



Australian Centre for Justice Innovation

Timeliness in the Justice System: Ideas and Innovations

Because delay is a kind of denial

by

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I am honoured to have been invited to address this forum dealing with the vital subject of timeliness in the justice system. I describe the subject as vital because a lack of timeliness, or delay, seems to have been one of the characteristics of systems for the resolution of civil disputes by legal means almost since the time such systems evolved. Indeed, somewhat paradoxically, in civil justice systems at least, lack of timeliness seems to have a timeless quality.

For the purposes of historical analysis at least, it is appropriate to distinguish between civil and criminal justice because, at least in common law systems, criminal justice and punishment was dispensed with an alacrity which no doubt struck terror into the hearts of those accused and which makes contemporary criminal justice systems appear torpid by comparison.

Before going any further I would like to acknowledge the traditional owners of the land on which we meet, including the various cultural groups and clans who together comprise the great Kulin Aboriginal nation, and acknowledge that we meet on their country, and pay my respects to their Elders past and present. Given the topic with which we are concerned, we might remind ourselves that the Kulin people have been stewards of this land for more than 40,000 years, whereas the colonists arrived less than 200 years ago.

Historical Context

As I have mentioned, complaints with respect to delays in the civil justice system have a venerable history. The expression 'justice delayed is justice denied' is well known to lawyers and non-lawyers alike. Some scholars identify the source of that expression in early Rabbinical writings from around two centuries after the birth of

Christ.¹ Whether that attribution is correct or not, the desirability of avoiding delay in the administration of justice is clearly expressed in cl 40 of the Magna Carta, to which King John's Great Seal was attached at Runnymede in 1215, and which states:

Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam

(To no man will we sell, to no man deny, or delay right or justice)

Coke and Bacon

In his commentaries on the Magna Carta published in 1642 as the second part of his *Institutes of the Laws of England*, Chief Justice Edward Coke described delay as 'a kind of denial' of justice in the following passage:

Justice must have three qualities; it must be *Libera*, Free; for nothing is more odious than justice let to sale; *Plena*, Full, for justice ought not to limp, or be granted piece-meal; and *Celeris*, Speedy ... Because delay is a kind of denial.

Students of legal history will be aware of Coke's long-standing rivalry with Francis Bacon, first Viscount of St Alban's, a man of many accomplishments including appointments as Attorney-General and later Lord High Chancellor of England, and just as many eccentricities. He and Coke competed for the hand of Lady Elizabeth Hatton who chose Coke over Bacon,² to Bacon's continuing regret. Coke instigated the 28 separate counts of bribery and corruption which resulted in Bacon's dismissal from the office of Lord Chancellor. Bacon admitted receiving gifts from litigants, but defended himself on

¹ *Pirkei Avot* 5.8. The full reference, however, is said to be: 'The sword comes into the world because of justice delayed and justice denied, and because of those who interpret the Torah in a manner different from halachah.'

² Cuthbert William Johnson, *The Life of Sir Edward Coke* Vol 1: Lord Chief Justice of England in the Reign of James I (1837) p

the basis that he had never allowed those gifts to influence his judgment and, in relation to the two chief complainants, had in fact given a verdict against those who had paid him. As he said to King James I:

with respect to this charge of bribery I am as innocent as one born upon St Innocent's Day; I never had a bribe or reward in my eye or thought, when pronouncing judgment or order.³

There was, however, one thing upon which Coke and Bacon were agreed, and that was the desirability of speedy justice. Upon his appointment as Lord Chancellor in 1618, Bacon declared:

For myself, I am resolved that my decree shall come speedily, if not instantly, after the hearing, and my signed decree speedily upon my decree pronounced. For it hath been a manner much used of late in my last lord's time, of whom I learn much to imitate, and somewhat to avoid; that upon the solemn and full hearing of a cause nothing is pronounced in court, but breviates [briefs] are required to be made; which I do not dislike in itself in causes perplexed. For I confess I have somewhat of the cunctative [delayer]; and I am of opinion, that whosoever is not wiser upon advice than upon the sudden, the same man was no wiser at fifty than he was at thirty. And it was my father's ordinary word, 'You must give me time.' But yet I find when such breviates were taken, the cause was sometimes forgotten a term or two, and then set down for a new hearing, three or four terms after. And in the meantime the subject's pulse beats swift, though the chancery pace be slow. Of which kind of intermission I see no use, and therefore I will promise regularly to pronounce my decree within few days after my hearing; and to sign my decree at the least in the vacation after the pronouncing. For fresh justice is the sweetest. And to the end that there be no delay of justice, nor any other means-making or labouring, but the labouring of the counsel at the bar. Again, because justice is a

³ The Saturday Magazine, *The Church Scholar's Reading Book* (1840), 'Biographical Sketches' p 36.

sacred thing, and the end for which I am called to this place, and therefore is my way to heaven; and if it be shorter, it is never a whit the worse, I shall, by the grace of God, as far as God will give me strength, add the afternoon to the forenoon, and some fourth night of the vacation to the term, for the expediting and clearing of the causes of the court...⁴

With the benefit of hindsight, a cynic might suggest that this declaration served as notice to litigants that their gifts and inducements should be delivered promptly, as he did not propose to reserve his decisions for extended periods.

Despite his manifest shortcomings, Bacon seems to have had a prescience in relation to the issues we are discussing today. In his *Essays*, first published in 1597, he wrote: 'To choose time, is to save time', which might be seen as one of the objectives of contemporary case management. In the same work he wrote: 'It is generally better to deal by speech than by letter', which has certainly been our experience of the operation of a rule of the Supreme Court of Western Australia (Order 59 rule 9) which requires lawyers to speak to each other before initiating any interlocutory proceeding, and which has been very successful in reducing the number of interlocutory disputes, thereby assisting expedition.

The Court of Chancery

Despite the express acknowledgment of the virtue of expedition in legal proceedings by the two most eminent jurists of the early 17th century, their successors seem to have accepted institutionalised delay as an inevitable feature of the civil justice system. Delay was an enduring characteristic of proceedings in the Court of Chancery,

⁴ Francis Bacon, *The Works of Lord Bacon: With an Introductory Essay and a Portrait*, Vol 1 (1838) p 711.

which was, of course, the setting for the fictional case of *Jarndyce v Jarndyce*, immortalised by Dickens in *Bleak House* (1852-3), a case which outlasted generations of litigants and consumed their estates, to the inestimable benefit of the lawyers involved (and this was long before time billing). A graphic picture of the mire into which the civil justice system had by then descended is provided by Dickens' description of the Lord Chancellor's court:

The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation, Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds this day in the sight of heaven and earth.

On such an afternoon, if ever, the Lord High Chancellor ought to be sitting here--as here he is--with a foggy glory round his head, softly fenced in with crimson cloth and curtains, addressed by a large advocate with great whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon some score of members of the High Court of Chancery bar ought to be --- as here they are --- mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of equity with serious faces ...

No doubt Dickens took a degree of poetic licence. However, it seems clear that his observations were underpinned by fact. A study of the

Court of Chancery published at the end of the 19th century described the delays which were characteristic of that court in these terms:

An almost continuous complaint of the delays of Chancery had existed from the reign of Elizabeth... The facts are indisputable, that a common administration suit where the parties were not hostile, took from three to five years; that eminent counsel stated that no man could begin a contested suit and hope to see its end; that clients were advised to compromise good claims, and to yield to bad ones, rather than risk a suit; and that, on the average, causes took at least three years to reach the top of the list after they were ready for hearing. The delays after the cause was ready for hearing, which, as it was said, were the worst delays of all, for the litigants were then making a direct demand for the Court's assistance, were due to the insufficiency of the judicial strength of the Court for its work. To these had to be added the delays due to the cumbersome procedure necessary to get ready for hearing, of which some idea may be gained from what has already been said, and the greater delays, after hearing, in the Master's offices, if, as happened at some stage in almost every case, enquiries were directed.⁵

The litigation reform industry

Reduction in the delays most evident in the Court of Chancery was one of the justifications for the passage of the *Judicature Act 1878* which might be seen as the first significant step in what has recently been described as a burgeoning industry of litigation reform. Responding to the publication of Lord Woolf's report on reforming the justice system in 1996,⁶ *The Economist* noted that since Dickens wrote *Bleak House* there had been 60 official commissions of reports on

⁵ D M Kerry, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery: Being the Yorke Prize Essay of the University of Cambridge for 1889* (1890) pp 270, 271.

⁶ Lord Woolf, *Access to Justice, Final Report* (July 1996)

reforming Britain's civil justice system. It concluded that: 'They have had little impact'.⁷

Subsequently, of course, there have been even more reports; one of the more recent by Lord Justice Jackson finding that in fact some of reforms implemented following Lord Woolf's review had led to 'substantial delay and extra costs'.⁸

As commentator Richard Ackland also noted, 'Australia does not lag behind in the litigation reform industry', citing a string of Commonwealth reports and remarking that 'the states have been busy as well'.⁹ As the Chair of the Law Reform Commission in WA in the late 1990s I was partly responsible for the production of one such report.¹⁰

The recently released draft report on *Access to Justice Arrangements* by the Productivity Commission¹¹ and this Timeliness Project¹² are of course other examples of this so-called litigation reform industry.

Delay

The consequences of delay

I will come in due course to the task of defining what I mean by 'delay' in this context, but for the moment I mean it to refer to any avoidable and unproductive lapse of time prior to the final disposition of a civil dispute of the magnitude that contributed to the litigation reform

⁷ Editorial, 'More justice is more just', *The Economist* (27 July 1996).

⁸ Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), p 353.

⁹ Richard Ackland, 'Pricey lawyers colonise work that requires just half a brain', *Sydney Morning Herald* (11 April 2014) p 20.

¹⁰ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (1999).

¹¹ Productivity Commission, *Draft Report: Access to Justice Arrangements* (April 2014).

¹² Australian Centre for Justice Innovation (ACJI), 'Timeliness Project' (available at: www.law.monash.edu/centres/acji/projects/timeliness/index.html accessed 17 April 2014).

industry to which I have referred. The adverse consequences of delays of that character are relatively self-evident, but for the sake of completeness I will enunciate some of the more significant consequences. Perhaps the two most significant and obvious are delay in the provision of a resolution and the debilitating effect of delay on the process of adjudication.

Delay in the provision of a resolution

It can be reasonably inferred that any significant lapse of time between the accrual of a cause of action and the provision of a legal remedy for the wrong which gave rise to the cause of action increases the loss suffered by the innocent party. In a simple case of debt, the innocent party can be compensated for loss of the right to use the money to which he or she was entitled by the award of interest. However, interest will often provide inadequate compensation if, for example, a lucrative investment opportunity was lost by reason of the lack of funds, or, to take another example, a crop was unable to be planted because of a lack of capital. There are also many classes of case in which delay in the provision of a remedy significantly impedes its efficacy. Examples include defamation, where the vindication of reputation by order of a court years after the libellous publication provides cold comfort to a person traduced by the modern mass media. Cases involving assets deteriorating over time (grain, food stuffs, fashionable clothing, etc), or assets of fluctuating, perhaps volatile value (listed shares, intellectual property etc) provide other examples. Delays in the determination of an action which ultimately fails can have similar consequences for a defendant who might be required to

refrain from dealing with assets against the contingency of a claim succeeding.

Of course, it is a mistake to assess the consequences of delay in the provision of a resolution in purely pecuniary or material terms. In many cases, the lives of litigants are effectively 'put on hold' until their litigation is resolved, and in the meantime the commitment of time, money and emotion to the litigation process can be all consuming and debilitating. The longer the process takes, the greater the stress on the parties. In too many cases, that stress becomes too great to bear and a party with a good claim will abandon it, or a party with a good defence will admit liability rather than protract the agony. In those cases, there is no doubt that justice has been denied.

The debilitating effect of delay

Delay has the capacity to distort and indeed corrupt the litigation process in a number of ways. I have just mentioned one - namely, by causing a party with a good claim or a good defence to abandon it. Another is through the effect of delay upon the evidence available to establish the facts upon which the claim or defence depends. To the extent that the evidence relies upon oral testimony, the memories of witnesses fade, and witnesses die. Physical exhibits, including documents, can be lost or destroyed or conditions may alter (in the case of a person's health, or at the scene of critical events) such that direct evidence is no longer available. Generally speaking, the adjudication process will be less reliable the longer the period between the occurrence of the events giving rise to the claim and the trial at which the occurrence of those events has to be determined. The exception that proves this rule is the circumstance in which there are

developments in technology or forensic science (such as DNA testing) which can enhance the adjudicative process. In some cases, the enhancement of the adjudicative process by such developments has been profound but those cases are not sufficiently frequent to clothe delay in virtue.

The nature of contemporary delay

I have painted a bleak picture of delays in the civil justice system and the consequences of those delays by stopping my historical analysis in the latter part of the 19th century. Some of the causes of delay present in those times remain, but there have been many significant changes in the mechanisms available for the resolution of civil disputes since those times, some of which have had a profound effect upon the characteristics and the magnitude of contemporary delays in the civil justice system.

Despite my haggard visage, I am not so old as to have any personal experience of litigation in the 19th century. I have, however, been personally involved in the conduct of litigation in Australia for more than 40 years. I will come to the attempts to measure delay quantitatively shortly, but for the moment it is sufficient to observe that I have an overwhelming impression that, generally speaking, civil disputes in Australia are resolved much more quickly than they were 40 years ago. Many factors have contributed to the reduction of delay, but in my view the three most significant are:

- (a) the development of information technology which enables instantaneous communication and the ready dissemination of information to the public;

- (b) the proactive and interventionist management of cases by the courts so that the pace at which any case proceeds is largely dictated by the court rather than by the inclinations or proclivities of the parties or their lawyers;
- (c) the proliferation of alternative mechanisms for the resolution of civil disputes including, most particularly:
 - (i) the development of a variety of mechanisms for resolving consumer complaints against government and in particular industries (finance, telecommunications etc) through the creation of ombudsmen, and the provision of complaints handling services by government agencies;
 - (ii) the development of umbrella administrative Tribunals at State and Commonwealth level with jurisdiction over a wide range of disputes including, but by no means limited to, disputes with government (in the case of the State Tribunals);
 - (iii) the integration of consensual mechanisms for dispute resolution, particularly mediation, as an almost invariable component of pretrial process in virtually all Australian civil courts, with the result that, in the superior civil courts at least, adjudicated outcomes are now relatively rare.¹³

¹³ Professor Mark Galanter 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' *Journal of Empirical Legal Studies* Vol 1(3), 459–570, November 2004 ; Justice Kenneth Hayne AC 'The Vanishing Trial' Supreme and Federal Court Judges' Conference, Sydney, 23 January 2008
(www.hcourt.gov.au/publications/speeches/current/speeches-by-Justice-Hayne-AC)

I will deal with each of these three developments in more detail later in this address. However, in relation to the proliferation of alternative mechanisms for the resolution of civil disputes, I will focus my observations upon the integration of consensual mechanisms for resolution within the pretrial process, and will not direct any significant attention to the development of administrative tribunals or government and industry-based schemes for the resolution of consumer complaints by government agencies or officers styled as ombudsmen.

'In the shadow of the law'

Timeliness and non-curial resolution

My reluctance to comment upon issues of timeliness in relation to mechanisms for the resolution of consumer complaints or on the disposition of cases by administrative tribunals is not borne of my lack of experience or expertise in those fields because, like most lawyers, I would not ordinarily permit a deficiency in knowledge or experience to discourage the expression of an opinion.

Nor do I mean to suggest that the establishment of mechanisms for the resolution of consumer complaints or the creation and expansion of administrative tribunals with broad jurisdictions have not had a significant effect upon the means by which civil disputes are resolved in Australia today. To the contrary, the significance of those mechanisms for the resolution of disputes has been recently highlighted in the draft report on Access to Justice Arrangements released by the Productivity Commission¹⁴ which describes those

¹⁴ Productivity Commission *Access to Justice Arrangements*, Draft Report (April 2014).

mechanisms as acting 'in the shadow of the law' drawing support and encouragement from the parties' knowledge of what might happen if their dispute ended up in a court.

Dr Mundy of the Productivity Commission has spoken of these matters earlier in this forum, but for my part I gain the sense that the Productivity Commission sees some stereotypical figures lurking 'in the shadow of the law' who are both good and bad. The good figure lurking in the shadow has available to him or her the legal principles and rules enunciated by the courts which might enable the outcome of the dispute to be predicted if it were to go to court, which assists in resolving the dispute through less formal means. The bad figure lurking in the shadow is armed with the *in terrorem* threat of cost, delay, uncertainty and complexity which the parties apprehend would likely attend legal proceedings, and which encourages them to use other means for the resolution of their dispute.

Full cost recovery

This sinister figure lurking in the shadow of the law suggests that an economist might view features of the litigation process that are generally seen as unattractive by the parties, such as cost and delay, in a somewhat different light. An economist might see those features as serving the public purpose of encouraging the use of less formal, quicker and cheaper mechanisms of dispute resolution. It seems that this is one of the reasons why the Productivity Commission has proposed, in its draft report, that all Australian courts should move towards fees generally set at levels which would enable the cost to government of providing the civil justice system to be fully recovered. The Commission argues that 'The current low level of cost recovery in

Australian courts means that litigants do not internalise the cost to society of resolving their private disputes'.¹⁵

By contrast, there does not appear to be any suggestion in the Commission's draft report to fully recover the cost to government of providing ombudsmen or other mechanisms for consumer complaints, or administrative tribunals, so that participants in those processes can internalise the cost to society.

The third branch of government

I would respectfully suggest that one flaw in the Commission's approach on this subject stems from the reason why I will not be addressing issues of timeliness in relation to consumer complaint mechanisms and administrative tribunals, and that is because the courts perform a function which is fundamentally different in character to the functions performed by those agencies of executive government or industry. With respect, the approach taken by the Productivity Commission in its draft report elides the vital distinction between the role and function of the judicial branch of government as the third branch of government, and the quite separate and distinct roles of each of the parliamentary and executive branches of government. The Commission erroneously treats the courts as just another provider of dispute resolution services for which government should recover the full cost, even though no attempt is made to recover the cost of the parliamentary branch of government, and only limited attempts are made to recover the cost of the executive branch of government. I maintain this view notwithstanding the prominence of contemporary views to the effect that insistence upon a traditional

¹⁵ Productivity Commission, Draft Report, p 478.

approach to the separation of the three branches of government has a deadening and distorting effect on public discourse and ignores contemporary reality - a view recently expressed eloquently by an eminent commentator (and good friend) Professor John McMillan.¹⁶

There is, of course, no doubt that the judicial branch of government performs a significant role in the resolution of disputes between private parties. However, it also serves broader objectives which have a constitutional significance within the framework of a society ruled by law. Those objectives include the enforcement of the law by one citizen aggrieved by the conduct of another, or by the conduct of government; the enunciation and development of legal principles; the establishment of norms and standards of behaviour accepted in a civilised society; and the regulation of the relationships between the government and the governed. Spigelman CJ put the matter in these terms:

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 resolution of private disputes. An economist might call them 'externalities'. They constitute, collectively, a core function of government... The judgments of courts are part of a broader public

¹⁶ Professor John McMillan AO, 'Oral Address' (Commonwealth Oversight Arrangements – Successes and Challenges, Australasian Study of Parliament Group, 2013 Annual Conference, Perth WA, 3 October 2013) (available at: www.parliament.wa.gov.au/ASPG/2013%20ASPG%20Conference%20Video%20Presentations2.pdf - Session 2 at 41:46)

discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances.¹⁷

Others have expressed similar views, notably including French CJ¹⁸ and Professor Hazel Genn.¹⁹

The Constitution of the Commonwealth clearly and unequivocally embodies the assumption that the judicial function is a fundamental and inalienable function of government accessible to all those governed. The oath taken by judicial officers throughout Australia requires them to 'do right to all manner of people according to law without fear of favour affection or ill-will'. There must be limits to the degree to which access to the courts can be impeded while retaining the integrity of the juridical function. If access is not reasonably available,²⁰ right cannot 'be done to all manner of people according to law'. A system in which only a few can access the enforcement mechanisms of the law to secure their legal entitlements while the majority have no option but to make do with unenforceable administrative recommendations, agreements or undertakings ceases to be a system of government according to the rule of law.

The flaw in the Commissioner's approach is also evident in the apparent assumption that the main beneficiaries of the civil justice system are the parties to proceedings, from whom more of the costs of that system should be recovered. But the beneficiaries of a system for the enforcement of contracts are not just those who commence

¹⁷ Hon J J Spigelman AC, 'Judicial Accountability and Performance Indicators' (1701 Conference: The 300th Anniversary of the Act of Settlement, Canada, 10 May 2001) p 9.

¹⁸ Chief Justice Robert French, 'Perspectives on Court-Annexed Alternative Dispute Resolution' (Law Council of Australia Multi-Door Symposium, Canberra, 27 July 2009) (available at: www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27july09.pdf)

¹⁹ Genn H G, *Judging Civil Justice* (2009) p 35.

²⁰ Heydon J D, 'What do we mean by the rule of law?' (New Zealand Legal Method V: Modern Challenges to the rule of Law conference, Auckland 2009) p 12.

proceedings for enforcement; it is all those who engage in trade and commerce on the assumption that a system for enforcement is available if required.

The Commission proposal to mitigate the effect of settling court fees at a level which would recover the full cost of civil justice by permitting reduction or waiver of fees in limited circumstances²¹ fails to acknowledge the broader public interest in systems of adjudication and enforcement that are readily available to those who wish to utilise them.

In the case of the Supreme Court of Western Australia, court fees would have to be increased more than 500% in order to fully recover costs incurred in the exercise of our civil jurisdictions.²² It is ironic (to use a neutral term) that in a society governed by the rule of law a report ostensibly aimed at improving access to justice should propose the erection of even more substantial financial barriers in the path of those who wish to seek a judicial determination of their rights and obligations.

Timeliness in the third branch

A proper appreciation of the constitutional role of the courts in a system of government according to the rule of law necessarily underpins a proper appreciation of the time taken by the courts to administer justice.²³ The quality of justice provided by the courts is related to the time taken by the litigation process. That proposition can be graphically illustrated by the observation that any significant

²¹ For matters involving personal safety, the protection of children, untested issues, or if 'otherwise of significant public benefit' and also for those who are financially disadvantaged (Productivity Commission, Draft Report, Draft Recommendation 16.1, p 482).

²² Productivity Commission, Draft Report, p 470.

²³ Note that in this context I am referring to time, rather than delay

lapse of time taken for the disposition of cases could be avoided by resolving cases on the toss of a coin. However, any relationship between the outcome of such a process and a just outcome would be entirely coincidental.

Spigelman CJ used examples that are a little more real than my postulated toss of the coin when he wrote:

We should recognise that inefficiencies in the administration of justice in common law countries are not unintentional. There is no doubt that a much greater volume of cases could be handled by a specific number of judges, if they could sit in camera, not be constrained by obligations of procedural fairness or the need to provide a manifestly fair trial, and not have to publish reasons for their decisions.²⁴

So, when evaluating the Productivity Commission's recommendation that court fees should be increased so as to increase incentives for use of less formal and quicker mechanisms for the resolution of disputes, such as Ombudsmen, it should be remembered that in general, Ombudsmen do not operate with anything like the same degree of transparency and public accountability as the courts. As the Privy Council observed in 1936, 'publicity is the authentic hallmark of judicial as distinct from administrative procedure'.²⁵ Intervention by an Ombudsman is discretionary, rather than as of right. Ombudsmen generally only have power to make recommendations and do not make binding determinations of right. There is no entitlement to legal

²⁴ Hon J J Spigelman AC, 'Judicial Accountability and Performance Indicators' (1701 Conference: The 300th Anniversary of the Act of Settlement, Canada, 10 May 2001) p 7.

²⁵ *McPherson v McPherson* [1936] AC 177, 200.

representation or a general right to reasons for a decision,²⁶ and no right of appeal.

Put another way, when one is endeavouring to construct a system for the administration of justice which strikes the right balance between the fairness and justice of the process and the time which it takes, it must always be remembered that the interests served by the courts extend beyond the interests of the parties to any particular dispute and include the broader public interest which includes the affirmation of the rule of law and the delivery of outcomes which can be qualitatively assessed as just, as compared to dispositions quantitatively assessed as timely.

This is why I have chosen Coke's description of delay as 'a kind of denial' as the title for this address. It helps to underscore the proposition that reforms undertaken in order to improve timeliness should not view expedition as an end in itself, but must view timeliness in the context of the broader objectives of the civil justice system including most particularly of all, the provision of qualitatively just outcomes. The challenge which this forum confronts is improving timeliness without detracting from the achievement of the fundamental objectives of the civil justice system to which I referred and which are, with respect, given insufficient weight by the Productivity Commission in its draft report.

²⁶ For example, under section 17 the *Parliamentary Commissioner Act 1971* (WA), a complaint must be made by the person aggrieved, unless the complainant is unable to act on their own behalf. Complainants have no entitlement to reasons if the Ombudsman refuses to investigate a complaint (s 23) but not otherwise and government agencies are entitled to reasons if the Ombudsman is of the opinion that further action is required by the agency, s 25(3).

Defining timeliness

Numerous attempts have been made to define 'timeliness' and its obverse 'delay' in the context of the civil justice system. All must confront the difficulty of distinguishing between the lapse of time which is necessary for the just and efficient resolution of civil disputes, and the lapse of time which does not contribute to that outcome and is, in that sense, avoidable. For example, the authors of the International Framework for Court Excellence described timeliness as 'a balance between the time required to properly obtain, present, and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources'.²⁷

In the background report which preceded this forum, timeliness is defined as:

The extent to which;

- (a) those involved in the dispute and within the justice system consider that every opportunity has been taken to resolve the matter prior to commencing or continuing with court proceedings;
- (b) processes are efficient and avoidable delay has been minimised or eliminated throughout the process on the basis of what is appropriate for that particular category or type of dispute; and
- (c) the dispute resolution process that has been used is perceived as fair and just and where adjudication within courts and tribunals has taken place, the outcome supports the rule of law.²⁸

This definition has a number of components. They include:

²⁷ International Consortium for Court Excellence, *International Framework for Court Excellence* (2nd ed) (March 2013) p 4, available at: <http://www.courtexcellence.com/Resources/The-Framework.aspx>; see also *Supreme Court Civil Rules 2006 (SA)*, r 209.

²⁸ Australian Centre for Justice Innovation, *The Timeliness Project Background Report* (October 2013), p vi.

- (a) the subjective views of the participants to the dispute and those within the justice system;
- (b) efficiency of process;
- (c) minimisation or elimination of avoidable delay assessed by reference to the nature of the dispute;
- (d) fairness and justice of process;
- (e) outcomes which support the rule of law.

Like the other definition to which I have referred, this definition attempts to distinguish between necessary and appropriate lapse of time on the one hand, and delay on the other. In that context it admirably reflects and brings to account the broader objectives served by the judicial branch of government and to which I have already referred. In order to achieve that outcome the definition is necessarily multifaceted, and many of its facets defy quantitative measurement and can only be qualitatively measured. This is significant to the measure of timeliness, a topic which I will shortly address.

Lapse of Time v Delay

All definitions recognise that the lapse of time cannot be equated with delay. They recognise that some lapse of time is inevitable and unavoidable and that there will be some cases in which a significant lapse of time is essential for the proper administration of justice. So in some cases, time must be taken to prepare for a mediation or trial so that the outcome of the process will be fair and just - for example, by the preparation and exchange of expert reports or the disclosure of documents. In other cases, the time which must elapse to ensure a fair and just outcome may be unconnected with the process of dispute

resolution - such as cases in which damages for personal injury are claimed but cannot be properly assessed until the plaintiff's medical condition has stabilised to the point at which a reasonable prognosis of his or her future can be made.

The vanishing trial

I have already referred to 'the vanishing trial'. It is essential to bear steadfastly in mind the fact that only a very small proportion of civil disputes in the higher courts are resolved by adjudication after trial,²⁹ and that the majority of disputes are resolved by consensus. The achievement of consensus can be influenced by factors which are not directly related to the particular dispute, and which can be influenced by the effluxion of time. Many with extensive experience in the civil justice system assert that cases will settle when they are good and ready, and not before. Those sentiments reflect the fact that sometimes parties need time to reflect upon the issues and sometimes for emotions to subside before they can seriously contemplate consensual resolution. In those cases the lapse of time can be beneficial, rather than detrimental. In those cases it is at least arguable that requiring the parties to actively participate in case management processes is counterproductive, not only because it requires them to incur irrecoverable costs unnecessarily, but also because it requires them to participate in an adversarial process which is antithetical to consensual resolution of the dispute. So, in at least some cases, insistence upon the speedy performance of interlocutory steps properly undertaken to prepare for a trial can be contrary to the interests of justice.

²⁹ In the Supreme Court of Western Australia, less than 3% of lodgements are finalised by trial.

Measuring timeliness

As Spigelman CJ has famously pointed out, there is an almost unquenchable contemporary enthusiasm to count things simply because they can be counted, rather than because they should be counted. But as he noted not everything that can be counted matters and not everything that matters can be counted.³⁰

Contemporary information technology enables data with respect to the lapse of time in the justice system to be captured and presented quite easily. Because it is easy to do, it is done. And once it has been done, there is an almost irresistible drive to use that data as a surrogate for measures of timeliness when, in fact, the data only measures the lapse of time. The data sheds no light upon the vital distinction between the lapse of time which is appropriate and necessary for the just resolution of a dispute, and avoidable delay. That distinction is the critical issue addressed by the various definitions of timeliness to which I have referred.

As I have noted, the definition of timeliness prepared for the purposes of this forum has a number of facets which cannot be measured using data readily captured from the statistical data collected by courts, and some of which is incapable of ready quantitative measure - obvious examples being the opinions of the participants to the dispute, the fairness of the process and the justice of the outcomes. As far as I am aware, none of the measures commonly used by courts around Australia or by the Productivity Commission in its annual Report on Government Services shed any light on these issues. Further, for the

³⁰ Hon JJ Spigelman AC, 'Judicial Accountability and Performance Indicators' (1701 Conference: the 300th Anniversary of the Act of Settlement, Canada, 10 May 2001) p 7.

reasons which follow, not only are those measures ineffective as a surrogate measure of timeliness, but in many instances they can be positively misleading.

Current measures of timeliness

The fundamental problem with the measures currently used as a surrogate for timeliness is that equal weight is given to all cases within the class in which the lapse of time is measured, without differentiation or weighting by reference to the particular circumstances of each case. If all cases within the class measured have identical characteristics, the median lapse of time between two identified points in the processing of those cases (often commencement and finalisation) can shed light on timeliness by identifying fluctuations over time. In some areas of civil jurisdiction, the cases are relatively homogenous, so that there are not significant variations in the characteristics of the cases within the class over time. So, for example, because the general character and composition of non-contentious cases seeking a grant of probate does not alter over time, fluctuations in the median time which elapses between lodgement of an application for probate and finalisation provide a useful measure of the timeliness within which the court is discharging that area of its jurisdiction.

However, the more heterogeneous the cases within the class measured, the less effective is the measure of the lapse of time as a surrogate for timeliness. Most civil courts in Australia have widely divergent areas of jurisdiction and the characteristics of the cases brought within those areas of jurisdiction diverge widely. As a consequence, measures of time taken across all the cases within the civil jurisdiction of a court,

which are the most common measures adopted, are at best meaningless and sometimes misleading as a surrogate for timeliness.

I will endeavour to illustrate this point first by reference to the statistical data collected by the Supreme Court of Western Australia with respect to the lapse of time and then by reference to the measures used by the Productivity Commission in its annual report on government services.

Supreme Court of Western Australia data

Lapse of time to case finalisation

In the Supreme Court of Western Australia, the data collected with respect to the lapse of time taken to finalise a case cannot be differentiated by reference to the particular circumstances and characteristics of the case. So, in the data collected by our court, the Bell case³¹ which occupied 404 hearing days in which 166 witnesses were called, nearly 800,000 documents tendered and in which the reasons for decision extended to more than 1,000,000 words, is given equal statistical weight in the timeliness data as an uncontested application to wind up a company, or even an application for admission to be a lawyer. Because in most courts the simpler cases significantly outweigh the complex cases numerically, statistical measures which do not differentiate between the simple and more complex cases will give much greater weight to the time within which less complex cases are resolved.

This point can also be illustrated using the data collected by the Supreme Court of Western Australia. Each year around 3,000 cases

³¹ *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239.

are commenced in the general civil jurisdiction of the court. Less than 100 of those cases are finalised following trial. Consequently the time lapse data collected in respect of those 3,000 cases is dominated by the 2,900 cases which are finalised by some means other than a trial. The most common means of finalisation within that class is by judgment in default of appearance or in default of defence. Because of the numerical significance of those cases within the class measured, the median time between commencement and finalisation of cases measured across that class never fluctuates significantly, and generally ranges between 17 and 19 weeks. Such fluctuations as can be observed are either the consequence of fluctuations in the time taken for the administrative processing of applications for default judgment due to fluctuations in the levels of staff available to process those applications, or due to changes in the characteristics of the cases within the class.

Changes in caseload

A good example of changes in the composition of the class of cases brought within the civil jurisdiction of a court can be found in the aftermath of the global financial crisis in 2008. The years following that crisis saw a dramatic increase in mortgagee applications for possession of property. Those cases came to represent about one-third of the civil lodgements in the Supreme Court of Western Australia, and changes in the rate and number of total lodgements over time were driven almost entirely by changes in the rate and number of lodgements of applications for possession of land.

Under Order 62A of the Rules of the Supreme Court of Western Australia, a special procedure applies to applications for default

judgment in actions by mortgagees for the possession of land. In those cases the defendants must be summoned to a hearing and additional information must be provided to the Court by the applicant for default judgment. Because of the numerical significance of those cases, data collected with respect to the lapse of time prior to finalisation of cases within our civil jurisdiction was heavily influenced, indeed dominated, by the time taken to process applications for default judgment in mortgagee actions. More recently, fluctuations in the time lapse data collected by the court can be attributed to the reduced numerical significance of those cases within our general jurisdiction, as the impact of the global financial crisis diminishes.

Time lapse between entry for trial and trial

Of course, we use other statistical data to try to assess timeliness. For many years in our court, the time which elapsed between the entry of a case for trial and the commencement of the trial was regarded as a surrogate for timeliness. However, that was at a time before we introduced docket case management and in which all cases had to be formally entered for trial in order that they could join a queue of cases awaiting the allocation of trial dates. In that system, the time taken between joinder of the queue and the commencement of the trial provided some measure of the court's capacity to respond to the needs of the litigants. However, under our contemporary system of seamless docket case management, likely trial dates are usually allocated well in advance of the case being ready for trial, or being entered for trial, and a timetable is set which will ensure that the case is ready to go to trial at the time allocated. The formal entry of a case for trial is no

longer a significant milestone in the preparation of a case for trial - its contemporary function is essentially to provide an occasion upon which the court can collect the fees for trial. Because of these changes in our case management systems, the lapse of time between the time at which a case is formally entered for trial and the time at which it is tried no longer measures anything of any significance.

Only counting cases tried

We have attempted to avoid the problem to which I earlier referred, that is, of the time lapse data being dominated by the large numbers of cases resolved administratively by separately counting the data in respect of those cases which have been finalised by trial. However, because the class of those cases is relatively small, unless there is some qualitative assessment of the characteristics of the cases within that class, the measure is not particularly helpful. So, when judgment in the Bell case was given in 2008, almost 13 years after the case was commenced in the Federal Court of Australia,³² that entry in the data set had a significant impact upon the average time to finalisation of the less than 100 cases tried that year, although no significant impact upon the median time taken to finalise the cases tried that year. Because a simple contract case which can be quickly prepared for trial and tried within a day or two receives the same statistical weighting in that data set as a large and complex case between two major mining companies, changes within the characteristics of the cases tried in any given accounting period³³ will cause changes in the time lapse data which

³² The litigation commenced in December 1995 (*The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at 67).

³³ The shorter the accounting period the more vulnerable to influence by changes in the characteristics of the cases.

are unrelated to timeliness in the sense in which we are using that word.

Time taken to deliver reserved decisions

Another measure which we use is the time between the completion of trial and delivery of judgment. Generally speaking, however, this is more of an index of the workload imposed upon the judges of the court and the efficiency with which that workload is managed, rather than anything else. This measure also has the same vulnerability to changes in the complexity of the caseload of the court as the other measures to which I have referred - so that, if the cases tried are predominantly complex commercial cases, a median time between trial and delivery of judgment of, say, three months may be entirely acceptable, whereas a different conclusion might be reached if the caseload was predominantly relatively straightforward debt claims.

So, in our court, we have been unable to identify or capture any statistical data which sheds any meaningful light upon the timeliness with which we are discharging our civil jurisdiction. For the reasons which follow, I respectfully suggest that the data provided by the Productivity Commission in its annual report on government services has not solved this problem either.

Report on Government Services

The annual Report on Government Services (ROGS) published by the Productivity Commission reports data collected by Australian courts which is used for the purposes of comparative analysis of cost, efficiency and timeliness. The Background Report prepared for this forum conveniently identifies the data sets in the ROGS report which

might be thought to provide some measure of efficiency and timeliness.³⁴ They include:

- Backlog indicator
- Attendance indicator
- Clearance indicator
- Cost per finalisation.

Backlog indicator

The backlog indicator presents a profile of the age of pending cases within a court's inventory of unresolved cases. It provides a measure of the number and proportion of cases on hand which exceed specified time standards (eg, all cases more than 2 years old). Because the measure is applied to all unresolved cases within a civil court's inventory of cases on hand, the measure is heavily dominated by the proportion of cases within that inventory that are resolved administratively, as compared to the proportion that go to trial. So, over the period when the inventory of cases pending in the Supreme Court of Western Australia came to be dominated by cases involving applications for the possession of land which were mostly resolved by default judgment, our backlog indicator improved significantly, but it did not reflect any change in the timeliness with which we were managing our cases, but only a change in the composition of the workload.

³⁴ Australian Centre for Justice Innovation, *The Timeliness Project Background Report* (October 2013), pp 19, 20.

Attendance indicator

This indicator measures the average number of attendances recorded for each finalised case. Presumably it is underpinned by an assumption that the less attendances per finalised case, the more efficient is the court. It is another measure which is heavily dependent upon changes in the characteristics of a court's caseload. Again, our influx of mortgagee actions provides an example. They have the effect of reducing our average attendances per finalisation, but there was no change in our relative efficiency.

It also seems to me that the assumption which appears to underpin this indicator is questionable. It seems reasonable to infer that contemporary systems of docket case management have increased court attendances per case finalised. However, if those systems are also having the effect of encouraging the early identification of issues and the elimination of delay, with the result that cases are brought to finalisation more quickly and overall less expensively, an increase in attendances may in fact be an index of efficiency, not inefficiency.

Clearance indicator

This indicator compares the number of lodgements in any court during a particular accounting period, with the number of finalisations during that same period. So, using simple numbers, if during the relevant accounting period a court receives 100 new cases and finalises 90, it has a clearance ratio of 90%. If, in the next accounting period, it receives 100 new cases but finalises 110, it has a clearance ratio of 110%.

Bizarrely, this indicator is commonly taken as a surrogate for court efficiency. Clearance ratios equal to or greater than 100% are said to indicate an efficient court, whereas clearance ratios less than 100% are said to indicate an inefficient court. This is bizarre because clearance indicators provide no real indication of the efficiency of a court, for the reasons which follow.

First, clearance indicators are dominated by a factor which is entirely outside the control of the court - namely, the number of new lodgements. Let us suppose that a court has the staff and judicial resources sufficient to finalise 100 cases per annum. If 80 cases are lodged in a year, and 100 cases finalised, the clearance ratio will be 125% and all will be congratulated. But if the following year 125 cases are lodged, and 100 cases are again finalised, the clearance ratio will be 80% and an inquiry may be launched into the apparent inefficiency of the court. However, all that has happened is that the court has used the resources available to it to consistently finalise cases at the same rate, but the rate of lodgements has changed.

Second, the indicator has the same vulnerability to changes in the characteristics of the caseload of a court as all the other indicators I have mentioned. So, if the proportion of cases resolved administratively increases in any accounting period, the clearance indicator will appear better, and if it decreases, the clearance indicator will appear worse. But those changes in the clearance indicator tell one nothing about the efficiency of the court.

Third, the indicator compares cases lodged within one accounting period, with cases finalised in that same accounting period. Often they will not be the same cases, because a case lodged in one

accounting period will be finalised in the next. This has two consequences. First, the comparison of a clearance indicator in one accounting period to the clearance indicator in the next accounting period may be distorted by changes in the composition of the caseload over those periods. Second, a significant increase in caseload at the end of one accounting period may significantly reduce the clearance indicator for that period and then significantly improve the clearance indicator in the next accounting period, when those cases are finalised. So, 'bubbles' in the numbers of cases lodged with a court - a matter entirely beyond the control of any court - may have a profound effect upon the clearance indicator.

For these reasons I am continually bemused that anyone would take the clearance indicator, on its own, to be a meaningful index of anything.³⁵ No doubt the clearance indicator shows whether cases on hand are increasing over time. But that can be easily assessed simply by counting cases on hand.

Cost per finalisation

This indicator divides the total cost of a court's civil jurisdiction by the number of finalisations achieved during the relevant accounting period. Like the other measures to which I have referred, it is vulnerable to changes in the composition of a court's caseload, so that an increase in the proportion of cases resolved administratively will reduce costs per finalisation without shedding any light upon the efficiency of the court. Further, because it is assessed by reference to a particular accounting period, it suffers the same vulnerability as the

³⁵ If there were a means of quantifying consistent and efficient delivery of services by the court through other measures, clearance measures could be an indicator of whether the court is sufficiently resourced to meet demand.

clearance indicator to which I have just referred, so that the finalisation of cases during one accounting period which were lodged and worked upon in another, will result in a reduction in the cost per finalisation in that accounting period without shedding any light upon the efficiency of the court.

Measuring timeliness - conclusions on the statistics

Two conclusions follow from these observations. First, if there is a quantitative measure of timeliness available to be extracted from the statistical data maintained by courts, we have not yet found it. Second, notwithstanding the clarion call made by Spigelman CJ more than a decade ago, in the area of court administration we are still counting things just because we can, and not because we should, and we are still drawing entirely unjustified conclusions from the data which is extracted from our computer systems.

How can we measure timeliness?

So what can we do to measure timeliness? This is I think one of the big challenges which the timeliness project must confront, and I will be very interested to hear the views of others at this forum on that topic. My own view is that we need to move toward more qualitative and subjective assessment of timeliness, and away from our apparent dependence upon statistical data.

Timeliness audits

It occurs to me that in this area, auditors may have more to offer than statisticians. Perhaps instead of relying upon statistical data collected across entire fields, it would be preferable to use audit techniques to qualitatively assess a representative sample of cases. By this means

the particular characteristics and circumstances of each case would be taken into account in assessing whether the time taken between initiation and finalisation was any longer than necessary and appropriate for its fair and just disposition as perceived by the parties to the dispute. In respect of cases where delay was identified by this process, the causes of delay could then be assessed and steps taken to reduce the prospects of delay in similar cases in the future.

Such a process would also enable the characteristics of cases likely to experience delay to be identified - for example, cases involving self-represented litigants, or claims for damages for personal injury, or involving significant components of expert evidence etc. Case management techniques could then be developed and utilised with a view to minimising delay in cases having those characteristics.

Case management data

If one was to succumb to contemporary enthusiasm for quantitative analysis, contemporary systems of case management may provide opportunities for the collection of data which is relevant to timeliness. For example, it would be possible to identify the number of occasions upon which a timetable set by the court was breached or the time fixed by the court for the taking of any act had to be extended. Assuming that the time fixed by the court for the taking of any step in the litigation was a reasonable estimate of the time properly allowed for that step, failure to comply could be taken as a departure from timeliness.

However, I am concerned that if such a measure came to be seen as a general index of timeliness, or even of court efficiency, it might result in behavioural modification - not by the parties subject to the

timetables imposed by the court - they have no interest in the perceived efficiency of the court, but by the court itself. If this were to become an index in general use, there is I think a risk that case managers would incline towards protracting the times within which steps are to be taken by the parties when fixing the litigation timetable, so as to avoid adverse inferences of inefficiency being drawn from non-compliance.

I would like to return now to say a little more about the three things which have, in my view, contributed significantly to improvements in timeliness over the last 20 years or so.

Improvements in timeliness

Information technology

Communication

The most obvious way in which information technology has contributed to improved timeliness is by enabling instantaneous communication between lawyer and client, between lawyer and lawyer, and between lawyer/litigant and court, and vice versa. The speed with which communication can and does now take place enables things to happen a lot more quickly than in the past.

Electronic filing

The second way in which information technology has improved timeliness is by the enormous contribution which it has made to improving the efficiency of court administration. Although there is still room for improvement in relation to electronic lodgement, electronic court file management and automated responses to requests

for information and court documents, improvements and developments in these areas over time will inevitably contribute significantly to improved timeliness.

Discovery

The third area in which information technology has and will continue to have an impact is in the area of data retrieval for the purposes of litigation. There are, of course, threats to timeliness in this area. The proliferation of electronic data in contemporary commerce and the relative ease with which it can be retrieved creates a very real risk that the litigation process may be swamped by a tsunami of irrelevant data of unfathomable proportions.

While there have been instances in which that threat has been realised, I am optimistic that we will develop the skills and the technology to enable us to retrieve only that data which is essential to the fair and just resolution of civil disputes. I readily acknowledge that searching large sets of electronic documents by reference to identified key words has had its problems in the past, but I get the clear sense that those problems are diminishing as our skills and techniques are improving. The technique of predictive coding so as to identify the documents within the data set that are most likely to be relevant to the issues in dispute appears to have great potential for minimising the burden of civil discovery, and the time consumed by that process.

Procedural information

The fourth area in which information technology can make a significant contribution to timeliness is by the capacity which it offers to provide user-friendly information to parties to civil disputes,

including those who represent themselves. Information asymmetry - that is, the circumstance in which lawyers have a great advantage over non-lawyers in relation to the information available with respect to the mechanisms available for the resolution of civil disputes can be ameliorated to some extent by the provision of user-friendly information on a wide variety of topics to those many people who now rely upon the internet as their primary source of information. With the benefit of such information, parties to disputes will be better equipped to efficiently instruct their lawyers and focus upon the critical areas of controversy. Further, there can be no doubt that self-represented litigants consume a disproportionate amount of the time and resources of most Australian courts. Anything which improves the flow of information to such persons can only improve the timeliness of the justice system generally.

Online dispute resolution

The final aspect of information technology which I would like to mention as being relevant to timeliness concerns those systems for online dispute resolution which have now emerged and which are likely to become a more significant aspect of the various mechanisms available for the resolution of disputes in the future. I may be showing my age when I suggest that it appears to me to be unlikely that these mechanisms will be utilised by parties to significant commercial or personal disputes because of the natural human preference for direct personal contact. Whether that prophecy is correct or not, there seems a real prospect that online dispute resolution systems will provide opportunities for the prompt resolution of less complex civil disputes.

Case management

Although there is currently a lack of data available to establish the impact which contemporary systems of case management have had upon the timeliness of dispute resolution, my intuitive belief that these systems have made a positive contribution to timeliness is I think commonly shared. It seems unlikely that systems of case management which have as their objective the early identification of the real issues in dispute, the elimination of any step or process which does not make a contribution to the justice of the resolution of the dispute which is proportional to the time and cost of that step or process, and which encourage parties to a dispute to prepare for mediation or trial by the quickest and most efficient means do not have that effect. However, there are a number of specific issues in the area of case management which bear upon timeliness and upon which I would venture a comment.

Is time money?

Contemporary case management proceeds upon the assumption that the longer a case goes on, the more it is likely to cost the parties. Intuitively that proposition seems correct. However if, as I suggested earlier, there are some cases the resolution of which depends upon factors which are not directly connected with the preparation of the case for mediation or trial, requiring those parties to actively participate in case management may be counter-productive. As Lord Jackson pointed out in his report,³⁶ modern systems of case management have the effect of requiring parties to 'front end' the costs of preparation to a much greater extent. There is a real risk that these

³⁶ Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), p 353.

practices may result in parties incurring more costs than they otherwise would have. The difficulty is that we presently lack any real data by which to assess how often that risk is realised, and in particular, to assess whether our systems of case management should be modified so as to avert that risk. However, this is, I believe, an area in which research is under way.

Proportionality

One of the cornerstones of the Wolfe reforms, and a key component of most contemporary systems of case management is the doctrine of proportionality. The basic concept is that no step will be taken in preparation for mediation or trial unless the time and cost incurred by taking that step is proportional to the contribution which the step or process will make to the achievement of a fair and just outcome.

There are many instances in which the application of the proportionality principle will be clear and simple. If general discovery will take a year and cost an amount roughly equal to the amount in issue in the dispute, it will not be ordered. However, there are many instances in which the application of the principle is not so clear. In those instances, the difficulty of applying the principle is compounded by the fact that it requires a comparison between things which are not commensurable - cost and delay on the one hand, and fairness and justice on the other. It is not at all clear to me that we are regularly getting the balance of these incommensurables right, and once again this is an area in which there is little data or research available by which to gauge our success or failure.

Pre-action protocols and good faith obligations

Various Australian jurisdictions impose obligations upon prospective litigants which must be fulfilled prior to the commencement of litigation. They take differing forms and are expressed in different terms. In the context of timeliness there is a question as to whether these procedures expedite resolution of a dispute by requiring the parties to focus upon the issues and the prospect of consensual resolution prior to commencement of the litigation, or whether such processes delay resolution by imposing another step or steps which must be performed before the jurisdictions of the courts can be invoked. In the United Kingdom, Lord Jackson found that the adoption of pre-action protocols on the basis of one size fits all had, in some areas, produced substantial delay and resulted in extra costs being incurred. On the other hand, there is evidence that at least in some jurisdictions in Australia, pre-action obligations have improved the timeliness of resolution.

It occurs to me that there may not be a single answer to this question, and that the effect of pre-action obligations might depend upon the nature of the dispute and the processes of the court after jurisdiction has been invoked. For example, in the Supreme Court of Western Australia, if a case is admitted to a list of cases docket managed by a judge, a strategic conference will be convened early in the life of the case for the purpose of identifying the real issues in dispute and charting a course aimed at the earliest possible resolution of the dispute whether by mediation or by trial. Court-based mediation is provided for a listing fee of \$222, which is a fraction of the fee which would be charged by a private mediator. In that context there is

something to be said for the proposition that the parties might be better off invoking the jurisdiction of the court sooner rather than later, in order that the court can supervise the early identification of the real issues in dispute and refer the matter to mediation at a fraction of the cost charged by a private mediation provider.

Docket case management

Many Australian courts now provide case management on a docket system, where each case is managed by a single judicial officer from inception to resolution. Intuitively one is inclined to think that docket management is likely to enhance timeliness by reducing delays due to the inefficiencies associated with file 'churning', when a number of judicial officers each have to come to terms with the issues in the case, or arising from inconsistent managerial approaches in relation to the one case. However, I am unaware of any data or research which establishes this proposition.

Docket management comes at the risk of inconsistency as between docket managers. Unless docket managers within a court confer regularly with a view to ensuring that their practices and approaches are consistent, there is a danger that the timeliness of any particular case might depend upon the idiosyncratic approach of the docket manager to whom the case is allocated.

Nor can it be safely assumed that all judicial officers are skilled case managers with the capacity or inclination to properly manage the cases to a timely resolution. Many years ago in the Supreme Court of Western Australia, a particular list was created known as the Long Causes List. Any case with an estimated trial length in excess of two weeks was entered into the list and allocated to a judge of the court

selected by reference to a list in which each judge took his or her turn. Not all of the judges had skills or aptitude as case managers and over time the list became known in the profession as the 'lost causes list', because many of the cases entered into the list appeared to disappear without trace.

Some courts have particular lists in which expedition is the central focus of case management, often indicated by the name of the list such as 'fast track' or 'rocket docket'. While I readily accept that there are often good reasons for the creation of such lists, I do not favour them myself. Designating one list as a 'fast track' appears to me to connote that the other lists are 'slow track' which is I think an unfortunate impression to convey. I am inclined to the view that in any system of docket case management, all cases should be managed on the basis that they will be brought to resolution as quickly as possible having regard to the particular circumstances of the case.

Filters and shortcuts

In many court systems, attempts are made to enhance timeliness by placing filters upon the capacity of a party to take a procedural step (by requiring leave of the court) or by offering shortcuts (such as summary judgment or the trial of a preliminary issue). These techniques can be successful, but they need to be handled with care. For example, the imposition of a requirement for the grant of leave before a step is taken may simply introduce another step or steps in the process which delays rather than expedites resolution, especially if there is a right of appeal from the refusal of leave. Lowering the barrier so as to make summary judgment easier to get might encourage appeals from the entry of summary judgment which, if successful,

would introduce significant delay prior to the final resolution of the case. Experience has also shown that early determination of preliminary issues which might seem to provide a shortcut to final disposition might, in the end, turn out to be the long way home.

Alternative dispute resolution

In the Supreme Court of Western Australia, many more civil cases are finalised after mediation than after trial, and I see no reason to suspect that the experience in other Australian superior courts is any different. As I have already noted, in that context a question arises as to whether insistence that parties participate actively in case management processes focused upon preparation for a trial in an adversarial environment is counter-productive. In my view, this is a very real issue which could usefully be informed by further research.

Ripeness

Much has been written on the identification of the particular point in time at which a dispute is 'ripe' for mediation or some other form of alternative dispute resolution. However, I suspect that the learning in this area may be better known to mediators than to judicial officers responsible for identifying the point at which a case should be referred to mediation. In Western Australia I have said that mediation is a process and not just an event so many times now that it is becoming something of a joke within the profession. By that expression I mean that I do not see any particular advantage in reserving mediation until the case is about to be tried. To the contrary, experience suggests that much is to be gained by referring cases to mediation early on the basis that if they do not settle at the first mediation conference, an assessment can be made of the further steps which need to be taken

with a view to improving the prospects of settlement at a subsequent conference.

Non-Court based mediation

Another issue with respect to the timeliness of ADR arises in jurisdictions like Western Australia, in which all civil jurisdictions offer court-based mediation services. That question is whether government should be offering to provide mediation services independent of the courts, so as to offer a more timely means of dispute resolution. Put another way, if government is willing to provide a subsidised mediation service as part of the court system, why should parties who want to access those services be required to first invoke the jurisdiction of the court by invoking processes which can be time consuming, expensive and antithetical to consensual resolution because of the adversarial nature of the process?

I suspect that the answer to this question depends upon the limited availability of publicly-funded resources, a topic to which I will shortly turn. In the Supreme Court of Western Australia it is a constant struggle to provide mediation services to litigants in a timely fashion. If we were to be expected to provide those services to non-litigants as well, the resources available for mediation would necessarily have to increase significantly. It seems most unlikely that those additional resources would be provided in the current fiscal climate.

Court resources

Any meaningful discussion on the subject of the timeliness of the justice system must take account of the limited judicial and other

resources available to the courts. Any systems or procedures designed to enhance timeliness which fail to take account of those limited resources is doomed to fail. Furthermore, at the risk of ending on a note of pessimism, in the current fiscal climate it seems to me that the challenge which confronts many Australian courts is not so much to enhance timeliness, but rather to maintain current standards of timeliness in the context of ever diminishing judicial and other resources.

In the Supreme Court of Western Australia we have not been provided with any additional judicial resources for more than eight years, and although I am awaiting a definitive statement from government on the subject, it seems likely that judicial numbers will be reduced to levels below that which prevailed eight years ago. Taking into account population growth, expansion in specific areas of jurisdiction, particularly criminal jurisdiction, and the significant increase in commercial activity in Western Australia and consequential increases in the number and complexity of civil disputes within our State, the failure to maintain appropriate levels of judicial resources will inevitably have an adverse effect upon timeliness. Our difficulties are compounded by reduced levels of support staff which have now been locked in by a freeze upon staff recruitment. In this context, enhancing timeliness is frankly unrealistic, and perhaps the best that can be hoped is that we can continue to find efficiencies and processes which will mitigate the reductions in timeliness which are the inevitable consequence of inadequate resources.