



New South Wales Government
Attorney General's Department

ADR Blueprint Discussion Paper

Framework for the delivery of
alternative dispute resolution
(ADR) services in NSW

April 2009

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Summary of Proposals

Proposal 1: Establish an ADR Directorate within the NSW Attorney General's Department to coordinate, manage and drive ADR policy, strategy and growth in NSW.

Proposal 2: Provide better information to consumers about non-court options to resolve disputes. Position LawAccess as a 'one stop shop' for information about dispute resolution services for consumers and business.

Proposal 3: Provide consumers with resources about how they can resolve disputes themselves, including ensuring existing resources are easily accessible.

Proposal 4: Place a legislative obligation on legal practitioners to provide information to their clients about ADR.

Proposal 5: Put a much greater emphasis on negotiation/mediation/conciliation skills in legal education.

Proposal 6: Enact 'guiding principles for the conduct of civil disputes', which parties would be encouraged to honour. A court would take compliance with the principles into account should it ultimately be asked to adjudicate a civil dispute. Serious failure to comply with the principles could result in adverse cost orders.

Proposal 7: Encourage collaborative law practices in a greater range of civil law matters.

Proposal 8: Require government agencies to be more accountable with respect to their adherence to the Model Litigant Policy and relevant Premier's memoranda, by putting in place appropriate performance measures to monitor compliance and / or using appropriate auditing mechanisms.

Proposal 9: Incorporate the main elements of pre-action protocols as 'best practice standards' in the 'guiding principles for the conduct of civil disputes' (see Proposal 6). If a dispute is subsequently litigated the court could take the extent of compliance into account, when determining costs (including indemnity costs) (see Proposal 15). Alternatively, practice directions could be issued mandating specific steps that must be taken before certain types of cases commence.

Proposal 10: Progress amendments to uniform commercial arbitration legislation, based on the UNCITRAL Model Law on International Commercial Arbitration, supplemented by any additional provisions as are necessary or appropriate for the domestic scheme.

Proposal 11: Establish a single Sydney International Arbitration Centre that has the physical space, organisational facilities, secretarial, computer and research support in the one location, to position Sydney better as a centre for international commercial arbitration.

Proposal 12: Give high priority to the collection and analysis of data about the ways civil matters are finalised in the courts, and data about the cost effectiveness of case management strategies.

Proposal 13: Change the language and processes used by courts to resolve civil disputes - along the lines suggested by the British Columbian working group on civil justice reform - so that the primary focus is on preparation for ADR rather for trial.

Proposal 14: Give high priority to the collection and analysis of data about court-annexed and private mediations, including how quickly they are able to effect settlements, and whether they ultimately reduce the proportion of matters that proceed to trial.

Proposal 15: Provide that the court is to take into account parties' attempts to engage in ADR when making orders as to costs.

Proposal 16: Improve arbitration by penalising failure to disclose if a matter is subsequently litigated (there is some evidence that parties have been using it as a 'dry run', and keeping 'smoking guns' until the actual trial).

Proposal 17: Increase the small claims jurisdiction of the Local Court from \$10,000 to \$30,000 and make greater use of assessors.

Proposal 18: Introduce the following strategies to encourage earlier settlement of disputes in the small claims division:

- Pre trial reviews being conducted by trained mediators (registrars, assessors and magistrates)
- Require the party to attend the pre trial review either in person or by teleconference
- Conduct the pre trial review in a registry office instead of the courtroom to facilitate a mediation session, where possible.

Proposal 19: Move to a system where all mediators on the District and Supreme Court mediators' panels are accredited under the National Mediator Accreditation System, and all court-annexed mediations (where a registrar or other officer of the court is the mediator) are carried out by a person accredited under the National Mediator Accreditation System.

A. CIVIL DISPUTES

The NSW justice system is founded on a traditional adversarial model of judicial determination. However a growing number of civil disputes, whether they occur in a family, community or business setting, are now settled by Alternative Dispute Resolution (ADR) techniques. The National Alternative Dispute Resolution Advisory Council (NADRAC) defines ADR as 'processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.'¹

ADR encompasses a broad range of techniques that can include mediation, arbitration, neutral evaluation and conciliation. These are defined by NADRAC in the following terms:²

Mediation is a process in which the disputants, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its mediation.

Arbitration is a process where the parties present arguments and evidence to a dispute resolution practitioner who makes a determination. Arbitration is particularly useful where the subject matter is highly technical, or where the parties seek greater confidentiality than in open court.

Neutral evaluation is a process where the disputants present arguments and evidence to a dispute resolution practitioner. The practitioner makes a determination on the key issues in dispute and the most effective means of resolving the dispute, without determining the facts of the dispute.

Conciliation is a process in which the disputants, with the assistance of a conciliator identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process.

When used in appropriate cases and at the appropriate time, ADR techniques can:

- Put the parties in control, rather than their legal representatives
- Focus on the real issues in dispute, rather than the strict legal rights and obligations of the parties
- Preserve the relationship between the parties, instead of establishing one winner and one loser
- Be less expensive and quicker than traditional adversarial litigation
- Keep private disputes private
- Deliver more flexible remedies than the court

The growth of non-adversarial justice, including ADR, has been an important development in Australia over the past thirty years, however one that has lacked

¹ National Alternative Dispute Resolution Council, *Dispute Resolution Terms* (2003) 4.

² Ibid.

strategic coordination. Significant gaps currently exist in ADR service delivery and infrastructure in NSW. There are accordingly extensive opportunities for improvements to be made to the coordination, integration and appropriate use and growth of ADR in NSW.

ADR Services in NSW

ADR services encompass a diverse range of processes, dispute types, and settings. Some ADR services operate within the NSW court and tribunal system, and others operate outside it. A broad range of bodies offer ADR services. The services provided can be quite specific to the nature of the dispute, and the outcome being sought. Some providers are publicly funded and some are privately funded. They include:

Community Justice Centres, Community Legal Centres, Consumer Trader and Tenancy Tribunal, Administrative Decisions Tribunal, Ombudsman, Human Rights and Equal Opportunity Commission, Anti Discrimination Board, Privacy NSW, Office of the Legal Services Commissioner, Motor Accidents Authority, Department of Fair Trading, the Housing Appeals Committee, various industry ombudsmen (eg Telecommunications Industry Ombudsman, Australian Banking and Finance Industry Ombudsman), the General Insurance Enquiries and Complaints Scheme, welfare agencies, ACDC, LEADR, Institute of Arbitrators, Relationships Australia.

The ad hoc and piecemeal way, in which the ADR industry has developed, means that there is currently no comprehensive and clear picture available of the full range of ADR suppliers in NSW. This can lead to confusion for consumers, gaps and overlaps in service delivery, and the potential for referral loss. These issues are discussed in further detail below.

Civil Litigation and Focus on Preparation for Trial

A small minority of disputes result in the commencement of legal action. Nearly 20 years ago it was estimated that only 5.7% of all commercial disputes end up within the courts system, and the percentage is likely to be even less today, with the greater acceptance and institutionalisation of ADR techniques.³

Although the civil litigation system deals with a small minority of cases, it is nonetheless an essential means of dispute resolution in the community. This system is based on law, and includes the power to compel parties to participate and to abide by the court's decision. The rule of law is fundamental to a democratic and civilised society and its very existence provides an important motivation to settle civil claims. If a party is aware of the relevant law, and they know their case is weak, then they are unlikely to risk a judgement that could include an adverse costs order.

There is no question that the courts' principle role is to administer justice, and a proportion of litigants come to court to have their legal rights upheld and enforced. However it is also the case that many people come to the court to solve problems or disputes that do not ultimately require judicial determination. This is particularly true in the civil jurisdiction. The fact is that the overwhelming majority of matters in the civil jurisdiction of the courts do not proceed to hearing. They are either withdrawn,

³ T Sourdin, "Mediation in Australia: Impacts on Litigation", *Global Trends in Mediation* (2006), p63.

uncontested (with default judgements being entered), or they are settled somewhere along the line.

Understanding that judicial determination is actually the exceptional way to resolve disputes provides an important perspective for the future scope of ADR. It is also no doubt the reason why the Commonwealth *Family Law Act 1975* referred to alternative dispute resolution processes as “primary dispute resolution methods.”⁴

Canadian figures⁵ suggest that only about 2-3% of civil matters are ever tried – they are settled or otherwise disposed of, regardless of the structures put in place to process the flow of cases through the system. In NSW, Local Courts statistics are somewhat higher, with about 5% of matters proceeding to hearing.

One recent Canadian report⁶ makes the point that when clients approach lawyers with problems to resolve, lawyers are trained to frame the problems in terms of legal rights and obligations. Legal solutions are then pursued, and lawyers start to prepare for trials that are very unlikely to eventuate. They leave no stone unturned in their search for evidence; they withhold information as long as possible to retain a tactical advantage, and they are deadline driven (working backwards from the trial date). Court processes are structured to support this adversarial process.

*The current procedural rules remain focused on preparation for trial rather than alternative means of dispute management and resolution. This is despite the fact that a final trial on the merits does not take place in the overwhelming majority of cases.*⁷

*When every case is litigated under the presumption it is going to trial, valuable court time is tied up in the unnecessary adjudication of procedural issues that flow from litigation.*⁸

These sentiments were recently echoed by the Chief Justice of Western Australia, the Hon Wayne Martin, who observed:

*...the adversarial process is, at least in the civil justice system, being used in a system which is intended to resolve disputes. But the adversarial system is antithetical to a conciliated resolution. Given that the vast majority of civil cases in the superior courts of Australia are resolved by a means other than trial... it seems curious that we are wedded to a methodology which is calculated to exacerbate dispute and push the parties to that dispute further and further apart.*⁹

The adversarial nature of the civil justice system can be a barrier to the ‘just, quick and cheap resolution of the real issues in a dispute’, which is the primary objective of the *Civil Procedure Act 2005 (NSW)*.

⁴ See former section 14 E *Family Law Act 1975*. The Act was amended in 2006 and now refers to family dispute resolution.

⁵ British Columbia Justice Review, *Effective and Affordable Civil Justice*, 2006

⁶ *Ibid*, pp. 61, 87.

⁷ Victorian Law Reform Commission, *Civil Justice Review: Report 14* (2008), p81.

⁸ British Columbia Justice Review, *Effective and Affordable Civil Justice*, 2006, p.75.

⁹ The Hon Wayne Martin, Chief Justice of Western Australia, *Courts in 2020: Should they do things differently?* National Judicial College conference, Sydney, 25 October 2008.

Is there an opportunity to develop a less adversarial and litigious culture in NSW?
The answer is yes - and there are three key strategies that will help to achieve this:

1. Encourage people to use other appropriate dispute resolution strategies.
2. Change the culture of the legal profession, so it becomes less focused on running cases and more focused on solving problems.
3. Structure the civil justice system so that, when litigation is contemplated or commenced, the way the system works increases the likelihood that the dispute will be settled quickly.

The proposals outlined in this paper set out a blueprint, a proposed new direction, for the resolution of civil disputes in NSW.

The successful implementation of these strategies requires strong leadership (particularly from within the legal profession) as well as some new rules of engagement for civil disputes. The NSW Attorney General, as first law officer of the State and leader of the Bar, is well placed to lead this new strategic direction.

To support the new direction at an institutional level, an ADR Directorate is being set up within the NSW Attorney General's Department to coordinate, manage and drive ADR policy, strategy and growth in NSW. The ADR Directorate will work closely with senior representatives from key areas including the Courts, the Law Society, the Bar Association, Community Legal Centres, and informed by members of ADR industry groups.

Proposal 1: Establish an ADR Directorate within the NSW Attorney General's Department to coordinate, manage and drive ADR policy, strategy and growth in NSW.

B APPROPRIATE DISPUTE RESOLUTION STRATEGIES

There is clear evidence of an international trend away from the excessive legalisation of dispute resolution, and greater recognition of the importance of alternative dispute resolution strategies. ADR is increasingly seen as a more consensus based form of conflict resolution that in many cases will be more appropriate than civil litigation.

As the European Union recently observed, ADR techniques such as mediation allow the parties to resume a dialogue and come to a real solution to their dispute through negotiation instead of getting locked into a logic of conflict and confrontation with a winner and a loser at the end...Mediation can lead to the adoption of an innovative resolution of what are often very sensitive conflicts and provide creative remedies which may be beyond the powers of the courts.¹⁰

In May 2008, the Council of the European Union issued a Directive on Mediation in Civil and Commercial Matters.¹¹ This Directive makes a number of important propositions that will shape the future of civil dispute resolution in European Union member states, including the United Kingdom

- The objective of securing better access to justice should encompass access to judicial as well as extra judicial dispute resolution methods.
- Laws which make the use of mediation compulsory or subject to incentives or sanctions are acceptable, provided that they do not prevent parties from exercising their right of access to the judicial system.
- Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member states should ensure, subject to certain exceptions, that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable.
- Member states should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

Consumer Education

People are more likely to choose non-court pathways to dispute resolution if they are accessible, credible, and relatively inexpensive and provide an outcome they would be happy with. But they have to know about these options to choose them. This is why it is essential to provide consumers with high quality information about the range of options open to them.

There would be considerable merit in establishing a one stop shop or portal, which provides good quality/current information about the options that are available to help people/business to resolve disputes.

¹⁰ http://ec.europa.eu/civil/justice/adr/adr_ec_en.htm

¹¹ Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

The Victorian Law Reform Commission in its *Civil Justice Review* report,¹² recommended that the courts should be adequately resourced to appoint or designate people with responsibility to recommend suitable forms of ADR and to assist parties in arranging ADR providers and facilities.

It may be preferable in NSW to confer this role on an existing agency, such as LawAccess. LawAccess NSW is a free government telephone service that provides legal information, advice and referrals for people who have a legal problem.

As a corollary, consumers could also be better informed about how to solve matters themselves. A number of agencies provide brochures and guides (for example, the Consumer, Trader and Tenancy Tribunal) and it would be useful to have these guides more generally accessible.

Another option might be to legislate to require legal practitioners (including judicial officers) to advise parties about ADR. The Commonwealth *Family Law Act 1975* (section 12E) places an obligation on legal practitioners to provide their clients with information about the available dispute resolution and arbitration facilities. A similar obligation is imposed on principle executive officers of courts (section 12F).

The Court could be empowered to require legal representatives to certify that they have provided such information.

Proposal 2: Provide better information to consumers about non-court options to resolve disputes. Position LawAccess as a 'one stop shop' for information about dispute resolution services for consumers and business.

Proposal 3: Provide consumers with resources about how they can resolve disputes themselves, including ensuring existing resources are easily accessible.

Proposal 4: Introduce a legislative obligation on legal practitioners to provide information to their clients about ADR.

¹² Victorian Law Reform Commission, *Civil Justice Review: Report 14* (2008).

C CULTURAL CHANGE

Out of all the civil matters registered with the courts, only a very small proportion end up in a hearing. Canadian research suggests 2-3% of claims require formal adjudication and NSW Local Court data indicates about 5% of civil claims ultimately proceed to hearing.

The low hearing rate suggests there may be opportunities to save litigants (and the courts) some time and money, by providing a framework that is more effective in promoting the quicker settlement of civil disputes.

This is not necessarily an argument for 'alternative' dispute resolution at all – it is about a framework that is more conducive to settlement or disposal (since settlement is almost always the outcome anyway). Any savings to the civil justice system may only be savings arising from quicker settlements, and not avoided court cases.

The Culture of Litigation

Litigation is fundamentally an adversarial process. Lawyers are trained as advocates for their clients. The civil law system has been designed with an underlying assumption that it is dealing with a battle between two opposing sides, both trying to secure whatever tactical advantages they can to win the case.

Advocacy includes getting as much information as possible from the other side, using court orders if necessary. Advocacy can also involve 'hired gun' experts who will support the cause. This can drive up costs considerably.

Lawyers are also paid by the hour, and the longer and more complex the case, the higher the financial rewards to lawyers (provided a client is willing and able to pay).

The litigation culture eventually produces settlements, but it is not particularly efficient at doing so.

It would be naïve to think that an adversarial litigation system could be quickly transformed into a more efficient system that places a stronger emphasis on dispute resolution. However, there are number of strategies that could be deployed to effect cultural change over the longer term. These strategies relate to consumer education (see above), legal training, professional practice, case management and improved legislative frameworks to facilitate dispute resolution.

Legal Training

The reality is that the lawyers actually do resolve disputes – it's the way they go about it that can be less than efficient.

In a recent evaluation of two pilot mediation schemes in London, the evaluators reported that there had been no growth in the proportion of lawyers recommending mediation to their clients over a 10 year period. The evaluators concluded that the legal profession clearly remained to be convinced that mediation is an obvious

approach to dispute resolution, and a critical policy challenge is to identify incentives for legal advisers to embrace mediation on behalf of their clients.¹³

The situation is probably not quite so grim in Australia. In recent years, there has been a significant growth in the use of mediation in the community and business sectors, and this is reflected by the extent to which legal practitioners now regularly advertise their expertise in dispute resolution services.

The question that arises is: how well are lawyers trained to mediate? One commentator has observed that ‘mediators tend to mediate in a manner that reflects their previous profession, whether as lawyers, engineers, social workers, psychologists or academics’; and Australian lawyers receive considerably less training in mediation techniques than their civil law counterparts.¹⁴

In 1998, the Law Society of NSW published a report on the Early Dispute Resolution (EDR) Task Force. This report recommended that:

- Dispute resolution should continue to be included in the Legal Studies subject of the Higher School Certificate
- Dispute resolution should be a compulsory and separate component of the undergraduate law program
- Dispute resolution should remain a compulsory component of practical legal training
- Solicitors who provide dispute resolution services should undertake annual CLE training
- All judicial officers, registrars and masters in the Supreme, District and Local Courts should receive training in the range of dispute resolution options and specific training in the techniques that can assist to identify and narrow the issues in dispute.

A greater emphasis on ADR training throughout the professional life of lawyers – from undergraduate studies through to judicial office – would help to promote a stronger culture of non-litigious dispute resolution.

Proposal 5: Put a much greater emphasis on negotiation/mediation/conciliation skills in legal education.

Professional Conduct

Most civil disputes do not end up being adjudicated by a judge. They are settled. It would be interesting if lawyers had to explain this fundamental fact to their clients on their first visit. The conversation might go: “I can tell you right now there is a 95% chance we are going to settle this, and it won’t ever be heard by a magistrate or judge. So my advice to you is, be prepared to do a deal, and minimise your costs”.

¹³ Genn, Fenn, Mason, Lane, Bechai, Gray and Vencappa, *Twisting Arms: Court referred and court linked mediation under judicial pressure*, Ministry of Justice Research Series 1/07, May 2007.

¹⁴ N Alexander, “Global Trends in Mediation: Riding the Third Wave”, *Global Trends in Mediation* (2006). p.18.

Instead, the conversation may be more like – “You have an excellent case that we can win. If you win, the other side will have to pay some of your costs, so it’s really worthwhile taking this case to court”.

There are already situations where Australian lawyers are obliged to advise clients of alternatives to litigation. For example, under Part IIIA of the *Family Law Act 1975*, lawyers must provide information about counselling and family dispute resolution services to their clients.

In NSW, the Advocacy Rules of the Law Society stipulate that a practitioner ‘must inform the client or the instructing practitioner about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make a decision about the client’s best interest in relation to the litigation’.

The Victorian Law Reform Commission is of the view that lawyers (and parties) need to be put under a more general obligation (statutory guidelines) to try and resolve matters by agreement without the necessity for litigation, and to clarify and narrow the issues in dispute in the event legal proceedings are commenced. The obligations are quite extensive, and are set out in Appendix One. They are intended to apply to lawyers and parties engaged in ADR processes as well as litigation. The Victorian Law Reform Commission also contemplates sanctions should anyone breach these obligations (including adverse cost orders).

The Victorian Law Reform Commission approach is interesting, but not without risk. One key risk is that it could generate considerable ‘satellite litigation’, as each side accuses the other of acting dishonestly, or not co-operating, or not disclosing the existence of all relevant documents, or not minimising costs or delays.

Another key risk is that it will place a considerable burden on unrepresented and vulnerable parties.

A better course might be to have statutory guidelines that are not enforceable in the strict sense, but which set out clearly how the parties to civil litigation are expected to conduct themselves. Rather than making people liable to sanctions should they breach particular obligations, the court could take into account the extent of compliance in the rare event it is eventually asked to adjudicate the substantive case. Serious failure to comply could result in an adverse costs order.

Proposal 6: Enact ‘guiding principles for the conduct of civil disputes’, which parties would be encouraged to honour. A court would take compliance with the principles into account should it ultimately be asked to adjudicate a civil dispute. Serious failure to comply with the principles could result in adverse cost orders.

Collaborative Law

There is a promising development in the practice of law that should be further encouraged. This is the practice of collaborative law. Collaborative law involves

both lawyers and their clients signing a contract at the start of the process which provides that all four parties to the contract will not go to court and will not use threats of going to court to solve the dispute. If the collaborative process fails, both lawyers and their law firms must withdraw from acting for their respective clients.

Collaborative law has been largely been confined to family law matters, but it is a process that could be applied to other kinds of civil disputes, including wills and probate disputes, and property and construction disputes.

Proposal 7: Encourage collaborative law practices in a greater range of civil law matters.

Model Litigant Policy

State government agencies are expected to set an example, by using ADR techniques over litigation wherever possible.

The NSW Model Litigant Policy on Civil Litigation has been approved by Cabinet and applies to all NSW government agencies. It is set out in Appendix Two.

The Commonwealth government has similar model litigant guidelines, which it adopted as legally binding statutory obligations in 1999. The guidelines apply to private lawyers acting on behalf of the Commonwealth. The Office of Legal Services Co-ordination within the Commonwealth Attorney General's Department monitors compliance with the guidelines and receives and investigates complaints.

In March 2001, the English government formally pledged that government departments and agencies would consider and use ADR in all suitable cases, and put in place performance measures to monitor the effectiveness of the pledge. In 2006/07, the Government reported that ADR was used in 331 cases with 225 leading to settlement, saving costs estimated at 73.08m pounds.¹⁵

In NSW, the responsibility for ensuring compliance with the model litigant policy rests with the Chief Executive Officers of government agencies. There is no mechanism to test whether government agencies are *in fact* complying with the spirit and intent of the policy, nor is there a complaints process.

Proposal 8: Require government agencies to be more accountable with respect to their adherence to the Model Litigant Policy and relevant Premier's memoranda, by putting in place appropriate performance measures to monitor compliance and / or using appropriate auditing mechanisms.

Pre-Action Protocols

Procedures can be put in place to require or encourage people to try to resolve their disputes before lodging a claim in court.

¹⁵ Ministry of Justice *The Annual Pledge Report 2006/07 Monitoring the Effectiveness of the Government's Commitment to using Alternative Dispute Resolution.*

In the UK, following the Woolf report,¹⁶ significant changes were introduced to civil procedure.

Pre-action protocols now require parties to send out pre-action letters outlining the elements of the claim, to enter into negotiations to settle the matter, to exchange information and documents, and to agree on joint experts. Courts may impose costs against someone who unreasonably fails to follow the protocols.

There are nine pre-action protocols in force, which have been implemented by practice direction rather than court rules. They cover specific types of civil disputes, namely personal injury, clinical negligence, construction and engineering, defamation, professional negligence, judicial review, disease and illness, housing disrepair and possession claims based on rent arrears. The Pre-action Protocol for Construction and Engineering Disputes is annexed at Appendix Three by way of example. A general pre-action protocol for all types of civil litigation has been under development by the Ministry for Justice since 2001.

The Woolf reforms also introduced stronger and much more active case management of civil cases by the courts/judges, as well as a case tracking system.

A recent evaluation of the reforms shows the following results:

- The culture of litigation has changed, with parties being more co-operative with each other and the courts
- There is widespread use of case management conferences (especially by phone)
- The new experts regime is working well
- There is a very high settlement rate (60-80% in some courts)
- The majority of cases are settled pre-issue
- Late settlements are still high
- There was no increase in ADR
- It is generally felt that more judges are needed to case manage effectively.
- Costs have been 'front end loaded'. It looks like costs have increased for claimants, and decreased for defendants.
- Costs seem to be disproportionate in fast track matters (but this could be because lawyers are being required by the new rules to do more work for simple matters, and are billing accordingly).¹⁷

The conclusion is that the reforms are delivering quality, at a better pace, but at a higher cost. The authors of the evaluation referred to the 'Quality Triangle' tool in the business world. "This offers a virtually iron law, that of the three objectives in a business – speed of delivery, cost of production and quality of production – it is possible to improve two out of three but rarely all three."¹⁸

The measures introduced in the United Kingdom are useful, but mandating them could reduce flexibility, and could lead to higher consumer costs for some cases.

¹⁶ Lord Woolf, *Access to Justice, Final Report* (1996).

¹⁷ Peysner and Seneviratne, *The Management of Civil Cases: the Courts and post-Woolf Landscape*, Department for Constitutional Affairs Research Series 9/05, November 2005.

¹⁸ Stet. p 72.

The Victorian Law Reform Commission has recommended the introduction of prescriptive and mandatory pre-action protocols to facilitate the communication and exchange of information prior to the commencement of legal action (see Appendix One). These pre-action protocols would have a statutory base, and would be specific to the type of dispute (the specific pre-action protocols would be developed by a proposed Civil Justice Council). Lawyers would have to certify that the pre-action protocols had been complied with, and sanctions would apply for non-compliance (eg indemnity costs could be awarded). The cost of complying with the protocol would normally be borne by each party.

Pre-action protocols exist in Queensland (eg personal injury, motor accidents and workers compensation proceedings) and South Australia (personal injury proceedings, and claims for liquidated and unliquidated damages). The Victorian Law Reform Commission points to some evidence that these types of protocols are successful in reducing the number of cases commenced (but this is difficult to gauge in Australia, due to the impact of tort law reform on civil litigation).

One of the problems with mandating pre-action protocols is that they can potentially drive up costs in straight forward and/or low value matters. This seems to have been the experience in the United Kingdom, where fast track matters seem to be the matters where costs have escalated the most.

There is a real risk that by being too prescriptive about the action a lawyer must take, that consumers will end up paying the price.

The Victorian Law Reform Commission report indicates that pre-action protocols are generally favoured by the courts and the insurance industry, but are quite strongly opposed by the legal profession. Some of the main concerns relate to the impact of pre-action protocols on costs, self represented litigants, the delivery of pro-bono services, and the extra burden on the courts (which would be required to adjudicate on compliance with pre-action protocols). There is also a concern that pre-action protocols can be somewhat bureaucratic and could simply add extra steps or impede other dispute resolution processes.

These concerns should not lightly be dismissed, but nor should the potential value of pre-action protocols. Perhaps, as the Victorian Law Reform Commission suggests, it is a matter best left for particular types of cases. This could be raised with the courts, with a view to issuing practice directions that mandate specific steps that must be taken before certain types of cases commence.

An alternative would be to incorporate the main elements of pre-action protocols as 'best practice standards' in the guiding principles for the conduct of civil disputes mentioned in Proposal 6. A court would only take these 'best practice standards' into account should it ultimately be asked to adjudicate a civil dispute. Serious failure to comply with the standards could result in an adverse cost order.

The courts' discretion would necessarily be wide, reflecting the extremely broad nature of civil claims (eg simple small debts through to complex professional negligence claims) and the broad range of litigants (unrepresented and impecunious through to counsel represented and very deep pockets). It would not, for example, expect compliance with the standards if a matter was undefended, or the matter was

in the small claims list. It would, however, expect a high degree of compliance if the matter was complex and the parties were well resourced.

After some experience with the 'best practice standards', consideration might be given to making them enforceable in particular circumstances.

Proposal 9: Incorporate the main elements of pre-action protocols as 'best practice standards' in the 'guiding principles for the conduct of civil disputes' (see Proposal 6). If a dispute is subsequently litigated the court could take the extent of compliance into account, when determining costs (including indemnity costs) (see Proposal 15). Alternatively, practice directions could be issued mandating specific steps that must be taken before certain types of cases commence.

Mandatory Pre-Litigation Mediation

There seems to be growing consensus that mediation ought be mandated at some point, either before litigation commences, or some time before it proceeds to hearing. In NSW the courts already have the power to compulsorily refer appropriate cases to mediation at any stage of proceedings.¹⁹

Is it desirable to go the next step and insist on mediation before civil proceedings are filed? Any pre-litigation mediation policy would need to recognise the following:

- Many civil cases are uncontested, and court proceedings may be pursued by one party in order to initiate enforcement action.²⁰
- Parties need to know enough information about the issues in dispute and the evidence to be relied on before a matter can sensibly be resolved.
- Parties may have vastly different resources at their disposal. Mandatory mediation can force parties into forums where imbalances of power are exacerbated and where the procedural safeguards offered by the courts are lacking.
- A potential litigant may have other legitimate reasons for seeking a court judgement, including the need for a point of law to be clarified, or a precedent to be set.
- Requiring parties to engage in mediation (at their own cost) could simply add a layer of unnecessary cost and delay to some disputes.

Family Law

The Family Court of Australia introduced pre-lodgement procedures in 2004. The Family Law Rules require prospective parties in proceedings that involve financial and parenting orders, to genuinely try to resolve their dispute through mediation, counselling, negotiation, conciliation or arbitration, before commencing proceedings. Prospective parties must write to the other party, setting out their claim and exploring options for settlement. In addition, all parties must comply with a duty of disclosure.²¹ Parties must provide to all other parties disclosure of all information

¹⁹ Section 26 Civil Procedure Act 2005.

²⁰ In the NSW Local Court, 43% of civil claims result in default judgements.

²¹ Rule 13.01, *Family Law Rules*.

and documents that are relevant to an issue in dispute. Failure to abide by this duty may have serious consequences, including an order to pay costs, an order to stay or dismiss all or part of the party's case, or punishment for contempt of court.

From 1 July 2007 compulsory pre-filing mediation for children's matters was also introduced. There are statutory exceptions for these pre-filing processes, including violence or abuse. Even where these exceptions apply, however, there is still a requirement to receive information on other alternatives with a subsequent exception available if this delay risks abuse or violence.²²

Commercial Arbitration

Another pre-litigation strategy for commercial clients is the use of commercial arbitration.

However the NSW Chief Justice, the Honourable James Spigelman AC, has stated that, '*The focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective mode of resolution of disputes.*'²³ The President of the Australian Centre for International Commercial Arbitration, Mr Doug Jones, has commented that domestic arbitration is still:

*'...expensive and hugely inefficient, forcing many companies to prefer expert determination – due to a combination of arbitrators failing to insist on processes different to courts, and lawyers continuing to insist on intricate pleadings, excessive discovery and prolonged hearings. We need reform to distinguish arbitration from court processes.'*²⁴

Mr Jones has also stated that, '*Reform of the domestic arbitration process is critical to the health of ADR in Australia.*'²⁵

The uniform legislative scheme for domestic arbitration was implemented in 1984. It is now regarded as somewhat out-of-date and has not been adjusted in accordance with changes in international best practice. Improvements to the domestic uniform commercial arbitration legislation have been on the Standing Committee of Attorneys-General ('SCAG') agenda for some time. The progress of the legislative amendments has stalled.

Chief Justice Spigelman has publicly commented that he believes new legislation is required to bolster the effectiveness of domestic arbitration and to support Australia's efforts at becoming an international arbitration hub.

²² Some concerns have been raised about the impact of these changes on women and children in violent situations. See for example Shoebridge G and Willmott L, "A Summary of the key changes contained in the Family Law Amendment (Shared Parental Responsibility) Act 2006" (2006) 27 *QLD Lawyer* 63-65 at 64. See also Field R and Brandon M "A Conversation about the introduction of compulsory family dispute resolution in Australia: Some positive and negative issues for women" (2007) 18 *ADJR* 27-36.

²³ Address by the Honourable JJ Spigelman AC, Opening of Law Term Dinner, 2009, The Law Society of NSW, Sydney, 2 February 2009.

²⁴ Reported in '*Call for much simpler Arbitration*', Australian Financial Review, 7 November 2008, p.51.

²⁵ Reported in '*Chief Justice presses for arbitration law reform*', Australian Financial Review, 6 February 2009.

The Chief Justice has suggested that the UNCITRAL Model Law should be adopted as the domestic Australian arbitration law. The Chief Justice states, *'It is a workable regime Its adoption as the domestic Australian arbitration law would send a clear message to the international arbitration community that Australia is serious about a role as the centre for international arbitration. Our competitors in this regard, such as Hong Kong or Singapore, do not create a rigid barrier between their domestic and international arbitration systems. Nor should we.'*

Proposal 10: Progress amendments to uniform commercial arbitration legislation, based on the UNCITRAL Model Law on International Commercial Arbitration, supplemented by any additional provisions as are necessary or appropriate for the domestic scheme.²⁶

In terms of international commercial arbitration, it is also noted that Australia currently does not have adequate international commercial arbitration facilities in the one location to compete with other locations such as Singapore and Hong Kong. In order to position Australia, and in particular Sydney, as a centre for international commercial arbitration, a single Sydney arbitration centre could be established which has the physical space, organisational facilities, secretarial, computer and research support in the one location. This facility could become the headquarters of all the disparate organisations involved in mediation and arbitration.

Proposal 11: Establish a single Sydney International Arbitration Centre that has the physical space, organisational facilities, secretarial, computer and research support in the one location, to position Sydney better as a centre for international commercial arbitration.

²⁶ Update: the Communique of the Standing Committee of Attorneys-General (SCAG) Meeting 16-17 April 2009 notes that SCAG has decided to re-invigorate its efforts to update uniform commercial arbitration laws by reference to international standards.

D CASE MANAGEMENT

Some parties are not so much interested in ‘resolving a dispute’ as enforcing their legal rights and entitlements under law. This needs to be accepted and recognised and parties should not ultimately be prevented from exercising their right of access to the justice system.

Nonetheless, as the Victorian Law Reform Commission has observed, ‘Governments cannot reasonably be expected to provide unlimited publicly funded resources for the adjudication of disputes, particularly private disputes that do not have significance beyond the interests of the individual parties.’²⁷

A stark example of the cost of litigation to the public purse is provided by the McLibel case,²⁸ the longest running case in English legal history. This case cost more than 10 million pounds, yet it did not involve a matter of great public importance like some major terrorist plot. At issue were leaflets distributed by some impecunious environmentalists who were alleged to have defamed McDonalds.

The likelihood of this scenario being repeated in NSW is somewhat diminished, as section 56 of the *Civil Procedure Act 2005* states that the overriding purpose of that Act is to facilitate:

The just, quick and cheap resolution of the real issues in the proceedings.

Further, section 60 of the *Civil Procedure Act 2005* explicitly states that:

In any proceedings the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.

However, in an address to the 35th Australian Legal Convention in Sydney on 24 March 2007,²⁹ Chief Justice Spigelman of the NSW Supreme Court said “*I accept this as a statement of ambition rather than a description of what occurs.*”

Examples of disproportionality are often seen in *Family Provision Act* proceedings. The Honourable Mr Justice John P Hamilton notes:³⁰

“For instance, in Lawrence v Campbell [2007] NSWSC 126 Macready ASJ dealt with a case which was determined at trial level only. Yet in respect of an estate of only \$600,000 (out of which legacies of \$60,000 and \$140,000 respectively were granted to two claimants), costs had been incurred in the vicinity of \$290,000. I can say from personal knowledge that that is an example of a phenomenon seen in only too many FPA cases.”

²⁷ VLRC, Civil Justice Review, 2008, p 72.

²⁸ *McDonald’s Restaurants v Morris & Steel* [1997] EWHC QB 366.

²⁹ “Access to Justice and Access to Lawyers”.

³⁰ The Honourable Mr Justice John P Hamilton, ‘Containment of Costs: Litigation and Arbitration’, Address at Supreme Court of New South Wales, 1 June 2007.

There is widespread acceptance, however, for the proposition that effective case management (which includes mediation and other ADR strategies) has the potential to promote the, just, quick and cheap resolution of disputes, proportionate to the relative importance of the matters in dispute.

But it must be *effective* case management. The Hon Justice Hayne of the High Court of Australia, commented:

'There are times when we are focusing too much on process, and too little upon those very practical ends to which the process must be directed'.

The consequences of too much case management have been noted by the Hon G L Davies, former Judge of the Queensland Court of Appeal:

*'It is much less clear that, at least so far, case management has reduced cost. That is because up till now it has in the main taken the form of a series of interlocutory hearings by judges. There is good anecdotal evidence that such hearings, requiring as they may, substantial expenditure of time by lawyers, tend to increase cost and that they are sometimes used for the purpose of delay. Whether judicial case management reduces or increases costs is impossible to judge without independent empirical analysis.'*³¹

Case management techniques are used extensively in NSW courts, but it is difficult to assess their effectiveness, and hence whether there is potential for improvement.

The Report on Government Services (ROGS) reports on an "attendance indicator" for federal, state and territory courts. This is an indicator of the number of times that parties or their representatives are required to be present in court. Fewer attendances may suggest a more efficient process. NSW does not currently provide attendance data for ROGS.

There is a similar lack of empirical data relating to the effectiveness of mediation – whether privately sought or court ordered – in resolving disputes quickly, thereby avoiding the need for hearings to commence. It appears that the Supreme Court refers only about 6% of civil matters to court-annexed and private mediation, and the outcome of all these referrals is not known. Similarly, it appears that the District Court refers only about 2% of its case managed civil list to mediation, and again the outcome of these referrals is not known. There is no court-annexed mediation in the Local Court.

Proposal 12: Give high priority to the collection and analysis of data about the ways civil matters are finalised in the courts, and data about the cost effectiveness of case management strategies.

Notwithstanding the lack of data to help assess the effectiveness of case management and mediation strategies, there is little doubt that the vast majority of civil disputes settle, without requiring a formal hearing. There is a very substantial

³¹ G L Davies The reality of civil justice reform; why we must abandon the essential elements of our system, 20th AIJA Annual Conference, July 2002 p.8

difference between the number of civil claims filed in the courts each year, and the number of matters that proceed to final adjudication by a judicial officer.

In 2007:

- In the Supreme Court there were 13,023 civil filings, 1,192 civil cases listed for hearing (including interlocutory hearings) and of the cases listed, 327 settled before the hearing started. The Supreme Court is not able to provide data on the number of hearings that actually commence each year, but this data suggests only about 865 hearings pa (7% of total filings)
- In the Land and Environment Court, of 1,627 civil matters, 717 were disposed of by hearing – an adjudication rate of 44%.
- In the District Court in Sydney, there were 6,219 civil filings, and 1,590 judgements – an adjudication rate of 26% (figures for the District Court across the State are not available)
- In the Local Court there were 141,549 civil filings, and 7,398 hearings commenced – an adjudication rate of 5%.

There may be opportunities to significantly improve settlements rates so that our adjudication rates approach the Canadian benchmark of 2-3%.

Perhaps the most significant factor influencing settlement is the extent to which there has been full and frank disclosure. The evidence strongly points to the fact that parties are more inclined to settle once they have all the relevant information.

The Victorian Law Reform Commission has proposed fairly extensive case management procedures, which are designed to put parties in a better position to resolve the matter. These procedures relate to early disclosure of information, and enhancing judicial control over proceedings (including the imposition of time limits).

The NSW *Civil Procedure Act* already puts the courts in a strong position to actively manage cases, with its emphasis on the just, quick and cheap resolution of disputes. The case management provisions under Part 6 of the *Civil Procedure Act* are more extensive than any other state or territory legislation. Is there any need to go further? If the issue is framed a little differently, there is an argument for more far reaching and fundamental reforms.

As noted throughout this paper, only a very small percentage of civil proceedings are actually adjudicated. Judges spend a lot of time dealing with interlocutory applications and other case management issues.

If it is acknowledged that judges are already engaged in much more case management than case adjudication, then the reforms suggested in a recent Canadian report make sense. The Canadian report suggested three basic strategies:

- Do away with pleadings, and replace them with 'dispute summary and resolution plans'
- Introduce case management conferences, presided over by a judge, where the plan is discussed, and directions are issued

- Hold a further trial management conference 15-30 days before the hearing.³²

The report stated that case management conferences would not be held in every case, but could be requisitioned by a party at any time after case initiation. These conferences would normally be compulsory before any non-urgent interlocutory applications were made, or formal demands for discovery were issued.

The Canadian proposal was put forward by a working group in British Columbia, which included the Chief Justice of the Supreme Court, the Deputy Attorney General (co-chairs), two other judges, as well as representatives of the Bar, the Law Society and court administration.

Similar suggestions for fundamental reform of the civil justice system have been advanced by senior Australian judicial officers. Justice Mark Weinberg of the Victorian Court of Appeal put the need for reform in very plain terms:

I have long thought that we should move from a series of rules and practices in civil proceedings that are archaic to something that more closely approximates a sensible method of resolving disputes. A number of my colleagues see great virtue in retaining formal pleadings. I see none. I would much rather see us move to a system of narrative pleadings, whereby each side provides the other, and the court, with a detailed outline of the nature of its case. The test should be: does each party know with reasonable precision the case that it has to meet? Frankly, I regard pleading summonses as largely a waste of time. Forays into court to fight about further and better particulars are little better. These exercises simply build up costs and rarely achieve anything of true value. I would do away with interrogatories entirely.... Affidavits are usually drafted by solicitors and sometimes settled by counsel. What is in them bears little resemblance to what the deponent would have said if permitted to recount the story in his or her own words. I would allow affidavits only in relation to uncontentious evidence.³³

In a similar vein, the Hon Wayne Martin, Chief Justice of Western Australia, foresees pre-trial processes being more focussed on substantive issues in the future:

I expect that the period between now and 2020 will see much greater emphasis upon preparation for ADR, and much less emphasis upon preparation for trial. The current assumption that ADR is a process which is engaged to stop a case going to trial, will be replaced by an assumption that a trial is something you have only after all ADR processes have been exhausted.... Future years will see the strict rigours of the adversarial approach modified to encourage a more collegiate approach to the identification of the real issues in contention, and the most efficient and inexpensive means of resolving those issues....If the substantive issues in a case can be identified without need for pleadings, pleadings will be dispensed with...Parties and their legal representatives will be required to confer, in a meaningful way, before any interlocutory dispute is countenanced by the court.³⁴

³² Report of the Civil Justice Reform Working Group to the British Columbia Justice Review Task Force, *Effective and Affordable Civil Justice*, November 2006.

³³ Justice Mark Weinberg, *The Australian Judicial System – what is right and what is wrong with it?*, National Judicial College Conference on the Australian Justice System in 2020, 25 October 2008.

³⁴ Hon Wayne Martin, Chief Justice of Western Australia, *Courts in 2020 – Should they do things differently?* National Judicial College Conference on the Australian Justice System in 2020, 25 October 2008.

These comments suggest that there is considerable merit in fundamentally refocusing the way civil matters are dealt with by the court. Rather than requiring each party to prepare each issue for a trial that is unlikely to eventuate, the focus should be on identifying as quickly as possible, through joint conferences and dispute resolution plans, the real issues in contention. Early identification of the issues at the heart of the matter should ensure that case management directions (whether made by judges or registrars) focus more precisely on what steps need to be taken to assist the parties to bring the matter to conclusion.

Proposal 13: Change the language and processes used by courts to resolve civil disputes - along the lines suggested by the British Columbian working group on civil justice reform - so that the primary focus is on preparation for ADR rather for trial.

Court Related Mediation

In 1999, the Council of Chief Justices of Australia published a Declaration of Principles of Court-annexed Mediation. The full text of this Declaration is set out in Appendix Four. Importantly, it affirms mediation as “an integral part of the Court’s adjudicative processes.”

There are three main models of court related mediation, namely:

- Private mediation, which involves voluntary or mandatory referral by the court to an external mediator, chosen and paid for by the parties
- Court-annexed mediation, which involves voluntary or mandatory referral by the court to an accredited mediator chosen from a panel, paid for by the court.
- Judge led mediation, where a judicial officer takes on a mediation role, but does not conduct a trial if a trial eventuates.

In NSW, section 26 of the *Civil Procedure Act 2005* provides:

- (1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.
- (2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator.
- (3) In this section, *listed mediator* means a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators for the purposes of this Part.

This provision applies to civil proceedings in the Supreme Court, the Land and Environment Court, the District Court and the General Division of the Local Court.

In the NSW Supreme Court, both private and court-annexed mediation may be arranged for most civil matters. Parties may request referral to mediation and, as noted above, the Court has the power to make a referral with or without their consent.

With court-annexed mediation, there is no charge to the parties for the mediator or the use of the room. The mediator is assigned to the dispute from among the registrars and officers of the Court who are qualified mediators. Between 1 July 2007 to 31 March 2008 the settlement rate for 287 court-annexed mediations was 49%.

With private mediation there are usually fees for the mediator and for the use of the room, and there may be other costs as well. The mediator is chosen by the parties. If the parties cannot agree on a mediator, the Supreme Court has a joint protocol arrangement with six mediation provider organisations that have agreed to maintain panels of suitably qualified mediators. If the parties are still unable to agree, the Court may appoint the mediator itself.

For both private and court-annexed mediation, if the parties resolve their dispute at mediation, they may make a written agreement and have orders made by the Court to finalise the case. The orders can be enforced if necessary.

The Land and Environment Court (LEC) has offered a mediation facility since 1991. The service is available to all parties before the Court, except those involved in criminal matters. The mediation conference is presided over by a trained mediator and can be conducted at the Court or another location suitable to the parties. There is no fee involved for a court appointed mediator unless the mediation is conducted away from court premises. As in the Supreme Court, if the parties draft 'consent orders' they may be endorsed as orders of the court and can then be enforced if necessary.

The LEC also offers neutral evaluation of claims. Under the Court rules, the parties may voluntarily seek neutral evaluation, or the Court may refer parties in appropriate cases. The evaluator may be agreed by the parties or appointed by the Court (in the latter case, a Commissioner conducts the evaluation). Their role is to identify and reduce the issues of fact and law in dispute, including an assessment of the relative strengths and weaknesses of each party's case and the offer of an opinion as to the likely outcome of the proceedings.

The most common form of ADR in the LEC is, in fact, conciliation. Section 34 of the *Land and Environment Court Act 1979* provides for a hybrid dispute resolution process involving first conciliation (presided over by a Commissioner) and the, if the parties agree, adjudication (by the same Commissioner). If no agreement is reached, the case is listed for hearing.

In the District Court any civil matter in the Case Managed List (CML) is eligible for referral to mediation. When a pre-trial conference is held (usually 2 or 3 months after a statement of claim is filed) the Court will either allocate a trial or arbitration date, or refer the parties to mediation.

As in the other courts, parties may either elect to use mediators of their own choice, or those appointed by the court. Court-annexed mediation is conducted by assistant registrars. In 2007, 103 matters were referred to court-annexed mediation and 49% settled at or prior to mediation. In 2008, the Sydney District Court referred 476 matters to mediation – 133 to court-annexed mediation and 343 to private mediation.

The mediation provisions of the *Uniform Civil Procedure Act* do not apply in the Small Claims Division of the Local Court (where only about 10% of matters are defended). In the General Division only about 20% of matters are defended, and of

these, about 50% settle.³⁵ The Local Court does not offer court-annexed mediation in the General Division.

As noted above, about half the matters referred to court-annexed mediators settle. It is not known how this compares with the settlement rates of private mediators, or whether court-annexed mediation alters the ratio between cases tried and settled.

It is not clear that court-annexed mediation produces significant savings. Early case management may be more efficient in encouraging the early resolution of disputes. When pre-action protocols and case management reforms were introduced in England following the Woolf report, an evaluation found that while settlement rates improved, this was not matched by a corresponding increase in the use of ADR.³⁶

Proposal 14: Give high priority to the collection and analysis of data about court-annexed and private mediations, including how quickly they are able to effect settlements, and whether they ultimately reduce the proportion of matters that proceed to trial.

There is strongly divided opinion on whether judge-led mediation is appropriate in Australian courts. The Victorian Law Reform Commission noted that it is used extensively in Ontario and British Columbia, where it is referred to as 'judicial dispute resolution'. A Canadian study found 82.5% of lawyers surveyed thought that judicial involvement in case conferences was likely to significantly improve the prospects of success.³⁷

The Victorian Law Reform Commission generally favoured the increased use of judicial mediation but also noted the significant resource issues to be considered, as mediation can be time and resource intensive.

Until the effectiveness of court-annexed and private mediation is fully understood (see proposal 14), it would be premature to promote judge led mediation in NSW civil jurisdictions.

Costs sanctions for unreasonably declining to mediate

As a financial incentive to use ADR, the court could be given an explicit power to take into account whether a party has attended ADR when deciding costs issues.

This could be similar to the way in which courts currently considers settlement offers made in terms of a Calderbank letter. If the offer is as much or more than the opposing party ultimately recovers through litigation then the court may take this into account when considering an order for costs. Any cost penalty will depend upon whether in the circumstances the refusal to accept the offer was unreasonable.

There have been a number of English and some Australian decisions in which the successful party has not recovered their costs because they either refused to

³⁶ Peysner and Seneviratne, *The management of civil cases: the courts and the post Woolf landscape*, DCA Research Series 9/05 November 2005.

³⁷ VLRC, *Civil Justice Review*, 2008, p 252.

participate in mediation or because the court considered their participation in mediation was less than helpful.

In *Capolingua –v- Phylum Pty Ltd (as trustee for the Gennoe Family Trust)* 1991 5 WAR (at 337), Ipp J of the Supreme Court of Western Australia refused to award costs to the successful defendant for a number of reasons including the defendant’s unreasonable conduct during mediation, which meant that a trial that should have taken only two days, in fact took four days.

In *Dunnett v Railtrack PLC* [2002] 2 AllER 850, Railtrack won the initial case and appeal, but the English Court of Appeal declined to order that the defeated claimant pay Railtrack’s costs because Railtrack refused to consider an earlier suggestion from the court to attempt mediation.

In *Hurst –v- Leeming* [2002] EWHC 1051 the claimant withdrew his claim, but argued that costs should be borne by the defendant because he had refused offers to mediate both before and after proceedings had been issued. In his judgment Mr Justice Lightman explained why he viewed the refusal to mediate as reasonable in this instance, but warned lawyers that refusal is a high risk course to take:

“A party who refuses to proceed to mediation without good and sufficient reasons may be penalised for that refusal and, most particularly, in respect of costs. Mediation is not in law compulsory ... but alternative dispute resolution is at the heart of today’s civil justice system and any unjustified failure to give proper attention to the opportunities afforded by mediation and, in particular, in any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated a real possibility that adverse consequences may be attracted.”

In the 2006 case of *P4 Ltd –v- Unite Integrated Solutions plc* [2006] EWHC TCC 2924, the court awarded losing party P4 some of their costs after the winning party refused ADR and as a result denied P4 an opportunity to settle the case at minimum cost.

One way of encouraging lawyers to consider ADR would be to provide that a successful party does not recover their costs where they have unreasonably refused to mediate. This could be achieved, for example, by giving the courts the explicit power through amendments to Schedule 3 to the *Civil Procedure Act 2005* and to the *Uniform Civil Procedure Rules 2005*:

“The Court will take into account the parties’ attempts to engage in ADR when making orders as to costs.”

or

“The Court will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR when making orders as to costs.”

Proposal 15: Provide that the court is to take into account parties’ attempts to engage in ADR when making orders as to costs.

Court Ordered Arbitration

The courts have quite extensive powers to promote the use of ADR, including the powers to compel parties to arbitrate the dispute.

Arbitration was adopted as a preferred form of ADR by the Supreme, District and Local Courts from the late 1980s. However the number of matters referred to arbitration by the courts in recent years has plummeted (coinciding with tort law reforms).

The table illustrates that the number of arbitrations referred by the courts has dropped significantly since the 2002 civil liability reforms. The fall in referrals is especially marked in the District Court.

Calendar Year	Local Court Referrals	District Court Listings	Supreme Court Listings
2005	1,154	384	0
2006	820	212	1
2007	606	111	0

(Statistics maintained by the District and Supreme Courts in relation arbitrations are of listings as opposed to referrals. Referrals may be revoked prior to the matter going to arbitration)

The courts argue that very few matters before them are suitable for arbitration. The courts have also indicated that arbitrations can be a waste of time, if parties treat them as a 'dry run', and proceed to hearing anyway. The courts also claim that parties 'keep their powder dry' and withhold important evidence until the real trial begins.

However in *The Access to Justice: an Action Plan* report, Justice Sackville supported the use of court-annexed ADR:

*There are strong arguments in favour of court-annexed ADR. They include the reduction of costs associated with the early resolution of a dispute and the increased capacity of a court to cope with its workload. In short, it is argued court-annexed ADR provides an opportunity to make better use of existing resources, to speed decision-making and to enhance the acceptability and quality of decisions, all in a forum where disputes are traditionally resolved.*³⁸

There is a line of authority where the NSW Court of Appeal has determined that parties who use the arbitration as a warm-up to the trial by withholding crucial evidence, should suffer a cost penalty (see *Morgan v Johnson* (1998) 44 NSWLR 578; *MacDougall v Curlevski* (1996) 40 NSWLR 430).

Proposal 16: Improve arbitration by penalising failure to disclose if a matter is subsequently litigated (there is some evidence that parties have been using it as a 'dry run', and keeping 'smoking guns' until the actual trial).

³⁸ Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), 277.

Civil Proceedings in the Local Court

The Local Court deals with more than 140,000 civil filings each year, which far exceeds any other jurisdiction.

Civil proceedings in the Local Court are either dealt with in the Small Claims Division (less than \$10,000) or the General Division.

The **Small Claims Division** was introduced in 1991. The legislative objective is to dispense with “the formalities and procedural intricacies of the adversarial system where small claims are concerned and to provide litigants in such matters with a forum designed to achieve a fast, cheap, informal, but final resolution of disputes” (AGs Second Reading Speech, Hansard 22 November 1990).

The jurisdiction limit of the Small Claims Division was increased from \$3,000 to \$10,000 in September 2000.

Where a small claim is defended the Registrar sets the matter down for a pre trial review within six weeks. A Protocol established in 2006 requires registrars to consider referring parties to a Community Justice Centre at the time of the filing of a defence and prior to the conduct of a Pre Trial Review.

At the Pre-trial Review stage, Rule 9 of the Local Courts (Civil Procedure) Rules 2005 requires the Court to attempt to identify the matters in dispute and bring the parties to a settlement. The Rule requires the attendance of each of the parties, either in person or by a legal representative having general authority to negotiate a settlement of the proceedings. The absence of a party compromises the extent to which there can be direct settlement negotiations.

Although Registrars are expected to encourage parties to attempt settlement they are generally not trained in mediation or legally qualified. As a result, the capacity of registrars to effectively facilitate mediation is limited.

The Court may refuse to list proceedings for trial if it is satisfied that the parties have not made reasonable attempts to settle the dispute between them (but, strictly speaking, it is not able to mandate attendance at mediation).

If the dispute is not resolved at a Pre Trial Review the court may allocate a hearing date and make directions for the preparation of witness statements. The standard order requires the simultaneous exchange of statements 14 days prior to the hearing date.

The jurisdiction of the Small Claims Division may be exercised by a Magistrate or by an Assessor (assessors are lawyers appointed by the Minister for terms of up to 7 years). There are currently three assessors appointed to the Local Court – one full time and two part-time. These assessors do the majority of the small claims work in the Sydney metropolitan area.

Section 71 of the *Local Courts Act 1982* requires the Assessor or Magistrate to use his or her “best endeavours” to bring the parties to a settlement prior to determining the proceedings.

Parties are entitled to be represented in the Small Claims Division in the same way as any other court proceedings. However, the costs that may be allowed in defended hearings is limited to the costs that could be awarded on default judgment. The maximum costs allowed on a Small Claims hearing based on the current scale of legal costs is \$607.20.

The procedures of the Small Claims Division have been developed with a view to encouraging self represented litigants being able to mediate and resolve disputes informally and without reliance on legal practitioners. However, claims before the Small Claims Division predominantly involve commercial disputes. In most instances at least one party will be a large financial or insurance corporation. In most instances, these agencies are represented by in-house solicitors and the scope for mediation is limited.

The list below is a break up of the cause of actions recorded in relation to claims filed at the Downing Centre Sydney and Parramatta Local Courts during the last twelve months. Based on a report of 20,686 claims filed at these locations in the past twelve months the most common causes of action were:

Local Court Civil Claims Statistics – Downing Centre and Parramatta - 2007

Matter	Number	Percentage
Money due under card agreement	6,871	33%
Money due under loan agreement	2,084	10%
Negligence, motor vehicle	1,901	9%
Unpaid Council rates	1,816	9%
Goods sold and delivered	1,767	9%
Moneys due under agmt/account	1,761	9%
Moneys due for unpaid premiums	1,293	6%
Prof. Services rendered	726	4%
Non payment of strata levies	505	2%
Work done materials provided	437	2%
Unpaid advertisement fees	387	2%
Unpaid tax	229	1%
Other	909	4%
TOTAL	20 686	100%

As noted above, in the Small Claims Division, the Court is under an obligation at both at the Pre Trial Review stage and the final hearing to attempt settlement. There are no similar obligations on the Court in the General Division. Paradoxically, the settlement rate in the Small Claims Division is lower than the settlement rate in the General Claims Division (even though more claims are defended in the General Division).

Local Court Civil Claim Statistics 2007

	Number	Percentage
Small claims	115,183	81% of all civil claims
Defences filed	8,885	8% of small claims
Defended cases that are settled	3,955	45% of defended small claims
Default judgments	49,522	43% of small claims
Disposed of within 12 months		98% of all small claims
General Claims	26,366	19% of all civil claims
Defences filed	5,092	19% of general claims
Defended cases that are settled	2,624	52% of defended general claims
Default judgements	12,020	46% of general claims
Disposed of within 12 months		88% of general claims
Total civil claims	141,549	100%
Total hearings held	7,398	5% of all civil claims

Settlement rates are higher in the General Division of the Local Court than the Small Claims Division. This suggests the introduction of mechanisms designed to increase mediation do not necessarily achieve an increase in settlements. This may be partly due to the fact that registrars, assessors and magistrates are not required to have mediation skills.

The Local Court statistics indicate that the majority of civil claims involve corporations. 43% of claims are uncontested and result in default judgements. 10% are actually defended and only 5% proceed to a hearing. The rest settle or are withdrawn.

The Small Claims jurisdiction is designed to achieve a faster, cheaper and more informal resolution of disputes. There may be some opportunities to improve the efficiency of the civil jurisdiction, and speed up the rate of settlement. Measures to consider include:

- Increasing the small claims jurisdiction
- Appointing more assessors (rather than magistrates) to deal with small claims
- Ensuring registrars and assessors (and perhaps magistrates) are accredited mediators
- Requiring parties to attend pre-trial reviews (not just their legal representatives). If the party is a corporation then an officer of the corporation should be required to attend. The Registrar should inform parties of the right to attend by teleconference.

Proposal 17: Increase the small claims jurisdiction of the Local Court from \$10,000 to \$30,000 and make greater use of assessors

Proposal 18: Introduce the following strategies to encourage earlier settlement of disputes in the small claims division:

- Pre Trial Reviews being conducted by trained mediators (registrars, assessors and magistrates)
- Require the party to attend the Pre Trial Review either in person or by teleconference
- Conduct Pre Trial Review in a registry office instead of the courtroom to facilitate a mediation session, where possible.

Australian National Mediator Accreditation System

Until recently, there were no nationally consistent mediation accreditation standards in existence in Australia. On 1 January 2008, however, the National Mediator Accreditation System commenced operation. The new System has been introduced to enhance the quality of national mediation services, to improve the credibility of ADR, and to build consumer confidence in ADR services.

The National Mediator Accreditation System is industry-based, relying on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards. Such mediator organisations are referred to as Recognised Mediator Accreditation Bodies (RMABs), and in NSW include the Law Society of NSW, the NSW Bar Association, and the Institute of Arbitrators and Mediators. The criteria for accreditation under the National Mediator Accreditation System include, amongst other things: evidence of good character; at least 25 hours of mediation, co-mediation or conciliation within a two year cycle; and, at least 20 hours of continuing professional development within a two year cycle.

The system is voluntary for those mediators who wish to obtain accreditation. However, for example, the Bar Association and Law Society have determined that only those barristers and solicitors who are accredited under the National Standards will be selected in future for the District Court and Supreme Court mediators' panels.

Certain courts in other jurisdictions have determined that all court-annexed mediations (where a registrar or other officer of the court is the mediator) are to be carried out by a person accredited under the National Mediator Accreditation System. In order to build consumer confidence in ADR services, NSW Courts could adopt a similar approach.

Proposal 19: Move to a system where all mediators on the District and Supreme Court mediators' panels are accredited under the National Mediator Accreditation System, and all court-annexed mediations (where a registrar or other officer of the court is the mediator) are carried out by a person accredited under the National Mediator Accreditation System.

APPENDIX ONE

Victorian Law Reform Commission Proposed Standards of Conduct for Parties to Disputes (including Pre-action Protocols)

1. Pre-action protocols should be introduced for the purpose of setting out codes of 'sensible conduct' which persons in dispute are expected to follow when there is the prospect of litigation.
2. The objectives of the protocols would be:
 - to specify the nature of the information required to be disclosed to enable the persons in dispute to consider an appropriate settlement
 - to provide model precedent letters and forms
 - to provide a time frame for the exchange of information and settlement proposals
 - to require parties in dispute to endeavour to resolve the dispute without proceeding to litigation
 - to limit the issues in dispute if litigation is unavoidable so as to reduce costs and delay.
3. Although information and documentation about the merits and quantum of the claim and defence would be available for use in any subsequent litigation, offers of settlement made at the pre-action stage would be on a 'without prejudice' basis but would be able to be disclosed, following the resolution of the dispute after the commencement of proceedings, and would be taken into account by the court in determining costs.
4. The general standards of pre-action conduct expected of persons in a dispute would be incorporated in statutory guidelines. Each person in a dispute and the legal representative of such person would be required to bring to the attention of each other or potential party to the dispute the general standards of pre-action conduct and any specific pre-action protocols applicable to the type of dispute in question (where such other person is not aware of such protocols).
5. The statutory guidelines should provide that, where a civil dispute is likely to result in litigation, prior to the commencement of any legal proceedings the parties to the dispute shall take reasonable steps, having regard to their situation and the nature of the dispute, to resolve the matter by agreement without the necessity for litigation or to clarify and narrow the issues in dispute in the event that legal proceedings are commenced. Such reasonable steps will normally be expected to include the following:
 - (a) *The claimant shall write to the other party setting out in detail the nature of the claim and what is requested of the other party to resolve the claim, and specifying a reasonable time period for the other person to respond.*
 - (b) *The letter from the person with the claim should:*
 - (i) *give sufficient details to enable the recipient to consider and investigate the claim without extensive further information*
 - (ii) *enclose a copy of the essential documents in the possession of the claimant which the claimant relies upon*
 - (iii) *state whether court proceedings will be issued if a full response is not received within a specified reasonable period*
 - (iv) *identify and ask for a copy of any essential documents, not in the claimant's possession, which the claimant wishes to see and which are reasonably likely to be in the possession of the recipient*
 - (v) *state (if this is so) that the claimant is willing to undertake a mediation or another method of alternative dispute resolution if the claim is not resolved*
 - (vi) *draw attention to the courts' powers to impose sanctions for failure to comply with the pre-action protocol requirements in the event that the matter proceeds to court.*
 - (c) *The person receiving the written notification of the claim shall acknowledge receipt of the claim promptly (normally within 21 days of receiving it), specify a reasonable time within which a response will be provided and indicate what additional information, if any, is reasonably required from the claimant to enable the claim to be considered.*

- (d) *The person receiving the written notification of the claim, or that person's agent, shall respond to the claim within a reasonable time and provide a detailed written response specifying whether the claim is accepted and if not the detailed grounds on which the claim is rejected.*
- (e) *The full written response to the claim should, as appropriate:*
- (i) *indicate whether the claim is accepted and if so the steps to be taken to resolve the matter*
 - (ii) *if the claim is not accepted in full, give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions are accepted and which are disputed and the reasons why they are disputed*
 - (iii) *enclose a copy of documents requested by the claimant or explain why they are not enclosed*
 - (iv) *identify and ask for a copy of any further essential documents, not in the respondent's possession, which the respondent wishes to see*
 - (v) *state whether the respondent is prepared to make an offer to resolve the matter and if so the terms of such offer*
 - (vi) *state whether the respondent is prepared to enter into mediation or other form of dispute resolution.*
- (f) *In the event that the claim is not resolved or withdrawn, the parties should conduct genuine and reasonable negotiations with a view to resolving the claim economically and without court proceedings.*
- (g) *Where a person in dispute makes an offer of compromise before any legal proceedings are commenced the court may, after the determination of the court proceedings, take that into consideration on the question of costs in any proceedings.*
6. Specific pre-action protocols applicable to particular types of dispute should be developed by the proposed Civil Justice Council (see further recommendations below) in conjunction with representatives of stakeholder groups in each relevant area (eg, commercial disputes, building disputes, medical negligence, general personal injury, etc.).
7. Where a specific pre-action protocol is developed for a particular type of dispute it would be referred to the Rules Committee for approval and implementation by way of a practice note in each of the Magistrates' Court, the County Court and the Supreme Court, with such modifications as may be appropriate in each of the three jurisdictions.
8. Except in (defined) exceptional circumstances, compliance with the requirements of the practice notes would be an expected condition precedent to the commencement of proceedings in each of the three courts. The obligation to comply with the requirements of applicable practice notes would be statutory. A person seeking to formally commence a legal proceeding should be required to certify whether the pre-action protocol requirements have been complied with, and where they have not to set out the reasons for such non compliance.
9. Because it would not be practicable for court registry staff to determine whether there had been compliance with the pre-action protocol requirements or to evaluate the adequacy of the reasons for noncompliance, the court would not have power to decline to allow proceedings to be commenced because of noncompliance. However, where the pre-action protocol requirements have not been complied with the court could, in appropriate cases, order a stay of proceedings pending compliance with such requirements.
10. The 'exceptional' circumstances where compliance with any pre-action protocol requirements would not be mandatory would include situations where:
- a limitation period may be about to expire and a cause of action would be statute barred if legal proceedings are not commenced immediately
 - an important test case or public interest issue requires judicial determination
 - there is a significant risk that a party to a dispute will suffer prejudice if legal proceedings are not commenced, in circumstances where advance notification of proceedings may result in conduct such as the dissipation of assets or destruction of evidence.
 - there is a reasonable basis for a person in dispute to conclude that the dispute is intractable
 - the legal proceeding does not arise out of a dispute

- the parties have agreed to dispense with compliance with the requirements of the protocol.
11. Unreasonable failure to comply with an applicable protocol or the general standards of pre-action conduct should be taken into account by the court, for example in determining costs, in making orders about the procedural obligations of parties to litigation, and in the awarding of interest on damages. Unless the court orders otherwise, a person in dispute who unreasonably fails to comply with the pre-action requirements:
- would not be entitled to recover any costs at the conclusion of litigation, even if the person is successful
 - would be ordered to pay the costs of the other party on an indemnity basis if unsuccessful.
12. The operation of the protocols and general standard of pre-action conduct should be monitored by the Civil Justice Council, in consultation with representatives of relevant stakeholder groups, and modified as necessary in the light of practical experience.
13. There should be an entitlement to recover costs for work done in compliance with the pre-action protocol requirements in cases, which proceed to litigation. Specific pre-action protocols should attempt to specify the amount of costs recoverable, on a party-party basis, for carrying out the work covered by the protocols. As with the current Transport Accident Commission (TAC) protocols in Victoria, such costs should be either fixed (with allowance for inflation) or calculated in a determinate manner (eg, like the fixed costs payable in certain types of simple cases in England and Wales, where costs are calculated on a fixed base amount plus an additional percentage of the amount claimed). Consideration should be given to whether specific pre-action protocols should include a procedure for mandatory pre-trial offers which would be taken into account by the court when determining costs at the conclusion of any legal proceeding.
14. Where the parties to a dispute have agreed to settle the dispute before starting proceedings but have not agreed on who is to pay the costs of and incidental to the dispute or the amount to be paid, and there is no pre-action protocol which provides for such costs, any party to the dispute may apply to the court for an order:
- (i) for the costs of and incidental to the dispute to be taxed or assessed, or
 - (ii) awarding costs to or against any party to the dispute, or
 - (iii) awarding costs against a person who is not a party to the dispute, if the court is satisfied that it is in the interests of justice to do so.
15. Where, taking into account the nature of the dispute and the likely means of the parties, the costs of and incidental to the dispute are relatively modest, there should be a presumption that each party to the dispute will bear its own costs. The court should have power to determine the application on the basis of written submissions from the parties, without a hearing and without having to give reasons, or refer the matter to mediation or other form of alternative dispute resolution.

APPENDIX TWO

NSW Model Litigant Policy:

- 3.1** The obligation to act as model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.
- 3.2** The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:
- a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;
 - b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;
 - c) acting consistently in the handling of claims and litigation;
 - d) endeavouring to avoid litigation, wherever possible. In particular regard should be had to Premier's Memorandum 94-25 Use of Alternative Dispute Resolution Services By Government Agencies and Premier's Memorandum 97-26 Litigation Involving Government agencies;
 - e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - i) not requiring the other party to prove a matter which the State or an agency knows to be true; and
 - ii) not contesting liability if the State or an agency knows that the dispute is really about quantum;
 - f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
 - g) not relying on technical defences unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier's Memorandum 97-26;
 - h) not undertaking and pursuing appeals unless the State or an agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration

of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable; and

- i) apologising where the State or an agency is aware that it or its lawyers have acted wrongfully or improperly.

3.3 The obligation does not require that the State or an agency be prevented from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken pursuing litigation, or from testing or defending claims made.

APPENDIX THREE

Pre-Action Protocol for Construction and Engineering Disputes

Contents

- 1 Introduction
- 2 Overview of the Protocol
- 3 The Letter of Claim
- 4 The Defendant's Response
- 5 Pre-Action Meeting
- 6 Limitation of Action

1 Introduction

- 1.1 This Pre-Action Protocol applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).

Exceptions

- 1.2 A claimant shall not be required to comply with this Protocol before commencing proceedings to the extent that the proposed proceedings (i) are for the enforcement of the decision of an adjudicator to whom a dispute has been referred pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996 ('the 1996 Act'), (ii) include a claim for interim injunctive relief, (iii) will be the subject of a claim for summary judgment pursuant to Part 24 of the Civil Procedure Rules, or (iv) relate to the same or substantially the same issues as have been the subject of recent adjudication under the 1996 Act, or some other formal alternative dispute resolution procedure.

Objectives

- 1.3 The objectives of this Protocol are as set out in the Practice Direction relating to Civil Procedure Pre-Action Protocols, namely:
 - (i) to encourage the exchange of early and full information about the prospective legal claim;
 - (ii) to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and
 - (iii) to support the efficient management of proceedings where litigation cannot be avoided.

Compliance

- 1.4 If proceedings are commenced, the court will be able to treat the standards set in this Protocol as the normal reasonable approach to pre-action conduct. If the court has to consider the question of compliance after proceedings have begun, it will be concerned with substantial compliance and not minor departures, e.g. failure by a short period to provide relevant information. Minor departures will not exempt the 'innocent' party from following the Protocol. The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions. For sanctions generally, see paragraph 2 of the Practice Direction- Protocols 'Compliance with Protocols'.

Proportionality

- 1.5 The overriding objective (CPR rule 1.1) applies to the pre-action period. The Protocol must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs. In lower value claims (such as those likely to proceed in the county court), the letter of claim and the response should be simple and the costs of both sides should be kept to a modest level. In all cases the costs incurred at the Protocol stage should be proportionate to the complexity of the case and the amount of money, which is at stake. The Protocol does not impose a requirement on the parties to marshal and disclose all the supporting details and evidence that may ultimately be required if the case proceeds to litigation.

2 Overview of the Protocol

General Aim

2. The general aim of this Protocol is to ensure that before court proceedings commence:
 - (i) the claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;
 - (ii) each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;
 - (iii) there is more pre-action contact between the parties;
 - (iv) better and earlier exchange of information occurs;
 - (v) there is better pre-action investigation by the parties;
 - (vi) the parties have met formally on at least one occasion with a view to defining and agreeing the issues between them; and exploring possible ways by which the claim may be resolved;
 - (vii) the parties are in a position where they may be able to settle cases early and fairly without recourse to litigation; and
 - (viii) proceedings will be conducted efficiently if litigation does become necessary.

3 The Letter of Claim

3. Prior to commencing proceedings, the claimant or his solicitor shall send to each proposed defendant (if appropriate to his registered address) a copy of a letter of claim, which shall contain the following information:
 - (i) the claimant's full name and address;
 - (ii) the full name and address of each proposed defendant;
 - (iii) a clear summary of the facts on which each claim is based;
 - (iv) the basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied on;
 - (v) the nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed;
 - (vi) where a claim has been made previously and rejected by a defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected;
 - (vii) the names of any experts already instructed by the claimant on whose evidence he intends to rely, identifying the issues to which that evidence will be directed.

4 The Defendant's Response

The defendant's acknowledgment

- 4.1 Within 14 calendar days of receipt of the letter of claim, the defendant should acknowledge its receipt in writing and may give the name and address of his insurer (if any). If there has been no acknowledgment by or on behalf of the defendant within 14 days, the claimant will be entitled to commence proceedings without further compliance with this Protocol.

Objections to the court's jurisdiction or the named defendant

- 4.2 Objections to the court's jurisdiction or the named defendant

- 4.2.1 If the defendant intends to take any objection to all or any part of the claimant's claim on the grounds that (i) the court lacks jurisdiction, (ii) the matter should be referred to arbitration, or (iii) the defendant named in the letter of claim is the wrong defendant, that objection should be raised by the defendant within 28 days after receipt of the letter of claim. The letter of objection shall specify the parts of the claim to which the objection relates, setting out the grounds relied on, and, where appropriate, shall identify the correct defendant (if known). Any failure to take such objection shall not

prejudice the defendant's rights to do so in any subsequent proceedings, but the court may take such failure into account when considering the question of costs.

- 4.2.2 Where such notice of objection is given, the defendant is not required to send a letter of response in accordance with paragraph 4.3.1 in relation to the claim or those parts of it to which the objection relates (as the case may be).
- 4.2.3 If at any stage before the claimant commences proceedings, the defendant withdraws his objection, then paragraph 4.3 and the remaining part of this Protocol will apply to the claim or those parts of it to which the objection related as if the letter of claim had been received on the date on which notice of withdrawal of the objection had been given.

The defendant's response

4.3

- 4.3.1 Within 28 days from the date of receipt of the letter of claim, or such other period as the parties may reasonably agree (up to a maximum of 3 months), the defendant shall send a letter of response to the claimant which shall contain the following information:
- (i) the facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;
 - (ii) which claims are accepted and which are rejected, and if rejected, the basis of the rejection;
 - (iii) if a claim is accepted in whole or in part, whether the damages, sums or extensions of time claimed are accepted or rejected, and if rejected, the basis of the rejection;
 - (iv) if contributory negligence is alleged against the claimant, a summary of the facts relied on;
 - (v) whether the defendant intends to make a counterclaim, and if so, giving the information which is required to be given in a letter of claim by paragraph 3(iii) to (vi) above;
 - (vi) the names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed;
- 4.3.2 If no response is received by the claimant within the period of 28 days (or such other period as has been agreed between the parties), the claimant shall be entitled to commence proceedings without further compliance with this Protocol.

Claimant's response to counter claim

- 4.4 The claimant shall provide a response to any counterclaim within the equivalent period allowed to the defendant to respond to the letter of claim under paragraph 4.3.1 above.

5 Pre-Action Meeting

- 5.1 Within 28 days after receipt by the claimant of the defendant's letter of response, or (if the claimant intends to respond to the counterclaim) after receipt by the defendant of the claimant's letter of response to the counterclaim, the parties should normally meet.
- 5.2 The aim of the meeting is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement in respect of each issue, and to consider (i) whether, and if so how, the issues might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective as defined in rule 1.1 of the Civil Procedure Rules.
- 5.3 In some circumstances, it may be necessary to convene more than one meeting. It is not intended by this Protocol to prescribe in detail the manner in which the meetings should be conducted. But the court will normally expect that those attending will include:
- (i) where the party is an individual, that individual, and where the party is a corporate body, a representative of that body who has authority to settle or recommend settlement of the dispute;
 - (ii) a legal representative of each party (if one has been instructed);

- (iii) where the involvement of insurers has been disclosed, a representative of the insurer (who may be its legal representative); and
 - (iv) where a claim is made or defended on behalf of some other party (such as, for example, a claim made by a main contractor pursuant to a contractual obligation to pass on subcontractor claims), the party on whose behalf the claim is made or defended and/or his legal representatives.
- 5.4 In respect of each agreed issue or the dispute as a whole, the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.
- 5.5 If the parties are unable to agree on a means of resolving the dispute other than by litigation they should use their best endeavours to agree:
- (i) if there is any area where expert evidence is likely to be required, how the relevant issues are to be defined and how expert evidence is to be dealt with including whether a joint expert might be appointed, and if so, who that should be; and (so far as is practicable)
 - (ii) the extent of disclosure of documents with a view to saving costs; and
 - (iii) the conduct of the litigation with the aim of minimising cost and delay.
- 5.6 Any party who attended any pre-action meeting shall be at liberty and may be required to disclose to the court:
- (i) that the meeting took place, when and who attended;
 - (ii) the identity of any party who refused to attend, and the grounds for such refusal;
 - (iii) if the meeting did not take place, why not; and
 - (iv) any agreements concluded between the parties.
 - (v) the fact of whether alternative means of resolving the dispute were considered or agreed.
- 5.7 Except as provided in paragraph 5.6, everything said at a pre-action meeting shall be treated as 'without prejudice'.

6 Limitation of Action

6. If by reason of complying with any part of this protocol a claimant's claim may be time-barred under any provision of the Limitation Act 1980, or any other legislation which imposes a time limit for bringing an action, the claimant may commence proceedings without complying with this Protocol. In such circumstances, a claimant who commences proceedings without complying with all, or any part, of this Protocol must apply to the court on notice for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the court to issue proceedings. The court will consider whether to order a stay of the whole or part of the proceedings pending compliance with this Protocol.

APPENDIX FOUR

Declaration of Principles of Court-annexed Mediation by the Council of Chief Justices (1999)

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

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