

The Mandela Institute

The Role of Lawyers in a Rapidly Changing Dispute Resolution Environment – International Trends in Civil Justice

The Hon Murray Kellam AO

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The Rule of Law requires fair and just resolution of disputes.¹ However it also requires that the process, particularly in relation to civil disputes be cost effective. The primary goal of a civil justice system is the just resolution of disputes through a fair but swift process at a reasonable expense. Delay and excessive expense will negate the value of an otherwise just resolution. Systemic delay and expense will render the system inaccessible. The public must have confidence in not only the outcomes but the processes of that litigation. For that reason our litigation processes must be reviewed continuously and refined as necessary.

When I commenced practice nearly 40 years ago, civil justice operated much as it had for the better part of nearly a century before that time. Writs were issued, defences were filed, requests for further and better

¹ The process used to achieve a resolution must not only be fair (a level playing field), it must be designed to produce a just result. Just results come in two forms—rights based and interest-based. In either case, a just result does not mean perfect justice.

A rights-based just result is one that, to the greatest extent reasonably possible, upholds the legal rights and legal obligations of the parties to the dispute. It usually follows from a rights-based process, where an adjudicator duly considers the material evidence, determines the facts as accurately as possible, properly interprets the law that pertains to the case and applies the law to those facts to determine the resolution. An interest-based just result is the resolution of a dispute that, to the greatest extent reasonably possible, meets the interests of all parties to the dispute. It usually follows from an interest-based process, where a skilled mediator or other type of facilitator elicits the interests (the goals, objectives, purposes, needs, etc.) of the parties in a way that enables the parties to agree upon a practical resolution that serves their needs.

particulars of pleadings were exchanged, interrogatories were delivered, general discovery took place, and in due course the matter would be listed for trial. At trial one would hear what the opposing witnesses would say for the first time. There was no requirement for the parties to exchange anything other than pleadings and in some circumstances affidavits in support of certain claims. There was no exchange of witness statements and in particular expert witness statements. In many ways trial was by ‘ambush’. Although the timetable of pleading was dictated by the court rules, in reality the legal profession controlled the process of the litigation. More often than not the case settled at the court door.

However if the matter did go to trial, counsel would be required to commence the case with the assumption that the trial judge had done no preparation and had little if any knowledge of the nature of the proceeding. I can well recall standing and reading the pleadings to the trial judge at the commencement of a trial. The tradition in Australia, as in the UK was an ‘oral’ one and very little documentation, apart from the pleadings, and perhaps affidavits in support, was provided to the judge.

Not surprisingly this process created substantial delay for the parties, as well as incurring great cost for the litigants and also for the public purse. Calls by the courts to appoint more judges in the face of increasing backlogs met with more and more resistance from the executive and from governments. Concerns expressed about the cost of civil justice to litigants, government and the community became strident. Delay and cost were perceived to be barriers to access to the courts. There were calls for the courts to become more efficient and responsive to community needs. It was in this context that the first major change took place. That change, which can be summarized as being ‘case management’ took the general

conduct of proceedings away from the profession. The judges took control of the management of the timetable, and much of the process of litigation.

The first ‘managed lists’ tended to be in limited areas or in ‘boutique’ areas of law such as building and construction or certain types of commercial proceedings. However, judicial case management of proceedings is now the normal process applied to almost all litigation in the superior and intermediate courts in Australia and New Zealand. The days when the courts were seen as passive tools controlled wholly by the litigants are days that are past. As early as 1992 Gleeson CJ said in *State Pollution Control Commission v Australian Iron & Steel Pty Ltd*²:

‘The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase of the resources made available to them. The inevitable consequence has been delay. This, in turn, has brought an increasing responsibility on the part of judges to have regard, in controlling their lists and cases that come before them, to the interests of the community, and of litigants in cases awaiting hearing, and not merely to the concerns of the parties in the instant case. The days have gone when courts will automatically grant an adjournment of a case simply because both parties consent to that course, or when a decision to grant or refuse an adjournment sought by one party is made solely by reference to the question whether the other party can adequately be compensated in costs. There are a number of *Practice Notes* issued in relation to the business of the Supreme Court making that perfectly clear. The flow of cases through the courts of this State is now managed by the judiciary, and not left to be determined by the parties and their lawyers.’

Judicial Case Management

The management of the interlocutory stage of litigation by judges was well established in Australia by the late 1980s and use of the technique was accelerated during the early 1990s. It is fair to say that such Australian schemes were derived largely from similar processes which had been adopted in US Federal Courts over the preceding decade.³ However, a

² (1992) 29 NSLR 487 at 6 493-494

³ Davies J *Managing the Work of the Courts* —Paper presented to AIJA Asia-Pacific Courts Conference Sydney 22-24 August 1997 and *Civil Justice Reform Act 1990* (US)

variety of schemes existed in the various Australian jurisdictions by the time Lord Woolf visited Australia in 1994 in the course of the preparation of his report.⁴

The objectives of case management include early resolution of disputes, reduction of trial time, more effective use of judicial resources, the establishment of trial standards, the monitoring of case loads and the development of information technology support . Other objectives include increased accessibility to the courts, facilitated planning for the future, enhanced public accountability and the reduction of criticism of the justice system by reason of perceived inefficiency.

There are different models of judicial case management in Australia but the Federal Court of Australia has led the way and it is useful to consider the manner in which it manages litigation before it.

The Federal Court of Australia Docket System

When an initiating document is filed, matters are given a return date for directions before a single judge. Cases in some areas of law requiring particular expertise (including intellectual property, taxation and admiralty law) are allocated to a judge who is a member of a specialist panel. That judge has a ‘docket’ of cases which he or she is responsible to manage. At directions’ hearings the judge gives whatever directions are necessary to assist the parties in identifying the relevant issues. The judge also makes the necessary orders for the progress of a case to trial. Such orders include those for particulars and discovery. There is no longer any entitlement to general

⁴ Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995)

discovery or to interrogatories. Leave is required for both. A case is adjourned to a fixed date by which parties are expected to have completed any interlocutory steps which have been ordered. The docket judge monitors compliance with directions, deals with interlocutory issues and ensures that hearing dates are maintained. Usually that judge will hear the case if it is not resolved before trial.

I shall not dwell further on case management processes as numerous examples of its manifestation can be found in Australia, New Zealand, Hong Kong, the US and the UK.⁵ One example is the Victorian Supreme Court Practice note for Case Management Conferences.⁶ However, the genesis of other reforms can be seen in the assumption of control of the litigation by the judiciary in the management of cases. It was this assumption of control which led judges to introduce ADR, and in particular mediation⁷, as a court connected process.

There have been concerns raised about active case management by judges. In particular the ‘docket system’ whereby a judge has control of the proceedings from start to finish has been the subject of criticism. An empirical study of the individual docket system in the US Federal Court suggests that the system reduces delay but does not reduce costs and in fact appears to have increased the cost of litigation in that Court.⁸ However,

⁵ Federal Court, *Individual Docket System* - www.fedcourt.gov.au/how/ids.html
Civil Procedure Rules 1998 (UK) – *Civil Justice Reform Act 1990* (US)
Civil Justice Reform 2008 (Hong Kong) – see also – www.civiljustice.gov.hk

⁶ www.supremecourt.vic.gov.au

⁷ Throughout this paper the term ‘mediation’ is used to describe a ‘facilitative, interests-based process in which mediators foster communication and discussion of the issues with the parties, conduct private sessions with the participants and encourage them to reach an agreed conclusion.’

⁸ Geoffrey L Davies ‘*Civil Justice Reform: Why we need to Question some Basic Assumptions*’ (2006) *Civil Justice Quarterly* 32

whatever concerns may have been expressed elsewhere, in recent times the High Court of Australia has affirmed in strong terms the obligation of judges to control the litigation before them. In *AON Risk Services Australia Ltd v Australian National University*⁹ the Court said:

In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

In my view it is likely that the power of judges to be interventionist in case management will continue to increase. Already there has been discussion in Australia as to whether or not judges should have power to call witnesses to give evidence without the consent of the parties.¹⁰ There have been calls for judges to have greater powers to impose limits on the conduct of pre-trial procedures.¹¹ Likewise judges will be granted power to limit time taken to examine and cross-examine witnesses and to make submissions. This has happened already in NSW.¹² The Final Report of the Hong Kong Chief Justice's working Party on Civil Justice Reform endorsed clearly defined directions for the conduct of trials and the power to limit times stating:¹³

Knowing what periods of time have been allocated for each task, counsel would be able to plan their submissions and examination and cross-examination accordingly. This would promote fairness in the distribution of trial time between the parties.'

⁹ [2009] HCA 27 [113]

¹⁰ Victorian Law Reform Commission *Civil Justice Review Report 14* 2008 p303-307

¹¹ Sackville J *Mega-litigation: Towards a New Approach* Paper presented to NSW Supreme Court Conference 17-19 August 2007

¹² *Civil Procedure Act* (NSW)2005

¹³ *Civil Justice Reform- Final Report* (2004) Hong Kong

I note that concerns about proportionality of costs have been expressed in South Africa. In *Brownlee v Brownlee*¹⁴ Brassey AJ described a family law case as a ‘tragedy’ which ‘would have been evident to anyone sitting in court throughout the days, sometimes seemingly endless, when ... the evidence was presented, challenged and minutely examined in argument’.

As stated above there have been concerns expressed in a variety of jurisdictions that case management techniques can add to the cost of proceedings. In particular, the ‘over management’ of cases is a risk. If care is not taken, the process of case management can be used to delay cases and add cost just as did the ‘interlocutory warfare’ which case management seeks to avoid. A change in culture both on the part of parties, legal practitioners and the judiciary is needed if case management is to achieve the desired result. In particular the focus must be on identifying the issues at an early stage. If the real issues in a case are not identified early, interlocutory steps are dictated by process rather than the ends to which they should be directed.

Furthermore the individual docket approach is not appropriate for all proceedings. Indeed the Hong Kong Final Report on Civil Justice Reform¹⁵ recommends that an individual docket system be used for what it described as special cases, including commercial, personal in jury, construction, and constitutional and administrative cases.

¹⁴ South Gauteng High Court (Unreported) Brassey AJ 25 August 2009

¹⁵ <http://www.civiljustice.gov.hk>

Specific other Civil Justice Reforms

Discovery

In his Interim Report Lord Woolf observed that the existing discovery process was a significant barrier to access to justice in England and Wales. Some of the problems brought to Lord Woolf's attention included:

- the excessive cost of the process,
- the enormous resources required to be deployed to carry out discovery,
- the increasing tendency to record matters in writing and the greater complexity of modern business,
- the use of discovery as a weapon to pressure the other side,
- the failure to weed out documents that were not essential, and this added to costs at every stage of the proceeding,
- the slavish copying of documents instead of carrying out an inspection to isolate only relevant documents.

The management of discovery has also been a major issue in all Australian courts. The principal criticisms of discovery are that the objectives of the process are either not being achieved or are achieved only at great cost. The use of discovery as a tactical tool to leverage settlement or deter an opposing party is also frequently cited as a serious problem. Accordingly reforms have been instituted throughout Australia. In particular the threshold test of discoverability has been narrowed from a *Peruvian Guano* 'train of inquiry' approach¹⁶ to a test of 'direct relevance to any issue

¹⁶ *Compagnie Financiere Commerciale Du Pacifique v Peruvian Guano* (1882)11 QBD 55, 63.

in dispute'. Pursuant to the *Federal Court Rules*¹⁷, having conducted a reasonable search, a party is required to discover documents of which it is aware at the time it makes discovery. A party must discover documents:

- that it relies on
- which adversely affect the party's case and
- that support or adversely affect another party's case.

This discovery test reflects generally the reform recommendations made in the Interim Report by Lord Woolf (referred to below).

The Federal Court has indicated that, generally, in order to prevent orders for discovery that require production of more documents than are necessary for the fair conduct of the case, it will limit discovery orders to those required to be disclosed under the above rule.

In making a reasonable search a party may take into account:

- the nature and complexity of the proceeding,
- the number of documents involved,
- the ease and cost of retrieving a document,
- the significance of any document likely to be found and
- any other relevant matter.

The parameters of discovery are further narrowed in the Federal Court's Fast Track List ('rocket docket'). In this list, except where otherwise ordered, parties are required to discover only those documents on which they intend to rely and documents that have a significant probative value adverse to their case. In addition, the scope of the parties' search obligations is further narrowed to a good faith proportionate search. A party must make a 'good faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive having regard to the

¹⁷ Order 15 rule 2

nature and complexity of the issues raised by the case, including the type of relief sought and the quantum of the claim'. If requested, a description of the search that has been undertaken must be provided.

Additional discovery management provisions in the Federal Court's Fast Track list include:

- the power to order additional discovery in relation to discrete issues, such as the quantification of damages. In this situation the court may order that discovery be by inspection alone, and
- requiring the parties to meet and confer and to attempt to resolve a discovery dispute in good faith before approaching the court. If the parties are unable to resolve the dispute, any application to the court in the Fast Track list must contain a certificate setting out that they have met and conferred but that their attempt at resolution was unsuccessful.

The central platform of Lord Woolf's discovery reforms was to limit the availability of full discovery to a small minority of cases in which it could be shown that such discovery was justified.

Lord Woolf recommended two types of discovery: 'standard' and 'extra'. Lord Woolf recommended that standard discovery should be the first step, with the extent and timing of any extra discovery to be determined by the court.

Although such a two stage approach has not been adopted generally in Australia, New Zealand, Hong Kong or Canada a similar philosophy can be seen to exist in terms of the necessity to limit the cost and abuse of 'general discovery'. Indeed, just before I left Australia to come here the newly appointed Chief Justice of the Federal Court was reported as saying 'At the initial directions hearing, why don't judges make an order that before

discovery, the plaintiff and defendant file the 10 documents they each consider most important to their case? I think that is a way to get the senior lawyers with the analytical abilities and responsibilities for presenting the case to take responsibility at a much earlier stage.’¹⁸

I think there is much to be said for this suggestion. The process of discovery, at least in Australia, Hong Kong and the UK has become a process often handled by junior lawyers. My experience is that once a case actually commences, few of the discovered documents are actually referred to, much less tendered in evidence. It may be that this is because careful consideration to the issues in dispute is not given until well after discovery.

Expert Evidence

Recently, expert evidence has been the subject of extensive enquiry and reports in a number of jurisdictions.¹⁹ These reviews have led to the introduction of a new framework for the judicial control of expert evidence in an attempt to improve the usefulness of and address the high costs of such evidence.

The Woolf Reforms

Lord Woolf had significant concerns about the use of expert evidence in litigation, arguing that it was susceptible to misuse. However, his interim proposals on the topic, which focused on mitigating ‘the full-scale adversarial use of expert evidence’, met with substantial resistance during the consultation stage. Members of the legal profession, he opined, were ‘reluctant to give up their adversarial weapons’.

¹⁸ Keane CJ – *Australian Financial Review* 19 February 2010

¹⁹ Victorian Law Reform Commission *Civil Justice Review Report 14* 2008

New South Wales Law Reform Commission *Expert Witnesses* Report No 109 (2005)

NSW Attorney General’s Working Party on Civil Procedure, *Reference on Expert Witnesses* Report(2006)

Nevertheless Lord Woolf believed reform was necessary if ‘more focused use of expert evidence’ was to be achieved, and premised his recommendations on the notion that ‘the expert’s function is to assist the court’. He considered that there was no uniform solution appropriate to all cases, and that the preferable approach would be a ‘flexible’ one built around enhanced court control and broad management discretion. In particular, he proposed making leave of the court a condition precedent to the adducing of expert evidence, such that the court can, for example:

- prevent the use of expert evidence, in general or on particular subjects,
- limit the number of experts whose evidence the parties can adduce,
- direct the use of a single expert on a particular matter,
- require an expert’s evidence to be given in writing,
- direct the parties’ experts to meet and produce a joint report noting matters of agreement and divergence and
- limit the scope of expert evidence in fast-track cases (eg, one expert per side per field of expertise, global limit of two experts per side, preference for single joint experts, no oral evidence).

In this regard Lord Woolf observed that there was significant opposition within the legal profession to the use of single experts, but he believed nevertheless that judges should consider whether it was appropriate in a particular matter. He stated that:²⁰

A single expert is much more likely to be impartial than a party’s expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up.

²⁰ *Interim Report* [13.21]

The use of single joint experts in the UK following Lord Woolf's Final Report has not been without controversy. Indeed the NSW Law Reform Commission considered this to have been 'arguably the most significant and controversial recommendation' of the Report.²¹ Importantly, the *Woolf* civil justice reforms in the UK were evaluated in two reports issued by the Department for Constitutional Affairs of the UK. The first report, entitled 'Emerging Findings: An early evaluation of the Civil Justice Reforms,' was issued in March 2001²², and the second, 'Further Findings: A continuing evaluation of the Civil Justice Reforms,' was issued in August 2002.²³ The first UK evaluation report, 'Emerging Findings,' relying primarily on anecdotal evidence, suggests that most stakeholders believe that the reforms in this area have helped to promote early settlement and a less adversarial approach to litigation. The subsequent 'Further Findings' report reports a high level of satisfaction with the quality of appointed experts (91%), but a majority of respondents (56%) also expressed some concerns about the use of single joint experts, with the possibility of increased costs being a frequently mentioned comment. Furthermore, the same survey indicates that while most lawyers (82%) believe single joint experts are appropriate in fast-track cases, far fewer lawyers (54%) think that they are appropriate in the more complex multi-track cases. Again, the possibility of increased costs was mentioned as a reason behind their concerns.

Expert Witness strategies in Australia

There has been a dramatic change in the reception of expert evidence by Australian courts. The first significant change was a requirement for exchange of expert witness statements well before trial. However, the later

²¹ 'Expert Witnesses' NSWLRC Report 100 at [4.16]

²² Retrieved from: <http://www.dca.gov.uk/civil/merge/merge.htm>

²³ Retrieved from: <http://www.dca.gov.uk/civil/reform/ffreform.htm>

reforms have gone well beyond the mere earlier exchange of reports. See for example, the Federal Court Practice note as to expert witnesses.²⁴

New strategies which have been introduced in Australia for controlling expert evidence include:

- limiting the number of expert witnesses to be called,
- appointing single joint experts (that is, one expert appointed jointly by the parties, sometimes referred to as the ‘parties’ single joint expert’) or court-appointed experts,
- permitting experts to give evidence concurrently in a panel format (often referred to as ‘concurrent evidence’ or ‘hot-tubbing’), or in a particular order,
- introducing a code of conduct to be observed by experts,
- formalizing processes for instructing experts and presenting experts’ reports,
- requiring disclosure of fee arrangements,
- imposing sanctions on experts for misconduct and
- developing training programs for expert witnesses.

By way of example, and in response to concerns that expert witnesses were being misused, a number of significant changes have been made to the procedures in the Common Law Division of the Supreme Court of New South Wales. The changes include single experts appointed by agreement between the parties, the option of court-appointed experts, power of the court to control the number of experts and the manner of their giving evidence. The amended rules allow the judge to order the sequence for the giving of evidence so as to require the defendant to call lay or expert evidence in what would otherwise be the plaintiff’s case.

²⁴ www.fedcourt.gov.au/how/practice_notes_cm7.html

Single Joint Witnesses

The NSW Supreme Court rules provide that at any stage of the proceedings the Court may order that an expert be engaged jointly by the parties. Where such an expert has been called in relation to an issue, the rules prohibit the parties from calling further expert evidence on that issue, except with the leave of the court.

Concurrent Evidence

Perhaps the most significant change in relation to expert evidence is the use of the concurrent method of hearing the experts' evidence. How does it work? Reports are obtained in the conventional manner by the parties. Exchange of the reports takes place and as is commonplace now the experts are required to meet to discuss the reports. This may be done in person or by telephone after which the experts are required to produce a short dot point document which sets out the matters upon which they agree, but more importantly those on which they disagree.

Essentially concurrent evidence is a discussion chaired by the judge in which the various experts, the parties or their advocates and the judge engage in an endeavour to identify the issues and to arrive at a common resolution of them. If agreement between the experts does not result what follows is a structured discussion with the judge as the chairperson. This allows the experts to give their opinions without constraint by the advocates in a forum which enables the experts to respond directly to each other. The resolution of the litigation is enhanced if the experts can give their evidence in an atmosphere of structured and constructive discussion where their views

are respected rather than in an aggressive encounter where the object is to destroy the witness.

A concurrent witness case study

McLellan J the Chief Judge of Common Law in the Supreme Court of NSW, has been a pioneer in the use of concurrent evidence. *Halverson v Dobler*,²⁵ is a case where a young man had had a cardiac arrest and sustained devastating and permanent brain damage. He sued his general practitioner. The issues required evidence from other general practitioners about the duty of a general practitioner when faced with the plaintiff's circumstances. There was also a major cardiological issue. Five general practitioners gave evidence concurrently. They sat at the bar table and over a period of one and a half days discussed in a structured and cooperative manner the issues which fell within their expertise. McLellan J estimated their evidence would have taken at least five days if taken in a conventional manner. In addition four cardiologists – one by video link from the US- also gave evidence concurrently. Their evidence took one day. They were able to distill the cardiac issue to one question. Although they had different views on that question, their respective positions were stated clearly. McLellan J said 'I have been a lawyer for in excess of 35 years. That day in court was the most significant I have experienced. It was a privilege to be present and chair the discussion between four doctors - all with the highest level of expertise, discussing the issues in an endeavour to assist me to resolve the ultimate question.'²⁶

²⁵ [2006] NSWSC 1307

²⁶ McLellan CJCL *Litigation-Some Contemporary Issues* Paper presented to the NSW State Legal Conference 26 March 2009

Court Connected ADR

Mediation

Of all the reforms that have taken place in civil justice, court connected ADR processes are the most significant. Of these, mediation is used most often, but other processes such as early neutral evaluation are being used increasingly. Most Australian courts have long had power (with the consent of the parties) to refer all or part of a proceeding out to an independent arbitrator, and power to refer a particular issue arising in a proceeding for determination by a ‘special referee’. However, it is only in relatively recent times that courts have had statutory power to order the mediation of a proceeding without the consent of the parties.

The methods by which such mediations take place vary according to the jurisdiction but it is now true to say that it is only in exceptional circumstances that a proceeding in a superior or intermediate court is not the subject of an order for mediation.

Indeed in May of 1999 the Chief Justices of Australian and New Zealand superior courts published a declaration on Court Annexed Mediation which included the following:

- Mediation is an integral part of the Court’s adjudicative processes and the ‘shadow of the court’ promotes resolution.
- 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 that process as soon as possible.

- Consensual mediation is highly desirable but, in appropriate cases, parties can be referred where they do not consent, at the discretion of the Court.
- The parties should be free to choose, and should pay their own mediator, provided that when an order is sought for such mediation the mediator is approved by the Court.
- Mediation ought to be available at any time in the litigation process but no referral should be made before litigation commences.
- In each case referral to mediation should depend on the nature of the case and be at the discretion of the Court.
- Mediators provided by the Court must be suitably qualified and experienced. They should possess a high level of skill which is regularly assessed and updated.
- Mediators must have appropriate statutory protection and immunity from prosecution.
- Appropriate legislative measures should be taken to protect the confidentiality of mediations. Every obligation of confidentiality should extend to mediators themselves.
- Mediators should normally be court officers, such as Registrars or Counsellors rather than Judges, but there may be some circumstances where it is appropriate for a Judge to mediate.
- The success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation.

The adoption of these principles by the Chief Justices of the Australian courts provided significant impetus and imprimatur for the use of mediation by the courts.

It should be noted that in Australia the legal profession was involved in the commencement of court annexed mediation processes from an early stage. The first court annexed mediation program in Australia commenced when members of the Victorian Bar convinced a Building List judge to refer such cases out for mediation as early as 1984. The involvement of the legal profession in mediation has grown from that time such that there are now barristers and solicitors whose sole practice is as a mediator. It is also notable that the early referral of cases to mediation took place in the absence of any empowering legislation or court rules.

In the Supreme Courts of Australia the overwhelming majority of court-referred mediations are conducted by outside mediators at the referral of a judge. The Supreme Court of Victoria does conduct a small number of ‘in-house’ mediations. In these mediations the mediator is an associate judge (formerly a ‘master’). On the other hand almost all mediations ordered by Federal Court judges are conducted ‘in-house’ by trained court registrars.

Referral of proceedings by a court to mediation is a process widely accepted in the Asia Pacific region. It is a process which has been adopted in Papua New Guinea, Palau, India, Samoa, Vanuatu and Bangladesh.

Mandatory Referral to Mediation

Most Australian jurisdictions have statutory power to refer proceedings to mediation with or without the consent of the parties. Some

US jurisdictions have introduced mandatory ADR processes.²⁷ Since 1999 Ontario courts have had power to order mandatory mediation. Canadian research suggests that mandatory referral to mediation led to significant reduction in delays, costs and the settlement of a high proportion of cases early in the litigation.²⁸ On the other hand mandatory ADR requirements have not been adopted in the UK. The prevailing view there is that ADR should be encouraged but not compelled.²⁹ In particular concerns have been expressed that mandatory referral to ADR processes is constrained by human rights issues. Likewise the recent Hong Kong civil justice reforms stopped short of empowering judges to impose mandatory ADR processes on the parties.

It should be observed that no Australian court has power to require parties to submit to arbitration without consent.

Judicial Mediation

There has been a significant debate in Australia as to whether or not it is appropriate for judges to engage in mediation processes as mediators. Mediation by judges does take place in Europe, Canada, Papua New Guinea and the USA. Some judges in Australia have acted as mediators, but the majority view in New Zealand and Australia is that it is not appropriate for judges to act as mediators, if the mediation is to involve the possibility of the judge meeting the parties or their lawyers in private session.

²⁷ See for example the *Alternative Dispute Resolution Act 1998*

²⁸ Haan and Baar, *Evaluation of the Ontario Mandatory Mediation program (Rule 24.1): Final Report – The first 23 Months (2001)*

²⁹ Review of Civil Litigation Costs: Final Report – 14 January 2010 Sir Rupert Jackson – http://www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm

Early Neutral Evaluation(ENE)

This ADR process has only recently had formal recognition by Australian Courts. At present the Supreme Court of Victoria is engaging in a pilot program of ENE.³⁰ Likewise, in the UK a recent proposal for judicial neutral evaluation is to be the subject of a pilot program in Cardiff. In his recent report Sir Rupert Jackson stated if the results of the pilot ‘are favourable, then judicial neutral evaluation may pass into more general use and become an effective means of promoting early, merits-based settlements.’³¹

Pre-action Protocols

A number of Australian jurisdictions require pre-action disclosure in specified areas of litigation. The *Personal Injuries Proceedings Act 2002* provides that in Queensland the parties to a proposed personal injury action must give notification of a claim, compulsorily provide certain documents, and engage in a compulsory conference before proceedings may be commenced. The Supreme Court of South Australia requires that in monetary claims (with some exceptions) the proposed plaintiff is required to give written notice to a proposed defendant containing details of the claim, copies of any expert reports and an offer to settle. Likewise the Family Court of Australia has extensive pre-action procedures.

Woolf Report

Pre-action protocols were introduced in England and Wales as part of the civil procedure reforms under the *Civil Procedure Rules 1999* (CPR). The intention of the protocols is to encourage the early disclosure of relevant documents and information and to enable parties to better assess the

³⁰ See Supreme Court of Victoria Practice note – www.supremecourt.vic.gov.au

³¹ Ibid. Para 1.4

strengths and weaknesses of their cases at an early stage thus fostering early settlement. Pre-action protocols have been developed under the Practice Direction in England and Wales. Each protocol relates to a particular area of dispute, such as personal injury, defamation, professional negligence, judicial review and building and construction.³²

The UK Practice Direction on pre-action conduct refers to the use of pre-action ADR as follows:

Starting proceedings should usually be a step of last resort and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require some evidence that the parties considered some form of ADR.....³³

The UK pre-action protocols have been the subject of evaluation by the two reports referred to above. Both reports concluded that the pre-action protocols 'are working well to promote settlement and a culture of openness and co-operation.' The 'Further Findings Report' cited a study on the effectiveness of pre-action protocols, done by the Institute of Advanced Legal Studies and the University of Westminster. The study consisted primarily of qualitative interviews with lawyers, insurers and claim managers. For personal injury cases, the study included a quantitative analysis. The study found that 85% of cases were settling without recourse to the courts and that most practitioners considered the protocols to be a success in helping 'focus minds on key issues at an early stage and encourage greater openness to smooth the way to settlement.' Unfortunately, however, the quantitative data for personal injury cases indicated that the

³² See UK Ministry of Justice website - www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm

³³ Practice Direction (UK) *Pre-action Conduct*, 8. Alternative Dispute Resolution (Commenced 6 April 2009)

overall time from instruction to settlement remained unchanged and that both injury awards and costs had risen following the introduction of the protocols.

Indeed The UK pre-action protocol model was rejected in Hong Kong, because of the concern that it would lead to a front-end loading of costs. The Hong Kong Final Report on Civil Justice Reform³⁴ however, did state that pre-action protocols might be useful for certain specialized cases.

Costs

The reforms in both the UK and Australia have required a different view to be taken about costs other than that ‘costs follow the event’. In *Newcastle City Council v Paul Wieland*³⁵, the New South Wales Court of Appeal considered whether the phrase ‘costs of the proceedings’ includes the costs associated with mediation. It was held that generally the expression ‘costs of the proceedings’ will include the costs of a court ordered mediation.

*AEI Rediffusion Music Ltd v Phonographic Perманence Ltd*³⁶ is an early case on the cost provisions of the CPR. Lord Woolf MR emphasised that while the ‘follow the event principle’ still has a significant role, it is a starting point from which a court could readily depart, and that under the new rules courts should be more ready to make orders reflecting the outcome on different issues.

³⁴ <http://www.civiljustice.gov.hk>

³⁵ [2009] NSWCA 113

³⁶ [1999] 1 WLR 1507

Current proposals for further reform in Australia

Recently the National Alternative Dispute Resolution Advisory Council (NADRAC) published a report making recommendations to the Australian Attorney General as to reforms in Federal civil justice.³⁷

In particular the recommendations provide that the legislation governing Federal Courts and Tribunals ‘require genuine steps to be taken by parties to resolve the dispute’ before proceedings are commenced. The recommendations set out a number of steps that prospective applicants and respondents should be required to take in compliance with such ‘genuine steps’. Those steps include provision of documents, and consideration of ADR processes. It is recommended that courts have power to make an adverse costs order (irrespective of the final determination in the proceeding) if a party has not taken genuine steps to resolve the matter before commencing proceedings. The recommendations suggest the imposition of obligations upon legal practitioners to provide information about ADR processes together with an estimate of the costs of the proceeding in the event that it goes to trial.

It is highly likely that pre-action protocols will become a regular part of the Australian litigation scene. It is likely that courts will be required to provide more ‘in-house’ ADR processes. The eradication of ‘trial by expert’ will continue and at the minimum, joint expert reports will become the norm.

Finally, what part does the legal profession have to play in the reform of civil justice? Some commentators have at times been critical of the profession suggesting that it has been resistant to change. From an

³⁷ *The Resolve to Resolve* –Embracing ADR to Improve Justice in the Federal Jurisdiction – September 2009

Australian viewpoint I would reject that view. Australian lawyers have been at the forefront of change. I have already mentioned how a small number of Victorian barristers were instrumental in commencing court annexed mediation in building cases as early as 1984. From that time on the judiciary has consulted with the profession about changes to civil process. I see the relationship as a partnership. Whilst it is true that true reform needs strong judicial leadership the part played by the profession is of great significance. Courts should have user groups which include the profession as part of the reform process. Experience has shown that pilot programs conducted by enthusiastic judges and equally as enthusiastic lawyers have paved the way for permanent change. I am confident that the profession will continue to cooperate in ensuring that civil justice is just fair and available to all, but within the constraints of proportionality.