18th AIJA ORATION

Managing Change in the Justice System

Address by

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MANAGING CHANGE IN THE JUSTICE SYSTEM

Introduction

I am greatly honoured to have been invited by the Australasian Institute of Judicial Administration to give the 18th oration in judicial administration. It is a particular pleasure to deliver the oration in this wonderful Banco Court, in a magnificent court building which has set the benchmark for future court buildings in Australia. I fear that it provides a benchmark which is unlikely to be reached in other jurisdictions. When the Council of Chief Justices met here recently in conjunction with the ceremonial opening of the building, the salivation of the Chief Justices of the other Australian States and Territories was palpable. Sponges were required. The justice precinct crowned by this building, in which all major courts and the bar are in close proximity, will enhance the efficiency with which justice is administered in this State, to the envy of other States and Territories.

The Traditional Owners

I would like to commence by acknowledging the traditional owners of the land on which this building is constructed, and in whose country we meet, the Turrbal people, and pay my respects to their Elders past and present.

The AIJA

I first joined the AIJA when I was in legal practice at the suggestion of Daryl Williams QC[1], who was then a colleague at the WA Bar. This should not be seen as the prescient anticipation of appointment to my current position - at the time I did not dream that judicial administration

[1] Later the Attorney-General for the Commonwealth

would ever form a part, let alone a significant part, of my daily duties. As it turned out, membership of the Institute prior to my appointment to the bench provided me with at least some appreciation of the issues that I was to confront. It is I think one of the great strengths of the Institute that it draws its membership from all those with an interest in judicial administration, be they judicial officers, legal practitioners, court administrators or academics.

Changes in the Justice System

It is the pretention of every generation to suppose that the conditions in which it is living, and the rate of change in those conditions is unprecedented and unique. Our generation is no different in this regard. Succumbing to that apparently inherent characteristic, it seems to me that the changes in the justice system over the 40 years in which I have been associated with that system are profound. I acknowledge that it is very difficult to make any meaningful comparison of the changes I have experienced with the changes experienced by other generations of lawyers. However, it is possible to make comparisons within the period of my experience, and within that period it seems to me that the rate of change over the last 20 years has been dramatic, and significantly greater than over the first 20 years.

ADR, Case Management and Therapeutic Jurisprudence

It seems to me that the changes that have been most significant over the last 20 years are the expansion and acceptance of alternative dispute resolution (ADR) in its many and varied forms, the adoption of pro-active case management, and the creation of specialised courts with the objective of bringing about behavioural change applying the principles loosely grouped under the heading of Therapeutic Jurisprudence. In this

address I will briefly describe each of these changes and their impact before addressing some of the controversial issues which have arisen from those changes, and the management issues which those changes pose for judicial administrators and policy makers. I will focus more attention upon ADR and case management than upon therapeutic jurisprudence, not because the latter is any less important, but because it is a relatively discrete and broad topic which could easily justify a lengthy address on its own.

Information Technology

I do not overlook the ubiquitous impact of information technology, audio visual systems, the world-wide web and social media, which have also had a profound impact upon virtually every aspect of our lives, including our courts. However, the ubiquity of these technological changes has meant that they permeate everything we do, making discrete analysis difficult, and in any case, consideration of the impact of these changes is well-trodden ground.

Alternative Dispute Resolution - A Misnomer

The expression "alternative dispute resolution" and its associated acronym ADR are now too well established to be changed. This is unfortunate. The terminology appears to have been adopted by those who saw the various techniques and processes collected under this heading as being in competition with curial adjudication, with curial adjudication being considered the mainstream or conventional method of dispute resolution and ADR as the alternative. There is a real risk that this implicit view of the relative use of dispute resolution processes perpetuates a myth.

The Endurance of Consensus

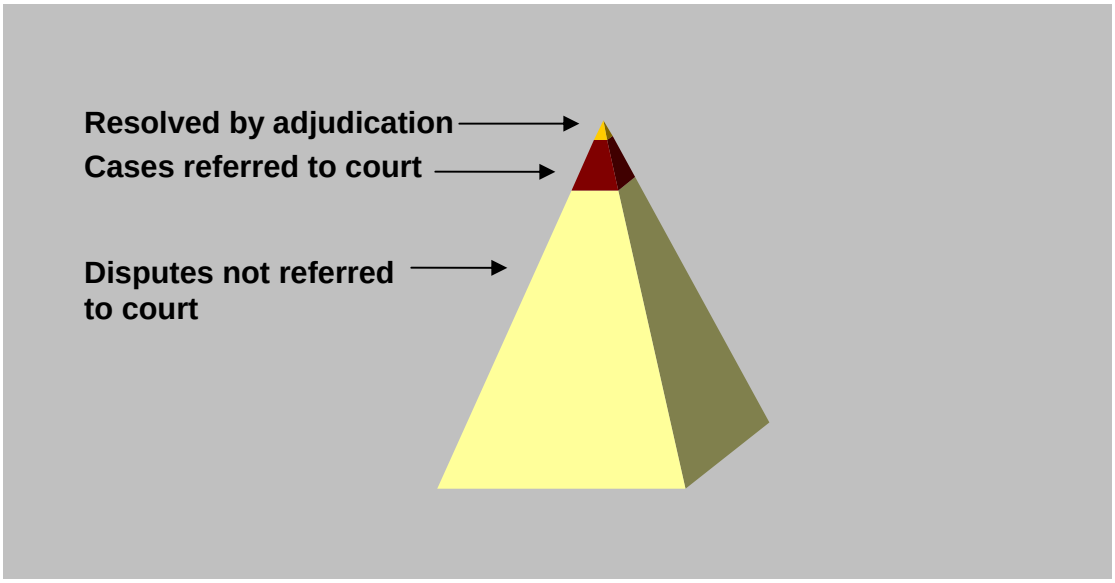
Achievement of a consensus has always been, and remains by far the most common means of resolving disputes in most, if not all, societies. In primitive societies, operating without the rule of law or courts to enforce laws or customs, intractable disputes would commonly be resolved by self help or the use of force. However, the use of force has its risks for all participants in the dispute. In *D v NSPCC*[2], Lord Simon of Glaisdale observed that the use of force in a primitive society carried with it the risk of counterforce and ultimately the risk of enduring vendetta. Generally speaking, those risks would only be taken if the dispute was serious and there was no other practical alternative. The risks for all associated with the use of force provided a strong incentive for consensual resolution in accordance with established customs and mores.

As civilisation progressed and societies became more sophisticated, systems of law evolved together with courts capable of enforcing those laws, enabling disputes to be resolved without resort to force, other than the coercive powers of the courts. However, while enthusiasm for litigation has waxed and waned in different societies at different times, the delay, uncertainty and expense associated with litigation has meant that, generally speaking, it has been regarded as a last resort to be utilised only when all other means of dispute resolution have failed. So, if one were to imagine all the disputes in a society as taking the metaphorical form of a pyramid, those disputes which are referred to a court might comprise only the uppermost layer of blocks on that pyramid.

[2] [1978] AC 171, 230

The Vanishing Trial

Of those disputes which are referred to a court, only a very small portion are resolved by adjudication. In the Western Australian Supreme Court, less than 3% of the cases initiated in our court are resolved by adjudication. This is fairly typical of Australian courts. Professor Peter Murray estimates that in the United States the percentage of civil disputes commenced that are actually decided by adjudication by a court is probably less than 2%[3]. A table provided by Dame Professor Hazel Genn QC in her Hamlyn Lectures 2008[4] shows that between 1990 and 2000, trials as a percentage of proceedings initiated in the Queen's Bench Division of the High Court of England and Wales hovered at around 0.5%. So, returning to the metaphor of the pyramid, the civil disputes within a society resolved by adjudication by a court could be regarded as comprising the smallest stone or pebble at the apex of the pyramid.



[3] Murray PL, 'The Privatisation of Civil Justice' (2011) 85 *ALJ* 490, 494
[4] Genn HG, *Judging Civil Justice* (2010) 35

Civil disputes which are resolved by curial adjudication are a minute fraction of the civil disputes which arise in our (or any) society. The cases that come within that minute fraction are not selected either by society or by the courts, but by the parties, who in the exercise of their autonomy, have decided not to resolve their dispute another way. It cannot therefore be assumed that the minute fraction of disputes which are resolved by adjudication are representative of either civil disputes as a whole, or any particular group of disputes, or that they necessarily give rise to complex issues of fact or law or issues of general principle. These considerations should be borne in mind when we come to assess the assertion that ADR may be undermining the fabric of our justice system and the rule of law.

What is meant by ADR?

The exhaustive identification of the various processes and techniques that could fall under the heading of ADR is a daunting task. For the purposes of this address, I will adopt a simpler approach, and use the expression to include any form of dispute resolution which does not involve adjudication by a court. Accordingly, ADR includes mediation, conciliation, early neutral evaluation, case appraisal, mini trial/case presentation, the use of referees, case conferencing, arbitration and hybrids of these various techniques and processes. Arbitration and the use of referees can be regarded as distinct from the other processes or techniques, all of which ultimately rely upon the consensus of the parties for the resolution of the dispute. By contrast, the determination of an issue by a referee, or the determination of a dispute by an arbitrator or panel of arbitrators is much more akin to the process of curial adjudication. These processes fall under the heading of ADR in my lexicon because they do not involve adjudication by a court.

The Relationship between ADR and the Courts

The definition of ADR which I have adopted necessarily means that ADR and curial adjudication are mutually exclusive. What then are the respective roles played by ADR and curial adjudication in the resolution of civil disputes?

The Role of the Civil Courts

It is reasonable to suppose that systems of law, and courts capable of enforcing those laws evolved at least in part to provide an alternative to self help and the use of force, and the adverse consequences associated with the use of force[5]. Civil justice systems in civilised societies have evolved to the point where they perform more important functions than reducing the risk of the use of private force and consequent vendettas. These functions have been stated more eloquently than I ever could by Prof Genn[6]:

> The machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. Bargains between strangers are possible because rights and responsibilities are determined by a settled legal framework and are enforceable by the courts if promises are not kept. Under the rule of law, government is accountable for its actions and will be checked if it exceeds its powers. The courts are not the only vehicle for sending these

[5] Jalowicz JA, 'Civil Litigation: What is it for?' in Dwyer (ed.) *The Civil Procedure Rules 10 years on* (2009) 51
[6] Genn, above m 4, 3

> messages, but they contribute quietly and significantly to social and economic wellbeing. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. If the law is the skeleton that supports liberal democracies, then the machinery of civil justice is some of the muscle and ligaments that make the skeleton work.

Normative Values

So, while resolution of a dispute serves the private interests of the parties to the dispute, adjudication has a public value which goes beyond those private interests[7]. That value lies in an authoritative statement of the law, of the rights of the parties to the dispute, and as to the manner in which those rights are to be vindicated. As Professor Marc Galanter has observed, these public pronouncements affect norms and standards of behaviour pertaining to the community generally, and not just the parties to the particular dispute giving rise to the pronouncements[8]. Public adjudication in the courts, as the third branch of government, has an important constitutional dimension. And, of course, the common law depends upon iterative development through the body of precedent being enlarged and modified to suit changing circumstances by public pronouncements made by courts in the adjudication of cases.

Grease in the Wheels of Commerce

Heydon J has also noted the economic significance of an efficient system of civil courts[9]. In *Aon* he cited with approval the following passage from the judgment of Rogers J in *Collins v Mead*[10]:

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[7] Hamlyn Lectures, 20

[8] Galanter M, 'The Radiating Effects of Courts' in Boyum and Mather (eds.) *Empirical Theories About Courts* (1983) 117; Hulls R, *New Directions for the Victorian Justice System 2004 - 2014* (2004) [2.3.1]; Department of Justice, Victoria, Australia, Justice Statement Chapter 2

[9] *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 [137]; (2009) 239 CLR 175, 223

[10] (Unreported, NSWSC, 7 March 1990)

> For example, if banks are unable to collect overdue loans from borrowers speedily, if small traders can not recover monies owed to them speedily the commercial life of the [c]ommunity is detrimentally [a]ffected. The consequences of delay in the hearing of a commercial dispute ... will impact not just on the two or three persons or companies who are the immediate parties, but may have an effect on the creditors of the business, on employees, and perhaps on other traders unrelated to the immediate dispute.

Heydon J went on to observe:

> Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

Powerful though these observations are, it is important to assess the economic significance of the courts bearing in mind the extent to which adjudication is in fact responsible for the resolution of civil disputes. Business enterprises more commonly and more quickly obtain financial certainty by consensually resolving disputes than by adjudication. This is, of course, not to deny the significance which the availability of courts ready and able to quickly and efficiently adjudicate upon civil disputes has upon the encouragement of consensus. Every judge and litigator knows that nothing focuses the attention of litigants upon the resolution of their dispute by agreement like the allocation of a trial date.

Transparency and Equality of Access

A prominent author in this field, Professor Judith Resnik, suggests that the civil courts provide a fundamental element of a democratic society, by providing a forum in which individuals and the State can present arguments in public as equals, and have those arguments adjudicated by an independent arbiter[11]. It is undoubtedly true in theory that in a liberal democracy like ours, all individuals and the State have equal access to the courts. However, practical access is somewhat different, given the intellectual and financial resources required to participate effectively in the court process.

The Constraints upon Adjudicated Outcomes

The normative and constitutional values of public adjudication must be assessed in the context of the significant constraints upon the adjudication process.

It is important to remember that the issues of fact resolved by a court are only those which the parties choose to present, and that they must be resolved on the basis of the evidence presented by the parties. In the adversarial system there is no practical capacity for a court to conduct its own investigations to establish the truth, nor is there any obligation upon the court to arrive at some notion of absolute or independent truth[12]. Courts are not commissions of inquiry, and can only view the facts through the prism of the evidence presented by the parties, which may or may not give a true view.

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[11] Resnik J, 'Courts: in and out of sight, cite and cite' (2008) 53 *Vill L Rev* 771, 806

[12] *Air Canada v Secretary of State for Trade* [1983] 2 AC 394

Similarly, courts are generally constrained to adjudicate only upon the legal issues presented by the parties, and have very little capacity to take the law in a direction not proposed by at least one party. The constraints imposed upon a court by the way in which the parties choose to present their case somewhat diminish the normative value of public adjudication. We should remember that the incentive of each party is to win, not to establish the truth or develop legal principles.

The point earlier made concerning the lack of any deliberative process or policies for the selection of the small fraction of civil disputes that will be adjudicated is also relevant. The curial evaluation of rights and behavioural standards occurs only in the context of a small subset of all civil disputes, which may not be representative of the entire set.

Further, courts are duty bound to provide the outcome which follows from the application of the law to the facts established by the evidence adduced by the parties. Often this means that one party will receive all that they want, and the other nothing. There is no capacity for a court to fashion a result "somewhere in the middle". In a number of major commercial cases in which I was engaged as a lawyer, an outcome which was going to mean a bonanza for one party and ruin for the other was a major factor driving settlement, because an outcome at the extremes was too horrible for the parties to contemplate. The risks were simply too great. ADR provides the parties with the opportunity to mitigate their risks.

Courts can only provide the remedies which the law permits. They cannot rewrite a contract or restructure a joint venture or provide many of the commercial solutions which will provide enduring benefits for the

parties. In a number of respects, ADR provides the parties with much more flexible outcomes and opportunities for resolution than can ever be provided by a court.

The Incremental Development of the Common Law - What if Mrs Donoghue had settled?

Unlike systems of civil law, where the decisions of the courts have no value as precedents, public adjudication is the life blood of the common law, without which it will wither and die. Those who extol the virtues of adjudication might rhetorically ask, "What if Mrs Donoghue had settled her case?"[13] Would the neighbour principle governing the duty of care in negligence ever have evolved?

There are a number of ways in which this rhetorical question might be answered. First, as Professor Genn points out, Mrs Donoghue was very fortunate to get her case to the House of Lords at all, she having been lucky enough to find a solicitor and counsel who would act for her on a pro bono basis. In order to get the case to the House of Lords, it was also necessary for Mrs Donoghue to declare herself to be a pauper. Had she not been prepared to take that step, the case would not have got there either. The point is that it is largely chance and circumstance which brings cases before the courts for adjudication, rather than some masterful design intended to secure the orderly development of the common law.

The second point to be made is the obvious proposition that if the neighbour principle had not been enunciated in Mrs Donoghue's case, there is no reason to suppose that it would not have been enunciated in some similar case shortly thereafter. The neighbour principle is of such

[13] *Donoghue v Stevenson* [1932] AC 562

general application that it did not require a case involving a snail in a bottle of ginger beer for its enunciation.

The third point to be made is that the influence of the common law is every day eroded by the increasing influence of statute law. One of the bastions of the common law, the law of tort is now subject to significant statutory incursion in all States and Territories of Australia. Perhaps the last bastion, contract law, is the subject of a review which may very well have, as its outcome, a proposal for statutory codification.

This is, of course, not to suggest that the courts do not have an important role to play in construing statutes. However, the enthusiasm of our legislatures for repealing and amending statutes necessarily means that a decision of a court based upon a construction of a statute is unlikely to have as enduring an impact as a decision of a court in the development of the common law.

Inequality of Bargaining Power

The proposition that ADR can produce injustice because it may give greater weight to the unequal economic bargaining position of the parties is not new. It was enunciated by Professor Fiss almost 30 years ago in the paper to which I have referred. However, as the Hon Geoff Davies has pointed out many times, parties with lesser economic resources are at a very significant disadvantage during the trial process. The economic reality in contemporary Australia is that legal aid is not available in civil disputes outside the area of family law (and even within that area is very limited) with the result that unless the case comes within that small category which will attract the interest of commercial litigation funders, a party without substantial economic resources must represent themselves,

and take the risk of a ruinous costs order against them. It is difficult to see how such persons could be at any greater disadvantage in settlement negotiations.

Authoritative Consent

Another criticism advanced by Professor Fiss was that settlement may lack what he called, "authoritative consent", in the sense that settlements may be motivated by the personal interests of the representatives of the parties (their lawyers or insurance companies) rather than the parties themselves. A related criticism is that advanced by Professor Murray, based on the absence of any meaningful external or independent scrutiny of the settlement outcome, which leaves the parties at the mercy of their own devices - unlike curial adjudication. Again, it is difficult for me to see how these aspects of the settlement process are materially different to the adjudication process. Generally speaking, parties surrender the conduct of a trial to their legal advisers, or their insurers, who may have their own motivations and interests. And, as I have noted, the court has no role of independent inquiry; it can only adjudicate upon the factual and legal issues presented by the parties who are therefore as much at the mercy of their own devices in the trial process as in the settlement process.

Judicial Review of ADR

The concerns underpinning these criticisms of the settlement process have led Professor Murray to recommend a form of judicial oversight and review of results and processes of mediation and arbitration. However, one of the great attractions of arbitration is the very limited scope for judicial review, increasing certainty and reducing cost and delay. In the absence of evidence of duress or coercion, it can reasonably be assumed

that parties who have agreed to resolve their differences following mediation have chosen that course, at least in part, so as to avoid further litigation. Any system of judicial review of outcomes or processes of mediation would be antithetical to the inferred objective of the parties.

Popular Dissatisfaction

Those of us who work in the justice system and who might be tempted to bask in the reflected glory created by lofty pronouncements on the virtue of adjudication can be brought back to reality by a reminder of the apparently inexhaustible supply of critics of that system. I have no difficulty remembering that the system has its critics, as many of them write to me regularly. Few of those correspondents have the eloquence of Dean Roscoe Pound who famously published a paper entitled "*The Causes of Popular Dissatisfaction with the Administration of Justice*" in 1906. More recently, the inquiry undertaken by Lord Woolf prior to his recommendation of the various reforms embodied in the *Civil Procedure Rules 1998* led him to conclude that the popular dissatisfaction and many of the causes of that dissatisfaction identified by Pound continued. The most pernicious aspects of the civil justice system identified by Lord Woolf, and relied upon to justify substantial reform of that system, including a commitment to ADR as a more desirable means of dispute resolution than adjudication, were complexity, cost, delay and uncertainty.

ADR

The Multi-Door Courthouse

By my definition of ADR, which includes any form of consensual dispute resolution, ADR is not new. What has emerged over the last 30 years or so, however, are techniques and processes specifically designed to

encourage the achievement of consensus including, most significantly, mediation, and the last 20 years or so has seen much greater resort to those processes. It seems fairly clear that the impetus for the development of these techniques and processes was the dissatisfaction with the civil justice system to which I have referred. It is no coincidence that the expression "multi-door courthouse" appears to have originated from a paper given by Professor Frank Sander of Harvard University in 1976 at a conference marking the 70th anniversary of the delivery of Roscoe Pound's paper on the causes of dissatisfaction with the justice system. The expression "multi-door courthouse" has, however, generated its own criticisms, to which I will return.

ADR Zealots

Some commentators argue that the development of ADR as a form of opposition to adjudication has infected the character of its adherents. Prof Genn has described the phenomenon in these terms[14]:

> Both the ideology and practice of mediation can encourage a zealot-like adherence among recent converts - perhaps people weary of adversarialism. New recruits to mediation often appear as shiny-eyed evangelists for whom litigation and adjudication are horrors not to be contemplated, while mediation offers a nirvana-like vision of the world rid of conflict, with only peace. For passionate adherents, there is no value in judicial determination, there are no legal rights, only clashing interests and problems to be solved.

Battle lines appear to have been drawn between those who regard ADR and adjudication as competing ideologies. Those who favour adjudication are disparaged as "adjudication romantics". Those wounded by this epithet counter with an assertion that the zealous proselytisation of

[14] Genn, above n 4, 20

ADR risks not only injustice, but the undermining of the courts and the rule of law. With some trepidation, I will now enter this fray.

The Adjudication Romantics v The ADR Zealots

One of the earliest critics of ADR was Professor Fiss of Yale Law School who in 1984 published an influential article entitled "Against Settlement"[15].

One of the criticisms raised by Professor Fiss in that article was that the promotion of ADR at the expense of adjudication treats civil courts as if their prime, or perhaps only function is to resolve the disputes that come before them, thereby ignoring or radically depreciating the many public values flowing from adjudication and to which I have already referred.

Courts are not Service Providers

This point was taken up by the Hon James Spigelman AC, during his term as Chief Justice of New South Wales. In a paper[16] in which he railed against the use of quantitative statistical performance indicators by executive government as a measure of the performance of courts, he disparaged the view that courts could be regarded as a service provider, providing services to litigants, in the same way as other agencies of government provide services to the public. In that context he wrote:

> A court is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes - these are all public purposes served by the courts, even in the

[15] Fiss OM, 'Against Settlement' (1984) 93 *Yale LJ* 1037

[16] Spigelman JJ, 'Judicial Accountability and Performance Indicators' (Speech delivered to the 1701 Conference, Vancouver, 10 May 2001)

> resolution of private disputes. An economist might call them "externalities" They constitute, collectively, a core function of government.
>
> The broader role of the courts is obviously true of the criminal law. But similar objectives, such as deterring conduct through a public process, are often served by civil justice. The constitutional role of the courts, particularly in the supervision of the exercise of public power which occurs in both criminal and civil courts, is likewise incapable of reduction to quantitative measurement.
>
> The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a similar character to that provided by legislatures but which has no relevant parallel in many other spheres of public expenditure. Managerial techniques appropriate for one part of the public sector are not necessarily applicable to another.

The characteristic eloquence and vigor of these words would incline one to place the Hon Jim Spigelman within the leadership ranks of the "adjudication romantics", a grouping in which he might well take some pride. However, it would be a mistake to infer that his endorsement of the important public values of adjudication supports an inference that he does not support the prolific use of ADR. It should be noted that Chief Justice Spigelman was a member of the Council of Chief Justices of Australasia when, in April 1999, the Council approved a declaration of principles relating to court-annexed mediation. The first two principles are in the following terms:

1. Mediation is an integral part of the court's adjudicative processes and the shadow of the court promotes resolution.

2. Mediation enables the parties to discuss their differences in a co-operative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from the process as soon as possible.

No Real Dichotomy

Further, in 2007 Spigelman CJ observed[17]:

> Increasingly, in-house counsel in commercial firms and the clients themselves are conscious of the cost and time benefits of successful mediation. The universal approach of commercial judges who case manage such litigation is to encourage mediation.

This leads me to my point (at last, I hear you say). There is no dichotomy of even tension between the endorsement of the public, democratic and constitutional values of adjudication and the endorsement of ADR as a mechanism for the private resolution of disputes. Adjudication has only ever applied to a minute fraction of civil disputes, selected by the parties for their own reasons in the exercise of their autonomy. Nothing has changed. Those parties who cannot, or choose not to resolve their dispute any other way can and do resolve those disputes by obtaining a curial determination which carries all the public and normative values and virtues which have been identified. Effectively what ADR has done over the last 20 years or so is to provide much more sophisticated mechanisms, and more focused opportunities whereby parties can resolve their dispute other than by public adjudication if they choose to do so.

Court Annexed ADR

My point is illustrated by a paper given by Chief Justice French AC[18] in which he joined with Spigelman CJ in rejecting the proposition that the court should be treated as simply one of a number of alternative dispute

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[17] Spigelman JJ, 'Commercial Litigation and Arbitration: New Challenges' (Speech delivered to the Indo Australian Legal Forum, New Delhi, 9 October 2007) (available on website of Supreme Court of NSW)

[18] French RS, 'Perspectives on Court Annexed Alternative Dispute Resolution' (Speech delivered to the Law Council of Australia Multidoor Symposium, Canberra, 27 July 2009) (available on High Court website)

resolution techniques, thereby ignoring the distinctive character of judicial function. He wrote:

> The concept of court-annexed ADR is well established and worthy of development in a way that better integrates the various options and provides a principled basis for their connection to the judicial process. I must, however, express a reservation about the use of the 'multidoor courthouse'. It is the courts and only the courts which carry out the adjudication function involving the exercise of judicial power. Their special position as the third branch of government is made explicit in the Commonwealth Constitution and is a matter of convention in the States. Importantly, the courts are not to be seen simply as one species of provider among a number of providers of ADR services.

It is clear that the issue for his Honour was one of focus and definition. That is apparent from the balance of his Honour's paper, in which the virtues of various forms of ADR, including court-annexed ADR and specifically court-annexed mediation were extolled, and in which reference is made to his Honour's personal experiences of ADR while a judge of the Federal Court, including his participation in mediation (including ex parte meetings with the parties) and early neutral evaluation. His Honour concluded:

> In my opinion, the term 'multi-door courthouse' may have the connotation that behind each door is a different mechanism for achieving the same or similar outcomes. But there is no doubt that the door into a courtroom is rather unique.
>
> In the Commonwealth Constitution it is the courts of the Commonwealth, including the High Court, and the courts of the States invested with federal jurisdiction which exercise federal judicial power. It is the third branch of government of which we speak. This is not just another provider of dispute resolution services in a market of different providers. The courthouse door is not just one door among many.
>
> I support, and have long supported, the provision of court-annexed ADR services. It is not only an aid to the earlier resolution of litigation, but can also be used as a case management tool to help

> the parties reduce the matters in issue between them. Nevertheless, it is in the public interest that the constitutional function of the judiciary is not compromised in fact or as a matter of perception by blurring its boundaries with non-judicial services. So long as the clarity of the distinction is maintained, and appropriate quality controls, including evaluative and cost-benefit assessments undertaken, then ADR has much to offer in connection with the judicial process.

Chapter III of the Commonwealth Constitution

The High Court has repeatedly emphasised the implied separation of the judicial branch of government from the other branches of government under the Constitution of Australia, and the importance of maintaining the integrity of the judicial branch of government. These considerations invalidate any attempt by either the Commonwealth or State legislatures to confer upon the courts of the Commonwealth or the States or Territories a function which is inconsistent with their integrity as a repository of the judicial power of the Commonwealth. In this constitutional context, it might be asked whether the annexation of ADR to a court, or participation in ADR by a judge is inconsistent with the judicial character of the court. Plainly, participation in a mediation would not involve the exercise of judicial power, but is it antithetical to the integrity of the court? As far as I am aware, this question has never been litigated. It is, however, addressed in a recent article in which it is concluded that there is no incompatibility between judicial participation in ADR and the constitutional integrity of the court[19]. Similar views have been expressed extra-curially by Justice Michael Moore[20] and Professor Sourdin[21].

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[19] Field I, 'Judicial Mediation, the Judicial Process and Chapter 3 of the Constitution' (2011) 22 *ADR J* 72

[20] Moore MF, 'Judges as Mediators: A Chapter III Prohibition on Accommodation?' (2003) 14 *ADRJ* 188

[21] Sourdin, T, 'Five Reasons why Judges Should Conduct Settlement Conferences' (2011) 137 *Monash UL Rev* 145

There is no practical difficulty in providing court-annexed ADR whilst maintaining the complete integrity of the important public adjudicative function of the court. Many courts in Australia and elsewhere have combined these functions for years without impinging upon the quality of integrity of the adjudicative function of the court. While constitutional principle requires us to steadfastly bear in mind the fundamentally different character of the adjudicative function, there is no practical reason why that function cannot co-exist with the provision of ADR facilities.

Peaceful Co-Existence

The public utility of the peaceful co-existence of curial adjudication and ADR is pithily expressed in the following passage from an article by Mr Les Arthur[22]:

> Notwithstanding improvements to the delivery of adjudication, the outcome of litigation in many cases will be uncertain, more time consuming and more expensive than settlement. For this reason, judicial emphasis on early settlement simply reflects party aversion to litigation risk while at the same time preserving judicial resources for cases which require intensive pre-trial judicial management.

To the same effect is the following observation by Justice Andrew Greenwood[23]:

> My own view is that there is a natural balance between the role of the courts, the "institution" of litigation and the many structured ADR paths to resolving a conflict between citizens which might be elevated to a dispute or, ultimately, to an actual piece of litigation.

[22] Arthur L, 'Does Case Management Undermine the Rule of Law in the Pursuit of Access to Justice?' (2011) 20 JJA 240
[23] Greenwood AP, 'ADR Processes and Their Role in Consensus Building' (2010) 21 ADRJ 11

> There is a natural progression in the evolution of disputes. Many disputes can and should be settled early, quickly and efficiently without recourse to court processes. Other disputes may commence their lives with a formal application to the court and a statement of the material facts supporting a particular claim. Steps can be taken to ensure that the issues in such matters are properly framed and key documents exchanged so that the ADR process has the best chance of bringing about a solution.

The Hon Geoff Davies AO has provided valuable insight into these issues in a number of papers. He proposes that while we should not abandon attempts to make court adjudication simpler, quicker and cheaper subject, of course, to the process providing a just outcome, we should also provide, alongside the existing system of adjudication, an alternative and simpler system by which parties may reach an informed early resolution of their dispute. He has made a number of recommendations as to the way in which such a system can be provided[24].

The Symbiosis of ADR and Adjudication

The dichotomisation of the world into ADR zealots and adjudication romantics ignores the symbiosis of ADR and adjudication. Each depends on the other to a significant extent. Parties agree to settle their disputes, or submit to arbitration because any agreement which they reach, or the arbitral award which they receive can be enforced using the coercive powers of the courts. Courts increasingly rely upon ADR processes not only to resolve disputes entirely, but also to narrow the issues which require adjudication. The prospect of an extensive time-consuming uncertain adjudicative process provides a substantial incentive for consensual resolution through ADR.

[24] Davies GL, 'Can Dispute Resolution be made Generally Available?' (2010) 12 Otago L Rev 305

Management Challenges

It is clear that ADR and adjudication are both here to stay. What are the management challenges which we must address if they are to co-exist harmoniously and provide an effective and economically efficient scheme for the resolution of civil disputes?

Maintaining the Integrity of Each

The Integrity of Curial Adjudication

I have already referred to a number of observations by eminent authors which address the need to maintain the integrity of curial adjudication because of its constitutional dimension. However, neither Chief Justice French, nor the Hon Jim Spigelman propose that this means that curial adjudication has to be kept entirely separate from court-annexed ADR processes. The problem which I have with the metaphor of the multidoor courthouse is that it connotes that the parties to a dispute have to choose which of a number of alternative doors they will go through. The metaphor carries the connotation that they can only choose one door, whereas the reality is that most parties want a combination of approaches - a blend of mediation and adjudication, for example, or perhaps a blend of mediation and arbitration. This is why I prefer the terminology suggested by Professor Sourdin, of a "multi-option courthouse"[25].

The management issues arising from the provision of a blended or hybrid approach to dispute resolution are, I suggest, quite easily resolved. Many Australian courts have considerable practical experience of providing court-annexed ADR. Tensions are easily managed by any judicial officer who has participated in ADR recusing himself or herself from any future role in the adjudicative process. I will separately address the slightly

[25] See Sourdin, above n 19, 147

more contentious question of whether judges should engage in ADR, and the related question of whether arbitrators should also act as mediators in the same dispute a little later in this paper.

The Integrity of ADR

As we have seen, much has been said by those in high authority about the need to preserve the integrity of the adjudication process. Outside the realm inhabited by ADR practitioners, much less has been said about the need to protect the integrity of ADR procedures from the detrimental impact of the adjudicative process. Any engagement in an adversarial process is fundamentally antithetical to the consensus which most ADR processes (other than arbitration) try to build. Adjudicative processes usually encourage the making of allegations and counter-allegations which are inherently more likely to have the effect of pushing parties further apart than closer together. The resources which the parties dissipate in curial processes such as pleading, disclosure of documents, etc, are resources which are not available to be brought to the table during settlement discussions. Rather, they are sunk costs which the parties may seek to recover as part of their settlement, making settlement more difficult. In a context in which the overwhelming majority of civil cases commenced in our courts will be resolved by ADR rather than adjudication, it seems to me that processing all cases down an adjudicative track poses a much greater threat to the integrity and efficacy of ADR than ADR has ever posed to the integrity and efficacy of adjudication.

Mediation Only Programmes Offered by Courts

As far as I am aware, no Australasian court has yet gone so far as the Delaware Court of Chancery, which offers a mediation only

programme[26]. Under that programme, the parties to a dispute may lodge a petition seeking mediation only, paying the requisite fee. They may request a particular member of the court to act as mediator. The programme contains provisions with respect to confidentiality, and prohibits any member of the court participating in the mediation from any subsequent role in adjudication of the dispute. All parties must consent, and at least one party must be a business entity, and the dispute must be a business or technology dispute with an amount in controversy exceeding $1,000,000. As I have noted earlier, the Hon Geoff Davies has proposed that we should offer alongside curial adjudication, an alternative simpler system by which parties may reach an informed early resolution of their disputes[27].

On the face of it, a policy of only providing publicly-funded ADR processes to those who have initiated the process of adjudication seems a little strange, because of the tension between ADR and adversarial adjudication which I will shortly address.[28] While it is conceivable that issues might arise under Chapter III of the Constitution of Australia if courts were to offer mediation only programmes, the possibility of offering such programmes appears to me to merit further consideration.

Management of the Hybrid

Most cases in Australia's civil courts will not be managed exclusively on the basis that they will be adjudicated or on the basis of ADR only but will be managed as hybrids. We know that only a tiny fraction of these

[26] The programme is described in Legg M 'Mediation of complex commercial disputes prior to litigation: the Delaware Court of Chancery approach' (2010) 21 ADRJ 44

[27] Davies, above n 22, 306

[28] I do not overlook the fact that many neighbourhood law centres and legal aid authorities offer publicly-funded mediation services. However, they are generally only available to those whose means are so limited as to preclude access to the court-based systems.

cases will proceed to contested adjudication. The statistical reality is that a civil trial is a last resort, only to be undertaken if all else has failed. Many Australian courts recognise this reality, by requiring all cases to undergo mediation before they will be offered a trial. This has been the practice in the Supreme Court of Western Australia for almost 20 years. However, notwithstanding the implicit acknowledgement of this statistical reality, most courts operate on the basis that all cases will be prepared on the assumption that they are proceeding to trial, when in fact only a tiny fraction will. This seems to me to pose perhaps the greatest management challenge for the hybrid system of civil dispute resolution which has evolved over the last 20 years or so. How do we better identify the 3% of cases that are likely to require adjudication so that the parties to the 97% of cases that do not require adjudication do not spend unnecessary time or resources in an adversarial environment which is antithetical to the consensus which will provide the most common means for the resolution of their dispute? How do we effectively manage cases in which we are encouraging parties to make the concessions which are an essential component of the ADR process in a context in which they wish to maintain a strong forensic posture against the contingency that they might eventually participate in an adversarial trial? What is the proper sequence of procedures - should the early focus be entirely upon ADR with adversarial processes only being employed after ADR has been exhausted, or are there some adversarial processes, such as those associated with issue identification, disclosure of documents and the exchange of expert evidence that are conducive to, and should ordinarily precede, ADR?

Bespoke Solutions

These are difficult questions, but their successful resolution is critical to the efficiency of the civil work of contemporary Australian courts. Perhaps the only thing that can confidently be said in answer to these questions is that the most appropriate approach in any particular case will depend critically upon the particular circumstances of that case, and the circumstances of the parties to the case. Civil litigation has now evolved to the point where mechanical procedures and processes in a sequence, and according to a timetable prescribed in rules of court of the kind reflected in the White Book - writ followed by pleadings, followed by particulars of pleadings, followed by disclosure of documents - etc are well past their use-by date. In today's hybrid environment, one size does not fit all and a bespoke solution is required for virtually every case. The need for a bespoke approach has fostered the contemporary approach to case management, to which I will be turning later in this paper.

Timing is Everything

This is not to say that lessons learnt in dealing with particular categories of case cannot be applied to cases coming within that category. For example, in our court we have learnt that in cases involving a claim that a testator has made inadequate provision for a member or members of his or her family, it is highly desirable to invoke ADR processes sooner rather than later. There are only three real issues in those cases - the size of the estate, the financial needs of the claimant, and the financial needs of other members of the family with a legitimate claim to the testator's bounty. However, if allowed, the parties will inevitably file lengthy affidavits airing long smouldering family grievances which have little or nothing to do with the case, but which make settlement difficult because the case is then seen as an opportunity for public vindication. So in those

cases, our general approach is to endeavour to establish the financial position of the estate and of the various claimants on the estate, and then send the matter straight to mediation.

Another example is provided by defamation cases. At least in cases of defamation in the public media, prompt retraction and apology is very often a critical factor in achieving settlement. Retraction and apology months or years after the insult is of little interest or value to a wounded plaintiff. If retraction and apology does not happen quickly, the case is very likely to turn into a long drawn out battle over damages. So, generally speaking, these cases are suitable for very prompt ADR - ideally within weeks, better still days, of proceedings being commenced.

ADR is a Process not an Event

ADR should be seen as a process, not an event. Decisions with respect to the timing of that process can have a profound effect upon the costs borne by the parties and the resources deployed by the court. Starting ADR too soon may mean that costs are incurred at a time when there is little prospect of consensual resolution. But starting ADR later carries the risk that the parties may incur substantial costs preparing for a trial, which could have been avoided by starting ADR earlier. The challenge lies in assessing just when a case is "ripe" for ADR.

Striking the right sequence and balance of ADR and adjudicative processes is difficult. It is not a topic upon which legal practitioners or judicial officers have received any training other than that derived from their experience. Because of the importance of these issues to the efficiency of the civil justice system, they seem to me to be issues ripe for scientific study and evaluation, from which principles may emerge which

can be the subject of training for lawyers and judges. This in turn provides a convenient segue into the next issue I wish to address, which concerns the need for greater information about why and when cases settle.

Why and When Do Cases Settle?

In the hybrid system which now obtains in most Australian civil courts, in order to make informed and effective case management decisions, it is essential for the case manager to have a good understanding of the factors and considerations that induce parties to settle their differences, and as to the time at which parties are most likely to resolve their differences. There are other good reasons for knowing these things, not least in importance being that without knowing why parties settle, we are unable to make an assessment of whether our systems are working effectively. Professor Murray has put this well[29]:

> Mediated settlements may also reflect the realities of unequal economic bargaining power and the cost and time burdens of litigation rather than the parties' mutual evaluation of the merits of their respective positions and interests. The increasing proportion of cases that settle, often facilitated by mediation, says little about the objective quality of the settlements. Resolutions embodied in agreements based on economic exhaustion, inability reasonably to predict or reach a judicial outcome, or risk aversion are not economically efficient and do not foster confidence in the norms or processes of law.

Put more bluntly, court administrators and policy makers generally tend to view high settlement rates following mediation as a measure of success. However, if those settlements are being achieved because the alternative of curial adjudication is too horrible to contemplate, it is a sign of failure rather than success.

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[29] Murray PL, 'The privatisation of civil justice' (2011) 85 ALJ 490, 496

The Need for Data

I would repeat the *cri de coeur* made by many others for greater data on the subject of the factors that induce a settlement, and which affect the timing of settlement. At present, the information available is essentially anecdotal or experiential. Efficient allocation of limited judicial resources necessarily means that even in those courts in which judges mediate, they will do so infrequently. It follows that judges as case managers will have little or no contemporary experience of the factors that will contribute to a settlement or influence its timing when making important case management decisions with respect to the sequence of ADR within the overall curial process. Uninformed decision-making is an anathema to the judicial process. However, our lack of knowledge of the factors that most significantly influence settlements, necessarily results in critical case management decisions being made based more on intuition than on knowledge.

Party Autonomy

The basic structure of the civil justice system strongly respects the autonomy of the parties. As I have noted, the vast majority of civil disputes are resolved by the parties without reference to any formal dispute resolution mechanism at all. Where a formal mechanism is invoked by the parties, the party initiating the process can choose the system to be invoked. Increasingly, parties will agree upon the process to be invoked in the event of a dispute prior to the dispute arising by, for example, agreeing that any dispute will be resolved by arbitration. Contemporary public policy evident in international treaties and domestic legislation requires courts to respect that agreement and decline jurisdiction.

The Spread of Arbitration

As Professor Murray points out, in the US this has led to arbitration clauses being included in a wide variety of consumer contracts which are presented to customers on a "take it or leave it basis", with the result that arbitration has become the dominant means of dispute resolution in significant areas of commercial activity in that country, including disputes between securities broker dealers and their customers, employment disputes within the securities industry, disputes between credit card issuers and their customers and disputes between large utilities and their customers[30]. In these commercial areas, whatever might be said about the normative and constitutional dimension of public adjudication, the parties, or at least the dominant economic party has chosen to eschew those values in favour of informality and confidentiality. Although Australian data on this topic is hard to find, I get the strong sense that despite significant improvements in the efficiency of court procedures, many of which now closely resemble procedures adopted in commercial arbitration, commercial arbitration is becoming increasingly popular. This trend does not appear to be daunted by the fact that the parties to an arbitration have to pay all the costs of their arbitrator or arbitral panel, and all costs associated with the hearing and its infrastructure - costs which in a court would be partially subsidised by public funds.

Why Arbitrate?

Unlike other forms of ADR, arbitration is essentially private adjudication. It does not rely upon the consensus of the parties, and if not properly managed, can have some of the characteristics of curial adjudication, including expense, delay and uncertainty of outcome. Why then are

[30] Ibid, 493

parties increasingly moving towards arbitration and away from the court system?

In the absence of data on this important question, one can only speculate. In the area of international commercial arbitration, the greater enforceability of an arbitral award outside the jurisdiction in which the determination takes place is an obvious attraction. It seems likely that the confidentiality of arbitrations is seen as a significant benefit to both domestic and international arbitrations. If that is so, it shows that the parties to commercial disputes would not place the same value on the normative aspects of public adjudication as those who contemplate the theory of different systems of dispute resolution.

The Views of the Parties

Turning now to mediation, in the absence of 'mediation only' programmes of the kind offered in Delaware, parties who want access to publicly-funded mediation services in Australia must, generally speaking, invoke the jurisdiction of the court. So, it seems likely that within the civil cases pending in any court there will be a group in which the primary motivation of the parties is to obtain the benefit of court-annexed mediation, and another group in which neither party has that objective, and both want their day in court. The management issue which this raises is the question of the weight which courts should give to the views of the parties in making case management decisions with respect to ADR and adjudication.

As I have already noted, many courts, including the court on which I serve, have long-established policies of requiring parties to go to mediation whatever be their view on the subject. That is because

experience tends to show that settlement rates in mediation are not significantly lower in cases in which parties volubly assert prior to mediation that they have no wish to engage in the process because it is futile. However, given the fundamental principle of autonomy which underpins the entire structure of the system, do practical considerations of this kind justify a court in overriding the stated position of the parties? Alternatively, are the courts justified in this practical approach given that no settlement can occur without the consent of all parties - so that it remains open to any party to insist upon his or her day in court? At a more detailed level, to what extent should the court give weight to the views of one party as to the most propitious time for ADR, or the essential procedural steps which must be taken before ADR is likely to be successful?

None of these questions is easily resolved. However, it seems clear that their resolution would be enhanced by greater information and learning on the factors that contribute to a successful mediation.

Judges as Mediators

There does not appear to have been any substantial opposition to court-annexed ADR in Australia. However, judicial involvement in ADR, particularly the question of judges acting as mediators has been more contentious. As the major issues in contention have been identified and developed in a number of published papers[31], I propose only to refer to those papers and the major issues identified therein, and express some personal views on the subject.

[31] See Brown and Marriott, "ADR Principles and Practice" 3rd Ed at 81 for a review of the issues and analysis of practices in Europe and Canada

The Protagonists

The former Chief Justice of New South Wales, Sir Laurence Street[32], Chief Justice Warren[33], Justice Andrew Greenwood[34] and the National Alternative Dispute Resolution Advisory Council (NADRAC)[35] have all published papers opposing the proposition that judges should act as mediators. On the other hand, the Victorian Department of Justice[36], Justices Bruce Debelle[37] and Nicholas Hasluck[38] and Professor Tania Sourdin[39] have all written in favour of judges participating as mediators. In the paper to which I have referred, and elsewhere, Chief Justice French has emphasised the importance of clearly maintaining the constitutional role of the judiciary. However, it is also clear from that paper that while on the Federal Court, his Honour participated in various forms of ADR and the judges of that court have from time to time acted as mediators. Given the different practices of different Australian courts, the Council of Chief Justices of Australasia has had an 'each way' bet. In the "Guide to Judicial Conduct" (2nd ed) published by the AIJA, reference is made to the possible incompatibility between the judicial role and service as a mediator, while at the same time reference is made to the practices adopted in a number of Australian courts which "should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary"[40].

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[32] Street LW, 'The Courts and Mediation - a Warning' (1991) 2 ADRJ 203; (1997) 71 ALJ 794
[33] Warren ML, 'Should judges be mediators?' (2010) 21 ADRJ 77
[34] Greenwood above n 21
[35] NADRAC, *The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General* (2009) (available at www.nadrac.gov.au)
[36] Attorney-General's Justice Statement 2 (2008)
[37] Debelle BM, 'Should judges act as mediators?' (Speech delivered to the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1-3 June 2007)
[38] Hasluck NP, 'Should judges be mediators?' (Speech delivered to the Supreme and Federal Court Judges' Conference, Canberra, 27 January 2010)
[39] Soundin, above n 19, 145
[40] *Guide to Judicial Conduct*, (2nd ed, 2007), [4.8]

The Arguments against Judge Mediators

The arguments advanced against judges acting as mediators include the risk of confusion to, and dilution of, the judicial role, which is said to be quintessentially the role of adjudication. It is also argued that the judicial resource available to any court is limited, and should be preserved for adjudication, by allocating mediation to be performed by registrars or associate judges. Reference is also made to the ready availability of mediators in the private market from the bar and the ranks of the retired judiciary.

The Arguments in Favour of Judge Mediators

The main arguments advanced in favour of judges acting as mediators include the increased likelihood of settlement because of the beneficial effect of the gravitas of the judge in dealing not only with the parties but also with their lawyers. It is also suggested that judges as mediators have a greater capacity to reduce the likelihood of inequality in the bargaining position of the parties resulting in an oppressive or unfair settlement, and can ensure that any settlement arrived at is the product of informed consent freely given - thus addressing some of the concerns enunciated by Professor Murray and to which I have earlier referred. More practical arguments include the capacity of a judge to immediately make binding orders giving effect to the settlement, at the conclusion of the mediation, reducing the risk that one or other of the parties might change their mind before orders are made. Proponents of judges acting as mediators point to the practices relating to recusal adopted by those courts in which judges act in this capacity, and the fact that judges acting in this capacity in a number of significant Australian courts over many years now does not appear to have led to any apparent dilution in the judicial role, or disrespect for the judicial function or the judiciary generally.

A Personal View

For what it is worth, I find the arguments in favour of judges acting as mediators more persuasive. Perhaps that view is influenced by practical experience in our court in which judges have acted in this capacity for many years now, without any apparent detriment, and with evident benefit. The vast majority of our mediations are conducted by experienced and well qualified registrars who are highly respected as mediators within the legal profession. Because of the value which we place upon limited judicial resources, judges only act as mediators in exceptional cases - perhaps 10 or 20 each year. They are the cases in which the benefits to the parties and the court from a settlement are likely to be the greatest because of the length and complexity of the case. Experience has shown that deployment of our judicial resources in this way has increased the prospects of those cases settling, providing substantial dividends for the parties and the court. Our experience has been such that we have decided to increase the number of judges trained as mediators to improve our capacity to provide this service.

Trial Facilitation

It should also be remembered that settlement is not the only objective of mediation. If a settlement cannot be reached, mediation can play an important role in facilitating and expediting a trial by narrowing the contentious issues of fact and law, and by achieving agreement on the procedures to be followed at trial. On these issues, the forensic skill and experience of a judge is invaluable.

A Practical Example

Let me give a practical example from my own experience. I am presently case managing a major commercial dispute relating to a substantial

industrial project. The plaintiff claims damages in excess of $3 billion, and there is a counterclaim for a significant but as yet unspecified amount. The parties are significant commercial entities or related individuals. I spend half a day or so each fortnight managing the many and varied issues that have arisen in the case. However, before taking on the role of case manager, I notified the parties that I did not consider that I would be able to conduct the trial because of my acquaintance with a person who is likely to be a significant witness in the trial. After receiving such notice, the parties expressly consented to me managing the case, notwithstanding this association. Issues have regularly arisen with respect to legal professional privilege, both in relation to discovered documents and documents produced by third parties on subpoena. On occasion, it has been necessary for me to review those documents in order to rule on the claim for privilege. Because I will be recusing myself from the trial in any case, this course is convenient.

Notwithstanding the fact that I have seen the documents for which privilege has been claimed, and my association with a prospective witness, the parties propose that I should conduct a mediation of the matter before recusing myself from the case. Presumably they propose this course because of my great familiarity with the many and varied issues in the case, and which will dramatically reduce the very significant process of education that would be required if any other person were to act as mediator, given the complexity of the case and its issues.

I sense that those who have written against judicial involvement in mediation would have serious misgivings about the variety of roles that I am playing in relation to this case. However, all of those roles are being performed with the informed consent of commercially sophisticated

parties. Discussions with members of the commercial community lead me to conclude that that community has developed an expectation that courts will provide flexible and efficient mechanisms for the resolution of their disputes and which serve the broader public interest in greasing the wheels of commerce identified by Justice Heydon in the passage I have quoted above.

Arbitrators as Mediators

Similar issues arise when consideration is given to an arbitrator or arbitrators who have been appointed to adjudicate upon a dispute performing a mediation role during the course of the reference. One difference arises from the fact that in the event of recusal, another arbitrator or arbitral panel is not so easily found as in a court with many alternative judges. Nevertheless, it will be apparent from the views I have already expressed in relation to judges acting as mediators that I share the view expressed by a number of others, including Arthur Marriott QC[41], that arbitrators should be encouraged to perform this role, ideally in such as way as to enable the arbitrator to continue to serve if the mediation does not bring about a settlement. In my view, it is unfortunate that the uniform legislation which governs international and domestic commercial arbitration in Australia does not strengthen the capacity of arbitrators to remain on the reference notwithstanding their participation in mediation or other forms of ADR.

ADR in Criminal Cases

So far in this paper I have only been addressing ADR in relation to civil disputes. This is consistent with a discernible tendency in the literature to

[41] Marriott AL, 'Breaking the Dispute Resolution Deadlock: Civil Litigation and ADR in the United Kingdom and Beyond' (2006) 17 ADRJ 157

overlook the potential for ADR in relation to criminal cases. It would expand the scope of an already overlong paper to address the issues which arise when ADR is applied in criminal cases. It is sufficient for present purposes to note that various forms of ADR are used in relation to criminal cases in different jurisdictions. In the Supreme Court of Western Australia we have been using a process which closely resembles mediation in criminal cases since 2007, and have found it to be advantageous. Those interested should refer to the paper on this topic by Dr Fiona Hanlon published by the AIJA[42].

Case Management - More Access and Less Justice?

One response to the perceived cost, delay, complexity and uncertainty of litigation has been the development of ADR. Another has been the development of proactive judicial case management. The development of intensive case management in Australia and elsewhere was stimulated by the implementation of substantial procedural reform, including the introduction of intensive case management in the courts of England and Wales, following the publication of two reports by Lord Woolf, published in 1995 and 1996 under the title "Access to Justice". Critics of Lord Woolf's reforms claim that they have provided more access but less justice. The object of this part of my paper is to assess whether those criticisms are valid.

Cost and Delay are Aspects of Justice

The philosophy and public policy underpinnings of case management were considered by the High Court in *Aon Risk Services Australia Ltd v Australian National University*[43]. All members of the court

[42] Hanlon F, *Criminal Conferencing: Managing or Reimagining Criminal Proceedings?* (2010) AIJA
[43] [2009] HCA 27; 239 CLR 175

enthusiastically endorsed the proposition that the avoidance of delay, and the efficient use of the limited resources of the parties and of the court were important aspects of achieving justice according to law[44]. Thus, the minimisation of cost and the avoidance of delay are not to be contrasted or counterposed to the achievement of a just result[45]. Further, the court rejected the proposition that an order for costs in favour of a party who was delayed, or caused additional work or expense by the conduct of the other party was a universal panacea that cured all[46]. Case management for the purpose of reducing cost and delay is now established by a decision of the ultimate Australian court to be a vital aspect of the achievement of justice.

Judges have made similar observations extracurially. Justice Stephen Rares has written:

> Courts now use case management as a means of ensuring a just outcome. Case management enables the judge to identify the real issues in disputes and to fashion an effective, efficient procedure to enable those issues to be resolved as quickly as possible.[47]

A Question of Balance

However, this cannot be taken too far. No-one would dispute the old aphorism that justice delayed is justice denied, or that a justice system which is so expensive as to be beyond the reach of the community it is intended to serve, cannot be described as a just system. But the quality of the outcome remains a vital consideration.

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[44] French CJ at [30]; Gummow, Hayne, Crennan, Kiefel and Bell JJ at [95] - [99]; Heydon J at [133] - [134], [137], [156]

[45] See the plurality's joint judgment at [98]

[46] ibid [99]

[47] Rares SD, 'What is a Quality Judiciary?' [2011] 20 JJA 113, see also Black MEJ 'The Role of the Judge in Attacking Endemic Delays: Some Lessons from the Fast Track' (2009) 19 JJA 88

Delay and cost can be eliminated entirely by tossing the coin to determine the outcome of any particular dispute. But the outcome will only be just by coincidence - in the same way as a stopped clock is right twice each day.

Justice is not absolute. Issues of balance and proportionality are involved. It can reasonably be supposed that time and money spent on factual investigation and legal research will improve the quality of the adjudicated outcome (at least in a very general sense). The adversarial procedures of the common law have developed systems which are very good at absorbing time and money in establishing contested facts, and in providing the parties with the opportunity to ventilate legal issues of their selection. Until recently, all of those systems and opportunities were provided to all parties to any civil dispute, irrespective of whether they are necessary or appropriate. The critical issue in any particular case is striking the right balance between the contribution made by a particular pre-trial procedure to the achievement of a just outcome and the detriment to justice occasioned by the dissipation of the time and resources utilised undertaking the procedure. Striking that balance is the role of case management.

The Relationship Between Cost and Delay

It is often thought that cost and delay are concomitant in the sense that the longer a case goes, the more it is likely to cost. In many cases there will be a direct relationship between the length of a case and cost. However, experience since the Woolf reforms were implemented suggest that in some cases there may be an inverse relationship between cost and delay, in that a speedier resolution may come at a higher cost to the parties. For that reason I will consider cost and delay separately.

The Lack of Empirical Data

However, before doing so, there is one issue that is common to both cost and delay, and that is the almost total lack of any empirical data available within Australia for the purpose of ascertaining whether the forms of intensive case management which have been adopted in various courts over the last 15 years or so have in fact succeeded in reducing cost, or delay, or both, or neither. Courts and litigants are investing substantial resources into intensive case management. It is most unsatisfactory to be left to anecdotal experience and intuition in order to assess whether these investments are paying dividends.

It also follows that any observations I now make in relation to the effect of case management on cost and delay are unsupported by any empirical data and should be weighted accordingly.

Delay

The annual data published by the Productivity Commission under the title "Report on Government Services" provides statistical data in relation to delays in Australian courts. However, that data has very limited utility in any process of qualitative evaluation of delay and its causes. In that data, each and every case is given equal numerical and statistical weighting, so that a major commercial dispute involving many parties and claims for billions of dollars is given the same statistical weighting as an uncontested claim for the winding up of an insolvent company. The AIJA, in conjunction with the Council of Chief Justices, has been running a project aimed at improving the utility of the data. However, in its present form it is of no assistance in any attempt to assess whether case management has reduced delays in Australian courts, not least because

the data fails to differentiate between those cases that have been case managed, and those that have not.

Investigation in England and Wales does suggest that delay subsequent to the commencement of proceedings has been reduced by the Woolf reforms[48]. A similar view has been expressed by Professor Turner, who served as Senior Master at the time the Woolf reforms were introduced[49]. In his view, cases that took five years or more to come to trial are now being resolved in 15 to 18 months, and the development of specialised forms of case management in specialist lists has advanced expedition.

Anecdotal evidence suggests that reductions in delay have also occurred in Australia as a result of intensive case management. Commercial courts in different Australian jurisdictions compete with each other on timeliness. Most Australian courts now enjoy the capacity to provide a timely trial where it is required in the interests of justice, and can fashion their pre-trial procedures accordingly. And the impact of ADR in bringing about speedy resolution should not be overlooked.

So, on balance and despite the lack of empirical evidence, it can be reasonably concluded that case management has achieved the objective of reducing delay.

Cost

The position with respect to cost is not so clear. In England and Wales, a review of costs undertaken by Lord Justice Jackson concluded that some

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[48] Department for Constitutional Affairs, *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (2002) 3 and 6

[49] Turner RF: "'Actively": The Word that Changed the Civil Courts' in Dwyer (ed) *The civil procedure rules 10 years on* (2009) 84

of the cost increases since 1999 did appear to be consequential upon the Woolf reforms[50]. Lord Justice Jackson considered that pre-action protocols in particular had the consequence of front loading the costs incurred by the parties. A similar view has been expressed by Professor Michael Zander[51] and other authors[52]. Given that most cases settle, it is distinctly possible that front loading costs might mean that the parties are paying more to achieve their settlement than they otherwise would.

Cost Shifting

Similar views have been expressed in Australia[53]. As the Hon John Doyle AC has pointed out, case management can result in cost shifting, as the parties are required to send their representatives to court to meet the requirements of the managing judge, to prepare written witness statements and trial bundles to reduce the time at trial and so on[54].

Number of Appearances

The Productivity Commission publishes data showing the average number of appearances by the parties in each case in Australia's courts in the annual publication to which I have already referred. It does so in a context in which it is to be inferred that the higher the number of appearances per case, the less efficient the court. Once again, however, the data is too blunt to enable any qualitative conclusions to be drawn. For example, each appearance is given a single numerical unit, whether it is for a short directions hearing or for a trial of a week's duration. If case

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[50] Jackson RM, *Civil Litigation Costs Review*, Preliminary Report (2009)

[51] Zander M, 'The Woolf Reforms: What's the Verdict?' in Dwyer (ed), *The civil procedure rules 10 years on* (2009) 84

[52] See the studies cited by Zander, above

[53] Legg M, *Case Management and Complex Civil Litigation* (2011) 259; Hayne RM 'The Vanishing Trial' (Speech delivered at the Supreme and Federal Courts Judges' Conference, Sydney, 23 January 2008)

[54] Doyle JJ, 'Imagining the Past, Remembering the Future: The Demise of Civil Litigation' (2012) 86 ALJ 240

management through a series of short directions hearings enables the parties to avoid or significantly reduce the time at trial, efficiency is enhanced, rather than reduced, and costs are reduced.

Empirical Evaluation

In an Australian context, it seems to me to be virtually impossible to empirically evaluate whether case management has increased cost without corresponding benefit unless comparisons of cost before and after the introduction of case management in a single jurisdiction are undertaken. Interjurisdictional comparisons would be likely to mislead. That is because there are so many different forms of case management in use in the different Australian jurisdictions. Whether the cost to the parties and the court exceeds the benefit derived may well depend upon the particular form of case management adopted, and the efficacy with which case management is delivered.

However, the problem with comparison of costs over time in a single jurisdiction is that other extraneous influences would have to be eliminated if the comparison is to be valid. As it happens, the time at which case management has been implemented in Australian courts coincides more or less with the advent of the revolution in information technology. The question of whether the advent of IT has increased or reduced the cost of litigation is a contentious topic which is well beyond the scope of this paper. However, unless the impact of IT and other extraneous influences on litigation costs can be eliminated from a time sequence comparison, any conclusions drawn from such a comparison would be dubious.

Management Issues

What then are the management issues thrown up by the advent of case management, and the present state of uncertainty as to its efficacy? I will endeavour to address some that come to mind.

Making Case Management Work

The essence of contemporary case management is its focus upon early issue identification, and the reduction of expense and delay by eliminating from the pre-ADR or pre-trial processes any procedures in respect of which the cost and time involved are disproportionate to their contribution to the achievement of a just outcome. If these ambitious objectives are to be achieved, case management must be flexible, bespoke and innovative. The adoption of standard orders, routines, or pre-determined procedures carry the risk of return to the formulaic and inefficient approach taken under the old rules of court.

Strategic Conferences

In our court we found it difficult to move the legal profession away from a formulaic approach to the conduct of civil litigation (pleadings followed by discovery following by witness statements etc). In those cases which are managed by a judge[55], we have adopted the practice of convening, very early in the process, a hearing which we call a "strategic conference". The hearing will be conducted in a non-adversarial environment (a conference room) and the parties are required to attend[56]. After opening statements of position from counsel for each party, the

[55] About one-third of the cases under management - the other two-thirds being managed by registrars

[56] We are flexible about venue. Attached to this paper is a photograph of a strategic conference which I conducted in a town hall near the site of a bushfire which led 99 people to claim damages from the utility which they alleged started the fire. Taking the hearing to the plaintiffs was more practical than asking them to come to the court. (Photo courtesy of WA Newspapers © not to be reproduced without permission)

judge will preside over a conference, hopefully conducted in a collegiate rather than adversarial environment, in which the parties guided by the judge will endeavour to map out a strategy for the quickest, cheapest and fairest resolution of their dispute by ADR, adjudication or a combination of both, and identify strategic milestones in the path to be followed. This conference provides the map or blueprint for the future progress of the proceedings and can significantly reduce the number of subsequent directions hearings required, if the parties and their legal advisers stick to the ordained route. This is, of course, not to say that the route cannot be realigned by the court as the case unfolds. We have found this measure to be advantageous, and it has been well received by the profession, and as far as one can tell, litigants.

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Conferral

Another step which we have found advantageous in the reduction of interlocutory disputes is a requirement that the legal advisers to the parties confer prior to bringing any such dispute before the court. In this context, we have construed "conferral" to mean at least a conversation, and ideally a meeting. That is because we have found "conferral" by exchange of written correspondence, often written in furious terms and copied to the client to be unproductive. Failure to confer in this sense will result in an adverse costs order, sometimes against the practitioner personally.

Judicial Education in Case Management

Obviously the efficacy of case management depends upon the skills of the case manager. Some judges are better case managers than others. In courts where all judges have a case management role, the ability of a person to act as an effective case manager should be assessed prior to that person's appointment to the bench (although how one does this is problematic). Although effective case management depends to a significant extent upon experience, temperament and intuition, it stands to reason that case management techniques can be improved by judicial education[58].

One difficulty in providing judicial education in the realm of case management is the many and varied forms and circumstances in which case management techniques are applied in Australian courts. This difficulty is compounded by the fact that the recent evolution of case management has meant that there is very little established learning or science in the field, which can be taught as accepted principles. These

[58] Although Zander challenges the utility of training judges in case management - see above m 49, 429

impediments should not discourage the development of an effective training programme in case management, given the contemporary significance of this component amongst the skill sets required of a judge. The National Judicial College of Australia is undertaking the development of a programme in this field, and I convene a committee which will oversee the development of that programme.

Docket Case Management

There is occasionally debate in judicial circles between the advocates of docket case management, under which a single judicial officer manages a case from inception to disposition, and proponents of other systems under which case management hearings are heard by whichever judicial officer happens to be available on the day. Advocates of docket case management point to the inefficiency of "file churning", given that every time a judicial officer comes to a file anew, time is spent reading in. Docket case management also has the great advantage of consistency in approach, and the parties and their legal representatives will come to appreciate the likely attitude of their case manager to different procedural issues, reducing the likelihood of contention. Further, if the case is managed by a judge who is likely to be the trial judge, knowledge of that fact is likely to encourage the parties and their legal advisers to adopt a more responsible and reasonable approach to case preparation, lest the judge form an adverse view of their position.

Is Ignorance Bliss?

Critics of docket case management point to the established common law tradition under which it was generally considered that the best trial judge was a judge who had no knowledge whatever of the issues prior to the commencement of the trial, and who had not, and would not, "descend

into the arena" where he might have his (or her) "vision clouded by the dust of conflict"[59]. However, for my part I find it difficult to see any virtue in ignorance. It is the view of our court that the advantages of docket case management significantly exceed the disadvantages, and our case management systems are all docket based.

Pre-action Protocols

As I have noted, a significant component of the Woolf reforms in England and Wales was the introduction of pre-action protocols, under which parties are encouraged to take certain steps prior to the commencement of proceedings, at the risk of an adverse costs order if they do not. The introduction of these protocols in England and Wales has been thought to be a significant source of the increase in costs following the Woolf reforms and as a source of the front loading of those costs. Australian commentators have been more sanguine about the utility of such protocols in this country[60]. At the federal level and in Victoria, parties are now required to take, "genuine steps" (Commonwealth) or "reasonable steps" (Victoria) to resolve their differences before commencing civil litigation. These obligations are relatively recent, and have been the subject of little written commentary. As I have no experience in either jurisdiction since these reforms were introduced, it would be foolhardy for me to venture any view on their practical impact. It will be interesting to see what effect these obligations have upon litigation after they have been in force long enough to make a meaningful assessment of their impact.

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[59] *Yuill v Yuill* (1945) P 15, 20; *Jones v National Coal Board* (1957) 2 QB 55, 63

[60] Legg M and Boniface D, 'Pre-action Protocols in Australia' (2010) 20 JJA 39; Sourdin T, 'Making an Attempt to Resolve Disputes Before Using Courts: We All Have Obligations' (2010) 21 ADRJ 225

Criminal Case Management

As with ADR, much more is written of case management in the context of civil litigation than in the context of criminal litigation. The different character of criminal litigation will obviously affect the principles and issues which arise when criminal cases are managed. The principal differences include the fact that the fundamental function of a criminal court is to enforce the law and thereby serve the public interest, rather than resolve a dispute between autonomous parties. The so-called "right to silence" also has a significant impact upon the extent to which a criminal defendant can be required to participate in case management processes which have early identification of the issues and disclosure by all parties as significant objectives.

Nevertheless, in England and Wales, the Criminal Procedures Rules have been modified to introduce forms of case management that closely resemble processes undertaken in civil cases. In our court, we have recently promulgated practice directions which will facilitate more intensive case management of criminal cases along the lines of the case management processes adopted in England and Wales. We are starting slowly in this field, focusing initially upon complex homicide cases before expanding the reach of case management to a wider range of cases.

Therapeutic Jurisprudence

I indicated at the outset of this paper that I would say much less about the issues arising from the development of therapeutic jurisprudence than in relation to my other two topics. This is not intended to diminish in any way the significance of the development of this branch of jurisprudence, which focuses upon addressing the underlying problem or cause of the

behaviour which has led to the matter coming before a court. Learning and experience in this area has developed over roughly the same time period as ADR and case management. The nomenclature involved has evolved with the field, and my own preference is to refer to "solution focused courts" because of the emphasis which this places upon the positive objective of the court in modifying aberrant behaviour.

I mention this field of jurisprudence because it is another area in which Chief Justice French has warned against the possible loss of the distinctive character of the judicial function, and its confusion with the provision of services by the executive branch of government[61]. As with ADR, it is clear that his Honour was not precluding the adoption of such approaches in our courts, as he referred to the prospect that "co-operative approaches may yield positive results"[50].

I would respectfully endorse his Honour's sentiment. A significant component of the success of solution focused courts, like the drug courts, (and they are successful) depends upon the availability of coercion and punishment as a ready alternative to the therapeutic approach. Insistence upon a rigid classification or delineation of functions between behavioural programme providers and the courts would very likely diminish the efficacy and success of this important emerging field of jurisprudence.

Conclusion

In this paper I have endeavoured to identify some of the management issues which arise from very significant developments in the way in

[61] French RS, 'State of the Australian Judicature' (2010) 84 ALJ 310, 316
[50] Ibid

which Australasian courts conduct their business which have occurred over the last 20 years or so. There is no reason to suppose that the rate of change in the way in which courts carry out their important functions will be any less in future years. Changes in practice in those future years, which we cannot now predict, will undoubtedly throw up management challenges of their own. It is important that we take the time to step back from the day to day conduct of business to analyse the effect of those changes, and the issues which they throw up. It is equally important that we have detailed data, analysis and research available to assist us in this task. These are areas in which an organisation like the AIJA can play an important role.