



**Australian Legal Convention**

*The Future of Case Management*

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## **Introduction**

As I was driving here today, it struck me as singularly appropriate to hold a conference to talk about litigation at a casino. I suspect if you are still awake at 2 o'clock tomorrow morning and you stood out the front of the gaming hall and asked people who were leaving about their experience, quite a number of them would say - "Well, I was here for much longer than I planned to be. I spent a lot more money than I planned to spend, and I didn't know whether I was going to come out in front or behind". I suspect if you stood at the front of one of our courthouses and asked people who were coming out the same questions, you would get much the same response - "I spent too long here. I have spent too much money and I didn't know what I was going to come away with". I think the challenge for all of us is to try to improve that experience for the litigants.

## **The Vanishing Trial**

I would like to try to put case management into context by referring to what Justice Kenneth Hayne has called "the vanishing trial". By that, of course, he refers to the phenomenon we have seen in all our courts by which only a relatively small proportion of cases are actually resolved by trial.

In the Supreme Court of Western Australia, something less than 3% of our lodgements are resolved by a trial, and I would be surprised if that proportion was significantly different in any of the Supreme Courts of Australia. Interestingly, that percentage is almost exactly the same as the percentage of cases resolved by trial in the US Federal Court. So this is no peculiarly Australian phenomenon.

### **Nomenclature**

There are a number of conclusions that I think follow from that fairly important statistic. One is not so important and that concerns nomenclature. I think some of our nomenclature is misplaced. We probably shouldn't call ourselves the Supreme Court of Western Australia. We should call ourselves the Supreme Dispute Resolution Centre because that would more accurately reflect what we do - at least on the civil side of the court's work.

There is another misnomer in this field, where reference is made to alternative dispute resolution. If you look at the cases resolved in our court, mediation is not the alternative resolution mechanism, it is the main mechanism for the resolution of cases. It is resolution by the trial that is the alternative.

### **Case Arrangement Techniques**

At a more substantive level, I think it reflects a significant consideration for our pre-trial case management processes. In most courts, and I think ours is probably no exception, all cases are treated as if they are going to go to trial, and are all prepared as if they are going to go to trial. However, the reality in our court is that only about one in 30 of our cases will in fact go to trial. The challenge, I think, is to get better at identifying the cases that are likely to go to trial and treat them in a particular way, and better at identifying the cases that are not likely to go to trial and spare the parties the expense of preparing as if the case will go to trial.

### **Triage**

What we need is the legal equivalent of what the medical profession call a system of triage, whereby when a case presents itself, its particular needs will immediately be assessed, just as a patient presenting at an emergency department will be assessed, and then sent to a particular stream. So that if a Bell case, or a C 7 case walks into the court, it gets sent off to the intensive pre-trial stream, and a lot of resources are applied to it. On the other hand, an *Inheritance Act* dispute might be sent straight off to mediation before the parties are given the opportunity to exchange the often vitriolic affidavits that are going to push the family members further and further apart and impede a consensual resolution.

### **Bespoke, Flexible and Consistent**

Case management should have three important characteristics: firstly, it's bespoke or tailor made - each programme of case management for each case must be case specific, and designed specifically to meet the particular needs of that case. Secondly, the systems must be flexible - sufficiently flexible to deal with the many and varied circumstances of each case. Thirdly, each case must be managed consistently. That is to say, there must not be significant differences in approach between different judicial officers in the one court. Consistency for each case generally means that docket management is required. The same manager should manage the case from start to finish and ideally that manager should be the trial judge, if it goes to trial. If the system of case management has those three features, then in our view - and with no disrespect to the Federal Court - you probably don't need things like "rocket dockets" or "expedited lists". If a case management system works as I have suggested, every case should be able to be managed at a speed

and at a pace that is appropriate for it, so that a specific fast-track list or an expedited list are not required.

### **Case Management in the Supreme Court of WA**

In our court, we split case management between judges and registrars. The judges provide the more intensive form of case management, and, of course, for those cases that are likely to go to trial, the judge who manages the case will generally, but not invariably, be the trial judge. Our systems are very similar to the Federal Court docket management system. We manage about 400 cases that way through five judges. Another 800 cases are managed by registrars. Those are cases where management is less intensive, there is less likelihood of the case going to trial, less need for expedition, and no significant interlocutory disputes. So the cases under management are split roughly one-third, two-thirds between the two different types of case management. My guess would be that the proportion of cases being managed by judges will increase over time, rather than decrease.

### **Alternative Dispute Resolution**

Another conclusion that flows from the statistic which I mentioned when starting is that ADR has to be an integral part of the process of case management. It is not an add on - or specific event. It has to be seen as an essential and integrated part of the entire process of preparation for case resolution. I use that term advisedly, because most often cases will not be resolved by a trial. In our court, we specifically encourage dual streams of preparation so that there will be a stream which will be preparing parties for trial, and there will be another stream that will be preparing them for a mediation. In our court, like a lot of other

Australian courts, generally speaking, a trial will not be listed until mediation has occurred. We provide court-based ADR.

### **Timing of ADR**

One of the things that we have challenged in recent years is the notion that mediation is the last thing that one does before having a trial. The commonly-accepted wisdom is that until the parties are fully prepared for trial, until they have exhausted all the interlocutory processes, they won't be in a position to evaluate the strength of their case with sufficient certainty to meaningfully participate in mediation. We have challenged that proposition and in a number of cases have sent people to mediation very early - basically, as soon as the issues have been identified. What the figures tell us, interestingly, is that the settlement rate at those mediations is almost exactly the same as the settlement rate of the mediations that are conducted just before a trial.

It is hard to know exactly why that is and I'm sure in different cases the reasons would vary, but my guess would be - having done a number of mediations as a practitioner - that when you have a mediation that is the last thing that occurs before a trial, all of the parties have significant sunk costs. They have incurred sometimes many hundreds of thousands of dollars in costs to get them to that point, and recovery of those sunk costs becomes a significant obstacle in the path of settlement. On the other hand, if you have an early mediation, especially if you are dealing with experienced litigators - they can make an accurate assessment of what the costs which they are going to incur between then and the trial, and they can put those saved costs onto the table as part of the settlement process. I think there is much to be said for mediating early and mediating often. We also now adopt the approach that mediation is a process; it's not an

event. If you start the mediation process early, if it doesn't work then, then you come back and resume the process at some more appropriate time a little later.

### **Pre-Action Protocols**

In other jurisdictions, particularly the UK, and in Australia in the Northern Territory, they have taken this concept even further, and adopted pre-action protocols which require people to mediate before they even open the door of the court. We are looking at those in Western Australia, although the English experience has been a little mixed. Nevertheless, such protocols are certainly something that merit further consideration.

### **Early Issue Identification**

One of the key components of case management has to be to encourage the parties to identify the issues early. In my experience, pleadings have a very limited utility in identifying the real issues in a case. Sometimes we will discourage the parties from undertaking the pleading process and encourage a process of exchanging a narrative statement of facts, issues and contentions comprising three or four pages. My experience has been that this process is often quite sufficient to identify the real issues, particularly when there are other steps in the process that will involve exchange of witness statements and exchange of written submissions in relation to legal issues. The prospect of someone being taken by surprise at trial, or not knowing what the issues are, is very much diminished by those other steps. There are, of course, some cases in which pleadings will be appropriate, but the 100-150 page pleading is often just a waste of time and money.

### **Discovery**

The expense involved in discovery can be horrendous. It is unfortunate that attempts to achieve a national consensus on the best way of limiting discovery and the cost of discovery do not seem to have been successful. Certainly in Western Australia, we are doing our best to curtail the amount of time and money that is spent on the discovery process. The forensic benefit derived from what can be a very long and expensive process is often very limited.

### **Interlocutory Disputes**

In Western Australia, we have actively and aggressively discouraged interlocutory disputes. We've made no secret about that. We have embraced the notion of proportionality which was first identified by Lord Woolfe and we apply it forcefully. If someone comes along and says, "We want to have a day's hearing about this particular point on the pleading", we might look at it and say, "No, that day and the time and money spent on that day is not justified by the significance of that issue to the just disposition of the case, so we will hear the application, which is dismissed". That approach is not uncommon.

### **Conferral**

We also have the benefit of a very important rule of court, Order 54 rule 9, which requires the parties to confer before they can initiate any interlocutory dispute. In judicial decisions, we have made it clear what conferral means. Conferral does not mean writing an aggressive and derogatory letter to the other parties' solicitors and sending a copy to the client. Conferral means, ideally, a face-to-face meeting between people with authority to resolve the interlocutory dispute, and at a minimum, it means a telephone conversation between people with that authority. We

have found that insistence upon compliance with this rule has been enormously successful in discouraging the volume of interlocutory disputes in the court.

The WA Bar Association is about to publish a Best Practice Guide in relation to conferral. There was a seminar on that subject a few weeks ago. With a bit of encouragement from the court, meaningful conferral has now become an accepted part of the legal culture in Western Australia and I think it is a very important part of that culture.

### **Trial Procedures**

In relation to the trial process, there are a number of things that we do in common with other courts around the country that are intended to reduce the amount of time spent at trial. For my part, I always encourage consecutive openings from counsel, so that we can go forward together, and by the time we get to the witnesses, we all know precisely what the issues are and what each party's stance is in relation to them.

### **Oral Evidence**

Exchange of written witness statements and the giving of evidence-in-chief by the tender of written witness statements is virtually axiomatic in all of our trials, as in many other courts. In commercial cases, my experience as a judge has been that the oral evidence is of very limited utility. These days, most communications between commercial entities are conducted by email or other indelible means. There is usually a contemporaneous record of communications that reveals exactly what was going on at any given point in time. One can often interpose quite accurately what is likely to have been said in any meeting simply by looking at the email chain. The days in which a lot of time is devoted to

oral evidence will gradually diminish because of the significance of the indelible record provided by emails.

### **Trial Bundles**

Trial bundles are inevitably prepared for our trials. We emphasise the need to prepare them early, before the witness statements are prepared so that there can be one common database and a single and unique identifier for each document and the witness statements can all refer to that identifier. There is an inevitable tendency for lawyers to err on the side of caution by putting far too much unnecessary material into trial bundles. We are trying to discourage that tendency, but it's difficult.

### **Expert Evidence**

In relation to expert evidence, we are trying to move towards adoption of the New South Wales model which I think probably provides best practice in this area. That includes conferral, hot tubbing and all the various techniques relating to expert evidence that are applied in the New South Wales Supreme Court. We are moving a bit slower on that than I would like, but that is certainly our ambition.

### **Admissibility**

In relation to the admissibility of evidence, the technique that I and a number of my judicial colleagues adopt is to refuse to hear any objection to evidence until the barristers have conferred in relation to that objection. I have found that works well. Conferral will very often resolve the issue without the need for the court to rule which speeds up the trial process.

### **Time Limits**

Written submissions are increasingly common, and time limits on oral evidence and submissions are also used from time to time. We haven't yet adopted the "chess clock" system in Western Australia, but we have certainly thought about it and I would not exclude the possibility that there might be appropriate cases in which it should be applied.

### **Case Management of Criminal Cases**

It is often thought that the differences between civil work and criminal work are so profound and so significant that the things we have learnt from case management in civil can't readily be applied in crime. I think most courts around the country that have significant criminal caseloads, are now applying varying kinds of case management to those caseloads. There are obviously some different considerations, but by and large I can't see any reason in principle why almost exactly the same sort of approach to the case management of a civil case can't be applied to a criminal case.

One of the practical problems is that under most court structures, the more serious criminal cases are dealt with by two courts. They start life in a Magistrates Court and spend quite a long time there, and then get sent to a higher court, either a District Court, a County Court or a Supreme Court. That poses a problem for case management which should ideally be seamless and holistic. We have endeavoured to overcome that in Western Australia where we have a bit of an advantage over other jurisdictions because we don't have the prospect of an oral committal hearing any longer. Any committal hearing is an administrative act and it occurs on the papers. So it's quite possible, and we have in fact elided the distinction between the Magistrates Court and

our Supreme Court by having two of our registrars appointed as magistrates. They sit as magistrates in our court building dealing with cases that are within our jurisdiction. Wherever in the State someone is charged with any case coming within our exclusive jurisdiction, they will appear first before the local magistrate, and then be sent to us for all subsequent appearances. The registrars sitting as magistrates work closely with the judge in charge of the criminal list, and so programming and case management orders can be made very early in the life of that criminal trial that will move it towards a trial in our court much quicker. Our experience has been that this has been enormously beneficial.

One of the features of that process that we are trying to encourage which is the same as on the civil side of our work is early issue identification. Early issue identification has a significant role to play in reducing the amount of time that is spent on criminal trials. We have introduced a process to encourage this. We call it voluntary criminal case conferencing. It's a kind of an ADR - not always aimed at resolving the case, although it does sometimes achieve that, but at least aimed at identifying the real issues in the case fairly early on so that we can move towards a trial of those issues, and only those issues, sooner rather than later. We have found that to be successful and the programme is continuing.

### **Conclusion**

I commenced these remarks by expressing the view that it is incumbent upon the courts and the legal profession to do what we can to improve litigants' experiences of the litigation process. This is an important aspect of improving access to justice. Enhancements, past and future, in the

ways in which cases are managed provide a very real means by which that experience might be improved.