Court, was overturned by the High Court without the substance of the plaintiff's claim having been considered.[52] The risk of this occurring were the test for obtaining summary judgment lowered, could only be expected to increase unless sufficient safeguards were put in place.

Nevertheless, on the basis that measures can be put in place to reduce these risks, it is recommended that the test for summary judgment be modified to enable summary judgment to be granted unless the respondent demonstrates that their case has a 'reasonable prospect of success'.

Proposal 3

That the test for summary judgment be amended so that summary judgment may be entered for either party unless the opposing party demonstrates that its case has a reasonable prospect of success.

A number of consequential changes would need to flow from a change to the test for summary judgment proposed above.

Firstly, to lessen the risk seen in cases such as *Webster v Lampard* that proceedings are summarily determined without the substance of the dispute between the parties being fully addressed, there should be more scope for the Court hearing a summary judgment application to summarily determine a disputed fact in the proceedings. At present, facts in dispute are not determined summarily and, save for the cases that where there is no real question to be tried, an action can only be determined in a summary manner where all the parties consent.[53]

It is therefore proposed that, where the success or otherwise of a party's case can be seen on a summary judgment application to come down to one area of disputed fact, the Court should be empowered to order that that disputed fact be tried summarily. In essence, the Court could order, of its own volition, that there be trial of a separate issue as part of the summary judgment application where that issue is likely to decide the fate of the application. The power of the Court to so order could be exercised at any time during the course of the application where it becomes apparent that the resolution of a discrete question of fact is required. Such a determination would generally be on affidavit evidence, although the Court would retain the current discretion to allow cross-examination as part of the procedure.

A degree of caution would be needed to prevent the summary judgment application itself becoming a protracted hearing which removes any benefit in proceeding summarily. However, were the opportunity for finally determining disputed facts as part of a summary judgment application properly utilised it would produce a more equitable basis upon which to determine matters summarily and provide more certainty in the result. For example, an appellate court, unlike in *Webster v Lampard*,[54] would be in a position to determine a question of law arising out of a summary judgment application in the context of a proper factual finding.

Proposal 4

That on a summary judgment application the Court have the power to order that a disputed fact be determined finally as part of the application. The power to order the determination of disputed facts may be made on the application of a party or on the Court's own motion at any point during the application.

A more critical assessment of the relative merits of a party's case, and the ability to determine discrete factual disputes in a summary judgment application, requires a reassessment of the current time limits imposed for bringing applications for summary judgment. As discussed above, the rules currently impose a time limit of 21 days following the date of appearance for both plaintiffs and defendants to bring applications for summary judgment, subject to the leave of the Court being granted to bring the application at a later time. Those time limits have obvious relevance where the test for summary judgment is that there is no real question to be tried; a case with no possibility of success will more usually be apparent from the outset.

However, were the proposals formulated above implemented, it is more likely that the justice of a party's case, and their right to summary judgment, would only become clear at a later point in the proceedings. It may be, for example, that a party's entitlement to judgment becomes clear in light of material discovered by the other party or revealed by answers to interrogatories. It is therefore proposed that the time limits for bringing summary judgment applications be extended.

The Woolf Report recommended that the summary judgment procedure be made available to the parties up to and including the trial of an action.[55] While the possibility of summary judgment throughout the life of an action should not be foreclosed, it is suggested that there be some time limit imposed to encourage applications for summary judgment to be as early as possible. It is therefore recommended that, subject to the leave of the Court, summary judgment applications be made within 60 days from the completion of discovery.[56]

Proposal 5

That either party may apply for summary judgment within 60 days after the completion of discovery, or at any later time by the leave of the Court.

The greater potential for the merits of the parties' respective cases being identified and determined in summary judgment applications opens the possibility that judgment may be entered for a party notwithstanding that they have not brought the summary judgment application. It is therefore proposed that, where the Court is so satisfied, it may enter judgment for either party on a summary judgment application.

Proposal 6

That on summary judgment application the Court have the power to enter judgment for any party, regardless of the identity of the party bringing the application.

The existing orders allowing summary judgment on a part of a claim and the wide powers to impose conditions on the grant of leave to defend following an unsuccessful summary judgment application are sufficiently broad and should be retained as part of any changes to the summary judgment procedure.

The existing provisions in Order 14 rule 8, dealing with costs, it is suggested, are based on a conception of summary judgment as a procedure to be encouraged in only the clearest of cases. While Order 14 rule 8 does not provide an inflexible rule fettering the Court's general discretion, its implicit purpose does not rest comfortably with a procedure designed to encourage summary judgment applications and the early disposal of litigation. Nor does Order 14 rule 8 reflect the general rule in relation to summary judgment that the costs of unsuccessful applications be in the cause. The special costs rule in relation to summary judgment applications should therefore be removed.

Proposal 7

That Order 14 rule 8 of the Supreme Court Rules be repealed and the costs of summary judgment applications be generally in the discretion of the Court.

The potential for abuse of the summary judgment procedure, particularly by powerful or well resourced litigants, is a matter which must be considered in the context of any reform of the summary judgment procedure. Summary judgment should not be another mechanism whereby more powerful litigants are able to delay or impose unreasonable burdens on other parties. It must also be recognised that the proposed changes to the summary judgment procedure outlined above, while intended to be significantly speedier and more cost effective than a trial, would inevitably increase the cost and time involved in summary judgment applications themselves. In many ways this risk inherent in the procedure can only be alleviated by the powers of the Court, by the imposition of time limits and its discretions in relation to costs, to control abuses of its processes.

One restriction which could be placed on the procedure, however, is to restrict the possibility of a litigant making more than one summary judgment application. To impose such a restriction, with limited exceptions, would both prevent repeated and vexatious applications for summary judgment and encourage litigants and their advisers to bring applications at the appropriate time. The only exception allowing leave to be granted to bring a further application would be where the application can demonstrate that

there is 'fresh evidence' that could not by reasonable diligence have been discovered before.[57]

Proposal 8

That following an unsuccessful summary judgment application, a party may only bring a further application with the leave of the Court. Leave should only be granted on the basis that the applicant demonstrates that there is fresh evidence, material to the application, that could not by reasonable diligence have been discovered before.

The potential for an expanded summary judgment procedure to be open to abuse also justifies the inclusion of a general discretion in the Court to refuse to grant summary judgment notwithstanding a prima facie entitlement to judgment based on the test outlined above. The Woolf Report, as part of its suggested reform of summary judgment, proposed an exceptional discretion in the court to allow a case to continue if it were considered there was a public interest in the matter being tried.[58]

At present there is a general discretion in the Court to refuse summary judgment, at least on applications by plaintiffs, created by the words 'there ought for some other reason to be a trial of the claim' in Order 14 rule 3(1). This discretion has been described as confining Order 14 'to being a good servant and prevent it from being a bad master'[59] and has been used where there is some aspect of the transaction the subject of the action which requires close scrutiny.[60]

The effect of the changes proposed above on summary judgment applications is also another justification for retaining some residual discretion in relation to summary judgment. For example, while it is suggested, in relation to Proposal 2 above, that the risk of stifling the development of the law by determining questions of law summarily is overstated, there may well be occasions when the importance of a potential development in the law is such that it would not be in the public interest to determine the matter summarily. In such a case, a residual discretion could be called into aid.

A discretion to refuse summary judgment where the pre-conditions for its exercise have been satisfied, however, would need to be reserved for exceptional cases. Little would be achieved if, in the application of a public interest discretion, the intended effect of the reforms proposed above were able to be circumvented. Accordingly, it is suggested that the party maintaining that there is a public interest in the matter proceeding should have the onus of establishing that that is so.

Proposal 9

Where the Court is satisfied that a party's case has no reasonable prospect of success, the Court may refuse summary judgment where there are exceptional circumstances suggesting that it would not be in the public interest to enter judgment. In such a case the party maintaining that there is a public interest in the matter proceeding has the onus of establishing the public interest.

Finally, as stated above, to bring about an expansion of the summary judgment procedure, not only must the rules be changed, there is also a need to change the culture of the civil justice system to promote the use of summary judgment as a tool for reducing delay in litigation. To that extent, summary judgment could be greater enhanced by measures which require the proper consideration of whether a summary judgment application would be appropriate.

There have in recent years been various rules introduced whereby a party's solicitor is required to certify that a certain step has been taken in the litigation. Such certificates are designed to better facilitate case flow management and eliminate unnecessary steps being taken and include requirements to certify that discovery has been given,[61] that discovery has been explained to a party[62] and that the parties have conferred before an application is made in chambers.[63] A similar system should be put in place to ensure that the possibility of obtaining summary judgment is properly addressed by the parties' advisers.

This could be achieved by the parties' solicitors being required to file a certificate stating that consideration has been given to an application for summary judgment and that it was not considered appropriate. The certificate could briefly set out the factual or legal disputes between the parties that make it inappropriate to apply for summary judgment. Such a certificate could be filed, consistent with Proposal 5 above, 60 days from the date of the completion of discovery and the matters set out in the certificate scrutinised at case management conferences.

Proposal 10

Except where an application for summary judgment has been made by a party, within 60 days of the date of the completion of discovery, the solicitor having the conduct of proceedings on behalf of a party shall file and serve a certificate signed by that solicitor stating that consideration has been given to an application for summary judgment and that it was not considered

appropriate. The certificate should set out the factual or legal disputes between the parties that make it inappropriate to apply for summary judgment. A matter may not be entered for trial in the absence of a summary judgment certificate.

PRELIMINARY ISSUES AND SPECIAL CASES

There are various mechanisms in the *Supreme Court Rules* which enable a question of law or fact in proceedings to be finally determined separately from the balance of the proceeding. It is useful to consider the powers of the courts to determine issues of law or fact as preliminary points together with summary judgment, as the two kinds of procedures have essentially similar purposes, that is, the early and efficient determination of disputes. The trial of a preliminary issue has traditionally been ordered only where the Court comes to the view that the determination of the preliminary issue will necessarily determine the outcome of the litigation between the parties. In that sense, the procedure's potential to produce a final judgment between the parties is akin to an application for summary judgment.

The differences between the two procedures are, however, significant. It may not necessarily be the case that a trial of a preliminary issue or stated case of law will finally resolve the dispute between the parties; indeed, the preliminary issue may be only one step towards establishing a party's case. The question of liability, for example, may be tried prior to any consideration of the quantum of damages. Trials of preliminary issues have also traditionally differed from summary judgment in the sense that a trial of a preliminary issue determines the disputed issue finally in accordance with the usual trial process, whereas summary judgment applications have, traditionally, looked only to the nature of the disputed issue and whether they in fact give rise to triable questions.

Were the availability of summary judgment to be expanded, however, the lines between trials of preliminary issues and summary judgment applications would become increasingly blurred. As seen above, it was recommended that the Court have power to order that a disputed fact be determined finally as part of a summary judgment application.[64] That proposal effectively seeks to introduce a form of trial of preliminary issues as part of the summary judgment procedure. Nevertheless, there remains an important role for trials of preliminary issues outside the area of summary judgment.

Existing procedures for trials of preliminary issues

The procedures whereby a preliminary point may be determined may be divided into those dealing exclusively with questions of law and those dealing with questions of fact or mixed fact and law.

The relevant rules of court

Order 31 of the *Supreme Court Rules* enables the separate determination of questions of law. Within Order 31 there are a further two procedures,

depending upon whether the facts as between the parties have been settled (by agreement or otherwise) or whether the facts are still to be determined. Where the facts between parties have been agreed, or have been determined by a court or tribunal, the parties may state a question of law arising from the facts as a special case for the opinion of the Court or the Full Court.[65] The Court may then determine the answer to the question of law based on the facts stated.

Alternatively, it may be the case that the parties seek to have a point of law determined in the absence of any findings of fact. In such a case the Court may direct that the question of law be raised for the opinion of the Court by way of case stated or otherwise.[66]

Where the parties seek to have a preliminary issue determined which raises questions of fact or mixed questions of fact and law, the appropriate mode of proceeding is by way of a trial of a preliminary issue under Order 32 rule 4 of the *Supreme Court Rules*.

For the sake of convenience, applications to determine questions of fact or law, whether under Order 31 rule 1, Order 31 rule 2 or Order 32 rule 4, are collectively referred to below as 'trials of preliminary issues'.

The test for ordering the trial of a preliminary issue

In Australia the test for whether to order for a trial of a preliminary issue has traditionally been a narrow one. Whether it be a preliminary issue of fact or law, the courts have in the past been reluctant to order the trial of a preliminary issue unless it would resolve the dispute between the parties whichever way it was resolved or, at the very least, where it is resolved in favour of the party wishing to raise the point.[67]

In Western Australia, the traditional view was expressed by Burt CJ in *Wilsmore v Court*[68] in relation to a point raised pursuant to Order 31 rule 1(2):[69]

> No doubt the parties at the time saw the course which they have embarked upon as being a cheap and quick way in which to have the case decided. They apparently saw it as a short cut. It has not turned out that way. It seldom does. It is an exceptional way of proceeding and should be reserved for the exceptional case and when it is used the question of law should be formulated in the order with precision and it should be a question which on the admitted facts will finally dispose of the action or of an identifiable cause of action within it. It should not be used when the question of law so-called is but a step in the development of an argument. The danger of using the proceeding in an inappropriate case and the manner adopted in this case has recently been discussed by Walters J,[70] and I agree with everything that his Honour had to say about it.

According to that test, it may be very difficult indeed for the parties to set down a matter for trial as a preliminary issue.

There have been signs, however, that the approach to trials of preliminary issues has been reviewed by the Supreme Court in recent years, especially in light of the case flow management principles set out in Order 1 Rules 4A and 4B. In *Stirling Marine Services Pty Ltd v Austral Piling & Constructions Pty Ltd,*[71] Master Sanderson ordered a trial of a preliminary issue notwithstanding that the case was not 'an exceptional case' specifically on the basis that case management principles 'have resulted in a significant shift in the approach to trial of preliminary issues'.[72]

This shift in approach is further evidenced in the Full Court in *Smith v Maloney.*[73] In that case Malcolm CJ[74] confirmed the traditional view that the determination of a preliminary issue was an exceptional way of proceeding and that the trial of a preliminary issue of fact will generally only be appropriate where its outcome will put an end to the action or otherwise save inconvenience and expense. However, having referred various decided cases, including *Wilsmore v Court*, his Honour stated:

> It should be noted that all of these cases were decided before the advent of case management, which commenced in the civil jurisdiction on a pilot basis in this Court in 1990 and which has been in full operation since 1 November 1996. Experience has shown that the existence of a significant possibility that the determination of one or more issues tried separately may lead to a settlement is a practical consideration which should be taken into account.[75]

The relevance of the possibility of settlement following the determination of a preliminary issue must be seen against the backdrop of the increase in court based mediation introduced as part of the case management system.[76] As the emphasis on, and opportunities for, alternative dispute resolution are increased, the potential for courts to resolve part only of a dispute becomes ever more important.

Proposals for reform

As the above discussion demonstrates, there is already evidence of a change in approach in relation to trials of preliminary issues as a result of case flow management in the Supreme and District Courts. Proposals for reforming those procedures would be directed at consolidating that shift.

Firstly, as a matter of rationalisation, there should be one procedure for trials of preliminary issues, whether they be issue of fact or law. The provisions of Order 31 rule 1, Order 31 rule 2 or Order 32 rule 4 unnecessarily duplicate what could be a single system of determining issues in civil proceedings at different times. Any differences that arise, for example, depending upon whether a question of law is to be determined based on agreed facts or before the facts are determined, could be resolved by a sufficiently flexible procedure.

Proposal 11

That a single procedure for the trial of preliminary issues replace the existing procedures under Order 31 rule 1, Order 31 rule 2 or Order 32 rule 4 of the *Supreme Court Rules*.

The involvement of the courts in court based mediation and case management, has greatly increased the capacity for the courts, particularly through their mediation and case management registrars, to identify issues between the parties the resolution of which are more likely to be conducive to a settlement of the proceedings. Given that advantage, it would be appropriate to specifically provide as part of the procedure for the trial of preliminary issues that the Court may of its own initiative order that an issue between the parties be tried as a preliminary issue.

Proposal 12

That the Court have the power to order of its own motion the trial of a preliminary issue at any stage in proceedings before it.

Finally, trials of preliminary issues should remain confined to those cases where their outcome is likely to result in a final resolution of the proceedings between the parties. However, in that context, it should now be recognised that the final resolution of the proceedings between the parties is not always, and perhaps not usually, brought about by a judgment of the Court. The test for ordering the trial of a preliminary issue should therefore be amended to specifically reflect the fact that the trial of a preliminary issue may bring about a resolution through the increased likelihood of alternative dispute resolution.

Proposal 13

That the test for whether a question or issue of law or fact be tried as a preliminary issue be whether the trial of the issue will substantially promote the resolution of the dispute between the parties, including resolution by settlement of the whole or part of the proceedings.

WRITTEN AND ORAL SUBMISSIONS

The issue of the correct balance between written and oral submissions in civil matters is a further aspect of the civil justice system which has received attention in recent years in the search to reduce the delay and cost of civil litigation.

The use of written outlines of submissions, and even full written submissions, has gradually increased over recent years. While the use of written submissions has a positive effect in identifying the issues between the parties and focussing submissions before the Court, it also has its drawbacks. There is a danger with written submissions, particularly when full written submissions beyond an outline are employed, that the courts may simply be overburdened with further paper without gaining an appreciable benefit.[77] The utility of written submissions may also be questioned where their use fails to alter in any way the oral presentation of a party's case and simply adds to, rather than complements, the oral submissions. There is the real risk with written submissions that they merely add to the cost of litigation without reducing the time spent in oral argument.

Attention needs to be given to the ways in which written submissions can become a useful tool in more efficiently resolving civil disputes, rather than an additional burden which detracts from that efficiency.

Existing procedures

In Western Australia, the use of written outlines of submissions is largely regulated by Practice Directions, rather than Rules of Court. In the Supreme Court, Practice Direction No 5 of 1997[78] ('the Practice Direction') provides various directions for the filing and service of written outlines of submissions depending upon the jurisdiction concerned. In each jurisdiction (ie, the Full Court, causes or matters in court or judges' or masters' chambers) the procedure is essentially the same. The plaintiff or applicant in the proceedings is required to lodge a written outline of submissions on the fourth working day prior to the date fixed for the hearing, followed by the defendant or respondent, who is required to lodge a written outline of submissions on the second working day prior to the date fixed for the hearing. The Practice Direction indicates that the outline should not be in the form of written submissions and should not normally exceed three to five pages in length.[79]

Similarly, in the District Court, the Consolidated Practice Direction dated 16 December 1996, requires that in various circumstances[80] each party must lodge a written outline of submissions, not exceeding five pages, not less than seven working days before the date fixed for the hearing.

It is also common in both the Supreme and District Court for particular programming orders to be made in relation to outlines of submissions where, for example, directions are made in relation to a particular special appointment in chambers or to the trial of an action.

While the Practice Directions in the Supreme and District Courts generally provide the rules in relation to written outlines of submissions, there have been amendments to the *Supreme Court Rules* in recent years which specifically address the question of oral submissions.

Firstly, in relation to proceedings at trial, Order 34 rule 5A of the *Supreme Court Rules* provides that a judge may at any time by direction limit, inter alia, 'the time to be taken in oral submission'.

Secondly, in relation to appeals, Order 65B provides that an Appeals Registrar may direct the parties to attend mediation in relation to the appeal and may 'by direction limit the time to be taken by a party in presenting its case'.[81] In deciding to make a direction imposing a time limit, the Appeals Registrar is required to have regard to the following matters:

(a) the complexity or simplicity of the appeal;
(b) the state of the Court lists;
(c) the time expected to be taken for the appeal; and
(d) the importance of the issues and the case as a whole.

Where an order is made imposing time limits on an appeal, the parties are required to file written submissions not exceeding 20 pages.[82]

There is therefore currently scope, at least in trials and appeals to judges or the Full Court in the Supreme Court, for time limits to be imposed in relation to oral submissions and, correspondingly, a greater emphasis on written submissions. None of the rules, however, requires the imposition of time limits or restricts the use of oral argument. This may be compared with the *High Court Rules 1952* which have instituted a specific regime in relation to applications for special leave to appeal. Under Order 69A of the *High Court Rules,*[83] an applicant for special leave is required to file a written summary of argument within 28 days of filing the application, which is followed by a written summary of argument from the respondent within a further 21 days. The summary is not to exceed 10 pages and must state whether the party wishes to present oral argument. A party may elect not to present oral argument and may simply rely on the written summary.[84]

Where an application for special leave is listed for hearing, there are strict limits placed on the time allocated for a party to make submissions. The applicant and the respondent are both allocated 20 minutes each, with the applicant permitted five minutes in reply.[85]

Proposals for reform

Orality is in may ways a dominant feature of our legal system[86] and its benefits should not be underestimated. The opportunity for a party to present its argument orally contributes greatly to justice being conducted publicly and in open court. In so far as oral submissions are concerned the remarks of Sir Gerard Brennan are instructive:

> Oral argument is essential both to the dialectic which refines the issues and points to the solution and to the persuasion of the judicial mind to the submitted conclusion. ... In oral argument, the advocate is to display the issue for determination in an attractive way, to respond thoughtfully to judicial questioning, to rebut firmly judicial pre-conceptions, to

> captivate the judicial mind by reasoned argument concisely and courteously expressed and lead it on the true path of judgment.[87]

The benefits of oral submissions suggest that reforms should be directed at making them more focussed rather than replaced entirely. One method of focussing oral argument is by the imposition of time limits. As has been discussed, there are strict time limits imposed as part of the special leave process in the High Court. That has the potential to be expanded to the hearings of cases and appeals themselves and is already contemplated as a possibility by the rules discussed above.

Currently, however, the imposition of time limits is not compulsory and there is a case for making that so. It would be inadvisable to prescribe fixed time limits to be applied to all or even particular kinds of case. Each case is different and the variety of cases in terms of complexity prevents generalisations being made about appropriate time limits.[88] Rather there should be put in place a more structured procedure whereby a time limit is determined for each case. This may not be a practical consideration for all cases, but it could at least be applied to appeals and trials of actions.

In order to best make use of time limits, they would need to be imposed prior to the listing of the appeal or trial so as to be included as part of the determination of the length of the whole matter. Parties would therefore be required to file, with entry for trial or hearing papers, an estimated length of oral submissions. Those estimates could be considered either by the court intended to hear the matter or a registrar. Once imposed, a time limit could only be exceeded with the leave of the Court at the hearing.

Proposal 14

That for the purposes of appeals and trials of actions, the Court be required to impose time limits on oral submissions. Time limits are to be determined at the time a matter is listed for hearing based on the estimates of the parties. Time limit may only be exceeded with the leave of the Court at the hearing.

The use of written submissions should also be reformed. At present there are limits imposed on the length of written outlines of submissions by Practice Directions, which are often overlooked or ignored. This can be burdensome and produce the opposite of the effect intended by the use of written material.

It would therefore be appropriate, at the time of setting time limits for oral argument, to impose appropriate limits for written submissions. The most efficient way of doing this would be to impose a standard maximum length of written submissions (for example five pages) which the Court or registrar

could in their discretion extend. The parties would then require the leave of the Court to file an outline of submissions of length in excess of that ordered.

Proposal 15

That for the purposes of appeals and trials of actions, the Court be required to impose limits on the length of written submissions. Limits on written submissions are to be determined at the time a matter is listed for hearing based on the estimates of the parties. In the absence of a particular order the limit shall be five pages. Written submissions in excess of that ordered may only be filed with the leave of the Court.

While it is suggested that orality be retained generally, there are nevertheless a number of areas where the need for oral argument may be minimal. An application for leave to appeal an interlocutory order, to file an application out of time or to take some procedural step, such as leave to administering interrogatories, can often be determined based on the orders sought and the papers in support alone. In such cases, the parties should at least have the option of presenting argument in writing only.

Giving parties the option of so proceeding would reduce what are seen by the parties as unnecessary appearances. Moreover, by being optional, such a system would not deny a party's real or perceived entitlement to natural justice.

Proposal 16

That in any interlocutory proceeding, including an application for leave to appeal, the parties file a written outline of submissions stating whether the party intends to present oral argument. The applicant must file the outline with the application and the respondent within seven days thereafter. The applicant may file any submissions in reply within a further seven days. Where neither party intends to present oral argument the application may be determined based on the papers and written submissions in support without the need for an appearance.

Following the introduction of a limited and optional form of proceeding by way of written submissions, an assessment could be made as to the possibility, in the future, of introducing a system whereby applications or proceedings could be determined more generally without oral argument. Such a change, however, is not advocated until an assessment can be made based on evidence as to the matters which may be determined based on written material alone. If an optional system were introduced such an assessment could be made based on the experience of that system.

SUMMARY OF PROPOSALS

1. That a single procedure for summary judgment replace the existing procedures enabling plaintiffs and defendants to bring an application for summary judgment or to strike out pleadings disclosing no reasonable cause of action or defence.

2. Where on a summary judgment application the only question arising between the parties is a question of law, the court hearing the application be required to determine finally the question of law and give judgment accordingly.

3. That the test for summary judgment be amended such that summary judgment may be entered for either party unless the opposing party demonstrates that its case has a reasonable prospect of success.

4. That on a summary judgment application the Court have the power to order that a disputed fact be determined finally as part of the application. The power to order the determination of disputed facts may be made on the application of a party or on the Court's own motion at any point during the application.

5. That either party may apply for summary judgment within 60 days after the completion of discovery, or at any later time by the leave of the Court.

6. That on summary judgment application the Court have the power to enter judgment for any party, regardless of the identity of the party bringing the application.

7. That Order 14 rule 8 of the Supreme Court Rules be repealed and the costs of summary judgment applications be generally in the discretion of the Court.

8. That following an unsuccessful summary judgment application, a party may only bring a further application with the leave of the Court. Leave should only be granted on the basis that the applicant demonstrates that there is fresh evidence, material to the application, that could not by reasonable diligence have been discovered before.

9. Where the Court is satisfied that a party's case has no reasonable prospect of success, the Court may refuse summary judgment where there are exceptional circumstances suggesting that it would not be in the public interest to enter judgment. In such a case the party maintaining that there is a public interest in the matter proceeding has the onus of establishing the public interest.

10. Except where an application for summary judgment has been made by a party, within 60 days of the date of the completion of discovery, the solicitor having the conduct of proceedings on behalf of a party shall file and serve a certificate signed by that solicitor stating that consideration has been given to an application for summary judgment and that it was not considered appropriate. The certificate should set out the factual or legal disputes between the parties that make it inappropriate to apply for summary judgment. A matter may not be entered for trial in the absence of a summary judgment certificate.

11. That a single procedure for the trial of preliminary issues replace the existing procedures under Order 31 rule 1, Order 31 rule 2 or Order 32 rule 4 of the *Supreme Court Rules*.

12. That the Court have the power to order of its own motion the trial of a preliminary issue at any stage in proceedings before it.

13. That the test for whether a question or issue of law or fact be tried as a preliminary issue be whether the trial of the issue will substantially promote the resolution of the dispute between the parties, including resolution by settlement of the whole or part of the proceedings.

14. That for the purposes of appeals and trials of actions, the Court be required to impose time limits on oral submissions. Time limits are to be determined at the time a matter is listed for hearing based on the estimates of the parties. Time limit may only be exceeded with the leave of the Court at the hearing.

15. That for the purposes of appeals and trials of actions, the Court be required to impose limits on the length of written submissions. Limits on written submissions are to be determined at the time a matter is listed for hearing based on the estimates of the parties. In the absence of a particular order the limit shall be five pages. Written submissions in excess of that ordered may only be filed with the leave of the Court.

16. That in any interlocutory proceeding, including an application for leave to appeal, the parties file a written outline of submissions stating whether the party intends to present oral argument. The applicant must file the outline with the application and the respondent within seven days thereafter. The applicant may file any submissions in reply within a further seven days. Where neither party intends to present oral argument the application may be determined based on the papers and written submissions in support without the need for an appearance.

ENDNOTES

1 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) .
2 Ibid 2.
3 Unlike, for example, default judgment, a successful application for summary judgment results in a final determination of the rights of the parties on the merits: *Langdale v Danby* [1982] 3 All ER 129; *Hunt v Knabe (No 2)* (1992) 8 WAR 96, 109.
4 See for example the reference to case flow management principles in *Smith v Maloney* (1998) 19 WAR 209, 223 (Malcolm CJ) and *Stirling Marine Services Pty Ltd v Austral Piling & Constructions Pty Ltd* (Unreported, Supreme Court of WA, Sanderson M, 21 November 1997, Library No 970620).
5 Cleary, 'Summary Judgment in Okalahoma: Suggestions for Improving a 'Disfavoured' Procedure' (1994) 19 *Oklahoma City University Law Review* 251; J Fiocco, M Brewer, S Owen-Conway QC and G Clarkson QC, *Civil Procedure in Western Australia: Practice Manual* (1998) 210-211.
6 Although, as discussed below, applications for summary judgment may often be accompanied by applications to strike out pleadings (*Supreme Court Rules* O 20 r 19) or applications in the inherent jurisdiction of the Court to prevent abuses of process.
7 *Local Courts Act 1904* (WA) s 47A. S 47A applies only to summary judgment on the application of a plaintiff. In the Local Court an application by a defendant for summary dismissal on an action needs to be made based on its inherent (or implied) power to control abuses of its process.
8 *Supreme Court Amendment Rules (No 4) 1996* (WA).
9 See the former *Supreme Court Rules* O 14 r 1(2).
10 See the former *Supreme Court Rules* O 14 r 1(2).
11 The rules in relation to summary judgment by plaintiffs apply *mutatis mutandis* to applications by defendants who have served a counterclaim.
12 *Supreme Court Rules* O 14 r 1(1).
13 *Deputy Commissioner of Taxation v Heaton* (1997) 35 ATR 450, 453 (Sanderson M).
14 *Supreme Court Rules* O 20 r 4(2).
15 *Supreme Court Rules* O 14 r 2(1).
16 *Supreme Court Rules* O 14 r 2(2).
17 *Supreme Court Rules* O 14 r 4(3).
18 *Whitehall Holdings Pty Ltd v Custom Credit Corporation Ltd* (Unreported, Supreme Court of WA, Ipp, Pidgeon and Owen JJ, 19 June 1992, Library No 920347) 4, 5, 7.
19 *Esplanade Hotel Busselton Pty Ltd v Graywinter Properties Pty Ltd* (Unreported, Supreme Court of WA, Sanderson M, 8 December 1997, Library No.970683) 5.
20 *Supreme Court Rules* O 20 r 19(1).
21 The same possibility may arise in an application by a plaintiff for summary judgment and applications to strike out a Defence, although, given that plaintiffs' applications will usually precede delivery of the Defence this course is less likely.
22 *Supreme Court Rules* O 16 r 1(2).
23 *Supreme Court Rules* O 16 r 1(3).
24 *Supreme Court Rules* O 20 r 19(2).
25 *Supreme Court Rules* O 16 r 1(1).
26 (1949) 78 CLR 62.
27 Ibid, 91.
28 (1964) 112 CLR 125, 129.
29 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99 (Mason, Murphy, Wilson, Deane and Dawson JJ).
30 (1993) 177 CLR 598, 603 (Mason CJ).
31 *General Steel Industries Inc v Commissioner for Railways (NSW)*, above n 28, 130; see also, *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 31.
32 See in particular Dixon J's references, above n 26, 91-92 to reasons for decision of O'Connor & Higgins JJ in *Burton v Shire of Bairnsdale* (1908) 7 CLR 76.
33 See *Dey v Victorian Railways Commissioners*, above n 26, 84-85 (Latham CJ).
34 See in particular the Court of Appeal in England in *RG Carter Ltd v Clarke* [1990] 2 All ER 209, 213 (Lord Donaldson MR). See also *Sunbird Plaza Pty Ltd v Boheto Pty Ltd* [1983] 1 Qd R 248, 255 (McPherson J).
35 The most recent High Court authority being *Webster v Lampard* above n 30, 602, where Dixon J's formulation is approved by Mason CJ, Deane & Dawson JJ (see also Toohey J's cautionary note, 619).
36 *Burton v Shire of Bairnsdale*, above n 32, 92 (O'Connor J), cited in *Dey v Victorian Railways Commissioners*, above n 26, 91 (Dixon J) and 88 (Latham CJ) to 'full' and 'thorough' argument. See also *Sunbird Plaza Pty Ltd v Boheto Pty Ltd*, above n 34, 255 (McPherson J).
37 *Hospitals Contribution Fund of Australia v Hunt* (1982) 44 ALR 365, 373 (Allen M), cited with approval in *Kimberley Downs Pty Ltd v WA* (Unreported, Supreme Court of WA, Staples M, 25 August 1986, Library No 6414) 6; *Bridgetown Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management* (Unreported, Supreme Court of WA, Parker J, 9 August 1995, Library No.950415) 12-13.

38 Woolf, above n 1, 123, para 32.
39 Pursuant to *Supreme Court Rules* O 31.
40 A Zuckerman, 'A Reform of Civil Procedure: Rationing Procedure rather than Access to Justice' (1995) 22 *Journal of Law and Society* 155.
41 Ibid 161, 170.
42 See also ALRC, *Civil Litigation Practice and Procedure*, Background Paper No 5 (December 1996) 28.
43 Above n 34.
44 Woolf, above n 1, 123, para 34.
45 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (Mason J, Stephen & Aicken JJ agreeing).
46 Walsh and Anderson JJ agreeing.
47 Applications for Leave to Appeal pursuant to the *Justices Act 1902* (WA).
48 (1993) 9 WAR 215, 262.
49 (1887) 36 Ch D 489, 495.
50 Again, see the discussion of 'real', 'foreseeable' and 'probable' in the tortious context in *Wyong Shire Council v Shirt,* above n 45, 47-48 (Mason J).
51 Above n 35.
52 Note Toohey J's cautionary remarks that this unfortunate result was 'risk inherent' in the disposition of actions summarily: *Webster v Lampard,* ibid 619.
53 See *Supreme Court Rules* O 16 r 1(1). See also *Trinity Enterprises Pty Ltd v Drum Services (WA) Pty Ltd* (1992) 7 WAR 587, 588-589 (Adams M).
54 Above n 35.
55 Woolf, above n 1, 123-124, para 35.
56 The time for completion of discovery being determined in accordance with the standard times prescribed by systems of case flow management: see *Supreme Court Rules* O 29 and 29A and *District Court Rules 1996* (WA) O 1.
57 See *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88, 89 (Wolff CJ) cited with approval in *Smith v NSW Bar Association (No 2)* (1992) 176 CLR 256, 267.
58 Woolf, above n 1, 123, para 34.
59 *Miles v Bull* [1969] 1 QB 258, 266 (Megarry J).
60 As was the case in *Miles v Bull,* ibid.
61 *District Court Rules 1996* (WA) O 2 r 1(d).
62 *Supreme Court Rules* O 26 r 15A.
63 *Supreme Court Rules* O 59 r 9.
64 See above Proposal 4.
65 *Supreme Court Rules* O 31 r 1(1).
66 *Supreme Court Rules* O 31 r 2(1). The reference to 'otherwise' in O 31 r 2(1) can be taken as a reference to determining the question of law as a preliminary issue under O 32 r 4.
67 See *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375, 382 (Evershed MR); *Rogers v Baillieu Bullok Wilkinson Pty Ltd* (1981) 28 SASR 594, 597 (Walters J); *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601, 606 (Kirby P).
68 [1983] WAR 190, 194.
69 Although his Honour noted that Order 32 Rule 4 was 'much to the same effect'.
70 *Rogers v Baillieu Bullock* (1981) 28 SASR 594.
71 Above n 4.
72 Ibid 7.
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74 Kennedy and Ipp JJ agreeing.
75 *Wilsmore v Court* , bove n 68, 223.
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78 As amended by Practice Direction No 1 of 1998.
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81 *Supreme Court Rules* O 65B r 3(1)(b).
82 *Supreme Court Rules* O 65B r 3(2).
83 See generally *High Court Rules 1952* (Cth) O 69A rr 6, 7, 8, 9.
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2.8

The Procedure of the Local Court

CONSTITUTION OF THE LOCAL COURT

In its report of June 1988 on Local Courts (Jurisdiction, Procedures, and Administration) ('the 1988 Report'),[1] the Law Reform Commission of Western Australia recommended:

> Local Courts and Courts of Petty Sessions should he merged to form a single court of combined civil and criminal jurisdiction.
>
> The merged court should have the following divisions -
>
> (i) an Offences Division;
>
> (ii) a Civil Division;
>
> (iii) a Small Debts Division;
>
> (iv) an Administrative Law Division; and
>
> (v) a Family Law Division.
>
> and said that:
>
> Provisions would be required as to the matters to be assigned to the respective divisions and as to the powers of the Court to transfer or retain matters in a particular division.[2]

The Commission is aware that the Attorney-General is considering the establishment of a Magistrates Court of Western Australia by legislation which will comprise two Bills, the *Magistrates Court Bill 1998* and the *Magistrates (Consequential Provisions) Bill 1998.* The *Magistrates Court Bill 1998* will establish the Court and include provisions which:

- determine how the Court will be constituted;
- refers to other legislation which provides jurisdiction to the Court;
- establishes the Chief Magistrate as the principal judicial officer of the Court;
- provides a general rule making power for magistrates;
- refers to other officers of the Court; and
- provides for appointment and tenure of magistrates.

It is proposed that the new Magistrates Court will have five divisions:

(1) *Offence Division* will deal with offences currently dealt with in the Court of Petty Sessions.
(2) *Civil General* will deal with general civil caims that do not come within the definition of minor claim and will cover claims up $50 000.
(3) *Civil Minor Claims* will replace the Small Disputes Division and will include Residential Tenancies claims and small claims up to $ 10 000.
(4) *Administrative* will deal with reviews and appeals pursuant to legislation that allows review by, or an appeal to, a magistrate.
(5) *Family Law* will deal with family law matters currently dealt with in a Court of Petty Sessions.

It is intended that the *Magistrates (Consequential Provisions) Bill 1998* will amend various Acts as a result of the establishment of the Magistrates Court, repeal certain Acts and provide transitional provisions for justices, magistrates, clerks of Petty Sessions and other court officers. It is proposed that there be substantial amendment to the *Local Courts Act 1904* and the *Justices Act 1902.*

The *Local Courts Act 1904* will be renamed *Magistrates Courts (Civil Jurisdiction) Act 1904* and the *Justices Act 1902* will he renamed the *Criminal Procedure (Summary Proceedings) Act 1902.*

JURISDICTION

Given that the Government is currently considering the jurisdiction of the Local Court in the context of the amendments that have been outlined above, there is no need for us to revisit in detail the recommendations in the 1988 Report.

It is not clear whether the magistrates in the Local Court will be given power, within the limit of the monetary jurisdiction, to grant primary equitable relief, nor whether the 'Minor Claims Division' of the Court will include claims for damages. However, for present purposes, both these changes are proposed.

PROCEDURE

The new amendments will provide the magistrates with the power to make rules for the procedure of the Court. Given that procedure of the Small Debts Division works well we will confine our remarks in this sub-section to the procedure in the General Division.

At the outset we should acknowledge the work that the Court has done under the guidance of now retired Deputy Chief Magistrate Mr IG Martin and his colleagues including the present Managing Magistrate of the Local Court Mr M Whitely SM. We also need to acknowledge the work done by the magistrates and the Law Society Committee in reviewing the current procedure.

Given the intention to provide the magistrates with the power to make the rules of procedure for the Local Court, we believe that it is sufficient for us to make some general observations about the philosophy we believe should underpin any new rules and secondly, to make some limited additional comments to those made in the 1988 Report.

The present system

The litigation process in the Local Courts proceeds on an implicit foundation of an adversarial system and passive court. Under this system, it is left to the parties to progress the matter and to apply to the Court to obtain leave to take a step in the action or to require the other party to perform a step.

Such a system is open to abuse. The procedure was intended to provide the means by which parties could define and refine the issues in dispute, obtain admissions and evidence from the other parties and to enforce judgment.

The Local Court procedure is sourced in both the *Local Courts Act* and the *Local Court Rules*. The *Local Courts Act* was first enacted in 1904 and the present Rules were first published in June 1961. The Rules are antiquated, arguably more detailed than they need to be and expressed in a drafting style that is outdated. The Rules are not conducive in any sense to being understood by the increasing number of litigants who are not represented by a Legal Practitioner.

The goal

In our view courts should aim to develop a procedure which enables the parties to a dispute to resolve the dispute or, have it adjudicated:

- quickly;
- at minimal cost;
- by means of a process that they understand; and
- in a manner which accords to the principles of natural justice.

Lord Woolf in his *Access to Justice* report, identified a number of attributes which the civil justice system should have in order to ensure access to justice. He said:

> The system should:
> (a) be just in the results it delivers;
> (b) be fair in the way it treats litigants;
> (c) offer appropriate procedures at a reasonable cost;
> (d) deal with cases with reasonable speed;
> (e) be understandable to those who use it;
> (f) be responsive to the needs of those who use it;
> (g) provide as much certainty as the nature of particular cases allows; and
> (h) be effective, adequately resourced and organised.[3]

Arguably, it is even more important for a Magistrates Court to meet these criteria than the 'superior' courts. This point was borne out in our public consultations, where it was pointed out that:

> there are many rules and regulations which are often beyond the comprehension of ordinary people. The system must change to be quicker and simpler'[4]

and perhaps even more damning:

> If both Plaintiff and defendant are of modest means - but have a serious dispute to be sorted out, it can never be settled in court. Such venues are not an option for the poor, or the modest income earner.[5]

How does the current procedure measure up?

The bulk of matters commenced in the Local Court are debt recovery matters that are resolved by default judgment soon after the summons is served. A significant number of those that remain are eventually settled at the pre trial conference under the procedure established by the *Local Courts Amendment Act 1987* (WA). However a significant number of matters still find their way through the usual interlocutory process and go to trial.

The magistrates in the General Division of the Local Court have been successful in clearing backlogs and reducing delays in the Court. Substantial improvements have been made. However, the Rules are such that unacceptable delays can still be experienced in bringing matters to trial in the General Division. This is to be contrasted with matters in the Small Disputes Division, where there is no undue delay and where notably, the procedures involve little formality.

Causes of delay

As a magistrate of the Civil Division of the South Australian Magistrates Court has eloquently put it:

> The trinity of cost scales that reward activity, fear of being sued for negligence and an adversary based litigation process drive lawyers to leave no stone unturned in litigation at a cost to the parties that is beyond their ability to pay and which often overwhelms the amount of the actual dispute.[6]

It is also hardly surprising that a procedure that enables the parties to put off a detailed consideration of the litigation until the end of the process (the trial) is dogged by delays and a myriad of unproductive interlocutory applications.

The present procedures allow the unscrupulous to avoid clarifying issues and to obfuscate. By way of example, the rules allow a plaintiff to issue a complaint containing little information other than a short indorsement followed by the phrase 'particulars whereof have been rendered'[7] and a defendant can avoid having to provide particulars of his defence until the plaintiff compels him to do so.

The present rules allow a game to be played. But the game comes at a price, namely, increased legal cost for the litigants and perhaps (due

to the lapse of time and the effect that has on witnesses), an unjust outcome.

Increased costs however may be a price some litigants are prepared to pay if the delay will gain them an advantage, such as, extra time within which to pay the debt or the other party being prepared to settle on more favourable terms. Thus a decision to delay may be based on a simple cost/benefit analysis. What damns the present procedure is that it is vulnerable to such abuse.

A NEW PROCEDURE

We acknowledged above that there has been considerable improvement in the practice of the Local Court within the constraints of the present antiquated system. For example, the Court has been proactive in reducing delays and has put in place a system to measure the effectiveness of its systems. Bestowing the rule-making power in the magistrates will remove the shackle of an antiquated procedural system allowing the Court to complete the task.

In drafting a new procedure we believe that we should start by focusing on a procedure that will have the attributes of the system that seeks to avoid litigation whenever possible, is less adversarial and more cooperative, is less complex, will take less time, be more certain, will progress to trial in accordance with the timetable set and monitored by the Court to conclude in a set time frame.[8]

In our view, in order for a system to have these attributes, a prerequisite is that the 'the ultimate responsibility for the control of the litigation must move from the litigants and their legal advisers to the Courts'.[9]

Another prerequisite is that the rules for the New Civil Division of the Magistrates Court state clearly the objective of the rules and the context in which proceedings are to be conducted.

The *Magistrates Court (Civil Division) Rules 1998* (Tas) provide a good description of objectives we believe should be included, viz:

> 4. Proceedings in the Court are to be conducted -
>
> (a) with the least possible delay; and
>
> (b) in a manner that ensures, as far as is practicable, that the parties are on an equal footing; and
>
> (c) in a manner that saves costs; and
>
> (d) in a manner that is proportionate to -
>
> (i) the amount of any claim;
>
> (ii) the importance or complexity of the action; and
>
> (iii) the financial positions of the parties.[10]

Defining the issues (pleadings)

The role of pleadings is, simply, to state clearly the issues to be tried by the court in order to aid the resolution of the dispute and to satisfy a basic requirement of natural justice. In sub-section 2.5, 'Pleadings — Sacrificing the Sacrosanct' we quoted from Jacob and Goldrein:

> The system of pleadings ... is also designed to fulfill some of the fundamental principles of natural justice, such as that each party should have fair and due notice of what case he has to meet, that each party should have a reasonable opportunity of answering the claim or defence of his opponent, and that each party should have a reasonable opportunity of preparing his case on the basis of the issues disclosed in the pleadings. On this basis the fundamental right of each party to a fair trial is well founded.[11]

We also quoted in that context from Sir Gerard Brennan who said:

> [A] procedure which involves all the principal dramatis personae of the litigation in an early Court procedure designed to settle the issue for trial offers interesting possibilities, early settlements, instant definition of issues, early compulsory education of Court and counsel in the facts and relevant law. These possibilities were lost by the introduction of written pleadings.[12]

It is Sir Gerard Brennan's description of a procedural system that we need to create.

Commencing proceedings

In the 1988 Report it was suggested that the procedure for commencing proceedings in the Local Court should be simplified and that the summons or an attached explanatory booklet should explain the rights of litigants under the *Local Courts Act* and *Rules*.

We would now go further and propose that all actions should be commenced using a simple standard form summons which requires the plaintiff:

(a) to provide details of the claim (and in some classes of action specific detail required by the Court);
(b) require the plaintiff to specifically list the documents upon which he will rely at trial;
(c) give an outline of the court's procedure;
(d) contains a statutory declaration to the effect that the facts contained in the initiating document are true and correct.

Simple pro forma forms

In our view, because of the increasing trend for litigants to be unrepresented, the Court should prescribe a simple form for commencing proceedings. We do not believe that we need to make any recommendations about what the name of this document should be; however, the form must draw to the attention of the person who receives it that an action has been commenced against him or her and set out in plain English the steps the defendant must take to defend the claim.

We also propose that the Court develop practice directions (similar to standard word processing precedents) which prescribe the type of particulars that it requires the plaintiffs to give in the most common classes of action commenced in the Court. By this means the Court would be able to insure that the relevant details are being provided by the plaintiff to the defendant and the Court. For example, the form would specify the information that the plaintiff was required to provide in matters based on dishonored cheques, debts arising out of a credit contract, property damage claims and similar actions. A useful example is the form of initiating process prescribed for the Magistrate's Court in Victoria which specifies, amongst other things, the information that the plaintiff must include in a claim arising from a motor vehicle collision, as follows:

- *What is the nature of your claim?*
  (e.g. cost of repairs to motor vehicle; cost of repairs to damaged fence.)
- *Where did your claim arise?*
  [Give the location of any collision, including a Melway reference if possible, and in the space below draw a sketch plan of the collision with names of roads, etc. identify your vehicle as '1', the vehicle driven by the defendant as '2' and any other vehicles involved as '3', '4', '5', etc.]
- *Where did your claim arise?*
- *How did the collision happen?*
  [You must set out here in as much detail as you can how the collision happened and why you believe the defendant is at fault. If the space is insufficient you may attach other sheets.]
- *How much are you claiming?*[13]

We also propose that the Court enable these forms to be completed remotely (say over the Internet), be made available on disk and at a terminal in a court registries.

Electronic lodgment

There are obvious gains to be had from allowing the filing of documents electronically. In Victoria, the Rules[14] specifically provide for parties to be able to file electronically:

- the initiating process (the 'complaint');
- default judgment;
- warrant;
- summons for oral examination.

We believe that this method of filing documents should be made available as soon as possible.

Service of the initiating process

The 1988 Report recommended that:

(a) Service of summons should be effected by AR certified mail unless the plaintiff specifically requests personal service;

(b) The clerk of court should have the responsibility of posting the summons to the defendant;

(c) A duly completed acknowledgment or delivery of the letter should be proof of service of the summons.[15]

We acknowledge that there is some tension between providing a method of service that is both efficient and effective.

Proponents of an efficient service propose that service be effected by registered or certified mail. On the other hand, the experience of the Local Court is that there are a large number of applications to set aside default judgment arising under the present system because service may be effected by leaving the summons at the defendant's address with 'a person over the apparent age of 16'.[16]

The essential test is that an initiating process must be brought to the attention of the defendant. Certified mail is likely to satisfy this test because the recipient is required to acknowledge receipt of the mail when he or she receives it. For this reason we recommended in the 1988 Report that certified mail be available as a means of serving an initiating process. However, we will also propose that:

- the posting of the initiating process be completed by the Court and that the receipt be returned to the Court; and
- no other form of service be permitted unless the service is effected by delivery to the defendant personally or unless it is specified in an order for substituted service. (This means it would be no longer effective service to leave the summons with the person over the apparent age of 16 years).

With respect to corporations, we propose that the Rules provide that service be effected on a corporation, on the principal officer, secretary or other similar officer of the corporation or, where provision is made by or under any Act for service on a corporation, by serving the document in accordance with that provision.

Notice of intention to defend

In some other jurisdictions the defendant is not required to file a notice of intention to defend, merely a detailed defence.[17] At present in the Local Court the defendant must first file a short notice of intention to defend.

In the 1988 Report the Commission recommended that the various periods allowed under the Rules for a defendant to file a notice of intention to defend be standardised to 14 days from service of the summons.

The experience of the Local Court is, however, that a period of 14 days may be too short and many defendants seem to have trouble meeting that time frame. Accordingly we propose that the defendant have 21 days to file a defence. Because of the longer period of time available to the defendant, we propose that the Defendant be required to file a Defence which complies with the requirements set out below under 'A New Procedure — Defence' and the requirement to file a separate notice of intention to defend be abolished.

Judgment in default

The large number of default judgments demonstrates the utility of this procedure in the Local Court and confirms the necessity for retaining this procedure. Once the initiating process has been served and time to file a defence has expired, the plaintiff should be able to file an application for default Judgment and it should be possible to lodge this application electronically.

The procedure should require the plaintiff to confirm that the debt is continuing and allow the plaintiff to enter judgment for a lesser sum than that claimed in the initiating process.

Consistent with the recommendations in the 1988 Report we propose the limits on the class and amount of claims for damages in respect of which judgment by default may be obtained should be liberalized. In the case of damages for pecuniary loss the plaintiff should be entitled to enter judgment by default if the damages claim does not exceed a prescribed amount (in 1988 we suggested an amount of $2 000 for pecuniary loss and $500 for non-pecuniary loss).[18]

Defence

In sub-section 2.5 'Pleadings — Sacrificing the Sacrosanct', we said the defence should be a detailed response to the plaintiff's claim. General denials should no longer be permitted and relevant documents should be appended to the defence. We also propose the defence should contain a statutory declaration to the effect that the facts contained in that document are true to the best of the signatory's knowledge and belief.

We propose that a practice direction specify a standard form for the 'defence' which requires the defendant to address the plaintiff's claim and in so doing, sets out a concise statement of the nature of the defence, a summary of the material facts, with particulars on which the defendant relies and state any fact or matter which (using the Victorian example):

(a) the defendant alleges makes the claim of the Plaintiff not maintainable; or
(b) if not stated specifically, might take the Plaintiff by surprise; or
(c) raises questions of fact not arising out of the complaint.[19]

Consistent with the recommendations made in the 1988 Report,[20] the defendant should be able to file a defence which indicates that he defends the claim as to part only or, he admits liability but disputes the amount claimed.

Case management conference

Within 14 days of the time for filing the defence a compulsory case management conference should be held.

The purpose of this conference should be precisely stated leaving the method to be expressed in the widest possible terms and in a way that provides the Court with broad powers and considerable flexibility. The danger of being too prescriptive about how the outcome might be achieved is that the focus again will shift from resolving the issue to the process for doing so.

We see the conference as fitting the description given by Sir Gerard Brennan in the quote above. A primary purpose of such conference should be to engage the parties in narrowing and refining the issues in dispute and to:

(a) determine whether the matter is appropriate for mediation or conciliation and if so adjourn it to such a conference;
(b) decide the best method of resolving the issues and make directional orders accordingly (i.e. deal with all interlocutory matters);
(c) provide a firm trial date not more than a given number of months ahead.

Given the importance and nature of the conference we see it as essential that if parties are represented then they should still personally attend the conference.

Alternative dispute resolution

We cannot over emphasise the importance of alternative dispute resolution methods to assist the parties to resolve a dispute. At every opportunity and especially at the case management conference the parties should be given the opportunity to adjourn the conference for the purposes of attending mediation.

Defining the issues

This is a crucial step in the process and in our view precedes every other step. Once it is clear which facts are actually in issue the Court and parties are in a position to decide what interlocutory orders are needed. Refining the issues also helps narrow the focus of inquiry (such as discovery) thus saving time and money.

Ideally, in more complex matters we would like to see a process develop where at the case management conference, the Court was able to settle with the cooperation of the parties, a statement of facts and contentions to be tried.

As a corollary to being required to 'define' or 'refine' what is in issue between the parties, we propose that the person who convenes the conference is

empowered to make findings of fact and is empowered to enter summary judgment for part or all of the claim, including judgment on liability, leaving quantum to be the only issue that goes to trial.

Decide the best method of resolving the issues

Lord Woolf suggests in the *Access to Justice* report a procedure that requires a decision to be made as to whether a matter should proceed down a fast or ordinary track. The procedure in the fast track is truncated and would allow the speedy resolution of matters.

As we said above, we propose a procedure that is more flexible. Rather than classify a matter before deciding on which course it will take, simply provide the Court with sufficiently wide powers to make any order that suits the matter having regard to the objectives set out above, namely to ensure that the proceedings are conducted:

(a) with the least possible delay;
(b) in a manner that ensures, as far as is practicable, that the parties are on an equal footing;
(c) in a manner that saves costs; and
(d) in a manner that is proportionate to -
    (i) the amount of any claim; and
    (ii) the importance or complexity of the action; and
    (iii) the financial positions of the parties.

Make directional orders

In order to provide the Court with the greatest amount of flexibility in bringing the matter to the point where it can be tried, we suggest the Court have extensive powers. These might include powers:

- to require the parties to give particulars;
- to settle, with the cooperation of the parties, a statement of facts and contentions;
- to make findings of fact and to enter summary judgment for part or all of the claim (including judgment on liability, leaving quantum to be the only issue that goes to trial);
- an order that the conference be adjourned to a mediation conference or alternatively a power to conciliate;[21]
- an order that a document may be filed with the court in electronic form;
- an order that there be an exchange of written statements of the intended evidence of each witness;
- an order as to how statements referred to in the preceding paragraph can be used;
- an order for an exchange of documents and the preparation and filing of an agreed list of exhibits that are page numbered and indexed (in appropriate order);
- an order for the preparation of written submissions on a question of law raised, and the filing of copies of authorities relied on.[22]

By way of emphasis we reiterate, that at the case management conference, the Court should only make interlocutory orders which are proportional to the amount of any claim, the importance or complexity of the action and the financial positions of the parties.

Provide a firm trial date

The purpose of providing a trial date is to reduce the delay between commencing the action and its ultimate resolution. As we observed above, once the parties begin to focus on the issues often a dispute will be resolved by agreement. Moreover, a fixed trial date will provide the parties with a time frame in which all the interlocutory preparation must be complete and any delay will be to their own detriment.

Additionally, the benefits of case management have been apparent in many other jurisdictions and therefore, the Court should have a case management power to call up of its own motion actions that are falling behind in the timetable and make effective orders to insure the matter gets back on track. We note that it may be necessary to secure the jurisdictional basis of case management rules by providing a provision in the renamed *Local Courts Act (Magistrates Courts (Civil Jurisdiction) Act 1904*) that the Court be under a duty to conduct its business with the object of ensuring that the action is dealt with expeditiously and with achieving the outcomes that we have quoted above.

To further insure the parties avoid delay in bringing the matter to trial we discuss later the need for sanctions to be imposed for non compliance with a directional order and the type of sanctions that might be effective.

Interlocutory procedures

One purpose of the case management conference is, so far as practicable, to deal with *all* interlocutory matters at the one conference so as to avoid the need for endless piecemeal interlocutory applications. To this end we propose the abolition of rules that require or allow a party to apply for any order that could have been made at the case management conference (such as particulars, discovery and summary judgment). Parties should be forced to deal with the issues at the conference. The only exception would be to allow a party to apply for an order sanctioning another party for non compliance with an order made at the conference (see below).

We also wish to make some specific observations concerning some common interlocutory matters:

Discovery

Discovery is necessary to insure that all relevant evidence is before the court and the parties. However the discovery process has its disadvantages and it can become a considerable burden on the parties if its scope is unlimited. These problems are compounded by the parties often not being able to

appreciate the relevance or significance of a document. The danger with limiting discovery is that it can result in relevant and significant evidence not being put before the parties or the Court. In that event the process would not meet the fairness aspect of the natural justice test. In complex matters this possibility would be even more likely.

To the extent that the case management conference is successful in narrowing and clarifying the issues in dispute it should also assist in limiting the scope and therefore cost of discovery in money and time.

It is not uncommon for parties to swear affidavits of discovery followed by affidavits of further and better discovery and so on. To deal with incomplete discovery we propose that the Court have power to deny a party the right to rely at trial on a document he or she neglected to discover or alternatively, if the document advantages the non discovering party then an order that the defaulting party pay the costs of the action.

Interrogatories

There is considerable debate about the usefulness of interrogatories considered in sub-section 2.6, 'Discovery — Should the Whistleblowers Stop the Train of Inquiry?' With respect to the Local Court we believe it is sufficient to simply propose that the question of whether interrogatories be allowed in any given matter be left to the discretion of the Court to be decided at the case management conference.

Summary judgment

We refer to Chapter 12 of the 1988 Report where a number of recommendation were made with respect to summary judgment, largely, broadening the types of matters in which summary judgment could be made.

Anecdotal evidence is that in the Local Court, in Perth, a large number of applications for summary judgment are made but about three quarters fail resulting in considerable delay and wasted costs. It has been suggested that the opportunity for summary judgment be removed and instead, where the defence disclose no defence in law, the action be dealt with under a fast track truncated procedure.

We see the case management conference as providing an opportunity for the Court and the Parties to see what issues of fact and law are in issue. This process will be made easier by the requirements specified above, that the parties set out the facts on which they rely in the pleadings and that they are required to verify the truth of those statements by way of statutory declaration. Accordingly we propose that it be open to the Court at the case management conference to make findings of fact on the basis of the pleadings and to give judgment if the finding of facts warrant that outcome.

Sanctions

We have referred above to some of the causes of delay and we observed that it is practically impossible to devise a procedure that could not be exploited to some extent. For this reason it is necessary to have appropriate sanctions for non compliance with the Rules or Court and orders and in particular to punish undue delay.

The type of sanctions that we propose have been referred to above.[23] We propose that the Court have power to order:

(a) the claim or defence or part of one be struck out if there has been a failure to comply with a rule, practice direction or direction given by the Court;
(b) that a party may not call evidence on a particular issue, or call a particular witness or use a particular document;
(c) that the action proceed to trial as soon as practicable;
(d) fixing time limits in respect of any subsequent proceedings;
(e) fixing the date for the trial of the action;
(f) that the action be dismissed.

In addition, if our observations above regarding causes of delay are correct and some litigants weigh up the costs of delay and the costs of resolving a matter to determine whether they will delay, then appropriate cost orders could be effective deterrents to delaying tactics. We propose that the Court have power to impose a penalty order on a party if he or she either, has failed without reasonable excuse to comply with an order or, has complied but in a manner that has caused delay.

Penalty orders

Cost orders which follow the event or are to be paid at some later date do not provide an incentive for avoiding delay since the matter may settle or the costs of some interlocutory skirmish are forgotten about when the matter ultimately comes to trial. As Lord Woolf put it:

> Orders for costs which do not apply immediately have proved to be an ineffective sanction and do nothing to deter parties from ignoring the court's directions.[24]

We propose that penalty orders be made on application of a party or by the Court. The penalty should be payable forthwith to the Court and in an amount which is in the discretion of the Court but which is sufficient to be an effective deterrent.

Counterclaims and third party proceedings

Counterclaim and setoff

At the present time it is possible for a defendant to file a counterclaim in the Local Court even though the amount claimed exceeds the limit of the Court's monetary jurisdiction and even though it relates to a matter or circumstance completely unconnected with the plaintiff's claim. In these circumstances, in effect, two actions are being tried together. In our view this is undesirable and we propose that a defendant only be able to plead a counterclaim if the

facts and circumstances on which it is based are directly related to the facts and circumstances on which the plaintiff's claim are based. Consistent with our recommendation that there be no other interlocutory order than those made at a case management conference or pre-trial hearing, we propose that a defendant intending to file a counterclaim or setoff may only do so:

- in a form specified in a practice direction (which has the same requirement to form and content as a claim); and
- at the same time as the defence is filed.

We also propose that once the time for filing the defence has expired it is not possible to issue a counterclaim or setoff.

Defence to counterclaim or setoff

We propose that the plaintiff file a defence to a counterclaim or setoff within 14 days after service of the counterclaim or setoff and prior to the case management conference.

Third party claims

There is a view that the issuing of third party notices can be a major delaying tactic with anecdotal evidence that although the current Rules provide a time limit for filing the notice it is often ignored. Given that the defendant has 21 days within which to file a defence we propose that the defendant must file and serve any third party notice:

- only in a form specified in a practice direction (which has the same requirement to form and content as a claim);
- at the same time as the defence is filed;. and
- on the third party forthwith.

The third party notice should require the third party to file a response in the same form and content as the defence. Because we envisage a short time frame between the filing of the defence and the case management conference, we propose that third party directions be made at the case management conference.

PRE TRIAL CONFERENCE

Although we have proposed a case management conference at the very outset of the action, which would provide the parties with an opportunity to explore settlement by way of mediation or conciliation, we are of the view that there is still a benefit in conducting a further conference closer to the trial. Unlike the present pre-trial conference however we propose that its primary purpose be to allow the Court to make orders concerning the conduct of the trial. For this reason the person conducting the conference should be the magistrate who will hear the matter.

The orders that the magistrate should be able to make include any of those that could be exercised at a case management conference[25] with the additional power to give directions as to:

- referring the parties to a mediation conference;
- the order of evidence at trial;.
- limiting the time to be taken in examination, cross-examination and re-examining a witness;
- limiting the number of witnesses (including expert witnesses) that a party may call on a particular issue:
- ordering the exchange of witness statements;
- limiting the time to be taken in making any oral submission;
- limiting the time to be taken by a party in presenting its case;
- limiting the time to be taken by the trial.[26]

THE TRIAL

If the new procedure we have outlined above is successful then by the time the matter comes on for trial the issues in dispute should be clear as should the manner in which the issues will be determined. It is desirable, however, that the Court have the power to make any or all of the orders set out in the preceding paragraph to further determine the manner in which evidence will be adduced at the trial and to change, if it is in the interests of justice to do so, any of the orders made at the pre-trial conference.

Evidence

We propose that a rule similar to Rule 101 of the *Magistrates Court (Civil Division) Rules 1998* (Tas) which permits a witness's evidence to be given by way of affidavit is desirable and should be included in the new Rules. That Rule provides:

> Witness not required to attend trial — 101.
>
> (1) The attendance of a witness at a trial is not required if -
>
> (a) the party calling the witness serves an affidavit of the witness on all other parties not less than 14 days before the date fixed for trial; and
>
> (b) within 7 days after the affidavit is served, another party has not objected to the use of the affidavit at the trial.
>
> (2) An objection under sub-rule (1)(b) is to be in writing.
>
> (3) The Court may receive as evidence an affidavit served under this rule and to which no objection has been made.
>
> (4) The Court is to order a party whose objection it considers unreasonable to bear relevant costs.

Consistent with the 1988 Report we also propose the New Court should be given a similar power to that given the Federal Court to dispense with compliance with the rules of evidence in certain circumstances.[27]

Non attendance of a party

We propose that the Court have the power to strike out an action if the plaintiff fails to attend at the hearing and to similarly strike out the defence if the defendant does not attend the trial. Judgment entered as a result of failure to attend should be capable of being set aside.

JUDGMENT AND EXECUTION

The Law Reform Commission of Western Australia published a report in 1995 on *Enforcement of Judgments of the Local Court*. Given the currency of that Report and the fact that the Commission will soon be issuing a report on Writs and Warrants of Execution, we do not intend to reexamine the procedures for the enforcement of judgment in this sub-section.

SUMMARY OF PROPOSALS

The Law Reform Commission of Western Australia recommends the following proposals which have been outlined above:

Jurisdiction

1. Magistrates in the Local Court be given power within the limit of the monetary jurisdiction to grant primary equitable relief.

2. The "Minor Claims Division" of the Court have the jurisdiction to determine claims for damages.

Objectives of a new procedure

3. Any new procedure should force the parties to come to terms with and understand the issues and evidence as soon as possible after the claim is filed.

4. The Rules for the New Civil Division of the Magistrates Court should state clearly the object of the Rules and the context in which proceedings are to be conducted, such as:

Proceedings in the Court are to be conducted -

(a) with the least possible delay; and

(b) in a manner that ensures, as far as is practicable, that the parties are on an equal footing; and

(c) in a manner that saves costs; and

(d) in a manner that is proportionate to -

(i) the amount of any claim; and

(ii) the importance or complexity of the action; and

(iii) the financial positions of the parties.

Standard and simplified forms

5. All actions should be commenced using a simple standard form document which requires the plaintiff:

(a) to provide details of the claim;

(b) to specifically list the documents upon which he or she will rely at trial;

(c) to give an outline of the court's procedure

(d) to provide a statutory declaration to the effect that the facts contained in the initiating document are true and correct.

6. The Court develop (perhaps by way of practice directions) standard precedent forms for various types of common causes of action and these forms are capable of being completed over the Internet, on Disk and at terminals in Court registries.

Service of initiating process

7. Service of the initiating process be posted by Court officers and that the receipt be returned to the Court.

8. Service can only be effected by:
- personal delivery to the defendant; or
- posting it to the defendant's last known address by AR certified mail; or
- in the case of a corporation in any manner permitted by other legislation; or
- as specified in an order for substituted service.

Pleadings

9. Pleadings cannot contain general assertions nor general denials.

10. All pleadings must contain:
- a concise statement of the facts on which the party relies, with particulars;
- any relevant fact that may take the other party by surprise if it were not stated; and
- relevant documents referred to in the pleading.

11. The pleadings must contain a statutory declaration by the party that the facts pleaded are true to the best of the signatory's knowledge and belief.

Defence and judgment in default

12. The notice of intention to defend be abolished and the defendant, within 21 days of service, be required to file a defence which complies with the requirements set out in this sub-section.

13. The limits on the class and amount of claims for damages in respect of which judgment by default may be obtained should be liberalized. In the case of damages for pecuniary loss the plaintiff should be entitled to enter judgment by default if the damages claim does not exceed a prescribed amount.

Case management conference

14. As soon as practicable after the filing of a defence a case management conference must be held which:

(a) determines whether the matter is appropriate for mediation or conciliation and if so, adjourns the action to such a conference;

(b) defines and clarifies the issues in dispute;

(c) decides the best method of resolving the issues and makes directional orders accordingly (i.e. deals with all interlocutory matters);

(d) provides a fixed trial date not more than a given number of months ahead.

15. The powers which can be exercised at a case management conference are:

- to require the parties to give particulars ;
- to settle, with the cooperation of the parties, a statement of facts and contentions;
- to make findings of fact and to enter summary judgment for part or all of the claim (including judgment on liability, leaving quantum to be the only issue that goes to trial);
- an order that the conference be adjourned to a mediation conference or alternatively a power to conciliate;[28]
- an order that a document may be filed with the court in electronic form;
- an order that there be an exchange of written statements of the intended evidence of each witness,
- an order as to how statements referred to in the preceding point can be used,
- an order for an exchange of documents and the preparation and filing of an agreed list of exhibits that are page numbered and indexed (in appropriate order);
- an order for the preparation of written submissions on a question of law raised, and the filing of copies of authorities relied on.

16. The abolition of rules that require or allow a party to apply for any of the matters that should now be dealt with at the case management conference (eg, particulars, discovery and summary judgment).

Sanctions

17. Parties should be able to apply for an order sanctioning another party for non compliance with an order made at the conference.

18. The Court have power to impose a penalty order on a party if he or she has failed without reasonable excuse either to have complied with an order or caused delay in complying with an order.

19. Penalty orders be payable forthwith to the Court and in an amount in the discretion of the Court but sufficient to be an effective deterrent.

20. By way of emphasis we reiterate, that at the case management conference, the Court should only make interlocutory orders which are proportional to the amount of any claim, the importance or complexity of the action and the financial positions of the parties.

21. The Court have power to deny a party the right to rely at trial on a document he or she neglected to discover or alternatively, if the document is to the advantage of the non-discovering party then an order that the defaulting party pay the costs of the action.

22. The question of whether interrogatories be allowed be left to the discretion of the Court.

23. A power enabling the Court to make findings of fact on the basis of the pleadings and to give judgment if the finding of fact warrant that outcome; and power to order:

(a) the claim or defence or part thereof be struck out if there has been a failure to comply with a rule, practice direction or direction given by the Court;
(b) a party may not call evidence on a particular issue, or call a particular witness or use a particular document;
(c) that the action proceed to trial as soon as practicable;
(d) fixing of time limits in respect of any subsequent proceedings;
(e) fixing of the date for the trial of the action;
(f) that the action be dismissed.

24. A defendant only be able to plead a counterclaim if the facts and circumstances on which it is based are directly related to the facts and circumstances on which the plaintiff's claim are based.

25. A defendant intending to file a counterclaim or setoff may do so:

- in a form specified in a practice direction (which has the same requirement as to form and content as a claim); and
- at the same time as the defence is filed.

26. The plaintiff file a defence to a counterclaim or setoff within 14 days after service of the counterclaim or setoff and prior to the case management conference.

27. The defendant file and serve any third party notice:

- in a form specified in a practice direction (which has the same requirement to form and content as a Claim);
- at the same time the defence is required to be filed.

28. It is only possible to issue a counterclaim or third party notice in the time permitted and no extension of time will be permitted;

Pre-trial conference

29. A pre-trial conference be held shortly before the trial to enable the Court to make orders concerning the conduct of the trial.

30. The person who presides over the pre-trial Conference be the magistrate who will hear the matter and he or she may make orders:

- referring the parties to a mediation conference if appropriate;
- setting the order of evidence at trial;.

- limiting the time to be taken in examination, cross-examination and re-examining a witness;
- limiting the number of witnesses (including expert witnesses) that a party may call on a particular issue:
- ordering the exchange of witness statements;
- limiting the time to be taken in making any oral submission;
- limiting the time to be taken by a party in presenting its case;
- limiting the time to be taken by the trial.

Trial

31. The attendance of a witness at a trial is not required if :

- the party calling the witness serves an affidavit of the witness on all other parties not less than 14 days before the date fixed for trial; within 7 days after the affidavit is served, another party has not objected to the use of the affidavit at the trial.
- an objection under the preceding point is to be in writing.
- the Court may receive as evidence an affidavit served as above and to which no objection has been made.
- the Court is to order a party whose objection it considers unreasonable to bear relevant costs.

32. The Court have the power to strike out an action if the plaintiff fails to attend at the hearing and to similarly, strike out the defence if the defendant does not attend the trial. Judgment entered as a result of failure to attend should be capable of being set aside.

ENDNOTES

1 LRCWA, *Report on Local Courts: Jurisdiction, Procedures and Administration* Project No 16 Pt I (June 1998).

2 Ibid Ch 3.

3 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996) 2.

4 Unidentified speaker, oral submission to the LRCWA (Perth 28 July 1998).

5 C Burke, written submission to the LRCWA (Perth, 28 August 1998).

6 Andrew James Cannon *Honours Master of Laws Thesis* (University of Wollongong, 1996).

7 See *Local Court Rules 1961* (WA) O 5 r 15.

8 Adapted from Woolf, above n 3

9 Ibid 14, para 1.

10 See also *Magistrates Court (Civil Division) Rules 1998* (Tas) paras 5, 7.

11 J Jacob, 'The Present Importance of Pleadings' (1960) *Current Legal Problems* 10, 11-12.

12 G Brennan, 'Written Pleadings' (1975) 12 *The University of Western Australia Law Review* 33, 45.

13 *Magistrates' Court Civil Procedure Rules 1989* (Vic) Form 4A, r 4.02.

14 See eg, *Magistrates' Court Civil Procedure Rules 1989* (Vic) rr 4.02.2 and 4.02.3.

15 LRCWA, above n 1, paras 10.1, 10.3-10.15.

16 *Local Court Rules 1961* (WA) O 6 r 4.

17 See the *Magistrates' Court Civil Procedure Rules 1989* (Vict.) and the *Magistrates Court (Civil Division) Rules 1998* (Tas).

18 For a detailed discussion of this topic: see LRCWA, above n 1, Ch 11 .

19 Magistrates' *Court Civil Procedure Rules* 1989 (Vict) r 9.01(4) & (5).
20 LRCWA, above n 1, para 12.2.
21 For example, a power similar to that in the *Residential Tenancies Act 1987* (WA) s 23.
22 Adapted from *Local Court (Civil Claims) Rules 1988* (NSW) Div 3 r 9.
23 See Woolf, above n 3, ch 6, especially para 9.
24 Ibid ch 6, para 1.
25 Ibid para 4.7.
26 Adapted from the *Magistrates' Court Civil Procedure Rules 1989* (Vic).
27 See LRCWA, above n 1, paras 15.8 - 15.10.
28 For example, a power similar to that in the *Residential Tenancies Act 1987* (WA) s 23.

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Statutes

WESTERN AUSTRALIA

Justices Act 1902 (WA)
Local Courts Act 1904 (WA)
Local Courts Amendment Act 1987 (WA)
Residential Tenancies Act 1987 (WA)

Regulations

NEW SOUTH WALES

Local Court (Civil Claims) Rules 1988 (NSW)

TASMANIA

Magistrates Court (Civil Division) Rules 1998 (Tas)

VICTORIA

Magistrates' Court Civil Procedure Rules 1989 (Vic)

WESTERN AUSTRALIA

Local Court Rules 1961 (WA)

2.9

Costs in Civil Proceedings

INTRODUCTION

Historically the two chief criticisms which have been made of the English common law tradition are cost and delay. Those two criticisms are linked. Delay is in major part caused by procedural complexity and that in turn adds to cost. The criticisms of cost and delay are not new. They date back to the writings of Charles Dickens.

It follows that no matter how little lawyers charge their clients for individual tasks relating to the litigation process, if those tasks are numerous and/or time consuming then the total costs will quickly mount up. Thus, reform of the law relating to costs must of necessity go hand in hand with the procedural reform of the law and, possibly also, the reform of substantive law.[1]

Lawyers have always charged clients for their services. However, the ability to recoup costs from the other (losing) party to the litigation is an invention of statute rather than of the common law. This was made clear by the High Court of Australia in *Cachia v Hanes*[2] where their Honours traced the law concerning costs back to the *Statute of Gloucester 1278* (UK). Since that time there have been disputes not only as between solicitor and client but also as between party and party concerning the quantum of costs.

The costs (fees) which clients must pay out to their own lawyers obviously have an important impact upon access to justice. The English common law tradition is that all are equal before the law and thus have equal access to the courts. But, as Mr Justice Barry of the Supreme Court of Victoria said in his forward to *Oliver's Law of Costs*:[3] 'The cynical comment, 'the Courts, like the Ritz Hotel, are open to both rich and poor', has an uncomfortable sting in it.'

There is always going to be an uncomfortable tension between legal costs and justice. All people in a free and democratic society regard justice not as a privilege, but as a right. Accordingly, there is something inherently inconsistent in the notion that justice is a right which must be paid for. Further, the cynical but successful litigant might well ask 'Why should I pay anything since by winning the Court has upheld the right which I have claimed?'

Another tension lies in the fact that lawyers still like to regard themselves as practising a 'profession'. This idea is under challenge of late and it is now common place to hear of a 'legal services industry' in which there are no professionals, but rather 'legal service providers'. Those who would take economic rationalism to the extreme argue that lawyers should see themselves as doing nothing more than selling widgets. Others still cling to the description of a profession given by the famous American jurist Dean Rosco Pound as 'a group of men pursuing a learned art as a common calling in a spirit of public service — no less a public service because it may incidentally be a means of livelihood.'

Aside from the criticism that litigation costs too much, there is also the problem of the extreme difficulty in trying to estimate precisely how much a litigation venture will actually cost. Most clients quite properly regard litigation as an option of last resort and thus wish to carry out a cost/benefit calculation before proceeding. Litigation is uncertain enough to start with (it would be a brave (or foolish) lawyer indeed who would guarantee that any particular case has a 100% chance of success) and so it is necessary to work out what the client will have to pay to take a case to its conclusion to the client's own lawyers as well as what the client will have to pay to the other side in respect of their costs.

OUTLINE OF THE LAW OF COSTS IN WESTERN AUSTRALIA

Basically the law of costs in Western Australia divides itself into two categories — costs as between solicitor and client and costs as between party and party. This reflects the twin liabilities for costs which a litigant faces — (1) the costs the litigant must pay the litigant's own lawyers; and (2) the costs which the litigant may have to pay the other side, if the litigant loses.

In the absence of a valid costs agreement between the solicitor and the client, the solicitor is only entitled to charge the client in accordance with the applicable scale of costs. That scale of costs also applies to any order for costs made as between party and party. The term 'taxation' is used to describe the process whereby the precise amount of costs is fixed by an independent person. This taxation process is resorted to where there is a dispute between the client and the client's solicitor or between the losing and winning litigants as to the amount of costs. Where the dispute is between the client and the client's solicitor the taxation process is commonly referred to as a 'solicitor/client taxation'. Where the dispute is between the winning

and losing sides to litigation, the taxation process is commonly referred to as a 'party/party taxation'.

It has long been recognised that the so called 'indemnity principle' underlying an award of party/party costs is only a partial indemnity. The usual order in civil litigation is that the loser must pay the winner's costs. Although there are no statistics kept on the subject, most practitioners would agree with the estimate that costs recoverable from the other side will only be between 40 to 60 per cent of what the client has had to pay to the client's own lawyers.[4] In theory, in the absence of a costs agreement this should not be so.[5]

The loser pays principle

The loser pays principle is a unique feature of English common law. By and large it does not apply in the United States of America which also follows the common law tradition. The general rule of thumb in the United States is that each litigating party should bear its own costs irrespective of the outcome of the case. However, it needs to be appreciated that in both Australia and England the loser pays principle is by no means absolute and is hedged in by a great many exceptions and qualifications. One exception is that in probate, administration and trust disputes a common order is that the costs of all parties be paid out of the estate. Another exception is where the 'losing party' is ordered to pay less damages than the 'loser' had (prior to trial) offered to pay the 'winner'. Further, in a number of statutory jurisdictions the usual rule does not apply so that the parties must bear their own costs.[6]

Determination of costs scales in Western Australia

Until 1987 cost scales in Western Australia were fixed by the judges of the particular court to which the scale related. The judges were given that power by the statute which created the court so as to make and amend rules of court. The costs scale appeared as a schedule to the rules of the particular court. These rules (and hence the scale) took effect as delegated legislation and thus was subject to disallowance by the Parliament in accordance with the *Interpretation Act 1984* (WA).

By Act No 65 of 1987 the *Legal Practitioners Act 1893* (WA) was amended to insert new Divisions 1 and 2 into the Act. That Division created the Legal Costs Committee made up of a judge of the Supreme or District Courts or a senior practitioner, two practitioners, an accountant and two lay members. Division 2 conferred on the Committee the power to make and review determinations regulating the remuneration of practitioners in litigious and non-litigious matters after taking submissions from the public and conducting enquiries. Such determinations override any scales included in rules of court or other delegated legislation. It is these determinations which prescribe the fees which a solicitor can charge the client in the absence of a costs agreement between the solicitor and the client. These determinations also prescribe the fees which are allowable on a party/party taxation.

Current costs scales in Western Australia

So far as litigation in Western Australian courts (aside from the Family Court of Western Australia which is essentially governed by scales made under the *Family Law Act 1975* (Cth)) is concerned, there are three key[7] scales:

- Legal Practitioners (Supreme Court) (Contentious Business) Determination 1996 — this applies to litigation in the District Court (save for appeals to that Court) and the Supreme Court.
- Legal Practitioners (District Court Appeals) (Contentious Business) Determination 1996 — this applies to appeals to the District Court (eg from the Local Court and the Commercial Tribunal).
- Legal Costs Committee Determination Local Court Scale 1994 — this applies to the Local Court.

Subject to very few exceptions, the scale which applies to Supreme and District Court litigation is based on time charging for discrete steps in the litigation process but with the important safeguard of a recommended/ estimated amount of time each task should take. The scale lays down maximum charge out rates for practitioners of different levels of seniority. Some items of the scale (eg requesting particulars of a pleading) calculate the maximum by providing that only a more junior practitioner should do that particular piece of work and stating how long it should take to complete the job. The scale recognises that more junior practitioners usually take longer to complete a task than do more senior practitioners. The maximum amounts for many tasks are calculated by reference to how long it would take a senior practitioner to complete the task.[8]

It follows that for many tasks in Supreme and District Court litigation there is a very wide range. For a statement of claim the range is theoretically $0 to $2 700. On a taxation, the taxing officer must assess the complexity of the statement of claim, the seniority of the person who drew the statement of claim and how long the task took. This assessment involves experience, judgment and discretion. It is more an art than a science. It follows that although it is virtually impossible to predict exactly what will be awarded on a taxation for drawing a statement of claim, at least the maximum is ascertainable.

The scale which applies to District Court appeals is calculated according to fixed maximum amounts (eg counsel fee on hearing of $3 500). Once again the range is wide (ie $0 to $maximum) and although it is virtually impossible to predict exactly what will be awarded on a taxation for any particular item, at least the maximum is ascertainable. The other advantage of the scale which applies to District Court appeals is that there are very few steps involved and the maxima are modest. Thus the client can and should be told with a good degree of accuracy the maximum the other side will recover on a taxation, if the appeal is lost.

The Local Court scale is different again. The scale is basically divided into four categories. All Local Court actions, for cost purposes, fall into either division 1 (claims below $3,000) or division 2 (claims over $3 000). Each division is then divided into routine cases and complex cases. The costs allowed on routine matters are, with very few exceptions, fixed for all items. This is in recognition that in matters such as debt collection (eg on a dishonoured cheque) the work is so routine (even where the amount claimed is over $3 000) that it is not worth providing a range of fees which will inevitably lead to arguments about the appropriate figure within a range. The same applies to complex cases in division 1 (ie below $3 000) — the fees for each item are still fixed but are slightly higher. Division 2 complex cases basically follow the same approach as litigation in the Supreme and District Courts save that the rates are lower.[9]

SOLICITOR/CLIENT TAXATIONS

Although Western Australia does not presently have the statutory requirement for fee disclosures and fee agreements which have recently been introduced in the eastern states, Western Australia for many years has had an important statutory protection for clients at the point at which a bill of costs is rendered. Section 65 of the *Legal Practitioners Act* prevents a solicitor from suing for fees until a bill of costs has been served on the client which contains a warning advising the client of the client's right to have the bill taxed.

If the bill is a 'lump sum' bill, then the client has 30 days in which to ask for an itemisation. After receiving an itemised bill the client then has a further 30 days in which to request that the practitioner present the bill of costs to the Supreme Court for taxation. The combined effect of sections 59 and 66A of the *Legal Practitioners Act* is that the taxing officer of the Supreme Court (almost always a registrar) is required to tax the bill in accordance with the costs agreement, and in the absence of a costs agreement in accordance with the applicable scale.

Taxing officers of the Supreme Court are concerned to protect the position of the client and it often happens that quite significant amounts are 'taxed off' a practitioner's bill. Taxing officers of the Supreme Court are very prompt in arranging solicitor/client taxations and the whole matter generally tends to resolve itself within a month or two of the practitioner forwarding the bill and relevant papers to the Supreme Court for the purposes of the taxation.

There is, however, a difficulty when the 30 day period prescribed in the section 65 notice has expired and the solicitor then sues the client for outstanding fees. At this point, the client often belatedly seeks to have the bill taxed. Section 68A(d) gives the taxing officer of the Supreme Court the power to extend the time within which the client may seek a taxation. Section 66B also gives the taxing officer the power to order a stay of any recovery proceedings by the solicitor. This is a somewhat unusual provision in the

sense that it allows a junior officer of the Supreme Court to grant a stay of an action which, as often as not, is proceeding in another Court (eg the Local Court or the District Court in an action by the solicitor against the client). Nonetheless, this is a provision which appears in the main to work well in practice.

The case authorities on extensions of time to seek a taxation of costs show that the Court is generally quite indulgent towards the client. Indeed, the cases suggest that it would be a rare situation indeed in which the practitioner should even object to an extension of time. As it happens, most solicitors welcome a taxation because as soon as the bill of costs is signed it takes effect as a judgment of the Supreme Court and may be executed upon accordingly.[10] This saves the practitioner the time and expense of suing for recovery in the Local or District Courts.

Difficulties, however, arise where the client for some reason chooses not to exercise the statutory right to a taxation. The client (often acting in person by this stage) usually concedes that the legal work was done. The two main defences are usually that an unreasonably high amount has been charged and, sometimes, that the legal work was negligently performed. In respect of the former defence, this leads to a very unsatisfactory situation. It is not unusual for there to be a hearing in a Local Court before a Magistrate which has all the trappings of a full blown trial but is, in substance, simply a taxation procedure.[11]

Proposal 1

The *Legal Practitioners Act* should be amended so that a solicitor has the option of referring any unpaid bill rendered to a client to the Supreme Court for taxation on the solicitor's own motion.

Serving the client with the bill of costs and also the notice of appointment would in effect act as the summons. It is preferable that all questions of reasonableness of amount be determined by a taxing officer of the Supreme Court experienced in such matters rather than (for example) Local Court magistrates sitting in open court in the course of a trial.

Proposal 2

The *Legal Practitioners Act* should also be amended so that in any proceedings before a court by a practitioner against a client seeking the recovery of fees, the court (eg the District Court or the Local Court) is obliged to direct that the question of the amount and reasonableness of the fees charged be determined only after the conduct of a solicitor/client taxation before a taxing officer of the Supreme Court.

PROTECTION OF THE CLIENT BEFORE LITIGATION COMMENCES

Protections built into the *Legal Practitioners Act* with respect to the recovery of fees by solicitors from clients, although important, in a sense come too late. Those protections tend only to be invoked once the relationship between the solicitor and the client has broken down and the solicitor is pressing for recovery of unpaid fees.

Prudent solicitors invariably explain the cost implications of any proposed litigation. Indeed, the *Professional Conduct Rule*s published by the Law Society of WA require a solicitor as soon as reasonably practicable after taking instructions to explain the basis upon which fees will be rendered. But there are few hard and fast rules. The lawyer/client costs agreement published in pro forma format by the Law Society does contain some useful warnings for the client. Space is provided for the solicitor to provide an estimate of the total amount the solicitor is likely to charge the client to conduct the litigation and also an estimate of the amount likely to be recovered on a taxation for the other side should the matter be won or lost. However, there is no legal (query ethical) requirement for the solicitor to provide the client with this information.

It not infrequently happens that the solicitor charges an amount which is reasonable and proper in accordance with either a costs agreement or a relevant scale, but two-thirds of the way into the litigation, legal fees have reached a point where the client no longer considers it worthwhile to proceed with the litigation. The client is then in a dilemma. To pull out at that stage may well require the client to pay the other side's legal costs, leaving aside the fees which the client has paid her or his own solicitor to date and which will be wasted. This often makes clients feel as though they are 'locked in' to litigation right through to the bitter end and thus are left without an effective choice.

Whilst all prudent solicitors try to give this information before proceedings are issued, it is extremely difficult for the solicitor to give an accurate estimate. What tends to happen is that the solicitor out of an understandable desire to avoid any come back by the client, gives an estimate of costs which is pessimistic. Solicitors understandably give their estimates on the basis of a 'worst case scenario' rather than an 'optimistic or best case scenario'. There are at least three reasons for this. The first is that most of the scales provide quite large ranges of costs for each step in the litigation. Before proceedings have got under way it is extremely difficult for the solicitor to predict whereabouts within the range the taxing officer is likely to go. The second difficulty is that the precise number of steps in any litigation is frequently dependent upon the approach which the other side adopts to the litigation. The conduct of the other side may force the solicitor to take additional steps in the litigation which she or he might not otherwise have taken. Further, the other side may well take steps in the litigation which the solicitor could not

reasonably have predicted and which may even be frivolous steps.[12] Furthermore, the solicitor will quite naturally wish to avoid later assertions of professional negligence by not giving the client an insight as to the worst case scenario.

Proposal 3a

Notwithstanding these uncertainties, there should be some statutory recognition of the fact that it is preferable for a client to be given a written estimate on the basis of given parameters as to the likely cost of proposed litigation. Such matters should form part of a written retainer between the solicitor and the client before any proceedings are issued.[13]

The client could also usefully be given a booklet or leaflet or standard form memorandum which refers to the risks and pitfalls of litigation generally and which is tailored to the particular court out of which the proceedings are to issue. Such a booklet could refer to the risks of losing a case on appeal even though the client is successful at trial. The possibility of interlocutory skirmishes could also be referred to in such a booklet and the additional costs which flow therefrom.

Proposal 3b

The requirement to provide such a standard form booklet could be made by an amendment to the Law Society's Professional Conduct Rules and/or as a mandatory prerequisite to the perfecting of a valid costs agreement with a client.

Such a booklet would be particularly useful to unrepresented litigants. Ideally the booklet would be produced after consultation between the Law Society and the court to which the booklet relates.

Proposal 3c

Court staff should be directed to provide a copy of the booklet to any litigants in person immediately upon the filing of an action or a defence.[14]

In the Supreme Court the case management registrars frequently make orders requiring solicitors to provide a written statement to their clients of all fees incurred to date, an estimate of likely future costs to be charged by the solicitor, the likely amount recoverable from the other side if the case is won and the amount likely to be paid in costs to the other side if the case is lost.[15] Failure by the solicitor to comply with such an order is a contempt of court. Typically those orders are made after the close of pleadings (so that the issues in the case and the parameters of the case can be identified) and before a mediation conference is fixed. There is also a requirement that clients personally attend the first directions hearing with their solicitors.[16]

Of course it needs to be recognised that each case is different and each client is different. There would be little point requiring a cost disclosure statement to be made by a solicitor acting for a bank who is seeking an order for vacant possession under a residential mortgage. The bank officer concerned would probably have been involved in the issue of numerous such actions. Further, even if the action is defended, the bank is often awarded summary judgment. Thus the costs involved are (to a bank at least) relatively modest and the litigation fairly short. If, however, summary judgment was not awarded, then the future costs may become more of an issue to the bank. At this point, a costs disclosure order would not only be more useful but also more likely to be accurate.

Without in any way detracting from the desirability of clients receiving as much information as possible from a point before proceedings are issued, in terms of court ordered cost disclosure orders a more flexible procedure is necessary. Further, cost disclosure orders should go hand in hand with mediation orders as is currently the practice among Supreme Court case management registrars. Solicitors should be relied on to give their clients the information booklet referred to above as well as some general warnings and global estimates about costs in the early stages of the litigation. Some clients do not take these warnings seriously until they receive a few accounts from their solicitors for the cost of drawing pleadings. If the client obtains summary judgment and thus wins the case in a few months after the action is started without all the cost of a full blown trial, then the client may not be too concerned about the size of the bill. Further, the fact that the action is not going to be over in a few months and much more interlocutory work needed will only be apparent once the application for summary judgment has failed.

One difficulty with the existing approach is that a Supreme Court registrar cannot force a party to mediate. Mediation orders can only be made by consent. Further, mediation registrars will only conduct mediations if standard form confidentiality orders (in part designed to protect the mediation registrar) are consented to.

Proposal 4a

The rules of all courts should be amended to allow some appropriate judicial officer to direct that mediation shall take place on certain terms, even without the consent of the parties, at any time the judicial officer thinks fit. Cost disclosure orders should be made as a part of the mediation order. The solicitors for the parties should be directed to bring a copy of the cost statement to the mediation and the mediation registrar should be permitted to inspect the statement upon request if the mediation registrar considers it appropriate to do so.

If the solicitor concerned fails to comply with the request then the mediation registrar should be permitted to refer the matter to the Legal Practitioners Complaints Committee and/or to a more senior judicial officer (eg a master or a magistrate) for the making of a personal costs order against the solicitor or a finding of contempt.

Proposal 4b

The officer conducting the mediation, as well as the judicial officer making case management directions, should also be permitted to require the solicitors for the parties to provide updated cost statements from time to time.

TIME-BASED CHARGING

Time-based charging has been a feature of legal practice in Western Australia since about the late 1970s. Prior to that, charges tended to be rendered by solicitors on the basis of the relevant scale, the amount of time a matter took to complete, the complexity of the task, the overall subject matter of the dispute, the seniority of the particular solicitor who did the work, any urgency involved, the importance to the client of the result, whether the client was a 'repeat client', the capacity of the client to pay, and such like.[17]

Unfortunately, the shift towards time-based costing came at a time when the scope and complexity of litigation increased enormously along with the cost of practising law (eg, higher compulsory professional indemnity insurance, etc). Even the smallest firms are now run in a very businesslike way. Timesheets are kept in almost every law firm. Two of the main 'performance indicators' of solicitors are 'fees rendered to budget' and 'fees recovered to budget'.

There is nothing inherently wrong in recording the time spent on a piece of litigation. Even under the 'old fashioned' way of charging, the amount of time spent was an important factor. Further, even under the pre-1997 Supreme

Court scale of costs which charged matters such as getting up as a percentage of the total value of the claim, in practice the taxing officers liked to see a schedule setting out how time was spent in getting a matter up for trial. The trouble comes when time charging becomes the master rather than the servant of the costing process.

Most solicitors in Western Australia now enter into written cost agreements with their clients under which the client agrees to pay the solicitor according to the time spent by the solicitor. Costs agreement in Western Australia are perfectly legal. They are provided for by section 59 of the *Legal Practitioners Act*. But the Court has the power to set aside any costs agreement which it regards as unreasonable to the client.[18]

The trouble with time-based costs agreements is that they start from a dubious premise — that is, that the applicable scale of costs is insufficient to provide the solicitors with adequate remuneration. In some Courts that may certainly be the case. In the Supreme Court this is a hard assertion to sustain. The current scale provides for time-based charging for most items at a generous hourly rate with the protection to the client of the recommended number of maximum hours to be spent on any particular task. The old scale was open to understandable objection by solicitors because its most important component, getting up, was based on a percentage of the amount in issue. This worked uncertainty where only injunctive or declaratory relief was claimed and even in cases where liquidated amounts were claimed. The percentage system did not work well where a retainer was terminated in the middle of litigation. But there can be no similar objection to the current Supreme Court scale.

The apparent distaste of the judiciary for time-based costs agreement is that, notwithstanding they are permitted by the *Legal Practitioners Act*, they are likely to involve a conflict between the duty of a solicitor to her or his client and the interest of the solicitor. As Mahoney JA of the New South Wales Court of Appeal said in *Law Society of NSW v Foreman:*

> [A] costs agreement which provides for charges on an hourly or similar basis is likely to involve a conflict between the solicitor's duty and his interest. Such an agreement ordinarily involves that the solicitor may determine how much time is to be spent on the client's litigation and by whom. It will therefore put the solicitor in a position in which her duty to her client (to do the work in such time that the costs will be no more than they need be) may be in conflict with her interest (that she receives more costs rather than less). The temptation may exist to spend upon the client's litigation time for which costs would not otherwise be billed or to engage on its staff whose time could or would not be used elsewhere in the firm. The law provides against not merely actual abuse, but the possibility of a solicitor preferring her interest to that of her client and the temptation to do it.[19]

Another well recognised problem with time charging is that it is apt to reward the inefficient rather than the efficient. As Gleeson CJ said in *New South Wales Crime Commission v Fleming:*

> I understand it to have been conceded on this appeal, and in any event it is the case, that a bare order providing for solicitor's costs 'for preparation, instructing (and) acting' at an hourly rate of $200, or any other single fixed hourly rate, is unsustainable. To take a simple example of the problem involved, according to the terms of the order the hourly rate specified would apply to the time spent by a junior solicitor travelling to and from a gaol to interview a prisoner and obtain instructions, or sitting in a barrister's waiting room waiting for the commencement of a conference. The order pays no regard to the kind of activity involved in 'preparation' or 'acting', or the seniority or experience of the particular solicitor doing the work. If, for example, the 'preparation' involved looking up a point of law, a solicitor who knew where to look would be paid less than a solicitor who was less knowledgeable or efficient. An inexperienced solicitor might well charge much more than an experienced solicitor. It is true, as was noted earlier, that it would still be open to a taxing officer to treat particular time as having been spent unnecessarily, and therefore not reasonably chargeable to the client, assuming, of course, that the officer had the requisite information. Even so, to allow a simple, flat, hourly rate as the basis for charging for anything, of whatever character, done by any solicitor of whatever seniority and experience in relation to the matter, is difficult to justify.[20]

His Honour went on to say:

> I would have no difficulty in accepting an appropriate hourly rate (and I make no particular comment on the figure of $200) as a reasonable basis for charging for such work as attending Counsel or the Court, or attending in Court, or interviewing witnesses, but I would require a great deal more evidence than was available to Matthews J to accept that position in relation to such activities as travelling to interview a client or a witness, researching the facts or the law, writing letters, participating in telephone conversations, and various other forms of work of a like nature for which a solicitor is entitled to charge. I would also have serious reservations about the fixing of a single rate to apply regardless of the seniority or experience of the solicitor in question.[21]

In *Singleton v Macquarie Broadcasting Holdings Ltd,* Rogers CJ Comm D said:

> The gap between party and party costs and costs payable by the client to his, or her own solicitor, to which I earlier referred, became enlarged with the introduction by solicitors, and indeed by barristers, of the system of time cost charging. Until relatively recently, in taxing costs in respect of contentious work against the other party, and largely, also for the purpose of a detailed bill of costs to their own client, solicitors have been content to follow the system of charging for work in accordance with Schedule G, item by item, with additional loading for skill, care and diligence. As professional practices became more like a

> business, it was recognised that such a system of charging may have operated unfairly to the solicitor. Time charging was introduced, because it was perceived to be more fair to the practitioner in that the payment was more closely related to the actual work done. The hourly rate is meant to cover overheads of the practice as well as the need for appropriate remuneration for partners. Of necessity this will vary from firm to firm depending on such tangibles as the rent paid and the intangibles such as the position of the practice in the legal firmament. However, quite apart from any other feature, time cost charges may have conspicuous elements of unfairness. Most obviously it rewards the inefficient and the incompetent. The same item of work may quite obviously take half an hour in the hands of a highly skilled practitioner and two hours in the hands of someone of considerably lesser ability. To some extent of course, this will be compensated for by the fact that the charge out rate for the less skilled is likely to be much lower than for the highly skilled practitioner. However, this is not necessarily so, and, in any event, the lower charge out rate may not sufficiently compensate for the greater amount of time occupied. As well, time cost charging loses the incentive to avoid unnecessary work or inefficient practices. Most importantly it does not discriminate according to whether the practitioner is engaged in the highly skilled task of preparing a statement of evidence, or the more mundane task of making a telephone report to the client of what may have passed in Court fixing the date for hearing. There is nothing in a time cost agreement which provides a discrimen between the two situations and this may argue for the proposition that such an agreement is so unfair, or unreasonable, that the Court ought not to give effect to it.[22]

In *Re Morris Fletcher and Cross' Bills of Costs,* Fryberg J of the Supreme Court of Queensland said:

> Second, there is nothing to show the appropriateness of the person who did the work in each case. The bill must be calculated in my view on the basis that work is done by appropriately skilled persons. It is clear that if work is done by a practitioner of higher standing (and, therefore, a person who charges out at a higher rate) than is necessary for the performance of the task there is scope for error. That scope, it seems to me, potentially existed in the present case.
>
> Third, there is, in my view, inherent scope for error in the number of hours charged. That is because the time charging depends upon charging of time in blocks of six minutes. That time is charged regardless of whether the block is fully utilised or merely invoked because there was a 30 second telephone call. . . .
>
> A further factor which leads me to think there is a potential for error in the invoices is the absence of internal controls in the firm. The invoices were seen by a partner before their dispatch in accordance with the firm's practice, but there seem to have been few other internal controls. The amount of attention which a partner could give to an invoice would, it seems to me, be likely to be no more than a perusal of the invoice on its face. I do not think that this system would be likely to enable the partner to detect many potential errors.[23]

His Honour also referred to the fact that time cost charging relies very much on 'employee subjectivity'. Invariably every entry in a time sheet involves some judgment as to whether the task relates to the particular piece of litigation.

Another criticism of time-based charging is that it 'creates incentives for lawyers to 'over-lawyer' and impose unnecessary costs on their clients, their opponents and the public . . . legal bills should emphasise value of the work done rather than the hours expended'.[24]

The great advantage of the current Supreme Court scale is that it is practical in that is based on time but provides a check on the abuses of time. Most solicitors now enter into cost agreements with their clients. Those agreements are usually based on time spent. Under the old scale where getting up was calculated ad valorem this was artificial on both a party/party taxation and a solicitor/client taxation because the solicitors on both sides were charging their clients not ad valorem for getting up but on the basis of time spent on everything. On both forms of taxation the taxing officer can assess whether too much time has been spent by reference to an objective standard – ie a clearly identified number of steps in the litigation together with a recommended number of hours laid down in the scale.

DO THE CURRENT SCALES NEED TO BE REFORMED?

As pointed out above, the current Supreme Court scale has much to recommend it. The question is whether it can be improved.

One obvious point of difference between the Local Court scale and the Supreme Court scale is that the former takes account of the value of the subject matter but the latter does not (although it used to — see above). One might argue that all actions in the Supreme Court are by definition major cases (usually over $250 000 at stake) and thus there is no point in dividing up the scale according to the amount in issue in the way that the Local Court scale does. However, it needs to be remembered that the Supreme Court scale applies in the District Court as well. Leaving aside its appellate jurisdiction, the District Court has jurisdiction in civil matters where $25 000 to $250 000 is in dispute save that in personal injury matters the amount of damages that can be awarded is unlimited. In actions for personal injury the District Court not infrequently delivers awards of over $1 000 000.

It is by virtue of this wide range of amounts in dispute that the Supreme Court scale may need further refinement along the lines of the Local Court. However, a better way of proceeding might be to give the District Court its own scale rather than merely adopt that of the Supreme Court. The District Court already has its own appeal scale. Given that personal injury cases are such a specialised and significant part of the work of the District Court it would be better if such cases were the subject of their own special scale of

costs as well. Personal injury cases readily divide themselves into cases where liability as well as quantum is in dispute and cases where only quantum is in issue. A special personal injuries scale of costs could well take this into account.

Proposal 5

The District Court should be given its own scale of costs. Within that scale there should be a special scale tailored to the steps peculiar to personal injuries actions. The special personal injuries scale should make provision for cases in which only quantum is in issue.

Much of the non-personal injuries work of the District Court is commercial in nature — eg, disputes between banker and customer, sale of business disputes, contract and debt claims. These commercial matters fall within the broad $25 000 - $250 000 category referred to above. Such matters could usefully be the subject of a separate scale (say to be called the 'General Scale') closely modelled on the current Supreme Court scale. There would seem to be some scope for further refinement, however, in view of the wide amounts of money at stake. In cases where less than $50 000 is in dispute then regardless of the issues involved there would seem to be a need for a sense of proportion as to costs in the same way that the Local Court scale divides up between over $3 000 and under $3 000 claims. However, it might be better just to raise the monetary limit of the Local Court from $25 000 to $50 000.

Proposal 6

The jurisdiction of the Local Court should be raised from $25 000 to $50 000.

A significant part of the work of the Supreme Court is equity matters.[25] Much of the equity work which the Supreme Court carries out is conducted differently from ordinary commercial disputes. Most commercial disputes in the Supreme Court are commenced by filing a writ of summons which is followed by pleadings, discovery and the taking of oral evidence at trial (although most commercial trials are now conducted on affidavits or witness statements). However, actions for declarations as to the interpretation of wills, leases, trusts and other documents, as well as applications under the *Charitable Trusts Act 1962* (WA), the *Trustees Act 1962* (WA), the *Inheritance (Family and Dependants Provision) Act 1972* (WA) and such like are commenced by originating summons. Pleadings are sometimes ordered to narrow down

the issues and if necessary limited discovery is ordered. Evidence at trial is usually in the form of affidavits. Companies matters are commenced by application rather than originating summons. There are no practical differences between an application and an originating summons and actions under both documents tend to be carried out in much the same way (ie trial on affidavit is the norm but pleadings and discovery are occasionally ordered).

There are important cost consequences of commencing proceedings by originating summons or application. Absent a special costs order the maximum amount of costs that can be awarded on a party/party taxation in such matters is $6 900. It may seem odd to divide up cases for costs purposes by reference to the document by which they are commenced. However, this needs to be seen in the light of the principle that originating summonses should not be used when there are likely to be disputed questions of fact and are best suited to cases where there is only a question of law to be resolved. Where there are to be disputed questions of fact then the action should be commenced by writ of summons — in which case the costs allowable are often 10 times higher. Viewed in this light the different cost consequences which flow from the initiating document make sense. Factually complex cases are more expensive to run than legally complex cases. For this reason the special provision made for actions commenced by originating summons is proper.

However, the current system breaks down when applied to companies applications. For example it used to be the case that actions alleging preferences were commenced by writ. However, there is authority to suggest that preference claims are brought under the *Corporations Law* and thus may be commenced by application.[26] Frequently there will be disputed questions of fact in such cases. The same also applies to oppression actions under section 260 of the *Corporations Law*. Pleadings are often ordered in such cases. Such cases should perhaps not be treated as actions commenced by writ for cost purposes, but equally they should not be subject to the $6 900 limit. Some kind of interim scale is needed.

If the Supreme Court (which currently has at least six different initiating documents) was to move to a more simplified system (eg all actions commenced by application as used to be the case in the Federal Court in non-bankruptcy matters), then it would no longer be possible to divide up cases for cost purposes according to their mode of commencement. One response would be to divide the Supreme Court into divisions as in New South Wales (eg Common Law Division, Equity Division, Probate Division, Administrative Law Division, etc) or into lists as in Victoria (eg Intellectual Property List, Building and Construction List, Commercial List, etc) by reference to the subject matter of the action.[27] Each list or division could have its own separate scale of costs.[28]

Another option would be to recognise that some cases are factually more complex than others and that some cases involve more interlocutory steps than others. One could create a number of scales (say Scale A, Scale B and Scale C) to deal with different levels of factual complexity and interlocutory involvement. Scale A would be appropriate for a typical Supreme Court commercial case and broadly follow items 1-18 of the current Supreme Court scale. Scale B would be appropriate for an application under the *Charitable Trusts Act* or for the interpretation of a will or a lease. The $6 900 limit for originating summonses would remain without elaboration. Scale C would be appropriate for a complex companies' or trust matter which requires pleadings and limited discovery, will go to trial on affidavit, will involve only modest cross-examination, will not usually have expert evidence and largely be a documentary and legal issues case. Scale C would be a summarised version of items 1-18 of the current Supreme Court scale but have a fixed range rather than an absolute limit.

On this system there is the awkward question of allocating the case to a particular scale. Allocating a scale at the end of the case means that the parties cannot enter into the action with a relatively certain costs budget in mind. This would fly in the face of the need for predictability referred to above. Another option would be to allocate the case to a cost scale at the first or second directions hearing. This is not as bad as the previous option but still has an element of uncertainty. A better option would be for the plaintiff's initiating application to nominate a cost scale under which the litigation is to be conducted and for the defendant to file an appearance in which the defendant either accepts the scale nominated by the plaintiff or nominates another scale. If there is a clash of scales then the court could resolve the dispute at a directions hearing. Subsequent movement from one scale to another (especially to a more expensive scale) would have to be the subject of a special application (eg like the existing application for a special costs order).

Proposal 7

The current Supreme Court scale should be divided into three scales. One scale should basically follow items 1-18 of the current scale. A second scale should be limited to $6 900 as per the current scale for matters commenced on originating summons. The third scale should be an interim scale. Originating documents could nominate a scale according to which the action is to be conducted. If all parties to the action do not agree to conduct the action according to the nominated scale, the court should resolve the dispute. If the court uses a higher scale than nominated by the plaintiff, then the plaintiff should be permitted to discontinue the action at that point with no order as to costs. Subsequent applications to move to a higher scale would have to be treated as an application for a special costs order.

CONTINGENCY FEES

Unlike in the United States, in Australia and England contingency fees are not permitted. In part this is due to statute and in part due to the torts known as maintenance and champerty. The tort of maintenance consists of the promotion or support of legal proceedings by a stranger who has no direct concern in them. Usually maintenance consists of financial assistance such as giving or lending money, bearing the whole or part of the costs of the action or saving a litigant expenses that the litigant might otherwise incur. Champerty is an aggravated form of maintenance and consists of unlawfully maintaining a suit in consideration of a bargain to receive, by way of reward, part of anything that may be gained as a result of the proceedings, or some other profit.[29]

Therefore, for a Western Australian solicitor to reach an agreement with a client whereby the solicitor will be remunerated only if the case is won and then according to a percentage of the damages recovered, would mean that the solicitor has committed the tort of champerty. This would expose the solicitor to an action by the other party to the litigation for the tort of champerty.

Of more concern to the solicitor would be the possibility of professional disciplinary proceedings arising out of entering into a champertous arrangement with the client. Even if the client is perfectly happy with the arrangement, the client's opponent is usually unhappy about it and may sometimes become aware of the arrangement and lodge a complaint with the relevant professional disciplinary body. The Courts have traditionally regarded champertous agreements between solicitors and their clients as deserving of professional sanction.

The matter is no longer regulated solely by the common law. Part VI of the *Legal Practitioners Act* deals with solicitors costs. Division 3 of Part VI deals with (inter alia) costs agreements. Section 59 provides that a solicitor and client may enter into a written costs agreement. However, section 59 must be read subject to section 63(1)[30] which provides:

> Nothing in this Act contained shall be construed to give validity to any purchase by a practitioner of the interest or any part of the interest of a client of that practitioner in any suit action, or other contentious proceeding to be brought or maintained, or to any agreement by a practitioner for payment only in the event of success in the suit, action, or other contentious proceeding.

One of the ironies about the unlawfulness of contingency fees in Western Australia is that under the old Supreme Court scale, a solicitor's remuneration for getting up was calculated as a percentage of the value of the subject matter of the litigation. In claims for unliquidated damages, the figure used by the taxing officer was almost always the amount of the damages awarded by the trial judge.

A contingency fee agreement as understood in the United States has two aspects — the solicitor only receives any remuneration in the event that the solicitor's client recovers (either at trial or by a settlement) and that remuneration is calculated as a percentage of the amount of the verdict or settlement. In common Australian parlance, this first aspect is referred to as 'doing a case on spec'.

In Australia, there is nothing unlawful about a solicitor conducting a case for a client on the basis that the solicitor will only be paid in the event of success. The source of payment may be either the amount of the judgment debt or the damages recovered and/or any order for costs obtained against the other side. The arrangement only becomes objectionable where the amount of the remuneration is calculated by reference to the degree of success. The solicitor is only permitted to charge her or his normal professional fee. The decision of the High Court in *Clyne v New South Wales Bar Association*[31] takes that principle one step further in that it permits the solicitor to 'maintain' the action by paying disbursements out of the solicitor's own pocket as well as speculating on the recovery of fees for the solicitor's own professional services.[32]

Should the law should be reformed so as to permit a solicitor to not only conduct a case 'on spec', but also to receive some extra remuneration in the event of success? There are arguments for and against American style contingency fees. If the law is reformed to allow the solicitor to receive extra remuneration calculated not by reference to the amount recovered, but according to some other formula, then the force in some of the reasons against contingency fees is weakened to a greater or lesser degree but never entirely removed.

At first blush it may appear that the contingency fee arrangement between a solicitor and a client is a 'win-win' situation for both the solicitor and the client. If the client is impecunious then it may well be the only way in which a legitimate legal grievance can be prosecuted through the Courts. Further, even if the litigant is perfectly able to pay, the litigant may feel that a contingency fee arrangement is appropriate because the solicitor is simply being asked to 'back his or her judgment' as to whether the case has merit or not. Such a litigant may well say: 'What I want is to win my case and if you deliver me what I want then I will pay you, but if you do not deliver me what I want then you will not be paid.' In any event, this hypothetical litigant can say with some force that if the case is lost the litigant will have to pay the other side's costs, and therefore it seems unfair that the litigant should have to pay the litigant's own solicitors as well. From the solicitors' point of view, the extra remuneration can quite justifiably be seen as a fair reward for taking on the very substantial risk of not being paid at all for a very large expenditure in professional time (with all the attendant internal costs of a solicitor's practice).

The Justice Statement issued by the Federal Government is strongly in favour of contingency fees.[33] The Statement does not consider the ethical questions involved and only identifies three possible down sides to the use of contingency fees — (1) the potential for increased litigation; (2) additional fees will be charged for success in sure cases which might previously have been undertaken on a purely speculative basis for a normal fee; and (3) windfall fees may be generated out of all proportion to the work done.

One very forceful objection to contingency fees is that they make the solicitor and the client joint venturers, in the sense that the solicitor has just as much interest in the outcome of the litigant as the client does.[34] In other words, the litigation becomes as much the solicitor's own personal litigation as that of the client. This flies in the face of the old adage that 'a lawyer who acts for himself has a fool for a client and a fool for a lawyer'.[35]

This objection to contingency fees is a very real objection. The solicitor's independent judgment must inevitably, to some extent, be clouded by the solicitor's own self interest. Further, there are added temptations for the solicitor to overlook ethical obligations such as ongoing proper discovery of documents (including documents which go against the interests of the client). It must be remembered in this regard that all legal practitioners are first and foremost officers of the court and not merely agents of their clients. Contingency fees have the potential to interfere with a lawyer's duty to the court.[36]

But at the end of the day these problems also exist just as much in doing a case on a permissible speculative basis as with doing a case on the basis of a contingency fee. In a speculative case the solicitor receives $X if the case is won and $0 if the case is lost.

Another real objection is that contingency fees usually only work one way, ie, for a plaintiff. Contingency fee arrangements cannot work in the same way to assist a defendant (who is not counterclaiming) and who needs to fund a defence by contingency arrangements with legal advisers. A typical defendant may be seeking only an outcome which is the dismissal of the plaintiff's case. Thus, there is no potential money award for the defendant at the end of the trial upon which to premise any contingency success payment to the defendant's legal advisers. Some plaintiff suits are 'try-ons' or 'marginal cases at the very best'. A cash-strapped defendant facing such an action, however, may be forced to settle or fully capitulate in the face of sustained assault brought by a plaintiff assisted with the contingency legal representation of a large law firm as effective co-venturers. The one-sidedness of such arrangements is obvious. Pressure against a defendant who must pay on an ongoing basis its legal costs of defending a 'try-on' case irrespective of outcome, distils down to a sophisticated form of extortion by economic duress.

There is a temptation to see the United States experience as a panacea for access to justice. However, in the United States the proportion of all litigation where at least one party to the litigation is conducting the litigation subject to a contingency fee arrangement is very small. Contingency fees are mainly used in personal injury cases, debt collection, oppression actions, will disputes and insolvency matters. Contingency fees are prohibited in criminal cases and administrative law matters and only rarely permitted in family law cases.[37] The complaints about delay and cost exist in the United States even after many years of experience with contingency fees just as elsewhere in the common law world.[38]

Further, it is not accurate to generalise about the percentage that the United States lawyer takes from the client's award of damages. It is true that in many states of the United States the usual percentage for a fairly standard case is one-third. However, the lawyer and the client may agree that the lawyer will take a higher percentage where the lawyer agrees to pay witness expenses and other disbursements, where the chances of success are particularly poor or if there are likely to be a number of appeals. In such cases the percentage can be 40 to 50 per cent. Lawyers sometimes agree to a part fixed fee and a part percentage fee. In some States statute provides that the percentage must slide downward as the client's award increases. Under the *Federal Tort Claims Act* the maximum is set at 25 per cent.[39]

The United States' experience with contingency fees has many unattractive aspects. Percentage fees can lead to remuneration for lawyers out of all proportion to their efforts and the risk involved. In one case the plaintiffs lawyers received $2 billion of a $10 billion verdict.[40] Contingency fees have also led to the American phenomenon known as 'ambulance chasing' the standard example of which is 'the dismal spectacle of hordes of lawyers flocking to Bhopal in India seeking to contract with illiterate victims of the Union Carbide disaster'.[41]

One response of other jurisdictions which have opted to allow limited contingency fee arrangements has been to continue the existing prohibition on lawyers charging fees according to a percentage of the amount recovered but to allow the successful party's lawyers to charge an added percentage on top of their normal fee. This has become known as an 'uplift fee'. In South Australia the permitted amount of the uplift is 100 per cent and in New South Wales 25 per cent. Criminal matters are excluded in South Australia and New South Wales. Family law matters are also excluded in South Australia. Otherwise both states allow contingency up lift fees in all other types of litigation.

The Justice Statement favours a contingency fee calculated not on the proportion of the damages recovered but on the basis of an extra 'uplift'

percentage of the fee that would otherwise have been charged. This is the approach used in New South Wales and the Federal Government strongly favours the expansion of that system.

The Access to Justice Advisory Committee[42] makes the following recommendations:

(a) The Commonwealth should encourage those states that have not yet done so to permit lawyers to enter into contingency fee agreements with their clients, where such agreements provide for an uplift fee above the lawyers' normal rates.

(b) Contingency fees should not be permitted in criminal or family law matters.

(c) The introduction of contingency uplift fees should be subject to the following safeguards:

- The governing rules should allow such fees only if the lawyer judges the client's claim has some prospects of success but the risk of failure of the client to meet his or her own costs is sufficiently significant as to warrant the percentage up lift proposed to be agreed.
- The arrangement should be in writing and in plain English and should be in a standard form, developed by the law societies in consultation with consumer bodies.
- The arrangement should include a statement in writing by the lawyer briefly stating his or her reasons for considering the uplift factor to be appropriate and disclosing the lawyer's usual fees in a similar matter.
- The arrangement should specify the outcome that will constitute 'success' for the purpose of attracting the contingency fee.
- The arrangement should provide for a cooling off period of five business days during which the client can cancel the arrangement; during this period the lawyer should perform work under the agreement only if she or he believes it to be necessary to protect the interests of the client and she or he is specifically instructed to perform it.
- In addition to other disclosure requirements, the practitioner should inform the client in writing of his or her right to independent advice, why legal aid is unavailable for the case, the existence of the cooling off period and the fact that the client may be liable to pay the costs of the successful party if unsuccessful in litigation.
- The client should be informed in writing of the right to apply to a court to set aside the agreement if its terms are unreasonable.

- The general provisions relating to review of unfair costs agreements and unreasonable delays should apply to contingency fee arrangements and should be capable of applying to the uplift factor.

(d) The rules governing contingency fees should specify a maximum uplift factor of 100 per cent of the usual fees of the practitioner. This percentage and the need for a maximum should be reviewed by a competent body after, say, two years experience with contingency fees.

(e) Practitioners acting under a contingency fee arrangement should be required, when an offer of settlement is made, to advise the client in writing of the amount offered, an estimate of the amount that may be achieved by taking the matter to trial, an estimate of the chances of success or failure at trial and an outline of the likely total lawyer's fees if the matter settles as compared to proceeding to trial.

In the United Kingdom[43] contingency uplift fees have been permitted as from 5 July 1995 in personal injuries cases, certain insolvency proceedings, claims by liquidators, claims by trustees in bankruptcy, proceedings before the European Commission on Human Rights and proceedings before the European Court of Human Rights. The maximum uplift permitted is 100 per cent. The safeguards imposed are not dissimilar to those referred to in the Justice Statement.

Broadly speaking the South African Law Reform Commission has recommended a position similar to the Justice Statement. However, one significant difference is that the amount of the uplift is not to exceed 25 per cent of the proceeds of the litigation in the case of claims sounding in money. There is also a requirement that the agreement stipulate the procedure and nature of payment in the event of termination of the agreement. The report also makes some detailed recommendations to recognise and allow for the use of the Bar.[44]

The question must be asked whether criminal and family law cases should be excluded from a contingency uplift regime.

As to family law cases, the Justice Statement noted that the object of family law was to achieve a just and equitable distribution of matrimonial property and to provide for the welfare of the children of the marriage. Leaving aside the impact of children, one would have thought that a just and equitable distribution of compensation or other legal redress is an aim of all civil litigation. As to the comment about children, in fatal accident claims and indeed in many cases where the plaintiff is responsible for children, the outcome of the litigation and the amount of the verdict that actually ends up in the hands of

the plaintiff has a very real impact on children. Up lift contingency fee agreements were also said to have the effect of reducing the pool of assets available to the parties. But the same applies with any award of a compensatory nature (eg, damages for personal injury for loss of earning capacity) — the more the lawyers take out of the verdict the less that the plaintiff gets in her or his hand. The only time it would not in Australia is where punitive damages are awarded. Unlike in the United States, awards of punitive damages are kept to very modest proportions. Triple statutory damages regimes occur in the United States but are unheard of in Australia.

As the law currently stands, it is possible for the access to justice concern to be alleviated slightly. In property cases, it is possible for one party to a marriage to seek past and future legal and accounting costs for the purposes of funding the action in the Family Court. Such orders tend to be made where the other party to the marriage has control of all the major matrimonial assets.[45] Similar orders have been made in de facto property cases.[46] Such orders are of no assistance in custody cases where the matrimonial assets are negligible. However, legal aid is somewhat easier to obtain in custody cases as against property cases.

As to criminal cases, one reason identified by the South African Law Reform Commission was that it was particularly important that a lawyer's duty to the court not be compromised or appear to be affected by any influence that a fee agreement might have on a lawyer's judgment or conduct.[47] However, lawyers do not owe any higher duty to the court in criminal cases than in civil cases. Further, one would not have thought that the temptations are any higher in criminal cases.

It is true that the Legal Aid Commission does not have the funding to provide legal aid for many serious criminal offences especially where the trial will exceed a few weeks. However, it needs to be remembered that the High Court in *Dietrich v The Queen*[48] recognised a common law right to a fair trial. The High Court held that a criminal court should stay a serious criminal charge where the accused is indigent until the Crown provides adequate funding for her or his defence.

The real answer to whether uplift contingency fee agreements should apply to family law and criminal cases is the recognition that uplift contingency fee agreements are the lesser of two evils — no access to justice versus the vices inherent in such arrangements. In a perfect world both sides to all litigation would be able to pay for their own representation. Commercial, tort and will disputes (to name but a few examples) may be cynically passed off as commercial ventures the object of which is to recover money. The commercial venture has certain risks attendant to it and needs a certain capital component to finance it. An uplift contingency fee agreement can be seen as a form of

risk financing. But such a hard nosed view is probably unpalatable to many members of the public in criminal and family law cases. If we wish to regard ourselves as members of a just society, and lawyers wish to see themselves as something more than just legal service providers providing risk capital, then there must be some limits.

A fair criminal trial and adequate legal representation have been recognised by the High Court as a common law right.[49] The United States Supreme Court has implied into the 5th, 6th and 14th amendments to the United States Constitution a constitutional right to counsel.[50] To allow up lift contingency fee agreements in criminal cases would be a recognition that such rights are fit for commercial negotiation. Do we really want the break down of so important a relationship as that of husband and wife to be a subject for commercial negotiation of lawyers' fees? The answer has to be the expansion of the use of interim property settlement in property cases and the protection of children through providing greater legal aid in custody cases.

The South African report considers in some depth the question whether uplift contingency fee agreements should be confined to persons unable to otherwise fund the litigation and whether such agreements should be available to defendants as well as plaintiffs. In the case of defendants, unless there is a successful counter claim, the amount of the uplift will have to come from the defendant's own pocket, since there is no verdict out of which the successful defendant can pay beyond the amount of the taxed costs which the unsuccessful plaintiff has to pay.

This may seem unfair, but it is equally unfair that the successful plaintiff should have to pay the amount of the up lift out of her or his own pocket. In the case of a successful claim by A against B under a loan agreement A's solicitors take the amount of the taxed costs which the unsuccessful defendant B has to pay. Under the current Supreme Court scale these taxed costs will be not inconsiderable. Nonetheless there can be no objection to this — A has lost nothing. A's lawyers will charge A in accordance with the time costs agreement they will undoubtedly have with A. Invariably that costs agreement will produce a figure which is higher than the amount of the taxed costs recoverable from B. A will have to pay to her lawyers the difference — in which case A has lost something. Further A will have to pay her solicitors the amount of the up lift fee. The gap between solicitor/client costs and taxed party/party costs and the up lift fee both come out of the judgment entered by the court under the loan agreement. By definition this money is A's money. It is coming out of A's pocket just as much as if B had repaid the loan on time and A did not have to sue B and instead A was the successful defendant to an action against her by C. The same also applies where, in the above example, A had sued B for a declaration or an injunction. Accordingly

there can be no greater objection to uplift contingency fees charged to defendants as to plaintiffs.

Nonetheless it must be acknowledged that contingency fees favour plaintiffs over defendants. Plaintiffs have something to gain whereas defendants have nothing to gain. Further, defendants win cases (broadly speaking) as often as plaintiffs do. This works an inequity between plaintiffs and defendants. That is certainly a factor to be taken into account in deciding whether or not to introduce contingency fees. However, it should be remembered that contingency fees are simply one possible remedy to the access to justice problem. In a sense they are a necessary evil. For that reason they should be regarded as a measure of last resort where other possible remedies fail (eg partial summary judgment).

The question of plaintiffs and defendants who are able to pay raises different issues. Assume that a bank lends money to a company. The company is unable to repay the money. The bank winds up the company. The company proves to be a shell. The bank knows that it is the only creditor and that the directors are very wealthy. The bank considers bringing an insolvent trading action against the directors to recover the amount of the loan. Is it appropriate for the bank to engage solicitors, whom the bank can well afford to pay, on an up lift contingency fee basis? The bank approaches its usual firm of solicitors to act. The firm is reluctant to act other than on its usual terms. The bank threatens to take all of its mortgage preparation work to another firm unless the solicitors agree to take the case on an up lift contingency basis. Assume the solicitors acts for the bank against the directors on an up lift contingency fee basis. What is the difference between the solicitors and a debt collection agency? Indeed, in the example given is not the firm of solicitors also engaging in the business of banking in the sense that the solicitors are being forced to share the risk that the bank's loan may become a bad debt? A situation will arise where trafficking or gambling in litigation, prohibited at common law, will become possible.[51]

The South African Law Reform Commission did not consider the example just given. However, it did note that banks and other institutions might wish to use up lift contingency fee agreements. Ultimately the Commission came to the conclusion that it would (1) be contrary to the equality of all persons before the law and (2) unjustly limit freedom of contract for the use of up lift contingency fee agreements to be confined to persons unable to pay for litigation.[52]

The first reason is, with respect, fallacious. The existence of legal aid is a recognition that unless rights can be enforced through the courts not all persons are equal before the law. If legal aid was granted to an old lady to resist a bank's action to evict her under a guarantee mortgage, could it be said that the bank and the old lady were not both equal before the law even

though the government was funding the lady's case but not the bank's? The answer must be 'no'. Legal aid is quite properly seen as increasing access to justice. The calls for contingency fee agreements are motivated out of a desire to increase access to justice for those who cannot afford it. Legal aid is not seen as a right and nor should the use of up lift contingency fee agreements.

The second reason overlooks the very real dangers that come with any form of contingency agreement and which the South African Law Reform Commission was quite properly at pains to emphasise. Freedom of contract is a theory rather than a reality. Most contracts are entered into with some form of extraneous pressure. Consider the pressure on the solicitors looking to keep the bank's mortgage work in the example above. As pointed out above in the discussion as to whether up lift contingency fee agreements should apply to family law and criminal cases, such agreements are the lesser of two evils — no access to justice versus the vices inherent in such arrangements. In the case of litigants well able to pay, access to justice is not increased (in the example of the bank it has access to justice by virtue of its wealth), and so there is no gain as a result of suffering the vices inherent in any form of contingency agreement. Solicitors should not be permitted to enter into up lift contingency fee agreements unless they have good reason to believe that the client will not be able to afford the cost of losing.

Proposal 8

Limited contingency fee agreements should be permitted in all cases save criminal law and family law matters where two conditions are satisfied: (1) all other means of avoiding the use of a contingency fee arrangement have been exhausted; and (2) the client is financially unable to conduct the litigation without the use of a contingency fee arrangement. The reward to the lawyers should be in the form of an up lift on fees rather than a percentage of the amount recovered. Contingency fee arrangements should be available to both plaintiffs and defendants. The safeguards set out in the 1994 Access to Justice Advisory Committee Report should be adopted.

The federal Justice Statement says:

> The introduction of contingency fees will be complemented by the establishment of a national disbursements fund. A contingency fee arrangement may only extend to the lawyers foregoing their professional fees until the case is successfully concluded. However, there are a range of up front costs that must be met during litigation, such as fees for medical reports and witness expenses. The establishment of a national disbursements fund will enable litigants to apply to the fund to meet the necessary up front costs of litigation. This will enable clients

> of limited means to obtain legal services from lawyers who are willing to provide their services on a contingency fee basis. The funds provided by the scheme will be repayable, with an administration fee, only if the client wins the case.[53]

The South African Law Reform Commission[54] makes a similar recommendation. Without such a fund solicitors would be forced to pay for such expenses out of their own pockets if their clients could not afford those expenses. In the event of success the solicitors would understandably wish to recover interest for the period during which they were out of pocket. This effectively involves solicitors in lending money to their clients. Traditionally such conduct has been frowned upon as being inconsistent with a solicitor's fiduciary duties to her or his client. In any event, many solicitors would be reluctant enough to enter into an up lift contingency fee agreement in the first place let alone acting as a banker as well. In any case where non-liquidated damages are being claimed some form of expert report will be required as to the amount of damages the plaintiff has suffered. Such reports are also usually necessary in establishing liability (eg in an action by a liquidator against an auditor). Absent such a disbursements fund many of the cases which would otherwise be conducted under up lift contingency fee agreements could not in any event be prosecuted.

Proposal 9

The establishment of a disbursements fund is necessary. The fund should be established even if it is decided that uplift contingency fees are not in the public interest. Such a fund would allow many cases to proceed on a speculative basis under the existing law.

The consensus appears to be that if contingency fees are to be allowed they should be in the form of an up lift fee rather than a percentage of the amount recovered. Percentage recovery cannot in any event be used where non-monetary relief is granted — eg, injunctions and declarations. Further, the United States experience is based on the general rule that the loser does not pay and at least part of the damages are often not strictly compensatory. Percentage recovery also adds even greater conflict of interest than is inherent in up lift fee agreements. The South African Law Reform Commission gives the following example taken from a United States law journal:

> By settling a case quickly, a lawyer can receive a large fee without expending much time on the case. Lawyers may advise their clients to settle a case at the insurance company's settlement price because the lawyers then maximise the return on their investment of time and money, despite the best interests of their clients. An example illustrates the attorney's incentive. A lawyer may decide that the true worth of

> a claim is $100 000, which will require 100 hours of work to obtain. The lawyer will receive one third of the award as a fee, $33 000. After 5 hours of work, the insurance company offers $15,000 to settle, the lawyer receiving one third, $5 000. The lawyer who accepts the settlement receives a fee of $1 000 an hour, as opposed to $330 an hour if the case goes to trial. The attorney maximises the hourly fee by settling.[55]

In Australia, as a general rule the loser pays the costs. There is already a gap between solicitor/client costs and party/party costs. Uplift contingency fees by definition add to the erosion of the compensation awarded by the court caused by that gap. It must not be forgotten that the compensation awarded is the client's and not the lawyers'. Uplift contingency fees are a necessary evil (which would not be necessary if there was adequate legal aid) and are the price which must be paid for access to justice. It is vital that the amount of the up lift reflects no more than a limited allowance for the risk undertaken by the lawyers concerned and some compensation for the cases of other clients (ie, not the client whose money the lawyer is taking) where the lawyer receives no payment because the case is lost.[56] It is also vital that up lift contingency fee agreements not be encouraged.

Contingency uplift fees are likely to be based on time-based cost agreements. For the reasons pointed out above, time-based cost agreements have a real potential to reward inefficiency and encourage waste. To base the percentage up lift on the amount derived from a time-based cost agreement will only reward further such inefficiency and waste. The current Supreme Court scale is by no means ungenerous.

Proposal 10

The amount of the uplift should be calculated not on the bill the solicitor renders to her or his own client but on the amount of costs recovered from the other side by taxation or agreement.

The solicitor's normal base fee could be calculated according to the costs agreement. If counsel is briefed on the basis of a contingency up lift fee, then the client has the protection of a solicitor to negotiate with the barrister. Further, if the barrister's brief is marked with a fee on brief plus refresher's or a fixed fee, then there can be no time-based abuse. Out of an abundance of caution and for uniformity any up lift fee paid to a barrister should also be based on taxation.

The question of the amount of the up lift fee is an awkward one. Some cases are more risky than others. Some forms of contingency fee agreements carry more risk to the solicitors than others. For example, in the United

Kingdom solicitors sometimes enter into contingency fee agreements with barristers but sometimes, even though the solicitor has a contingency fee agreement with the client, the barrister may only be prepared to accept the brief on the traditional basis. In the latter situation the client might be prepared to pay to his solicitor the amount of the barrister's fee. Alternatively the solicitor may have to personally undertake the payment of the barrister's fee without recovery from the client. Where the client covers the barrister's fee the solicitor's risk is less for two reasons. Firstly the solicitor is not putting at risk the cost of the advocacy component of the case — the risk of the venture is being shared with the barrister. Secondly, the solicitor is not committing her or his own funds towards the disbursement represented by the barristers fee. However, if the solicitor conducted the case without a barrister or was personally liable for the barristers fee, the solicitors level of risk is greater. Another example is the length of the trial. Two cases may both have a 50:50 chance of success. One case is only likely to last two days. The other case is likely to last four weeks. Clearly the lawyers involved are undertaking a greater risk in the latter type of case.

Proposal 11

The amount of the up lift fee needs to reflect the level of risk undertaken. Although the circumstances of each case are infinitely variable, some attempt should be made in the contingency agreement to identify the level of the up lift fee by reference to the level of the risk undertaken.

EXISTING PROCEDURES

Even if little or no change is made to the current way in which costs are calculated both as between party and party and solicitor and client, there already exist procedures which can alleviate cost pressures and speed up the delivery of justice.

As has been pointed out above, no matter what system is used for calculating legal costs, the more lengthy and complex the litigation the greater will be the costs. It is impossible to completely separate the issue of costs from the issue of procedure.

Summary judgment

Most cases which, if they went to trial, would be extremely expensive are comparatively inexpensive if they are disposed of earlier at the stage of summary judgment. Summary judgment is a procedure whereby the court gives one party to litigation judgment without proceeding to a full blown trial. Evidence is given on affidavit and there is no cross examination permitted. Basically the court works on the premise that what the respondent to the application asserts to be the facts of the case are true unless they are inherently incredible or inconsistent with contemporaneous documents.

The use of partial summary judgment should be encouraged. For example, in a personal injuries case liability may not be in issue. It may also be clear that the plaintiff should obtain a judgment of not less than $100 000 and possibly as high as $200 000. The fight between the plaintiff and the defendant is obviously going to be resolved somewhere between these two figures. In this situation the court should be given the power to order that the defendant immediately pay the plaintiff, say, $50 000 to allow the plaintiff to fund the action, especially where she or he is otherwise unable to do so. This would achieve both justice and increase access to the courts without changing the existing costs rules (eg the loser pays rule) and without the need for contingency fees. It is also consistent with the family law and de facto property cases referred to above.

Proposal 12

Order 14 of the *Rules of the Supreme Court 1971* (WA) should be amended to encourage greater use of partial summary judgment.

Costs of interlocutory applications

Under the present system of procedure almost every piece of litigation will have a number of interlocutory skirmishes prior to trial. Even under a reformed system it is likely that such interlocutory skirmishes will still exist although, hopefully, they will not be quite as common or as protracted. The commonly made orders for costs on an interlocutory application are as follows:

(a) Costs of the application be costs in the cause — this means that the party ultimately successful in the action at trial will recover costs.

(b) Costs of the application be the plaintiff's [defendant's] in any event — this means that the plaintiff [defendant] is entitled to the costs whatever the result of the action, the costs being taken into account in the ultimate taxation.

(c) Costs of the application be taxed and paid forthwith — this means that the party liable under the costs order must pay the costs straight away rather than wait to bring the costs into account at the end of the action.

The sanction of paying costs of an interlocutory action in any event, as a matter of practicality, has no great impact upon the litigation. Even if one side was to bring all the interlocutory applications, to lose all those applications, and to have to pay the costs of each of those applications in any event, the mounting cost which the other party to the litigation has to pay to her or his own solicitors may be such as to make the continuation of the litigation financially unbearable. Indeed, it is not uncommon in settlement negotiations for an allowance to be made for costs but disregarding costs orders made along the way.

Clearly the court has ample power at present to order the costs of interlocutory applications be taxed and paid forthwith. However, experience suggests that this is a procedure which is rarely utilised. In part, this may be due to the fact that the circumstances in which the power should be exercised are not clearly articulated in Order 66 of the *Rules of the Supreme Court*. Increased use of the power to order the costs be taxed and paid forthwith would help discourage unnecessary interlocutory applications. It should also encourage respondents to interlocutory applications which should clearly succeed to concede the merits of the application, thereby avoiding the need for argument.

One situation in which the court does with somewhat greater frequency order the costs be taxed and paid forthwith is on unsuccessful applications for summary judgment. In part this may be due to the fact that Order 14 of the *Rules of the Supreme Court* (which deals with summary judgment applications) has a specific provision dealing with costs. Order 14 Rule 8(1) provides:

> If the plaintiff makes an application [for summary judgment] and the case is not within this order, or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the Court may dismiss the application with costs, and may require the costs to be paid by the plaintiff forthwith.

The existence of this provision has been a salutary reminder to practitioners to think twice about applying for summary judgment. There are many cases where it is clear that the plaintiff should apply for summary judgment. Equally, there are many cases where it is clear that the plaintiff should not so apply. However, there are also many cases in which a very delicate judgment must be exercised by the practitioners concerned as to whether or not they ought to apply for summary judgment on behalf of their client. There is a very large 'grey area' where if the same application was to be presented to two different judges one would enter judgment and one would not. Clearly in this 'grey area' an order that costs be taxed and paid forthwith should not be used to punish a plaintiff who applies for summary judgment and who might well have obtained judgment had the application been made before another judge. Experience suggests that the existence of Order 14 Rule 8(1) has not discouraged applications for summary judgment which fall within this interim category.

It could be argued that each interlocutory application is in effect a separate piece of litigation and thus the 'loser pays' principle should apply. On this reasoning, an unsuccessful applicant or respondent to an interlocutory application should pay the other side's costs regardless of how meritorious

the application or the opposition thereto was so long as it was unsuccessful. If the 'loser pays' principle is not regarded as a sufficient basis for deterring cases which have only a 50/50 prospect of success, why should that principle not apply where the prosecution or defence of an interlocutory application similarly only has a 50/50 chance of success?

Although there is force in this argument, and although the court should be quick to order that costs be taxed and paid forthwith where an interlocutory application has unreasonably been brought or has been unreasonably opposed, the court must also be alive to the fact that if interlocutory costs orders mount up, and the wins and losses do not cancel each other out, there is a very real risk that the litigation will be stifled.[57] This is a real danger which must be guarded against.[58]

Proposal 13

Order 66 of the *Rules of the Supreme Court* should be amended to provide for the circumstances in which the costs of interlocutory application should be ordered to be taxed and paid forthwith. The court should be given a discretion to order that costs be taxed and paid forthwith where the application was unreasonably brought or unreasonably opposed unless the making of such a costs order would, having regard to the loser's financial circumstances, prejudice the ability of the loser to continue the litigation. The court should also be given a discretion to make such an order where the winner of the application is in a financially stronger position compared with the loser of the application.

Exceptions to loser pays rule

Another procedure which is not used as often as it might is to deprive a successful litigant of his or her costs. One situation which the courts have, increasingly of late, ordered that the successful party pay the unsuccessful party's costs is where the successful party has not conducted the litigation as efficiently as it should have done.[59]

Another situation where a successful party is often deprived of costs is where an offer by the other side to compromise is rejected. These situations arise in two ways:

(a) through the formal mechanism of Order 24A offers — in which case the discretion as to costs is exercised under Order 24A in accordance with very strict criteria; and

(b) where a letter marked 'without prejudice save as to costs' (often referred to as a 'Calderbank letter') is sent to the other side — in which case the discretion as to costs is far more flexible and is exercised under Order 66.

Order 24A procedure most commonly, but by no means exclusively, arises in the context of personal injuries actions. It often happens that the defendant admits liability on the pleadings but the only issue is as to the quantum of damages which the plaintiff should recover. Some time before trial the defendant will offer to pay $X by way of damages. If the plaintiff accepts that Order 24A offer, then a judgment is drawn up for the plaintiff against the defendant in the sum of $X. Under Order 24A the plaintiff may then tax her or his costs up to that point in the litigation. If the matter proceeds to trial and the plaintiff recovers less than $X, then Order 24A provides that the plaintiff is only entitled to an order for costs against the defendant for the costs incurred up to the date of the making of the offer but the defendant is entitled to costs against the plaintiff for all costs incurred after that point.

The reverse situation can also apply. The plaintiff may make an Order 24A offer offering to take $X by way of damages. If the defendant rejects that offer and the matter proceeds to trial and the plaintiff recovers more than $X, Order 24A provides that the plaintiff is entitled to costs calculated on the usual basis up to the date of making of the offer and costs calculated on an indemnity basis thereafter.

Once again dealing with personal injury situations, the real issue at trial will be whether or not the plaintiff 'beats the defendant's offer'. It often happens that plaintiffs in personal injuries cases are impecunious and the solicitors are conducting the litigation on a speculative basis. It is difficult to predict what level of damages a judge will award in personal injuries cases. A trial in front of Judge A may lead to the defendant's Order 24A offer being exceeded but a trial in front of Judge B may mean that damages are awarded at less than the amount of the offer. In the latter situation it can happen that the amount of damages awarded to the plaintiff is eaten up in the costs which the plaintiff must pay the defendant because the offer was not beaten. This is an obvious area of possible conflict between solicitor and client when the solicitor would prefer to have the offer accepted so as to give some reward for work done to date, whereas the client may unreasonably wish to continue, in which case the solicitor will get nothing.

Order 24A offers have had a very valuable role to play in the settlement of personal injury litigation. Most personal injury claims are settled out of court. Although the recent changes to the workers' compensation legislation have led to a decreasing amount of personal injuries work, this work nonetheless still takes up a significant proportion of all writs filed in the District Court.

Notwithstanding that Order 24A procedure can and does work well, there perhaps should be a recognition that the calculation of the quantum of damages is not a precise science and that different judges make different levels of award. Further, there needs to be a recognition that the exercise of trying to

'beat the offer' takes on an air of unreality where the offer is only 'beaten' by a comparatively small amount. Why should a plaintiff not suffer the costs consequences of coming in below an Order 24A offer simply because she or he happens to recover as little as $1 000.00 above the offer? Given that quantum of damages is not an exact science the plaintiff in that situation would, to the person in the street, probably be regarded as unreasonable in refusing the offer.

Litigation is quite properly seen as a procedure of last resort. Costs rules should be designed to encourage that notion rather than detracting from it. However, it also needs to be recognised that there is no such thing as a 'definite winner' case. Unfortunately, legislation is unclear and judicial decisions sometimes conflicting. Often the concepts used by statutes and the common law are pitched at such a high level of generality that it is simply unrealistic for a litigant to expect a concrete answer as to whether he or she will win a case.[60]

When these two factors are borne in mind, together with the fact that judicial time is provided at the public's expense, the question must be asked whether the rules as to costs should be changed to encourage still further the acceptance by parties of reasonable offers of compromise. For example, Order 24A procedure does not really work well where liability as well as quantum is in issue. Both sides' legal advisers may know that if liability is established then the Judge will assess quantum at approximately, say, $300 000. There may well be a decision of the New South Wales Court of Appeal to the effect that the defendant is liable. Similarly, there could be a conflicting decision of the Victorian Court of Appeal to the effect that the defendant is not liable. There may well be conflicting expert opinions and hotly contested issues of credibility between witnesses. All in all, both sides' legal advisers recognise that the case is one of those in which it is virtually impossible to predict and assess the merits of success quite properly at 50:50. On that basis, and in an effort to avoid a precedent, the defendant may well be prepared to offer the plaintiff $150 000 plus a contribution towards costs to settle the matter. Although opinions may differ, many in the community may well see the plaintiff's rejection of the offer of $150 000 as unreasonable, especially given the public expense in taking up judicial time. In this hypothetical situation Order 24A procedure does not work well. An Order 24A offer for $150 000 is largely worthless in the event that the plaintiff succeeds because it is common ground that if liability is made out then damages will be assessed at significantly in advance of that figure.

In commenting on this dilemma Rolfe J of the Supreme Court of New South Wales said in *Multicon Engineering Pty Ltd v Federal Airports Corporation:*

> I would also observe that where a party wishes to have a difficult question of law resolved, perhaps because as an insurer it is one that

> affects it in its business on a regular basis, the other party, if minded to make an offer, should not be deprived of the benefit of that offer because, irrespective of the offer, the first mentioned party wishes to have a final determination of the matter of law. The offering party does not wish to be a party to a binding precedent. It wishes to resolve its dispute and be rid of expensive litigation. If the offeree insists on going ahead for its own particular reasons, whether they be those to which I have just referred or other reasons, in the face of an offer, which turns out to be a better offer than the judgment or order the offeree ultimately receives, no matter how important the point of law, I do not see why the offeree should not be paid its costs on an indemnity basis. This is reflected, from time to time, at an appellate level, by the grant of special leave or leave to appeal being conditional on the applicant's paying the respondent's costs in any event.[61]

Earlier His Honour said:

> As I have sought to say, legal and factual difficulties are matters which should attract settlement offers rather than detract from them, particularly if the logical conclusion from the reasoning is that it is only in clear cut and 'simple' cases that offers of compromise can have any effect. Those, from one's experience, are relatively easy to predict and determine. It is the type of case to which Sheppard J was referring, which is, in my respectful opinion, eminently suited to a commercial resolution by a sensible commercial evaluation by the parties and their legal advisers of the prospects. . . .
>
> If the view adopted by Hill and Sheppard JJ is to prevail then there is no purpose in making an offer of compromise in complicated commercial litigation because it can hardly ever be said that there is no chance of success or that the rejection of the offer is plainly unreasonable. Further it can always be said, in such litigation, that the final result is clouded by uncertainty. That seems to me to defeat, in an area which cries out for commercial resolution of disputes to avoid the vast expensive litigation and the debilitating effect of it on the parties involved, the aim of trying to resolve the litigation, and certainly it both takes away from the force of any judicial comments that the parties should seek to settle, and tends to defeat the ultimate sanction in settlement negotiations, which is the making of an offer or the taking of a step prescribed by the Rules, which will place the other party in jeopardy if the offer is not accepted. To remove that sanction, in circumstances where it is generally agreed that every reasonable effort should be made to settle a case, seems to me to be in conflict with the philosophy that settlement should be pursued.[62]

His Honour also said:

> If a party is entitled to refuse an offer of compromise because the adjudication process will involve the resolution of difficult questions of fact and/or law there is no obligation on the party in very many cases to accept an offer of compromise prior to judgment and, conversely, a party making the offer is not advantaged if ultimately its prognostication of the litigation proves to be correct. In my opinion this cannot be so.

> If it is it takes away from the utility of making an offer and, accordingly, the general philosophy of a Court, seeking where possible and once again acting judicially to promote settlement, is defeated. All of this has to be looked at in the context of the present approach to legal proceedings where procedures are being taken such as early neutral evaluation of cases and alternative dispute resolution seeking to bring about a compromise prior to the hearing. This is the climate in which the Courts are now operating . . . Further, Judges frequently suggest to parties, (and I do not suggest that this is a recent occurrence), that serious consideration should be given to settlement. This is often couched in terms that ultimate factual findings will depend upon the view taken of the witnesses and their evidence and, in some cases, the law is uncertain. It is frequently pointed out by the Court that settlement will achieve certainty of result. However, it seems to me that there is little point in the Court making such remarks to the parties if a party, which has adopted a procedure to try and bring about a settlement and thereby eradicate those doubts and difficulties, derives no benefit from making a sensible commercial offer, which if accepted would have concluded the litigation, because the Court denies it that benefit.
> . . .
> The question, so it seems to me, when one is considering a case where an offer of compromise has been made and the party rejecting the offer has not achieved a better result than that provided for by it, is not whether it was reasonable for the party rejecting the offer to fight on notwithstanding that the offer had been made, but whether it was reasonable for the party rejecting the offer to do so and, in that regard, I would suggest that the onus must be on the party rejecting the offer to establish in some way the reasonableness of the course it took. In my opinion that cannot be done by saying that litigation is uncertain and it was entitled, rather than accept the offer, to have the uncertainties, whether legal or factual, resolved by judicial decision. That, of course, is an entitlement any litigant has; but what must be understood is that if that litigant has received an offer, which it does not ultimately better, its desire for a judicial determination should, generally speaking, be made subject to its paying the other party's costs on an indemnity basis from the date the offer is made. It is the very uncertainty of the legal and factual issues propounded for decision, which makes settlement an appropriate course, a matter much stressed in suggesting that settlement be considered. If there is no uncertainty, if that can ever be so, there is no reason to settle. It also seems to me that the more difficult and complicated the legal and factual issues the greater must be the uncertainty and, accordingly, the greater must be the incentive to settle on a commercial basis. The greater the uncertainty the more that is being risked and the more the prospect of further litigation by way of appeals.[63]

These comments by Rolfe J were made in considering an application of a party/party costs on an indemnity basis rather than on a party/party basis. Such applications are made to bridge the gap between what a party has to pay to that party's own lawyers and what the successful party recovers from the other side on a taxation of costs.

One of the objections to the approach advocated by Rolfe J is that it detracts from the principle that it is every litigant's right to have uncertain questions of fact and law resolved by the courts and that a litigant should not be punished for insisting upon that right. There is force in that objection. But the answer to that objection is to bridge the gap between party/party costs and solicitor/client costs and also by reducing the overall cost of litigation generally.

PERSONAL COSTS ORDERS

It sometimes happens that steps are taken in proceedings, or some aspect of the litigation is conducted in such a way, that costs are needlessly and unreasonably incurred. Two common examples are unduly prolix cross examination thereby lengthening the trial and unreasonably brought or defended interlocutory applications. Sometimes it is the client who is the prime mover behind those two situations and sometimes it is the client's legal advisers who are to blame. Sometimes it is a combination of the two. Generally speaking, whether the client is the instigator of the conduct in question or not, any adverse costs order made by the court as a result of the conduct is visited upon the client. If the client is the prime mover behind the conduct then it is only fair that the client must bear the cost consequences. But, given that lawyers have ethical obligations to the court, and must take those obligations into account regardless of their instructions (or at least withdraw from acting if those instructions do not change), the question must be asked whether the lawyers responsible should bear personally (either in whole or in part) the costs order which has been visited upon the client. This is especially so where the client does not have the financial capacity to meet the costs order which the court has made in favour of the other side. However, the question becomes even more acute when the client was not really the prime mover behind the conduct giving rise to the costs order. In that situation there is an unfairness in visiting the costs consequences upon the client.

It often happens in the course of conducting litigation that a solicitor takes some step or fails to take some step which affects the interests of the client. A classic example is where a pleading is inadequate and the solicitor realises (possibly after consultation with counsel) that the pleading needs to be amended. Depending upon the circumstances, it may be wholly inappropriate for the solicitor to charge the client for drawing an amended pleading, especially when the original pleading has already been charged and paid for. Moreover, an application may well have to be made to the court for permission to amend the pleading. If the court gives permission it is usually upon the condition that the other side recovers the costs of the application to amend and the costs thrown away by reason of the amendment in any event.

In this hypothetical situation many solicitors with either not charge their client for drawing the amended pleading or will pay out of their own pockets the costs of counsel for drawing the amendment. If this was the only issue then

it would probably not matter much whether or not the client knows of the error which has now been rectified at no cost to the client. Clearly the solicitor has behaved both honourably and appropriately. The problem, however, comes pursuant to the order that the client pay the other side's costs thrown away. As often as not, these costs are not brought to account until the final taxation and indeed, may never be brought to account if in the negotiation and costs allocation process no real weight is given to the existence of the costs order.

There will of course be many grey cases where views may differ as to whether it is the solicitor or the client who is responsible for the particular item of cost. In the amendment example given above it may be that the pleading is a proper reflection of the client's instructions but that the pleading needs to be amended in the light of new instructions. The solicitor might say that the client is to blame for the cost of amending the pleading and also the costs that will have to be paid to the other side consequent on the amendment because the client did not tell the solicitor the new facts. The client might argue that if the solicitor had asked a few more probing questions of the client whilst taking instructions the new facts would have emerged.

Order 66 Rule 5 of the *Rules of the Supreme Court* deals with at least some of the situations which may arise. It is necessary to set out the Rule in full:

(1) Where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default the Court may make against any solicitor whom it considers to be responsible (whether personally or through a servant or agent) an order –
  (a) disallowing the costs as between the solicitor and his client;
  (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to any other party to the proceeding; and
  (c) directing the solicitor personally to indemnify any party other than his client against costs payable by the party indemnified.

(2) No order under this rule shall be made against the solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made, except where any proceeding in Court or in Chambers cannot conveniently proceed, and fails or is adjourned without useful progress being made –
  (a) because of the failure of the solicitor to attend in person or by a proper representative; or
  (b) because of the failure of the solicitor to deliver any document for the use of the Court which ought to have been delivered, or to be prepared with any proper evidence or account, or otherwise to proceed.

(3) The Court may before making an order under this Rule refer the matter to the Taxing Officer for inquiry and report.
(4) The Court may direct that notice of any proceedings or order against a solicitor under this Rule shall be given to his client in such manner as may be specified in the direction.

Order 66 Rule 5 is probably not wide enough to allow the Court to make a personal costs order against that employed solicitor.[64]

Proposal 14

Order 66 Rule 5 of the *Rules of the Supreme Court* should be amended to allow an order to be made against an employed solicitor.

Barristers are not caught either. Order 66 Rule 5 does not confer jurisdiction to make an order against a barrister.[65] Part 52A Rule 43 of the *Supreme Court Rules 1970* (NSW) is in virtually identical terms to Order 65 Rule 5 of the Western Australian Rules. However, in 1994 Rule 43A was inserted into the New South Wales Rules:

(1) Where costs are incurred or improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default, and it appears to the Court that a barrister is responsible (whether personally or through a servant or agent), the Court may, after giving the barrister a reasonable opportunity to be heard —
    (a) disallow the costs as between the barrister and his or her instructing solicitor or as between the barrister and the client;
    (b) direct the barrister to repay to the client costs which the client has been ordered to pay to any other party; and
    (c) direct the barrister to indemnify any party other than the client against costs payable by the party indemnified.
(2) Without limiting the generality of sub-rule (1), a barrister is responsible for default for the purposes of that sub-rule where any proceedings cannot conveniently proceed, or fail or are adjourned without useful progress being made, because of the failure of the barrister —
    (a) to attend in person or by a proper representative;
    (b) to file any document which ought to have been filed;
    (c) to deliver any document which ought to have been delivered for the use of the Court;
    (d) to be prepared with any proper evidence or account; or
    (e) otherwise to proceed.
(3) The Court may, before making an order under sub-rule (1), refer the matter to a Register for inquiry and report.

(4) The Court may order that notice of any proceedings or order against a barrister under this Rule shall be given to the barrister's instructing solicitor or client in such manner as may be specified in the order under this sub-rule.

Proposal 15

An amendment to Order 66 of the *Rules of the Supreme Court* should be made by inserting a Rule 5A in virtually identical terms to Part 52A Rule 43A of the *Supreme Court Rules* (NSW).

In Western Australia the use of the term 'barrister' may cause some consternation but a term such as 'any practitioner engaged as Counsel who is not a member or employee of the firm of solicitors on the record' would probably achieve the same result.

Another problem is that the consideration of such orders creates a conflict between the solicitor and the client. Usually the client will have to pay the other side the costs the subject of the application in the absence of an order that the solicitor pay. Clearly the solicitor has an interest in the client paying the other side rather than the solicitor. However, it commonly happens on applications under Order 66 Rule 5 that counsel for the solicitor against whom the order is sought and counsel for the other party to the litigation are heard by the judge but not the client. In a sense the application is a three way contest but only two of the contestants are heard.

In the amendment example given above, it would be very unusual for the other party to ask for a personal costs order. In such a situation the court is unlikely to intervene. Nonetheless there is a costs issue between the solicitor and the client, as to the costs which the client has to pay the other side and the costs which the solicitor may have charged the client with respect to the previous pleading and the application to amend. As the court does not know, and should not know, what has taken place between the solicitor and the client, the court should not become involved. The only answer which can be given to this delicate issue is that the client needs to be kept fully informed as to each step taken in the litigation, why it is taken, what was the result of the taking of that step and the court's reasons for making any particular costs order. A fully informed client would then at least be in a position to consider whether she or he needs to change solicitors or at least discuss with the solicitors whether or not in all fairness the solicitors should be making a deduction from their fees to compensate the client for the costs order which has been made.

Proposal 16

The Professional Conduct Rules should be amended to require solicitors to inform their clients as to all costs orders made against the client and the reason for the making of such orders.

The making of personal costs orders is a jurisdiction which must be exercised with great caution. As Drummond J of the Federal Court said in *Re Bendeich (No.2):*

> There is good reason for caution. Too ready an exposure of the lawyer for a party to personal liability for the costs of his client or of the other party is likely to inhibit the way the lawyer acts in conducting the litigation. It frequently happens that a lawyer will have to make judgments as to which of a number of courses is the optimum one to follow, bearing in mind his duty to advance his client's interests and his duty to the Court to conduct the litigation in proper fashion. The introduction of a third consideration into everyday litigation that requires a solicitor to keep in mind the need to minimise the chances of a costs order being made against him personally, would raise a conflict between the lawyer's duties to his client and to the Court, on the one hand, and his own interests, on the other. As is understandable, such a conflict would likely be resolved by the solicitor concentrating on identifying and adopting the course most likely to minimise his own personal exposure at the expense of following courses best fitted to advantage his client and to bring the action to an expeditious end.[66]

It is extremely undesirable that claims for wasted costs under Order 66 Rule 5 should be used as a means of brow beating or threatening the other side and its legal advisers during the progress of a case. Such a practice gravely undermines the ability of a solicitor to act with the required objectivity and independence.[67]

In the United Kingdom Section 51 of the *Supreme Court Act 1981* (UK) provides for the Supreme Court to have the power to award costs and to make rules for that purpose. The section was amended by the *Courts and Legal Services Act 1990* (UK). Section 51 now relevantly provides:

(1) Subject to the provisions of this or any other enactment and to rules of Court, the costs of and incidental to all proceedings in [various Courts] shall be in the discretion of the Court....

(6) In any proceedings mentioned in sub-section (1), a Court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of Court.

(7) In sub-section (6), 'wasted costs' means any costs incurred by a party–

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any other employee of such a representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Court considers it is unreasonable to expect that party to pay....

(13) In this section 'legal or other representative', in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.

In commenting on these provisions the English Court of Appeal said in *Ridehalgh v Horsefield*:

> It should, however, be noted that the jurisdiction is for the first time extended to barristers. There can in our view be no room for doubt about the mischief against which these new provisions were aimed; this was the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their or the other side's lawyers. Where such conduct is shown, Parliament clearly intended to arm the Courts with an effective remedy for the protection of those injured.[68]

In England[69] it appears that a three stage test is applied in dealing with applications for what are now known as 'wasted costs orders':

(1) Has the legal representative of whom complaint is made acted improperly, unreasonably, or negligently?

(2) If so, did such conduct cause the applicant to incur unnecessary costs?

(3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

It is generally the case that applications for wasted costs orders should only be made at the end of the trial.[70] Where the conduct complained of is proved but there is no waste of costs shown to have been caused by that conduct, a wasted costs order should not be made and the Court should simply refer the matter to the appropriate disciplinary body.[71]

There is a conflict between the wasted costs jurisdiction and the duties which lawyers owe to their clients. The English Court of Appeal accepted in *Ridehalgh v Horsefield* the changes to section 51 of the *Supreme Court Act* do not alter the pre-existing law that a legal representative is not to be held to have acted improperly, unreasonably or negligently simply because she or he acts for a party who pursues a claim or a defence which is plainly doomed to fail.[72] As Lord Pearce of the House of Lords said in *Rondell v Worsley*:

> It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and

> reasonable and likely to succeed in their action or defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. It would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter.[73]

This sentiment represents a principle and a policy of the law which most reputable lawyers would regard themselves as being under a defacto duty to uphold so far as they reasonably can although there is no provision in the Law Society's Professional Conduct Rules which encapsulates the principle.

Members of the Western Australian Bar Association are in fact under a positive obligation to take on cases for disreputable and unreasonable clients even where the case appears likely to fail. This is known as the 'cab rank rule'. The cab rank rule is adequately summarized in paragraph 209 of the Code of Conduct of the Bar of England and Wales, which relevantly provides as follows:

> A barrister . . . must comply with the 'cab rank rule' and accordingly except [in various situations such as conflicts of interest, etc] he must in any field in which he professes to practice in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded:
>
> (a) accept any brief to appear before a Court in which he professes to practice;
> (b) accept any instructions;
> (c) act for any person on whose behalf he is briefed or instructed; and to do so irrespective of:
> (i) the party on whose behalf he is briefed or instructed;
> (ii) the nature of the case; and
> (iii) any belief or opinion which he may have formed as to the character, reputation, cause, conduct, guilt or innocence of that person.

In short, the cab rank rule ethically obliges barristers to provide representation to difficult or unpopular clients who have seemingly unmeritorious cases. It is for the judge to judge the client's case and not the client's lawyers. Lawyers should only give advice to their clients and leave it to the client to make the decision. Thus a barrister is obliged to conduct a case even though she or he personally regards it as likely to fail.

When these principles, and the reasoning behind them, are borne in mind, it can be seen that the recommendation of the Australian Law Reform Commission[74] goes too far. Recommendation 37 states:

> A court or tribunal should be able to order a party or his or her legal representative to pay the costs incurred by the other parties to the proceedings as a result of an unreasonable claim or defence. A claim

or defence will be unreasonable if, in the opinion of the court or tribunal, it is

- not well grounded in fact
- not based on the existing law or on a good faith argument for the extension, modification or reversal of the existing law.

The power to order that legal practitioners pay costs personally exists and should be used more often than has been the case of late. However, it is a draconian power and would only be used with extreme caution. Such an order has the power to drive a wedge between the party and the party's own lawyers to the advantage of the other party. Such applications should generally be left until the conclusion of the case. Pre-trial applications should be confined to situations where the court is considering ordering that the costs be taxed and paid forthwith. Suitable pre-trial situations in which the court should be disposed to making a personal costs order are where the practitioner does not file some document required by an order of the court or a practice direction and this leads to an adjournment.

Proposal 17

If the practitioner asserts that the reason leading to an adverse costs order relates to the conduct of the client the court should give serious consideration to directing that the client be informed that she or he might wish to be separately represented on the question of whether the client or the practitioner should bear the costs in question.

It would be wrong for the court to use such orders to generally police the solicitor/client relationship. Save in extreme cases the courts have no alternative but to hope that solicitors will act appropriately towards their clients.

THE LOSER PAYS RULE

As pointed out above, the loser pays rule does not generally apply in the United States.[75] However, this rule is itself under attack in the United States. In 1994 the *Common Sense Legal Reforms Bill* was introduced into Congress, proposing to introduce a loser pays rule for certain litigation. Supporters of the Bill argue that a loser pays rule is needed to curb the high level of litigation in the United States. However, the high level of litigation is probably the result of many other factors as well. Further, since the 1960s state and federal legislatures have introduced legislation dealing with civil rights and environmental litigation which provides for plaintiffs to obtain costs if they win but to not have to pay the defendant if they lose.[76]

The loser pays rule also applies in many non common law countries of Europe. However the rule is subject to many exceptions. If one of the exceptions is

made out then the parties bear their own costs. Exceptions include cases where the law is in doubt or there is a genuine dispute as to the facts.[77]

The Australian Law Reform Commission recommends that in civil proceedings (using that term to exclude family law and industrial relations cases) the loser pays rule should remain. However, the Commission goes on to recommend[78] that the rule be subject to a number of exceptions:

- personal costs orders against legal practitioners
- special costs orders where case management directions are not complied with
- appeals succeeding on a point not raised in the court below
- cases where there is a public interest – most commonly in judicial review proceedings
- cases where having regard to the financial circumstances of one of the parties, the possibility of a loser pays costs order will adversely impact on the ability of that party to present the case or negotiate a fair settlement.

Proposal 18

The recommendations of the Australian Law Reform Commission on the loser pays rule, and the exceptions thereto, should be followed.

The public interest exception will be dealt with below in the context of judicial review proceedings.

The last exception may seem radical but in truth it is a more sophisticated version of a very old costs order. Historically courts granted indigent litigants to proceed *in forma pauperis*. This Latin phrase translates as 'in the character or manner of a pauper'. Even today the Privy Council from time to time grants petitions for leave to appeal *in forma pauperis*. This means that the appellant may proceed without liability for filing fees or costs if the appeal fails.

The Australian Law Reform Commission[79] refers to its version of *in forma pauperis* as the 'material effect exception'. The gist of the exception is fleshed out in recommendations 41-44:

> 41. The court shall presume, unless satisfied otherwise, that a party's ability to present his or her case properly or to negotiate a fair settlement will be materially and adversely affected if the court is satisfied that the party would suffer substantial hardship if required to pay the other party's costs.
>
> 42. When determining whether a party would suffer substantial hardship the court shall have regard to whether the party will:

- lose or be forced to vacate his or her home
- lose a motor vehicle or the use of a motor vehicle reasonably necessary for domestic, employment or business purposes
- lose his or her employment or livelihood
- be made bankrupt

as a result, in part or in whole, of being required to pay the other party's costs.

43. If a court finds that a party's ability to present his or her case properly or to negotiate a fair settlement will be materially and adversely affected if costs follow the event, the court may make such orders as to costs as it considers just having regard to the resources of the parties and to the circumstances of the case. The orders the court may make include an order that
    - each party bear his or her own costs
    - the affected party, if unsuccessful, only pay the successful party's costs up to a cap set by the court
    - another person, group, body or fund, in relation to which the court has power to make a costs order, is to pay all or part of the costs of one or more of the parties.

    An order under this provision will be subject to the court's power to make disciplinary and case management costs orders.

44. When considering the 'resources of the parties' the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or in part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.

Recommendation 41 effectively constitutes a presumption that each party should bear his or her own costs. That seems to fly in the face of the recommendation that the loser pays rule should remain.

The Australian Law Reform Commission[80] correctly points out that for parties to make informed decisions about the cost of litigation the type of costs order the court is likely to make needs to be identified at an early stage in the proceedings. Recommendation 3 says:

> A court or tribunal should, at any stage of proceedings, be able to indicate the costs order it is likely to make at the end of the proceedings subject to any change in circumstances coming to light in the course of the proceedings.

Proposal 19a

The loser pays rule should apply in the absence of a declaration that the case falls within one of the exceptions. If the court makes a declaration that a particular exception applies, then the rule that each party bear her or his own costs becomes the presumptive rule in the place of the loser

pays rule. The presumptive rule should only then be displaced for good reason — for example, the other side makes an offer of settlement which is unreasonably rejected. The presumptive rule should be identified at the start of the proceedings.

This could be done in at least two ways: (1) bring a separate application for leave to issue proceedings on the basis that a particular presumptive rule will apply; or (2) the proceeding is instituted and an application for a declaration as to a presumptive costs order is made in that proceeding — for example, at a directions hearing. The second course is probably better because it would not mean the court registry opening two court files and may create difficulties when limitation periods are about to expire.

Proposal 19b

The plaintiff should be permitted to discontinue with no order as to costs if the presumptive costs rule on which she or he had hoped to litigate is not declared to apply.

If the loser pays rule is the presumptive rule, in the absence of a declaration that some other rule applies, the applicant for the rule will, on normal principles, bear a forensic onus of showing that the loser pays rule should not apply. This may involve elucidating at the directions hearing the principles of law upon which the applicant will rely at trial. This should probably also involve outlining on affidavit the factual framework within which that case is to be presented. Relevant documents could be annexed to the affidavit. Such a process would involve the applicant for a non loser pays presumptive costs order effectively in resisting a notional summary judgment application and putting on affidavit the kind of material as to her or his financial circumstances as would be done on an application for security for costs. When seen in this light the fact that the applicant is 'showing his/her hand' is not objectionable since that often happens at an early stage of most litigation at the moment. If the judge hearing the application for a non loser pays presumptive rule decides that, say, the plaintiff could be wiped out by an adverse costs order but has an arguable case then the declaration should be made rather than merely an indication of the costs order that may be made. An arguable case remains an arguable case even if it is lost at trial after disputes as to facts and law are resolved.

It may well be that a slightly stricter test should be applied in the context of an appeal where an application is made by a 'poor appellant' for a non loser pays presumptive costs order, especially a second appeal. However, where there is a 'wealthy appellant' and a 'poor respondent' then the courts should consider very seriously whether the appeal should be on condition that the 'poor respondent' not have to pay the costs of the appeal regardless of the outcome. In cases where appeals are taken not to avoid the judgment under appeal so much as to avoid the precedent created by the result, there should perhaps be the added protection to the 'poor respondent' of an order that the 'wealthy appellant' pay the 'poor respondent's' taxed costs of the appeal regardless of the outcome. This is a condition which the High Court and the Privy Council impose from time to time as a condition of granting special leave to appeal.[81]

Such a process may seem to unfairly discriminate in favour of the poor. As a matter of theory that is true only if the loser pays rule is the premise. The United States and European experience shows that that is not a universal premise. As a matter of practicality there is unfairness anyway. Many a plaintiff has taken a very arguable case to trial and lost, been ordered to pay the costs under the loser pays rule, and been bankrupted on the strength of the taxed bill of costs. The successful defendant recovers no costs from the plaintiff in any event. What then is the difference in the court saying up front that the defendant will recover no costs even if the plaintiff loses the case? Further, it has always been a principle in dealing with applications for security for costs against non-corporate plaintiffs that poverty, of itself, is an insufficient basis to justify an award of security for costs against a plaintiff.

Orders 24A and 66 of the *Rules of the Supreme Court* contain some of the principles upon which the judicial discretion as to costs is exercised. However, it may be better to codify the rules as to all state courts and tribunals into a separate costs statute.

Proposal 20

A separate Costs Act should be passed. The Act should cover all relevant courts and tribunals by having a suitable definition of 'court' and 'tribunal'. Part VI of the *Legal Practitioners Act* should be reorganised and inserted into the Costs Act along with any provisions concerning barristers' fees, contingency fees, personal costs orders and the other matters referred to above. Scales (ie determinations of the Legal Costs Committee) should then be enacted by way of regulations under the Costs Act.

COURT FILING FEES

All courts (and most tribunals) in Western Australia charge filing fees for the lodging of various documents — most particularly documents which initiate an action. It is convenient to consider this issue by reference to the Supreme Court.

Section 169 of the *Supreme Court Act 1935* (WA) authorises a majority of the Judges of the Supreme Court, with the concurrence of the treasurer, to levy filing fees. Section 170 provides that the judges may make rules of court for this purpose. Order 83A and the Fifth Schedule of the *Rules of the Supreme Court* deal with filing fees. Broadly speaking, the effect of these provisions is that a fee is charged on the filing of an initiating document and on the entry of matters for hearing, but not on the interlocutory steps (one exception is that a $200 fee is charged on the filing of a summons for admission to the Expedited List). The most expensive fee levied for an initiating document is currently $500 (being the fee for a notice of appeal). Most initiating documents are subject to a fee of $265.

The filing fee for a notice of appeal to the Full Court of the Supreme Court is $500 whereas the filing fee for a notice of appeal to the Full Court of the Federal Court is $1 000. The filing fee for an application to the Federal Court (the equivalent of a writ of summons in the Supreme Court) is $1 200 for a corporation and $500 for an individual. The Supreme Court does not charge filing fees for interlocutory chamber summonses (except for admission to the Expedited List) but the Federal Court levies $123 on the filing of a notice of motion (the Federal Court equivalent of a chamber summons). The Federal Court also levies substantial daily hearing fees.

The fees charged in the Supreme Court of Western Australia do not distinguish between corporations and natural persons. Given the prevalence of small companies as a vehicle through which natural persons trade these days, the absence of any distinction should be maintained. It is often the case that the substantive plaintiff is a natural person even though the nominal plaintiff is a company.

The New South Wales Commercial Division differs from the Expedited List in the Supreme Court of Western Australia in that it is confined (as its name suggests) to commercial matters. Both the Expedited List and the Commercial Division are conducted on an expedited basis with special rules and practice directions in force designed to make proceedings as quick as possible. However, the similarity ends there because although a great proportion of the work of the Expedited List is commercial in nature, many non commercial matters are also dealt with in the Expedited List.

One advantage of establishing a Commercial List (as in the Supreme Court of Victoria) from the point of view of levying filing fees is that it would identify

a class of litigants who are demanding special treatment (ie expedition) and are probably litigating over large amounts of money. On this basis it would seem fair to levy higher filing fees to be applied for various funds necessary to be established or enhanced (eg the Suitors Fund) as part of the reform of the legal system.

Proposal 21

A special Commercial List be established in the Supreme Court to handle commercial work and higher filing fees should apply to actions which are commenced in that List.

Order 83A Rule 5 gives the court or a registrar the discretion 'in a particular case for special reasons' to direct the waiver of the fee in whole or in part or the deferment of payment of the fee. This is a very open-ended discretion. It may be compared with the *Federal Court Regulations* which not only give the Federal Court registrar a similar discretion (albeit with a list of factors to be considered) but provide for particular categories of litigant who are to be exempt from filing fees (for example, legally aided persons, holders of health care cards, inmates of prisons, etc). The Federal Court Registry also has a detailed form to be filled out by applicants for waiver of fees. Regulation 2B provides for decisions of the registrar on waiver applications to be reviewed by the Administrative Appeal Tribunal.

Proposal 22

Order 83A of the *Rules of the Supreme Court* should be amended to follow the *Federal Court Regulations*.

However, it would be preferable for Parliament to set filing fees by way of regulations passed under the *Supreme Court Act*. This would allow for merits review in an external body if Western Australia was to follow the Commonwealth and Victoria in establishing an administrative appeals tribunal or the like.

GAP BETWEEN PARTY/PARTY COSTS & SOLICITOR/ CLIENT COSTS

There has always been a gap between what a successful party eventually recovers on a taxation of costs from the unsuccessful party and what the successful party has to pay her or his own solicitors. Costs taxed on a party/party basis did not and were not meant to cover, in full, the costs payable by the winner to her or his own solicitors. In part this represented a conscious policy to discourage litigation.[82]

In one sense this is unfair. If the plaintiff is successful then by definition the right which the plaintiff was asserting in the litigation was a right which the plaintiff always had and which the defendant should have recognised. As Rogers CJ Comm D said in *Singleton v Macquarie Broadcasting Holdings Ltd*:

> It seemed to me wholly inappropriate that a party, forced to take legal proceedings, entirely through the wrongful and inappropriate conduct of the other party, be left badly out of pocket at the successful conclusion of the proceedings, simply by reason of an inappropriate method of taxation of costs.[83]

An order for indemnity costs has been the traditional mechanism by which this gap has been bridged. An order that costs be paid on an indemnity basis means that 'all costs incurred will be allowed except any which have been unreasonably incurred or are of an unreasonable amount. In applying those exceptions the receiving party is given the benefit of any doubt'.[84]

Cases such as *Singleton* make it clear that an order for indemnity costs does not oblige the loser to pay whatever the winner's solicitors have charged the winner under a time costs agreement. Reasonableness is always the touchstone. But how does one define 'reasonable'? Is 'reasonable' something more than the scale? If 'reasonable' is something more than the scale, does that make the scale unreasonable and thereby suggest that the scale should be made more generous or even done away with?

The Supreme Court scale, as has been noted, is generous. It provides for time costing but puts a break on the abuse of time by providing for recommended amounts of time. The scale allows for a senior solicitor to charge $270 per hour and for Queen's Counsel at the rate of $370 per hour. These fees currently represent the upper end of market rates in Western Australia, but are low by current national standards. It is true that some senior solicitors charge in excess of $270 per hour and some Queen's Counsel charge in excess of $370 per hour. If the client is made aware of a scale rate but still chooses to pay in excess of that rate, is it fair for the other side to pay for the difference even under an indemnity costs order?

Even if the winning party's lawyers charge at scale rates, there will always be a difference between the amount awarded on a party/party taxation and what the winner has to pay her or his own solicitors. One example is the cost of taking a statement from a witness who, for forensic reasons, it is decided not to call at trial. That cost will not usually be awarded as part of getting up on a party/party taxation. The cost should, however, be awarded on a solicitor/client taxation since it would probably be professionally negligent for a solicitor to not take a statement from a potentially helpful witnesses.

Under section 208A of the *Legal Profession Act 1987* (NSW) a party is entitled to recover a fair and reasonable amount for work that was reasonably required

for the litigation. This would seem to cover the witness example just given and there should be an amendment to Order 66 of the *Rules of the Supreme Court.*

Proposal 23

Order 66 of the *Rules of the Supreme Court* should be amended to enshrine a principle that a party is entitled to recover a fair and reasonable amount for work that was reasonably required for the litigation. Preferably the principle should be set out in a separate Costs Act.

The main reason, however, why the winner's costs will always be higher than the taxed party/party costs is that the scale does not expressly allow for a good deal of 'file management' work. Such work is invariably billed under time cost agreements between solicitor and client. File management work is a necessary part of the proper conduct of the file by the solicitor. Although it adds significantly to the amount of paper on the file, such paper is required to establish a 'useable trail' to protect the solicitor against claims for professional negligence by the client and also to comply with the requirements for a Law Society Approved Quality Practice.

Examples of file management work connected with, say a chamber summons for a Mareva injunction, include the following:

- telephone calls seeking a barrister who is free to argue the application,
- negotiating the barrister's fee,
- explaining the impact of an undertaking as to damages to the client,
- taking instructions from the client as to whether the application should be made and advising as to the risks involved,
- conference between partner, junior solicitor and articled clerk dividing up work to be done (eg partner to take affidavit from key witnesses, junior solicitor to travel to office of less important witness to take affidavit, articled clerk to research latest cases on Mareva injunctions against assets of third parties),
- telephone calls to the Listings Office of the Supreme Court to see if a judge is available for an urgent application,
- telephone calls, faxes, etc with the other side's solicitors in an endeavour to reach an interim arrangement to avoid having to make the application,
- letter to the Orders Office of the Supreme Court asking for urgent extraction of the order,
- letters to third parties who should be given notice of the making of the injunction (eg, banks),
- taking telephone calls from a (understandably) very nervous client about facts which are of doubtful relevance to the application,

- writing a reporting letter to the client about the outcome of the application and explaining the next steps in the litigation,
- letter to barrister enclosing cheque in payment of barrister's fee
- file notes as to all conversations with the client, the barrister and the other side's solicitors,
- considering a fax from the other side threatening to appeal the grant of the Mareva injunction,
- reporting the threatened appeal to the client,
- sending the bill to the client with (at the request of the client) a detailed explanation of the work done and the amount of the bill.

The extent to which file management work is allowed on a party/party taxation varies from taxing officer to taxing officer. If the party/party bill is otherwise well within the $6 900 limit for a Mareva injunction (being an application in Chambers) some taxing officers will allow some of the above file management work. However, some taxing officers will confine the costs awarded to on a party/party taxation to litigious work intimately connected with the Mareva injunction application itself. The kind of allowances that would be made on the latter approach are as follows:

- barrister's fee on brief
- drawing brief to barrister
- taking and settling affidavits
- research for latest cases
- drawing undertaking as to damages
- drawing and extracting order granting Mareva injunction
- attendance of instructing solicitor
- drawing chamber summons
- drawing certificate of urgency
- drawing minute of proposed orders
- drawing outline of submissions.

To 'squeeze' file management items into the current Supreme Court scale is a very artificial exercise. The exercise becomes even more artificial on a solicitor/client taxation. If the solicitor does not hold an enforceable costs agreement with the client then if the client exercises the right to have the solicitor's bill taxed, all of the work of the solicitor has to be justified by reference to the scale. Even the most rigorous taxing officer who would not otherwise allow any of the file management work referred to above on a party/party taxation will probably feel obliged to try and allow for some of that work on a solicitor/client taxation. To some extent Order 66 Rule 11 (3) and Order 66 Rule 12 of the *Rules of the Supreme Court* can help achieve this end.

Some other jurisdictions, either currently or in the past, have allowed for the file management work by allowing a loading for 'skill, care and attention' on

top of the figure that would otherwise be allowed. The loading is in the form of a percentage — not unlike the uplift fee discussed above in the context of contingency fees. Such a loading is unscientific. However, it does have the advantage of allowing the solicitor (assuming the solicitor has no cost agreement or the rates in the cost agreement broadly follow the rates in the scale) to give an estimate to the client of what the client will be charged by the solicitor as compared to what the party/party costs are likely to be.

The approach which is gaining currency in the eastern states, however, is rather different. The trend is to encourage time-based cost agreements subject to the giving of an estimate and various other disclosure requirements. Disputes between the solicitor and the client as to the amount of time spent are resolved by referring the cost agreement and the file to an independent cost assessor. It is not necessary for the solicitor to draw a detailed solicitor/client bill of costs for taxation. The assessor reads through the file, looks at any documents drawn (eg, court documents, briefs to counsel, etc) and nominates a figure the assessor considers reasonable having regard to the rates set out in the cost agreement.[85]

Proposal 24

To reduce the gap between party/party and solicitor/client costs, the scales should be amended to recognise the fact that as between solicitor and client, file management work is properly done and is properly charged for.

Proposal 25

For the purposes of a party/party taxation, solicitor/client file management work should be expressed as a flat percentage of the amount at which the party/party bill would otherwise be taxed. The percentage should be determined after consultation with the Law Society, consumer groups, the Legal Costs Committee and the taxing officers of the Supreme Court.

Although this is unscientific, and will probably not achieve a total indemnity, it has the advantage of allowing parties to litigation to know at the very early stages of litigation what their best and worst case scenarios are likely to be. The aim should be to allow litigants to make as informed decisions as possible. Further, the existence of some gap will be a continuing encouragement not to litigate unless absolutely necessary.

Proposal 26

A flat hourly rate for file management work should be identified in the scale for the purpose of a solicitor/client taxation where the solicitor does not have an enforceable cost agreement and the scale must be applied.

This hourly rate should take account of market rates charged by firms of solicitors of various sizes and locations but be comparatively low to recognise the fact that much (but by no means all) file management work can be (and is) carried out by more junior solicitors or even by articled clerks. For the sake of argument the rate might be $180 per hour. This rate should also be used by the court in making an indemnity costs order.

This will mean that the loser is not exposed to the full impact of a cost agreement between the winning party and her or his solicitors which provides for over the scale rates or where the agreement uses scale rates but the work has been carried out by solicitors more senior than was appropriate to the task. It is true that the loser who is subject to an indemnity costs order will not know the exact amount she or he is liable to pay, but an indemnity cost order is only made in Western Australia where there has been reprehensible conduct deserving of sanction .

ADMINISTRATIVE LAW AND PUBLIC INTEREST LITIGATION

Applications to superior courts for prerogative writs and equivalent statutory remedies are collectively known as judicial review applications. In broad terms such applications fall into two categories:

(a) applications against a single respondent who has impacted upon the applicant's interests — eg, the Minister for Immigration ordering a person to be deported; and

(b) challenges to decisions of inferior courts and tribunals where there are two respondents — the tribunal or judicial officer itself and the other party to the proceedings before the tribunal.

There is no rule of law which forbids the award of costs against public officers and agencies appearing as respondents to successful applications for judicial review. The courts have, however, tended to apply special principles in the exercise of their general discretion to award costs in judicial review matters.[86]

There is a convention that when an application is made for review of decisions of courts and tribunals invested with quasi judicial functions, the respondent court or tribunal should not actively oppose the application but should simply acknowledge service of the court papers and submit whatever order the court conducting the judicial review thinks fit to make save as to costs. There

are, however, cases which suggest that in exceptional circumstances it may be proper for the tribunal to mount an active defence to the judicial review application when its jurisdiction is challenged. In the ordinary run of events the court will not order costs against the tribunal if it adopts the usual approach. But if the tribunal actively seeks to oppose a judicial review remedy then it is quite likely that the reviewing court will order that the tribunal pay the costs in the event that the application for judicial review succeeds.

Although costs are not generally awarded against a respondent tribunal or its members, they will usually be awarded against an unsuccessful co-respondent who is a party before the tribunal in question. But if the tribunal is the only respondent to whom the applicant can look for an order as to costs, one can well understand the successful applicant feeling somewhat disgruntled about being forced to litigate to vindicate her or his rights and not receiving any costs in the event of success.

Judges have from time to time suggested that the reviewing court should have the power to award costs against the Crown, to be paid out of a public fund similar to an Appeal Costs Fund. Judges have made this suggestion because they have believed on first principles it would not be appropriate for the respondent as a public institution to pay costs where there has been no suggestion of serious misconduct on the part of that tribunal. This has left the judges recommending that the Crown make ex gratia payments in respect of the review proceedings and also the proceedings before the tribunal the subject of the review.[87] On some occasions the Attorney General has intervened in the judicial review proceedings and given an undertaking that if the application succeeded the Crown would bear the applicant's costs.[88]

As Campbell says:

> The present state of affairs regarding award of costs in successful applications for review of tribunal decisions can hardly be regarded as satisfactory. Whilst it is not reasonable to expect members of tribunals who have acted in good faith to be fixed with (sic) personable liability to pay any costs awarded against them, it is just as unreasonable for the successful applicant to be left to bear his own costs or to be dependent on the readiness of Governments to organise ex gratia payments to indemnify him for his reasonable costs of litigating.[89]

As Campbell[90] points out, there is a certain inconsistency between this position and the Suitors Fund legislation. The *Suitors Fund Act 1964* (WA) is considered separately.[91] If the *Suitors Fund Act* exists for the benefit of litigants in (for example) commercial cases who have been put to expense on the ground of a legitimate error of law by a judge, why then should not applicants for judicial review who succeed in convincing a superior court that an inferior court or tribunal has made an error of law, not be similarly compensated?

Western Australia has no system of statutory judicial review (leaving aside magistrates sitting in Courts of Petty Sessions under the *Justices Act 1902* (WA)) along the lines of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Administrative Law Act 1978* (Vic). Nor does Western Australia have any general administrative review tribunal to conduct merits based review along the lines of the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Appeals Tribunal Act 1984* (Vic). If Western Australia was to enact such legislation, then suitable costs provisions could be inserted into that legislation, either independent of, or cross referenced to, the *Suitors Fund Act* — assuming that the separate Costs Act recommended above was not enacted.

If, however, judicial review continues for the foreseeable future to be conducted by way of common law prerogative writs in the Supreme Court pursuant to its inherent jurisdiction, then a whole new division should be inserted into the *Suitors Fund Act* dealing with costs in applications for prerogative writs. A more simple way of proceeding is to acknowledge the practice adopted by the Crown that when costs orders are made against public officials, those costs are met out of the public purse.

Proposal 27

Either the *Supreme Court Act* and/or the *Rules of the Supreme Court* should be amended to state a principle that as a general rule an unsuccessful public respondent to an application for judicial review should pay the costs on the loser pays principle and provide that the applicant may enforce the costs order as a debt owed by the Crown.

A public officer who appears as a co-respondent to an application for review of a tribunal's decision is usually joined because that officer initiated the proceedings before the tribunal or appeared there to oppose the application of the applicant for judicial review — eg, an objector to an application to a tribunal for the grant or renewal of a licence. There have been cases in which it has been held that on a successful application for judicial review costs should be not awarded against a public officer who appears as a co-respondent in either of the capacities described above if the officer has done all the officer could do in a right and proper manner in the discharge of her or his duties.[92] However, it appears of late that the Courts are much less ready to depart from the general principle that costs follow the event merely because the co-respondent to a successful application for judicial review is a public officer who is not at fault.

An applicant for judicial review takes the risk that if the application fails she or he may be ordered to pay the costs of the respondent to the application. In

the Federal Court migrants who unsuccessfully seek to challenge deportation orders are almost always ordered to pay the Minister for Immigration's costs in the event that the application for judicial review fails. This is probably a fair result since, taking the immigration example, an order quashing the deportation order of the Minister is of benefit solely to the applicant and the applicant's family and thus can be likened, in a sense, to a litigant who obtains a declaration or an injunction. But what if the applicant is effectively a representative applicant for a much wider interest group? An example might be a tribal elder of an Aboriginal community who challenges a decision of a bureaucrat which will have an impact upon an Aboriginal sacred site. Clearly, the effective applicant is the relevant Aboriginal tribe rather than the Aboriginal elder alone. Another example would be an association incorporated under the *Associations Incorporation Act 1987* (WA) who has as its object the protection of the environment. Such a corporate body may challenge conduct of the State Planning Commission which may have an impact on the environment.

Judges have from time to time recognised that applicants in such cases may well be performing a public service in testing the legality of governmental action. As Fox J of the Supreme Court of the Australian Capital Territory said in *Kent v Cavenagh*:

> [It is] undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at the risk of paying costs to the Government if they fail. They find themselves opposed to parties who are not personally at risk as to costs and have available to them almost unlimited public funds. The inhibiting effect of the risk of paying costs is excessive and not in the public interest. Once, not so long ago, litigation was more a luxury than it now is and for the most part only wealthy people could engage in it.[93]

The law is still developing as to when the loser pays principle will not be invoked in public interest litigation. The decision of Wilcox J in *Woodlands v Permanent Trustee Company Limited*[94] shows that there is no clear trend in the cases as to when costs will and will not be awarded against applicants claiming to uphold the public interest. Two judges of the Full Court of the Federal Court noted this conflict of authority in *Qantas Airways Ltd v Cameron (No 3)*, but went on to say:

> In this court it has been accepted that at least where the applicant is a body established to pursue or safeguard a particular public interest, and to do so by litigation if appropriate, it should not be exempted from the usual adverse costs order where it has failed in a proceeding brought by it for that purpose.[95]

The *Suitors' Fund Act* also needs to be considered in this regard. Proceedings by way of prerogative writ have been held to fall within the definition of 'appeal' in s 3 of the *Act.*[96] See *Basapa v Burton,*[97] a decision of White J of the

Supreme Court of Western Australia. In that case the Full Court quashed a decision of Mr Burton, the senior referee of the Small Claims Tribunal. White J held that, on the principles referred to above as to the award of costs against members of tribunals, an award of costs should not be made against Mr Burton. His Honour held that this opened the way for the court to exercise the discretion conferred by section 12A of the Act to grant a costs certificate under the Act. But under the Act the grant of a certificate under section 12A could only be made because the application for prerogative relief succeeded and does not deal with the broader issue of liability for costs if the case fails. Further, costs certificates under the *Act* have limitations as to amount referred to below.

It sometimes happens that because of the quite intricate rules relating to standing to challenge administrative decisions, no individual person can challenge the conduct complained of. The Attorney-General as the representative of the public interest always has standing to challenge allegedly unlawful conduct on the part of public bodies. Where the Attorney-General applies for judicial review against the public body and fails, then the usual order is that there be no order as to costs. Not infrequently, however, the Attorney-General will not take up the case herself or himself but will allow some individual to sue in the name of the Attorney-General, thereby overcoming any problems of standing. This is referred to as a 'relator action'. Before granting such consent the Attorney-General will usually require an undertaking that the person seeking to use the Attorney-General's name will assume responsibility for payment of any costs awarded in the application for judicial review. If the Attorney-General considers that the action has sufficient merit to grant consent, and the relator is thus the defacto Attorney-General, why then should not the relator be in the same position as to costs as if the Attorney-General sued and failed?

Given the grave risks which individuals and small corporations run in bringing an application for judicial review, and given the public benefit in testing the lawfulness of conduct by public officials and bodies, the law needs to be reformed. As the respondent to most such applications will usually be a public body, and often as not represented by the Crown Solicitor's Office, it would probably be fairer to specifically provide that no costs should be awarded against such applicants, unless the Court is of the opinion that the application was doomed to fail or was otherwise frivolous or vexatious (being terms which have a recognised meaning in the law of procedure). Given the public interest, this may be compared with purely private disputes between employers and employees under unfair dismissal legislation which also provides that no costs shall be awarded against either party unless the action is frivolously brought. It must be remembered that the applicant will still have to pay its own legal costs to mount the challenge, which will probably be considerable, but the added burden of the risk of an adverse costs order is probably just

too much. Lawyers often act for applicants in such judicial review challenges where they perceive the case has merit and the limits of the law will be clarified by a decision in the case. Lawyers often act in such cases for no fee or very reduced fees.

The unclear state of the law flows from the fact that the award of costs is discretionary. The principles are developing on a case by case basis. There is no reason why Order 66 of the *Rules of the Supreme Court* could not be amended to insert some general statements of principle as to how costs should be awarded in public interest litigation. It is of course open for Parliament to intervene and it could do so by passing appropriate legislation to lay down the guiding principles in this area rather than leaving it to the judges of the Supreme Court to amend the *Rules of the Supreme Court*. Such principles could conveniently be included in the Costs Act referred to in the discussion above.

In Queensland the *Judicial Review Act* 1991 (Qld) provides that the court may order that a party to proceedings under the Act bear only his or her own costs regardless of the result.[98] In considering whether to make such an order the court must have regard to whether the proceedings involve an issue that may affect the public interest.[99]

The Australian Law Reform Commission[100] has recommended that legislation be passed establishing 'public interest costs orders'. The recommendations are in line with the changes in the law suggested above. The relevant parts of the Commission's recommendations are:

> 45. A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that:
> - the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
> - the proceedings will affect the development of the law generally and may reduce the need for further litigation
> - the proceedings otherwise have the character of public interest or test case proceedings.
>
> A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.
>
> 47. If the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to
> - the resources of the parties
> - the likely cost of the proceedings to each party
> - the ability of each party to present his or her case properly or to negotiate a fair settlement

- the extent of any private or commercial interest each party may have in the litigation.

The orders the court or tribunal may make include an order that

- costs follow the event
- each party bear his or her own costs
- the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall
  - not be liable for the other party's costs
  - only be liable to pay a specified portion of the other party's costs
  - be able to recover all or part of his or her costs from the other party....

48. When considering the 'resources of the parties' the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or in part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.

49. The court or tribunal may make a public interest costs order at any stage of the proceedings including at the start of the proceedings.

Proposal 28

The above recommendations should be implemented in Western Australia subject to a procedure being put in place for an early declaration that some other costs order will replace the loser pays rule as the presumptive costs order for the purposes of the particular case.

FIXING SUMS IN ADVANCE OF LITIGATION

As a part of any reform of the loser pays rule (both in general and in relation to public interest and administrative law matters in particular) serious consideration needs to be given to the use of capped costs orders being made in the early stages of the litigation. Such orders are available in the Federal Court by virtue of Order 62A of the *Federal Court Rules*.

Order 62A is short and may be set out in full:

1. The Court may:
   (a) by order made at a directions hearing; and
   (b) of its own motion or on the application of a party;
   specify the maximum costs that may be recovered on a party and party basis.
2. A maximum amount specified in an order under rule 1 shall not include an amount that a party is ordered to pay because the party:
   (a) has failed to comply with an order or with any of these Rules; or

(b) has sought leave to amend its pleadings or particulars; or
(c) has sought an extension of time for complying with an order or with any of these Rules; or
(d) has otherwise caused another party to incur costs that were not necessary for the economic and efficient:
(i) progress of the proceedings to trial; or
(ii) hearing of the action.

3. An order under rule 1 may include such directions as the Court considers necessary to effect the economic and efficient:
(a) progress of the proceedings to trial; or
(b) hearing of the action.

4. If, in the Court's opinion, there are special reasons, and it is in the interests of justice to do so, the Court may vary the specification of the maximum recoverable costs ordered under rule 1.

The intention behind Order 62A is explained in a letter from the Chief Justice of the Federal Court to the President of the Law Council of Australia dated 6 November 1991 and is quoted by Beazley J in *Sacks v Permanent Trustee Australia Limited*:

> There is concern within the Court, reflecting that within the wider community and the legal profession, that the cost of litigation, particularly for persons of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice.
>
> A deterrent to the assertion or defence of rights in civil litigation is a fear of the ultimate exposure in terms of the legal costs to which an unsuccessful party may be subjected. One suggestion that has been made proposes a change to the Rules so as to empower a judge, early in proceedings, to make an order fixing a ceiling on the amount of costs recoverable from the unsuccessful party in the litigation. This ceiling could be defined by reference both to party and party costs and by reference to solicitor/client costs. It should be pointed out that this proposal does not involve the court in regulating the costs recoverable by a solicitor from his or her client but rather, where costs are ordered to be paid on a solicitor/client basis, the maximum that would be recoverable would be that fixed amount.
>
> The fixing of any such maximum would not preclude recovery over and above that limit where a party had, by its own conduct, caused the successful party to incur additional and unnecessary costs. There would of course be a general provision to allow for the variation of a maximum figure so fixed, but the object of such a rule would be to define a budget so that the management of the case might be tailored to its economic limits. It is anticipated that such a rule, if introduced, would be applied principally to commercial litigation at the lower end of the scale in terms of complexity and the amount in dispute, although it could be applied in other cases as appropriate.[101]

Order 62A is basically designed to keep a sense of proportion. In this sense it is a broad brush equivalent of some aspects of the Local Court scale — ie fixed amounts for actions where less than $3 000 is in dispute. The trouble is that only party/party costs are fixed but not solicitor/client costs. Thus the cap on costs may only serve to increase the gap between party/party costs and solicitor/client costs with the result that the winner pays the difference out of any award of damages.

The need to keep a sense of proportion arises from the fact that a $10 000 dispute over the sale of a business where the turnover has alleged to have been overstated is often more time consuming than an action under a loan agreement to recover $1 000 000. In the former case it might forensically be preferable to cross-examine on many source documents (eg invoices, etc), and where more was at stake this should probably be done, but where only $10 000 is at stake cross-examination should be confined to more general documents — eg, bank statements and financial statements. Capped costs orders made at the outset of such smaller scale litigation encourage a sense of proportion. However, especially in the example just given, the ability to make such orders needs to be combined with a reform of many rules of procedure and evidence (eg not having to prove documents through the maker of the document, etc) otherwise there will be a temptation to cut corners in the presentation of a case (to the prejudice of the client) or the solicitor/client costs will remain excessively high.

If the reforms of the current Supreme Court scale suggested above are made (eg Scales A-C) then the need for capped costs orders should be greatly reduced, albeit not entirely eliminated. If those reforms were made, then capped costs orders would be one of the options available to a judge on an application for a variation of the loser pays rule (eg under the 'material effect' exception). If those reforms are not made then conferring on judges the power to make capped costs orders is even more important. This is especially so in the District Court which has jurisdiction in non personal injury money claims between $25 000 and $250 000. Cases at the lower end of that range are especially suited to capped costs orders.

In *Hanisch v Strive Pty Ltd*[102] the plaintiff commenced an action in the Federal Court which could have been instituted in the District Court of Queensland. Drummond J of his own motion, during the course of a directions hearing, made an order under Order 62A that, regardless of which party won the action, the costs awarded would be no higher than the costs laid down in the District Court Scale. Such an order is appropriate for actions in the Supreme Court even where the action is properly brought in the Supreme Court. As pointed out above, it is sometimes necessary to commence actions in the Supreme Court which would otherwise have been instituted in the Local

Court because equitable relief of certain types is being sought. In order to keep a sense of proportion in such cases it is desirable that the court have the power to order that any order for costs is to be taxed on the Local Court scale. This is especially so if the current uncertainty as to the equitable jurisdiction of the inferior courts is not remedied by statute. Order 66 Rule 17 of the *Rules of the Supreme Court* only allows an order to be made that the Local Court scale apply if the action was instituted in the Supreme Court even though it could have been instituted in the Local Court.

Proposal 29

An Order 66A should be inserted into the *Rules of the Supreme Court* which corresponds with Order 62A of the *Federal Court Rules*. Regardless of whether this is done, Order 66 Rule 17 should be amended to provide for the Local Court scale to apply where the only reason the action is brought in the Supreme Court rather than the Local Court is because some equitable or other relief is sought which the Local Court is not able to grant.

As with the reforms of the loser pays rule discussed above, there needs to be an early directions hearing at which, say, the plaintiff can apply for a capped costs order so that the litigation can be undertaken with a known best case and worst case scenario. If the plaintiff does not obtain a capped costs order within limits acceptable to the plaintiff, then the plaintiff should be permitted to discontinue with no order as to costs if the presumptive costs rule on which she or he had hoped to litigate is not declared to apply.

PROCEDURE ON TAXATION OF COSTS

Both party/party and solicitor/client taxations have the potential to be drawn out and tedious exercises. This is especially true of solicitor/client taxations carried out by reference to time based cost agreements. Party/party taxations under the Local and Supreme Court scales, however, do not involve enormous amounts of time in preparation of the bill of costs for taxation nor do they tend to be too protracted at the actual taxation hearing.

Solicitor/client taxations conducted according to time based cost agreements can be lengthy by virtue of the fact that they are based on each unit of time expended rather than categories of work carried out. The solicitor/client bill of costs for taxation tends to be an expanded version of the computer print out from the solicitor's billing computer. This can run to many pages. In a hotly contested solicitor/client taxation each computer entry can be the subject of debate before the taxing officer, with reference to the various pieces of paper on the file said to relate to that entry, and can canvas such issues as:

- how long a telephone attendance took and how long it should have taken
- whether the reporting letter to the client was really necessary and if it was whether the partner rate or the articled clerk rate should have been charged for it
- whether it was reasonable for the partner and the junior solicitor to discuss the client's file together and for both to charge at their rates under the cost agreement
- whether the use of a second junior solicitor on the file was really necessary
- whether the second junior solicitor has charged for bringing herself or himself up to speed on the file and if so whether it is reasonable under the cost agreement to do so
- whether the articled clerk's time should be charged for filing a document at court or whether the firm should have had the outside clerk do that job
- whether it was necessary for the partner to settle the brief to a barrister which the junior solicitor had prepared
- whether the 45 minutes entered by the partner for attending at court on the fifth day of the trial was necessary given that the client overheard the barrister say to the partner that she was being properly assisted by the junior solicitor attending the trial
- whether it really was necessary for the partner to settle a letter to the barrister enclosing a cheque for the barrister's fees – why not just staple the cheque to a photocopy of the barrister's memorandum of fees and put it in an envelope?

Generally speaking party/party taxations in Western Australia do not debate such questions — at least not in such depth. This is because of the way in which the scales are structured. Although there are 29 items in the Supreme Court scale, after a trial only about 8-10 of them may be of any real relevance. The bill of costs may only have 15-20 items in it — and a good deal less if there were few interlocutory skirmishes during the litigation. Typical items in respect of a trial may be as follows:

- writ of summons
- statement of claim
- reply
- summons to strike out part of statement of claim
- requesting particulars of defence
- summons to compel particulars of defence
- giving discovery
- inspecting defendants documents
- getting up
- counsel fee for trial
- attendance of solicitor at trial

- taking reserved decision
- extracting judgment
- drawing bill of costs.

Many of these items will only be one line entries — eg, $X for drafting the statement of claim. The taxing officer will be told who drew the document, how many years experience that person has, what that person's rate is and how long it took to draft the document. The taxing officer will then leaf through the statement of claim, consider the magnitude of the case, how complex the pleading is and then decide where in the $0-$2700 range the document fits. That item could probably be disposed of in 5-10 minutes. The same applies for all of the items which have only a one or two line entry in the bill of costs.

Items such as getting up and also lengthy contested interlocutory summonses normally have an entry which says 'see attached schedule marked A'. The schedule will then have a number of global sub-headings. Using the getting up item as an example, the sub-headings might be as follows:

- proofing witness A – X hours
- proofing witness B – Y hours
- drawing brief to counsel – Z hours
- collating book of documents – etc.

Although it is undoubtedly a skill to draw a bill of costs for a party/party taxation, it is not the most difficult exercise a solicitor has to perform. Even in respect of a trial which has lasted five days, it may take a few hours to draw the bill. Nonetheless, as von Doussa J (of the Federal Court) said in *Beach Petroleum NL v Johnson (No. 2)*[103] taxation of costs is 'an exercise that cannot be described as socially useful'. Accordingly it should be avoided at if at all possible.

Order 62 Rule 46 of the *Federal Court Rules* provides for an assessment procedure aimed at avoiding a full taxation. The party with the benefit of the costs order lodges the bill of costs. Rather than note on the bill a time at which the taxation will take place, the Registrar peruses the bill and advises the parties of an estimate at which the bill is likely to be taxed. The registrar may ask the lodging party to provide further documents for the registrar to inspect (eg witness statements, briefs to counsel, etc). Unless a notice of objection is filed by either side within 14 days, the estimate stands.

Upon receipt of a notice of objection the registrar provisionally taxes the bill in the absence of the parties and provides a photocopy of the provisionally taxed bill to both parties. Unless either side lodges a detailed list of objections within 21 days the provisionally taxed bill stands. If a notice of objection is lodged then a taxation hearing is convened. At that hearing only the items

mentioned in the list of objections are considered. All other items in the provisionally taxed bill stand. There are cost penalties to the objecting party unless the hearing results in a more than a 15 per cent variation in favour of the objecting party.

The trouble with this procedure is that it still involves preparing a detailed bill of costs for taxation. However, the length of the bill is a fair guide to the length of the taxation hearing in the Federal Court. Party/party taxations tend to take longer in the Federal Court than in the Supreme Court due to the nature of the scale. That explains the provisional assessment procedure.

In the Supreme Court most party/party taxations are fairly short. They can be made quicker by permitting the taxing officer to give an initial estimate. Order 66 of the *Rules of the Supreme Court* should be amended to allow this to occur. However, it may be doubted whether a provisional assessment procedure in the Supreme Court really adds to overall efficiency. Nevertheless, from time to time there are party/party bills of costs lodged in the Supreme Court which will take many hours to tax. The introduction into Order 66 of the *Rules of the Supreme Court* of a provisional assessment procedure may be of use in such cases. It should be left to the taxing officer of the Supreme Court to decide whether any particular party/party bill is suitable for provisional assessment. On the other hand, solicitor/client taxations under time based cost agreements tend to take rather longer to tax and would benefit from both the estimate procedure and the provisional assessment procedure.

Proposal 30

Order 66 of the *Rules of the Supreme Court* should be amended to adopt the estimate and provisional taxation procedures of the *Federal Court Rules*.

The trend in the eastern states is to abolish or avoid solicitor/client taxations. Disputes between the solicitor and the client as to the amount of time spent are resolved by referring the cost agreement and the file to an independent cost assessor or a nominee of a professional body (for example, the Law Society). It is not necessary for the solicitor to draw a detailed solicitor/client bill of costs for taxation. The assessor reads through the file, looks at any documents drawn (for example, court documents, briefs to counsel, etc) and nominates a figure she or he considers reasonable having regard to the rates set out in the cost agreement.[104]

There is much to be said for the use of this assessment procedure for solicitor/client cost disputes. Many complaints made against solicitors to the Legal Practitioners' Complaints Committee and the Law Society relate to fees.

There are conciliation procedures under the *Legal Practitioners Act* to resolve such disputes.[105] However, these procedures should be augmented by allowing for the appointment of a costs assessor.

Proposal 31

The *Legal Practitioners Act* should be amended to allow the use of costs assessors. The file should be referred to the assessor without the necessity for the solicitor to draw a formal bill. The assessor should be entitled to call for and receive written submissions but only if the assessor believes this will assist him or her. Upon issuing a formal assessment the client or the solicitor should have approximately 21 days to refer the matter to the taxing officer of the Supreme Court for taxation. If the matter is not referred to the Supreme Court then the client (if there is a refund due to the client) or the solicitor (if further money is due to the solicitor) should be able to register the assessment in the Local Court and enforce it as a judgment of the Local Court.

The cost of providing cost assessors under the auspices of the Legal Practice Board or the Law Society to deal with solicitor/client taxations could be defrayed by involving cost assessors in party/party taxations. An independent cost assessor, subject to the agreement of both parties, could give an estimate of the amount likely to be recovered on a party/party taxation without the necessity for a bill of costs to be drawn. The party with the benefit of the costs order could simply lodge the file and any other supporting documents (eg briefs to counsel) with the assessor. The assessor could call for written submissions only if she or he thought it necessary to do so. The assessor would then peruse the material and deliver an assessment under such broad categories of work as the assessor considers appropriate. The lodging party should pay some kind of fee since that party has been relieved of the burden of drawing a bill of costs. In Queensland this procedure resolves cost issues in about 90 per cent of standard personal injuries actions without the need for a taxation.

Under Order 62 of the *Federal Court Rules* the registrar of each District Registry is obliged to publish once a year figures for the guidance of solicitors as to amounts awarded on taxations in particular categories of cases during the previous two years. For many years various district registries have published allowances typically made for counsel fees in various types of matter. As to the latter figures, this is not quite so compelling in the Supreme Court where counsel fees are the subject of a range mentioned in the Supreme Court scale, whereas under the Federal Court scale counsel fees are a disbursement

item. Even so, the Supreme Court scale contains many items which have a wide range of possible allowances. Further, the Supreme Court scale applies to a wide variety of cases (eg personal injuries, companies, judicial review, tax appeals, etc). The publication of data concerning the outcome of taxations should increase consistency among the taxing officers and also assist solicitors and cost assessors to avoid the need for taxations.

Proposal 32

The taxing officers of all courts and tribunals should publish costs data similar to that published by the Federal Court.

Another means of determining costs which can be used, albeit in a very limited class of case, is by the calculation of a gross sum which the loser must pay rather than proceeding to taxation. Order 66 Rule 12(3) of the *Rules of the Supreme Court* provides that the 'Court may award a lump sum by way of costs'. This provision is not commonly invoked in the Supreme Court but was used by Ipp J in *Gallagher v CSR Ltd.*[106] That case also involved an application to award costs in excess of the limits set out in the scale. This is permitted by Order 66 Rule 12(1) of the *Rules of the Supreme Court* and section 58ZB(3) of the *Legal Practitioners Act*. The approach which judges adopt in fixing a gross sum is best illustrated by the decision of Justice von Doussa of the Federal Court in *Beach Petroleum NL v Johnson (No 2)*[107] in which his Honour applied the Federal Court equivalent. Basically Justice von Doussa considered the total legal bills the winning party had received from its solicitors against the nature of the case (which his Honour had tried) and various schedules which the parties had produced. In the result his Honour excluded various categories of work and then applied a discount factor of 30 per cent to arrive at a party/party figure.

The interesting point for present purposes is whether such a broad brush approach has anything to offer in respect of party/party and solicitor/client bills of average complexity. In this regard it should be noted that in criminal matters judges and magistrates frequently calculate costs under the *Official Prosecutions (Defendants') Costs Act 1973* (WA) on the basis of affidavit evidence without requiring the detailed bills of costs which can sometimes run to many pages in commercial litigation. Given the experience in criminal matters, it may well be that the ability to use this procedure rather than an item by item taxation procedure in civil matters would be of some use. If it is satisfactory for a judge to adopt a fairly broad brush approach to costs in criminal matters, why should not the same approach be adopted in civil matters?

It is common for the masters of the Supreme Court to award a fixed sum by way of costs in undefended applications to wind up companies on the ground of failure to comply with a statutory demand for the payment of a debt. This saves the added expense of going to a taxation. The practice also encourages efficiency. The practice should be expanded to other standard procedures in the courts. A procedure which very much lends itself to the making of a nominated lump sum is an application under Order 62A of the *Rules of the Supreme Court* for leave to enter judgment in default of appearance or defence in actions by mortgagees seeking to recover vacant possession of land.

Proposal 33

Consideration should be given to the courts identifying routine procedures and issuing practice directions as to costs orders which will be awarded by way of lump sum without need for taxation in such cases.

SUITORS FUND ACT

Introduction

The *Suitors Fund Act 1964* (WA) has equivalents in the other Australian states. In the federal context the equivalent is the *Federal Proceedings (Costs) Act 1981* (Cth). The purpose of the legislation is to achieve two broad aims:[108]

- relieve litigants of the burden of costs that might be imposed on them by reason of an erroneous decision on a question of law; and
- compensate litigants where proceedings are rendered abortive through no fault of either party (eg the judge dies in the middle of the trial).

Errors of law

The first aim is best explained by an example. If A sues B in the District Court and the action fails, A will ordinarily have to pay B's costs. If A appeals to the Full Court of the Supreme Court against the decision of the District Court judge and wins the appeal, the usual order is that B must pay A's costs of the appeal before the Full Court. Especially if the appeal is allowed on the ground that the District Court judge made an error of law, there is a certain unfairness to B in the sense that B has to bear the costs of the judge's error. It is for this reason that the *Suitors Fund Act* allows B to ask for a certificate from the Full Court to cover the costs which B must pay to A pursuant to the award of costs in the Full Court as well as B's own costs in endeavouring to uphold the judgment which she or he had won in the District Court.

Where the respondent is given a certificate, that certificate is usually taken as covering the following:

(a) an amount equal to the appellant's costs of:
  (i) the appeal in respect of which the certificate was granted; and

(ii) if the appeal is one of a sequence of appeals in the same action, all of the preceding appeals;

(b) the respondent's own costs:

(i) of the appeal in respect to which the certificate was granted; and

(ii) if the appeal is one of a sequence of appeals in the same action, all of the preceding appeals.

Amount of costs

Thus it can be seen that the intention is to cover not only the costs which the unsuccessful respondent must pay the successful appellant, but also the costs which the unsuccessful respondent expends in endeavouring to uphold the judgment appealed from in the appeal court. However, this intention is rarely if ever achieved by virtue of s 11(3)(b) of the *Act* which provides that the amount payable from the Suitors Fund shall not exceed the amount from time to time prescribed by a regulation in any one certificate. The current amount prescribed is $2,000.

It must seem almost a joke to the unsuccessful respondent that $2 000 is designed to cover the costs which the respondent must pay the appellant as well as the respondent's own costs.[109] The farcical nature of the $2 000 limit becomes even more apparent given that the *Act* states that the certificate is also to cover the costs incurred in preceding appeals. A may sue B in the Supreme Court. A may lose the trial and appeal to the Full Court. The Full Court may allow the appeal and B may apply to the High Court for special leave to appeal. Assume the High Court grants special leave to appeal and B wins the substantive appeal. The usual order is that A will have to pay the costs which B incurred in the Full Court, and the application to the High Court for special leave to appeal and also the substantive appeal in the High Court. The $2 000 limit is going to be an insignificant fraction of the costs which A must pay B, even without getting to the costs which A has incurred itself at the Full Court and High Court stages.

The *Suitors Fund Act* works on the premise that trial Judges and also the Full Court can and do make errors of law which are subsequently corrected by higher appeal courts. The *Act* acknowledges the usual costs rule that the loser pays, even at the appeal stage. The idea behind the *Suitors Fund Act* is that it is unfair for the unsuccessful respondent to have to bear the appellant's costs of the appeal when the respondent won in the court below and, not unreasonably, was simply trying to hang on to that judgment in the appeal court. The fact that the respondent won in the court below necessarily means that the respondent's case is unlikely to have been without a substantial degree of merit. Especially where there is an appeal to the High Court, it is fairly reasonable to assume that some law applicable to the case must have been unclear or at least open to doubt.

The propositions stated in the previous paragraph also need to be seen against the principle upon which party/party taxations are conducted. As explained earlier, a party/party taxation rarely provides the party with the benefit of the order for costs of the full amount which that party has had to pay for her or his own legal representation. Thus, an order for costs is only a partial indemnity. It must follow that costs as taxed after a party/party taxation are more than reasonable.

The propositions developed in the previous two paragraphs are inconsistent with the current way in which the *Suitors Fund Act* works and indeed, the theory upon which the Act is based. Either the Act should be repealed or it should be amended and given some useful operation.

One can well understand a sentiment that the costs which an unsuccessful respondent incurs for his own legal representation at an appeal stage is just one of the risks of litigation (even though the *Suitors Fund Act* is at least theoretically designed to cover that part of the cost as well). Nonetheless, it seems unfair for the respondent to have to pay a successful appellant very significant costs which would not have been incurred had the judge at first instance identified and applied the law in accordance with the law as subsequently determined by the appeal court.

Proposal 34

The *Suitors Fund Act* should be amended so that, subject to judicial discretion, the unsuccessful respondent is entitled to have paid out of the Suitors Fund an amount equal to the taxed (or agreed) party/party costs recovered by the appellant.

This will mean that the unsuccessful respondent will be indemnified against the successful appellant's costs at the appeal stage and the respondent will only be left having to pay her or his own costs of the appeal as well as his or her own costs of the trial and the costs of the appellant at the trial stage.

To fund this change in the law the collection base of the Suitors Fund scheme will obviously have to be expanded. For some reason only writs of summons are levied with a fee to go towards the Suitors Fund.

Proposal 35

Notices of appeal, companies' applications, originating summonses, originating motions, and all other initiating processes should attract the same fee as a writ of summons for the purposes of the *Suitors Fund Act*.

The need for a question of law

Under the *Suitors Fund Act* not all unsuccessful respondents obtain Suitors Fund certificates. The test is whether the appeal succeeds 'on a question of law'. This is a notoriously uncertain concept and it has been the subject of much judicial debate in the context of many other areas of the law. For this reason alone, the test should be changed.

Further, the fairness of the test is open to doubt. An appeal to the Full Court of the Supreme Court is, in most cases, an appeal by way of re-hearing. There are many appeals to the Full Court raising errors concerning questions of fact. This will often involve drawing inferences from facts which were common ground at trial or which were found by the trial judge by virtue of an acceptance of the credibility of the testimony of certain witnesses. But to draw a wrong inference from found facts is not an error of law. If the trial judge makes an error on a crucial issue concerning fact, then the appeal will be allowed just as much as if the trial judge makes an error of law in the interpretation of an Act of Parliament. The costs consequences to the unsuccessful respondent are exactly the same.[110]

Proposal 36

The reference in section 10(1) of the *Suitors Fund Act* to 'on a question of law' should be deleted. The sole criteria for invoking the judicial discretion to award a Suitors Fund certificate should be the fact that the appeal has succeeded because of an error at trial, which error is not attributable to the respondent's conduct of its case. The *Suitors Fund Act* should then be further amended to provide that the discretion of the court is to be exercised having regard to the conduct of the respondent at the appeal stage and also in the court or courts below.

Abortive proceedings

Section 14 of the *Suitors Fund Act* deals with abortive proceedings in both civil and criminal proceedings. It sometimes happens that a trial is aborted because the judge becomes ill or must disqualify herself or himself on the grounds of conflict of interest or ostensible bias. In criminal cases trials may have to be aborted because, through the fault of no one, the jury becomes aware of prejudicial material (eg, the previous convictions of the accused).

Section 14 (1)(a) of the *Suitors Fund Act* provides unlimited cover where the proceedings are aborted by reason of the death or protracted illness of the judge. If the $2 000 limit does not apply to this situation, there is no reason why it should apply to the various other situations dealt with by the Act.

SUMMARY OF PROPOSALS

1. The *Legal Practitioners Act* should be amended so that a solicitor has the option of referring any unpaid bill rendered to a client to the Supreme Court for taxation on the solicitor's own motion.

2. The *Legal Practitioners Act* should also be amended so that in any proceedings before a court by a practitioner against a client seeking the recovery of fees, the court (for example, the District Court or the Local Court) is obliged to direct that the question of the amount and reasonableness of the fees charged be determined only after the conduct of a solicitor/client taxation before a taxing officer of the Supreme Court.

3. There should be some statutory recognition of the fact that it is preferable for a client to be given a written estimate on the basis of given parameters as to the likely cost of proposed litigation. Such matters should form part of a written retainer between the solicitor and the client before any proceedings are issued. The requirement to provide such a standard form booklet should be made by an amendment to the Law Society's Professional Conduct Rules and/or as a mandatory prerequisite to the perfecting of a valid of a costs agreement with a client. Court staff should be directed to provide a copy of the booklet to any litigants in person immediately upon the filing of an action or a defence.

4. The rules of all courts should be amended to allow some appropriate judicial officer to direct that mediation shall take place on certain terms even without the consent of the parties at any time the judicial officer thinks fit. Cost disclosure orders should be made as a part of the mediation order. The solicitors for the parties should be directed to bring a copy of the cost statement to the mediation and the mediation registrar should be permitted to inspect the statement upon request if the mediation registrar considers it appropriate to do so. The officer conducting the mediation, as well as the judicial officer making case management directions, should also be permitted to require the solicitors for the parties to provide updated cost statements from time to time.

5. The District Court should be given its own scale of costs. Within that scale there should be a special scale tailored to the steps peculiar to personal injuries actions. The special personal injuries scale should make provision for cases in which only quantum is in issue.

6. The jurisdiction of the Local Court should be raised from $25 000 to $50 000.

7. The current Supreme Court scale should be divided into three scales. One scale should basically follow items 1-18 of the current scale. A second scale should be limited to $6 900 as per the current scale for matters commenced on originating summons. The third scale should be an interim

scale. Originating documents could nominate a scale according to which the action is to be conducted. If all parties to the action do not agree to conduct the action according to the nominated scale, the court should resolve the dispute. If the court uses a higher scale than nominated by the plaintiff, then the plaintiff should be permitted to discontinue the action at that point with no order as to costs. Subsequent applications to move to a higher scale would have to be treated as an application for a special costs order.

8. Limited contingency fee agreements should be permitted in all cases save criminal law and family law matters where two conditions are satisfied: (1) all other means of avoiding the use of a contingency fee arrangement have been exhausted; and (2) the client is financially unable to conduct the litigation without the use of a contingency fee arrangement. The reward to the lawyers should be in the form of an up lift on fees rather than a percentage of the amount recovered. Contingency fee arrangements should be available to both plaintiffs and defendants. The safeguards set out in the 1994 Access to Justice Advisory Committee Report should be adopted.

9. A disbursements fund should be established. The fund should be established even if it is decided that up lift contingency fees are not in the public interest. Such a fund would allow many cases to proceed on a speculative basis under the existing law.

10. The amount of the uplift should be calculated not on the bill the solicitor renders to the client but on the amount of costs recovered from the other side by taxation or agreement.

11. The amount of the uplift fee needs to reflect the level of risk undertaken. Although the circumstances of each case are infinitely variable, some attempt should be made in the contingency agreement to identify the level of the uplift fee by reference to the level of the risk undertaken.

12. Order 14 of the *Rules of the Supreme Court 1971* (WA) should be amended to encourage greater use of partial summary judgment.

13. Order 66 of the *Rules of the Supreme Court* should be amended to provide for the circumstances in which the costs of interlocutory application should be ordered to be taxed and paid forthwith. The court should be given a discretion to order that costs be taxed and paid forthwith where the application was unreasonably brought or unreasonably opposed unless the making of such a costs order would, having regard to the loser's financial circumstances, prejudice the ability of the loser to continue the litigation. The court should also be given a discretion to make such an order where the winner of the application is in a financially stronger position compared with the loser of the application.

14. Order 66 Rule 5 of the *Rules of the Supreme Court* should be amended to allow an order to be made against an employed solicitor.

15. An amendment to Order 66 of the *Rules of the Supreme Court* should be made by inserting a Rule 5A in virtually identical terms to Part 52A Rule 43A of the *Supreme Court Rules* (NSW).

16. The Professional Conduct Rules should be amended to require solicitors to inform their clients as to all costs orders made against the client and the reason for the making of that order.

17. If the practitioner asserts that the reason leading to an adverse costs order relates to the conduct of the client the court should give serious consideration to directing that the client be informed that she or he might wish to be separately represented on the question of whether the client or the solicitor should bear the costs in question.

18. The recommendations of the Australian Law Reform Commission on the loser pays rule, and the exceptions thereto, should be followed.

19. The loser pays rule should apply in the absence of a declaration that the case falls within one of the exceptions. If the court makes a declaration that a particular exception applies, then the rule that each party bear her or his own costs becomes the presumptive rule in the place of the loser pays rule. The presumptive rule should only then be displaced for good reason — eg, the other side makes an offer of settlement which is unreasonably rejected. The presumptive rule should be identified at the start of the proceedings. The plaintiff should be permitted to discontinue with no order as to costs if the presumptive costs rule on which she or he had hoped to litigate is declared not to apply.

20. A separate Costs Act should be passed. The Act should cover all relevant courts and tribunals by having a suitable definition of 'court' and 'tribunal'. Part VI of the *Legal Practitioners Act* should be reorganised and inserted into the Costs Act along with any provisions concerning barristers' fees, contingency fees, personal costs orders and the other matters referred to above. Scales (ie determinations of the Legal Costs Committee) should then be enacted by way of regulations under the Costs Act.

21. A special Commercial List should be established in the Supreme Court to handle commercial work and higher filing fees should apply to actions which are commenced in that list.

22. Order 83A of the *Rules of the Supreme Court* should be amended to follow the *Federal Court Regulations*.

23. Order 66 of the *Rules of the Supreme Court* should be amended to enshrine a principle that a party is entitled to recover a fair and reasonable amount for work that was reasonably required for the litigation. Preferably the principle should be set out in a separate Costs Act.

24. To reduce the gap between party/party and solicitor/client costs, the scales should be amended to recognise the fact that as between solicitor and client, file management work is properly done and is properly charged for.

25. For the purposes of a party/party taxation, solicitor/client file management work should be expressed as a flat percentage of the amount at which the party/party bill would otherwise be taxed. The percentage should be determined after consultation with the Law Society, consumer groups, the Legal Costs Committee and the taxing officers of the Supreme Court.

26. A flat hourly rate for file management work should be identified in the scale for the purpose of a solicitor/client taxation where the solicitor does not have an enforceable cost agreement and the scale must be applied. This rate should also be used by the court in making an indemnity costs order.

27. Either the *Supreme Court Act* and/or the *Rules of the Supreme Court* should be amended to state a principle that as a general rule an unsuccessful public respondent to an application for judicial review should pay the costs on the loser pays principle and provide that the applicant may enforce the costs order as a debt owed by the Crown.

28. The recommendations of the Australian Law Reform Commission as to costs orders in public interest litigation should be implemented in Western Australia subject to a procedure being put in place for an early declaration that some other costs order will replace the loser pays rule as the presumptive costs order for the purposes of the particular case.

29. An Order 66A should be inserted into the *Rules of the Supreme Court* which corresponds with Order 62A of the *Federal Court Rules*. Regardless of whether this is done, Order 66 Rule 17 should be amended to provide for the Local Court scale to apply where the only reason the action is brought in the Supreme Court rather than the Local Court is because some equitable or other relief is sought which the Local Court is not able to grant.

30. Order 66 of the *Rules of the Supreme Court* should be amended to adopt the estimate and provisional taxation procedures of the *Federal Court Rules*.

31. The *Legal Practitioners Act* should be amended to allow the use of costs assessors. The file should be referred to the assessor without the necessity for the solicitor to draw a formal bill. The assessor should be entitled to call for and receive written submissions but only if the assessor believes this will assist him or her. Upon issuing a formal assessment the client or the solicitor should have approximately 21 days to refer the matter to the taxing officer of the Supreme Court for taxation. If the matter is not referred to the Supreme Court then the client (if there is a refund due to the client) or the solicitor (if further money is due to the solicitor) should be able to register the assessment in the Local Court and enforce it as a judgment of the Local Court.

32. The taxing officers of all courts and tribunals should publish costs data similar to that published by the Federal Court.

33. Consideration should be given to the courts identifying routine procedures and issuing practice directions as to costs orders which will be awarded by way of lump sum without need for taxation in such cases.

34. The *Suitors Fund Act* should be amended so that, subject to judicial discretion, the unsuccessful respondent is entitled to have paid out of the Suitors Fund an amount equal to the taxed party/party costs recovered by the appellant.

35. Notices of appeal, companies applications, originating summonses, originating motions, and all other initiating processes should attract the same fee as a writ of summons for the purposes of the *Suitors Fund Act*.

36. The reference in section 10(1) of the *Suitors Fund Act* to 'on a question of law' should be deleted. The sole criteria for invoking the judicial discretion to award a Suitors Fund certificate should be the fact that the appeal has succeeded because of an error at trial, which error is not attributable to the respondent's conduct of its case. The *Suitors Fund Act* should then be further amended to provide that the discretion of the court is to be exercised having regard to the conduct of the respondent at the appeal stage and also in the court or courts below.

ENDNOTES

* The Law Reform Commission of Western Australia engaged Mr Peter Hannan, Barrister – Francis Burt Chambers, to prepare this sub-section. The views expressed are those of the Commission.

1 See ALRC *Costs Shifting: Who Pays for Litigation?* Report No 75 (1995) [2.6], [2.21], [2.22], [3.14] and [3.15]; Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (1996) vol 1, 1 and 3; WE Burger, 'Symposium: Reducing the Costs of Civil Litigation – Introduction' (1985) 37 *Rutgers Law Review* 217, 237.

2 (1994) 179 CLR 403.

3 LL Oliver, *Law of Costs* (1960) viii-ix — which was for many years the standard text book authority on costs.

4 See ALRC, *Review of Adversarial System of Litigation: Rethinking the Federal Civil Litigation System,* Issues Paper 20 (April 1997) [12.35].

5 See the decision of Ipp J in *Collins v Westralian Sands Ltd* (1993) 9 WAR 56, 64.

6 See eg s 27(1)(c) *Industrial Relations Act 1979* (WA) in respect of proceedings before the Western Australian Industrial Relations Commission and s 117 *Family Law Act 1975* (Cth) in respect of proceedings before the Family Court of Western Australia. Therefore, in these jurisdictions the position is broadly the same as in the United States. However, the experience, certainly in the industrial relations field, has been that employers feel as though they 'have a gun to their heads' in the sense that their solicitors frequently advise them to offer the disgruntled employee several thousand dollars because (win, lose or draw), that is what the employer will have to pay its own solicitors in defending the claim. This often leaves employers with a very sour taste in their mouths. By the same token, if employees who are frequently in straitened financial circumstances had the risk of a substantial costs order they might be less disposed to complain to an industrial tribunal that they have been unfairly dismissed. There is therefore an awkward balancing exercise.

7 There are other determinations of the Legal Costs Committee which apply to workers compensation matters and other matters, but they will not be considered.

8 Thus it is legitimate for a junior practitioner to take 12 hours to complete a statement of claim at the junior practitioner rate of $180 per hour even though the item provides for a maximum of 10 hours where a senior practitioner carries out the work. The reason is that the senior practitioner is allowed the higher rate of $270 per hour.

9 The Local Court scale bears a striking similarity to the recommendation made by Lord Woolf in England with respect to £0 to £5 000 disputes and £5 000 to £10 000 disputes. See Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 58, recommendation 4.

10 See *Legal Practitioners Act 1893* (WA) s 70.

11 See *Banning v Bowen Buchbinder Vilensky* (1995) 13 SR (WA) 197, 200-201.

12 See ALRC, above n 4, para 12.50. A simple debt collection case provides a classic example. If A lends money to B and it is agreed that the money is to be repaid by a certain date, any action by A against B to recover the money should be relatively straight forward and inexpensive. The solicitor in estimating costs may well give two estimates. The first estimate would be on the basis that A applies for and obtains summary judgment against B. The second estimate might be on the basis that summary judgment is refused and the matter has to proceed to trial. An added complication may be that after the proceedings have started, A becomes aware that B is shifting assets out of the jurisdiction so as to make execution on any judgment futile. A prudent solicitor would then advise A that he can apply for a Mareva injunction to restrain B from dissipating these assets. An application for a Mareva injunction is a highly involved and important step in the litigation. It necessarily adds a whole new item of expense to the litigation. On top of that, if the court was to grant a Mareva injunction against B, this is an order which B is entitled to appeal as of right. Thus, A is then faced with a whole set of costs in the appeal court as well as the trial court. Further, invariably there is liberty granted to apply to discharge a Mareva injunction. B may on one or two occasions apply, even unsuccessfully, to have the Mareva injunction dissolved. Once again this adds to the cost of litigation. If a solicitor was to give an estimate of costs on the basis of an absolutely worst case scenario, then most non-institutional clients would be scared off from pursuing even the most simple and legitimate of claims. But by the same token, if an up front and realistic but insufficient estimate is given one can feel some sympathy with the client when she or he complains that the solicitor's explanation of 'changed circumstances' is cold comfort.

13 In New South Wales since the coming into effect on 1 July 1994 of the *Legal Profession Reform Act 1993* (NSW) it has been an obligation for solicitors to disclose to their clients in writing an estimate of the costs which the solicitor will charge the client if a fixed fee has not been agreed. The estimate must be updated if any significant increase is likely. Strangely there is no requirement to estimate the amount likely to be payable to the other side if the litigation is lost or recoverable from the other side if the litigation is won. In New South Wales barristers have similar obligations to their instructing solicitors upon acceptance of a brief.

14 This is in line with the ALRC, above n 1, recommendations 51-53.

15 Such orders are authorised by *Rules of the Supreme Court 1971* (WA) O 29A r 3 (2)(o).

16 Cost disclosure orders are in line with ALRC, above n 1, recommendation 54. Recommendation 55, however, goes a step further in requiring solicitors to file at court a certificate that they have provided a statement of past and future costs to their clients. See also District Court Practice Direction No 2 of 1995, para 3. In the Family Court of WA such statements are actually handed to the court officer conducting the directions hearing.

17 Anecdotal evidence suggests that such an unscientific approach to legal costing was adopted in all of the major law firms of Perth and that the partners derived comfortable but not extravagant livings therefrom. Indeed, some older practitioners yearn for the 'good old days'.

18 Recent experience in the Supreme Court suggests that the chances of a costs agreement being upheld (at least in whole) are decidedly poor. One of the most frequent orders made is an order setting aside the costs agreement and requiring that the solicitor's bill be taxed in accordance with the relevant scale of costs. There is a view held in the profession that no matter how careful one is when entering into a costs agreement with a client, it is simply impossible to make the agreement immune from successful challenge.

19 (1994) 34 NSWLR 408, 437.

20 (1991) 24 NSWLR 116, 126.

21 Ibid 127.

22 (1991) 24 NSWLR 103, 108-109.

23 [1997] 2 Qd R 228, 239.

24 See Ontario Law Reform Commission, above n 1, 26.

25 In New South Wales until 1972 there was within the Supreme Court of NSW a separate Equity Court with its own set of court rules and court forms. The Supreme Court of Western Australia has not had a separate Equity Court in that sense since 1880.

26 See *Guthrie v Quiptek Australia Pty Ltd* (Unreported, Supreme Court of WA, Bredmeyer M, 27 March 1995).

27 Both de facto and de jure the Supreme Court of Western Australia already has lists. There is an Expedited List (which is not limited to subject matter – commercial cases, Medical Board appeals, interpretation cases, etc are dealt with in this list), a Long Causes List (as the name suggests, this list deals with all long cases regardless of their subject matter) and a Defamation List (this is the only list which deals with a discrete type of case). There is de facto a Companies List because companies matters are allocated a special file number (COR rather than CIV) and are often dealt with by masters rather than judges. There is de facto also a Single Judge Appeal List (SJA rather than CIV), a Commercial Arbitration List (ARB rather than CIV) and a Probate List (P rather than CIV). Applications for prerogative writs, although allocated a CIV file number just like most civil matters in the Supreme Court, are effectively on a de facto Judicial Review List. Each of these de facto lists have developed their own peculiar practices either because of explicit provisions in the *Rules of the Supreme Court*, Common Forms and Practice Directions designed to achieve that end or simply because standard form but otherwise informal orders are typically made which lead to the efficient disposition of cases in these de facto lists.

28 To some extent that already applies. Most appeals in the Single Judge Appeal List are brought under the *Justices Act 1902* (WA). Cost awards under the *Justices Act* are basically governed by the *Official Prosecutions (Defendants' Costs) Act 1973* (WA) rather than the Supreme Court scale. Matters in the de facto Commercial Arbitration List, the Judicial Review List and the Companies List are subject to the $6900 limit referred to above by virtue of the document by which they are commenced.

29 See Fleming, *The Law of Torts* (8th ed, 1992) 625.

30 There are or have been similar provisions in the legal practitioners' legislation of the other states. See for example *Legal Profession Practice Act 1958* (Vic) s 28(4).

31 (1960) 104 CLR 186.

32 In that case the solicitor incurred barrister's fees (which were a disbursement item) well knowing that if his client lost the case he would have to cover the barrister's fees out of his own pocket. The solicitor's client was so impecunious that the solicitor knew that a costs order from the other side was the only hope of the solicitor being reimbursed for the barrister's fees let alone receiving some recompense for his own professional work.

33 Attorney-General's Department, *The Justice Statement* (1995) 48-49.

34 As Mr Heath SM of the Perth Magistrate's Court said in a submission to the LRCWA: 'I would be concerned that any form of contingency charging would give lawyers a vested interest in the outcome of litigation that could place them in conflict with their client and act as a hindrance to the settlement

of matters. There are admittedly problems with the time costing system which would appear to reward the slow and penalise the fast. Perhaps the time has come to deregulate costs leaving each client to negotiate with no costs being chargeable without a costs agreement.'

35 The old adage was referred to by the Full Court of the Supreme Court of WA in *Dobree v Hoffman* (1996) 18 WAR 36 in considering the question whether the exception to the indemnity principle that a solicitor who acts for her or himself may obtain the benefit of an order for costs. Parker J said at 42: 'It should further be noticed that for solicitors to act in their own litigation carries with it the disadvantage that the solicitor litigant is without impartial advice as to whether a particular line of effort in the litigation is warranted or merely a reflection of undue nervousness or zeal encouraged by the personal interest of the solicitor litigant.'

36 See *Wallersteiner v Moir* [1975] 1 All ER 849.

37 South African Law Reform Commission, *Report on Speculative and Contingency Fees,* Working Paper 63, Project 93 (1996) [2.6].

38 Joseph Franaszek, 'Justice and the Reduction of Litigation Cost: A Different Perspective' (1985) 37 *Rutgers Law Review* 337, 337.

39 South African Law Reform Commission, above n 37, para 2.6.

40 Ibid para 3.13.

41 Ibid para 3.5.

42 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) 191-192.

43 South African Law Reform Commission, above n 37, 16.

44 Ibid paras 3.5, 4.75 and 4.113.

45 See eg *Marriage of Wilson* (1989) 13 Fam LR 205, a decision of the Full Court of the Family Court of Australia based on the *Family Law Act 1975* (Cth) s 117.

46 See *Parker v Parker* (1992) DFC 95-123, affirmed on appeal (1992) DFC 95-124.

47 South African Law Reform Commission, above n 37, paras 4.43 and 4.56.

48 (1992) 177 CLR 292.

49 Ibid.

50 See *Gideon v Wainwright* 372 US 335 (1963).

51 South African Law Reform Commission, above n 37, para 4.79.

52 Ibid [4.100].

53 *Justice Statement,* above n 33, 49.

54 South African Law Reform Commission, above n 37, para 4.57.

55 Ibid [4.11].

56 Access to Justice Advisory Committee, above n 42, 186.

57 For example, an impecunious plaintiff who very reasonably brings an application for further and better discovery of a particular class of document which is important to the litigation, but after a reserved decision from the Master where the Master's mind waxed and waned as to whether the application should be upheld, lost the application, was ordered to pay the costs forthwith, the other side could execute on the costs order and bankrupt the plaintiff leaving the litigation in the hands of the plaintiff's trustee in bankruptcy rather than the plaintiff him or herself.

58 The ALRC, above n 1, identifies this concern at para 2.42 and recommends at para 2.43 that the current practice not change.

59 A classic case is where a plaintiff pleads a statement of claim and the defendant's statement of defence gives the plaintiff cause to believe that he or she will win at trial. It often happens that shortly before or during the trial the defence is amended to plead for the first time facts giving rise to a good defence which then leads the plaintiff to realise that she or he has some exposure in terms of success at trial. Another example is where a defendant pleads a complex factual defence and a very simple defence in point of law. If the defendant had realised that the facts underlying the factual defence were unlikely to be found in favour of the defendant at trial and had simply run with the simple defence based on a point of law, then the trial would have been much shorter. The successful party is often deprived of costs in these situations. See eg *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] VR 129, 156; *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137.

60 See, for example, the notion of 'misleading or deceptive conduct' in *Trade Practices Act 1974* (Cth) s 52 and *Fair Trading Act 1987* (WA) s 10 and the common law notion of 'reasonable care'.

61 (1996) 138 ALR 425, 452.

62 Ibid 450.

63 Ibid 447-448.

64 *Knaggs v JA Westaway & Sons Pty Ltd* (1996) 40 NSWLR 476, 477, 484 and 485. The case refers to the possibility of the court making a personal costs order against an employed solicitor under the inherent jurisdiction of the Supreme Court to control its own officers. However, inferior courts do not have inherent jurisdiction. Further, the *Rules of the Supreme Court* apply in the District Court (an inferior court).

65 *Ridehalgh v Horsefield* [1994] Ch 205, 228, 231. But see the reference to the inherent jurisdiction ibid.

66 (1994) 53 FCR 422, 426-427.

67 *Orchard v South Eastern Electricity Board* [1987] QB 565, 577, 580.

68 Above n 65, 231.

69 See *Re A Barrister* [1993] QB 293 and *Ridehalgh v Horsefield* ibid 231.

70 *Ridehalgh v Horsefield*, ibid 238.

71 *Re A Barrister,* above n 69 and *Ridehalgh v Horsefield,* ibid 237.

72 *Ridehalgh v Horsefield,* ibid 233.

73 [1969] 1 AC 191, 275.

74 ALRC, above n 1, recommendation 37.

75 The rule dates back to at least the decision of the United States Supreme Court in *Arcambel v Wiseman* (1796) and is subject to an exception where the litigation is vexatious or an abuse of process.

76 ALRC, above n 1, 201–202.

77 Ibid 201–202.

78 Ibid 214-215.

79 Ibid 142.

80 Ibid 25.

81 See eg *Utah Construction & Engineering Pty Ltd v Pataky* [1966] ALR 587, 591, a decision of the Privy Council on appeal from NSW in an employer's negligence case where the 'poor respondent' was the injured employee. See also D O'Brien, *Special Leave to Appeal* (1996) 172-173 as to the practice in the High Court.

82 *Singleton v Macquarie Broadcasting Holdings Ltd*, above n 22, 106.

83 Ibid 105.

84 *Ballato v Co-operative Bulk Handling Ltd* (Unreported, Supreme Court of Western Australia, Nicholson J, Lib No 7856, 1989) 3.

85 See commentary by Deane & Garrett on the *Civil Justice Reform Act 1998* (Qld).

86 Campbell, 'Award of Costs on Applications for Judicial Review' (1983) 10 *Sydney Law Review* 20, 21.

87 *Carr v Werry* [1979] 1 NSWLR 144 and *Cummins v MacKenzie* [1979] 2 NSWLR 803.

88 See for example the decision of the High Court in *R v Cooke; Ex parte Twigg* (1980) 147 CLR 15 at 19 and 29 where the respondent to the application for a prerogative writ before the High Court was a Family Court Judge.

89 Campbell, above n 86, 24.

90 Ibid 25.

91 In summary it is designed to give unsuccessful respondents to appeals a public fund from they can draw to cover the costs of the appeal they have to pay the successful appellant as well as their own costs in attempting to uphold the judgment appealed from. The theory is that it is neither side's fault that the trial judge made an error of law — if the trial judge had got the law right at the trial there would have been no need for the appeal.

92 Campbell, above n 86, 25.

93 (1973) 1 ACTR 43, 55.

94 (1995) 58 FCR 139, 146-148.

95 (1996) 68 FCR 387, 389.

96 It is doubtful whether an application for a declaration or an injunction against even a tribunal would fall within the scope of an 'appeal'.

97 (1991) ASC 56-049.

98 See s 49(1)(e).

99 See s 49(2).

100 ALRC, above n 1, 147-151.

101 (1993) 45 FCR 509, 511.

102 (1997) 74 FCR 384.

103 (1995) 57 FCR 119, 123.

104 See commentary by Deane & Garrett, above n 85.

105 *Legal Practitioners Act 1893* (WA) ss 25 (1) (d) and 28B.

106 (Unreported, Supreme Court of Western Australia, Ipp J, 31 March 1994).

107 Above n 101.

108 Northern Territory Law Reform Committee, *Report on a Suitors' Costs Fund,* Report No 16 (1994) 2.

109 By virtue of unsuccessfully defending an appeal from a decision of a Judge of the Supreme Court or District Court to the Full Court, the respondent will have to pay the appellant at least $500 (being the filing fee incurred by the appellant on the notice of appeal) even without beginning to consider professional fees. The sum of $855 will in most cases be allowed on a taxation of a Full Court appeal with very little question from the taxing officer (being the costs of settling the appeal book index, attending on the reserved decision and extracting the order allowing the appeal). This leaves $645 out of the maximum of $2 000 allowed under the Act. There would be very few notices of appeal to the Full Court on which a taxing officer would award $645 or less for drawing the notice of appeal (the maximum allowed in the absence of a special costs order is $4 050). Thus, the $2 000 maximum will be eaten up in what the unsuccessful respondent has to pay the successful appellant even without getting to the major item which the respondent will have to pay the appellant – ie the appellant's Counsel fees (where the Full Court certifies for two Counsel, and this is not uncommon in Full Court appeals, and assuming the appeal only goes one day, the maximum allowance for Counsel fees under the Supreme Court Scale is $17 400).

110 In Tasmania the test is whether the appeal succeeds. See *Appeal Costs Fund Act 1968* (Tas) s 8. See also *Suitors' Fund Act 1951* (NSW) s 6(1)(a) which refers to an appeal succeeding on a question of law or fact.

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2.10

Self-represented Litigants

INTRODUCTION

This sub-section focuses on those people seeking to access the civil justice system,[1] who are 'self-represented litigants', that is, they represent themselves in court.[2] In many cases, these unrepresented persons are unable to obtain assistance either because they cannot afford a lawyer or because no legal representative is willing to act on their behalf. In some cases litigants may deliberately choose not to be represented, even if eligible for legal aid.[3]

We begin by examining the effects of the increasing numbers of people representing themselves on the courts and then assess court-based responses, alternative dispute resolution options and various services to provide assistance to those people who are self-represented.

This sub-section does not deal with people representing themselves in criminal matters. Although this is a significant issue, it is one which may be the subject of a legislative initiative. Thus, we limit this topic to those litigating civil matters and begin with a discussion of people who represent themselves in a justice system designed to serve those represented by lawyers.

Representatives of Western Australian courts have noticed an increase in the number of self-represented litigants, despite evidence from other jurisdictions that represented litigants are more successful. The lack of reliable quantitative data is a significant difficulty faced by the Law Reform Commission of Western Australia and others attempting to assess the magnitude of this situation and develop solutions to the problems self-represented litigants present.[4] Accurate statistical information[5] would facilitate an assessment of the impact of self-represented litigants and facilitate the development of programmes to deal with the needs of people without legal representation.[6]

Thus our first proposal is to quantify the number of people who represent themselves and qualify the essence of their problems. It is essential to have accurate information from all courts and tribunals concerning the nature and cost of the involvement of self-represented litigants in the justice system.

Proposal 1

Data should be collected to profile litigants, categorise their legal disputes, determine the cost of resolving matters, and assess the quality, nature, and satisfaction of the results.

The impact of litigants in person on the courts and other litigants

The justice system in Western Australia operates on the premise that litigants will be represented in court by lawyers. People representing themselves may or may not be adequately informed or prepared. As a consequence, self-represented litigants place considerable demands and stress on court staff and the judiciary. They may lack knowledge about court procedures. They may not understand the law and legal terminology. Moreover, they may not have the advocacy skills necessary to prove their cases. '[A]ll too frequently, the burden of ensuring that the necessary work for the self-represented litigant falls on the court administration or the court itself'.[7] However, greater intervention by judges and court staff to assist unrepresented litigants renders the system vulnerable to claims of bias.

Nevertheless, the problems presented by self-represented litigants compel court staff and judiciary to coach and intervene to assist. This occurs from the moment an individual seeking to represent him or herself first enters the system, at the court registry desk, through to the completion of proceedings. As a result of the need to provide additional assistance to self-represented litigants, resources are diverted and other matters are delayed.[8] The consequences are cost increases for all matters in the system.[9] These cost increases arise from:

- excessive time being spent in hearings;
- more pre-trial proceedings;
- time and expense in responding to unclear or irrelevant evidence;
- poor issue definition and clarification; and
- a general reduction in procedural clarity and outcome certainty.[10]

It is generally believed that self-represented litigants can have a significant economic impact on court proceedings with increases having a multiplier effect on the time and costs of other parties, lawyers, court staff, and judges. On the other hand the Family Court experience of unrepresented parties is that, due to their unfamiliarity with the system, they do no know what to ask

for in interim matters. Similarly, trials are truncated because self-represented litigants have little knowledge about how to present their cases effectively by leading evidence and cross-examination.

Other matters of concern are the disadvantages suffered by self-represented litigants at hearings[11] and the heavy burden of legal costs awarded against them, when unsuccessful. Self-represented litigants invariably need assistance at trial or hearing to make up for their lack of representation. In the absence of assistance from a lawyer, only the magistrate or judge is available to help the self-represented litigant. The consequences of this shift in role for the judiciary are discussed below.

Demands for and dangers of intervention in trials

Self-represented litigants have the capacity to unbalance the adversarial nature of the justice system and undermine efforts at impartiality by judges, magistrates and court staff. Judges can be forced into an interventionist style, to the extent perceived necessary to address the shortcomings and lack of familiarity with pre-trial and trial procedures of unrepresented litigants.[12] In some cases the resulting injustice is extraordinary.[13] The trial judge inadvertently becomes more of a manager of the trial, while continuing to be the umpire.[14]

Lord Woolf embraced greater involvement by judges when a party is unrepresented.[15] While Lord Woolf is not alone[16] in his support of judicial intervention, critics[17] identify dangers inherent in judicial activism. Concerns include:

- the absence of norms and rules making it difficult to review managerial decisions;
- the insidious influence of statistics and time standards;
- the loss of neutrality;
- the need to make decisions before all the facts are known;
- the impropriety of involvement in settlement negotiations; and
- the extra financial costs of managerial judging.

The more interventionist courts become, the more they mimic tribunals. The disadvantages of being unrepresented before a tribunal become exacerbated in traditional courts. In an interventionist tribunal it is accepted that adjudicators or tribunal members have a responsibility to intervene and to help elicit information.[18] There is an even greater onus on the adjudicator to intervene and effectively do the work of an advocate when a party is unrepresented.[19]

The greater the involvement of an adjudicator, the more the role of the lawyer is supplanted, and the less important representation becomes.[20] The adjudicator, however, cannot replace a competent advocate whose job is to prepare and present a winning strategy.[21] It is inappropriate to expect an inquisitorial or interventionist arbitrator, coupled with the more

'accommodating' processes, to redress the disadvantages of not being represented:

> [T]he integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by an arbiter who attempts to decide a dispute without the aid of partisan advocacy. Such an arbiter must undertake, not only the role of judge, but also that of representative for both of the litigants. Each of these roles must be played to the full. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.[22]

In tribunals, intervention by the adjudicator increases responsibility[23] and workload. Adjudicators themselves question their ability to cope:

> The requirement that chairs be responsible for eliciting all the necessary information from appellants, for correctly applying the law and adjudicating the case, involves the performance of several different roles. Even if chairs succeed in obtaining the information they think they require, there may still be scope for creative argument on the application of regulations which they are unlikely to undertake on behalf of an unrepresented appellant. Although it is the job of tribunals to 'compensate' for these disadvantages, representatives, and indeed many tribunals themselves, do not believe that this is possible. These beliefs were largely supported by observation and the results of analysis of tribunal outcome.[24]

Limits of intervention: avoiding bias and partiality by fairness and balance

There can be no doubt that 'representation increases the accuracy of tribunal decision making' and 'that without representation cases with merit may be lost at the hearing.'[25]

Judicial intervention is considered as acceptable in two circumstances. The first arises when there is a potential injustice involving the parties to the trial itself and the judge advises or assists an unrepresented party to avoid injustice. Intervention may be appropriate where there is an injustice involving the larger community including issues such as the speedy resolution of trials through limiting length of the trials and using witness statements and expert witnesses.[26]

But, how far must the judge or magistrate intervene to achieve a fair trial? The Australian Law Reform Commission suggests '[t]he limits the adversarial system places on judges scope for intervention ... must be balanced against the overall responsibility judges have to ensure that proceedings are fair'.[27] The self-represented litigant creates a difficult role for the intervening trial judge or magistrate, who has to achieve balance, ensure fairness and avoid bias, whilst finding truth:

> However, while the nature of the adversarial system of litigation and its overriding concern for the neutrality of the judge limits the scope

> for judicial intervention to assist a litigant in person, the judge has also an overall responsibility to ensure that proceedings are fair. This responsibility means that in some circumstances there is a judicial right and obligation to intervene, both for the benefit of an unrepresented party and more generally.[28]

Lord Woolf promotes an interventionist approach by judges at hearings. In his view the judge has a critical role in ensuring that the unrepresented party gets a fair hearing and understands and accepts the outcome of the case.[29]

Judicial intervention in the trial process: how far should and can it go?

With apparently increasing numbers of self-represented litigants, a uniform approach to intervention is appropriate.[30] Unless care is taken, judicial intervention can have an adverse effect upon the perception of both the represented and the unrepresented litigant as to the even handedness of the court in dealing with the parties.[31] Whilst some might argue that the justice system is biased in favour of represented parties because of the complexity of forms and procedures, there is also a perception that self-represented litigants receive differential or even more favourable treatment from judicial officers as a result of the additional assistance provided by intervention.

In the *Panogopoulos* case[32] a trial judge, Justice Smith of the Supreme Court of Victoria, faced a gross imbalance between the capabilities of the parties to present their cases. He observed that an '[i]mbalance creates a situation of unfairness which will usually compromise the reality and appearance of justice.' In dismissing an application to disqualify himself on the basis of apprehended bias, Smith J said:

> Increasingly, with the reduction of Legal Aid, the courts will be faced with complex sophisticated litigation from which the Legal Aid Commission, applying its guidelines, has decided to withdraw support. The cases will still have to be tried. If the law requires that the trial judge cannot attempt to fully investigate the facts without falling foul of the apprehended bias principle, he or she will be seen to preside over a charade masquerading as justice. Such a situation will quickly bring the civil justice system into disrepute.[33]

We believe it is appropriate to acknowledge, as did Lord Woolf, that 'Judges should be prepared to adopt an interventionist approach in all cases involving an unrepresented party'.[34] However, judges need training to help in this new task and also to ensure uniformity in their approach. Lord Woolf, whilst recommending intervention, strongly recommends judicial training and benchmarks or safeguards. In his view, judicial training is essential to ensure greater consistency of judicial approach, both as a safeguard for the individuals using the system and to increase the esteem with which the jurisdiction is held. There must be consistency in conducting hearings, examining papers, approaching evidence and applying the law.[35] The following discussion suggests that the goal of consistency maybe approached by training.

Training

Courts and the justice system are becoming more management oriented.[36] Judges and magistrates must acquire new skills to deal with self-represented litigants in order to provide accessible and equitable justice.[37]

The more informal a hearing[38] the more the adjudicator may be interventionist. Different approaches to the conduct of informal hearings range from 'going for the jugular', 'hearing the parties',[39] to taking a passive or mediatory approach.[40] Lord Woolf found these inconsistencies unacceptable.

> I consider it essential to ensure greater consistency of judicial approach, both as a safeguard for the individuals using the system and to increase the esteem in which the jurisdiction is held. That consistency of approach needs to cover both the conduct of the hearing, and the pre-hearing examination of papers as well as the substantive approach to evidence and the application of the law.[41]

Differing approaches by adjudicators dealing with unrepresented parties could have an impact on the result.[42] Lord Woolf found that there was inconsistency in how magistrates and judges handled small claims matters.[43] In Western Australia, the Family Court has a high number of self-represented litigants. The experience of the Family Court in dealing with self-represented litigants may be worth considering.[44]

Training court registry staff to deal with self-represented litigants is also imperative:

> The public experience of the justice system will increasingly be formed not by a trial judge in an austere courtroom but from more informal interchanges within pre-trial or summary trial proceedings or alternative dispute resolution processes. This future vision directs our attention to the educational needs of those judges, magistrates, tribunal members and court administrators dealing with the high volume, robust end of legal interchange and application.[45]

Registry staff, particularly counter staff, are often the first point of contact for the unrepresented person. It is therefore essential that staff have the skills to ascertain a person's needs so that the appropriate information can be provided as to where to access advice and diversionary processes. We concur with Lord Woolf and advocate training for all participants in the justice system who deal with self-represented litigants.

Proposal 2

There should be training for all court personnel including the judiciary in methods of assisting and managing self-represented litigants.

Guidelines

Guidelines are needed to ensure consistency.[46] The Civil Justice Review recommended the preparation of manuals on civil adjudication in the United Kingdom.[47] Guidelines for judicial officers would benefit all involved in the litigation process as well as help counter allegations of bias in favour of self-represented litigants.[48] Appendix 1 sets out Smith J's 'Dos and Don'ts' for conducting civil litigation in Victoria when a party is unrepresented.[49]

Proposal 3

There should be a manual for court staff and specific guidelines for the judiciary to assist in dealing even-handedly with self-represented litigants and other litigants.

Proposal 4

Research should be undertaken to determine what resources are required by adjudicators to assist them in dealing with matters involving self-represented litigants.

Accommodation of self-represented litigants by the courts and appeals tribunals

The Supreme Court

Although proportionately small in number among the 1500 applications the Supreme Court has each year, self-represented litigants have a significant impact on other parties and the court itself. In the 1990s the Supreme Court began developing case management procedures through a series of practice directions and changes to the formal rules of court in order to enhance efficiency and ensure fundamental fairness. The 1996 amendments to the *Supreme Court Rules* promote alternative dispute resolution and curtail interlocutory procedures.[50] Ensuring compliance with court orders is fundamental to the success of case management.[51]

The legal and evidentiary issues raised before higher courts are usually more complex than those presented in the Local Court.[52] Supreme Court procedure is generally too complex for the average self-represented litigant. Due to this inherent complexity[53] the involvement of self-represented litigants at this level can add greatly to the time and financial cost for all concerned. Arguably, changing the highest court in the State to accommodate unrepresented parties is neither a practical nor principled solution.

Whilst the right of a natural person, unlike a corporation, to appear unrepresented is recognised[54] it is arguably better for all concerned for parties to be represented. A party should be encouraged, even assisted, to obtain proper legal representation. Legal Aid's Minor Assistance Programme (MAP) does not generally help people involved with superior court matters, taking

the view that proper legal representation is needed in higher courts due to the level of complexity.

However, the promulgation of the new Order 80 of the *Federal Court Rules* may be an option for the Supreme Court to consider. It creates a Pro Bono Panel to provide legal assistance to litigants otherwise unable to obtain assistance: Rule 1(2).

The District Court

The civil jurisdiction of the District Court is unlimited for personal injury matters, but generally is set at $250 000. It is also the appeal court for a number of tribunals. About 7 000 civil writs per year issue from the District Court.

The District Court Registry recognises the apparently increasing number of self-represented litigants and is now referring potential litigants to community legal centres and Law Access as a consequence of the apparently increasing number of self-represented litigants. Self-represented litigants may consume more time at pre-trial conferences than represented parties in the District Court, however the Family Court experience does not confirm this perception.

Local Court

The Local Court of Western Australia is, and increasingly will be, the jurisdiction in which most disputes involving unrepresented litigants are heard.[55] The Local Court currently exercises jurisdiction up to $25 000 for civil disputes. This may increase to $50 000 if the proposed Magistrates' Courts legislation is enacted. This will divert the workload from the higher courts but place a significant burden on the Magistrates' Court. If the small claims limit is raised, there may be even more people unrepresented in the Magistrates Court.

About 50 000 Local Court matters were filed in the year to 30 June 1996, together with an increasing number of interlocutory applications, and about 8 000 residential tenancy applications. The Small Disputes Division of the Local Court has a jurisdictional limit of $3 000 with a proposed increase to $6 000. The Residential Tenancies Tribunal division deals with rental matters to a limit of $6 000.

In considering a similar jurisdictional change, Lord Woolf noted 'the need to compensate effectively through a pro-active interventionist judiciary for the legal representation that would be lost.' Safeguards are necessary to ensure fair treatment as between the parties and a consistent approach. Lord Woolf goes on to say 'I am particularly concerned that any rise in the limit should be accompanied by better training for district judges, a more consistent judicial approach and better information, advice and support for litigants'.[56]

The current system streams matters of higher value and complexity to the higher courts and simpler, smaller matters to the lower courts. The Local

Court Registry provides user-friendly brochures about various aspects of the court and generally refers people to various advice agencies. It also provides copies of standard forms to litigants and accepts hand written court forms. These efforts are very helpful particularly given the complicated and antiquated rules and forms which bind the court. Fortunately significant reforms have been proposed.[57]

The increasing lack of legal representation in the Local Court means that registry staff, clerks and magistrates now have to do work which was previously the responsibility of lawyers. Although adjudicating on matters when parties are unrepresented is not easy, the lower courts are developing more user-friendly, informal and simplified practices and procedures.[58] The Small Disputes Division accommodates unrepresented parties with informal procedures and discourages the participation of lawyers by limited provision for legal costs. The Residential Tenancies Tribunal generally does not permit representation although experienced real estate agents appear occasionally for lessors.

The continuing need for representation compels consideration of the right of non-lawyers to represent litigants. The Civil Justice Review recommended that litigants in small claims, debt and housing cases should have a statutory right to be represented by a lay representative of their choice, subject to the discretion of the court.[59]

Administrative Appeals Tribunal

The Administrative Appeals Tribunal has various user-friendly processes that benefit unrepresented parties.[60] These range from case management conferences to directions hearings and help from associates.[61] The aim of the Tribunal is that matters do not go to hearing unless they are 'ready'. The process of getting matters 'ready' is hands-on and helpful, particularly when an unrepresented party is involved.[62] The case management regime is used to inform the unrepresented party about the process in order to reduce hearing time. Some matters progress to hearing without a directions hearing or conference but this rarely occurs when a party is unrepresented.

Existing services

Legal advice enables people to better manage their affairs.[63] For this reason, advice agencies such as Legal Aid, community law centres, and citizens advice bureaux[64] encourage people to resolve their disputes other than by litigation.[65] Volunteer lawyers and legal aid services are crucial in providing access to justice. However, growing numbers of self-represented litigants are increasing pressure on free or discount advice services such as Law Access and Legal Aid. The existing services for self-represented litigants are reviewed below.

Legal Aid Western Australia

Limitations on funding coupled with responsibility to help more people access justice compelled Legal Aid Western Australia to search for alternative ways to deliver legal services. Traditional case management has shifted to preventive and solution-oriented services including:

- a telephone advice service;
- a community centre support line;
- referral for non-legal advice;
- community legal education;
- training community workers;
- pamphlets (in various languages) describing common areas of litigation;
- standard form documents with information on how to issue proceedings;
- draft letters of demand; and
- self-help kits.

Legal Aid has been at the forefront in drafting self-help kits for common court actions. Under Legal Aid's MAP,[66] paralegals, overseen by lawyers, usually provide information to self-representing litigants. This information is sometimes provided on a step by step basis as litigation progresses. This assists people to deal with lower court matters. Legal Aid also operates a duty counsel scheme every morning at certain petty sessions courts and, at the Family Court.

Problems which city self-represented litigants face in accessing adequate legal advice generally are exacerbated in rural areas. The Aboriginal Legal Service, Legal Aid and community law centres exist in some country locations. Data is needed to determine the extent to which the facilities provided meet the needs of regional Western Australians.

Community legal centres

Community Legal Centres (CLCs) are often the only avenues available to people unable to afford a lawyer and ineligible for legal aid. CLCs attempt to deliver a solution-based service, which is often more appropriate than full-blown litigation.

As an alternative to traditional legal services CLCs specialise, particularly in areas of law often not dealt with by the private profession including residential tenancies, consumer rights, social security, neighbourhood disputes, and debts. Some CLCs provide toll-free telephone advisory services, mediation, and financial counselling. In servicing regional communities, CLCs encourage self-help and provide community legal education and information.

The presence of a practicing lawyer, an experienced paralegal or a practising volunteer lawyer provide the only controls over the advice delivered at CLCs. If CLCs are to be systematic referral points from courts, especially for self-represented litigants, there will need to be greater consideration given to the regulation and monitoring of their activities and publications.

Law access: the shopfront service and pro bono work for the public good

The Law Society of Western Australia operates Law Access, a free or discounted referral service for litigants who would otherwise not be able to obtain legal advice. Shopfront lawyers provide discrete advice and self-help information. These services

- are economic to run;
- reach the most people; and
- have the benefit of giving people a sense of possession of their matter.

Many people are capable of acting for themselves if the system is demystified. For example when 'interrogatories' is decoded to 'answering questions' people understand and are less frightened, according to Greg Mohen from Law Access.

Many lawyers in Western Australia contribute a considerable amount of their time to public service.[67] In England, public service is expected[68] and more formalised: 'Free *pro bono* work in the public service is a vital ingredient for any profession worthy of that title… that obligation is one which has traditionally formed part of the ethic of the Bar of England and Wales'.[69]

In the United States there was such concern about the profession's decreasing commitment to *pro bono* work that a Commission was established. It '…made a strong call for an increase in the *pro bono* activities of the American Bars, and for every lawyer to accept the obligation to perform *pro bono* services'.[70] Apart from performing *pro bono* work because 'it counters the disturbingly negative attitudes toward the legal profession that are widely held by both the general public and by lawyers themselves', [71] there is also evidence of '…enlightened individual and firm self-interest served by appropriate *pro bono* activity'.[72]

Litigation Assistance Fund

The Law Society of Western Australia operates a Litigation Assistance Fund (LAF). It provides assistance for civil litigants who are perceived by a panel to have a potentially meritorious cause of action, but do not qualify for legal aid and are unable to afford the full costs of private legal services. LAF supplements Legal Aid's capacity to aid civil litigants. Its operations are dependent on the goodwill and contribution of the legal profession. Paid lawyers volunteer their time to assess applications free of charge. The remuneration paid by LAF is discounted below market rates. LAF assistance is only available for litigation with the potential for a monetary award.

Alternative lawyering: Unbundling legal services

Unbundling legal services, also known as alternatives to full time representation ('AFTR') or discrete task representation, involves clients employing lawyers to carry out only discrete aspects of a case. This is a means of accessing some legal help whilst the litigant remains responsible for conducting the matter:

> [I]f a lawyer is willing to offer discrete services, clients are generally willing to pay for services such as legal counselling, help with forms, coaching for negotiations, ghost writing letters, preparing settlement documents and reviewing proposals and drafts.[73]

In the Family Court of Western Australia it is apparent that some self-represented litigants have had legal advice, particularly in the drafting of

documents. Community Law Centres, in their use of volunteer lawyers for over 20 years have provided unbundling assistance. Unbundling is practised through the Legal Aid's self-help programme.

Lord Woolf says that unbundling

> would offer a real way forward in terms of making justice accessible and understandable to those on moderate incomes who are currently not eligible for legal aid. Such an approach poses a challenge to both professional lawyers and other advisers as to how best to develop schemes that can provide the level of assistance needed within a cost ceiling appropriate to the matter at issue. I am well aware that this is something which is already done by law centres and other specialist advice agencies.[74]

Acting as a consulting attorney in mediation is another form of unbundling. This provides the benefit of expert advice but keeps costs down.[75] Unbundling services are complemented with client libraries,[76] legal check-up questionnaires, legal audits, and a non-litigation calendar.[77]

Unbundling raises difficult issues with regard to professional negligence insurance.[78] Lord Woolf suggested that, in terms of paying clients, there may be a need for new retainer arrangements for professional negligence insurance.[79] For example, if a client seeks help with only a discrete part of the case, if anything goes wrong there could develop a dispute as to the precise extent of the instructions as well as to ancillary rights and obligations.[80]

To further the development of unbundling alternatives, the capacity to enter a limited contractual relationship which would provide clear civil immunity for the lawyer outside the scope of the contract is necessary. This would also protect the client for the work which was carried out.[81] Unbundling also requires consideration of a party's entitlement to costs, if successful, when there is no lawyer on the record although a lawyer has done some part of the work.[82]

Innovations to assist litigants in person

A litigants in person track

A special case management track should be considered for self-represented litigants in the higher courts. Flexibility should be the hallmark of this special track.[83] An unrepresented litigant's case manager could have responsibility for keeping the matter on track and making all interlocutory decisions including security for costs, summary judgments, preliminary issues and springing orders.

All matters involving each unrepresented party should be assigned to the same case manager, to ensure continuity and achieve familiarity with the particular matter and all cases involving each unrepresented litigant. The case manager would be alert to the excesses or habits of particular litigants, and lend a consistency of approach. Having one case manager assigned precludes the need for numerous people to 'get on top' of the file each time a new issue arises.

One difficulty with having all self-represented litigants in a special track is that some parties move in and out of representation, especially unreasonable litigants. It is necessary for the case manager to have the power to keep matters in the special track despite the fact that the party has obtained representation. The case manager should have special powers to curb excesses, including the power to limit applications and impose costs. While compelling self-represented litigants to accept special or truncated procedures might be seen as discriminatory, the ultimate objective is to devise a fair, if imperfect, system of civil justice.[84]

Proposal 5

A special self-represented litigants track should be considered for establishment in the higher courts managed by a designated, specially trained staff and adjudicators. The Local Court should operate under the presumption that most litigants will represent themselves.

Early intervention, diversion, screening, mediation and ADR

Even if citizens have a legal problem, legal action is not necessarily the best option or solution. Abraham Lincoln said 'Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good person'.[85] People commencing proceedings should be encouraged to explore alternative diversionary processes for solving problems. '[M]ore work is required to ensure that people facing legal proceedings obtain advice before the day of the hearing'.[86]

Diversion

Each self-represented litigant should be diverted, at the point of entry to the system, to get some initial advice concerning the pros and cons of litigating; the strengths and weaknesses of the case, strategies for early settlement or even pre-litigation settlement. CLCs and Legal Aid can assist self-represented litigants to consider alternatives. There is also the option of providing a court-based adviser who will canvas alternatives with the self-represented litigants.

Diversion to other agencies is one way of regulating entry into the system. Already court registries provide information about alternatives to litigation and advice agencies. All court registries should further establish formalised links with advice agencies, possibly through a nominated information officer and dedicated telephone lines, for example.[87]

Screening and Informed decision making

An informed litigant will always be in a better position to make a decision about which course of action to take. Evidence supports limited advice as being better than no advice. 'If only in the interests of efficiency the court system must give some assistance to the litigant in person'.[88] A screening mechanism or evaluation facility[89] could help potential litigants consider alternatives to litigation and, if litigation is the only solution, to select the appropriate forum. Trained court registry staff could help alleviate confusion and delay, especially for self-represented litigants. Screening may encourage an unrepresented party to obtain legal advice before commencing proceedings.

Mediation and alternative dispute resolution (ADR)

The Ontario Civil Justice Review[90] recommended courts become dispute resolution centres, channelling cases through the most suitable door, ranging from traditional court proceedings to ADR. Despite its benefits, mediation has been generally considered unsuitable for self-represented litigants, as a requirement for independent advice during the course of the mediation is usually overwhelming.

The current efforts being made in the higher courts as a consequence of case management efforts should be extended into the lower courts. In this context mediation should be mandatory before proceedings are even commenced.[91]

> Alternatives to court resolution of disputes do exist and have met with varying degrees of success. There is no doubt that the existing ADR framework could be built on, providing a way to take pressure off the courts and reduce overall expenditure on legal action. Some of the changes are largely administrative and would not be very expensive — for example, the establishment of a body to oversee standards in the area.
>
> Others would be costly, although the cost would often be associated with real overall savings. Thus more advice on using the local government ombudsman may well save legal aid costs. Some of the costs would not offset directly against other savings. A proper publicity campaign costs money and the advantages are long term and not always easily quantifiable; an IT system that is genuinely user friendly means a system purpose designed and supported with high quality copy and graphics — a task that will demand a substantial budget.
>
> The last decade has seen an emphasis, in both public and private sectors, on the importance of efficiency savings. There is no doubt that there are efficiency savings to be made in the area of ADR and that there is potential for substantial reductions in the costs of dispute resolution for both the state and the individual. We suggest, though, that while there is an overall benefit, any improvements will have direct cost. The success of ADR as a genuine alternative to the courts is likely to depend, ultimately on the government's willingness to back its commitment to alternatives with hard funding.[92]

The extent to which ADR has been implemented in Western Australia is discussed in sub-section 2.3.

The need to develop innovative conflict resolution mechanisms has been recognised throughout the common law world.[93] Lord Woolf describes all alternatives to the traditional courts as alternative dispute resolution.[94] Mediation, ombudsmen, and arbitration are all important for providing cheaper access to justice and diverting inappropriate matters from the courts.

Tribunals,[95] as alternatives to courts, pre-date current ADR mechanisms for informal justice like mediation, conciliation and small claims procedures.[96]

The more that unrepresented parties wish to use the justice system, the more that traditional courts will be driven to adopt the practices of tribunals, including instituting systemic practices modelled on the Administrative Appeals Tribunal, not only to help litigants, but to enable the system to cope. In this regard, the Civil Justice Review made numerous recommendations about accessible justice including a recommendation that 'cases in which individual litigants tend not to be represented should be conducted on an interventionist basis'.[97]

The Australian Law Reform Commission suggests that some matters are more suited to being unrepresented than others and that, in fact, people should not be expected to incur legal fees disproportionate to the nature of the matter at stake.[98] Smaller, simpler matters could be encouraged to diversionary alternatives based on a tribunal model where people can appear unrepresented, allowing higher courts to be reserved for litigants who are able to secure proper legal representation. Cranston recommends that on a cost-benefit basis alone 'it might be better to provide public funds' for representation in the higher courts.[99]

Lord Woolf promoted a greater development of the small claims courts, including fixed costs, no costs orders, paper adjudication, and, for the next tier of matters, the fast track;[100] and Cranston promotes industry-specific ombudsmen schemes and arbitration. Whilst there is already a Small Claims Tribunal, it should not be assumed that the expedient of raising the small claims jurisdictional limit will itself inevitably enhance a citizen's access to justice: '(T)he point will eventually be reached where the do-it-yourself approach will offer a solution that is unacceptably crude'.[101]

The Ontario Civil Justice Review suggests procedures for dispute resolution including early neutral evaluation, pre-trial meetings, mini-trials, mediation and mandatory settlement conferences. The multi-door concept involves 'a system where the "court" becomes a "dispute resolution centre" — a place where people go to have their differences resolved in a fashion which is most appropriate to their particular situation'.[102]

Assistance and advice provided at the courts?

Registry assistance — procedural advice only

Court registry staff is often the first contact point for an unrepresented party within the civil justice system. It is important, therefore, that the advice of the staff is provided in a clear and accurate way. But whilst the staff can provide procedural advice they are not, and should never be expected to become, de facto legal advisers. Lord Woolf recommended that 'the provision of assistance to litigants should be an invariable obligation of the courts'.[103]

Registry referral — legal advice

Models for providing some legal advice include:-

- Chamber Magistrates in New South Wales:

New South Wales operates on the basis that a properly informed litigant being able to participate can be an asset to the justice system, by having more realistic expectations of the courts.[104] In New South Wales' local courts potential litigants must first pass an information officer, before they reach the registry. The officer attempts to provide relevant information with the aim of assisting and diverting before they proceed any further.

Information officers can have a potentially deterrent or cooling-off effect.[105] Prior to initiating proceedings, potential litigants are encouraged by the information officer to visit referral agencies and carefully consider their options.

Then registry staff make an initial assessment about the complexity of a matter and an appointment with the chamber magistrate, if necessary. More complex matters are referred to a general or specialist community legal centre. Chamber magistrates[106] provide legal information — not advice — and assistance to litigants in civil and criminal matters in magistrates courts. However, it has been recommended[107] that legally qualified chamber magistrates should be able to provide legal advice.

- Staff attorneys in the United States Federal Appellate Courts

Some United States Federal Circuit Courts of Appeals employ staff attorneys who help *pro se* litigants prepare court documents or make courtroom presentations. The staff attorneys take a legalistic approach, to ensure that a matter goes smoothly for the benefit of the court. In reality, attorneys are more an aid to the court than the litigant, rendering the judge's job somewhat easier.

- Canada

The Canadian Bar Association has recommended various ways[108] to help litigants cope with the legal system:

- Better ways should be developed for people to obtain information about their options as well as sources for referral.
- There should be public legal education initiatives and increased information and assistance to litigants.
- Information on dispute resolution options should be available to the public.[109]
- Lawyers should have a crucial role in providing point-of-entry advice to members of the public. The Bar Association proposed the civil justice system as a dispute resolution centre with various alternative options, especially using technology to assist in the dissemination of information. It also proposed that significantly enhanced information and advice be available at the court house,[110] to acquaint people who have legal needs with options which may be appropriate. Court information officers would co-ordinate these efforts.

• Registry-based legal and other information and community legal education

> Informing the community about legal rights and the legal system is the first step in access to justice ... it seems basic to the operation of law in a democratic society that governments should inform citizens about the law and that information should be available to all.[111]

Currently, the Western Australian public may obtain information about their rights and about the legal system by various means.[112] Legal Aid Western Australia and community legal centres have been at the forefront of providing better information for the community about the legal system. The Family Court also provides information sessions for litigants.

The New South Wales Legal Information Access Centre ('LIAC') provides a Legal Tool Kit which is a collection of plain language books about the law. It also provides access to a wide range of legal information resources including legislation, court cases, recent journal articles, books and pamphlets and databases. LIAC publishes 'Hot Topics', an on-going series of information packages about recent changes, and current debates in the law. LIAC staff conduct workshops, offer training and work in cooperation with a range of agencies to provide community legal education for the general public and community workers. Staff are available to research legal questions or refer the public to advice agencies.

Proposal 6

The possibility of engaging court-based and employed staff lawyers to assist judges generally with research and particularly when dealing with self-represented litigants should be explored. Such alternatives could include:

- A chamber magistrate's scheme complemented with other services;
- A duty counsel scheme for civil matters modelled on Legal Aid's duty counsel scheme;
- An advice scheme including financial counselling at courts;
- Requiring government-employed lawyers to participate as rostered court based advisers and considering ways to encourage lawyers to provide free advice to potential litigants;
- Creating a Law Access type organisation, or alternatively, expanding Law Access, to coordinate volunteer and low fee advice and representation, provide shop-front advice, and refer potential litigants to alternative diversionary bodies or coordinate legal representation;
- Adopting a rule similar to Order 80 of the *Federal Court Rules*;
- Extending the Court Welfare Service or other community-based programmes to provide assistance not appropriately provided by court officers or lawyers.

- Simpler practices, procedures and laws of evidence

Reforms to the complexity of court rules of procedure and evidence, initiating processes and court forms are crucial to litigants accessing the justice system and to the cost impact they have on the system.[113] Sir Gerard Brennan has said that:

> Procedural changes have to be made in all courts not only to assist litigants but to assist the courts cope with the burden of litigation in which one or more of the parties is unfamiliar with the practice and procedure of the court and even with the nature of the issues which the court has jurisdiction to determine.[114]

Specific proposals to simplify practices, procedures and the law of evidence are considered in Volume 2.

- Information through technology

The law needs to be accessible. Accessible legislation requires physical accessibility. The harder it is to find out the current state of the law, the more costly any excursion into the courts becomes. Computer based consolidation of all primary legislation, with relevant explanatory and other information improves accessibility.

Although considerable progress has been made, a website operated by legally trained staff could be the most effective way of making services and advice available on a continuing and unrestricted basis to the public. It would be cost effective and interactive, extending to the provision of simple advice and checking of documents.

The Internet offers cost-effective opportunities to deliver information and to give advice to self-represented litigants. Operators of an Internet website could monitor and analyse demand. Most public libraries now provide Internet access. Access to legal information could be available through a LIAC model, 'one stop shop'[115] or kiosk model.[116] Reliance on ownership of a personal computer could be supplemented with access through computers provided at courts, libraries, advice centres, and Legal Aid.[117]

The Australasian Legal Information Institute (AustLII) provides free access to most contemporary federal and state judgments. Practitioners' Legal Electronic Access Services (PLEAS) is a Western Australian rules system service which carries ongoing electronic access to judgments with daily updates. The Ministry of Justice website has a 'virtual' courtroom and information on court processes.

However, care must be taken not to disenfranchise litigants, even lawyers, who are not computer literate.[118] The computers should not overtake the capacity of users or of the justice system.[119]

Proposal 7

Information sessions should be provided by all courts.

Proposal 8

All litigants, whether represented or not, should have visiting rights to court law libraries.

Proposal 9

Research should be conducted to determine the most effective use of information technology to inform and assist self-represented litigants.

Proposal 10

A 'one stop shop' information service should be introduced on a trial basis at selected courts.

CONCLUSION

What is justice for the litigant in person?

The combination of economic and access concerns raise the issues of 'what is justice', and the type of access to justice which should be available to self-represented litigants. Whilst no citizen should be precluded from accessing a court (more especially for economic reasons), access to justice may not mean access to a traditional court system. Some argue that tribunals were established to provide second rate justice to the underprivileged, whilst others

counter that there was no forum to deal with welfare rights, so it was either tribunals or nothing.[120]

Often justice is not achieved through an advocate in a trial. Rather it is by settlement achieved outside the court.[121] Countering criticisms that changes to the system … mean a lower standard of justice for some litigants', Cranston[122] cites Lord Devlin:

> The fallacy inherent in our High Court procedure of civil litigation is just that — that where justice is concerned, time and money are no object. We think of British justice as an ideal into which such sordid considerations ought not to enter. We refuse to associate with it such homely maxims as that half a loaf is better than no bread. But is it right to cling to a system that offers perfection for the few and nothing at all for the many?[123]

We acknowledge that '[t]he civil justice system consists of much more than the civil courts. It encompasses all the ways in which people can legitimately resolve disputes and enforce their rights and the obligations of others under the law'.[124] For, just as a lawyer's advice is fundamental to helping a person achieve a satisfactory resolution of a matter without ever needing to issue process so access to justice includes being available to get advice about a course of action even if it does not involve going to court.

Ultimately the provision of access to justice for the litigation process becomes a balancing of access with economics. Cheaper justice, rather than no justice, may be the choice of some reforms.[125]

Arguably there already is a differential justice system in place caused by economic considerations. Inaccessibility to the higher courts effectively means that people cannot litigate in those jurisdictions without a lawyer. Chief Justice Gleeson points to clear signs that governments, driven by costs considerations, are expanding magistrates' courts by increasing their jurisdictions, so that

> [f]or ordinary citizens the form of justice…which they are most likely to encounter in practice is summary justice administered in a Local Court by a magistrate. This reality has important implications for issues such as judicial independence, access to justice, and the cost of justice, judicial education, judicial ethics and the relationship between the courts and the public. There are clear signs that governments are turning to the expansion of summary justice as a means of responding to some of the pressures.[126]

Simple procedures and flexibility can provide the solution to access problems for many self-represented litigants. However, the essential requirement remains fairness, which can only be achieved by equality of treatment for all litigants.

SUMMARY OF PROPOSALS

1. Data should be collected to profile litigants; categorise their legal disputes; determine the cost of resolving matters; and assess the quality, nature and satisfaction of the results.

2. There should be training for all court personnel including the judiciary in methods of assisting and managing self-represented litigants.

3. There should be a manual for court staff and specific guidelines for the judiciary to assist in dealing even-handedly with self-represented litigants and other litigants.

4. Research should be undertaken to determine what resources are required by adjudicators to assist them in dealing with matters involving self-represented litigants.

5. A special self-represented litigants track should be considered for establishment in the higher courts managed by designated, specially trained staff and adjudicators. The Local Court should operate under the presumption that most litigants will represent themselves.

6. The possibility of engaging court-based and employed staff lawyers to assist judges, generally with research and particularly when dealing with self-represented litigants, should be explored. Such alternatives could include:

- A chamber magistrate's scheme complemented with other services;
- A duty counsel scheme for civil matters modelled on Legal Aid's duty counsel scheme;
- An advice scheme including financial counselling at courts:
- Requiring government-employed lawyers to participate as rostered court based advisers and consider ways to encourage lawyers to provide free advice to potential litigants;
- Creating a Law Access type organisation, or alternatively expanding Law Access, to coordinate volunteer and low fee advice and representation, provide shop front advice, and refer potential litigants to alternative diversionary bodies or to coordinate legal representation;
- Adopting a rule similar to Order 80 of the *Federal Court Rules*;
- Extending the Court Welfare Service or other community-based programmes to provide assistance not appropriately provided by court officers or lawyers.

7. Information sessions should be provided by all courts.

8. All litigants, whether represented or not, should have visiting rights to court law libraries.

9. Research should be conducted to determine the most effective use of information technology to inform and assist self-represented litigants.

10. A 'one stop shop' information service should be introduced on a trial basis at selected courts.

ENDNOTES

* The Law Reform Commission of Western Australia acknowledges Ms Nuala Keating for research and development of this topic.

1 This topic does not deal with people with unmet legal needs or those who do not litigate. See Ross Cranston, *Access To Justice: A Background Report for Lord Woolf's Inquiry* (1995) 1, 9 and Ch 2; Royal Commission, *Legal Services* (Cmnd 7648, 1979); Sir Peter Middleton, *Report to the Lord Chancellor on the Review of Civil Justice and Legal Aid* (September 1997) 9: 'The vast majority of actual and potential legal disputes do not involve court proceedings. Of those that do, only the minority (about 1%) reach a trial before a judge. The courts are nevertheless peculiarly important. They set the framework in which the rest of the system operates'. See also, Forrest S Mosten, 'Unbundling of Legal Services and the Family Lawyer' (1994) 2 (3) *Family Law Quarterly* 421; American Bar Association, *Consortium on Legal Services and the Public: Major Findings of the Comprehensive Legal Needs Study* (1994) 12; ALRC, *Costs Shifting – Who Pays for Litigation?* Report No 75 (1995) paras 3.51-3.58.

2 In the US they are called *pro se* litigants ('for one's own behalf': *Blacks Law Dictionary* (6th ed, 1990) 1221). Generally 'unrepresented parties' refer to people appearing in tribunals, as noted in ALRC, *The Unrepresented Party*, Background Paper No 4 (1996); Justice G Mullane, 'In Person Litigants' (Paper presented at Family Court of Australia Conference, Queenscliffe, April 1998) 1; Vince Bruce QC, 'Litigant in Person — Proposals for Reform', in Australian Institute of Judicial Administration (ed), *The Litigant in Person*, Discussion Paper (1993) 17-18.

3 Litigants who represent themselves should be distinguished from those who abuse the system or use the justice system abusively against others. We call these unreasonable and vexatious litigants and sub-section 2.11 deals briefly with these categories of litigants.

4 In 1994, the Access to Justice Advisory Committee recommended that the Australian Judicial Administration and the Australian Bureau of Statistics undertake a statistical collection programme for Australian Courts. This has still not happened. ALRC, *Costs Shifting*, above n 1, para 3.59. '…there is a need for better data…the lack of an overall guiding statistical body or guidelines has led to widespread inconsistency in the collection, grouping and reporting of these statistics.'

5 Cranston, above n 1, 151-152; Helen Gamble and Richard Mohr, 'Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: A Research Note' (Paper presented at the Australian Institute of Judicial Administration Conference, Melbourne, 1998).

6 ALRC, above n 2, 13: 'In the absence of data … it is difficult to reach policy conclusions about how best to assist litigants in person.' See also Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) paras 17.7, 17.47-17.68.

7 *Cachia v Hanes* (1994) 179 CLR 403, 415 (Mason CJ).

8 Mullane, above n 2.

9 ALRC, above n 2; H Powles et al, 'The Litigant in Person', in Australian Institute of Judicial Administration (ed), *The Litigant in Person*, Discussion Paper (1993) 8.

10 ALRC, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper 20 (April 1997) para 8.11.

11 An English study found, overwhelmingly, that even in tribunals, unrepresented parties were at a disadvantage. Even limited legal advice helped. Hazel Genn and Yvette Genn, *Report to the Lord Chancellor - The Effectiveness of Representation at Tribunals* (1989) 68, 70; Cranston, above n 1, paras 10.3-10.14. Unrepresented defendants are less successful than unrepresented plaintiffs and unrepresented litigants are disadvantaged in bargaining. Hazel Genn, *Hard Bargaining*. See also Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 *Modern Law Review* 393.

12 'Litigants in person are a problem for the adversarial system of litigation premised as it is on two equally matched sides able to present their respective cases with skill and in full. Indeed, where there is no legal representation, save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice, breaks down'. Patrick Devlin, *The Judge* (1979) 67.

13 *In the Marriage of Sadjak* (1992) 16 Fam LR 280, 283-84 (Nicholson CJ, Purdy and Nygh JJ). The lack

of legal representation and of a reliable interpreter were grounds for a new trial:'In this regard there is very little that a court can do. Its role is to decide cases as between litigants and it cannot perform that role and retain the confidence of litigants if it is proffering advice to one side or another. At the very least, an independent source of legal advice in the form of a duty lawyer should be available to such people in all registries.'

14 'The trial judge will be much more concerned with case management and will be expected to give closer attention to the definition of issues, to simplified proof of inessential issues, their acceptance in evidence, and exchange of witnesses' statements, the possibility of dispensing with oral evidence, where appropriate, and to limiting cross examination.' Sir Anthony Mason, 'The Role of the Courts at the Turn of the Century' (1993) 3 *Journal of Judicial Administration* 156, 165 and DA Ipp, 'Reforms to the Adversarial Process in Civil Litigation-Part I' (1995) 69 *Australian Law Journal* 705, 724.

15 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 130-131 paras 41-47]; 113 para 49.

16 Peter Sallmann, 'Observations on Judicial Caseflow Management' (1989) 8 *Civil Justice Quarterly* 129; Ipp, above n 14, 725.

17 Judith Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 374; Judith Resnik, 'Managerial Judges: The Potential Costs' (1985) 45 *Public Administration Review* 686, cited in Ipp, above n 14, 717.

18 Ipp, above n 14, 725; and DA Ipp 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365, 368.

19 Genn, 'Tribunals and Informal Justice', above n 11; Woolf, above n 15.

20 Genn, 'Tribunals and Informal Justice', above n 11: Cranston, above n 1; and Woolf, above n 15.

21 Genn, 'Tribunals and Informal Justice', above n 11, 404.

22 L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353. See also Genn, 'Tribunals and Informal Justice', above n 11, 406-407.

23 Ipp, above n 18, 368-369. Justice DA Ipp warns that 'There are other practical problems with an over-zealous copying of the inquisitorial system. The inquisitorial judge has the direction of the entire proceedings assigned to him or her. Thus, in the course of a trial, the civilian judge tends to be overworked, and the civilian advocate tends to be underworked. There are, accordingly, far more judges under the civilian system than under ours. There were 16.8 judges per 1 000 000 of population in England and Wales and 278 in Germany.'

24 Genn, 'Tribunals and Informal Justice', above n 11, 401.

25 'Unless the activities of representatives are thought to lead tribunals into allowing unmeritorious cases, the conclusion must be that representation increases the accuracy of tribunal decision-making. Representatives do this by furnishing tribunals with the information needed to reach reasoned decisions, based on all the relevant facts of the case, and on the law that relates to the case. In investigating cases, obtaining evidence, and advocating cases, representatives are ensuring that appellants whose cases have merit, are given the best possible chance of succeeding before the tribunal.' Genn and Genn, above n 11, 247.

26 Ipp, 'Judicial Intervention in the Trial Process', above n 18, 367; Sir Anthony Mason, above n 14, 161 referred to in Ipp, above n 14, 724; Ipp, 'Reforms to the Adversarial Process in Civil Litigation- Part II' (1995) 69 *Australian Law Journal* 790, 804.

27 ALRC, above n 10, para 8.28.

28 Ipp, 'Judicial Intervention in the Trial Process', above n 18, para 369.

29 At the hearing there is a need for special help in understanding the procedure followed during the hearing, presenting and closing the case and testing by cross-examination the evidence of an opponent. Woolf, above n 15, 130-131, paras 41-47.

30 Lord Woolf found that with greater intervention in small claims jurisdictions there were discrepancies between how litigants were treated from judge to judge, likely because with traditional judging there are rules of evidence and other practices and procedures which must be followed. Woolf, above n 15, 107-110, paras 23-35.

31 Perry, 'The Unrepresented Litigant' (Australian Institute of Judicial Administration, 16th Annual Conference, Melbourne, September 1998) 25.

32 *Panogopoulos v Southern Healthcare Network & Fountain* (Unreported, Supreme Court of Victoria, Smith J, No 3665 of 1987, 25 August 1997) is a recent case involving an application alleging bias by the judge due to excessive and one sided questioning.

33 *Panagopoulos*, ibid 10, 19.

34 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 325, Recommendation 291.

35 Lord Woolf, above n 15, 109 paras 31-32.

36 The role of the judge in small claims is not only that of an adjudicator. It is a key safeguard of the rights of both parties. In most cases, the judge is effectively a substitute for a legal representative. His duty is to ascertain the main matters at issue, to elicit the evidence, to reach a view on the facts of the matter and to give a decision. In some cases he may encourage the parties to settle. In doing so he would ensure that both parties have presented the evidence and called the witnesses germane to their case and that he had identified and considered any issue of law which is pertinent to the case in hand. He must also hold the ring and ensure that each party has a fair chance to present his own case and to challenge that of his opponent. And since there is only a very limited right of appeal, the judge's decision, very unusually, is final.' Woolf, above n 15, 108, para 26.

37 Genn, 'Tribunals and Informal Justice', above n 11, 411. Lord Woolf recommended that judges be prepared to adopt an interventionist approach in all cases involving an unrepresented party and that the handling of such cases should be carefully covered in judicial training. Woolf, above n 15, Recommendation 57. Dealing with litigants in person should be a core subject for judicial orientation according to Wood J in 'The Prospects for a National Judicial Orientation Programme in Australia' (Paper presented at the Australian Institute of Judicial Administration Conference, August 1992). The Civil Justice Review recommended a substantial expansion of judicial training in civil business and also the preparation of manuals on civil adjudication. *Report of the Review Body on Civil Justice* ('Civil Justice Review') (1988) 394 para 328, in Woolf, above n 15, 107-108, para 24.

38 The informality of the Small Disputes Division of the Local Court permits greater flexibility with a lesser insistence on strict adherence to the rules of evidence.

39 This approach entails allowing the parties greater latitude to develop arguments in their own way.

40 Professor John Baldwin, *Research for the Office of Fair Trading* (1994).

41 Woolf, above n 15, 109, para 31.

42 Ibid 108, para 26: Lord Woolf concludes that 'Conducting a small claims hearing is a highly skilled task. It is more demanding than the traditional judicial role, because controlling fluid procedures is more difficult and because the district judge has to assist both parties in presenting their cases before he adjudicates on it. In my view, it is essential that more extensive guidance and training should be made available to district judges, to enable them to carry out that role as effectively as possible.' Ibid 110, para 32. 'It is my view that any increase in the scope for judicial discretion should be accompanied by an increase in expertise and accountability.' Ibid 110, para 34.

43 Lord Woolf recommended judicial training by hands-on judicial control of cases and case-flow management . He said: 'In the small claims jurisdiction the need for training and a consistent approach to support an increase in jurisdiction is all the more necessary as most individual litigants appear in person. In addition, there will be from time to time a need for guidance as to best practice.' Woolf, above n 15, 110 para 35, Recommendation 44.

44 See *In the Marriage of N and M L Johnson* (1997-8) 22 FLR 141, which refers to the obligations of trial judges hearing cases involving litigants in person under Part V11 of the *Family Law Act 1975* (Cth).

45 Dr Kathryn Cronin, 'Continuing Education of the Judiciary and Court Administration: Future Needs' (Paper presented at the Australian Institute of Judicial Administration: Courts as Community Service Providers Conference, September 1998) 5. Genn, 'Tribunals and Informal Justice', above n 11, 411.

46 Lord Woolf said that research 'indicates … more fundamental differences among district judges in the way in which they dealt with evidence and applied the substantive law to small claims. As far as evidence is concerned some judges make an active attempt to fill in any gaps in the evidence…. Others simply reach the best decision they can on the basis of what is available … the district judges presented widely differing views about the extent to which they should be constrained by legal principles in reaching decisions in small claims…. Some saw it as their unequivocal duty to apply the principles of English law, while those at the other end of the spectrum spoke of a wider responsibility to 'do justice' even if that meant disregarding the strict requirements of the law and adopting a more common sense approach in some cases' in Woolf, above n 15, 109, paras 28 and 30.

47 Civil Justice Review, above n 37, para 328.

48 The District Court of Western Australia has a Benchbook containing a set of guidelines, step by step processes and relevant law to help deal with litigants in person in trials. Perry J recommended consideration of rules of court specially directed towards dealing with litigants in person: above n 31, 25. A recent US publication has this aim: Jona Goldschmidt et al, *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (1998).

49 A starting point may be the current relevant case law dealing with litigants in person in trials. Perry J, above n 31; DA Ipp, above n 14 and n 26; and Powles above n 9.

50 Order 1 rule 4A 'Supreme Court Amendment Rules (No 4) of 1996: Interview with DA Ipp J of the Supreme Court of Western Australia' (1996) 23 (9) *Brief* 14-15; Janet Martin, 'Case Management by Registrars' (1996) 23 (9) *Brief* 10-13; Steven Penglis & Craig Sanderson, 'Major Changes to the *Supreme Court Rules*' (1996) 23 (9) *Brief* 7-8.

51 'Supreme Court Amendment Rules (No. 4) of 1996: Interview with DA Ipp J of the Supreme Court of Western Australia', above n 50.

52 Cranston says that on a pure cost-benefit basis it might be better to provide public funds to reduce the number of litigants in person in the higher courts given the burdens they may impose and the more extended hearings which can result. Cranston, above n 1, 157; Ipp, above n 14; Powles above n 9, 8.

53 Contrary to common view, litigants in person in the Family Court often do not cause delays in chambers and hearings. In fact, it is more common that represented parties take more court time because litigants in person use fewer legal manoeuvres.

54 *Cachia v Hanes* (1994) 120 ALR 385, 391 (Mason CJ).

55 Murray Gleeson, 'The Future State of the Judicature' Judicial Conference of Australia Colloquium on the Courts and the Future http://www.gov.hcourt.au/c19 html.; *The Australian,* 9 November 1998, 2.

56 Woolf, above n 15, 113, paras 49, 66.

57 Sub-section 2.8 considers Local Court issues.

58 Jenny Thornton, 'The Unrepresented Litigant', (Commentator on paper presented at the Australian Institute of Judicial Administration Conference, Melbourne, 6 September 1998).

59 Civil Justice Review, above n 37, paras 351-354, Recommendation 48.

60 These include: one application form to initiate proceedings; acceptance of an informal application such as a letter; provision of basic and relevant information sheets, including a list of legal advice and welfare agencies; provision of 'T' or all the documents held by the relevant department regarding the matter and relevant to the appeal; an outreach service, or personal telephone contact to ensure the applicant understands the procedure, including the compulsory conference; a video of the hearing process; information on interpreters; and access to the Library and the librarian who will provide help to unrepesented parties. When parties are represented the applicant must provide a statement of issues and the respondent a statement of facts and contentions. If the applicant is unrepresented then only the defendant must provide a statement of facts and contentions.

61 A first conference is held to see if the matter can be resolved, or to adjourn the matter if the applicant needs to get some evidence or persuade the applicant that there is no merit in the claim. When a party is represented, conferences are listed for 30 minutes and, when unrepresented, 45 minutes. Directions hearings are more formal and are held for a particular purpose. Directions hearings are not held if the parties know what they have to do. Another conference can be arranged to encourage parties to revisit matters. If there is no resolution, the matter is programmed for hearing. Staff informally discuss issues unrepresented party is facing, including what evidence will be needed for hearing. Another conference will then be listed if a party is unrepresented, if necessary, to ensure that the matter is ready for hearing.

62 Normally, a represented party will provide a statement of issues. If a party is unrepresented, a conference is convened to work out the issues. Sometimes the conference registrar will write out the issues, particularly if more evidence is required. A more formal directions hearing will then be held for a particular purpose. If a party is unrepresented, conference registrar informally will discuss the issues the party is facing and the evidence required to prove them. If a party is represented, they provide a statement of facts and contentions which, it is hoped, will narrow the issues in contention.

63 Middleton, above n 1, 89.

64 Middleton, ibid 89-99.

65 National Consumer Council, *Ordinary Justice* (1989) 369-370; Legal Action Group, *A Strategy for Justice* (1992).

66 Legal Aid prepared a self-help manual for people appealing to the District Court to have their drivers' licences reinstated. The District Court now provides this kit to all litigants in person, lifting a burden from the Registry staff and judges, at the same time enabling unrepresented people to put their case better. A draft kit for appeals against sentence, which must be heard in the Supreme Court is currently being reviewed by interested parties. A kit for appeals against conviction in the Court of Petty Sessions is also being prepared.

67 The Federal Court in Perth has an arrangement with Law Access whereby *pro bono* work is provided by barristers if a party is unrepresented and representation is critical. The head of Law Access, the Law Society's Shopfront Advice and Referral Service, Greg Mohen says this would occur about once per month.

68 Lords Woolf and Otton assume *pro bono* contribution from the Bar. Lord Otton, *Litigants in Person in the Royal Courts of Justice*, An Interim Report of the Working party established by the Judges' Council under the Right Honourable Lord Justice Otton (1995).

69 General Council of the Bar, *Quality of Justice: The Bar's Response* (1989) paras 9.25, 9.26, 4.7, 4.8. In England, the Bar's *pro bono* work is coordinated through the Free Representation Unit; 'With the

dedication of a small staff and many young barristers and students it copes with a large burden of representation of lay clients in those tribunals for which legal aid is not available.'

70 Ibid, para 9.26. See also American Bar Association Commission on Professionalism, 'In the Spirit of Public Sense: A Blueprint for the Rekindling of Lawyer Professionalism (1986) 112 FRD 243.

71 Nadine Strossen, 'Pro Bono Legal Work: For the Good of Not Only the Public, but Also the Lawyer and the Legal Profession' (1993) 91 *Michigan Law Review* 2122, 2132, referred to in Christopher Sclafani Rhee, book review of *The Law Firm and the Public Good* (1995).

72 Rhee, ibid 12.

73 Mosten, above n 1, 422-423; 'A lawyer can offer discrete services like (1) options, inside and outside the courthouse, for resolving the case without adjudication. (2) advise the client and offer an experienced assessment of proposed settlements or other course of action. (3) role-play strategies and techniques in a simulated negotiation to prepare the client for actual negotiations. (4) offer a psychological or negotiating profile to help the client deal with the other spouse and/or opposing counsel. (5) assess legal strengths and weaknesses in the client's case, helping the client formulate positions for negotiations and/or court hearings. (6) provide computer printouts on child and spousal support guidelines, develop budgets…help the client develop a realistic economic plan. (7) refer the client to necessary ancillary professionals.'

74 Woolf, above n 15, 129, para 40.

75 Mosten, above n 1, 437.

76 Barbara Kate Repa, *Client Library: A Novel Approach for Law Firms* (1992).

77 'The non-litigation calendar is an example of symptomatic preventive lawyering. Most preventive practice currently focuses on symptomatic needs flowing from past client problems, disputes or even litigation.' Mosten, above n 1, 443.

78 'If the need for ancillary legal services for *pro se* litigants is also in the public interest, civil immunity is necessary, provided there is proper lawyer-client contractual foundation limiting the scope of services rendered. Contracts would set forth the nature and scope of the services to be rendered compensation and adequate disclosures and waivers.' Mosten, above n 1, 433-434.

79 Woolf, above n 15, 129, para 40.

80 Mosten, above n 1, 430.

81 Ibid 434.

82 Ibid 425-426.

83 Penglis & Sanderson, above n 50, 7-8.

84 A Zuckerman, 'Access to Justice: The Lessons of History' (Paper presented at the Australian Institute of Judicial Administration Asia-Pacific Courts Conference, Sydney, October 1997) 2 and 3.

85 Abraham Lincoln, *Notes for a Law Lecture* (1 July 1850); Bruce Boehle, *The Home Book of American Quotations* (1967).

86 Woolf, above n 15, 22.

87 Woolf, above n 15, Recommendations 52, 53; Civil Justice Review, above n 37, 364-366, para 5.

88 Cranston, above n 1, 151.

89 The Ontario Civil Justice Review differentiated evaluation from screening 'Evaluation does not refer to a consideration of the controversy on its merits, although it may lead to discussions along those lines. It refers to the notion of examining the dispute with a view to assigning it to the appropriate administrative and processing route. 'Screening' refers to the exercise of making that assignment. In combination, these two techniques make a beneficial tool for the effective management and administration of cases in the system.' Ontario Civil Justice Review, *First Report* (1995) 219.

90 Ibid; see also sub-section 2.3 which deals with Alternative Dispute Resolution.

91 The NSW Health Commission and the Building Services Corporation provide mediation programs, which divert disputes away from the legal system.

92 Tamara Goriely and Tom Williams, *Resolving Civil Disputes: Choosing Between Out-of Court Schemes and Litigation – A Review of the Literature*, Research Series No 3/97 (1997) 116-117.

93 These alternatives to one on one legal assistance loom increasingly important if they can offer a cheaper, but no less effective, service to the individual…In moving away from traditional legal assistance we need to be clear about the sacrifices this might entail. Access and cheapness might be at the expense of outcome and fairness. The totally unassisted person is typically a vulnerable person…we must be realistic about our concerns. In many respects there is little choice about traditional legal representation – the fact is that in many forums it is not available and there is little chance that it will become available in the foreseeable future, at least if it is to be publicly subsidised. This demands that we think more creatively about alternatives to traditional legal representation. Cranston, above n 1, 144-145.

94 Woolf, above n 15, Ch 18, 136-147.

95 The Franks Committee summarised the attributes or descriptive characteristics of tribunals back in 1957: '…tribunals have certain characteristics, which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.' Franks Committee, *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218/9, 1957) in Genn, 'Tribunals and Informal Justice', above n 11, 396.

96 As Genn says 'Such tribunals have historically been viewed as cheap, non-technical substitutes for the ordinary courts for a wide range of grievances and disputes, in which parties can initiate actions without cost or fuss. Tribunals in the UK have been largely overlooked by scholars concerned with developments in informal justice, who have tended to focus on small claims procedures, conciliation, mediation and arbitration. This omission may be because the history of tribunals pre-dates the contemporary trend towards informalism, and because tribunals do not themselves represent 'alternatives' to courts'. Genn, above n 11, 393-394.

97 Civil Justice Review, above n 37, 63, para 349. See also Chs 6 and 8.

98 ALRC, above n 2, 11; Powles et al, above n 9, 8; General Council of the Bar and the Law Society, *Civil Justice on Trial – The Case for Change Report by the Independent Working Party* (1993) 65.

99 Cranston, above n 1, 157, Cranston recommends that 'on a cost benefit basis it might be better to provide funds to reduce the number of litigants in person in the higher courts.'

100 Lord Woolf's fast track had the following features: case managed by a District or County Court judge who initially allocates to fast track; cases between a certain value (say £10 000 though acknowledging that cases may not be financially quantifiable); power to direct a preliminary hearing where a litigant in person, to assist the litigant in person in the preparation of their case; a set timetable of 20-30 weeks with a 'warned week' or fixed date for trial, with variation only on application and automatic sanctions for failure to comply otherwise; limited discovery, save in exceptional circumstances; generally no oral expert evidence but written questions can be put; where possible a single expert with power in the court to appoint; a limited trial time of say 3 hours to be allocated equally with judge's discretion to increase to a day; limited oral evidence from witnesses of fact supplemented as necessary with written submission and written evidence; limited discovery; fixed costs; reference to the law with acceptance of short written submissions only; short judicial reasons for decision; directions orders issued as a series of requirements which must be completed by specified dates: see Woolf, above n 15, Ch 7 paras 35-36.

101 Woolf, above n 15, Ch 16; Cranston, above n 1, 172-181; National Consumer Council, *Ombudsman Services* (1993); John Baldwin, *Monitoring the Rise of the Small Claims Limit: Litigant's Experiences of Different Forms of Adjudication*, Research Series No.1/97 (December 1997) 73-74. See also Marlene Winfield, *Far From Wanting their Day in Court: Civil Disputants in England and Wales* (July 1996); National Consumer Council, *A Community Legal Service: The First Steps* (April 1998); National Consumer Council, *Seeking Civil Justice: A survey of People's Needs and Experiences*; Tamara Goriely and Tom Williams, above n 92. Lord Chancellor's Department, *Access to Justice – The Small Claims Procedure*, A Consultation Paper (November 1997).

102 Ontario Civil Justice Review, above n 89, 219; The idea of the multi-door courthouse was developed by Professor Frank Sander, Bussey Professor of Law and the Associate Dean, Harvard University.

103 Woolf, above n 15, 226, Recommendation 47. 'There should be a duty advice scheme funded by legal aid at each of the courts identified as handling substantial levels of debt and housing work. Ways of providing more general assistance, by the provision of a Citizens Advice Bureau or similar facility at court centres where the workload would justify it, should be explored and the possibility of legal aid funding for such a service should be considered'. See also Woolf, above n 15, 227, Recommendation 56, and paras 126-129. See also ALRC, above n 2.

104 Julia Harrison, Attorney General's Department, NSW.

105 Lord Woolf recognises the importance of properly staffed information desks at the entrances to courts: see Woolf, above n 15, 122-123, para 18. He recommended: 'All the Civil Justice Review's recommendations on the provision of information and advice to litigants should be fully implemented.' See also Woolf, above n 15, 22, Recommendation 53.

106 Since the 1890s, the NSW Local Courts have provided a system of chamber magistrates, who are employed by the courts and thus are part of the administration but they do not adjudicate.

107 The Chamber Magistrates Service in NSW Local Courts, Discussion Paper (NSW: Attorney General's Department, October 1998).

108 Canadian Bar Association Task Force, *Report on Systems of Civil Justice* (1996) 54-55, para 2.3.

109 Ibid 54. Information on dispute resolution options should be available from at least three sources: the legal profession, use of computer sites in courthouses and other public and community facilities, and court based information services.'

110 Ibid 54. 'The services provided could range from self-help publications to interactive computer

systems that answer questions and generate standard pleadings and forms, to legal clinics and seminars on topics of recurring interest.'

111 See Ontario Civil Justice Review, above n 89; Access to Justice Advisory Committee, above n 6, para 2.98.

112 They include through advertising, information booklets, brochures and pamphlets produced by the Legal Aid WA (LAWA), Community Legal Centres (CLCs) the Law Society, Ministry of Justice, etc; the Francis Burt Education Centre, free consultations with lawyers, school course, government departments, especially via pamphlets about their services, TAFE courses, self-help kits, especially those provided by LAWA and CLCs, legal information sheets produced by government, non-government and private law firms, 'Do it yourself workshops' and (kits) conducted by LAWA and CLCs, LAWA training programme for community workers, provision of information and talks to schools community centres and special interest groups by lawyers and judicial officers, provision of information in courts, media liaison officers, access to government employed advisers and lawyers eg Ministry of Fair Trading and Ombudsman, media coverage, legal education, including by video and computer programmes, public libraries, and the Internet.

113 Cranston, above n 1, 154, para 10.22.

114 Sir Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33, 43.

115 The 'one stop law shop' concept is where potential litigants can obtain advice and have access to a reference library, legal forms and office equipment, which is essentially self help with legal advice. This would be similar to Legal Aid's Minor Assistance Programme, with the addition of computer access.

116 Technological innovations, including kiosks, already provide a means of assisting litigants through computer software programmes. These can, by themselves or with the assistance of advisers or court staff, guide litigants through the possible range of remedies, the criteria for choice of the appropriate dispute resolution system, the setting out of key facts, the necessary form filling and the requirements of the procedure for documents, expert or other evidence. Woolf, above n 15, 123; 'An Arizona court introduced a Self-Service Center to help unrepresented litigants in a number of ways, including with the following services: a full set of re-written and simplified forms; written explanations of most domestic relations and probate processes; rosters of lawyers and mediators who are willing to provide 'unbundled legal services' or act in particular aspects of the matter; and an automated telephone system with 120 lines through which advice can be sought, information on social services and mediation, services which can be obtained through a home computer with modem access, and a list of tips on self-representation,' Stephen Parker, *Courts and the Public* (1998) 110.

117 Lord Woolf took the view that the provision of such kiosks or other IT facilities need not be limited to the court premises but versions for individual use could be in libraries, law centres, and post offices. Lord Woolf, *Interim Report*, above n 15, 119. See also Canadian Taskforce Report, above n 108, 54.

118 See ALRC, *Technology – What it means for Federal Dispute Resolution*, Issues Paper 23 (March 1998) paras 6.29-6.33.

119 Ontario Civil Justice Review, above n 89, Ch 18.

120 Genn, 'Tribunals and Informal Justice, above n 11, 393-397.

121 '…talk of litigated cases and of vindicating rights, developing the law and preserving the rule of law… Clearly… are all very important. But a great deal of the courts' work is handled by court staff, such as debt and housing work, which judges and lawyers never see. Much also occurs outside the court in the shadow of what happens in the courts — settlements are influenced no doubt by decisions on substantive law, but also by a whole range of other non-legal factors. It is for reasons such as these that …others regard the litigant as paramount.' Cranston, above n 1, 11-12, para 1.23.

122 Ibid 69, para 5.21.

123 Ibid: Cranston quoted Lord Devlin from Michael Zander, *Cases and Materials on the English Legal System* (6th ed, 1993) 489.

124 Middleton, above n 1, 9.

125 There are various pressures causing judges and magistrates to be more interventionist in hearings including budgets and financial pressures to use court resources expeditiously and efficiently; duty to assist litigants, per se; increasing numbers of litigants in person; and judicial responsibility to find the truth. That is, that lack of funding and resources have compelled the need to shorten trial time, save costs, and maximise earlier settlements. The justification for this is the injustice to those waiting to have their day in court but also a greater community intolerance of parties with money using and abusing the system to their own advantage. Ipp, above n 18, 368.

126 Gleeson, above n 55, 3. See also Cronin, above n 45.

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Appendix 1

Judges' Dos and Don'ts in a Civil Trial

by Justice T Smith of the Supreme Court of Victoria

The following are some 'Dos and Don'ts' for conducting civil litigation where a party is unrepresented which are relevant to the formulation of standard guidelines for civil proceedings. They reflect the view that a just civil trial requires both a genuine attempt to elicit the facts and an impartial hearing from the judge.

Public definition of role

Indicate, as soon as the nature and extent of the problem is clear, the role that the judge believes he or she must play; for example, that the judge sees his role as requiring more questioning than normal, that the judge will where necessary put to the parties' witnesses questions, intended not only to clarify, but also to test their evidence, because of the need to have a decision based on a proper examination of the facts if justice is to be done, and to be seen to be done. Indicate also that it will be necessary from time to time to advise the unrepresented party of his or her rights, both procedural and evidentiary and to assist the unrepresented party at times in organising the presentation of his or her case.

Judicial preparation

The unrepresented party may lack the ability to investigate the facts. In that situation the judge may find that it is necessary to examine the evidence closely, as the case unfolds, with a view to identifying relevant points that need to be canvassed with witnesses in case the unrepresented party does not do so.

Experts

The need for judicial intervention in questioning is more likely to arise in areas of expert testimony than in evidence concerning events that are in dispute as to which the lay party has personal knowledge. In the latter situation the judge is more likely to be able to take the position that both parties will in the end properly examine the evidence.

Timing of questioning

(a) Limit judicial questioning during cross-examination by counsel to minimise interruption of it and to avoid the appearance of trying to undo the effect of it.

(b) Delay questions until after both sides have completed examination in chief and cross-examination.

Manner of questioning

(a) Put the questions in a neutral way — for example, "Dr X says .... Do you have any comment to make on that?"

(b) Engage in a genuine questioning to elucidate the facts. This will in the end be seen to have produced answers that assist both sides and thus aid the appearance of neutrality.

(c) If it be necessary to put hypotheses to experts for the parties which, if correct, will assist the unrepresented party, present the questioning on the basis of an exploration of the evidence already presented and an exploration of the theories being advanced.

(d) Where the parties have different positions on facts that are in issue, put both positions to relevant witnesses, in particular experts, and seek their response.

(e) Avoid using leading questions unless it is clear that to do so will simply seek confirmation of what appears to be implicit in the evidence already led and/or it can be justified on the grounds of saving time. Also do not restrict use to questioning of one party's witnesses.

(f) Avoid, if possible, any questions relating solely to the credit of witnesses. If, however, there is anything in the evidence of parties' witnesses which has raised real concern in the judge's mind and affects their credibility, it is proper and arguably necessary that they be drawn to the witness's attention in a non aggressive manner — for example, evidence of one witness which appears to have been contradicted by other witnesses called by that party or an apparent inconsistency within the evidence given by the particular witness.

(g) Questions designed to test the represented party's case could be prefaced by statements such as: 'If X were represented by counsel, that counsel would probably ask you ... What would you say in response?'

Pleadings

Where the pleadings in the case have been prepared by lawyers for the unrepresented party, the parameters of the dispute as defined by the pleadings should be accepted. The judge should not suggest new ways of presenting the case. In that situation a judge could properly be accused of taking over the case. Where the case has not been pleaded by lawyers, what is to be done? Presumably at the outset steps would need to be taken to ensure that the issues are defined and that the unrepresented party is satisfied that they are adequately defined. In that situation again the judge should not attempt to later expand the parameters of the case. In cases of difficulty help should be sought from *pro bono* lawyers.

Advice about rights

It is necessary for the judge to be on the alert for the need to inform the unrepresented party of his or her procedural and evidentiary rights.

(a) Procedural: For example, if objection is taken to evidence led by the unrepresented party on the ground that it is irrelevant and the judge is of the view that no relevant issue is raised on the pleadings, the judge

should indicate to the unrepresented party that that is the case and that if the party wishes to pursue that issue further the party would need to amend the pleadings to raise the issue. The judge would advise the unrepresented party that that party has a right to apply for leave to amend and indicate to that party what would need to be done to exercise that The judge also needs to advise right. The judge would need to make it clear that he or she is not urging the unrepresented party to do so, but simply advising that party of his or her rights. The judge also needs to advise the unrepresented party of the consequences of a party closing its case and the right to seek leave to re-open.

(b) Laws of Evidence In the course of running, it will be necessary to alert the unrepresented party to his or her rights and to some of the traps that exist in the laws of evidence. For example, it is necessary to alert the unrepresented party to:

(i) the right to object to leading questions and hearsay and purported expert opinion evidence which may be outside the qualification of the expert giving evidence.

(ii) his or her rights in the event that the other party does not comply with the rule in *Browne v Dunn*, the rules in *Jones v Dunkel* and *Walker v Walker* and the right to seek leave to recall witnesses.

Assistance from counsel

To minimise the need for intervention in evidentiary matters, counsel for the represented party should be asked 'to endeavour to be scrupulous in the presentation of his or her client's evidence warning counsel that, if they appear to be overstepping the mark, you may intervene.'

As Justice Ipp warns: 'It is nevertheless accepted by American courts that the judge must wield the power of intervention with caution lest its exercise defeats its purpose: namely, fairness in the administration of justice…Yet caution must not deter activity where judicial passivity would invite injustice'.[1]

1 DA Ipp, 'Reforms to the Adversarial Process in Civil Litigaion — Part II' (1995) 69 *Australian Law Journal* 790, 803.

2.11

Unreasonable and Vexatious Litigants

This topic considers people who litigate in a manner which may cause undue harm to and incur unnecessary costs for opposing parties and other participants in the justice system. We call these individuals 'unreasonable' or 'vexatious' litigants. The unreasonable litigant is not necessarily self-represented. Parties with lawyers acting for them may act in an unreasonable manner. Unreasonable litigants in person often engage in solicitor shopping and excessive interlocutory or pre-trial legal manoeuvres. They may raise spurious defences, flout time limits to cause delays, pursue unmeritorious applications, refuse reasonable settlement offers, fail to pay orders for costs, and launch frivolous appeals. All of these actions impinge on the effectiveness and efficiency of the justice system and make the process of litigation more expensive for everyone.

This sub-section also considers those litigants to whom the *Vexatious Proceedings Restriction Act 1930* (WA) applies. There are people who habitually, persistently and without reasonable grounds bring legal proceedings. As is the case with the unreasonable litigant, the vexatious litigant may or may not be represented.

Some litigants who are classified as 'unreasonable' or 'vexatious' feel it is the 'system' which is unreasonable. Their original legal problem may have arisen from decisions by another governmental entity or agency. However, by the time disputes reach the justice system and the personal dramas are played out in court or excluded by pre-trial proceedings, the frustration of these litigants, whether they are represented or not, is overwhelming. While the Law Reform Commission of Western Australia has received a number of submissions from people who feel abused by the 'system' as a whole, and the 'justice system' in particular, their specific problems are not considered here.

UNREASONABLE LITIGANTS

Unreasonable litigants in person are often people:

> who have fallen foul of the legal system and the legal profession through muddleheadedness and inadequacy…. Often they go from solicitor to solicitor with ever mounting bundles of documents in hopeless disorder, making periodic appearances in court to keep their case alive or to seek a remedy for one that is plainly dead [or] "professional litigants in person" … are obsessed with the legal process and treat it as a hobby, issuing writs against all who incur their displeasure…. A few are plainly activated by spite and the desire for revenge, or by exhibitionist tendencies.[2]

A number of factors contribute to opportunities for represented litigants as well as litigants in person to behave unreasonably when pursuing claims. These include:

- rules which enable excessive procedural activity;[3]
- apparent court leniency towards litigants in person; and
- over-indulgence to recalcitrant represented parties .[4]

There is a natural reluctance to terminate the right to litigate. Judges are conscious of the disadvantages of a person being unrepresented in that a valid claim might be lost due to an inability to articulate it. But, there is also a perceived failure to recognise the emotional and financial impact of unreasonable litigants on other parties.[5]

In the case of seemingly genuine litigants in person, case management can help, initiate, guide, and possibly resolve issues in dispute. But with potentially vexatious or unreasonable litigants, case management is essential in order to keep very tight control.

Whether or not a litigant is unreasonable, or even vexatious, should be considered at an early stage in the proceedings by ascertaining whether the litigant's action has any real legal merit. This does not occur systematically. Instead, innocent parties can be dragged through the courts, often at great financial and emotional cost, for a decision to be made at the end of a long legal road that the claim never had any merit in the first place. The vindicated party frequently has no practical opportunity to recoup even taxed costs, let alone the actual out of pocket costs. The result is 'delay, wasteful use of legal resources, hardship to litigants and an erosion of confidence in the administration of justice.'[6]

Unreasonable litigants constantly appeal. For example, in the Supreme Court, they take appeals from registrars to masters, from masters to judges and from a single judge to three judges, and so on, to the High Court.

A court has an inherent right to control an unreasonable litigant. But despite radical changes which have occurred in the administration of justice[7] involving greater intervention, epitomised in case management reforms, not enough

appears to have been done to control unreasonable litigants – represented or not — and all the problems they cause.

There needs to be a greater awareness of the financial impact of unreasonable behaviour on other parties. A court has to balance the rights of both sides for '…it must be remembered that there are two parties at least to be considered where justice is being administered, and while a person of small means is not to be forgotten, his antagonist should also be remembered.'[8]

Chief Justice Doyle of South Australia said:

> The court must be careful not to be unduly indulgent to litigants in person. Banks and other lenders, like other litigants, are entitled to have their rights respected by the courts and are entitled to insist that wholly unmeritorious defences be despatched at an early stage.[9]

Judicial case management

All matters are case managed in the Supreme Court, usually by Registrars, save for the Expedited List and the Long Causes Lists, which are case managed by judges. An option already suggested is having all matters involving litigants in person case managed by a judge.[10] Benefits include immediate access to a judge who would be empowered to decide all interlocutory issues, which registrars cannot. This would limit or eradicate the necessity for appeals on interlocutory matters, reducing the possibility of the matter being sidetracked by such appeals. Registrars' decisions are open to appeal as of right and some unreasonable litigants in person are renowned for consistently appealing, irrespective of merit. Judges, given their primary decision-making function, are likely to be more confident about making final decisions and, thus, be firmer with litigants in person.

Preliminary screening of cases or early evaluation of grounds of claim

Further screening processes or stages must be built in to the early stages of processing, with the aim of both helping litigants in person to take appropriate courses of action whilst also encouraging only meritorious actions (to the extent that such a feature may be assessed without a trial) to proceed. Early evaluation of the case by a judge may encourage reconsideration of the need to litigate.

A judicial self-represented litigant track procedure, as outlined in sub-section 2.10, provides opportunities to create a more efficient and fairer system of justice for litigants in person and other parties. It could be used to facilitate the early screening or vetting of originating or interlocutory applications or appeals. Screening would serve the purpose of providing a barrier or filter to prevent or put a brake on unmeritorious processes being pursued, and identify those which would be more suitably diverted.

There are various ways to put some positive controls or monitoring on the filing of process by litigants. Order 67 Rule 5 of the *Supreme Court Rules*[11]

provides a screening precedent, but it needs development. It could be improved to include process being issued 'frequently', and to reflect that any screening take into account the 'manner of conduct' of an action.

Special provision could be made for circumstances where a litigant has a history of regularly issuing process without cause. For example:

(a) An interested party could apply to the court (or if a self-represented litigant, the judicial case manager) for a screening order so that all applications filed after a point in a specific action be automatically reviewed *ex parte*.

(b) The judicial case manager, of his or her own motion, could order that a litigant be automatically screened. Judicial case management should assist a fresh earlier identification of unreasonable litigants. If a litigant has a history of regularly issuing process without cause, the case manager could direct that henceforth any time a particular litigant wished to file a fresh application, the litigant must first seek leave of the case manager judge.

Screening provides an opportunity for the court to correct obvious errors of the litigant, and possibly even help the litigant, especially if unrepresented, to get the application right, on similar lines to the conference process in the Administrative Appeals Tribunal. Other parties may never get to hear about some applications nor be required to respond constantly to them.[12]

Screening should differ from Order 67 Rule 5, as once a decision was made by the judicial case manager, screening would be mandatory, and any screening decisions would be made immediately by a judge without an intervening need for a registrar to get involved, thereby providing more certainty and removing another unnecessary step in the process.

Appeals

A discernible trend has developed for appellants in person to appeal automatically the decisions (of such bodies as the Builder's Registration Board) on the very day of the decision. Not only are these litigants in person unaware of the differences between tribunals and courts, especially the greater formality of the court, but they will generally not have had the benefit of any advice prior to appealing.

Arguably litigants, whether represented or not, need time to calmly digest a decision, obtain advice, and assess the pros and cons of appealing. Putting a brake on immediate appeals by a cooling off period could help. A moratorium on the lodging of all appeals in any jurisdiction, for 14 days from the date of the decision being appealed, should be considered. But there would then need to be provision for a stay on judgments where appropriate, as well as a mechanism to protect the potential erosion of a successful party's judgment.

Another brake on excessive appealing would be to require that any self-represented litigants, after delivery of judgment and prior to filing an appeal, be required to have an *ex parte* conference with the judicial case manager for an explanation of the judgment and discussion. A self-represented litigant may obtain a better understanding of what the judgment is about through this process. This would simultaneously provide a cooling off period and a brake on issuing of further process by appeal. The judicial case manager could even recommend that the self-represented litigant get some legal advice, referring the litigant to an advice agency.

Sanctions, rationing, barriers and costs

Proposals including the self-represented litigants track and a judicial case manager require powers including the ability to impose adequate sanctions for non-compliance, as well as incentives to comply. The aim would be not to penalise, but to deter excessive behaviour by unreasonable litigants.

As a means of curbing excesses, procedures could be rationed. In other words, the cost of procedural activities during the course of litigation should not approach or exceed the value of the dispute.

Litigants cannot be discriminated against simply because they are unrepresented but there is an argument for rationing in any case of unreasonableness. On the other hand, if the conduct of a litigant falls within the category of 'vexatious' or 'unreasonable', steps should be taken to deal with that person by amendments to the *Vexatious Proceedings Restriction Act 1930* (WA).

The Australian Law Reform Commission concluded the risk of an adverse costs order was an inefficient mechanism for deterring unmeritorious claims and defences.[13] It said

> The most effective way of controlling costs is to narrow the issues in dispute and to limit the evidence required. In many jurisdictions this is treated as an objective of case management. [14]

The Ontario Civil Justice Review,[15] recommended courts be more vigilant in exercising their costs sanctioning authority under the rules in cases of abuse regarding motions and motions procedure.[16] There should also be appropriate sanctions for failure to comply with case management timelines, including imposition of cost penalties, dismissal of actions and the permanent striking out of offending pleadings and affidavits.

Security for costs

Current security for costs arrangements fail adequately to protect innocent defendants from unreasonable and vexatious litigants. Stronger measures are required.

To assist with identification of unreasonable litigants in a security for costs application there should be disclosure on oath by the party wishing to litigate, of prior litigation, including whether the party has been involved in interlocutory applications, appeals, judgments, costs orders, and whether adverse judgments were satisfied.

If a court is not confident about granting security for costs against a plaintiff who is impecunious, bankrupt or has a track record of failing to meet prior adverse costs orders, then the merits of the case should be dealt with expeditiously. The judicial self-represented litigant's track case manager hearing security for costs applications should be able to make a thorough investigation of the merits of the case, possibly through an expanded summary judgment process, trial of preliminary issues or a mini-trial.

Proposals concerning unreasonable litigants

The *Supreme Court Rules* should be amended to include:

1. Provisions for security for costs against defendants.

2. In a security for costs application, default in paying any previous judgment or costs award, the financial state of a party and the manner in which the party conducts litigation, should be made relevant factors for consideration in the exercise of discretion to award security for costs.

3. If a party is impecunious, bankrupt or has a record of failing to pay costs, the merits of the case may be dealt with through expanded summary judgments procedures, preliminary issues or a summary hearing process.

4. If a litigant frequently issues proceedings, is impecunious, or has outstanding judgments or costs awards, the judicial case manager may ration, limit or apply proportionality principles to the matter.

5. In an application for security for costs there should be provisions for a party wishing to litigate to be compelled to provide a sworn statement of disclosure concerning any litigation that party has been involved in, in any jurisdiction and whether and when any judgment was satisfied.

6. A court to have the power to screen or review any application filed by an unreasonable litigant prior to acceptance for filing and or serving.

7. 'Process being issued frequently' should be a ground for requiring leave of the court to issue any fresh process.

8. There should be a cooling off period for the lodgement of appeals in any jurisdiction for 14 days from the date of the decision being appealed from, with ancillary mechanisms to stay judgment and protect the successful judgment at first instance.

9. There should be power for a Court to refuse permission to file the appeal papers of an unreasonable litigant without leave of the judicial case manager and leave may be made subject to first paying costs of the matter appealed from.

THE VEXATIOUS PROCEEDINGS RESTRICTION ACT 1930 (WA)

Concerns with the Act

Theoretically, the severest sanction available to control abuse of the legal process is the power to have a person declared under the *Vexatious Proceedings Restriction Act 1930* (WA).[17] Whilst a vexatious litigant may have legal representation, it is, in the main, litigants in person who are most likely to be affected by this legislation. When legislation to declare a litigant vexatious was first introduced in England, Lord Halsbury said:

> The object sought to be secured by the Bill was that there should be some protection to the person sued. It was quite true that in such cases as those to which he was directing attention, verdicts followed for the defendants, but it appeared to be forgotten that they had to appear to defend themselves, and to instruct counsel, and the result was that though they succeeded, they succeeded at a loss to themselves. It was to put an end to that wanton and vexatious course of procedure that this Bill has been devised. [18]

Under current Western Australian legislation, the Attorney-General, usually following complaint from a member of the public, makes application to the Supreme Court for an order that a person only be permitted to commence litigation after having first obtained the leave of the court.

The current Act has proved to be largely ineffectual.[19] Applications are rarely brought and are almost never successful. The existing procedure is time consuming and cumbersome. The test is narrow and there is a reluctance to 'declare' a litigant vexatious. The most recent Western Australian case authority on the legislation[20] is on appeal. Changes are required to make the Act more functional.

Problems with the Act include:

- a narrow test,
- coverage limited to commencement of proceedings, not the 'manner of conduct' of proceedings; and
- a limited category of parties who may bring application to have a litigant declared vexatious.

Currently, the Act is linked to the nature of the proceedings,[21] rather than the way in which they are conducted. The present Act (and various inherent powers of the court and rules) may in theory be used to control claims of a vexatious or abusive content, so long as they are issued habitually and persistently.[22] There is a practical difficulty under the Act in proving excessive or persistent behaviour. Making an application under the Act is burdensome. Registries have to be trawled for information relating to all the applications (although this will become easier with greater computerisation). But the details of actions, court processes and the outcomes are best known by the litigant in question and could be accessed through mandatory disclosure.

The Act should be expanded to include the conduct of proceedings and thereby to cover litigants who, having issued proceedings, act in a manner which is vexatious, abusive or unreasonable.

The current test of 'habitually and persistently and without any reasonable ground instituted or commenced vexatious proceedings' is too narrow.[23] The manner of or behaviour in conducting any action should be sufficient for a declaration. Lack of compliance with orders,[24] and non-payment of costs orders and judgments should all be relevant and indicative of unreasonable behaviour, as should the financial impact on other parties weighted against the assessed legal merit of the action.

The Act should be extended to cover proceedings before tribunals and quasi-judicial bodies.[25] Given that excessive issuing of interlocutory process and appeals are a major complaint about unreasonable litigants, the Act should also extend to encompass issuing of interlocutory and appellate proceedings.

The present Act only permits the Attorney-General to make application. The categories of persons permitted to bring application should be extended to include interested parties,[26] any court or tribunal,[27] as well as the Director of Public Prosecutions.[28] Courts should also be enabled of their own motion to deal with potential vexatious litigants immediately subject to the provisions of natural justice.

A court should, of its own motion, be able to consider whether the provisions of the Act apply to a litigant, including immediately upon hearing and dismissing a case, and making an order against a litigant.

The Act should also cover any third person or representative who acts in concert with the vexatious litigant. This would preclude a person using a spouse, agent, representative or a 'corporate veil' on behalf of the declared litigant, from acting against the spirit of an order (that is, any entity against whom an order may not otherwise be made). [29]

There should also be reciprocal recognition of any orders made under similar legislation in other jurisdictions.

A party who is precluded from issuing proceedings without leave[30] should arguably be subject to closer scrutiny by the courts if leave is granted to proceed with a proposed suit. This would ensure the matter does not go off the rails. Consideration could be given to any court hearing the application having a discretion to grant only conditional leave[31] to ensure control of the future behaviour of that litigant including the protection of other parties and the minimisation of wastage of resources. Currently the court cannot differentiate as to how claims are dealt with,[32] beyond simply rejecting an application or upholding the application by granting leave to issue.

Proposals concerning vexatious litigants

The Vexatious Proceedings Restriction Act 1930 (WA) should be amended as follows:

1. The test of a vexatious litigant should include the issuing of process that is unreasonable and unmeritorious, without it being linked to frequency.

2. Standing to bring an application to have proceedings 'declared' vexatious should include, along with the Attorney-General, a Registrar or equivalent of any court or tribunal covered by the legislation, the Director of Public Prosecutions, or with the leave of the court, any interested or aggrieved person.

3. The Act should be amended to include, as part of a declared litigant's behaviour, actions of a third person or representative acting in concert with the declared litigant;

- issuing process or proceedings in tribunals or equivalent bodies including quasi-judicial bodies;
- issuing interlocutory proceedings and appeals, to be indicative of or relevant to the conduct of any proceedings;
- any failure to meet deadlines, lack of cooperation (including defaults in the settlement process), non compliance with orders, and possible delaying tactics to be indicative of or relevant to the conduct of any proceedings; and
- single actions may be the subject of an application.

4. All Western Australian courts should have the power to consider the frequency of issuing applications, including interlocutory applications

and appeals, and the history of non-compliance with orders and judgments by the litigant regardless of the merits of the action.

5. A court granting leave to a declared litigant to institute proceedings or to continue, shall have discretion to make such leave to issue or proceed conditional.

6. Conditions for leave to issue or proceed should include security for costs, representation by counsel, a limit to the number of interlocutory proceedings regarding a particular party or a particular aspect of a claim.

7. The Court's discretion in making a conditional order for leave to issue or proceed should include making an order about the particular litigation, a particular aspect of the litigation, a particular class of litigation, all litigation, or the commencement of any specified type of legal proceeding. This may include a particular person or class of persons forever or for a limited period.

8. Any court, of its own motion, at any stage of proceedings and without the need for an application under the Act (subject to natural justice being provided to the litigant)should have power to make an order declaring the litigant vexatious where it appears to the court that there are proper grounds for the making of such an order.

9. Any court, tribunal or quasi-judicial body should be able to refer a matter to the Attorney-General for consideration of an application being made under the Act where it appears to the court, tribunal or quasi-judicial body that there are proper grounds for such an application.

10. The litigant, the subject of an action under the Act should provide, on oath, a schedule of all applications, motions, summonses, writs and appeals which the litigant has filed in any court or tribunal. In addition the litigant should provide, on oath, a schedule of all orders relating to such matters and a history of compliance, including final orders thereof and judgments and subsequent compliance.

SUMMARY OF PROPOSALS

Unreasonable litigants

The *Supreme Court Rules* should be amended to include:

1. Provisions for security for costs against defendants.

2. In a security for costs application, default in paying any previous judgment or costs award, the financial state of a party and the manner in which the party conducts litigation, should be made relevant factors for consideration in the exercise of discretion to award security for costs.

3. If a party is impecunious, bankrupt or has a record of failing to pay costs, the merits of the case may be dealt with through expanded summary judgment procedures, preliminary issues or a summary hearing process.

4. If a litigant frequently issues proceedings, is impecunious, or has outstanding judgments or costs awards, the judicial case manager may ration, limit or apply proportionality principles to the matter.

5. In an application for security for costs there should be provisions for a party wishing to litigate to be compelled to provide a sworn statement of disclosure concerning any litigation that party has been involved in, in any jurisdiction and whether and when any judgment was satisfied.

6. A court to have the power to screen or review any application filed by an unreasonable litigant prior to acceptance for filing and serving.

7. 'Process being issued frequently' should be a ground for requiring leave of the court to issue any fresh process.

8. There should be a cooling off period for the lodgement of appeals in any jurisdiction for 14 days from the date of the decision being appealed from, with ancillary mechanisms to stay judgment and protect the successful judgment at first instance.

9. There should be power for a court to refuse permission to file the appeal papers of an unreasonable litigant without leave of the judicial case manager and leave may be made subject to first paying costs of the matter appealed from.

Vexatious litigants

The Vexatious Proceedings Restriction Act 1930 (WA) should be amended as follows:

1. The test of a vexatious litigant should include the issuing of process that is unreasonable and unmeritorious, without it being linked to frequency.

2. Standing to bring an application to have proceedings 'declared' vexatious should include, along with the Attorney-General, a Registrar or

equivalent of any court or tribunal covered by the legislation, the Director of Public Prosecutions, or with the leave of the court, any interested or aggrieved person.

3. The Act should be amended to include, as part of a declared litigant's behaviour, actions of a third person or representative acting in concert with the declared litigant;

- issuing process or proceedings in tribunals or equivalent bodies including quasi-judicial bodies;
- issuing interlocutory proceedings and appeals, to be indicative of or relevant to the conduct of any proceedings;
- any failure to meet deadlines, lack of cooperation (including defaults in the settlement process), non compliance with orders, and possible delaying tactics to be indicative of or relevant to the conduct of any proceedings; and
- single actions may be the subject of an application.

4. All Western Australian courts should have the power to consider the frequency of issuing applications, including interlocutory applications and appeals, and the history of non-compliance with orders and judgments by the litigant regardless of the merits of the action.

5. A court granting leave to a declared litigant to institute proceedings or to continue, shall have discretion to make such leave to issue or proceed conditional.

6. Conditions for leave to issue or proceed should include security for costs, representation by counsel, a limit to the number of interlocutory proceedings regarding a particular party or a particular aspect of a claim.

7. The Court's discretion in making a conditional order for leave to issue or proceed should include making an order about the particular litigation, a particular aspect of the litigation, a particular class of litigation, all litigation, or the commencement of any specified type of legal proceeding. This may include a particular person or class of persons forever or for a limited period.

8. Any court, of its own motion, at any stage of proceedings and without the need for an application under the Act (subject to natural justice being provided to the litigant)should have power to make an order declaring the litigant vexatious where it appears to the court that there are proper grounds for the making of such an order.

9. Any court, tribunal or quasi-judicial body should be able to refer a matter to the Attorney General for consideration of an application being made under the Act where it appears to the court, tribunal or quasi-judicial body that there are proper grounds for such an application.

10. The litigant, the subject of an action under the Act should provide, on oath, a schedule of all applications, motions, summonses, writs and appeals which the litigant has filed in any court or tribunal. In addition the litigant should provide, on oath, a schedule of all orders relating to such matters and a history of compliance, including final orders thereof and judgments and subsequent compliance.

ENDNOTES

* The Law Reform Commission of Western Australia acknowledges Ms Nuala Keating for research and development of this sub-section.

1 Helen Gamble and Richard Mohr, 'Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal: A Research Note' (Paper presented at the Australian Institute of Judicial Administration Conference, Melbourne, 1998).

2 Justice, *Litigants in Person* (1973) 7-8.

3 A Zuckerman, 'A Reform of the Civil Procedure: Rationing Procedure Rather Than Access to Justice (1995) 22 *Journal of Law and Society* 155. Zuckerman largely blames the *Judicature Acts.*

4 Ibid; Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 27.

5 Zuckerman, above n 3.

6 'Of all these remedies the ability of the court to summarily or peremptorily stay/dismiss an action is a key judicial weapon when dealing with abusive litigants. The alternative approach of seeking the amendment of abusive pleadings and/or allowing the litigation to go to full term and then deal with it according to substantive principles is far less satisfactory.' Simon Smith, 'Vexatious Litigants and their Judicial Control: The Victorian Experience' (1989) 15 *Monash University Law Review* 48, 50; N Williams, *Civil Procedure: Victoria* (3rd ed, 1987) paras 23.01.20. As Justice said 'we do not underestimate the need to protect parties who may be the victims of senseless, groundless or vindictive actions, and to protect the machinery of justice from time wasting or unseemly abuse', Justice, above n 2, 23.

7 Reflected in the Order 1 rule 4 of the *Supreme Court Rules*. The Woolf Reports constantly talk about the importance of eradicating delay, finalising matters as quickly as possible and reducing parties' legal fees; there is supposed to be much greater intervention by the justice system, both through case management and even in trials, because of pressure for expeditious justice and the need to limit the costs of court services; there is a much greater awareness of the costs of administering the justice system and the need to find ways to reduce those costs or use the funding in the most fair and equitable way possible; there is a greater consciousness of the high cost of legal fees and thus the need to finalise matters and the decreasing availability of legal aid; and a greater consciousness that even with deep pocket litigants the costs will flow on to the general public.

8 *Foran v Derrick* (1893) 14 ALT 284, 285.

9 *CBA v Marshall* (Unreported, Supreme Court of South Australia, Doyle CJ, Bollen and Duggan JJ, S6028, February 1997) 3.

10 Steven Penglis & Craig Sanderson, 'Major Changes to the Supreme Court Rules' (1996) 23(9) *Brief* 7.

11 It enables the registrar to refuse to file, issue or seal a writ, process, motion, application or commission if it appears to be an abuse of the process of the court or a frivolous or vexatious proceeding, without the party seeking to file the writ obtaining leave of the master or judge. The rule reinforces the power of the court to protect its own processes against unwarranted usurpation or its time and resources and to avoid the loss caused to those who have to face actions which lack any substance: P Seaman, *Civil Procedure in Western Australia* (1990).

12 *Supreme Court Rules* O 20 r 19.

13 ALRC, *Costs Shifting — Who Pays for Litigation?* Report No 75 (1995) para 17.3.

14 Ibid 34.

15 Zuckerman, above n 3. Ontario Civil Justice Review *First Report* (1995) 241, 242.

16 Ontario Civil Justice Review, ibid 241, 242.

17 Justice, above n 2, 63. Technically, a person is not declared a 'vexatious litigant' but a court makes a declaration that the person can no longer issue process without leave. For the purposes of this Review a person against whom such a finding has been made will be referred to as having been declared a vexatious litigant, which is how he or she is colloquially described.

18 *The Vexatious Actions Act 1896* (UK); 42 Parliamentary Debates (4th Series) Col. 1410.

19 Justice, above n 2, 20-22. See Simon Smith, above n 6, 65-66. Four have been declared in vexatious in Western Australia.

20 *Crown Solicitor for the State of Western Australia v Michael* (Unreported Supreme Court of WA, Wheeler J, Lib. No 980425, July 1998).

21 Albeit, as discussed elsewhere arguably the courts have power to control the manner of conduct of proceedings with a combination of various rules, inherent powers and Order 1 rule 4.

22 Both the inherent and conferred power of the court to control particular litigants are essentially restricted to existing, not future, proceedings. *Commonwealth Trading Bank v Inglis* [1905] 131 CLR 311. Wheeler J viewed the power to 'declare' an all or nothing provision so that if some claims had merit a declaration could not be made. (*Crown Solicitor for the State of Western Australia v Michael,* above n 20). There is a contrary view that 'In determining an application, the court does not have to determine reasonableness by examining each piece of litigation, but rather it should look globally at the number of actions brought, their general character and their results. A litigant can still be declared even though some actions may have a reasonable chance of success.' Smith, above n 6, 62: *Hutchinson v Bien Venu* (Unreported, Supreme Court of Victoria, Walsh J, 22 of 1970, 9 August, 1971,).

23 It links the substance of the claim (without any reasonable ground, vexatious proceedings) to behaviour or manner of conducting the claim (habitually or persistently) and it requires numerous processes to be instituted. It appears not to recognise that a single claim can be damaging to another party and the Act has no clear jurisdiction over, and thus cannot be used to control, a litigant who behaves unreasonably in conducting litigation without more.

24 A recurring criticism of unreasonable litigants is that they take every point, constantly taking interlocutory applications and appealing every decision, which add to the cost of proceedings both directly and because of delay and are a form of harassment as well. Such interlocutory actions are not covered by the Act. Another regular complaint about unreasonable litigants is that they play the Rules, taking every point and never complying with deadlines. These add to the costs which, if the unreasonable litigant is unsuccessful, may never be recovered.

25 Smith, above n 6, 60. *Hunters Hill v Pedler* [1976] 1 NSWLR 478.

26 They would be more familiar with the current state of the litigation. This should be subject to leave from the Attorney-General to avoid the legislation being used for abusive purposes or purposes for which it was not intended.

27 Registrars would know the extent of such litigiousness before the Attorney-General and so they are better placed to act and alert interested parties.

28 The Director of Public Prosecutions should be empowered to make application, given his responsibility regarding albeit only indictable prosecutions in this State, and the problems caused in the criminal courts by people bringing private criminal complaints and restraining order applications.

29 Smith, above n 6, 59.

30 Any decision about conditional leave should take into account the litigant's litigious history, strength of claim and previous behaviour regarding costs balanced against the right to litigate.

31 For example, the practice of the Victorian Supreme Court was only to give leave if the matter were to be carried forward with the assistance of counsel. Smith, above n 6, 64 referring to a Memorandum of Sholl J, dated 30 April 1952 in *Millane* (Unreported, Supreme Court of Victoria, File No 4360 of 1930).

32 Currently the court can declare the litigant and then give leave to appeal on meritorious matters.

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