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SOME DESIRABLE FEATURES OF LOWER COURT SYSTEMS TO VERIFY AND ENFORCE CIVIL OBLIGATIONS

A thesis submitted in fulfillment of
the requirements for the award of the degree

DOCTOR OF PHILOSOPHY

from the

UNIVERSITY OF WOLLONGONG

by

ANDREW JAMES CANNON BA LL.M (Honours)

Faculty of Law

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SUMMARY AND CERTIFICATE

Lower court systems to enforce civil obligations are complex and their operation is intertwined with other dispute resolution systems in the community. This inter-relationship must be understood to ascertain the role of lower courts. In this thesis I start with that and from that base I deduce desirable features to properly perform the role. This includes systems for debt collecting, fact finding and assisting settlements. The cost of access to lower courts is a primary factor in determining the level of use of them and how they are used. I conclude what are appropriate cost policies to ensure the system operates in a desirable way.

I have used the court in which I work as a primary place of research but I have also used comparative studies of the Dutch, German and Northern Irish courts to inform this topic. The civil code approach to fact finding and assisting settlements has much to offer common law countries. Readers from those countries may find the explanation and conclusions on these aspects to some extent the statement of the obvious.

In looking at the whole system by necessity I am covering a broad range of topics, each of which could be teased out in greater detail. I hope the reader will find my discussion sufficient for my purpose of identifying desirable features of lower court systems that take into account their inter relationship. To make my conclusions manageable I have summarised them at the end of each chapter and have repeated those summaries, with some overarching conclusions in the last chapter.

This work has not been submitted for a degree to any other university or institution.

CHAPTER 1: INTRODUCTION

Civilised society requires a system to enforce obligations and, where necessary, to resolve disputes about the existence or extent of those obligations. This underpins the security of property and financial rights to facilitate economic activity and provides enforceable codes of behaviour between citizens and between government and its citizens. Courts traditionally fulfil that role. The bulk of enforcing uncontested obligations is done in lower courts. Where there is a dispute, deciding the existence and extent of an obligation involves a determination of the factual circumstances and then an application of legal principle to them. The role of lower courts in this is primarily the determination of factual issues, whereas higher courts have a greater role in the interpretation and development of that legal principle. Having verified that an obligation exists, the courts provide and supervise the machinery for the enforcement of it.

This thesis contends that to be effective lower courts must take more control of and responsibility for the cases with which they deal. This is a change from the traditional common law role where courts provide an enforcement machinery for creditors to use without supervising its use and in disputed cases act as a disinterested umpire during a party controlled adversarial process to decide which of two versions is to be preferred. This involves a shift from party control to court control. Once courts exert control over cases they must accept a degree of responsibility to ensure a just result. Lower court systems also must provide appropriate methods of rationing access to ensure an appropriate balance between enforcing civil obligations in courts and avoiding bad debtors, managing debt collection and resolving disputes by other methods. One way of doing this is by economic incentives.

This thesis describes some policies that lower courts should adopt in the exercise of control over their work and cost policies to achieve an appropriate balance between access to lower courts and resolving civil obligations by other means.

This thesis is founded on research on the South Australian Magistrates Court which is the lowest state court in South Australia. Some comparisons to lower courts in

Germany and the Netherlands and debt collecting systems in Northern Ireland are made. **Chapter 2** gives background information on the history of the South Australian Magistrates Court and some comparative data for Germany and the Netherlands.

Chapter 3 quantifies the work of the South Australian Magistrates Court in relation to other identified dispute resolution methods in society. It emerges that in numerical terms the main role of the court is enforcing uncontested obligations. Defended cases are only about 10% of the cases commenced in the court and cases determined by verdict are only of the order of one percent. The disputed cases that the court resolves, (90% of these by means other than verdict) are less than half the civil disputes resolved by all means identified in this research. However the court has a role in disputes it does not resolve directly by providing the possibility of a state sanctioned answer to the dispute. The court method of resolving disputes is to decide a version of the facts and apply settled principle to those facts (the determinative model of dispute resolution). Other bodies use similar methods to determine disputes. The growth of these and government tribunals is an indication that sectors of industry and government see court processes as deficient. The magistrates court is compared with two company dispute resolution schemes using methods similar to the court determinative method to see what if anything distinguishes the court role from the role of such private quasi courts. There are great similarities between these private quasi courts and government lower courts. The key distinguishing feature of lower courts is the enforceability of their judgments. The ability of both sides to a dispute to enforce a court judgment is a key identifier of the court's role. The conclusion is that the assertion at the outset is correct. The role of lower courts is to enforce obligations and where necessary to determine the existence and extent of them. Having defined these two key roles of lower courts the next two chapters discuss the desirable features of lower courts systems to fulfil those roles.

In **Chapter 4** the effectiveness of present processes to verify debt and enforce judgments in the South Australian Magistrates Court is critically assessed. It is suggested that lower courts should manage these processes to ensure that unfair claims by creditors are identified and stopped. Chronic debtors should be identified

at the earliest possible time to ensure that creditors have realistic expectations of the likelihood of success of court processes against them. Where a debtor has multiple creditors lower courts should identify that fact. Court processes should be designed to avoid costs being wasted obtaining and attempting to enforce judgments which are unlikely to be paid. A wider range of factors should be identified to ensure a fair priority between creditors. The threat of an adverse report on creditworthiness should be used to encourage performance of obligations. Underlying these improvements is a change from the present position of the lower courts where the enforcement processes are creditor driven, to greater court involvement in managing the collection of all debts against each debtor.

Underpinning all cases processed by the South Australian Magistrates Court, and probably much dispute resolution outside it, is the availability of the court's determinative model of dispute resolution where it is needed to ascertain the existence and extent of a legally enforceable obligation. In **Chapter 5** the traditional common law adversary model of fact finding in the South Australian Magistrates Court is critically described. The present tradition of party control, which is in reality lawyer control, and the focus of fact finding on an oral trial at the end of the process results in a system where the costs of the process of determining a dispute is often greater then the amount in dispute. The process of fact finding in German courts is described. The conclusion is that lower court fact finding process could be improved by a shift in control of the fact finding process to the court. The margin of control between the court and the parties, consistent with the retention of an adversary process, is defined. In appropriate cases, fact finding should shift from the oral trial. Lower court processes should be designed to narrow the area of factual controversy at the earliest possible stage in the process. In relation to the specific problems of determining disputes requiring expert opinion or observation it is recommended that lower courts should retain their own expertise. Ways to achieve a proper balance between the parties' need to question a court expert's opinions whilst preserving that expert's status as an adviser to the court are discussed. A consequence of this is an important philosophical change from the common law adversary model where the role of the court is to adjudicate between the two alternative versions put before it. If the lower courts are to exercise control they assume thereby some responsibility for

the process. It is suggested that their primary objective should be to seek an accurate version of the facts.

In **Chapter 6** the proper role of lower courts in assisting parties to settle disputes, both before and after proceedings are commenced is discussed. Given the primary role of the court is enforcing obligations and determining their existence and extent, alternative dispute resolution should not be a barrier to accessing the deterministic role. Dangers of courts encouraging settlements include the loss of precedent, the dangers of settlements outside the parameters of legal fairness and the diminution of the distinctive role of magistrates if they use techniques so readily used by others. However most cases do settle. Consistent with a main theme of this thesis that lower courts should take greater control and responsibility for the management of their cases is the view that they should have a role in assisting the process of settlement. This can be done by courts encouraging prelodgement settlements and non judicial staff providing mediation. Data and survey results on a prelodgement scheme and court mediation conducted by non judicial staff in the South Australian Magistrates Court are discussed to lead to the conclusion that both these are useful parts of lower court systems. Whether judicial officers should be involved in settlement attempts has been contentious. The role of judges in settlement discussions in Germany is discussed. It is concluded that judicial officers in lower courts should be involved in settlement attempts in appropriate circumstances. Their primary role is the making of factual determinations. Where judicial officers are involved in settlement attempts they need to carefully identify the factual assumptions upon which settlement suggestions are based and the implications if the factual assumptions are wrong. A form of judicial evaluation at the outset of a case adapted from a preliminary injunction procedure in the Netherlands (kört geding) is noted as fitting well with the court determinative role. Judicial officers must be satisfied that settlements achieved under their direction are in accordance with the parties' rights, or if they are not the departure is for sensible and principles reasons.

In **Chapter 7** the economic incentives and impediments to access to lower courts are discussed. These policies affect the ability to access lower courts, how their processes are used and ration access to them. It is concluded that cost shifting from

the loser to the winner is desirable but should be calculated on a fixed predictable scale. The shifted costs generally are less than the actual costs. Ways to spread cost risks without encouraging abuse of lower court processes are discussed. Legal cost insurance, contingency and conditional fees are all useful ways of reducing cost barriers providing countervailing policies to discourage unnecessary and frivolous litigation are in place. Some form of legal aid is necessary to assist defendants facing a claim larger than a small claim.

Finally in **Chapter 8** the desirable features are drawn together in the conclusion.

CHAPTER 2: THE MAGISTRATES COURT IN SOUTH AUSTRALIA AND COMPARATIVE DATA

To describe the features of lower court systems, desirable or otherwise, the Magistrates Court in South Australia has been used as a focus. Its role in the state court system and its policies and practices bearing on the topics of this thesis are briefly described to lead into more detailed evaluation and conclusion in later chapters. In this thesis some comparisons to German and Dutch court systems are made so a brief description of the German system is included. Some relevant contrasts to the system in The Netherlands are noted. Some comparisons are also made to Northern Ireland in relation to debt collecting and cost scales but the information on that system is included in the relevant chapters.

In South Australia the civil jurisdiction of courts is somewhat fragmented. Family law disputes are a commonwealth matter and are dealt with in the Family Court constituted by the Commonwealth Government. The Federal Court deals with commonwealth civil jurisdictions including bankruptcy cases. The commonwealth also has the Administrative Appeals Tribunal to deal with reviews of commonwealth administrative decisions. This has no parallel in the state administration. There are both commonwealth and state ombudsmen to investigate complaints against administrative decisions. The Human Rights and Equal Opportunity Commission deals with discrimination complaints. Labour disputes and compensation for workplace injuries are dealt with in the state Industrial Court and Workcover Tribunal respectively. A specialist tribunal deals with residential tenancy disputes. Other civil disputes are dealt with in the state courts comprising of the Supreme and District Court, which have a concurrent civil jurisdiction and the Magistrates Court. At the time of writing this thesis the Magistrates Court has an upper limit on its jurisdiction of $30.000 or $60,000 depending on the type of dispute (references are to Australian dollars). The following table sets out the various government courts and tribunals operating in South Australia with their judicial establishment and number of cases.

Table 2.1: Courts and Tribunals in South Australia, December 1998

Court or Tribunal	full time judicial officers	part time judicial officers	FTE judicial officers	Civil cases per year
Federal Court	4		4	450
Family Court	5		5	5,258
Administrative Appeals Tribunal	2	4	2.5	951
Human Rights & Equal Opportunity Tribunal		1	0.5	33
Supreme Court	17		17	1,080
District Court	21		21	1,886
District Court Appeals tribunal			counted elsewhere	464
Youth Court	4		4	Not applicable
Environment Resources and Development Court	5	24	5	337
Magistrates Court	33		33	4,861
Industrial Relations Court and Commission	14		14	Court 1,141 Comm. 1,565
Workers Compensation Tribunal	15		15	7,441
Residential Tenancy Tribunal	1	15	5	8,098
Guardianship Board	1	unknown	4	1,743
Coroners Court	1		1	60
State Ombudsman	1		1	3,651
TOTALS			132	39,019

Sources: SA Law Calendar, CAA 1998, various judicial officers and registrars in these courts and tribunals, and annual reports. FTE is an acronym for Full Time Equivalent. Ombudsmen, judicial registrars and tribunal members are all included for comparative purposes with Germany where all such jurisdictions are within the court system. Figures for the Supreme, District, Environment Resources and Development, Magistrates and Coroners Courts are for the financial year 1998/9. The Federal and Family Courts are figures for SA 1998 calendar year. The ERD court figures exclude criminal matters and s.38 documents. The Coroner considers about 3000 matters a year but proceeds to an oral inquest only in about 60. The other matters have been left out in similar fashion to uncontested debt. The Guardianship Board figures are for 1999. It counts hearing outcomes at 4,099

but I have taken the lower figure of applications (one applications often has multiple hearings dealing with different aspects. Part time members have been reduced to FTEs by assuming a full time replacement at 40hrs per week for 50 weeks, again if anything understating the figure. No attempt to distinguish between judges and magistrates who do criminal cases has been attempted but the workload statistics are for civil disputes for comparative purposes in Table 2.7.

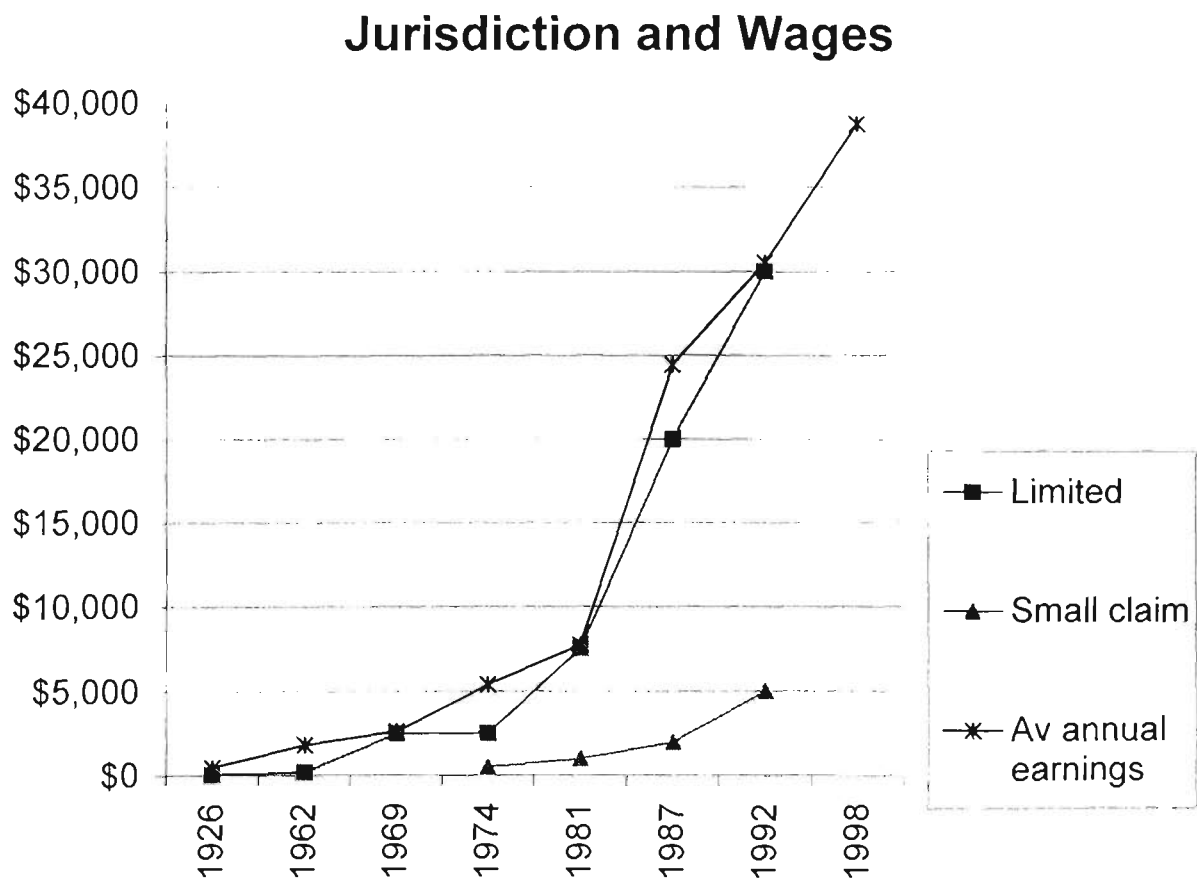
The South Australian Magistrates Court

The Magistrates Court's civil jurisdiction has its origins in South Australia as part of the Local Court, which has always been a creature of statute. An early Act was the Local Court Act of 1888. That court had two divisions, the court of full jurisdiction and the court of limited jurisdiction and was regionalised with major community centres each having a separate court. The judicial officers of the full jurisdiction were higher status judges and magistrates did the judicial work of the limited jurisdiction. The jurisdiction of the limited jurisdiction, or Magistrates Court has been compared with average annual earnings as an indicator of average community wealth. In 1901 when comparable wage data is first available the basic annual wage for manufacturing was 79 pounds 10 shillings which was four times the jurisdictional limit of the court (20 pounds). It remained at a small proportion of annual earnings until the jurisdiction was raised to 95% of average adult male 'All Industrial Group' annual earnings in 1969 ($2,500 compared to $2,627). In 1981 the jurisdiction was raised to 97% of the same measure of earnings ($7,500 compared to $7,749). The court was separately constituted in 1992 and at that time its general jurisdiction of $30,000 was 98% of the same measure of wages and its jurisdiction over damages and injury from motor vehicle accidents, property and some other disputes was fixed at $60,000, nearly double the same measure of wages. The detail of this jurisdiction is discussed below. Proposals to further increase the jurisdiction are being considered at the moment. This history of jurisdiction increases is shown in the following table and chart.

Table 2.2: Magistrates Court civil jurisdiction and average annual earnings

	Limited/ general jurisdiction	Small claim	Av. annual earnings	jurisdiction as a % of earnings	small claims as a % earnings
1886	$40	na	unknown		
1901	$40	na	$159	25%	
1926	$60		$491	12%	
1962	$200		$1,852	11%	
1969	$2,500		$2,627	95%	
1974	$2,500	$500	$5,373	47%	9%
1981	$7,500	$1,000	$7,749	97%	13%
1987	$20,000	$2,000	$24,440	82%	8%
1992	$60/$30,000	$5,000	$30,529	98%	16%
1998			$38,750		

Sources: legislative amendments and wages from the Commonwealth statistician. All figures are converted to dollars. The current jurisdiction is $60,000 for personal injury claims arising from motor vehicle accidents and property disputes. Unless otherwise specified the general limit is $30,000. The graph below is drawn to the general limit.



In 1970, an amendment created an intermediate court in South Australia, known as the District Court, which had jurisdiction over civil matters between the jurisdiction of the Magistrates Court and the Supreme Court. In 1975, the Magistrates Court (still known as the Local Court of limited jurisdiction) had a small claims jurisdiction up to a limit of $500 conferred upon it. This jurisdiction was distinguished by the exclusion of lawyers, simplified procedures and only limited cost shifting from the winner to the loser. At that time its 'limited' jurisdiction was $2,500. Magistrates could hear cases up to that limit. District Court judges could hear claims up to $7,500. The small claims jurisdiction was a plenary jurisdiction, i.e. all monetary claims under $500 were dealt with as a small claim and subject to special procedures. In 1982 the Small Claims Jurisdiction was increased to $1,000 and the limited jurisdiction to $7,500. District Court judges could hear claims to $46,000 and a larger jurisdiction of $60,000 was created for damages for personal injuries caused in motor vehicle accidents. In May 1988, the small claims jurisdiction was increased to $2,000 and the limited jurisdiction to $20,000. Magistrates exercising civil jurisdiction remained an adjunct to the District Court. District Court judges could hear claims to $100,000 and $150,000 for motor vehicle personal injury claims.

A raft of legislation in 1991, which came into effect in 1992, constituted the Magistrates Court as a separate court from the District Court (*Magistrates Court Act* 1991 (SA)). The full jurisdiction of the former Local Court went to the District Court and the limited jurisdiction to the Magistrates Court. The full jurisdiction, now the District Court became unlimited, and hence concurrent with the first instance jurisdiction of the Supreme Court with a cost penalty encouraging all cases under $75,000 (Personal injury from motor vehicle accidents $150,000, defamation $25,000) to be heard in the District Court (endnote 1).

The Magistrates Court was given a full civil jurisdiction to hear:

- An action at law or equity for a sum of money up to $60,000 for a claim for damages arising from the use of a motor vehicle and $30,000 in any other case.
- Recovery of title or possession of property of a value not exceeding $60,000.

- Domestic building disputes, second hand vehicle dealer warranty claims, and retail shop lease disputes of all values subject to right to refer disputes in excess of $30,000 to the District Court.
- 'Minor Civil Actions' for money claims of not more than $5,000, strata and community title disputes, fences disputes and neighbourhood disputes. In this thesis all of these are called small claims which is the common term for such cases in Australia.
- Power to grant injunctive relief, make declaratory judgments and order specific performance (ibid. Section 8).

The greater jurisdiction for personal injury claims from motor vehicle accidents, which existed in the previous Local Court of full jurisdiction, was carried to the Magistrates Court where the jurisdiction for those cases extended to $60,000. One result of this was for the Magistrates Court to receive a substantial personal injury jurisdiction. In 1987, general damages in personal injury claims arising from motor vehicle accidents were capped at $60,000, indexed for inflation for accidents in subsequent years. (*Wrongs Act* 1936 (SA), s 35A) Courts assessing those damages need to prescribe a number between one and 60 to the injury. This is then multiplied by $1,000 for accidents which occurred in 1987 and that sum adjusted for inflation for accidents in later years. The Supreme Court interpreted this to the effect that 60 was reserved for the most serious of injuries, and a typical whiplash injury would be in the order of five to eight. (*Packer* 1989) Before this, awards for past and future pain and suffering (the equivalent to the Wrongs Act number) for a typical whiplash injury were much higher. For example in *Wilkinson v. Alseika* the award for past and future pain and suffering for a "disabling though not a crippling injury of a whiplash type exacerbated by the nerve lesion" (*Wilkinson* p.358) was $30,000. Allowing for inflation, this was of the order of eight times the typical award in 1987 under the Wrongs Act. The combination of the reduction of general damages consequent upon the amendment to the Wrongs Act in conjunction with the increase in jurisdiction, resulted in the transfer of a substantial portion of personal injury motor vehicle accident claims from the District Court to the Magistrates Court.

Table 2.3: Personal Injury claims in courts in South Australia

Please see print copy for image

Source: internal Courts Admin. Authority data.

The general decline in personal injury claims evident in these figures is consequent upon preaction settlement of claims by SGIC discussed in Chapter 6.

The Magistrates Court became one court for the whole state with regional registries rather than the stand alone network of local courts that previously existed. The court now had power to regulate its own procedures.

Between 1973 and 1984 (endnote 2) an initiative of consumer legislation had constituted the Commercial Tribunal to deal with consumer credit, commercial lease, domestic building and secondhand motor vehicle warranty disputes. In 1995 the Commercial Tribunal was wound down and these jurisdictions were returned to the newly created consumer and business division of the Magistrates Court.

South Australia has its population highly concentrated in the main capital city of Adelaide. Magistrates sitting in suburban and country areas deal with both civil and criminal jurisdictions. However, in the CBD and inner metropolitan area, the civil and criminal jurisdictions, for many decades, have been separated. A specialist civil Magistrates Court serves the CBD and inner metropolitan area. Five magistrates have staffed this court for the past 20 years. The author has been supervising that court formally since 1 August 1991 and prior to that, on an acting basis with some minor interruptions, since 8 April 1988. As an author of some of the policies discussed in this thesis I would like to find that they are effective. I have borne this self-interest in mind when undertaking this research.

Policy issues for the Magistrates Court

The effect of these reforms was to give the Magistrates Court a substantial jurisdiction, which made it in number terms the main court of public access to the state court civil system.

Table 2.4: Case loads of state courts in South Australia

Year	Supreme Court	District Court	Mag. Court total claims	Mag. Court general claims defended	Mag. Court small claims defended	Mag. Court total defended	Mag. Court as % of total
1996/7	1,486	1,692	47,847	1,730	3,667	5,397	63%
1998/9	1,080	1,886	51,793	1,434	3,427	4,861	62%

Source internal Courts Administration Authority data. It has been assumed that all Supreme and District court actions are defended. Appeals have been extracted from the Supreme Court figures. In the Magistrates Court minor statutory proceedings in the civil and business division have been added to the small claims. The Magistrates court figures entered under 1996/7 are in fact for the calendar year 1997. Full figures in the magistrates Court are not available for 1997/8 due to disruption caused by a computer upgrade.

The Magistrates Court established its own procedure in the Magistrates Court (Civil) Rules 1992. The motherhood principle in its civil jurisdiction was "the Court and Registrar must in all things promote the *expeditious, economical and just* conduct and resolution of an action or proceeding" (author's italics) and "these Rules are not intended to defeat the proper action brought in good faith of any party and are to be interpreted accordingly". These are laudable and common enough aspirations for a court. Whether they have been carried into effect, and how they might better be so is a large part of this thesis. Specific areas of policy which will be discussed are as follows.

Uncontested debt

It is immediately apparent from Table 2.4 that the bulk of the work of the Magistrates Court is uncontested claims. The same claim form is used for an uncontested debt claim as one which is expected to be contested. A short form of the statement of claim is allowed. It is served on the defendant and if no defence is filed within 21 days the plaintiff can apply for judgment. Where the claim is for a fixed amount of money the judgment is automatic, where it is for damages the amount of the damages

is assessed by a magistrate. Most of the uncontested debt claims are the collection of debts by commercial enterprises. Although there was a legislative reform in 1992 (The Enforcement of Judgments Acts 1991 (SA)), which changed the name of some of the processes of enforcement, the underlying practice has been largely unchanged this century. The basic armory of the court is a summons to investigate the debtor's means of paying with a consequent order for payment. If the debtor has personal assets above a basic minimum, or real estate they can be sold. Money accruing to the debtor can be attached (garnisheed), but not wages without the debtor's consent. The initiation of a debt enforcement process is in the hands of the creditor and there is no coordinated attempt to pass information already obtained about debtors to creditors. Where the debtor is unable to pay much effort and cost may be spent to find that out. Some debtors may successful at hiding their assets.

This work is mostly done by non judicial staff. This may be why it receives less academic and judicial thought and comment than the attention given to the numerically fewer defended claims. In Chapter 3 I conclude that the power of lower courts to enforce their judgments is one of the defining characteristics that sets them apart from other dispute resolution services which use the adjudication method. Many people only use the court to access its debt collecting machinery. In a sense debt collecting is the engine room of the Magistrates Court. The court generated revenue to government comes largely from this work and the unpaid default judgments underpin the court registry and enforcement machinery. This work is discussed in detail in Chapter 4.

Management of contested cases

The Magistrates Court also determines most of the first instance defended cases in the state judicial system. In 1998/9 over 62% of contested civil cases are disposed of in the Magistrates Court compared to 14% in the Supreme Court and 24% in the District Court (Table 2.4). The complexity of factual and legal issues is often no less in the Magistrates Court than the higher courts. With the increasing jurisdiction of the Magistrates Court and with it being given specialist jurisdictions its role includes a function of developing legal principle. Principles it does establish are subject to guidance in the Supreme Court to which appeals from the general jurisdiction lie and

the District Court to which appeals from small claims lie. Appeals are not a hearing de novo but are determined on the factual basis determined in the Magistrates Court unless an attack on that itself is the basis of the appeal.

However, the primary role of the Magistrates Court remains to decide factual matters and apply established legal principle to them. For the court to fulfil this role it must provide a practice and procedure that determines a factual dispute with reasonable accuracy and ascertains correct legal principle and applies it to the facts in a principled, non-idiosyncratic way. It must also be sufficiently prompt to deliver the result in a time frame that is useful to the parties.

The Magistrates Court has not had substantial delay problems. The Adelaide Civil Registry of the court in the past ten years has not had a trial delay for litigants ready for trial of more than nine months (endnote 3). Other Registries in South Australia have less delay. Consequentially the court has not adopted coercive case flow management methods designed to deal with problems of excessive delay and the figures show that delay has been contained, notwithstanding increases in jurisdiction. Cases are individually assessed and managed according to their needs. No unnecessary activity is imposed and efforts have been made to avoid expense in pretrial procedures. However the pretrial processes and the presentation of evidence at the trial itself remains largely in the hands of the parties in the usual common law adversary way.

Later discussion will suggest that much of the credit for simplified procedures and short lists in the South Australian Magistrates Court lies with the court's cost scales rather than its management techniques. The cost shifting scale is in Appendix 7.C. It calculates costs on the basis of percentage of the judgment where a plaintiff is successful or the amount claimed where s/he is not. Some lump sum items are allowed. Cost penalties are used to exploit the difference between actual costs and shifted costs as an incentive to make realistic offers. The effect of cost scales is discussed in Chapter 7.

The German court system

German law is codified at the national level. The code owes much to the code Napoleon. The lengthy statute names are commonly abbreviated as follows:

- The German Federal Constitution, or Grundgesetz- the 'GG'.
- The courts are prescribed by the Constitution of Courts Act, or Gerichtsverfassungsgesetz- the 'GVG'.
- The procedure of the courts is regulated by Federal Civil Procedure Code, the Zivilprozessordnung- the 'ZPO'.
- The substantive law largely is prescribed in the Civil Code, the Bürgerliches Gesetzbuch- the'BGB'.
- Party party cost scales are prescribed in the Bundesrechtsanwaltsgebebuhrenordnung- the 'BRAGO'.

Germany is a federation of 16 states to which the Australian federal system is in many ways similar. It is governed by a constitutional democracy comprising of a bicameral parliament of the popularly elected Bundestag (lower house) and the Bundesrat (upper house) made up of delegates from the states. There is a president who is elected by parliamentarians, state and other delegates. His office is largely ceremonial and in the light of the Weimar experience he does not have power to dismiss the government. The government, headed by the chancellor holds office whilst it maintains the confidence of the Bundestag. Authority lies in States insofar as they have not expressly given power to the Federation ("the Bund"). The individual Länder (states) have their own Ländtag (parliament) and prime minister. There is a third tier of municipal government.

The lower court systems derive their authority from the states, but there is an appeal system to the federal court and a federal constitutional court. The law in the States may be idiosyncratic, in particular the city States of Bremen, Hamburg and Berlin have peculiar legal systems (Koch 1998, p. 16). However under the constitution the state courts must comply with the GG, ZPO, GBG and BRAGO (the key statutes of procedure and civil law). The consequence of the national approach to legal systems and the 'right to legal recourse, Justizanpruch' is a uniformity and consistency in marked contrast to the plethora of courts and tribunals in Australia. First instance

civil work (including all consumer and credit disputes), family disputes, tenancy disputes, guardianship disputes, the administration of companies, probate as well as criminal work are all dealt with in the one court system with the same procedures in all states.

The German Federal Constitution, GG, has a form of bill of rights (articles 1-19). Basic rights include "guarantee of human dignity, equal protection by law, freedom of religion, of speech, of movement and assembly, guarantee of private property of economic and professional freedom" (Koch 1998, p. 17). Article 1 obligates the state to protect the socially weak in society.

The GG provides that citizens are entitled to have their disputes determined in accordance with the law in a court. The guarantee of access to the courts is part of a tight lawyer monopoly over dispute resolution under the German system. This is reinforced by the requirement of legal representation in all but the Amtsgericht (lower court), provided in cases of poverty by the court administered legal aid scheme. Legal practices are still typified by small partnerships and practices tend to be highly regionalised.

The role of the judge

The independence of the judges is laid down and guaranteed (GG Article 97(1)). Judicial office is a life time vocation, with a pension upon retirement. Careful attention is paid to the procedure by which a case is allocated to a judge and once allocated it cannot be changed except for bias or other similar reason. The purpose of the court is to deal with the case in accordance with the actual facts and to apply certain legal principles to those facts (Koch 1998, p.26).

> "The fundamental objectives of the first instance court proceedings are that all facts relevant to the case shall be revealed and discussed, that these facts correspond to the truth, and that a judgment passed on the factual basis be in accordance with the legal order."

However there is a tension here between this stated intention and the principle of party control. 'The actual events ... do not walk into court,' (Varga 1995, p.131 quoting Frank 1949) and the parties may not want them to. The adversarial characteristics of the process allow the parties to define the boundaries of the dispute and to list the evidence to be brought to bear. However, the tradition of investigation by judges in criminal cases in civil code countries has resulted in a fundamentally different approach to fact finding in civil cases by German judges. They do seek the truth and exercise a high degree of control over the search. In contrast the common law tradition leaves the presentation of evidence to the parties and the judge chooses between the versions presented.

The most noticeable contrast to the common law tradition is this exercise of judicial control over the fact finding process and a parallel insistence on the presentation of the evidence in written form at the outset of the process. Consequentially the oral evidence tends to be something of a postscript and limited to key issues defined by the judge. A further contrast at least to the theory of the common law tradition is the obligation on the judge to assist the parties in reaching an amicable settlement at all stages of the process. However although their role in the determination of facts is great their role in the development of legal principle is less than in the in the common law tradition, with a consequential lesser status in the legal hierarchy. My impression is that generally status is well defined in Germany so judges are much less status conscious than their common law counterparts.

In Germany the highest status is accorded to the professor, who describes the development of the law. The judges apply the law rather than being key players in its development. Presented with a case the judge will in the first instance seek the law from the code and if it needs clarification from learned commentaries and lastly precedent. Likewise the judges are not masters of their own procedure. However the role of judges is to some extent changing. The obligation of the judges to follow statutes and the law has, since World War II been given a broad meaning (Koch 1998, p. 17 citing Rosenburg, Schwab, Gottwald 1993, pp.127-8):

> " and is aimed at preventing an unreflected application of statutes degrading the judicature to an uncritical follower of the legislature. The experience of the Third Reich, formally also a State governed by the rule of law led to this explicit judicial freedom."

Supplementary legislation has been necessary to accommodate society developments since the enactment of the code. For example special acts deal with product liability, consumer credit and contract terms. The codes are open textured needing interpretation by scholars and judicial precedent is becoming more important (Koch 1998, p. 18):

> "Of much greater importance is the judicial precedent (Gerichtsgebrauch), which results from a consistent line of court decisions. In contrast to customary law, judicial precedents are not legally binding on the courts, not even those of the trial or lower appellate levels, therefore it has to be contrasted with common law countries where the doctrine of binding precedent (stare decisis) is the cornerstone of the legal system. Nevertheless, as a matter of fact it is only very infrequently that German courts deviate intentionally from a consistent line of decision. This is especially true as regards municipal courts (Amtsgerichte) and courts of first instant with extended competence (Landgerichte/regional courts). For this reason judicial precedents play a very significant role in the German legal system despite their non-binding legal nature."

However even allowing for this trend the role of the judge in the German civil system is much more subject to a willing control both by the statutes and external views of the law and as to procedure than the more idiosyncratic approach of common law judges. The fact of control of procedure is an important distinction between the German civil code and the common law systems.

Judicial appointment

There is a fundamental difference in how judicial officers are appointed in Germany compared to the common law system. After the initial graduation test for lawyers there is a second examination. This is very exacting and very detailed grades are given. There are eight written examinations, each of five hours duration and then a five hour oral examination. There are 16 grades, each taken to two decimal points. It takes until 28 or 29 years of age to graduate for the second exam. When someone is appointed to the judiciary they can stay until they are 65 years of age. Selection for the judiciary is on the basis of the grade achieved in the second exam. There is a period of three years probation upon appointment, but it is very rare for someone to be rejected in that period. The consequence is that some highly intelligent people with good grades but little native instinct to deal with people or little wisdom are, on occasions, appointed as judges and can then stay until 65 years of age (Richter 1999). Salary is based on the term of service and an allowance for administrative duties. There is not a salary differential between the lower and higher state courts.

The cost scale and insurance

Another key distinction of the German system is the cost scale, the BRAGO. This provides a fixed fee unit relative to the amount in controversy. The detail is discussed in Chapter 7. This certainty of costs is also a major factor in the provision of legal cost insurance, because insurers can assess their cost risk. Legal cost insurance is a major financier of German civil litigation. For the indigent there are usually no contingency fees allowed for German attorneys and most attorneys ask for costs in advance for themselves and disbursements (Koch 1998, p. 37). The German Legal Aid system is a compromise and usually merely is a credit arrangement allowing payment of costs by instalments. Another hurdle to legal aid is the prerequisite that the intended litigation must offer a reasonable prospect of success and must not be frivolous or wilful (§ 114 ZPO). It is in the court's discretion whether legal aid should be granted.

The jurisdiction of courts

The organisation of courts and jurisdiction are governed by the Constitution of Courts Act (GVG). The following table summarises the courts and their jurisdiction.

Table 2.5: Jurisdiction of German courts

	Jurisdiction	Appeals	No. of judges	Divisions
Amtsgericht	small claims up to DM1,500 other up to DM10,000	none to OLG	1 judge	criminal, civil, family, probate, landlord and tenant, guardianship, company registration,
Landgericht	>DM10,000	to OLG	3 judges	criminal, civil, family probate, guardianship, commercial.
OLG	appeals	>DM 60,000 to BGH	3 judges	
BGH	appeals		5 judges	
Constitutional Court	complaints from all courts.			

Notes: The Landgericht often sits with one judge and in the commercial division with two laypeople. Social security labour and tax not included. Appeals for DM60,000 or less to BGH lie with leave. Separate complaints in all proceedings may be made to the Constitutional Court.

The small claims procedure is conducted in writing unless one party elects for oral evidence and formal reasons for judgment are not required. There is no appeal. Appeals only lie for matters over DM1,500. There are complaints from lawyers that parties have not been given a right to be heard and witnesses have been called up by telephone without prior notice. In practice this has not been popular because each judge tended to apply idiosyncratic procedures which created as many problems as it was meant to solve (Schlosser 1999).

The Amtsgericht (local or municipal court) has jurisdiction for an amount in controversy up to DM10,000. Where a non-liquidated sum is in dispute, the amount of controversy is assessed in monetary terms and determined in accordance with the DM10,000 limit. In assessing the jurisdiction of the court, the main claim is the relevant one. Ancillary claims such as interest are not taken into account for that

purpose. However, where several claims are brought in the one action, they will be added. In Appendix 2.A figures on case loads and disposal for the Amtsgericht in Stuttgart are set out, which represent about 60% of the work of the länder (state) Baden- Württemberg. The court of Stuttgart is taken as typical enough for these purposes of the previous west German states.

The Amtsgericht has exclusive jurisdiction over residential tenancies and the Landgericht exclusive jurisdiction over claims against the State based on a breach by a civil servant of a duty owed to the plaintiff. However there is some right in the parties to choose a regional court rather than an Amtsgericht.

The Amtsgericht sits with one judge, often with no staff, and sometimes proceedings are not recorded except by the judge in summary on a tape recorder.

The other court of first instance is the Landgericht (the regional court) which nominally sits with three judges including the presiding judge. The presiding judge is just "primus inter pares" but controls the list and chairmanship of the hearing. There is a special commercial litigation panel for commercial disputes with one judge sitting with two lay people who are experts in commercial practices. This is intended to introduce some 'commonsense' into proceedings but in practice the carefully random basis of choosing the judge to sit on a case equally applies to the lay experts. Consequentially they are likely to be appointed to cases where their expertise has no relevance. As a result judge members of the commercial division often obtain the consent of parties to sit alone (Richter Schmitz 1999).

There is a Court of Appeal, the Oberlandesgerichte (abbreviated as 'OLG'), which sits with three judges including the presiding judge, and the Federal Court of Justice, the Bundesgerichtshof (abbreviated as 'BGH'). The last sits with five judges including the presiding judge. It is common that one of the judges other than the presiding judge fulfils a role of preparing cases independently of the panel to make suggestions to bring before the panel. S/he is known as the reporting judge (berichtersatter).

There are proposals to amalgamate the Amtsgericht and the Landgericht, since they perform the same first instance function (apart from DM amount), by interchangeable judges, to the same effect (Gottwald 1999).

The courts control their own lists with the presiding judge having responsibility to ensure a fair distribution of cases. There are precautions to prevent parties forum shopping (the right not to be removed from the lawful judge) (Koch 1998, p. 46.).

Collection proceedings (mahnverfahren)

This is the main collection procedure for liquidated sums (§ 688-703d ZPO). A translated copy of the notices are in Appendix 4.A As in South Australia the overwhelming number of cases are uncontested debt. However in Germany they are processed by this special procedure. In 1996 in the whole of Germany 8,143,271 of these notices were issued compared to 1,737,202 normal court claims (Statistiches 1996 items 3 and 6). In Stuttgart in 1996 the mahnverfahren were 380,631 compared to 95,766 normal court claims. Contested mahnverfahren generate about 55% of the normal claims in the Amtsgericht (Richter Czerny 1999). This ratio of mahnverfahren to normal claims is of the same order as the uncontested claims, defended claims in the South Australian Magistrates Court. This is discussed at more length in Chapter 4. The mahnverfahren notice is processed by a Court Registrar without ever being checked on the merits. This must be made at the court nearest the defendant's place of residence. Documentary evidence can be named without being actually produced. The Registrar checks the requirements. In consumer credit cases the Registrar checks the conclusiveness of the claim (§ 688(2) ZPO). A dismissal by a Registrar is not a bar to future action. The Registrar issues a payment order giving the other party two weeks to pay or to lodge a written or oral objection. If an objection is received the plaintiff must then proceed by way of an ordinary claim which can be done without an additional fee. If an objection is not received, the plaintiff can, within six months of service of the payment order, apply for a Writ of Execution.

The procedure for contested claims

Everyone who has legal personality can be a party. Certain consumer and industrial organisations can bring a kind of class action under special legislation. These actions are limited to injunctive relief such as an injunction to prevent misleading advertising or such matters. No class actions lie for damages. As noted, apart from the Amtsgericht, all parties must be represented by attorneys admitted to practice before the court from the outset (§ 78 ZPO). The same parties cannot litigate the same claim twice at the same time. Once an action has been served upon a defendant the institution of fresh proceedings based on the same claim is precluded. Likewise, where a claim has already been decided, a fresh claim based on the same subject matter will be rejected (§ 261 ZPO). These issues have become formal res judicata or materielle rechtskraft. The parties cannot relitigate the issues.

In contrast to criminal cases where the court pursues the matter where it wishes the principle in civil disputes is that the parties control the subject matter (Koch 1998, p.25): " ... (T)he maintenance of the legal order in private law is substantially dependent upon the injured party vindicating his or her rights". The plaintiff defines the subject matter of the litigation, but once the action is commenced it cannot be amended or withdrawn without the consent of the other party or the court. The court sets hearing dates and time limits. Decisions on procedural matters cannot be taken on appeal.

A statement of claim in triplicate is lodged at the court which names the parties, alleges the facts on which the claims are based and indicates the supporting evidence together with the objective and the grounds of the claim with a specific request which must be precisely formulated. (Koch 1998, p. 25) This is roughly equivalent to a common lawyer's statement of claim and fulfills the same essential function, namely to define the territory of the dispute both to allow all relevant parties to prepare to meet the claim and for purposes of res judicata. An example of a statement of claim for recovery of a loan against a divorced partner is included in Appendix 5.C. The claim must be served on the defendant, preferably in person. Substituted service on a person in the defendant's household may be permitted. Service on a company can be

affected by service on employees in normal business hours. Service may not be executed at night, on Sundays or on bank holidays except with express permission of the court. A bailiff or postman returns a proof of service to the court. Substituted service may be ordered in certain circumstances by public notice.

A defence can deny that the plaintiff's facts are correctly stated, but if the facts stated by the plaintiff involve actions by the defendant, the defendant must state precisely and in detail which and to what extent the factual allegations of the plaintiff are incorrect (§ 138 ZPO).

Management of the progress of proceedings

To manage a defended case the court makes a choice of procedure. The court may choose an early first hearing (§ 275 ZPO) or written preliminary proceedings (§ 276 ZPO). The intention is to culminate in a hearing where all the evidence is taken at the main hearing. The court sets a timetable for the defendant's written reply, the plaintiff's response to that, etc. In apparently clear cut cases the Amtsgericht may proceed directly to the main hearing. These early processes may fulfil many of the same purposes as the variously styled conferences under case flow management systems which have been adopted in the common law tradition systems. However the role of the court is fundamentally different. In the German system the pretrial processes are part of the courts' direction of the fact finding process and application of the code to those facts. The court will at all stages of that process take opportunities to assist the parties to settle the dispute. The control of these processes is by the court. The relevant provisions are:

> "§ 272 **[Choice between two kinds of procedure]**
>
> (1) As a rule the lawsuit shall be dealt with in a comprehensively prepared session for the oral hearing (main hearing).
>
> (2) The Presiding Judge shall either fix a time for an earlier first session for an oral hearing (§ 275) or order a written preliminary procedure (§ 276).
>
> (3) The oral hearing shall be held as soon as possible."

"§ 275 **[Early First Session]**

(1) In order to prepare the early first session for oral hearing the presiding judge or a member of the trial court designated by him may set a time for the defendant for the filing of a written defence. Otherwise the defendant shall be required to inform the court without delay and in a written pleading prepared by his lawyer to be appointed of any means of defence which shall be presented.

(2) If the proceedings shall not be completed at the early first session for the oral hearing the court shall issue all orders which are necessary for the preparation of the main session.

(3) The court shall fix a period for the filing of the written defence if the defendant has not yet or not adequately responded to the statement of claim and he has not been previously allowed time pursuant to the subparagraph (1) first sentence.

(4) The court may, during this session, or after the defence is filed, allow time for the plaintiff to express his opinion in writing concerning the defence."

"§ 276 - **[Preliminary proceedings in writing]**

(1) If the court does not set an early first session for an oral hearing it shall require the defendant, when he receives service of the statement of claim, to notify the court in writing within the fixed period of two weeks from the service of the statement of claim if he intends to defend against the claim: the plaintiff shall be informed of the requirement. At the same time a period of at least another two weeks shall be set for the defendant for filing a written defence. If the service of the statement of claim is to be carried out abroad, the presiding judge shall set the time pursuant to sentence 1.

(3) Together with the requirement, the defendant shall be warned concerning the consequences of his failure to adhere to the time allotted to him under subparagraph (1) first sentence, as well as concerning the fact that the declaration of intention to defend against the claim may only be given by the lawyer who will be appointed.

(3) The presiding judge may allow a time limit for filing written comments on the statement of defence by the plaintiff.'

Where the matter proceeds on the basis of a written preliminary procedure, the defendant has two weeks to give notice of intention to defend and another two weeks to submit reasons for doing so. Failure to comply with these time limits precludes the defendant from subsequent filing of this contest and will entitle the plaintiff to a default judgment. In practice, the regional courts, Landgerichte, prefer the preliminary written procedure because the parties are represented by attorneys, and that procedure should save time, and also in that procedure the parties will submit detailed legal reasons to assist the court.

The early oral hearing will be chosen primarily in matters which are factually clear, and the court merely needs to make rulings on points of law to progress it further, and also, where the case seems very clear cut or so confused that it is necessary to have the parties present to sort it out, the oral preliminary hearing must be at least two weeks after the service of the written summons. At the early oral hearing there can be a final judgment (Koch, 1998, p.81).

The type of cases and manner of disposal in Stuttgart are set out in Appendix 2.A. It is be noted that the first hearing is conducted by the judge. In Stuttgart 36% of cases were disposed of at the first hearing without evidence (item 49), the same percentage as the South Australian Magistrates Court after it moved to having a magistrate conduct the first hearing (Table 6.6). However the number of cases determined by verdict in Stuttgart was 24.6% (item 32) compared to 15% in the South Australian Magistrates Court (Table 6.6), again after it moved to direct judicial involvement in the pretrial processes. The Stuttgart figure is inflated by the inclusion of 6% of small claims, which if excluded makes the comparison fairly close (18.6% compared to 15%). The change in the South Australian Magistrates Court to magistrates doing all pretrial hearings increased the rate of settlements early in the process, but there was also an increase in the number of cases that went to verdict from 7% to 15% (Table 6.6). The latter figure is high for common law courts (endnote 1, Chapter 6). Direct

comparisons between different systems can be difficult but the effect of this change and the higher figure in Stuttgart suggest that greater judicial involvement in all stages of the process may increase settlement early in the process (Chapter 6) but it may also increase the number of cases that go to verdict.

Appeals

There is no appeal against small claim decisions (controversy of DM1,500 or less). In other cases a first appeal, *berufung*, can be brought against the first instance decision of fact and law (§ 511 ZPO) to the OLG and then a further appeal, *review*, lies on points of law only (§545 ZPO) to the Federal Court or BGH. The latter review only lies if the controversy exceeds DM60,000 or where the OLG has given leave because an important legal issue is at stake or the decision involved a departure from the authorities of the BGH (§546 ZPO).

An appeal must be instituted within a month of the formal service of the first instance judgment. New facts and submissions can be admitted at the discretion of the appeal judges if they think it will not delay the proceedings (§ 528 ZPO). The court may allow the appeal, dismiss the appeal or send it back to the lower court.

A third type of appeal is called a complaint (beschwerde). This is a complaint against preliminary judgments concerning third parties and procedural questions. However, this is of the nature of interlocutory appeals and does not deal with the main issue in controversy.

The Netherlands

The legal system in The Netherlands has much in common with neighbouring Germany but some differences that are instructive for this thesis. Calculation of legal costs is based on the activity done rather than the fixed BRAGO of the German system. There is less legal cost insurance. This is a consequence of the difficulty for insurers in calculating the actuarial risk where costs are not predictable. The lawyer monopoly is not so tight and more legal advice is available through legal aid offices, trade unions and trade associations. For enforcement of debt bailiffs (huissiers) collect uncontested debt without verification through the court system so that when

an equivalent of the manverfahren has been in place it has been little used. Some of these differences are illustrated in these tables.

Table 2.6: Revenue, claims handled and external costs of legal cost insurance schemes 1989

Please see print copy for image

(Blankenburg 1999)

Table 2.7: Judges, lawyers and claims filed per 100,000 population in The Netherlands, West Germany and South Australia.

	The Netherlands	Northrhine-Westphalia	South Australia
Judges	12	24	9
Lawyers	51	110	161
Civil claims filed	2,258	3,535	2,601
Civil claims per judge	188	147	289
Civil claims per lawyer	44	32	16

The figures for The Netherlands and Northrhine-Westphalia are adapted from figures published by Prof. Erhard Blankenburg (Blankenburg 1998) He uses Northrhine-Westphalia as representative of the former West Germany because of its cultural similarity to The Netherlands and to remove the effect of inclusion of data from the former GDR. The figures are for 1992. His figures have been modified by adding prosecutors to lawyers. The German figures do not include the Mahnverfähren (uncontested debt) procedure which are another 10,588 claims per 100,000. The SA figures are taken from Table 2.1 and are reduced on a population of 1.5million in June 1998 (Australian Bureau of Statistics). The cases in the Magistrates Court likewise exclude uncontested debt cases which were another 46,932 (derived from Table 2.4). The figures for judges and lawyers include all of them. The number of cases are only non criminal proceedings. Lawyers include all with a current practicing certificate- June 1998, 2,419, June 1999, 2,423 (Law Society Annual Report). In South Australia prosecutors are counted as lawyers.

Such differences within similar systems and cultures suggest that systemic differences do affect the manner of usage of courts and these will be explored in Chapters 5 and 7. Some comparisons are also made with Northern Ireland. The relevant comparative figures for Northern Ireland are included at the point of comparison.

ENDNOTES

(1) The cost penalties between Supreme and District courts are in Supreme Court Rule 101.02A to the effect that a plaintiff in a claim for damages for injury arising out of the use of a motor vehicle who does not gain at least an award of $150,000, or in claim for damages for defamation at least $25,000 and in any other case- $75,000 does not receive any party party costs against the defendant. The equivalent rule between the District court and the Magistrates Court is in DCR 101.02A to the effect that a plaintiff:

- in a claim for damages for injury arising out of the use of a motor vehicle who does not achieve an award of $30,000,
- in a liquidated claim, $25,000,
- in a claim for damages for defamation, $7,500, and
- in any other action, $15,000,

does not receive any party party costs against the defendant.

(2) The Consumer Credit Act 1972 came into operation 3/9/73 and established the Consumer Credit Tribunal which the Commercial Tribunal Act 1982 (operation 1/3/84) changed into the Commercial Tribunal with additional jurisdiction over leases, car dealing and domestic building disputes as well as collateral licensing matters.

(3) Figures for the Adelaide Magistrates Court civil registry show the delay between the defence and trial for a case which proceeded through the trial process without delay caused by the parties varied between a maximum of 36 weeks in June 1990 down to 16 weeks in June 1995. In June 1999 it was 24 weeks. A sample of all defended general cases filed in a three month period in 1992 and tracked to conclusion showed 85% finalised within 270 days and 91% finalised within 365 days of filing a defence. A similar sample in 1996 showed 84% finalised within 270 days and 96% within 365 days of the filing of a defence. Delay in suburban and country registries of the court was no greater. Cases are tracked from the filing of the defence rather than the claim to take the uncontested debt matters out of the samples. Claims for uncontested debt are 90% of the cases filed (see Table 2.4 above).

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CHAPTER 3: THE ROLE OF LOWER COURTS

Civilised society requires a system to enforce obligations and, where necessary, to resolve disputes about the existence or extent of those obligations. Citizens must be able to predict their legal future to order their lives. Courts fulfil that role. Having verified that an obligation exists, the courts provide and supervise the machinery for the enforcement of it. This underpins the security of property and financial rights to facilitate economic activity and to provide enforceable codes of behaviour between citizens and between government and its citizens.

The upholding and enforcement of commercial obligations and property rights is essential to allow the market economy to thrive (Main 1997, p.1). "For the economy, legal certainty and effective legal protection also enhance the security of investments thereby promoting the willingness to invest, both abroad and domestically." (Gottwald 1999, p.222). The extension of credit is the lifeblood of modern commerce and is dependant on reasonable prospects of recovering it (Kagan 1984, p.324). This can be achieved by assessment of borrowers' ability to repay and forcible collection where they are able. Courts enforce commercial and property rights and the corollary of this is the need to ensure that those rights are not abused or used oppressively or unfairly.

The Civil Courts also have an important role in providing redress for various forms of harmful behaviour ranging from deliberate damage to person, reputation or property through to loss or damage caused by negligence. These are tangibly enforced by the provision of injunctive orders preventing some behaviours and, more typically, by the award of monetary compensation to the wronged against the wrongdoer where such behaviours occur. This aspect of the civil law provides a tangible enforcement of basic standards of conduct between citizens, legally recognised identities such as corporations, other recognised bodies and government.

Courts have always been associated with the fount of power in society. I shall argue that the ability to exercise power over all the people in a community is one of the defining features of a court. Thus in medieval Europe there were kings courts,

bishops courts, nobles courts and courts of the local guilds and towns. In England the establishment by Henry II of the Royal Judges (Kings Bench) with first instance authority to determine disputes over the whole of England formed the basis of the common law system which then developed separately from the continental systems. It is no coincidence that this was a time of flourishing royal authority, nor that these courts protected land holding interests thereby legitimising themselves with the powerful nobles and the church whose power was based on land holding (Merryman 1994, p.348). With the growth of the nation state, courts became unified in a cohesive system within each nation. In the common law system the notion is that power is exercised by three balanced groups, the legislature, the executive and the judiciary. All have their notional source of power in the crown whereas in fact power is shared between these three groups. Each has checks and balances to prevent abuse of the power they have and to preserve their credibility. Some of these checks and balances in the courts are the independence of their judiciary from influence by other powerful members of society, the performance of their activities in public, making decisions on a principled basis and that they give reasons for those decision which can then be reviewed by other courts on appeal. The law is the consequence of legislative decree and received statements of the law in the decisions of courts, with those of higher court binding lower courts. The courts determine a version of facts and apply that law to it. In lower courts most commonly the facts and law are not contested and the work of the court is to enforce the obligation. Where the obligation is contested the main work of lower courts is to establish a version of the facts and to apply settled principle to those facts. Where an application of law in a lower court breaks new ground, ultimately it will be in the appeal courts where the precedent becomes confirmed. The following table verifies the difference in the role of lower courts compared to higher courts in South Australia.

Table 3.1: Case loads of state courts in South Australia, variation on Table 2.4

Year	Sup. Court	District Court	Mag. Court general claims defended	Mag. Court small claims defended	Mag. Court total defended	Mag. Court as % of total defended claims in state courts	Mag. Court total claims including uncontested
1996/7	1,486	1,692	1,730	3,667	5,397	63%	47,847
1998/9	1,080	1,886	1,434	3,427	4,861	62%	51,793

Source internal Courts Administration Authority data. It has been assumed that all Supreme and District court actions are defended. Appeals have been extracted from the Supreme Court figures. In the Magistrates Court minor statutory proceedings in the civil and business division have been added to the small claims. The Magistrates court figures entered under 1996/7 are in fact for the calendar year 1997. Full figures in the magistrates Court are not available for 1997/8 due to disruption caused by a computer upgrade. Uncontested claims are counted as all claims filed but not defended. Some of these were not served and may have been contested had they been served.

The bulk of the work of the court in terms of cases filed (90%) is converting uncontested debt to a judgment and enforcing it. The remaining 10% is the main work of magistrates. It is determining the existence and extent of contested obligations. The magistrates court deals with over 60% of the contested civil claims in the state courts. Of these contested claims only some 10% go to judicial verdict (Chapter 6, endnote 2)

However these contested claims are still only a portion of the civil disputes that arise and are resolved in society as this representation suggests.

The spectrum of resolution of disputes can be represented as follows:

ADR outside courts	Mag. Court enforcement and determination		
	90% uncontested	9% settle	1% trial

A discussion of the types of dispute resolution outside the courts, who performs it and the extent of its use now follows. A consideration of processes that are alternative to court adjudication helps to define what, if anything, is unique about the dispute resolution role of lower courts. This is especially so with industry schemes that in many ways mimic court methods. It also establishes a framework for discussion in

subsequent chapters about how lower courts should use alternatives dispute resolution and how to set the boundaries between alternative dispute resolution and court determination. In this discussion resolution of a civil dispute by means other than judicial verdict is called ADR.

Classification of ADR

Alternative Dispute Resolution, or ADR is commonly used to describe methods of resolving disputes other than by a court judgment after a trial. The following brief description of some different types of dispute resolution is loosely based on definitions published by the National Alternative Dispute Resolution Advisory Council, or NADRAC (ADR Definitions 1997). The ADR movement is rapidly developing and there may be reason to take issue with some of these definitions. Some types of ADR are probably omitted. However they are adequate for this purpose which is to better inform the role of lower courts, rather than to explore ADR itself.

Negotiation

Bilateral negotiation between parties at an informal level probably settles most disputes in society. This achieves most settlements without resort to any formal dispute resolution process. It may occur at any stage of any process. In court proceedings these may occur as late as the court steps and during a trial, much to the chagrin of the tidy ideas of case flow management formalists. Many of court pretrial or conciliation conferences are in fact bilateral negotiations by the parties, assisted by their advisers often without any intervention by the court as an independent conciliator. Often however unspoken messages or even spoken broad hints from the court may change the character of these from a bilateral negotiation to a result assisted by third party intervention.

Third party interventions

Third party interventions can be classified along a spectrum of *facilitative* through *advisory* to *determinative*. The facilitator assists with the process of dispute resolution but does not advise on the substance of the dispute. At this end of the spectrum is Mediation. The mediator assists in the identification of areas in dispute and options to resolve them but does not advise on the outcome. Mediation has both zealous

proponents and detractors (endnote 1). The term facilitator also is used to describe a similar role with a group of people. The conciliator may take the process a step further and become involved in advising on the desirability and likelihood of alternative outcomes.

Advisory processes describe a group of processes where the third party suggests the likely results of the resolution of factual disputes and application of principles to them. These include investigation, expert appraisal, case appraisal, neutral evaluation and processes that in a sense mimic the determinative trial process such as Case Presentation and Mini Trials. In the last two each party presents their evidence and arguments to the third party who makes suggestions of the probable result if it went to a court determination. The factor that distinguishes these processes from the determinative model is that the result is not binding on the parties.

Determination occurs where the dispute is investigated and a result is decided (adjudicated) by the third party. It is usually characterised by the result being enforceable as with court decisions and tribunal decisions, which can be transferred to a court for enforcement as a judgement of the court. In this spectrum courts are seen as providing an adversary adjudication model. The process is adversary, the result is imposed. Enforceability is a central feature of external determination. Otherwise a disgruntled or recalcitrant party can walk away from the decision. Enforceability may be external to the decision-maker as with contractually binding Arbitration, Expert Determination and Private Judging. NADRAC would include some partially determinative processes such as fact finding and Early Neutral Evaluation as types of determination. Their sanction is typically in subsequent cost orders if a party contests them and does not do better than the suggested result. Since they are not binding on the parties they might better be regarded as advisory. Their true status is merely to advise parties of the likely outcome if they go to a forum that can bind them. A decision does not determine a dispute unless it is an enforceable result between the parties.

ADR organisations

In the last decade, in South Australia as elsewhere, there has been a considerable growth in organisations offering dispute resolution services as an alternative to

litigation in the court system. Lawyers and accountants often offer mediation. There are many other private mediators offering services over a wide range of fields. Community Legal services offer free advice, negotiate settlements and provide mediation services. Commercial contracts commonly provide means of dispute resolution outside the court system. The state government has encouraged mediation both outside and inside the court system. The state government Office of Consumer and Business Affairs offers an extensive mediation service (endnote 2). Most recently, industry-based schemes under the banner of industry ombudsmen and the like have gained currency. Federal Government policy has encouraged this and has established guidelines for such services (endnote 3).

The list of ADR organisations that follows demonstrates the proliferation of such organisations. They are arranged according to the type of service offered (Directory 1997/8).

First are a group of industry schemes with the power to award compensation against members of their industry. These schemes may use ADR processes but ultimately can make a determination against scheme members which is binding on them, although usually not on the customer.

Australian Banking Industry Ombudsman

This is a dispute resolution service offered by the banking industry. The Ombudsman has power to make awards of up to $150,000 against member banks. Access to the service is free to most complainants and the determination is not binding on the complainant. In many respects this follows the determinative model which characterises the court system. More detail of this ombudsman service is discussed below as an example of this type of model and to assess its relationship with the court adjudication model.

Other similar schemes with a power to make monetary awards, which are binding, on the industry which establishes them, are:

Complaints Resolution Scheme of the Financial Planning Association of Australia Limited

This is a three-stage system overseen by an independent council. It can make awards of up to $50,000.

Insurance Brokers Dispute Facility (General Insurance)

This handles matters up to $10,000, free of charge to consumers.

Life Insurance Complaints Service Limited

This has power to make awards up to $250,000, free of charge to customers.

Insurance Brokers Dispute Facility (Life Insurance)

This handles matters up to a value of $50,000, free of charge to customers.

Credit Union Dispute Reference Centre

This provides dispute resolution in relation to services provided by the credit union sector. This is free to customers.

Energy Ombudsman

In Victoria there is an ombudsman who works in conjunction with Council of Consumer and Industry representatives. She has the power to investigate and resolve disputes between customers and electricity companies. This is available to all electricity users. The ombudsman can make binding decisions, including awards of compensation up to $10,000 or by consent up to $50,000. A similar ombudsman service is being developed in New South Wales and will probably follow the leasing of ETSA to private interests in South Australia.

Credit Union Electronic Funds Transfer Arbitrator

Complaints against electronic transactions with credit unions are dealt with by a committee of the credit union representatives called "The Ready Net EFT Disputes Committee". If that does not resolve the matter, it can be referred to the arbitrator.

There are other industry dispute resolution schemes. These may not have direct power to make a monetary award against members but their processes are underpinned by a determinative role.

Domestic Building

The Housing Industry Association, an association of domestic builders, offers a two tiered conciliation and arbitration service. Parties to their standard contracts are required to use it to resolve disputes. The detail of this scheme is discussed below. Clients can still go to court for alleged breaches of statutory warranties.

Motor Traders Association

This offers an advice and conciliation service to customers in relation to motor vehicle repairs by members.

The Private Health Insurance Complaints Commissioner

He deals with complaints both by health fund members and also medical and industry client groups.

The Travel Compensation Fund

This can reimburse to consumers the cost of travel expenses where the licensed travel agency goes bankrupt or the business is abandoned.

General Insurance Inquiries and Complaints Scheme/Claims Review Panel

These investigate, conciliate and resolve complaints dealing with domestic insurance policies.

The Superannuation Complaints Tribunal

This is an independent statutory authority set up by the Commonwealth Government which deals with complaints about decisions by trustees in relation to regulated superannuation funds, approved deposit funds and life companies in relation to annuity or personal superannuation policies acquired after 12 December 1995. The tribunal can review and change or confirm a trustee's decision.

The Telecommunications Industry Ombudsman

This service resolves complaints about telephone services.

Finally, in this list, there are bodies established by professional societies and industry groups to investigate, conciliate and sometimes discipline members for alleged breaches of standards. These have no determinative role and are only mentioned by name:

The Australian Society of Practising Accountants, the Institute of Chartered Accountants in Australia, the Royal Australian Institute of Architects, the Dental Board, the Medical Board, the Legal Practitioners Conduct Board, the Real Estate Institute, Australian Direct Marketing Association and the Jewellers Association of Australia Limited.

The extent of use of ADR

To find out the extent that mediation is used in the South Australian community a survey of organisations that advertised themselves as available to conduct mediation was undertaken in 1998. The full survey results are annexed as appendix 3.A. The involvement of the Family Conference Team (FCT) and the Office of Consumer and Business Affairs (OCBA) have been treated separately because they dominate the results and they are specialist, government providers of mediation. FCT undertake a form of mediation to divert juvenile crime from the court system. It only has relevance to the lower court civil dispute system in the resolution of potential victim of crime claims. OCBA, as the name implies, is the government body with responsibility for consumer issues. It refers complaints to a form of mediation in first instance and if that does not resolve the dispute the paries may resort to a civil claim in the courts. The survey does not pretend to be a comprehensive statement of mediation conducted in South Australia, merely of those that responded from the advertised list. A summary of the results of that survey are set out in Table 3.2.

Table 3.2: Mediations conducted outside the court system in SA

	no. of mediators	no. of mediations	mediations per mediator
FCT	9	1,500	167
OCBA	26	3,300	127
Other	69	1,536	22
Total	104	6,336	

75% were identified by mediators as potential court matters. 70% settled. Of 48 mediations done by other than FCT and OCBA analysed as to type, 16 were in jurisdictions outside the Magistrates Court (family-8, child abuse-2. Equal opportunity-2, environment-1, sexual harassment-1, workers compensation-1, administrative-1).

In addition to these there is a network of community legal services in the metropolitan area of the capital city Adelaide. These include the Bowden Brompton Community Legal Service Incorporated, The Norwood Community Legal Service Incorporated and the Noarlunga Community Legal Service Incorporated. They collectively dealt with 2962 inquiries in the financial year 1998/9 and in the same period conducted 150 mediations (109 settled), and 354 shuttle negotiations (160 settled, 72 withdrawn, 82 continuing and 40 unsuccessful). Most of these queries were neighbourhood and consumer disputes which would have been dealt with in the Magistrates Court if the parties wished to pursue them in a court.

The dispute resolution scheme conducted by the Housing Industry Association dealt with approximately 50 matters in the same period. The Commonwealth Banking Ombudsman dealt with about 4,500 complaints within his jurisdiction Australia wide and using a broad axe of the population of South Australia being about one twentieth of the country, and assuming even distribution that represents about 225 from South Australia. Were it not for these alternatives most of these disputes had the potential to be resolved in the Magistrates Court.

Table 3.3: Dispute resolution- ADR compared to Magistrates Court SA 1998

Mediations- Table 4.1	OCBA- Table 4.1	Community legal centres	HIA	Banking Ombudsman	Total	Magistrates Court
1,536	3,300	504	50	225	5,615	4,861

Note: FCT from Table 3.2, and some other industry dispute resolution schemes are not included. The HIA scheme which has direct relevance to the Magistrates Court domestic building dispute jurisdiction is included. The Magistrates Court figure is defended cases. Uncontested debt collections are not included.

It is clear from this incomplete survey that the majority of disputes are resolved outside the traditional court system. This begs the question whether this plurality of dispute resolution is desirable and how policies affecting access to courts should be designed to achieve the right balance between resolution of disputes in courts and by alternatives outside the court system. This is discussed in Chapter 7.

Contrasts between these ADR methods and court adjudication help define what is unique about the court model. Some of the contrasts between facilitative and advisory ADR compared to court determination of disputes are:

Table 3.4: Contrasts between advisory ADR and court adjudication

ADR	*Court adjudication*
1. negotiated outcome	imposed decision
2. facts undecided	facts decided
3. community standards irrelevant	according to law
4. interest based	rights based
5. private	precedent
6. industry specific	integrated system
7. part of industry	independent
8. informal	strict procedural fairness
9. private	public
10. not directly enforceable	enforceable

The first of these describes the method of arriving at the result. The next five are consequences of the different methods for the parties and the community. Lower courts are more concerned with fact finding but do create precedents in specialist jurisdictions

and in other cases they set the factual matrix and make an initial decision for cases that become important precedents in appeal decisions. Seven to nine go to issues of fairness and accountability of the process and the parties. I note that many mediators would uphold their independence as between the parties but I have drawn the contrast between industry bodies and courts. The last is an issue of the power of the dispute resolution body. Where ADR processes move from facilitative and advisory models to mimic the court adjudication model these differences diminish. Some follow the adjudication model familiar to courts, establish and follow precedent and provide enforceable determinations within the industry that established them. Could it be the case that with the conscious reduction of role of government by privatising many of its functions other focuses of power are developing a privatised court system? The Commonwealth Banking Ombudsman and the contractually enforced arbitration in Housing Industry association contracts are two schemes that may qualify as de facto lower courts. They are considered here as representative examples of determinative models of ADR. The former is discussed in some detail because it is so similar to a court.

The Commonwealth Banking Ombudsman (endnote 4)

The Commonwealth Banking Ombudsman is established by a company limited by guarantee. This was a system imposed on the banks as a condition of deregulation and they have public position of acceptance the principle of the scheme. The scheme is required under the uniform Credit Code and banking codes of practice. All retail banks are members (guarantors) of the company. The directors of the company are bankers. The directors approve the budget of the Ombudsman and also the terms of reference which defines the jurisdiction of the Ombudsman. There is a separate council to whom the Ombudsman reports. This is comprised of three representatives from outside banking namely a consumer representative, public servant and a small business representative and three bankers. At the moment these are from the Commonwealth Bank, Westpac and NAB. The chairman of the council is Sir Edward Woodward. The council drafts the budget for the Ombudsman. The separation of the controlling council from the directors of the company is unique to the Commonwealth Banking Ombudsman. In other Ombudsman systems there is no separate council but the board of directors is conflated with the council. On the

Board of Directors there are sufficient consumer type representatives to form a majority. Indeed this may be a greater safeguard against pressure on the ombudsman by industry members (subject to directors' security of tenure and the selection of them) because in reality the effective power in most private companies lies with the board rather than the shareholders. In this case guarantors are equivalent to shareholders (except of course they cannot sell their guarantees).

Administrative Establishment

The Ombudsman's office is constituted of 39 people (31.5 full-time equivalents). The case manager group is comprised of 12 persons (10 full-time equivalents). There are 3 senior lawyers to provide legal advice. Increasingly case managers are legally qualified. The office receives 500 written complaints per month or about 6,000 per year. Of them about 1,500 are outside jurisdiction, typically involving Credit Unions or other credit providers not covered by the scheme which is limited to banks. Some also are service complaints outside the scheme. In addition they receive about 60,000 phone call queries per year.

Procedure

If matters cannot be sorted out by phone call then there must be a written complaint which does not need to have any particular form. The Ombudsman's office provides interpreters at no charge to the client. The Ombudsman's office is happy to reduce the complaint received over the phone to writing and send it to the complainant for the complainant to adopt it. Once a written complaint is received it is sent to the bank. 70% of cases resolve straight away. If the bank says they have fixed it direct with the customer the Ombudsman's office confirms that with the customer. If the customer is still unsatisfied then the complaint is continued by the Ombudsman's office. Of the cases that don't settle at that first stage there are two basic procedural stages from the customer's point of view. (For charging the banks the procedures are broken up into more stages but details of that are not relevant for this purpose). The first stage is an initial consideration. Both sides put in a written submission and the Ombudsman's office publishes to the parties a written 'initial view letter'. The status of this maybe enhanced shortly by calling it a 'draft determination'. This makes it clear that if it is not contested it will become the Ombudsman's

recommendation. If it is contested the next stage is for the Ombudsman to make an Ombudsman's recommendation. The Ombudsman himself reviews and adopts all recommendations. The Ombudsman's recommendation becomes and award and the bank is obligated to make any payment so awarded. In mid 1999 all matters had been sorted out prior to a final award. The limit of a monetary award is $150,000.

The Ombudsman cannot consider a matter that has already been determined by a court. The decision of the Ombudsman is binding on the banks but it is not binding on the complainant. If the complainant accepts the award of the Ombudsman then the bank will require the party to sign a release and indemnity and typically to also sign a confidentiality agreement.

Lawyers are allowed to represent parties. Although there is no formal scale of cost shifting, where in the Ombudsman's view the conduct of the bank forced the complainant to take legal advice, then the Ombudsman will recommend that the bank contributes to the complainant's legal costs. The reverse is not possible. The complainant cannot be made to pay the bank's costs. A negotiation rather than any formal scale determines the extent of the contribution to costs.

Nature of the hearing

The hearing is informal. There is no power to take sworn evidence. Although the parties may make oral presentations they are as such not evidence. Statutory declarations maybe submitted but little weight is attached to them. Each side is given the opportunity to ask each other questions. Sometimes where a complainant is so upset with the bank they don't even want to see the bank's representatives, hearings maybe conducted with the parties in different rooms and any questions of each other shuttled between the rooms by the case officer. The Ombudsman relies upon what are termed 'relevant and established facts' because no sworn evidence can be required. The documentary evidence maybe interpreted in accordance with oral presentations but factual determinations at the end of the day are made on the preponderance of inferences from the established documentary evidence.

There is no record kept of proceedings at the case conference except for case management purposes. It is conducted in private. Members of the public and the press are not allowed to hear what happens at the proceedings. The 'initial view letter' (draft determination) and the Ombudsman's recommendation are in writing. These have a precedent function. Important decisions maybe published in bulletins, which come out regularly, in quarterly summaries and in the annual report.

The Ombudsman's charter requires decisions to be made on the basis of three principles, the law first, banking practice and fairness. The Ombudsman's office is not bound to follow precedent but they do. It is interesting to note that in the early days of the Ombudsman's office decisions were made on a more case by case basis, even if this apparently involved inconsistencies. This caused a good deal of concern amongst the banking industry, which liked clear precedents to follow.

There is no appeal from decisions. The customer can decline to accept it and can relitigate the matter in the court.

The bank is bound by a decision. However, the bank against which a complaint is lodged, if it is of the view that the matter is an important test case, can require the matter to be litigated in the courts rather than by the Ombudsman. It must take this step before the Ombudsman's process is complete.

Security of tenure

Case officers are employees. Many have been employees for substantial periods. They are usually on a 12 month contract. The company limited by guarantee employs them. The Ombudsman holds tenure for a fixed period, typically five years. The Ombudsman used to be appointed for a maximum of 5 years but now appointments can be extended. In practice there is a substantial burn out factor. The Ombudsman's role is very 'hands on'. Complainants contact the Ombudsman direct in contrast to judges who remain remote from the arena.

There is no direct pressure to make decisions that will keep the banks happy but there is probably a subconscious sense of the need not to offend the banks excessively.

There have been two previous ombudsmen. One took a job at a member bank after only a short tenure.

Precedents are published without publication of the names of the parties. Neither the complainant nor the bank is named. In the first year of operation of this scheme the banks were named and the nature of complaints found upheld against those particular banks were outlined. That practice has been stopped. In contrast in Canada the equivalent Banking Ombudsman has no power to make monetary awards but the sanction is to name the banks. However, under that threat of publicity monetary compensation often is paid.

Fees

A fee regime was introduced for small business complainants in July 1998. This was to apply if the case went past the first stage. In practice these fees have not been charged because the Ombudsman has not charged the fee because he has been of the view that all complaints have been justified.

The Housing Industry Association Arbitration Scheme (endnote 5)

The Housing Industry Association Limited is a national body with a state branch in South Australia. Although it competes with the Master Builders' Association, its emphasis is on domestic building as opposed to the Master Builders, whose emphasis is more on commercial building. HIA is the larger industry organisation in domestic building work.

They have three standard contracts, one dealing with new housing, one with additions and alterations and one a cost-plus contract, which is rarely used. All have a similar ADR clause. This clause allows either party to require the other to resort to ADR before the courts to resolve their disputes. ADR referrals are dealt with through the HIA.

The HIA in South Australia have about 50 ADR referrals per year. There is a national '1800' complaints or consumer line, which, because of its expense, acts as something of a barrier to entry to complaints.

Most complaints come from consumers rather than builders, although some builders use this in preference to going to court.

There are two levels of dispute resolution. The first is conciliation. In this a fee of $200 is paid up front. The Regional Technical Adviser for the HIA then appoints a conciliator, who is drawn from a panel of people most of whom are members of the Institute of Arbitrators but in addition some experienced building consultants are used. They then contact the parties, arrange usually an on-site meeting and, for the $200, will spend about an hour of their time - and some more than that - in an attempt to resolve the matter. The conciliator will assist the process, sometimes by offering his own opinion. The parties are not bound to accept that but, if they do accept it, the conciliator will record the agreement, sign up the parties to it and it becomes an enforceable contractual resolution between the parties.

The second stage is dispute reference or arbitration. The essential difference between these two processes is that the parties cannot be represented by lawyers at a dispute reference but can be at an arbitration. Here an up front fee of $300 is charged, but after that the appointed referee or arbitrator will make arrangements to ensure the payment of his fee, which typically will be charged at about $150 per hour. When a matter goes to dispute reference the procedure is for a formal conference, agreement of terms of reference, a formal claim and response, exchange of reports, and the hearing of evidence. Awards are in writing. They are not a matter of public record; they are private between the parties. The referees follow legal precedents but their own decisions, being private, do not have a precedent function. On occasions conciliation might develop into a dispute reference by agreement of the parties. The contract can require parties to use ADR rather than court action. The courts have upheld this compulsion but exceptions remain (endnote 6).

Contrasts between courts and ADR schemes using adjudication

The differences between ADR schemes that use adjudication to resolve disputes and lower courts shrink as Table 3.3 adapted to the banking ombudsman scheme demonstrates.

Table 3.5: Contrasts between the Banking Ombudsman and court adjudication

Ombudsman	*Court adjudication*
1. imposed decision	imposed decision
2. facts decided	facts decided
3. according to law	according to law
4. rights based	rights based
5. precedent	precedent
6. industry specific	integrated system
7. a degree of independence	independence
8. informal	strict procedural fairness
9. private	public
10. partially enforceable	enforceable

The Ombudsman in a determination makes findings of facts and applies established principles to them. He follows the law of statute and precedent in higher courts. He publishes his judgments. These fulfil the role of precedents for the future. The Ombudsman is not bound by precedent but in practice the need to follow his own precedents quickly became an established practice. His determinations are binding on the member banks. He decides cases according to this combined set of principles, that is by established principles rather than individual interests. He can make monetary awards against the banks of up to A$150,000. This ability to make binding monetary awards against the organisation that gave him his power is what makes him important. From the perspective of the banks he sounds like a court.

Differences remain. His decisions as precedents are specific to the banking industry rather than part of set of coherent legal principles of general application. His procedures are informal although he does allow legal representation. His processes are conducted in private and his decisions although published as to the principle established are not a public pronouncement of the facts and decision between the particular parties. He lacks powers of enforcement. He cannot compel oral evidence and this places a consequential emphasis on documentary evidence in an inadvertent parallel to the methods civil code courts use to gather evidence before the oral hearing (see chapter 5). This is no doubt sufficient in most banking cases where the

nature of the transactions are such as to leave a documentary trail. However his lack of power to enforce compliance with procedural matters and the gathering of evidence is a key distinction from a court. His monetary recommendations are enforceable against a bank but are not binding on the customer. The customer can reject a recommendation and take the case to court. If s/he accepts the determination it will be on the basis of a waiver of rights and confidentiality of its terms. Although protection of the ombudsman's independence are in place the fact that the scheme is financed by the banks and the lack of long term security of tenure of the decision makers are criticisms of it as an ideal court model. This is not to criticise the present ombudsman who has demonstrated his actual independence by not implementing the board's proposal that business be charged fees for accessing the ombudsman system.

The differences of procedural formality, privacy of parties and integrity of independence are issues of the apparent and actual fairness of the system. These are desirable for the long term credibility of a system but do not define it. The difference of industry specificity goes only to whether a legal system is integrated or beset by pluralism. The distinction that sets courts apart from these industry schemes is the power of enforcement that courts have over all stages of their processes. They can compel the production of evidence and enforce their judgments against all parties. This is the defining characteristic of courts.

The HIA scheme is using a determinative model where conciliation fails. Referees make factual findings and apply the law to them. Their process is rights based not interest based. The courts have held that the dispute resolution procedures are enforceable between the parties (endnote 7). In this respect they perform the adjudication function of a lower court. The fact that they conduct their hearings in private and do not publish their decisions distinguishes them from courts in an important way. They are not defining the law nor providing any public accountability for themselves or the parties. The arbitrators have a fair degree of independence between the parties although without the security of tenure of judicial officers. Their procedures are less formal then court processes. They have no direct power of enforcement in their procedures and depend on courts to provide enforcement of their awards as a matter of contract between the parties. What is happening in schemes of

this type is that courts are permitting parties to contract out to private organisations the role of determining the extent of a disputed obligation and after that the parties can return to the courts for enforcement of that obligation.

If the contractual terms of the HIA scheme binding both parties to use it were extended to the Banking Ombudsman scheme and other adjudication models with the power to award damages against the client industry, the key outstanding condition to replicate a lower court would be in place. If the schemes were binding on both parties they would be a type of private court. This would run into constitutional problems at the Commonwealth level (endnote 8) but not necessarily so at the state level where courts have long upheld private arbitration clause in contracts, such as the HIA scheme.

The role of government tribunals

In South Australia most government tribunals have been returned to the court system. Specialist tribunals still deal with residential tenancy disputes and work injury compensation and there is an ombudsman to deal with complaints against government bodies (see Table 2.1 for details of government tribunals and ombudsmen). These have the attributes of a court. For example the Residential Tenancy Tribunal in cases that don't settle, decides a version of the facts, applies predictable law to it and imposes a judgment on the parties. It generally conducts its hearings in public (s. 22 *Residential Tenancies Act* 1995 (SA)). It has power to enforce its procedure and judgments for eviction. Its monetary judgments are readily transportable to the courts for enforcement (s. 36 *Residential Tenancies Act* 1995(SA)). Further indicative of the fact that it is a de facto court is the fact that they publish precedents. This allows client groups to inform themselves of the likely outcome of a dispute and informs the tribunal members themselves for the same purpose. The tribunal members are appointed for fixed terms and are independent of the parties. In all these respects it has the attributes of a court. The trial procedures of the tribunal are informal and lawyers are generally excluded (s. 113 *Residential Tenancies Act* 1995 (SA)). This is similar to the small claims division of the South Australian Magistrates Court (s. 38 *Magistrates Court Act* !991 (SA)). The adoption of these procedures does not lead any to suggest the Magistrates Court in its small claims division is not a court. It is obvious that the formality or otherwise of

procedures is not what defines a court. Likewise the German and Dutch courts exercise much greater control of the fact finding process and are more informal than in common law courts. The judge is obligated to attempt to settle cases before her or him, in a role that in the above terms would on some occasions be characterised as neutral evaluation and others as conciliation. (e.g. in Germany § 279 ZPO) Some of these processes undertaken by German judges are ADR in our lexicon but no one on the continent is confused about the identity of the court just because of its informal processes and judges using ADR. The of processes that a body uses in its roles as an adjudicator of the extent of an obligation between the parties is not definitive of whether it is a court. The Residential Tenancies Tribunal is a form of lower court.

The defining features of a lower court

The judicial interpretation of judicial power puts the emphasis on the adjudication function. The exercise of 'judicial power' for the purposes of the Commonwealth Constitution is defined as having three elements (endnote 8):

- adjudication between parties;
- the relation to existing rights and obligations; and
- the result of a binding decision.

The above discussion demonstrates that the role of a lower court and its defining characteristics go far beyond the exercise of its adjudication function. The paramount factor that defines an organisation as a court is its ability to enforce compliance with its processes and to enforce its judgments. Where the existence or extent of an obligation is contested, a further core attribute of a lower court is the fact that it imposes decisions after deciding a version of the facts and applies established principles to those facts. In constitutional legal terms this is its exercise of judicial power. This is a function of upholding rights rather than protecting interests. The process is generally public, providing a function of accountability to the parties and to the court process, and the reasons for a decision are published to have a precedent function. The principles they uphold have general application rather than being industry specific (although some particular quirks of specialised industries may be publicly recognised within that

generalist framework). These features are essential to allow citizens to predict their legal future. It is accepted that to fulfil this role courts must be independent of the parties. Obviously their processes must be fair but the degree of formality and detail of process is not defining of a court.

In a sentence, the role of the Magistrates Court is to enforce obligations and where the existence and extent of them is contested to publicly determine their extent in accordance with the established facts and established principle. This thesis is about designing those processes so that court performs its role better and setting the barrier of the expense of the court process at the right height to divert cases to alternatives but to leave access possible where is necessary.

The relationship between courts and ADR outside the courts

The implications for traditional courts of ADR generally, and industry 'quasi courts' in particular, is potentially profound. They undermine some traditional views of courts having a monopoly and sacred trust over dispensing Justice in the Dicey model (Mendelsohn 1994, p. 1):

> "(Courts)... indispensable universality, their commitment to a particularly severe conception of procedural and personal detachment, their adversarial process, and their absolute superiority as instruments of justice."

This self perception in the courts is still alive and well as the views expressed by the NSW Chief Justice early in 1999 demonstrate (Spiegelman CJ 1999).

> " There is a tendency today to treat courts as some form of publicly funded dispute resolution service. Such an approach would deny the whole heritage we have gathered here to commemorate. This court does not provide a service to litigants as consumers. This court administers justice in accordance with the law and that is a core form of government."

The notion that the work done by the traditional common law civil courts was and is the delivery of something sacred was in any event illusory. A correct analysis of the

adversary common law civil system is that its underlying aspiration is no greater than to choose the most likely version between the two presented by the parties rather than to seek the truth (Mason 1999). At times it has denied parties a result, just or otherwise, as a result of delay, expense and procedures that alienate the participants.

The fact that industries have established systems that use the court adjudication method of determining disputes and in the HIA example insist that parties use them is a strong indicator that the court version of the method is unattractive to them. Certainly there are some benefits to industry in privacy rather than mistakes being publicly paraded but it is likely that another reason is that the court version of adjudication is too slow and expensive. The existence of government tribunals to perform what could be normal adjudication functions of courts is a further indication of perceived deficiencies in court adjudication procedures.

Recent survey evidence suggests that the public perceptions of courts is poor (Parker 1998). Professor Parker concluded (Parker 1998, p. 3):

> "The problem of adverse perceptions may be dismissed by some as mere "consumerism" but it goes right to the heart of the justice system we operate. The justice system in liberal democracies like Australia relies ultimately on public confidence. In the absence of a civil militia or religious fundamentalism, neither force nor dogma is available to shore up respect for the courts. Rather, they have win the consent of the people."

One upshot of this is that there is room to improve lower court systems. Another is that it may be no bad thing for society to be served by diverse dispute resolution services. This debate has been expounded in western Europe in comparative work between West Germany and The Netherlands. The conclusion by Professor Erhard Blankenburg is that a court and lawyer monopoly over dispute resolution as tends to exist in Germany is expensive and undesirable. A less monopolistic court system and a diverse network of alternative sources of advice and assistance in resolving disputes as is the cases in The Netherlands, compared to Germany, is in his contention a better system (Blankenburg 1995).

It is beyond this work to consider the desirability of ADR methods. Some commentators are concerned that ADR may result in settlements that are unfair to the weak, poorly resourced and otherwise disadvantaged (endnote 1). There is also the view that society has an interest in ensuring that disputes are settled in accordance with its values and to use them to develop its normative values (Fiss 1984 and more recently Luban 1995). The contrary view is that a well developed system of dispute resolution outside the courts saves the parties and society time and money (Blankenburg 1995). As long as ADR systems have adequate standards of probity and are underpinned by an accessible court system parties can 'bargain in the shadow of the law' (Moonkin and Kornhauser 1978) and go to courts to publicly expose an unreasonable opponent. The gatekeeper to prevent too easy access to courts is the three headed Cerberus of costs (not to imply that litigation is always hell!); the parties personal costs, their own lawyer's costs and the risk of having to pay the other party's costs if the case is lost. These cost issues are discussed in Chapter 7.

If industry ADR schemes using the adjudication model go a step beyond their present state and become lower courts this would be very different from a method of ADR. Professor Parker suggests that private courts could become a laboratory to experiment with departures from the classical common law adversary model (Parker 1998, pp.11-12). However the operation of quasi courts would come with substantial dangers.

The privacy of the operation of such schemes is a concern. The courts have an important role not only in establishing community standards but also in publishing their existence by applying them in a public forum. They give public reasons for their decisions and an appeal system maintains consistency of approach and the proper application of established principles. Where cases attract publicity they inform the wider community about the existence of these standards. The risk of adverse publicity has a substantial deterrent effect on business. Where one party successfully asserts a wrong has been done the attendant publicity may assist others who have suffered the same wrong. Although these industry ombudsman schemes publish precedents they do not name the parties. The fact that individual cases are

conducted in private combined with the practice of the banks in requiring confidentiality agreements as a condition of paying the ombudsman's award minimises the general benefit of such determinative schemes. The fact that the only sanction of the Canadian Banking Ombudsman is the threat of publicity is powerful evidence of the effectiveness of that threat and of the significance of what is missing in these private quasi court schemes in Australia.

These schemes have been identified as ways for business to reduce legal conflict (Galanter 1999, p.130).

> " This fragmentation of jurisdictions may be thought of as a new kind of legal pluralism. But unlike classical legal pluralism that gave expression to the shared normative understandings and loyalties of a community, this new supply-side pluralism is an instrument of management by which organisations can pacify their internal domains and borderlands by reducing the scale and risk of legal conflict."

However unless sufficient guarantees of openness are in place such pacification may carry with it the risk of successful cover up of serious malpractice, and consequent non accountability, except to a few hardy souls who take the banks on. They may be pacified (bought off) in private with the risk of leaving others who suffered the same wrong unaware even of the potential for remedy. The more that these private quasi courts in practice take these jurisdictions from government courts the greater these risks become (Schwarz 1997 and Stemple 1996). This has led David Luban to argue again the Fiss view that secret settlements allow an undesirable loss of public knowledge and should not be allowed (Luban 1995). He suggests that public adjudication may actually reduce the overall cost of litigation by encouraging out of court settlements in the shadow of clearly established precedent (Luban 1999, p.136). Economic modelling indeed supports the view that accurate, predictable and public court systems increase the likelihood of settlement (Chapter 7).

A further problem with multiple lower court systems is that a multifaceted dispute may fall into the jurisdiction of several courts, tribunals and ombudsmen, with the

consequent undesirable possibility of contradictory decisions. A private court dealing with only part of a dispute may fail to do justice in the whole context and a decision on one aspect may leave the parties to continue an expensive and mutually destructive war in the next available venue.

As private courts develop a normative or law making role there is the likelihood of different versions of the law developing between different types of lower courts. This may on occasions be remedied when a higher court clearly pronounces a resolution of an area of controversy but between such pronouncements there will be large areas for potential differences of application of legal principle. Already there is a potential for different law being applied by the industry ombudsmen and lower courts. At the least a system of exchange of important precedents between lower courts and industry ombudsmen schemes should be in place so each are informed of the others' current view of the law. The significance of such pluralist versions of law would become unacceptable if each system was binding on both parties who accessed it. If this were solved by contractually excluding access to state government lower courts there is still the likelihood of specific principles developed in industry schemes that are impossibly at odds with principles of general application which develop in the government court system. Here is rich potential for lawyers to advise clients on the best ADR group, private court or government court to use and the different nuances of law that apply in each. It is ironic that the growth of ADR, many of the proponents of which are driven by anti lawyer dogma, carries with it the risk of such a pluralistic system of dispute resolution that the need for lawyers will be increased. Alternative dispute resolution schemes should not be allowed to develop into private lower courts. They must not be allowed to combine enforcement powers against the client industry with the ability to bind the customer to solve the dispute within the scheme.

A diverse system of dispute resolution may be desirable to allow people to choose the best method to resolve their disputes without the necessity of resorting to a court imposed resolution. However where such systems use the court determinative model with one way (or both way) enforceable results, they carry substantial risks of reducing corporate accountability, multiplicity of actions in the same dispute and

fragmentation and inconsistency of established legal principle. Perhaps paradoxically the greater the diversity of the alternatives the more important it is that these systems are underpinned by a prompt, affordable and just lower court system to act as touchstone for the multiple alternatives. Then when the parties negotiate or use other types of ADR they do so 'in the shadow of a law' which they have a realistic expectation of being able to resort to successfully. Access to courts also ensures that things that should not remain hidden are publicly aired. Alternative Dispute Resolution should not be permitted to become Substituted Dispute Resolution

Summary of conclusions

- The role of a lower court is to enforce obligations and where the existence and extent of them is contested to publicly determine their extent in accordance with the established facts and established principle. Better ways for lower courts to perform their function of enforcing obligations are discussed in Chapter 4.
- An adjudication function which finally decides a version of facts and applies established principles to those facts to make a public binding decision between the parties to a dispute is a defining characteristic of a lower court but the particular procedure used to perform the adjudication function is not.
- The growth of industry dispute resolution schemes and government tribunals is an indication that sectors of industry and government see existing court processes for adjudicating disputes as deficient. Better ways for lower courts to perform their adjudication function are discussed in Chapter 5.
- There is nothing in the defining characteristics of a court to prevent courts using dispute resolution techniques other than adjudication. The extent they should do so is discussed in Chapter 6.
- A diverse network of alternative sources of advice and assistance in resolving disputes may be desirable. Access to courts underpins ADR and ensures that if it is deficient citizens have a place to enforce their rights. The cost of having cases adjudicated in courts is a major impediment to going to court to adjudicate a dispute. Cost policies that encourage use of ADR but still allow adequate access to courts are discussed in Chapter 7.

- Alternative dispute resolution schemes should not be allowed to develop into private lower courts. They must not be allowed to combine enforcement powers against the client industry with the ability to bind the customer to solve the dispute within the scheme.

ENDNOTES

(1) For a review of ADR studies see MacCoun and others (1992). Adverse comments can be found in Guill and Slavin (1989). This article suggests that risks of injustice due to power imbalances equally exist for ADR as in adjudication processes. Some of the American literature is muddied by the fact that parties often do not attend court settlement conferences in USA. It is scarcely surprising to find a higher level of satisfaction with alternative processes where they attend and are listened to. Careful and dignified procedures are of paramount importance (see Lind et al 1989). The Rand report on the CJRA reforms in USA showed no reduction in cost or delay when courts used ADR. (Kakalik and others 1996, Vol. 1 p. 20). Cautionary remarks about the blurring of the distinction between adjudication and negotiated outcomes and party control and court control implicit in much ADR dogma can be found in S. Roberts (1993) and (1995). Most recently see M. Galanter (1999). There is further discussion of some of these issues in Chapter 6.

(2) The *Statutes Amendment (Mediation, Arbitration and Referral) Act* 1996 (SA) amended the *Magistrates Court Act* 1991 (SA) to allow the appointment of a mediator without the parties' consent and allowed a Magistrate who attempts to settle a case to continue to hear the trial, but not if he or she is appointed as a mediator in those proceedings. Parallel amendments occurred in the higher courts. *The Retail and Commercial Leases Act* 1995 (SA) provides for the Commissioner of Consumer Affairs to provide mediation of disputes under that Act (Part 9). The Commissioner provides a wide ranging and active mediation service for consumer disputes as the figures elsewhere in this chapter demonstrate.

(3) The Commonwealth Government has identified the need for appropriate structures in its guidelines encouraging the establishment of industry dispute resolution schemes (Benchmarks).

"Benchmarks for Industry-Based Customer Dispute Resolution Schemes

The Benchmarks and their Underlying Principles

1. Accessibility

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

2. Independence

The decision-making process and administration of the scheme are independent from scheme members.

3. Fairness

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

4. Accountability

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

5. Efficiency

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

6. Effectiveness

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance."

This bears a close relationship to performance standards developed by the National Center for State Courts in the United States under the following headings (National Center 1990. For Australian standards see Condie, Gamble and Wright 1996).

(1)access to justice;

(2)expedition and timeliness;

(3)equality, fairness and integrity;

(4)independence and accountability; and

(5)public trust and confidence.

(4) I am indebted to Colin Neave the Commonwealth Banking ombudsman for his time in providing much of the information in this section in a telephone interview on 30 September 1999.

(5) I am indebted to Ian Sutherland, Technical Advisor, Housing Industry Association for providing much of the information in this section in a telephone interview on 19 October 1999. The Standard HIA contracts provide compulsory ADR. A typical clause from the Building Contract of August 1998 provides:

"29.1 A "dispute" means any dispute between you and us to do with this contract.

29.2 A dispute can only be worked out by agreement between you and us of by someone else making a decision on it.

29.3 If someone else is to decide a dispute, this contract allows 3 ways to do it:

29.3.1. dispute reference (see clause 34)

29.3.2 arbitration (see clause 35)

29.3.3 legal action (that is going to a court or tribunal)

29.4 This contract also allows for a conciliation (see clause 33) to help you and us work out the dispute by agreement.

29.5 A conciliation can be called at any time, but also a dispute reference or arbitration must start with a conciliation.

...

31. **Which Procedure Has Precedence?**

31.1 Resolving disputes by legal action is usually costly and slow.

31.2 Arbitration is usually quicker, but can also be costly.

31.3 Dispute reference is usually quicker and less costly than arbitration.

31.4 Because of this. Dispute reference ranks over arbitration, and both rank over legal action.

31.5 If one of them starts, then for 14 days another one that outranks it can be started over the same dispute.

31.6 If that happens, the one that outranks go ahead, and the other stops.

31.7 If it does not, ranking no longer matters, and that dispute must be decided by the procedure already started."

Attached to the contract is a schedule 3 notice under the *Building Work Contractors Act* 1995 (SA) which advises the customer that:

"The Act implies certain warranties on the part of your building work contractor, and these apply regardless of what your contract says." and,

"What if I have a dispute with my building contractor?
First, talk to your building work contractor. Many potentially serious disputes can be avoided by good communication between building owner and contractor. Your contract may have clauses relevant to dispute resolution which may assist both parties in resolving the dispute.

If that does not work you may need independent advice. You may wish to seek legal advice, or the advice of the Office of Consumer and Business Affairs. Some disputes can be resolved by negotiation. Others can only be resolved by legal actions either before the courts or by private arbitration as provided in many building contracts.

Before commencing any legal action over building work, you should seek advice from a lawyer or the Office of Consumer and Business Affairs."

(6) In two circumstances jurisdiction of the courts cannot be ousted. A building owner complaining of bad workmanship is entitled to go to a special division of the Magistrates Court to enforce statutory warranties of quality under *The Building Work Contractors Act 1995*. There also is statutory warranty insurance under that Act. On the other side a contractor has a statutory lien over the property where work has been done under the *Workers Liens Act* 1893 (SA). These statutory rights can be enforced by court action regardless of the contract provisions.

(7) Gleeson J in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, at 165 said:

> "When parties to a commercial contract agree, at the time of making the contract, and before any disputes have arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of differences in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."

See also *Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd* (1987) 8 NSWLR 123 and *Qantas Airways Ltd v Dillingham Corporation* (1985) 4 NSWLR 113 (*CLRS* 1999, 13.7, footnote 5).

(8) The courts themselves in Australia have not made a comprehensive definition of judicial power, an issue in view of the separation of powers under the constitution. Windeyer J in *R v Trade Practices Tribunal; Ex p Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 said the notion of judicial power 'transcend[s] purely abstract conceptual analysis'. They have identified the core concept. as the authoritative determination of disputes as to existing rights and liabilities under the law. Griffith CJ's description of judicial power in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, at p. 357 is perhaps the most often cited:

> "(T)he words `judicial power' as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

Three essential elements have been identified:

- adjudication between parties;
- the relation to existing rights and obligations; and
- the result of a binding decision.

When a tribunal is, or is not a court may be hard to decide. See for example *Shell Co of Australia Ltd v Commissioner (Cth) of Taxation (Cth)* (1930) 44 CLR, where the Privy Council observed that a tribunal with many attributes of a court, e.g. determining cases inter partes with power to summons witnesses and with an appeal lying to a court may not under the constitution be a court. Recently in *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, the High Court held that the Commission's power to determine whether the past conduct of a person violated the *Racial Discrimination Act* 1975 (Cth) and to order the payment of damages was an exercise of judicial power because it was made enforceable as if it was an order of the Federal Court. The ability to enforce decisions, directly or by automatic transfer to a court's machinery of enforcement is obviously a key feature of what constitutes a court under these cases.

The attitude of courts to business ombudsman schemes such as the Commonwealth banking Ombudsman described in this chapter was discussed in *Citipower Pty Ltd v Electricity Industry Ombudsman (Vic) Ltd & Anor* [1999] VSC 275 (5 August 1999) (per Austlii) where Warren J said at Para 24:

"It was observed by Tadgell JA in *AFL v Carlton Football Club Ltd*, supra, at 549 that the courts have consistently refused to review decisions made by private or domestic tribunals. The learned judge observed:

> 'The reasons for the courts' declining to interfere in cases such as these have been various. For one thing, where the parties have agreed to have their disputes decided by domestic tribunals designated for the purpose,

> the courts have been in the habit of respecting the agreement or, one might say, not countenancing a breach of it by one party wishing to desert it and to resort to the civil courts for resolution of a dispute that the tribunal was designed to decide. For another thing the courts have been prepared to recognise that there are some kinds of dispute that are much better decided by non-lawyers or people who have a special knowledge of or expertise in the matters giving rise to the dispute than a lawyer is likely to have. Again, the courts have been willing to understand that not every aspect of community life is conducted under the auspices of the State, that it is right that this should be so and that, sometimes, it is appropriate that State-appointed judges stay outside disputes of certain kinds which a private domestic tribunal has been appointed to decide.'

The learned judge observed, further, that such tribunals are not above the law rather:

> '... the courts will not discourage private organisations from ordering their own affairs within acceptable limits'

It follows that the determination of the Ombudsman owes its binding effect to the contract between Citipower and EIOV and, accordingly, the making of the determination must be consistent with that contract before it is binding."

In effect the binding effect of the scheme on it sponsor organisation was upheld.

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CHAPTER 4: VERIFYING DEBT AND ENFORCING JUDGMENTS

In Chapter 3 the role of a lower court was identified as being the enforcement of obligations and where the existence and extent of them is contested to publicly determine their extent in accordance with the established facts and established principle. In the South Australian Magistrates Court all claims are commenced on the same form without distinction between those that are expected to be contested and those that are not. Only 11% of the claims commenced are contested by the filing of a defence. Nearly all the remaining 89% are served but not contested (Table 4.1 below). As this identified role of the court implies, in fact most of the work of the court in numerical terms is the enforcement of uncontested obligations. Most of these are for readily ascertained sums, such as the price of goods sold and delivered, services performed or payments due under credit arrangements. They can for convenience be styled as debt. Enforcing debt is most of the work in number terms of the South Australian Magistrates Court. This chapter is about desirable systems for that court, and inferentially lower courts generally, to effectively deal with debt.

Introduction

The creation, collection and extinction of debt is at the heart of economic activity in a modern society (Kagan 1984, p.324):

> " If the extension of credit is the lifeblood of the dynamic commercial society, the forcible collection of unpaid debts is its backbone."

How effective debt collection systems are, and the extent that extinction of debt, by policies such as bankruptcy, marginalises or rehabilitates debtors as economic actors affects the readiness of businesses to advance credit. It follows that the work of lower courts in enforcing debt has influences beyond the parties to each case. It is not the work of this thesis to study the credit industry, nor means of enforcing debt outside lower courts. However some history and an explanation of the needs of creditors and debtors provides relevant context for the design of lower court systems for the collection of debt. That is discussed first. I identify that the needs of large

commercial users of the court are different from those of the occasional users of the court.

Once that context is established lower court systems for the enforcement of debt are discussed. There are two main issues in that discussion. The first is how to ensure that so called debt that includes inflated or invalid claims does not become a judgment of the court. This is dealt with under the heading 'verification of debt'. A comparison is made with Germany where debt is dealt with in the court system but under a different process from claims that are expected to be contested, and The Netherlands where much of it is dealt with outside the court system. This leads to conclusions about the best system of verification.

Once a debt becomes a judgment (in Germany known as an enforceable title) it can be used in different ways. It gives the creditor access to the enforcement powers of the court, it can be used as a basis for bankruptcy proceedings and it is a matter of public record so it can be used by other potential creditors as adverse information about the reliability of the debtor. The issues of bankruptcy and the general topic of credit referencing are outside this thesis. However using the credit referencing effect of judgments is relevant as a new means of enforcement. It is discussed as part of the second main issue, the enforcement of judgments once the debt has been verified. This is dealt with under the heading 'Enforcing judgments'. Research below shows that for a group of chronic debtors the enforcement processes of the South Australian Magistrates Court are not successful in reducing the net indebtedness of the debtor. The problems identified with the present system are that unrealistic expectations are given to occasional users of the court, excessive costs are incurred pursuing chronic debtors and that the present basis for determining priorities is too simplistic and may consequentially be unfair between creditors. Here experience is drawn from Northern Ireland which has a specialist Enforcement of Judgments Office separate from the court system. Conclusions are drawn about better ways to manage chronic debtors.

First the history and present purpose of debt collecting is discussed briefly.

The history of government sanctions to force payment of debt

Roman law was unsympathetic to debtors (Max Weber 1978, p.680):

> "Originally there was no execution upon the debtor's assets at all. In the event of non payment, the creditor's only resort was execution upon the person, whom he could kill or imprison as a hostage or hold as a bond-servant or sell as a slave; where there were several creditors, they could as the Twelve Tables show, cut him into pieces. The creditor could also establish himself in the home of the debtor, and the latter would have to serve and provide for him (*Einleger)*; but this already marks the transition to liability of the debtor's assets."

The Romans did become more commercially pragmatic:

> "Traditionally a *lex Poetelia* dated at 326 B.C. ...is reported to have prohibited the chaining and the killing of the debtor and to have compelled the creditor to accept the debtor's willingness to ward off the debt."

The date is said to be uncertain. (Max Weber 1978, footnote 38, p.738)

However the continental European civil codes moved on and (Max Weber 1978, footnote 39, p.738):

> "In Germany by Bundesgesetz of 29 May 1868, as in probably all countries of Western and Central Europe, ... imprisonment for debt has been radically and completely abolished by nineteenth century legislation. Public opinion would not support it even as a means of enforcement of duties of family support."

Victorian England regularly gaoled debtors but in line with other western European countries does not now do so. In Australia gaol for debt only is available under the guise of punishment for failing to attend at court as a form of punishment for contempt of court. In some jurisdictions orders for imprisonment obtained for

contempt have been suspended conditional upon future payments being made. To the sophist this may not be gaol for not paying debt but a last extension of leniency to permit the prior contempt to be purged by future good conduct. To the debtor it must look like gaol for not paying debt. In the South Australian Magistrates Court imprisonment suspended against future payments of debt is not available. However imprisonment of up to 40 days can be ordered for past failures of court orders for payment without proper excuse (s. 8 *Enforcement of Judgments Act* 1991). Any term of imprisonment does not reduce the debt. Such orders for imprisonment in South Australia cannot be suspended conditional upon future payments being made, but can be suspended whilst the arrears are paid.

In the last 31 years there have been two reports on reform proposals for debt collecting in England, the Payne Committee in 1969 (Payne Committee 1969) and the Cork Committee (Cork Committee 1982).

The Payne committee recommended that all enforcements by courts should fall under a new enforcement office. Its function would be (Payne Committee 1969, para.318):

> "To ascertain and compare the claims and rights of creditors both against the debtor and as between themselves, to supervise the orderly liquidation of the judgment debts, to assist the creditor in obtaining from the debtor as much as he can properly afford, and to liquidate the debts as expeditiously as possible; to determine priorities between the creditors, disputes between the creditors and the debtor or third parties and finally to protect the debtor against undue hardship or harassment."

The second major recommendation was a social service office for debtors to provide general budgeting advice, help in claiming benefits, represent debtors in courts and assist debtors before court involvement. In Northern Ireland the Enforcement of Judgments Office was established along the lines of the first recommendation. Elsewhere in the United Kingdom these recommendations have not been implemented.

The Cork Committee recommended the establishment of a new mechanism to be called a 'Debts Arrangement Order'. This was a modification of the existing Administration Order. Consistent with regarding this as an enforcement process it was to be available upon the application of not only the debtor but also the creditor. It could be imposed on a debtor. One of the essential characteristics of the existing Administration Order, that is, its voluntary nature, would be replaced.

Similar reforms were suggested in Australia. In 1977 the then Law Reform Commission recommended a "regular payment of debts program" outside the Bankruptcy Act (The Law Reform Commission 1977, pp.ix-xi). This was for non-business debtors. There was to be a debt counselling service in the Department of Business and Consumer Affairs, (where total indebtedness excluding house mortgage did not exceed A$15,000), which would correspond with creditors and arrive at, in effect, an informal scheme of arrangement where pro rata payments were made to creditors. The proposal could be binding on creditors unless more than half of the creditors in number and amount rejected it. The scheme would prevent other debt collection procedures. Secured creditors were protected but not able to enforce security during the scheme. If the debtor defaulted, after 60 days a creditor could commence enforcement procedures, but the debtor still had 14 days to apply to a court for reinstatement. Upon completion of the plan or the expiry of three and a half years with compliance with a plan, the debts remaining unpaid would be discharged. An essential part of the plan was a debt counselling program.

The Bankruptcy Act was also to be amended with non-business bankrupts being discharged upon six months unless there was an objection by a creditor.

Although legislation giving effect to this was passed by parliament in South Australia, it was never proclaimed to have effect and was eventually repealed. The recommendations have not been adopted anywhere in Australia.

In a second report in 1987, The Law Reform Commission recommended further changes to debt collecting procedures. The following recommendations potentially affected lower courts (The Law Reform Commission 1987, pp. xxv- xx).

Default procedure for collection of debts should be retained, but the risk of that being abused should be met by establishing an audit system of default debts. In this the Commission rejected a suggestion that there should be no default judgments and that all judgments should be assessed by an independent court official or judge, who should contact the debtor and satisfy him or herself that there is no defence (The Law Reform Commission 1987, pp.257-8, paras.121-123). The commission rejected this as too expensive, but suggested an audit under which a proportion of all default judgments are fully investigated to ensure that creditors only sign judgment to the extent of claims to which they were entitled.

In relation to enforcement of judgments, fining and imprisonment for failure to pay a debt or failure to attend a hearing should be abolished. Absconding debtor procedures should be repealed and should only exist for people leaving the Commonwealth of Australia. Limitations should be placed on execution and the extent of wage attachment. There should be appropriate exemptions of property and income.

The creditor should retain the right to choose between the methods of enforcement and not have to wait until after the formal examination of the debtor.

Hearings as to debtors' means should be in private. The examination of the debtor should be a detailed one and the information obtained on the examination should be available to all judgment creditors.

The courts should be empowered to ensure appropriate priorities between various creditors to ensure a fair distribution and thereby prevent a rush by creditors to judgment to be the first one to obtain a good instalment order.

The changes recommended in these reports have not been adopted in the South Australian Magistrates Court nor elsewhere in Australia. The design of debt collecting functions of the South Australian Magistrates Court is little different from that inherited from England. The names of some processes have been changed but the underlying design has not. Cases are dealt with on individual basis and the verification process is part of a system primarily designed to deal with the

determination of factual and legal disputes in contested cases. Before considering if they, or other changes should be adopted, the needs of creditors and debtors are considered.

The needs of creditors and debtors

Much of the work of the South Australian Magistrates Court in enforcing debt is not what it seems. This has been described colourfully in relation to a similar English court (Cain 1986, p.129):

> "So by a number of devices of which the organisational segmentation is the most important each group is able to maintain its discreet occupational view of the work of the court, despite evidence to the contrary. Thus the research court was indeed a paradise island in which each achieved her heart's desire. Judges saw themselves as settling disputes, which is high status judicial and social work. Administrative staff saw themselves as collecting debts which at least gave their work a tangible purpose. Plaintiffs indeed got what they wanted - a judgment in nearly every case which was not settled after issue and defendants by and large, well they may not have got their problem solved, at least quite often did not have to pay! The court was not as punitive as might have been feared. No-one would be fool enough to seek to reform such an institution!"

This cannot be accepted as a permanent state of affairs. The comment emphasises the importance of the public and psychological functions of a court, but just as an emperor who has no clothes will be ridiculed, a court whose main function of enforcing debt is found to ineffective, will be marginalised. Also it is misrepresenting itself. Although such a system may serve the needs of a regular corporate plaintiff whose primary interest is deterrence rather than actual collection (the psychological function), and a debtor who cannot or does not want to pay, it may be a hypocritical offer of a service and a waste of effort and expense for an inexperienced plaintiff. This identifies that different creditors have different needs.

It is useful to define what creditors need from the process. A survey in England identified four reasons for plaintiffs taking cases to court (Cain 1986, p.110):

> "a. Point of principle: certain that right and the court will vindicate;
> b. To gain redress in the specific case (specific redress);
> c. To get money back insofar as this is cost-effective otherwise to write it off (cost-effective redress);
> d. To deter other potential debtors, non-payers etc. (general deterrence)."

Business repeat plaintiffs may have more realistic expectations and different needs than 'one shotters' (Ramsay 1986, p. 96).

> "The enforcement of judgment debts is only one part of the operation of the credit market. Changes in enforcement procedures will affect all stages of the market and all debtors, not just those who default. Lenders make a number of interlinked decisions when they extend credit. They must decide what type of potential borrower will receive a loan, how large that loan will be and what the repayment terms are and what action will be taken if the borrower defaults. ... Changes in the availability cost or efficacy of County Court remedies will affect not only their choice of remedy but will also influence the other decisions that they take. The authors go on to point out that shifting costs from debtors back to creditors might increase the use of informal collection procedures and less readiness to extend credit to marginal risks."

Nearly 50% of the plaintiffs interviewed indicate general deterrence was one of their reasons for taking cases to court (Cain 1986, p.117). It was fear from large players that if they did not take action, word would get around which would increase the amount of defaulting.

Institutional creditors have a greater opportunity to avoid bad debtors through credit checks before advancing credit and can lessen the loss of non payment by writing debts off in a tax effective way. Indeed by the time credit charges which are typically higher than commercial interest rates are added to the debt and then written off, the

loss to the creditor is much less than the original debt (endnote 1 suggests a net loss to credit account creditors of only twenty cents in the dollar). These creditors can spread this risk over the profit from similar transactions that are paid. For them the deterrent effect of court enforcement is a benefit regardless of whether the process is actually successful in collecting money from their defaulters.

In contrast occasional and involuntary creditors, such as consumers complaining of defects, those suffering an injury to person or property from an assault or negligent accident caused by an uninsured person and tradesmen and other contractors dealing with customers on a one off basis, have no advantage from the deterrent effect of their activity. Unless the debt arose from business activity they are unable to lessen the loss by writing it off their tax liability. To these creditors the actual collection of the debt is of prime importance and if it is not able to be collected they need to know at the earliest possible time before they incur further costs that also may not be recovered. Such creditors may have little or no opportunity to assess the creditworthiness of their debtor. Lower courts may need to adopt different strategies to effectively serve their respective needs and take these differences into account to be fair between them.

From the debtors' perspective they need a system that allows them time to pay where they are presently unable to do so, which does not treat them in a humiliating way and does not punish them just for being debtors.

Before allowing access to enforcement processes lower courts need to ensure that so called debt that includes inflated or invalid claims does not become a judgment of the court.

Verifying debt

Processing uncontested debt claims and enforcing them is the bulk of the work of the South Australian Magistrates Court in terms of volume and revenue. This is the same in Germany.

Table 4.1: Uncontested claims compared to contested claims

	South Australia 1998/9	Germany 1996
Uncontested claims	39,932	461,032*
Contested claims	4,861	1,686,960
Total claims/ Mahnverfahren	44,793	8,143,271
Uncontested as a % of total claims	89%	79% or 86.3%*

The South Australian figures are from Courts Admin. Authority data- see Table 2.4. From total claims an estimated 7,000 sundry appeals and miscellaneous applications and the 4,861 defended general and small claims have been deducted. The rest are uncontested debt. Figures from debt collectors show that due to up to date information about debtors' addresses from commercial data bases, especially from mobile phone accounts, over 98% of commenced claims are served (Lindquist 2000). The German figures are from (Statistiches 1996). *The Mahnverfahren is an uncontested debt procedure discussed below. The figure in 'contested claims' for Germany is total claims commenced in the courts. Some 55% of the contested court work in the lower court (Amtsgericht) comes from objections to Mahnverfahren, i.e. 45% of claims commenced in the lower court did not first try the Mahnverfahren. The 'uncontested claims' were court claims finalised by default or consent. Perhaps the better way to reach the % of uncontested claims would be to add the 45% of the court claims that did not first try the Mahnverfahren, to the Mahnverfahren to calculate the total claims and deduct the 'uncontested claims' (court defaults) from 'contested claims' (total court commenced) to calculate the actual contested claims. This yields uncontested as 86.3% of total.

In the financial year 1998/9 51,793 claims were commenced in the Magistrates Court and in the same year only 4,861 defences were filed. Of the defended cases only about 500 went to verdict after trial. Only 11% of filed claims are defended and 1% of filed claims receive a judgment after trial. In the calendar year 1998 judgment creditors issued 39,421 processes enforcing judgments.

The cost of converting an uncontested claim into a judgment that can be enforced is in first instance borne by the creditor and a portion of the creditor's legal cost and the court filing fee is added to the debt. It is in both creditors' and debtors' interests that the system is inexpensive. Lower court systems need to be efficient but also need to have checks to ensure that claims are not inflated or invalid. I now look at different systems against these twin criteria of low cost and checks against inflated and invalid claims.

In the South Australian Magistrates Court all claims are commenced in the same way. Some systems separate claims that plaintiffs expect to be uncontested from those they expect to be contested. Some remove them from the court system entirely. In Germany the main collection procedure for liquidated sums is a notice of uncontested debt or Mahnverfahren (§§ 688-703d ZPO) (a translated notice is in Appendix 4.A). This can be filed at the court nearest the defendant's place of residence by oral, internet or written application. Documentary evidence can be named without being actually produced. The Registrar checks compliance with procedural requirements but not the merits. The Registrar issues a final notice (Mahnbescheid) giving the other party two weeks to pay or to lodge a written or oral objection. If an objection is received the plaintiff must then proceed by way of an ordinary claim at the court which can be done without additional fee. If an objection is not received, the plaintiff can, within six months of service of the final notice, apply for an enforceable payment order (Vollstreckungsbescheid). This is in effect a judgment. The defendant can lodge an appeal against the enforceable payment order without reasons and, again, in that event the case is removed to the competent court (§ 700(3) ZPO). Where the process is commenced electronically the Registrar does not need to sign this but a "hallmark" is put on instead (§ 703 (b)(1) ZPO).

The risk of unchecked procedures is the inclusion of invalid claims, which become a judgment for the plaintiff. Even if they are eventually contested by then the costs in the proceedings may overwhelm the original issues. The potential of abuse is acknowledged by some commentators. The collection procedure can be abused by (Koch and Deidrich 1998, para. 179):

> "... surprise attacks on defendants lacking experience in court proceedings. In particular the surprise attacks by 'repeat players' e.g. in the mail order or credit business led in the past to a number of abuses in the collection proceedings because of the lack of check of the merits which had to be solved by the BGH (the appeal court) crushing the Writs of Executions being already res judicata by invoking the notion of a malicious tort contrary to public policy..."

Research shows that the objection rate to Mahnverfahren notices is about 12 per cent and in consumer credit only about five per cent. However in only about ten per cent of cases did the default summons proceeding lead to monetary success for the creditor. Why do it? Firstly, because the State adds its stamp on the creditor's claim, secondly, the judgment order can result in execution for a period of thirty years (Hörmann 1986, p.169).

In France they have an "injonction de payer" but only where there is a written contract, which serves the same purpose as the German Mahnverfahren. Here however they are individually checked by a judge. A judge I interviewed suggested that of the 600 or so of these per year which she checks, about 40 are rejected (Mme Huberty 1999). She checks them conscientiously and where a claim appears out of the ordinary she calls upon the plaintiff to justify it. Such a checking process of course is likely only to identify obvious errors. Also she suggested that some of her busier colleagues may just rubber stamp them, and consequentially some unwarranted costs and other claims may be undetected and become a judgment of the court.

In The Netherlands some uncontested debt, in particular claims by landlords against their tenants, can be dealt with by direct enforcement by licensed bailiffs, or Deurwaarders. They have the powers usually associated with court enforcement. This venerable office comes from the Huissiers in the late middle ages in France. It is a profession of relatively high status and standards. It needs to be because Deurwaarders can be put into the position of assessing the merit of contests by the debtor. They return the claim to the creditor if it is in their view contested on a possibly meritorious basis and the creditor who still seeks to pursue it has to commence a claim in court. This system has the merit of saving costs in getting the bailiff to a debtor's door. Under a court based system two sets of costs are incurred, those of the verification procedure (the cost of a Mahnbescheid in Germany or a claim in the South Australian Magistrates Court), and the cost of sending the bailiff or sheriff to enforce the judgment so obtained. In South Australia the sheriff is an officer of the court and there is an objection in principle to sending him to collect a debt without first giving the alleged debtor a chance to contest the claim. It would

appear as if the court is biased to the creditor. There is a body of licensed commercial agents. These are licensed by government as being of sufficient probity to act as investigators, inquiry agents and to serve documents when appointed to do so. Licensed commercial agents, and indeed unlicensed persons are on occasions retained by creditors to collect debts outside the court system. They have no powers to legally enforce a debt by seizing property and selling it or the like (except under a contractual right such as with mortgaged property). However to give licensed commercial agents powers to enforce alleged debt, as well as assessing the merits of any contest of the debt by alleged debtors, involves a conflict because they usually have a vested interest in the successful collection of the debt. Although there are no doubt cultural and other restraints in The Netherlands to ensure that this potential conflict is resolved without abuse, the Dutch system would not transport readily to either the present sheriff's infrastructure in the South Australian Magistrates Court, nor to licensed commercial agents. Some form of check against inflated and invalid uncontested debt claims by an independent body needs to be built into the system. Lower courts with their established adjudication function are best placed to perform this function.

In the South Australian Magistrates Court, in contrast to Germany, there is not a separate procedure for debt claims that the creditor expects to be uncontested. All court claims are commenced on the same form whether or not it is anticipated that they will be contested. If a claim form is served a defendant must file a defence within 21 days or the plaintiff can obtain a default judgment. This can later be set aside if the defendant can give a reasonable excuse for not having defended it in the time allowed and can establish a defence on the merits (*Magistrates Rules* 1992, rule 87). The present default judgment procedures in the South Australian Magistrates Court allows a plaintiff to obtain a judgment without any independent checking of the claim. If the claim is for a liquidated sum its accuracy and merit are not checked. Registry staff only ensure it complies with procedural requirements before accepting it for filing (as with the Mahnverfahren procedure in Germany). In a claim for damages to a motor vehicle from an accident, if the repair quote is attached to the claim, it is accepted at face value. It is only claims for other damages that are referred to a magistrate for assessment. In practical terms there is little difference

between an unchecked default judgment upon service of an South Australian Magistrates court claim and the same consequence from service of the specialised Mahnverfahren procedure.

An underlying reason why the German procedure differentiates between uncontested and contested claims is that in German contested claims the evidence is pleaded and may be attached to the claim. This is because fact finding by their courts commences early in the process rather than at the oral evidence trial at the end of the common law process (see Chapter 5). In contrast the common law tradition has a technical, precise and sometimes relatively uninformative pleading. In the South Australian Magistrates Court a short form of pleading is permitted such as: 'The plaintiff's claim is for goods sold and delivered between the 1 April 1999 and the 30 June 1999 full particulars whereof the defendant has had.'

One consequence of the court not differentiating its procedure for contested and uncontested claims is to allow the uncontested debt to attract the same court and more expensively, lawyer's fees for filing the claim. These are A$10 + 20% up to a maximum of A$200 in small claims up to A$5,000 and 4% of the judgment sum in general claims (*Magistrates Rules* 1992, 3rd Schedule). The fee payable to a lawyer for a Mahnverfahren of 5,000DM is 160DM and a court fee of 80DM compared to A$200 to the lawyer and A$55 court fee for a claim in the South Australian Magistrates Court, a similar amount in total (1DM is slightly less than A$1). The German fees for a normal court claim are double those for a Mahnverfahren (lawyer's fee of 320DM and a court fee of 160DM for a claim of 5,000DM). There is no obvious advantage in using a separate form for claims that the creditor expects to be uncontested in the South Australian Magistrates Court. Using the same claim form for all purposes has the same effect at no substantially different expense.

Both the Mahnverfahren and the South Australian Magistrates Court claim procedures require a prior warning from the creditor if it is to claim its costs (*Magistrates Rules* 1992, rule 20A). The manner of service and general warnings in claim in the South Australian Magistrates Court and a Manhnverfahren notice are not substantially different. Lawyers in South Australia routinely do this by a letter of

demand. There would be a significant saving of expense for the parties and for the court if payment of more debt claims was agreed at the stage of a warning of the claim and before the claim itself is filed. A procedure to encourage this is discussed below.

There is little effective difference between the separate Mahnverfahren procedure and the use of the standard claim form for debt as well as other claims in the South Australian Magistrates Court. Both methods rely upon the debtor defending a case to identify invalid and contested claims. Some suggest this is insufficient protection. I have noted the suggestion that all claims should be assessed by an independent court official or a judge to ensure that there is no inflation of claims, nor any possible defence available (Ison 1979). The French system noted above provides this to the extent of a judge checking each claim without however engaging in inquiries of the debtor. Ison also suggested that there should be no indirect collection of debts because pressure is applied to pay regardless of the legitimacy of the claim. This goes to the general regulation of the credit industry which is outside this thesis. However it is likely to be true that some defendants are poorly advised or unable to mount a legitimate defence due to social pressures, alienation from society's machinery or other reasons. Better education, budgeting and legal advice are ways of addressing these factors, but are matters of social policy outside the role of lower courts. Of course lower courts should make available to debtors and creditors information about competent budgeting and legal advice services. When such advice is not available, lower courts are left with the question of how to ensure that inflated and invalid claims do not become judgments.

Magistrates in the South Australian Magistrates Court assess only general damages claims. It has been long held that default judgments can include acceptance of the amount (quantum) of liquidated claims. This is based on the assumption that because they usually arise from invoiced transactions their amount is clear. In fact the invoiced amount may be inflated by debt collecting fees and interest or may be an agreement obtained by unenforceable means (e.g. door to door selling without giving a cooling off period). The 1987 report of The Law Reform Commission rejected checking each file as too expensive, but suggested an audit under which a proportion

of all default judgments are fully investigated to ensure that creditors are only signing judgment to the extent of claims to which they were entitled.

Indeed the resources required for a magistrate to individually check the 90% or so of undefended cases in the South Australian Magistrates Court would be prohibitively expensive and, as Mme Huberty pointed out in France where this is meant to occur, the other duties of a busy magistrate are liable to render the process cursory and largely ineffective in screening out invalid and inflated claims. However a variation on the audit of a proportion of the claims could readily be achieved without substantial additional resources. Magistrates deal with applications to set aside judgments which were obtained in default of a defence being filed. These often occur in response to an enforcement process being served on the defendant who then raises issues to show that s/he has a defence to the claim. Magistrates also determine the defended cases. Both are a selection by defendants of invalid or inflated claims. These functions bring abuses to individual magistrate's attention. If the magistrates use this information as an auditing function by exchanging information about any apparent abuses that come to their attention, that corporate knowledge could be used to take action to check similar uncontested claims and prevent similar abuses.

This may seem obvious but in fact it involves a substantial departure from the traditional common law role of judicial officers which is very insular. Magistrates deal with cases on an individual basis and do not use knowledge from one case in another case. Nor in what is a party driven system do they interfere in a claim without being asked to do so by a party. This proposal involves them exchanging knowledge and interfering in uncontested cases without being asked to do so. However there is no reason in principle why this cannot occur provided that before taking any action against the interest of a plaintiff in an uncontested claim, the plaintiff is given a chance to be heard. If the plaintiff can justify the claim the only harm is the cost to the plaintiff of justifying it, which on a one off basis would not be large. If it cannot justify the claim, all such similar claims would be reviewed.

This would offer an effective auditing function at no extra significant increase in cost to the court or the parties. For it to occur the magistrates have to accept a collegiate

role and responsibility for the management of uncontested work to prevent inflated or invalid claims proceeding to judgment.

Once such a system is in place to ensure only valid debts are converted to judgments the work of the court is to enforce those judgments to ensure the debts, and allowed costs are paid.

Enforcing judgments

Methods of enforcement

There is little difference in Germany, The Netherlands, France and South Australia in the ways of extracting money from debtors who are identified as having assets or income beyond their basic needs. Debtors are called upon to give a statement of assets and debts and income and expenses. Assets can be seized and sold and the proceeds after expenses distributed to creditors. Income can be attached. Income of a business owned by a debtor can be taken. Debtors can be restrained from leaving the jurisdiction until a judgment debt is paid. All systems protect debtors and their families from destitution by exempting basic household goods and tools of trade from execution. One difference is whether attachment of wages can be forced on a debtor. In Germany wages can be attached. Provisions are in place to prevent employers disadvantaging a debtor when wages are attached and to ensure that attachments leave sufficient in a debtor's hands for legitimate household expenses. This minimum is the equivalent of the social security pension rate. Various specified income cannot be attached such as half of wages earned for overtime, money paid for education, pensions (subject to some exceptions) and income from the sale of farm produce that is necessary for the orderly running of the enterprise (§§ 850-851b ZPO). In SA prior to 1992 attachment of wages was not possible. Since then attachment of wages is subject to the debtor's consent (s. 6(2), *Enforcement of Judgments Act* 1991 (SA)). This makes attachment a convenience of the debtor to aid in regularity of payment rather than a coercive measure. Since its introduction attachment on this consent basis has been rarely used. Whether this is due to the lack of coercive power, lack of a tradition of such orders or some other reason has not been researched. Attachment of wages without the debtor's consent does occur in Tasmania and Victoria. It is only permitted for short periods or single pays in NSW,

Qld and ACT (Law Reform Commission 1987, para.86). Although attachment of income sources of a judgment debtor will in some case be a useful means of enforcement it is essential to ensure that protections are in place to ensure the attachment does not cause the income to be lost to the debtor by dismissal or otherwise, and the debtor is left a sufficient means for basic living expenses. The German approach of setting a minimum income linked to the social security benefit below which attachment cannot be made is sensible.

Where a debtor has substantial assets or income in his or her name in the jurisdiction the enforcement powers of lower courts generally are effective to access those to ensure debt is paid. The mere threat of exercising those powers usually is effective to force payment. It is of course desirable to allow the debtor to arrange payment rather than actually seizing and selling assets because such sales rarely realise a full retail value, or in any event their value to the debtor.

The extent that joint property or property of other members of a household can be accessed to satisfy a judgment debt varies. In South Australia it cannot be accessed. One useful exception in South Australia, is that the interest of a debtor in joint property can be charged with a debt which prevents the debtor dealing with the asset without a court order, or discharging the debt. This effectively ties up the joint, non debtor's ownership because in practical terms one cannot deal with one portion of joint property. However, if a debtor places the ownership of his or her assets in another person, a company or a trust, he or she may retain use of houses, cars and other goods whilst those assets remain immune from court processes. In Germany there is a presumption that personal property of a matrimonial relationship is owned solely by the debtor. Separation ends the presumption and property intended for the exclusive personal use of either spouse is exempt from the presumption (§1362 BGB). Although this would be unlikely to be acceptable in Australia, nor would it solve many potential ways debtors can hide assets from creditors, it does suggest that ways of defeating schemes to hide assets within economic groups are possible to devise. In France there is a criminal offence known as 'organisation of poverty' as a recognition of the need to have sanctions against the 'cunning debtor'. It would be a useful field of research to assess the extent of this problem of shielding ownership of

assets from creditors and devising ways of penetrating such schemes. However the worst examples of such abuses occur far above the modest jurisdiction of lower courts, as the excesses and spectacular business collapses of the 1980s demonstrated, and hence they are outside the ambit of this thesis.

Imprisonment of debtors

The Law Reform Commission Report in 1987 (p. xxvii) recommended the abolition of imprisonment of debtors. It has been noted above that a suspended order of imprisonment is not available to ensure future payments in the South Australian Magistrates Court. Court ordered payment plans are required to leave sufficient income intact (s. 5, *Enforcement of Judgments Act* 1991(SA)): "to ensure that it does not impose unreasonable obligations on the judgment debtor." Gaol for up to 40 days can be imposed on a debtor who falls into arrears in two instalments of a court ordered payment plan if there is no proper excuse. The gaol order is removed if the arrears up to the date of the gaol order are paid.

It is a sound principle that gaol should not be available to be suspended on condition that future payments are made. At the time of such an order being made it is impossible to know the future circumstances of the debtor. This is just a backdoor way of using the imprisonment order to ensure payment and will inevitably result in people in fact being gaoled for non payment of debt rather than only for contempt. Further, there might be an intervention of circumstances, through no fault of the debtor, which makes a promise of payment impossible to perform. A debtor may lose an income or suffer a disaster that makes compliance with the order impossible. Such orders must on occasions result in a debtor being exposed to gaol penalty in circumstances that are beyond the debtor's control and which should not result in punishment, let alone by gaol.

The live issue is whether the ability to gaol debtors for past defaults should be retained. Most debtors are unable to pay due to circumstances not suggestive of punishment. The 'cunning debtor' has been skeptically identified by Rubin (Rubin, 1984, p.289) as "...an ideology which served the interests of the local business and legal elites who patronised the county courts...". They do in fact exist. I have met

them in my day to day work. These are debtors, identified above, who manage their affairs to place their assets and income in the hands of others, so that nothing is available to creditors, but who continue a lavish lifestyle. Others exist who cynically ignore court processes to achieve delay, until eventually they are arrested and then they ignore reasonable orders to pay. Debtors such as these certainly exist and for them any lesser threat than gaol is ineffective. It would bring the court into disrepute if it had no effective sanction with which to threaten and deal with such hard cases. However courts should distinguish between imprisonment for cynical non co-operation, or in effect contempt, which may be necessary, and imprisonment for incompetence or genuine inability to comply with an order for payment of debts which should not occur.

In similar vein powers to deal with people leaving, or moving assets from the jurisdiction of the court to defeat creditors should remain for the same reason that courts should retain the power of imprisonment. In the federal system in Australia, notwithstanding some greater powers given to each state court to enforce its judgments in other states (*Service and Execution of Process Act* 1992 (Cth)), the ability of state courts to enforce a judgment interstate remains limited. Where a debtor is about to depart from a state, or remove assets, leaving judgments unpaid, a court should have powers to prevent it without some assurances about the payment of the judgment debt. Otherwise the debt remains unpaid and the debtor and his or her assets are effectively beyond the power of the court.

The recommendation of the second Law Reform Report to the contrary (LRC 1987, p.xxv) does not address how courts should deal with such people. If courts are to enforce society's standards they must have the power to do so.

However even with the retention of coercive powers, courts can do little to successfully enforce judgments against people or companies with large debt levels and without identifiable assets or income. Society provides a procedure to bankrupt or liquidate these. Once that occurs the ability of such individuals to participate in economic activity is usually circumscribed and later restored. How easy or onerous that should be before the bankrupt is rehabilitated is outside the work of lower courts,

and of this thesis. In England lower courts can impose a form of bankruptcy for low levels of total debt known as Administrative orders (see for example Davies 1986, p.194 and the Payne Report 1969). The nearest equivalent in Australia is a Part 9 arrangement under the *Bankruptcy Act* 1966 (Cth). These are not available in state lower courts as bankruptcy is a Federal government responsibility. However for debtors with no assets and relatively small levels of debt the substantial expense of first obtaining a bankruptcy or liquidation and then administering it, cannot be recouped from their meagre assets. Such debtors remain as economic actors in society but are chronically unable to pay their debts. Lower courts have to develop strategies to manage the debt of such chronic debtors and this is discussed below.

Enforcement against chronic debtors

Chronic debtors are those who do not pay their creditors. Usually this is because they cannot. Some pay less than the amount incurred for court and lawyers' fees with no benefit to the creditor except general deterrence. There is no joy in this for any creditor and especially the one off creditor who may on occasions owe more to the debt collector than is collected from the debtor. Figures drawn from a typical debt list at the main city civil registry of the South Australian Magistrates Court are analysed in appendix 4.B. They are summarised in this table. The total of the debts from all the files in the list have been added before the court was engaged to collect them and again on the date of the debt list (8 August 1999). It can be seen that the total debt had been reduced only by A$219 to A$126,859 from a total original debt of A$127,078. The oldest claim had been in the court system for more than five years.

Table 4.2: Debtors summonsed to the Adelaide Magistrates Court civil registry on 8 August 1999 analysed by age and reduction of debt

Please see print copy for image

Source court files. This is a summary of a more detailed analysis in Appendix 4.B. Thanks to Nick Clark a CLE final year law student who collected and collated this data.

This demonstrates that although the court may be successful in enforcing judgments against debtors with assets and income, with chronic debtors it is not. There are two

factors in this, how much cost is added to the debts as a result of the court processes and how much is paid. The extent the costs escalate can be gauged from Table 4.3 below.

In July 2000 the costs to file a claim, sign judgment and enforce it in the South Australian Magistrates Court were as follows. They have been separated into court fees and allowed party party cost, i.e. the creditor's lawyer's costs that the court allows to be passed on to the debtor. Of course the actual lawyer and collection agent costs to the creditor may be greater than these. In addition interest is allowed on court judgments calculated at 10% per annum.

Table 4.3: Lawyer costs and court fees in enforcing a claim

Please see print copy for image

Source: schedule 3, *Magistrates Rules* 1992 and Magistrates Court and Sheriff's fees regulations. The costs are current at July 2000 and include an allowance for 10% GST. Service fees for a claim can be avoided by having the court serve it by post but some debt collectors prefer personal service to avoid the argument that the debtor did not receive the claim for due to a misadventure in the postal system.

Part of the reason for this unsatisfactory result is that at present creditors manage the process of enforcement, which results in multiple enforcement processes against chronic debtors to no good effect, but at substantial expense to the creditors, most of which is then added to the debt. Thus if a debtor has five debts of A$1,000, a total of A$5,000 and each is pursued to an investigation hearing, the costs and fees then added to the judgment debt would be A$1,430. The total debt would have risen toA$6,430. If five ad hoc payment orders are made and the debtor defaults on each then a further five examination hearings are likely to occur to see if the debtor has a reasonable excuse for the default and if not to decide if s/he should be punished. The costs fees for each of these are the same as an investigation hearing, A$45+A$28=A$73. For five debts this would add a further A$365 to the total debt.

The total debt would by then be A$6,786. Of course for larger debts the absolute amount of costs increase even more although as a lower proportion to the original debt. The payments that the court is successful in extracting often only pay the added costs, not the debt, as the figures of the total indebtedness in Table 4.2 indicate. Ways of preventing multiple procedures to reduce costs so that payments go to discharge the original debt need to be explored.

A different approach to managing debt collection has been adopted in Northern Ireland, in part to eradicate endemic corruption amongst bailiffs, but also as a new policy in debt collection in accordance with the recommendation of the Payne committee. It removes control over collection processes from individual creditors and places management of collection in the hands of the Enforcement of Judgments Office (EJO).

The Enforcement of Judgments Office

In Northern Ireland a specialist body, the Enforcement of Judgments Office (EJO) controls all enforcement processes (a description of this occurs in Appendix 4.C). The office examines a debtor and decides which type of process is best suited to the debtor. The EJO is largely self-funding from fees and enjoys a reasonable success rate.

There are several notable consequences from this centralised control of enforcement processes. One is the collection of information about debtors, both from the EJO's examination of debtors and also that it collects from other government agencies, subject to privacy limitations. All activities against a particular debtor are managed in the light of this information. Only one set of processes is on foot at one time against each debtor, resulting in substantial savings to both debtors and creditors. The office still observes the usual common law rule of first come first served and subsequent creditors are dealt with in the order of lodging with the office.

The EJO makes information about debtors available to potential claimants for a small fee before accepting their claim for enforcement. This has the considerable benefit of avoiding unrealistic expectations and may save the creditor wasted expense enforcing

a judgment against an indigent debtor. Further where a debtor is found to be indigent the EJO may make a declaration to that effect and refuse to accept further processes unless there is some reason to believe the debtor's circumstances have changed.

It is not this thesis that an EJO should be established as a feature of lower court systems. It is important not to lose sight of the fact that there are many debts that the present court processes successfully collect, either directly or by the threat of resort to them. For example in 1998/9 in the South Australian Magistrates Court there were 39,932 uncontested claims filed (Table 4.1). It has been noted that nearly all debt collecting claims are served (see note to Table 4.1). Undefended claims are automatically dismissed after one year if no action is taken by the plaintiff on them. 12,065 of these 1998/9 claims were dismissed for this reason (CAA data). The usual cause of a plaintiff taking no further action on a claim is that the defendant has come to an arrangement to satisfy the claim that is acceptable to the plaintiff. Although I do not have direct data on the point it is clear that the enforcement processes of the court are often effective to collect debts after judgment is obtained. There is no obvious benefit of shifting the management of successful collections from the creditors and their advisors to the court. To do this would involve a substantial bureaucracy. The EJO has its own judicial officer (Master Napier) who oversees the operation of the office and acts in an appellate capacity against decisions of the case workers. It is not attractive to establish a new and separate bureaucracy with judicial oversight when the structure already exists within the South Australian Magistrates Court and other similar lower courts. It is better to adopt the desirable features of the EJO within the existing system, particularly when it is dealing with chronic debtors.

These ideas can be adapted by the court making information it finds out about debtors available to creditors, managing multiple creditors against the one debtor and using cost disincentives to discourage fruitless processes against debtors without any current ability to pay. The idea of managing multiple creditors requires consideration of appropriate rules to govern priority between these creditors.

In the South Australian Magistrates Court the information about debtors is first obtained at an investigation hearing, where the debtor's version of his or her assets

and liabilities and income and expenses is ascertained. The court needs to ensure that the investigation of a debtor is thorough and accurate. The court should be willing to access information as to the debtor's means to pay from government departments, such as the Lands Titles Office. There is no valid objection in principle why a court should not gather its own information about a debtor's ability to pay. The court at this stage is not performing a judicial function of determining the facts of the case. It has determined those and is performing the function of ensuring that its own judgment is obeyed to the extent of the ability of the judgment debtor. Subject to the limitations on accessing information imposed by privacy laws, courts have an interest in having the best information available to assist in making appropriate enforcement orders. The information as to the debtor's means to pay should be available to other creditors. This will be of particular benefit to occasional users who may have no independent means to ascertain the debtor's means to pay. At the moment the court may raise a false expectation for occasional users who are suing chronic debtors that at the end of the process, if they succeed in obtaining a judgment, it will be paid. Where the court has knowledge that this is an unrealistic expectation it should make that knowledge available. This information will be useful for all creditors, at all stages of the process, to allow them to assess the risk of not recovering costs about to be incurred and to target enforcement processes where the debtor does have the means to pay. If any fee is charged for accessing this information it should be much less than the fee for an investigation hearing as the purpose is to reduce expense and discourage fruitless hearings.

Where the court finds that the debtor has no current ability to pay the EJO can prohibit further enforcement for a fixed period. Such an order is akin to bankruptcy relief (and is an act of bankruptcy) and as such would probably be beyond the power of lower state courts. Rather than prohibiting the creditor from filing further processes, the creditor should be discouraged by not allowing cost shifting against the debtor. Thus the creditor's right to pursue enforcement remains in place, but if it is exercised in the face of the court order, the debt is not increased by the costs of the process. In the South Australian Magistrates Court a rule has been introduced recently to this effect. It allows the court to make a Non Payment Order which has

the effect of preventing cost shifting against a debtor in these terms (rule 127A, *Magistrates Rules* 1992):

> "127A (1) If the Court makes a finding that a judgment debtor has no assets available against which execution could be levied nor other means of satisfying a judgment debt and any order for payment against the judgment debtor would impose an unreasonable obligation on the judgment debtor, the court may make a Non Payment Order.
>
> (2) A Non Payment Order will have effect for a period specified by the court or if no period is specified for one year.
>
> (3) A Non Payment Order and the evidence of the debtor's means upon which it was based must be made available to all creditors who seek to file a request for an enforcement process against the debtor.
>
> (4) Where a creditor who has had notification of a Non Payment Order files an enforcement process against the debtor the creditor shall not be entitled to shift the costs of the process to the debtor unless the creditor establishes that at the time of filing the process it had reasonable grounds to believe the debtor's ability to pay was different from that upon which the Non Payment Order was based."

The rule was introduced on 29 June 2000 and it is too recent to evaluate the effect of it.

The policy of having a careful inquiry about the means of a debtor to pay and making that information available to all creditors should discourage fruitless enforcement processes. This is reinforced where the cause is hopeless by the cost disincentive in a Non Payment Order. Expense to both creditors and debtors should be saved by these policies and where the creditor proceeds in the face of a Non Payment Order the debtor is spared additional expense being added to the debt.

Having adopted policies to minimise the expenses incurred in collections against chronic debtors the court then needs to ensure a fair distribution between creditors of the funds collected.

Priority

Issues of priority are only of real importance with chronic debtors. Where a debtor can pay all his or her creditors, who succeeds first is of less importance. At common law priority between creditors is determined on a first come first served basis (*Re Broughton* 1917, *General Credits* 1982). The EJO applies this policy and the first creditor is fully paid whilst the others wait their turn in the order they registered the judgment debt with the office. The first to come, of course, may not have the oldest debt. In contrast under the ad hoc, creditor driven system in the South Australian Magistrates Court , where the creditor decides what process is to be tried and when to use it, priority is in fact determined primarily by the extent of leverage obtained by each creditor. With chronic debtors some de facto sharing of the limited income between creditors in fact occurs as the debtor makes promises (often unrealistic) to competing creditors. Where priority between creditors is determined by the extent of pressure, sometimes the most recent may be receiving priority over the rest, who have been patient or whose enthusiasm may have dimmed. A first come first served policy may encourage a rush to file enforcement processes which contributes to the build up of costs noted in the above discussion of Table 4.2. In some cases more than one judgment debt against a debtor, by chance or for convenience may be listed at the same time. In dealing with them the court officer is likely to apportion payments between them. This has the effect of sharing priority between those creditors, usually regardless of the age or size of the debt.

There is no obvious fairness in the *re Broughton* principle which rewards the first to the court. Fair determination of priority might sensibly take into account more factors than have generally been considered. The first to the court has not necessarily waited longest for repayment of his or her debt. Creditors with an older debt which they have always sought to be repaid have a valid reason to claim priority over a more recent creditor. If timing is the all important issue, the length of time the debt

has been owing, all other things being equal, is a better claim to scarce funds of a creditor than being first to the court to seek enforcement. Creditors with a larger debt can claim that payments should be proportionate to the total debt, i.e. larger creditors might sensibly receive a larger proportion than smaller creditors. This is the principle that applies in bankruptcy where unsecured creditors are paid the same distribution per dollar owed and it has an obvious logic. The logic of this principle should apply to lower courts. The circumstances of the debt arising in the first place may be relevant to priority. Creditors who advanced credit that resulted in the debt, after the debtor had unpaid court judgments, had a chance to avoid the advance of credit by checking the court judgments. They might sensibly have later priority than creditors who suffered damages caused by the debtor where they had no chance to choose their debtor and could not assess the risk of their debtor not being able to pay. I identify each of these as a better basis upon which to determine priority than the purely arbitrary first come first served principle. The only obvious attraction of the first come first served principle is that it is clear cut and allows the court (or EJO) to deal with one creditor at a time. Once it is decided that priority should be decided upon factors beyond just timing it follows that the court may have to deal with more than one creditor at the one time. It will then need to define the relevant criteria and the weight to be placed upon each. From these examples I identify the following factors as relevant to priority and suggest they should have the following effect:

- older debts should have some priority over recent debts, but
- if a creditor has not attempted to collect a debt the inactivity removes the priority on account of the age of the debt,
- payments which are apportioned should be apportioned pro rata to the size of the debts between which they are apportioned, and
- creditors who should have known the debtor was a bad credit risk and with that knowledge could have avoided the debt arising should have priority behind creditors who did not have that opportunity.

I do not suggest this is a comprehensive list of factors to take into account. I merely conclude that for chronic debtors the determination of priority between creditors should take factors such as these into account in this way. This will require a change

in the common law. If this is accepted, the weight to be placed on each factor and other matters to be considered, in the common law tradition, will be developed by incremental experience.

Where a court determines that the debtor cannot repay all of several judgment creditors, it should gather together all present judgment creditors, and the debtor, investigate the debtor's means to pay, order a scheme of repayment and determine fair priority to distribute that payment between them. To some extent this occurs on a de facto basis already and in many situations will be a fairer distribution than either a first come first served, or a most aggressive takes most basis as occurs with ad hoc management of debtors. This is fundamentally different from the existing Administrative Orders and proposed Debts Arrangement Orders in England because it is not a form of bankruptcy. It does not extinguish the debts except by payment in full and does not bind other creditors. It is merely an orderly arrangement for the making and distribution of payments. The parties can avail themselves of bankruptcy as a separate exercise if they wish. The existence of a payment arrangement should be information that is available to creditors who subsequently seek recourse to the court system. Presumably the court would not make a separate order in favour of later creditors but rather extend the existing payments to the later creditors if they seek it. Whether they seek to have the payments extended to them will no doubt depend on the amount of the repayments ordered and whether they are being met. If subsequent creditors do seek a share that is a further issue of priority to determined by the court.

This involves a change from the present system which is creditor driven, to a system where courts manage chronic debtors by collecting all the creditors' judgments together and make one order apportioned between them. This should result in a higher return to the actual debt rather than to costs of collection and a fairer distribution between creditors.

The court should also give attention to the mechanics of payment and distribution. At present many payments are made by money orders purchased from Australia Post. These are relatively expensive for small payments and the cost is increased if they are

posted or delivered. If payments are to be distributed among several creditors a system of direct debit from a bank to a single account from which it is then automatically distributed should be in place. It is probably most convenient for the court to provide this service although it may be possible to subcontract it.

It will be noted from Table 4.3 that the greatest expense in enforcing debt claims is the filing of the claim. The greatest savings to both creditors and debtors will be if they can arrange for payment of a debt without the necessity of a claim. This assumes an ability to pay by instalments that the creditor will consider realistic. I propose a scheme to deal with such cases below. Even if a debtor has no ability to pay s/he should be able to consent to judgment without the full costs of a lawyer filing a claim being incurred by the creditor, nor being passed on to the debtor. No such procedure exists in the South Australian Magistrates Court at the present, nor elsewhere. Lower courts should have a procedure to allow a debtor to consent to a potential plaintiff entering judgment in respect of a claim of which the debtor gives details. Where the creditor accepts the consent is accurate the legal costs to which the creditor is entitled for obtaining a judgment should be reduced because the creditor has no need for anything but perfunctory legal advice.

However where the debtor can pay by instalments that are acceptable to the creditor the cheapest result for both debtors and creditors is if they can manage repayment without recourse to the court. Lower courts should encourage this by using the risk of adverse credit rating of a debtor as a sanction to encourage payment.

Creditworthiness as a sanction

The practice of the court making its record of judgments available for credit referencing is not unusual in common law countries. In the United Kingdom a national register of judgments is kept by Registry Trust Ltd. In Australia there are a plethora of credit referencing organisations, for example Credit Reference Limited and Dun and Bradstreet (Australia) Pty. Ltd., to name but two of many. The South Australian Magistrates Court sells details of its judgments to credit referencing agencies such as these. In contrast in Germany debt blacklisting is more circumscribed by privacy concerns. The practice needs scrutiny to ensure no unfair

damage is done to parties' credit. Much adverse credit reporting is done outside of the court system. Creditors report defaults to credit referencing agencies who relay the information to customers to assist them in avoiding advances of credit to bad debtors. This carries the risk that an adverse report on a debt that has not been verified by a court may be defamatory. Even within the court system the fact of an adverse judgment may have nothing to do with willingness and ability to pay debts as they fall due. For example many parties in insurance related litigation are a party in name only in a battle fought by the insurer under its rights of subrogation. A matter of principle may be fought and lost and the judgment paid. In either of these circumstances, and perhaps others, an adverse judgment is no indication of credit worthiness. Any use of court records for blacklisting needs to eliminate such records.

However once a proper measure of creditworthiness is established, experience in the South Australian Magistrates Court is that the threat of publishing a court judgment is a substantial sanction which could be used to the benefit of both creditors and debtors. Many defendants in the South Australian Magistrates Court are concerned to ensure that settlements are framed to avoid a judgment whilst payments are made. A practice has developed of noting that a settlement has occurred and adjourning the case whilst the payments are made. If the terms are complied with the claim is dismissed. With many defendants the threat of a judgment which will affect their credit rating is a greater threat than traditional enforcement procedures. This is especially the case with debtors who have no substantial assets against which the court can execute its processes. This experience leads to the conclusion that the threat of converting a debt to a court judgment is in itself a substantial sanction to encourage the repayment of debt. At present credit referencing is just used as a defence by creditors to avoid bad debtors. It can also be used as a weapon to encourage payment.

The credit referencing effect of a court judgment is already used as a sanction after a claim is commenced. This same sanction can be used before a claim is commenced. My observation is that a substantial number of claims are defended because the defendant needs time and achieves it by raising specious defences all the way to a surrender at the court steps on the date of trial. A final notice procedure can

encourage creditors to offer an agreement for delayed payment of an agreed sum of debt in return for an agreement that if the debtor fails to comply with the terms of payment the creditor can enter a summary judgment for that agreed sum. This buys the debtor the time to pay that s/he needs without causing the creditor the expense of taking a defended case to the court steps before reaching a similar agreement. This also saves the debtor costs because much of this expense is passed on to the debtor as party party costs if s/he eventually is able to pay. If the debtor under such an agreement defaults the creditor can file a claim and obtain a judgment without being exposed to the expense and delay of defeating specious defences. A similar procedure could be used to record agreements reached at mediation, or at any stage of the court process by an agreement to refrain from entering a judgment on the court record provided payment terms are kept. The sanction is an agreement that judgment can be entered for an agreed sum if there is a default of payment.

A recent rule amendment in the South Australian Magistrates Court has introduced such a scheme (rule 20B, *Magistrates Rules* 1992):

> "20B (1) An agreement of the extent of a monetary obligation and terms of repayment may be made in terms of Form 1B (an Enforceable Payment Agreement).
>
> (2) Where an EPA is in place and is being complied with the creditor must not make any adverse report about the non payment of the monetary obligation to any credit referencing agency.
>
> (3) Where a party to an EPA does not do what was agreed the other party may seek a judgment in accordance with the EPA, provided that where the EPA is for payment by instalments two instalment payments must be in arrears before a creditor can obtain a judgment for a monetary sum.
>
> (4) The court may accept an EPA verified by an affidavit of one party to it as proof of the matters contained in it.

(5) If payments have been made a creditor seeking to enforce an EPA must disclose them when seeking judgment and any judgment must allow credit for them.

(6) An EPA may be made before or after a claim has been filed."

A form of EPA is attached in Appendix 4.D. The rule was introduced on 29 June 2000 and it is too recent to evaluate the effect of it. It is probably of more immediate use to occasional users of the court because they often threaten to file a claim at court without having reported their debtor to any credit referencing agency. Large commercial creditors often will have made adverse credit reports prior to resorting to court, as a consequence of the earlier defaults by the debtors. The court proposal assumes no adverse credit referencing has occurred. If it has occurred already then the creditor has little left to offer the debtor for its side of the bargain. If commercial creditors are to use this some may have to modify their present practice of reporting every default a debtor makes and as an alternative try this procedure. The net effect of this is uncertain but having identified that an adverse credit report is a greater sanction to some debtors than the court's other powers of enforcement, this is a sensible step in using that sanction to encourage payment before action to save costs.

Issues to assist debtors.

Many of these conclusions will assist debtors. The reduction of the expense by discouraging multiple processes will reduce the costs that are added to the debt. Where a debtor can make no payment, the ability to consent to judgment before a creditor files a claim can save him or her costs. The use of an Enforceable Payment Agreement before a claim is filed gives a debtor a chance to manage an inability to immediately to pay the debt whilst keeping his or her credit reference intact and saves party party and the debtor's own costs of an unsuccessful defence mounted to buy delay.

Finally it is worth reiterating that chronic debtors lower courts see typically have limited means. Enforcement processes need to take account of this. They should be in a venue where the debtor can easily appear. Video links, phone and related technology should be used to achieve this to compensate for any reduction of the

number of regional court venues. Hearings to investigate the means of debtors should be heard in private. The public humiliation of debtors, which was a common feature of debtors' courts in South Australia twenty years ago amply met the objective of general deterrence. If it is correct that most debtors are not the 'cunning debtor' but arrive at the hearing due to misfortune, public humiliation is not an appropriate response. The real 'cunning debtor' is likely to be robust enough to withstand a dose of public humiliation, so the only harm done is to those who do not deserve it. Reports from registrars in South Australia, who conduct these hearings is that they achieve a much more detailed and frank view or the debtor's circumstances in private with only the creditor, or its representative, present than they used to in a public hearing.

These conclusions require magistrates to take a more collegiate and managerial role in exchanging information gained about abuses and using it to prevent inflated and invalid claims being successfully converted into judgments in uncontested matters. Officers of the court dealing with chronic debtors need to manage the creditors to ensure costs are minimised and the return to creditors is fairly distributed.

Summary of conclusions

Verifying debt

- Verifying debt should remain within the court system. Under the common law pleading system there is no advantage in having a separate procedure for uncontested debt claims.
- A system of checking uncontested claims against abuse is necessary. It is most efficiently achieved by magistrates, on a collegiate basis, using knowledge of inflation of and invalid claims obtained from applications to set aside judgments and contested hearings to prevent similar claims in other cases being successfully converted into judgments in uncontested matters.

Enforcement

- Existing processes left in the control of creditors are satisfactory for debtors with the means to pay.

- Ways of preventing debtors from hiding assets should be further researched. It is noted that the Germans have a presumption that assets of a marriage are owned solely by a debtor and hence they are available for creditors and in France there is a criminal offence for 'organisation of poverty'. In South Australia the ability to charge one joint owner's assets with a debt to prevent it being further dealt with is a useful innovation.
- Imprisonment should be retained as a sanction for contempt of court processes but not used as a backdoor way of sanctioning future payments, because things may occur to the debtor that make the future payments impossible. Likewise powers to restrain absconding debtors and assets should remain.
- Debtors should be protected by ensuring that court enforcement does not reduce their income below the level of social security benefits, nor remove their tools of trade.
- Existing court enforcement processes are ineffective in dealing with chronic debtors.
- Enforcement of obligations against chronic debtors should not be left to ad hoc activity by creditors. The court should collect information about the financial state of chronic debtors, on its own initiative if necessary, which should be available to creditors to ensure they have realistic expectations and do not waste costs on fruitless claims and enforcement.
- Where a lower court determines that the debtor cannot repay all of several creditors, it should manage all judgment creditors, determine fair priority and order a scheme of repayment to be distributed between them. Lower courts should develop principles that give a fairer distribution than either a first come first served, or a most aggressive takes most basis as occurs with ad hoc management of debtors.
- These factors are relevant to priority and they should have the following effect:
    - older debts should have some priority over recent debts, but
    - if a creditor has not attempted to collect a debt the inactivity removes the priority on account of the age of the debt,
    - payments which are apportioned should be apportioned pro rata to the size of the debts between which they are apportioned, and

- creditors who could have known the debtor was a bad credit risk and with that knowledge could have avoided the debt arising should have priority behind creditors who did not have that opportunity.

This list is not intended to be comprehensive.

- The court should also give attention to the mechanics of payment and distribution. At present many payments are made by money orders purchased from Australia Post. These are relatively expensive for small payments and the cost is increased if they are posted or delivered. If payments are to be distributed among several creditors a system of direct debit from a bank to a single account from which it is then automatically distributed should be in place. It is probably most convenient for the court to provide this service although it may be possible to subcontract it.
- Where the debtor has no ability to pay, the court should discourage fruitless enforcement processes by making an order preventing creditors from shifting the costs of further processes to the debtor unless the creditor can show that the debtor misled the court or has had an improvement in his financial circumstances.
- The fear of the effect that a judgment has on credit rating can be used as a sanction to encourage compliance with an agreed schedule for repayment. A final notice procedure can encourage creditors to offer an agreement for delayed payment of an agreed sum of debt in return for an agreement that if the debtor fails to comply with the terms of payment the creditor can enter a summary judgment for that agreed sum. The same procedure can be used to record agreements at other stages of court processes.
- Lower courts should have a procedure to allow a debtor to consent to a potential plaintiff entering judgment in respect of a claim of which the debtor gives details. Where the creditor accepts that the consent is accurate the legal costs to which the creditor is entitled for obtaining a judgment should be reduced because the creditor should only need perfunctory legal advice about the validation of the claim.
- These conclusions require the court to take responsibility for the effective management of verification and enforcement of debt. Information should be exchanged to prevent inflated and invalid claims being successfully converted into judgments in uncontested matters and information about, and claims against,

chronic debtors need to be managed to ensure costs are minimised and the return to creditors is fairly distributed.

ENDNOTE

(1) Assume the store bought the goods for A$100 and sold them for A$200. Ignore Goods and Services Tax. They were put on a credit account and attracted interest at 20% for six months before recovery was commenced. By then the notional value of the debt is A$220. At the company tax rate of 36% (soon to reduce by stages to 30%) when the debt is written off as a bad debt this gives a benefit of a tax credit of A$79 which reduces the notional loss from the original cost to A$21. The loss is greater than this due to holding charges on the capital and overhead expenses which have not been attributed to the sale (and which themselves are deductible) but the calculation demonstrates that the loss may be substantially less than the amount of the claim.

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CHAPTER 5: EFFECTIVE FACT FINDING

Where the existence and extent of an obligation is contested the role of a lower court is to decide a version of the facts that is necessary to determine the dispute and apply established legal principle to them. For the court to fulfil this role it must provide a practice and procedure that determines factual disputes with reasonable accuracy and applies correct legal principle to the facts in a principled, non-idiosyncratic way. To be effective the process must be affordable and be sufficiently prompt to deliver the result in a time frame that is useful to the parties.

In this chapter the South Australian Magistrates Court is used as an example of the common law fact finding process which leaves the control over the gathering and presentation of evidence in the hands of the parties. This in practice often means their advisers. As an alternative the approach to fact finding in Germany as an example of the European civil code approach is described. In Germany, although the approach to civil disputes is adversarial, the civil code inquisitorial tradition is seen in the greater control that courts exercise over the presentation of evidence. I identify the key similarities to describe the essential characteristics of an adversarial process and the differences in the management of evidence to consider whether there would be a benefit in adapting them to lower courts in the common law model. Some examples are then discussed to show how party/lawyer control has led to abuses of the pretrial processes of the common law model. Two examples of small claims trials demonstrate how judicial management of the presentation of evidence shortened the trials.

This leads to the conclusion that lower courts should be prepared, in appropriate cases, to manage the gathering and presentation of evidence. Characteristics to identify 'appropriate' cases and some consequential issues are discussed.

A particular type of evidence that has caused problems to common law courts, and expense to the parties, is expert opinions on matters of technical or scientific complexity or the explanation of observations involving the application of scientific expertise. Here the German practice and the experience of the South Australian

Magistrates Court in appointing court experts leads to a conclusion, consistent with the general conclusion that lower courts should be prepared to manage opinion evidence by appointing their own experts. Protocols for the appointment and use of court experts and a procedure to allow parties to question court experts in a way consistent with their status as an officer of the court are described.

Finally the resource implications of lower courts such as the South Australian Magistrates Court adopting these policies are discussed.

First the approach to fact finding in the South Australian Magistrates Court, which is based on the common law method of fact finding, is described.

Fact finding in the South Australian Magistrates Court

Fact finding in the South Australian Magistrates Court follows the common law adversary method of determining disputes. It has these features:

- The parties are entitled to be served.
- The parties commence the dispute.
- The parties define the extent of the dispute by a pleading of the alleged fact and the legal relief claimed.
- The parties control the pretrial gathering of potential evidence but can enlist the aid of the court to compel disclosure of information from the other side.
- The disclosure of the evidence to the court and the opponent and the consequential fact finding occurs at the end of the process, at a trial.
- The parties decide on the evidence, and the order of its presentation at the trial. The plaintiff goes first and has to establish its case before the defendant is called upon.
- The magistrate is not entitled to act on matters in his/her own knowledge nor to make his/her own inquiries.
- The evidence is primarily oral. The parties are typically key witnesses and they, and all other witnesses, go through a highly structured process of firstly open questioning by their own advocate, cross-examination by their opponent's

advocate and re-examination by their own advocate only on aspects that need clarification. The magistrate is obligated not to participate except to clarify minor issues.

- The magistrate makes factual findings solely on the basis of the evidence presented or agreed by the parties at the trial.

From the outset this process distinguishes between the facts alleged and the evidence. In cases that are contested the pleadings of the claim and the defence can be highly technical documents. Facts and evidence are distinguished by rule 46.04 Supreme Court Rules (SA), which applies to the South Australian Magistrates Court. This rule is soon to be amended but not to change this effect):

> "(1) A pleading shall:
>
> (a) be as brief as the nature of the case permits;
>
> (b) contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved ...
>
> (c) state the specific relief claimed. ..."

The method includes a useful armament of processes to ascertain the opponent's position, but not the evidence it has available. Firstly a party can be required to supply further and better particulars of pleadings. The pleadings define the territory of the dispute so that each party knows the case it has to meet, and provide the structure from which relevance and res judicata issues are determined. After the pleadings are finished there is a pretrial process where the parties prepare for trial and try to settle the case. In recent years courts have typically developed systems to manage the pace of this to endeavour to bring matters to trial within a reasonable time frame. The rules of discovery require a comprehensive list of all documents which might be relevant which can be inspected (discovery in Australia does not go so far as the United States of American system of depositions and oral discovery). Parties can interrogate each other with questions that are relevant and not so speculative as to be regarded as fishing. These must be sufficiently answered. The

right of interrogation has been circumscribed as an abuse. This is discussed below. Parties can be asked to admit, or deny relevant facts. However apart from the discovery of documents, parties generally are not required to disclose to each other the evidence they will call at the trial. An example of how jealously this non-disclosure of evidence is guarded is the instance where a defendant insurance company has a private investigator take film of a plaintiff undertaking physical activity inconsistent with the claimed injury. The defendant is not required to disclose the existence of the film, which is kept as a surprise for the plaintiff when s/he is cross examined at the trial. When it was proposed to change the South Australian Magistrates Court rules to require discovery of such a film opposition from the Law Society led to the proposal being abandoned.

The trial process was designed for lay juries although they are not, and never have been used in lower courts. Hence the presentation of evidence is oral and highly structured to prevent any unfair inferences being drawn by a lay jury. For example, a rule prohibits hearsay evidence, rather than admitting such evidence and giving it diminished probative weight. The plaintiff goes first and all facts for its case must be proved on the balance of probabilities, usually by calling witnesses. The documentary evidence is proved by calling witnesses who are able to verify the validity of the documents. The lawyer acting for a party calling a witness will have taken a careful statement from the witness beforehand and expects to take them through that statement with non leading or open questions. The opponent then may cross examine the witness on any relevant issue and as to their general credibility. The party who called the witness can then re examine but only to clarify ambiguities or new topics raised in cross examination. The magistrate listens to all this but generally should not interfere except to clarify minor issues. Subsequent witnesses do not hear their predecessors. The skilled cross examiner has as good a chance as can be constructed, for normal methods of advocacy, to expose errors in oral evidence, whether they are caused by deficiencies of observation, recall or expression, or lies.

In theory the parties control the pretrial processes and the presentation of evidence.

However the rules of pleading, discovery and evidence are highly technical and the suggestion in this description of actual party control is misleading. The parties' legal advisers in fact control the process. Unrepresented parties are permitted but have a great deal of difficulty negotiating the process. It is noted that legal aid generally does not extend to civil cases, outside family disputes, in Australia. Ways of financing legal fees are discussed in Chapter 7. The conclusion is that legal cost insurance, including contingency and conditional fees, can increase access to legal assistance to pursue and defend claims, but in lower courts, such as the South Australian Magistrates Court, without legal aid, there will be a significant number of unrepresented parties, particularly those defending claims.

If represented parties attend the pretrial processes they are spectators and at the trial itself make no direct contribution to the case, except when they give evidence. They sit in the body of the court and if they communicate with their barrister it is by hastily scrawled notes. In expensive cases they may have solicitors to whom they give instructions. The solicitor conveys these at convenient intervals to the barrister. The contribution of the parties to the trial usually is to give evidence. The evidence of the parties is often a major part of the trial. Much time is spent on their version with open questions and then they may be cross examined at length.

The Magistrate is aloof from the arena. S/he sits apart and above the arena and may say nothing during the evidence of a witness, save to rule on arguments about whether a question or answer is admissible under these technical rules of evidence. At the end both parties sum up and a judgment justifying the decision on both facts and law is delivered. An accurate verbatim record is kept of the proceedings which are subject to appeal.

There has been much discussion and more than a little criticism of how the common law courts fulfil their role of fact finding. The adversary common law model is under critical scrutiny and the supposed inquisitorial European model is championed by some as the panacea for its supposed ills (for a recent discussion see Stacy and Lavarch 1999). Describing the European model as inquisitorial is in fact mixing the

European approach in criminal cases with civil cases. In the latter there are many aspects in common with the common law adversary code. However the inquisitorial tradition is seen in the control that courts exercise over the gathering and presentation of evidence. Civil procedure in Germany is discussed as an example of the civil code approach.

Procedure and fact finding under the German Civil code

In German eyes their legal system for dealing with civil disputes is an adversary, party controlled process. Key features only of the system are discussed to identify the common ground and differences to see if they are informative.

Germany has a unified court system. The lower first instance court is the Amtsgericht (disputes up to 10,000DM; at the time of writing 1DM was worth slightly less than A$1) The higher first instance court is the Landgericht. Apart from the fact that in the latter the bench is sometimes constituted of three judges for these purposes the procedure of both courts is similar.

The republic of German states is governed by The Constitution, the Grundgesetz or 'GG'. The Federal Civil Procedure Code, the Zivilprozessordnung, or 'ZPO' regulates the procedure of the courts. The substantive law largely is prescribed in the Civil Code, the Bürgerliches Gesetzbuch, the'BGB'. Quotations of these Acts are from translations by Goren, 1990 and 1994.

There are ten basic principles of civil proceedings (Koch 1998, pp.27-35):

- The principle of party control
- The principle of adversary hearing
- The duty of the parties to tell the truth.
- The principle of orality.
- The principle of administration of justice in open court.
- The principle of immediacy.
- The principle of continuous hearing.

- The principle of a speedy trial.
- The right to be heard.
- The right to be tried by the lawful judge.

The last, the right to be tried by a lawful judge, is a constitutional guarantee of access to courts and is one reason for a relative lack of tribunals in Germany. For comparative purposes I shall discuss only those bearing upon the identification of the key elements of an adversary process and differences surrounding the greater control that German courts exercise over the gathering and presentation of evidence. These issues are discussed under the headings of pleadings, pretrial discovery and case management and the trial. The similarities and differences can be seen immediately in the nature of the pleadings which as in the common law allow the parties to define the dispute, but disclose the evidence that will be available to prove the facts alleged. This delivers to the court the ability to manage the presentation of that evidence.

Pleadings.

The right to be heard and the principle of party control

The right to be heard is fundamental to an adversary process and is guaranteed in the German Constitution (Article 103 GG). It has expression in firstly in the need for effective service of process. Once the parties are engaged in the process they control the life and history of a lawsuit and its subject matter (§ 253(2) ZPO):

> "The statement of claim must contain:
>
> (1) the description of the parties and of the court;
>
> (2) the precise statement of the subject matter and grounds of the claim raised, as well as a specific bill of particulars."

The defendant is required to appoint a lawyer and file a written defence (§§ 271, 275, 276 & 277 ZPO). There is a court administered legal aid system with a merit test assessed by the court. It is interesting to note that the German system, which is relatively informal, insists on legal representation. It is a contradiction for the common law system to maintain sometimes intricate processes, dependent on legal

expertise to negotiate, whilst permitting unrepresented parties. It has been noted that without legal aid, there will continue to be a significant number of unrepresented parties in the lower courts. These will be particularly defendants, who have not engaged in the system by choice. It is incumbent on lower courts, such as the South Australian Magistrates Court, to ensure that their systems are not themselves an obstacle to unrepresented parties. Otherwise they may lose as a consequence of their inability to negotiate the process rather than winning or losing on the merits. It is perhaps ironic that the German system, which insists on legal representation, has features which if they were adapted to the common law system would allow the unrepresented party to negotiate the process more easily.

The parties are obligated to disclose facts and if they admit them the court will accept there accuracy without further inquiry as to their truth (ZPO):

> "§138 **[Duty to declare facts]**
>
> (1)The declarations by the parties concerning factual circumstances shall be complete and truthful.
>
> (2)Each party shall answer facts asserted by the opponent.
>
> (3)Facts which are not expressly denied shall be deemed as admitted, unless the intention to deny them is manifest in the other declarations of the party.
>
> (4)A declaration of lack of knowledge concerning facts is permissible only concerning facts which were not personally dealt with by the party or subject of his concern."

The court is bound by the relief sought (§ 308 ZPO). Further, a plaintiff can withdraw a claim and the parties can settle a claim on their own terms. If the parties settle, they can record it in court to have the same effect as a judgment.

An example of a translated German claim appears in Appendix 5.A (Gottwald 1999). This is a simple claim for repayment of a small loan between ex spouses. The facts are pleaded and then the manner of proof of those facts is set out. In this case the loan transaction is pleaded and it is asserted it will be proved by:

"Proof: 1. Examination of the parties

2. Production of receipt of payment."

and a demand for repayment is pleaded and will be proved by:

"Proof: Presentation of a copy of that letter."

The claim also states the procedural and legal principles that will be relied upon. This type of claim fulfils the essential function of a statement of claim and defence, namely to define the territory of the dispute both to allow the parties to prepare to meet the claim and for purposes of relevance and res judicata. As with the common law system the parties commence the dispute and define the extent of it. However the differences to a common law pleading are noteworthy. In essence they are the brevity of the pleading as to the facts and the disclosure of the evidence that is available to prove them. Both these differences have their basis in the different approach to the presentation of evidence in Germany.

In Germany the court can choose a preliminary procedure where the parties file relevant documents or go directly to an oral hearing (see below). The lawyer filing this claim, in view of the factual simplicity of it, has asked for an oral hearing and has not filed the documents with the claim. The court chooses the procedure. In the event of the alternative written preliminary procedure the documentary proof would be attached to the claim. Factual complexity is dealt with by filing the documentary evidence at the outset rather than lengthy and detailed pleading of facts. At the same time the available evidence is disclosed to enable the court to decide the appropriate procedure and manage its presentation. In contrast in pleadings in the South Australian Magistrates Court, a party can be required to allege the relevant facts in detail but the actual evidence is not disclosed. Thus a case may be sustained until trial without the required evidence to prove the pleaded facts being available. Discovery procedures in the common law process allow parties to access each other's documents but otherwise evidence is not generally disclosed until the trial.

Case management and pretrial discovery

The principle of a speedy trial

Each case is allocated to a particular judge by a careful procedure to prevent parties, or any one else choosing the judge. The judge has responsibility for that case to its conclusion (subject to disqualification for bias in necessary instances). The judge can choose either an early oral hearing (§ 275 ZPO) or a written preliminary procedure (§ 276 ZPO). The court will choose the procedure best suited to bring each case to a prompt conclusion. A summary procedure based on documentary evidence is also available.

If the case is factually complicated it is common to adopt the written procedure. Here the defendant has two weeks to give notice of intention to defend and another two weeks to submit reasons for doing so. The plaintiff then has an opportunity to respond to the defendant's reasons. Under its duty to promote proceedings the court has the option to set time limits to file, amend and clarify written statements (§ 273(2) ZPO). Failure to comply with time limits can result in a default judgment. The plaintiff then has an opportunity to respond to the defendant's reasons. This procedure discloses a different approach to the manner of the presentation of evidence in the South Australian Magistrates Court. In Germany the court decides the manner of its presentation. In factually complicated matters it may require documentary evidence to be filed before the trial. It is common to set the case for a hearing with the parties summonsed to discuss settlement first. Some essential witnesses may be summonsed to this hearing by the court and their evidence heard. If the case does not settle then the hearing will have to be adjourned for the other witnesses. This is a breach of the principle of a continuous hearing but has become common practice (Schmitz 1999).

The early oral hearing will be chosen primarily in matters which are factually clear and the court merely needs to make rulings on points of law to progress it further. Generally in neither method are there conferences dealing with pretrial processes as occur in the common law method. Such conferences in common law procedure have a purpose of assisting the parties in the discovery process. Generally they have no

function in the presentation of evidence to the court. The German approach has a much greater extent of court control and management of the presentation of evidence.

Discovery

The parties have a duty to disclose completely all relevant facts, even if they are unfavourable (see § 138(1) ZPO above). This is subject to a right to withhold facts that might lead to a criminal prosecution or a counterclaim. Further this obligation under the code breaches the principle of Roman law (which influences the code countries) that a party does not have to deliver weapons to the other party's hands. On this is founded a culture against discovery and an obsessive view that evidence should not be obtained by fishing (Stürner 1999). Third parties (§§ 428- 409 ZPO) and court officers can be ordered to produce relevant documents. If a party deliberately destroys or suppresses documents required by the other party the court can regard the document as proved (§ 444 ZPO). In general, documentary evidence is regarded as the safest and most reliable form of evidence

It is interesting that the German approach which has a greater emphasis on the use of documentary evidence has limited ability for parties to access each other's documents, leaving the opportunity to parties to hide adverse documents. In some quarters this is acknowledged as an area where there is room for refinement (Schlosser 1998). In contrast the common law approach gives much greater access to the opponent's documents in search for the 'smoking gun' which infers the other side's culpable conduct, but then leaves the method of proof to oral evidence at the end of the process. There is concern that the discovery process can be used to build up expense and cause delay (an example is discussed below). If common law courts were willing to add to the discovery tradition a willingness to require documentary proof to be produced to the court early in the process it could narrow the factual controversy and reduce the expense of unnecessary discovery, whilst retaining the benefits of the discovery process.

The apparent disadvantage to parties in the lack of discovery powers in the German system is ameliorated by some other aspects. A powerful advantage to plaintiffs

which largely obviates their need for discovery has been achieved by the change in the onus of proof in product liability and medical negligence cases. This is also an instructive example of how the judiciary in the German civil system assume a legislative function through the use of precedent. These precedents are based on an interpretation of § 282 of BGB which provides:

> "**(Proof in case of impossibility)** If it is disputed whether the impossibility of performance is the result of a circumstance for which the debtor is responsible, the burden falls on the debtor."

Judicial decisions have extended this to apply generally to the negligent performance of contract. In practice, this has led to prima facie strict liability for product liability cases and gross medical malpractice. The onus is effectively shifted to the manufacturer/vendor or the medical practitioner to establish that no negligence occurred. This puts the onus on the party with the knowledge, thereby reducing the disadvantage of the opponent without discovery. In practice substantial discovery will be made in the usually detailed pretrial submission to rebut the reversed onus. This judicial innovation is contained now in a special piece of legislation known as "Produkthaftungsgesetz" (abbreviated as "ProdHhaftG", or PHG).

A form of disclosure known as a 'secondary duty to disclose' may also be imposed on defendants in product liability cases. This leaves the burden with the plaintiff but the court calls upon the defendant to respond in detail to the allegations against it. This is not sanctioned by the code but by the likelihood of judgment if there is not an adequate response to the request by the court. A defendant may however refuse to do so and hope for more favourable treatment in the appeal court. These examples demonstrate how methods other than discovery can be used to ensure parties make fair disclosure.

The greater control that German judges exercise over the presentation of evidence is most obvious at the trial.

The trial

The principle of administration of justice in open court and the principle of immediacy

Apart from Family Court and custody matters, the court must generally be conducted with the public being admitted. The same court that conducts the oral hearing must give the judgment. There is, however, a right to commission a judge to hear special evidence. In the Landgericht, the higher state court, cases are theoretically heard by a panel of three judges who often delegate one to hear evidence and report to the panel.

The principles of an adversary hearing and of orality

In Germany the civil procedure is adversary (there is an exception in family law and domestic disputes, where the court takes more initiative) and oral (there are exceptions in the cases of uncontested debt- mahnverfahren discussed in Chapter 4, and for summary and default judgments). This sounds like the common law method, but is very different.

The judge decides when it is time to set the main oral hearing. This usually lasts no more than a day and, indeed, it may only take half an hour or more since many of the issues will be obvious from the written statements. The parties themselves do not have to appear personally unless the court orders them to be there. They often do attend and participate actively in the proceedings, sitting beside their lawyers and sometimes effectively running their case. The court is informal, rather like a tribunal. I include two photos of courts in Stuttgart.

Photo 5.1: Richter Utz with expert in the Amtsgericht, Stuttgart.

Please see print copy for image

Photo 5.2: Einzel Richter Barth with plaintiff and defence lawyers in the Landgericht, Stuttgart.

Please see print copy for image

The judge is wearing a simple black robe and is sitting at the head of the table. Court experts sit beside the judge. The parties sit beside their lawyers on either side. The

witness sits in the chair in the middle. A diary of the hearing of a simple claim for damages caused in a motor vehicle accident is annexed in Appendix 5.B. This was conducted by Richter Utz in the Amtsgericht (lower court) with a court expert just before Photo 5.1 was taken. It is an example of the how the judge was informed of the facts from the file before the case and how she then conducted the hearing, rather than the lawyers as would occur in the common law tradition. Here a court expert participated. The role of court experts is discussed in more detail below. The case settled after evidence was taken and the role of the judge in making suggestions leading to the settlement, and the cost implications are noted. A diary of a case conducted by Richter Barth appears in Appendix 6.A, where it has relevance to judicial involvement in settlement discussions.

The parties define the subject of the dispute and nominate the witnesses to be called. However the inquisitorial tradition is seen in the control the court exercises over the process within those parameters. A German court's powers in relation to the presentation of evidence are much more extensive than the common law tradition. For example (ZPO):

> "§ 273(2) The presiding judge or a member of the trial court designated by him may:
>
> 1. require the parties to supplement or clarify their preparatory written pleadings, as well as to present documents and other persons to give up objects suitable for deposit in the court, and especially set a time limit for the clarification of certain points requiring clarification;
> 2. request public authorities or a public official to give information relating to documents and to furnish official data;
> 3. order the appearance in person of the parties;
> 4. summons witnesses on whom the parties rely, and experts to appear at the oral hearing."

It is the court that exercises these powers to bring the evidence to the hearing, not the parties. The hearing commences with the court summarising the factual and legal

issues by reference to the written material on the file. The court is under an obligation to attempt to reach an amicable settlement at every stage of the case and will typically discuss a possible settlement before the witnesses or experts are heard (§ 279 ZPO). A settlement obtained in court by that method is equal to a final judgment. If the case does not settle evidence is then taken. This is an important cost event because upon the taking of evidence the cost stake increases by another BRAGO unit (for an explanation of this see Chapter 7).

There are five different means of presenting evidence, each regulated by specific norms of the ZPO (Koch 1998, p. 110):

" 1.	Inspection by the court	(§ ... 371 et seq. ZPO),
2.	Witnesses	(§ ... 373 ZPO),
3.	Expert witnesses	(§ ... 402 et seq. ZPO),
4.	Documents	(§ ... 415 et seq. ZPO), and
5.	Interrogation of a party	(§ ... 445 et seq. ZPO)."

In addition, a court may ask administrative bodies for information and a court appointed expert can conduct inspections.

There is some controversy as to how far a court can take into account facts, which have independently come into its own knowledge or are outside the argument of the parties. Professor Dr. Peter Schlosser suggests that a court can achieve this by appointing its on expert to brief it on the topic or by the court asking a party for information on a topic and drawing an adverse inference if the request is met with refusal (Schlosser 1999). The issues surrounding court appointed experts are discussed under a specific heading below.

The court summonses the witnesses that the parties have nominated. As an ethical constraint the parties' lawyers will not have taken statements from the witnesses. A witness summonsed is obliged to appear. Exceptions from compellability are near relatives of a party, priests, doctors, notaries, attorneys and judges (§ 383 ZPO).

Evidence under oath, although suggested under § 391 of the ZPO is, in practice, exceptional. However the obligation to tell the truth is explained to a witness and it is an offence to give false evidence. The court decides the order in which the parties witnesses are called and conducts the examination of them. The judge conducts the examination and only after that are parties and their lawyers allowed to ask additional questions. Although the judge will typically ask open questions there is no adherence to anything resembling the formality of common law evidence in chief, cross examination and re examination. The evidence is summarised by the judge into a dictaphone and the witness is asked to acknowledge the accuracy of the summary.

It is confronting to a common law lawyer used to lengthy evidence and cross examination of the parties to find that in Germany parties are generally not competent to give evidence in their own cause because their evidence is biased (Koch 1998, p.112).

> "In any case the parties are the worst evidence possible since they are naturally biased in respect to a certain outcome of the proceedings and are not really inclined to tell the truth."

A party can nominate the opponent as a witness but is unlikely to do so because s/he will not have an opportunity to give evidence to contradict the opponent. There is less need for parties to give evidence than under the common law system as a consequence of a strict parole evidence rule in contract matters. However the inability of a party to give evidence on his or her own behalf underlines a different conceptual approach. In Germany the court is aware of the parties' versions from the written statements but goes about its work by reference to the surrounding facts. Under this method inaccuracies are exposed and the liar is caught out, not by the advocacy skills of the crossexaminer but by the weight of the other evidence. An issue that arises from the parties not giving evidence is the potential for lack of party involvement. However the process is not alienating to the parties just because they do not give evidence. On the contrary if they attend, they actively participate, asking questions, making submissions and participating much more directly than in the

common law tradition where they sit behind their lawyers who run the process for them.

At the end of evidence the court is bound to discuss the outcome with the parties. The lawyers sum up for each side, and the court can then given an immediate judgment but usually adjourns it for up to three weeks for the reading of a judgment. Reasons for the decision must be given. Factual decisions are made on the balance of probabilities with the plaintiff bearing the onus of proof (subject to the reversal of onus noted above). The decision is subject to an appeal at which fresh evidence can be given.

The German trial process emphasises the greater control the court exercises over the presentation of evidence and the greater reliance on documentary evidence compared to the common law system.

Similarities and differences between the common law and German civil code methods

From this several key similarities and differences can be extracted. Some similarities are:

- the parties are entitled to be served,
- the parties define the dispute,
- the parties can end the dispute by agreement,
- the parties nominate the evidence to be brought to the court,
- the parties can question witnesses and can be heard on all issues,
- proceedings are conducted in open court in the presence of the parties and their legal advisers, and
- reasons for judgment are given, are subject to appeal and have an effect of res judicata.

I identify these as essentials of an adversary process. The fact that the parties must be notified of a dispute, their ability to define its boundaries, the evidence that is

brought to bear and to end the dispute, leave the ultimate control of it in their hands. This much must be in the parties hands for it to be an adversary contest between them, rather than an errand, or inquiry imposed upon them, by a stranger to the dispute or the court. Their opportunity to test the evidence and be heard on all issues is the actual adversary process. The fact that it occurs in an open forum, the decision must be justified and the process and the decision is subject to appeal ensures that departures from the adversary process, and other errors can be corrected by the appeal court. The fact that the decision is final, subject only to appeal, ensures that this adversary process determines the dispute and is not just an adversary skirmish.

However there are profound differences in style and method. The judges in Germany are less formal than the common law tradition and participate more in the process, including attempts to settle. In Germany parties disclose the evidence they have in the pleadings and submit it to the court in the form of statements and documents filed before the first hearing. In the common law method parties do not disclose their oral evidence until the trial, but it has a more comprehensive disclosure of documents between the parties but not to the court. In Germany the court manages the presentation of the evidence identified by the parties but in the common law method the parties have not disclosed their evidence to the court, nor to each other and manage its presentation at the trial. The fact finding and legal rulings commence at the first attendance before the court in Germany in contrast to the extensive pretrial processes in the South Australian Magistrates Court. The emphasis on documentary evidence rather than oral evidence in Germany has an apparent weakness in the relative lack of ability to access the opponent's documents through discovery or a like procedure. The way around this, by reversing the onus of proof, although not necessary to overcome discovery weaknesses in the common law tradition may be a useful method to change the balance of power between parties. The role of the parties themselves under both systems is very different. It is a confronting notion to a common law lawyer that parties are so biased that their evidence should not be admitted. However in Germany the parties are much more involved in the process. They can actively participate in the trial, asking questions and making submissions. They must have lawyers but the role of the lawyer is more as an adviser rather than

controlling the process as occurs under the common law system. If opinion evidence on technical issues is required the German courts retain their own experts to advise them on those issues.

These differences may be grouped as:

- the early disclosure by parties of evidence both to each other and to the court,
- court involvement in settlement attempts,
- court management of the presentation of evidence,
- emphasis on documentary evidence rather than oral evidence,
- the informality of the trial,
- the different role of the parties who:
    - have legal representation,
    - do not give evidence, but
    - are more involved in the process,
- court use of experts to assist in the determination of technical issues.

Court involvement in settlement attempts is the subject of the next chapter (6). The early disclosure of evidence to the court is necessary if the court is to manage its presentation. For the purpose of analysing effective methods of fact finding I shall next focus on who should manage the presentation of evidence from which facts are concluded and the role of documentary and oral evidence. For that purpose I give some examples of how the common law method of leaving the pretrial gathering of evidence in the hands of the parties can in some instances lead to efficient fact finding, and in others, abuses that may defeat meritorious claims. I then give some examples of how court management of the presentation of evidence at trial can lead to a more efficient focus on the key issues. This leads to a conclusion that in appropriate cases the common law method would benefit from greater court control of the management and presentation of evidence, both in the pretrial process, to narrow the issues to be determined, and at the trial itself. It follows that the same magistrate will need to manage the case from its inception, parties will need to disclose the evidence upon which they intend to rely and that important documentary

evidence will need to be available to the court prior to the trial. Implicit in this is a blurring of the distinction between the pretrial process and the trial.

Informality and the different role of the parties go beyond style. They are possible because of the greater control that German courts exercise over the presentation of evidence. The sometimes elaborate rules of process in the common law system are an inherent part of the system that allows the bench to be largely mute and detached. With the court managing the process it can also be less formal. I shall conclude that there are some advantages in this because the process will be more accessible to the parties. It will give unrepresented parties an enhanced ability to negotiate the process to ensure that they win or lose on the merits.

Implicit in the differences between the two systems is a difference in the purpose of the judge. If magistrates are to exercise greater control over the gathering and presentation of evidence, their purpose will necessarily extend beyond merely choosing between the parties' versions. The proper purpose of magistrates is discussed. Finally in relation to ways to adapt these different approaches to lower courts such as the South Australian Magistrates Court the use of court experts is discussed.

Examples of the use and abuse of the common law fact finding method

At its best the common law method provides a sure way of arriving at a certain version of the facts or at least the surrounding facts via a process replete with procedural safeguards and without a wasteful use of the parties', nor court resources. However, inherent in the party control of the extensive pretrial processes and the oral evidence tradition is the potential for abuse. I shall discuss some examples to demonstrate this and rather than use theoretical cases I have taken some actual examples from my experience.

An example of the process working well was a case I decided involving the issue of whether a bank could enforce a guarantee. In broad brush the case involved guarantees by directors of the trading account of a restaurant. Subsequent to the

signing of the guarantee the directors, who were in a defacto relationship, separated and the male continued to manage the company that ran the restaurant. There were subsequent changes in the trading arrangements between the restaurant business and the bank. The key issue was whether those changes singly, or collectively, altered the nature of the original debt sufficiently to release the guarantee. I held they had. The point for this purpose is that through the discovery process the parties agreed all the relevant facts and the trial proceeded just as addresses on the applicable law to be applied to those facts. This was an efficient use of party controlled discovery to reach a settled version of the facts and the judicial determination was based upon that version. I note in this case the plaintiff was well resourced and the defendant was not. The defendant had arguments with merit and was able to gain access to the documentary evidence held by the plaintiff to prove those facts through the discovery process. The plaintiff could not contradict its own records. The plaintiff having won at first instance, settled during the appeal process on a basis unknown to me. However the pretrial processes of the common law method can be abused to cause a far less satisfactory result.

A recent judicial finding of the abuse of pretrial tactics was made in the Federal Court (*White Industries (Qld) Pty Ltd,* 1998). This is a common law higher court but the same abuses can and do occur in lower courts. This has been upheld on appeal (*Flower and Hart* 1999. References are to paragraph numbers.). The judge in first instance found that the lawyers acting for a developer Caboolture Park Pty Ltd suggested it institute proceedings against its builder White Industries (Qld) Pty Ltd as a pre-emptive strike to assist it in defending an anticipated claim by the builder. They used pretrial processes for delay and obstruction. The judge found:

> "The institution of the proceeding by Flower & Hart on behalf of its client was flawed and an abuse of process from its inception because of the illegitimate purpose for which the proceeding was instituted. That abuse of process was exacerbated by the manner in which Flower & Hart conducted the proceeding and the obstructionist and delaying tactics in which it indulged.

In the circumstances which I have described I am satisfied that Flower & Hart's institution and continuation of the proceeding falls within the principles and the authorities to which I have referred and warrants an order that Flower & Hart pay White's costs of the proceeding on an indemnity basis. The institution and continuation of the proceeding was a serious breach of Flower & Hart's duty to the Court, it was an abuse of process, it was an unreasonable institution of a proceeding with no prospects of success, it was not brought to vindicate a right claimed by the client and it was brought for an ulterior purpose. Not only was the institution of the proceeding unreasonable, so was its continuation. ...

The impetus for the institution of the proceeding came from the lawyers. It was their suggestion that the proceeding be instituted immediately. Had the advice and recommendation in the letter of 18 December 1986 not been given the proceeding would not have been instituted. It was only because Mr Callinan and Mr Meadows came up with an "avenue of relief" (the terms of the letter of 16 December 1986) that the proceeding was instituted. The client was not pushing for a proceeding to be instituted claiming particular relief; rather the client was saying - is there anything we can do? Flower & Hart was HDC's regular firm of solicitors and I am satisfied that if Mr Meadows had not given the advice and recommendation he gave on 18 December 1986, which was accepted by the client, the proceeding would not have been instituted claiming damages for breach of s 52, fraud and negligence."

The appeal court in upholding the decision set out correspondence which made clear the deliberate abuse of pretrial processes:

" 20 Mr Meadows, who was not a litigation expert, arranged for his colleague Mr Lockhart, who was, to act for Caboolture in the proceedings. Among other steps that were taken Mr Lockhart briefed counsel to settle a request for particulars of the defence and cross claim that had by then been filed by White Industries. Counsel returned the request with the following letter:

> 'We consider that, having regard to the general strategy which has been adopted in this action to date, there is some merit in taking the Respondent's solicitors to task in respect of certain aspects of their client's Defence and Counter-Claim; to that end, we have drafted a letter to those solicitors, which is self-explanatory. Subject to obtaining appropriate instructions, we recommend that a letter in substantially the same terms as our draft should be sent to the Respondent's solicitors at the earliest possible time.
>
> **We have also, as instructed, drawn a Request for Further and Better Particulars, which is enclosed herewith. We were tempted to prepare a Request which was even more searching and extensive; however, on reflection, we consider that the client's tactical objectives will be best served by adopting an attitude which is not transparently obstructive.** We regard the Request which we have drawn as being not unreasonable, having regard to the breadth of issues in the action, and the substantial amounts of money involved.'

21 On 10 April 1987 Mr Callinan and Mr Meadows went to Melbourne to review the documentation held by Caboolture. In an opinion given after that visit Mr Callinan advised that junior counsel should commence to draft an extensive set of interrogatories. He said:

> 'I reiterate that the most promising way of achieving this is by having ready as soon as possible, an extremely comprehensive set of Interrogatories.'

22 Ultimately a draft set of interrogatories comprising 700 pages in all and dealing with over 500 variations was prepared. Not surprisingly, no order was ever made giving leave to administer these interrogatories.

23 At various stages steps were taken on behalf of Caboolture which could be seen as supporting a conclusion that they were taken for tactical purposes and to delay the proceedings coming to trial. These are detailed in the reasons of the learned primary judge and need not be repeated here. ...

26 On 7 June 1988 Caboolture opened its case. Ultimately the trial occupied 154 hearing days. **An application for summary judgment, which was argued on 22 June 1988, was dismissed, not because Caboolture's case on the evidence it had filed was not hopeless, but because Caboolture might be able to rely on evidence not yet before the court.**

27 As may have been expected the case did not go well for Caboolture. ...

30 On 28 July 1989 a receiver was appointed to HDC (Caboolture's parent company). A receiver was appointed to Caboolture on 17 August 1989. On the same day Caboolture's application was dismissed. Judgment on the cross-claim, for a lesser sum than originally claimed, was given on 6 April 1990. An order was made against Caboolture for the costs of White Industries on the proceedings initiated by Caboolture to be paid on an indemnity basis. In so ordering Ryan J said:

> 'Having regard to the evidence of Caboolture Park's own witnesses, Messrs Herscu, Briggs and Bennett, I consider that Caboolture Park, properly advised, should have known before instituting its application, or early in the lengthy process of amendment needed to torture the statement of claim into disclosing causes of action in fraud and under s.52 and to provide appropriate particulars, that it had no chance of successfully proving those causes of action.'" (author's emphasis added)

Here are findings of a false case being raised on the pleadings, abuse of pretrial processes of requests for further and better particulars, rejected interrogatories and

other tactical manoeuvres to delay and attempt to defeat an opponent with a meritorious case. An application for summary judgment 15 days into the evidence was defeated, "not because Caboolture's case on the evidence it had filed was not hopeless, but because Caboolture might be able to rely on evidence not yet before the court." Caboolture's pleadings had been "tortured" into a form that disclosed the possibility of a meritorious claim and the court had to wait for another 139 days of hearing (a total of 154 days) to find there was no evidence to substantiate the pleaded facts.

The fact of abuse by the solicitors Flower and Hart only came to light because their advice came to notice in the liquidation of their client. This was not an isolated abuse of the common law pretrial processes. Such abuses are common enough to have a name: 'deep pocketing' your opponent, that is making the path to the trial so tortuous and expensive that the opponent cannot afford to go to the end of the path. As another example I remember a case, which was handled at a large commercial firm in South Australia. The defendant agreed to purchase an aeroplane subject to a satisfactory test flight. On the test flight he expressed satisfaction with it but remembered he needed to go to an important meeting at a different place remote from the airport. He filed a supplementary flight plan and took the plane to a different air strip. The defendant never paid the purchase price but kept possession of the plane. The plaintiff sued. The defendant counter claimed for misrepresentation of aspects of the plane and breaches of warranties of quality which allegedly caused him damages greater than the value of the plane in the nature of loss of business, loss of business opportunity and the like. The defence of the claim and prosecution of the counterclaim were conducted on the defendant's side with the abuse of every tactical manoeuvre to occasion complexity and delay. The case settled several years later on the court steps by both claim and counterclaim being withdrawn and each party bearing its own costs. The matters complained of in the counterclaim had no substantive merit.

These are examples of specious counterclaims by defendants and the use of adversary procedural processes to pursue them for the purpose of defeating the plaintiff. The

blame in the former example was placed on the lawyers. The clients may be cheerful participants in the abuse of process to their advantage and willing upon success to pay a generous account. The common law process with its emphasis on party/lawyer control permits the exploitation of weak arguments by parties who have no merit in the substantive dispute. The client has the incentive of delay and maybe escaping payment to encourage the use of such arguments. Its legal advisers have a substantial financial incentive to construct specious arguments to defeat the opponent because most cost arrangements reward this activity. Reinforcing this incentive for the lawyer is the possibility of the client later suing the lawyer for negligence if all avenues are not explored. These can be pleaded based on factual allegations without disclosure of the evidence to prove them. Courts have to indulge them. They leave the presentation of the evidence to support these allegations in the hands of the parties at the trial at the end of the process. The Flower and Hart conduct was exceptional only because it came to light. Abuses of this type are inherent in the traditional adversary system. If the court processes require the disclosure of evidence and the court can direct the presentation of all relevant evidence on key issues early in the process abuses such as these would be much harder to sustain. In the Flower and Hart example the key issue was whether Caboolture's claims of misrepresentation could be sustained. If the court had been able to demand that it disclose all evidence relevant to that issue and then order it to call that evidence at an early stage of the whole process, the court could have resolved that issue early in the process and could have disposed of Caboolture's claim long before the unsuccessful application for summary dismissal. There can be no doubt that this would have significantly shortened the whole process to arrive at the same result earlier and at a much reduced expense.

These examples of abuse were by well financed defendants with no merit seeking to defeat a meritorious claim. Other factors such as costs affect how a system is used and abused. For example in the United States' version of the common law adversary model, where often there is no cost shifting to the victor, the abuse can occur the other way by plaintiffs with little merit in a claim driving a defendant to make an offer in settlement rather than suffer the expensive oppression of the pretrial

discovery process (Painter 1995). This is exacerbated in the USA because "discovery" describes a much broader set of procedural armaments available to the parties than mere document discovery, as the term is used in Australia.

A view of some German commentators noted above, is that the ability of parties in common law pretrial processes to access the opponent's documents is desirable. It can be abused. The potential for abuse would be reduced if parties, as well as accessing potential evidence from the opponent, also had to disclose their own sources of evidence and common law courts had powers to manage the presentation of that evidence as courts do in Germany.

The pretrial procedures available to the parties are meant to be for the purpose of gathering information in preparation for the trial. These are examples of cases where they have been used, not just to gather information, but in an attempt to defeat a particular opponent regardless of the merits of the cases. Pretrial processes have also been subject to systemic abuse. An example of systemic abuse of a particular type of pretrial process follows. This has been dealt with by courts taking over the process and imposing a requirement on a party to give evidence on oath when making a claim. Courts have not gone the next step of using that evidence as proof of facts to determine the dispute. They should do so.

The abuse of interrogatories

In the 1970s judicial awards for personal injuries in South Australia were relatively generous and personal injury litigation was common (the recent history of personal injury litigation in South Australia is discussed in the context of prelodgment notices in Chapter 6). Defendant's lawyers routinely required standard word processor interrogatories in motor vehicle accidents to be answered by plaintiffs. In Appendix 5.C of this chapter a typical set of these interrogatories and answers is attached. The questions bear the hallmarks of a document that is rewarded by its length. At the end of the case one or other of the parties would pay for the defendant's lawyer's costs of drafting the interrogatories per folio (72 words), the plaintiff's lawyer's costs of perusing them (per folio), taking instructions from the client, drafting a reply (per

folio) and arranging for the signature of them on oath and the defendant's lawyer's costs of perusing the answers (per folio). It was wasteful for plaintiffs to answer them when liability was not an issue and sometimes the detail requested was oppressive. Failure to answer often resulted in delay, orders from the court that answers be forthcoming and attendant cost orders in favour of the defendant who had administered the interrogatories. There were fertile fields to argue technicalities and there is a whole body of case law about whether interrogatories are fishing or oppressive and whether answers are a sufficient answer. After this game had been played out, if the matter went to trial it was common for these interrogatories not to be referred to. To the common law lawyer this is obvious. One calls the witness and detailed statements are material for cross examination not primary evidence. To an outsider it must be astonishing. All this expensive effort to give a pedantically precise version of events on oath and the court may not even see it! In the South Australian Magistrates Court (and earlier in the District Court) the administration of interrogatories of this type in every personal injury motor vehicle claim was identified as a cost building abuse and the right to administer interrogatories was made subject to leave and now they are rarely seen (rule 74, now 76 *Magistrates Rules* 1992).

However then the courts themselves imposed a similar requirement on all personal injury plaintiffs. In the South Australian Magistrates Court the plaintiff is required to file a form 22 at the same time as filing the claim. This is reproduced in Appendix 5.D. The court in prescribing the form 22 is making the plaintiff go through a process in its own name which was seen as an abuse when it was done by the defendant. The justification for this is the need for the plaintiff to commit him/herself to a version of the facts upon which liability will be determined, and the injuries and consequences of them upon which the quantum of damage will be assessed, to allow the defendant to make realistic offers. Most personal injury cases settle and the answers to the questions in the form 22 (and their predecessor the answers to interrogatories) no doubt assist that process. To an extent this is duplicating the work that the preaction notice of formulated claim (discussed in Chapter 6) and the pleadings are meant to perform. Making it a requirement of the

court does save the costs of defendants' lawyers of drafting the interrogatories and technical arguments about the adequacy of answers largely have been eliminated.

For the cases that need the court to make findings of fact this effort to prepare the answers on oath that the court requires in the form 22 cannot used by the court as a primary basis of fact finding. It is only used as an extension of the pleadings, that is as assertions and not as proof of the facts so asserted (Holyoak 1995). At trial the plaintiff still gives exhaustive evidence about preaction injuries, the circumstances of the accident and the consequences, independently of the form 22 particulars. If the plaintiff departs from the version in the form, defence counsel has a sound basis for cross examination. A document used by defence counsel for cross examination is still not evidence but can become evidence at the choice of the plaintiff's counsel. Only if that choice is exercised does the form 22 become evidence and then only of a prior inconsistent statement.

This is a powerful example of how under the common law system the oral trial is the sole basis of evidence for fact finding. There is no sound logic to this. The South Australian Magistrates Court crossed the rubicon that a party cannot be required to disclose non documentary evidence until the trial when it required the plaintiff to give written answers on oath to the form 22 at the same time as the claim is filed and served. Such a formal sworn statement should be available to the court as primary evidence of the facts in it. The other side can cross examine on any aspect of it which its counsel wishes to contest.

The adherence to the requirement that facts be proved by oral evidence at a trial at the end of the process wastes many opportunities earlier in the process to decide uncontroversial facts and causes wasteful repetition of efforts in marshalling evidence of facts. Before considering ways of doing this I shall give two examples of small claims I have heard which are examples of typical lower court cases that have been dealt with more effectively as a result of court control of presentation of the evidence.

In small claims trials the process is styled as an inquiry and lawyers are excluded (s.38 Magistrates Court Act 1991). The Magistrate directs the presentation of the evidence.

The first case was a dispute between a business and a telecom supplier (*Ian Wood Homes* 1999). In about September 1998 the customer (plaintiff) had transferred three existing mobile phone accounts to the telecom company and obtained from it an additional two new phones, without charge for the hardware. Minimum values for monthly calls were agreed. Large minimum values of calls were agreed on the two new phones to justify the free hardware. However, there was an additional notation on the written contract that the calls were bundled to a minimum level of A$600 per month. The effect of this was in dispute.

Where a minimum usage on a phone was A$120 per month, the charge out rate for a local call of 30 seconds or less was 16 cents. The evidence of two witnesses from the plaintiff was that the agreement for bundling allowed the use of all phones to be averaged across all of them so that if the total use reached A$600 each of them on average reached the A$120 (5 @ A$120=A$600). In this event it was agreed that each of them would incur the lowest local call rate, viz 16 cents for a call of up to 30 seconds.

It was the defendant's contention that the effect of the bundling was merely to allow a total use across all phones to be regarded as compliance with the original minimum undertakings. The effect of this was that there would be no penalty in relation to the supply of free hardware to the customer if one phone was used very little but another in compensation was used more than the agreed minimum. The averaging was not to have effect to apply the lowest minimum rate to all the phones. This was the reason the telecom company charged for calls on the phones with low use at more than the 16 cent minimum rate for a 30 second call.

The customer did not notice that for a while. When it did, it complained. It undertook the calculation of what it said it should have paid, and paid that. It refused

to pay the balance. This case is also interesting as an example of the significance of credit referencing to commercial decision making (see Chapter 4). A Notice of Demand from a telecom company threatened the plaintiff in these terms:

> "Failure to settle this debt will also lead to a payment default being listed with the Credit Reference Association of Australia (CRAA) which may have an adverse effect in future credit or loan applications. Your account will then be referred to our collection agency for debt collection and if any legal costs are incurred, they will be your responsibility."

Upon receipt of the threat to refer the matter to the CRAA, the customer took out a pre-emptive action for a declaration that nothing owed. There was a counterclaim from the telecom company for calls at higher rates for several of the phones.

The key issue was the original agreement. The written notation was ambiguous so oral evidence to resolve that ambiguity was admissible. There was oral evidence from the customer's manager and its accountant, about what occurred at that transaction. The telecom company did not produce evidence from its salesman who was at the meeting. To assess how this oral evidence fits with the surrounding circumstances is a key factor in deciding a version. Hearing it as a minor civil action, I was able to focus on the key issues, viz. what oral evidence was available about the agreement reached at the original meeting, what documentary evidence was available to show what was agreed and finally evidence of the prior and subsequent conduct of the parties consistent or otherwise with what they said was agreed. I accepted the version given by the plaintiff. To reach this conclusion relevant factual conclusions that supported it were that the salesman was keen to make a sale, the access to the lowest rate was important to the plaintiff, and the plaintiff reacted in a way consistent with its version of the transaction, as soon as the higher rate of charging came to its attention. Against this finding were the factual conclusions that it was against the usual charging practice of the telecom company and that it charged in accordance with its usual practice. These are the surrounding facts against which oral evidence is measured to see how it fits. A possible explanation for the conflict was that the

salesman departed from standard policy in making his sale and failed to explain that to his employer. Since I was exercising control over the evidence it is interesting to think about whether I should have insisted that the salesman be called. He would have had a version of the key original conversation. He could have commented on his knowledge of his company charging policy and the possibility of a breakdown in communication between himself and his employer. The defendant gave a reason for his absence and did not suggest I should adjourn the case for him to attend. When I undertake an inquiry in a small claims matter I do not regard myself as merely choosing between the two versions presented to me. I am interested to discover what actually happened. However as long as the defendant knew that the salesman was an important witness and was content for me to decide without him (and it was), I was content to decide the case on the available evidence. I shall briefly return to this aspect later.

There are subsidiary issues in every case. It is useful to distinguish their relevance. To decide a version of the key disputed facts, the surrounding circumstances and conduct will be relevant. I have identified some of these above. There are other issues that must be decided to complete the findings necessary to finalise the case but many of these do not assist in the resolution of the key issues. The proper calculation of the phone charges, once the basis of charging was decided falls into this latter category. Proof would have consumed a lot of time, and would not have contributed to a more accurate result on the main issue. In the Flower and Hart example these were the detail of the contract charges and variations. In this case these were not pursued because I was in control of the presentation of the evidence and used that control to decide a version of the main issue first.

Had this been a trial in the General Jurisdiction with lawyers, there is every possibility that the phone accounts for the five phones over 18 months would have had to be proved with analysis by oral evidence of each of the items which were not in accordance with the alleged 16 cents local call tariff. In this case, once the main issue was decided, the reconciliation by the plaintiff's accountant was not contested. An adversary lawyer would certainly not have been content with that. S/he would

have had her/his party undertake its own analysis. There probably would have been some discrepancies of interpretation and much time and effort would have been spent on oral evidence sorting those matters out, although in dollar terms they would have been small and had no substantial relevance to credit. Time would probably have been spent on proving the value of the equipment provided as part of the transaction.

Another example was a small claim involving a carpenter who contracted with a builder who had taken over the completion of four partially built houses (*Acfield* 1999). His initial agreement was to work on an hourly rate. After several weeks the builder was unhappy with the carpenter's rate of progress. The carpenter also held a supervisor's licence. The builder and the carpenter negotiated a new agreement in writing that the carpenter was to be paid A$1000 each for supervising the four buildings to practical completion. A date for completion was agreed.

There was no dispute that the builder had paid the carpenter all that was owed for the carpentry done on the basis of an hourly rate.

The carpenter failed to complete the buildings by the due date. A week or two after the due date, the builder sacked the carpenter and paid him A$1,000 for one building that was almost completed and $400 each for the remaining three buildings, which was the builder's estimate of the extent they were completed. The carpenter said that the sacking was unjust and he had been deprived of the opportunity to complete his contract. He thought the completion date was unrealistic.

If this had been conducted as a claim in the General Jurisdiction, even if the carpentry work done on an hourly rate could have been quarantined out of the dispute, inevitably adversary lawyers would have involved themselves in a detailed analysis of the extent of the works completed by the carpenter up to the time when he was sacked, both to assess the reasonableness of the sacking and also to assess the merits of any quantum meruit (reasonable remuneration) claimed. An assessment by oral evidence of the work value of four building projects, starting off an uncertain base, could have taken weeks of trial time. There would have been little benefit from this

undertaking.

The plain fact was that the carpenter was working on each of the buildings at the time when he signed the agreement to complete them by a certain date and for an agreed figure. He was in the best position to assess the reasonableness of the time frame and the contract price. When he failed to comply with the agreed time frame for all of the buildings, and a week or two after the completion date had passed he still had a good deal of work to complete on three of them, that was a substantial breach of the contract. If his contract was an entire contract, and was not able to be dealt with on a reasonable fee basis then an analysis of work done would not have assisted that issue. If, as the builder had conceded by making payments, he was entitled to a reasonable assessment of the work done, then a realistic but broad axe needed to be taken to that assessment or else the cost of the fact gathering and presentation of evidence would quickly have totally overwhelmed the amount of any fee to which the carpenter was entitled.

Court control over the fact finding process allowed such realistic assessments to occur. In the event, the amount offered and paid by the builder was found to be sufficient. I note that the three incomplete buildings took more than a month to finish after the carpenter was sacked. Each of these cases was heard and determined in about one hour. There were no appeals from these decisions. In both these examples reserving all the fact finding to an adversary party controlled oral hearing would have resulted in very lengthy trials and prohibitive expense. I cannot see how the end result would have been substantially different.

The suggestion that the court should exercise control over the presentation of evidence is not a criticism of lawyers. Under the common law adversary process lawyers have a duty to pursue their clients' self-interest and the version instructed to them, not the truth. They have a duty not to mislead the court, but they may be sued themselves for negligence if they fail to vigorously pursue their clients' versions. The more work they do the more they are paid. It is not realistic to expect lawyers to ensure that litigation is conducted in an efficient way. This only leaves the court to

fulfil this responsibility. But under the common law adversary process the court remains aloof. No-one in the process has the responsibility to ensure that the gathering and presentation of evidence and fact finding is conducted in an efficient way. The primary purpose of the pretrial procedures (if not abused) in this process is the preparation for the compliance with the elaborate rules of evidence that govern the oral presentation of evidence. In fact, only some 10% of cases go to trial (Chapter 6, endnote 1). The process is not well-designed for the 90% of cases that do not go to trial. These would benefit from a narrowing of the factual controversy early in the process. Even in those that go to trial the pursuit of the process is the vindication of one of two competing versions, not the pursuit of truth. And in that process a great deal of expensive effort is likely to be wasted to prove things that did not need to be proved to arrive at the result, or worse as in Flower and Hart to avoid reaching the result.

The conclusion from the experience in Flower and Hart, the systemic abuse of some pretrial procedures and these examples of court management of fact finding in small claims, is that in appropriate cases, a level of court management over the gathering and presentation of evidence is desirable. I group those two aspects together as court management of fact finding and I now consider the implications of that.

Court management of fact finding

Court management of fact finding must fit with the existing pretrial management of cases. The traditional common law adversary model already has been compromised significantly by case flow management systems. The typical models of caseflow management involve a shift of the control of the timing and, to some extent, the extent of the pretrial procedures from the parties' hands to the court's. The origin of caseflow management was dissatisfaction with periods of delay in finalising cases in terms of years rather than months. In common law forums where it has been adopted criticisms of the concept of court control of procedural steps by caseflow management are now based on fears that it increases costs to the parties (endnote 1) and concerns at confusion as to the proper judicial role where caseflow managements steps into the use of ADR techniques (Resnik 1997) rather than any serious concerns

about the principle of caseflow management resulting in any injustice or lack of procedural fairness. Where it is still being introduced as in England it is still the subject of trenchant criticism (e.g. Zander 1995).

In the Magistrates Court in South Australia caseflow management is determined on an individual basis by a magistrate who conducts the first directions hearing, preferably with the parties present with their advisers. At that hearing, orders are made for procedural steps and the file is assessed as to whether it goes on a fast track to trial, to mediation, to report by court expert or is dealt with by some other means. In Australian terms this is probably closer to the Federal Court docket system than the macro event caseflow management model. However, the same magistrate does not generally control the file through to trial (at the time of writing this has changed to continuous control by the same magistrate but no figures are yet available on the effect of that). This can result in some lack of continuity and inefficiencies because subsequent magistrates handling the matter need to re-acquaint themselves with it. However, for the purpose of this discussion the important point to assert is that the control over the pretrial procedures has shifted from the parties, and more particularly from their advisers, to the court. This is accepted as a not improper departure from the adversary process. I conclude that lower courts should take the further step of exercising a degree of control over the gathering and presentation of evidence.

For courts to exercise control, a necessary corollary is for the parties to disclose to the court the evidence they will present to prove the alleged facts. Each case will need to be managed by the same magistrate. As noted above this should have some collateral efficiency advantages. The magistrate will need to decide what if any steps s/he will require the parties to take in the discovery and other pretrial processes. That is part of the existing pretrial procedure. It will not be necessary for magistrates to do more than they presently do in some cases as the guarantee example above demonstrates. Left to their own devices the parties and their lawyers often use the common law processes to good effect. They should be allowed to continue to do so. It follows that cases need individual assessment. Court control should be exercised over those that will benefit from court management of the gathering and presentation of

evidence. Which are they?

Cases where the parties have a marked difference in resources have obvious potential to have an unjust result if the gathering and presentation of facts is left to the parties. The need for a court to take this into account is recognised in the Tasmanian Magistrates court rules which provide that (*Tasmanian Rules* 1998):

> "4. Proceedings in the Court are to be conducted -
>
> ...
>
> (d) in a manner that is proportionate to -
>
> ...
>
> (iii) the financial positions of the parties."

An indication of this will often be that a party is unrepresented, although sometimes this is a matter of choice rather than resources. Management of these cases should prevent the imbalance in resources or legal skills affecting the result so that is not determined on the merits. Where cases have a narrow issue that will determine them, without court intervention, often a great deal of unnecessary time and effort will be spent on peripheral issues. Such a narrow issue may be a particular factual dispute or a ruling on a legal issue. If the court intervenes early to determine the narrow issue, this effort will be saved. A particular example of this are cases where liability and complicated proof of damage are both in issue. Court management may allow the liability issue to be heard first. If the plaintiff loses, proof of damage will be unnecessary and if it wins a much clearer basis upon which the parties might negotiate an agreement on the issues of damage has been established. Cases where a party is abusing the court processes to defeat a party by delay and introducing specious issues (such as *Flower v Hart* discussed above) can be shortened by the court determining the order in which the evidence is heard to eliminate the specious defences at an early stage. These will most likely be identified by not proceeding at a satisfactory rate through the pretrial processes as the party owing the money and seeking delay, achieves it. This list is not intended to be comprehensive. Experienced magistrates handling cases from the occasion of the filing of the defence

will readily identify those that will benefit from court management of the gathering and presentation of evidence.

In summary particular types of cases that will benefit from court management of fact finding will be those:

- where the parties have a marked difference in resources,
- that have a narrow factual or legal issue whose determination can be expected to resolve the matter,
- where the expected length of the trial is excessive due to the proof of detail not essential for the resolution of the key issues, and
- that are not progressing at a satisfactory rate through pretrial processes.

If a court manages the collection and presentation of evidence it will first need to ascertain the key issues. Consequent upon that, other issues can be grouped into those that assist in determining the key issues and those necessary to complete the required findings but not expected to assist in determining the key issues. The German rejection of evidence from the party personally illuminates the view that how a party's version fits with the detail of the surrounding circumstances is often a better indication of their veracity than their demeanour when giving evidence, or a cross-examination that unmasks the them. Indeed sometimes a skilled cross-examination can make an honest witness so discomforted they look like a liar. Where there are competing versions, courts should ensure that the parties efficiently gather the detail of the circumstances surrounding the key issues. Much of this detail will be uncontroversial. This detail may be ascertained from documentary records and it has already been noted that the common law tradition of discovery is good at ascertaining the extent of documentary records that are relevant to a dispute. In some cases it will be better to bring this evidence to court at the earliest reasonable time, rather than leaving it hidden as a trap to catch the liar at the oral trial which is the barrister's instinct. The detail may overwhelm the liar, or reveal an honest mistake, without the necessity of the trial.

The collection of evidence of facts that are not expected to assist in the resolution of the key issue should be given less priority and should not be allowed to become the subject of discovery abuse. At the end of the day when the key issues are decided any controversy on these issues will often evaporate either because the party who has to prove them has lost the main issue or the other party having lost the main issue will limit its contest to serious disputes to minimise costs. An example of such evidence is the proof of the individual telephone charges in the example above.

It has been noted that the South Australian Magistrates Court already requires plaintiffs in personal injury actions to supply written evidence on oath of the matters in the form 22. This precedent, in appropriate cases should be extended two ways, one to require evidence to be supplied on matters ordered by the court early in the pretrial process, and the other to use that information as primary evidence of the facts.

Another issue of principle that the German approach makes clear is the danger of witnesses being coached. To protect against this a German lawyer is ethically bound not to take a witness statement. This I am told causes some surprises at trial. This is not necessarily a protection against coaching, merely lawyer involvement in it. Under the common law method the risk of that is inherent. Early disclosure of the evidence of key witnesses by having them give evidence early in the process could lessen the risk of this. Orders for this to occur could be part of the control by the magistrate of the presentation of evidence. However, even the early preparation and disclosure of a statement by such witnesses still has a risk of the evidence being massaged. In some cases they may be useful, however the routine preparation and exchange of witness statements may increase expense where the witness also gives oral evidence, without tangible benefits. Whether they should be ordered will need to be individually assessed.

Techniques to narrow the factual controversy by means other than by sworn evidence should be considered. Conferences conducted under mediation protocols with key witnesses present can be very effective in covering a large amount of complicated

factual ground and reaching agreement on most of it in a relatively short period of time. The areas of factual controversy can be quickly identified and quarantined for further consideration. Lower courts could use these techniques in complicated factual to narrow the area of factual disputes. The adversary process then could be used efficiently at trial to concentrate on the facts that are actually in dispute. A collateral benefit of narrowing the disputed factual issues is that it is easier for the parties to reach an agreement. The proper role of the court in assisting parties to settle is discussed in Chapter 6. Where a party is seeking to prove matters in the opponents knowledge, rather than doing so by discovery, the German expedient of reversing the onus of proof onto the party with the knowledge should be considered.

These recommendations in some cases will involve a shift of the sole focus of the fact finding from the oral hearing and the acceptance of multiple hearings rather than one long continuous oral hearing. If this achieves a more efficient fact finding process it should be adopted. Oral fact finding should be reserved for doing what it is best at: determining factual issues which by their nature depend on oral evidence.

This will be a change in the judicial role. Defenders of the traditional common law adversary process place much weight on the importance of procedural fairness which is said to be essential for the pursuit of justice (Mendelsohn 1994, p.1)

> "... the values, indeed myths, about the rule of law that have sustained Anglo-American-Australian jurisprudence since Dicey summed them up better than anyone else more than a century ago. These values have to do with the centrality and special character of our courts of law- their indispensable universality, their commitment to a particularly severe conception of procedural and personal detachment, their adversarial process, and their absolute superiority as instruments of justice."

The remoteness of the bench under this process protects it from criticism because the judge does so little. The pretrial processes are in the hands of the parties and their advisers and they likewise run the trial itself. The evidence and law are summarised

by them at the end of the trial and by then the issues to be decided should be clear. The model protects the bench by keeping it aloof from the arena. The process has highly developed rules of procedural fairness both in the pretrial phase and the rules of evidence at the trial. These have sustained the courts in the special place they occupy in our constitutional system and they prevent at least the appearance of bias or other unfairness. However in addition to the abuses identified above that this process may permit and even encourage, in lower courts there is a further reason why it is flawed. The fairness of the process depends upon the ability of both sides to negotiate the process and put their case competently.

The rules of procedural fairness which underpin the complicated rules of evidence are difficult for the parties to personally comprehend. This means that party control is in fact lawyer control. The process disadvantages parties with unskilled counsel and unrepresented parties. Both are common enough in lower courts. Also the process may be alienating to the parties as a result of it being incomprehensible. A change to court control over the presentation of evidence in appropriate cases has the potential to be a system with less elaborate rules of process and which consequently can involve the parties more directly. It is likely that direct involvement by the parties can increase their satisfaction with the fairness of a process (see for example the American evidence that party involvement in settlement processes increased their sense of fairness in Kakalik, 1996, vol.4, p. 42. This is discussed in endnote 2 of Chapter 6). More importantly, inherent in a process which is managed by the court, is an enhanced ability by the court to arrive at an accurate decision on the facts where the parties have very different resources, leading to one side being inadequately represented or not represented at all.

A further inherent defect in a system where the parties control the collection and presentation of evidence is that it is unlikely that both seek the truth. Indeed it may be that the version of both protagonists in a case is remote from the truth. The judge is bound by their versions. The role of the judge, although the truth may be her or his personal quest, is not to seek the truth, but merely to make a determination between the versions presented by the parties in evidence (Sir Anthony Mason 1999, p.7):

> "The principal reason why the European system has attractions for some critics of the adversarial system is that control lies more in the hands of the judges and because the European courts are said to have as their object the investigation of truth. Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties. Whether European courts are effective in investigating the truth and actually finding out what is the truth, is a vexed question and one which is beyond the scope of this address. Although there are those who assert that the European system is not notably successful on this score, it is probably rather more successful in this respect than the adversarial system."

As long as a court takes no responsibility for the gathering and presentation of the evidence it need not worry itself unduly that it is choosing between the most convincing of two versions which may be remote from what actually happened. However it is almost trite to suggest that judicial officers will prefer to seek their view of the truth in essential factual disputes rather than playing blindman's buff between two versions insulated from considerations of what actually happened. Once a court accepts a degree of responsibility to supervise the process of gathering and presentation of the evidence to establish the relevant facts, it must accept some responsibility to get it right. It cannot seek to establish either party's version and maintain an impartial and unbiased position. If it is to manage the fact finding process, it must do so for some better purpose than adopting either side's version. The only obvious better purpose is to seek an accurate version of the facts. This is an obvious purpose for courts and to the layman the fact that the present common law traditional model may not have this purpose would probably be a surprise. A court can hardly seek to dispense justice if accuracy is not a purpose of its fact finding. Once a court decides to seek accuracy it cannot afford to blindly leave the gathering and presentation of evidence in the hands of the parties but must exercise sufficient management over the process to be satisfied that the process will focus on the right issues and bring the required evidence before it for the purpose of establishing

something close to what actually happened. However if the process is to remain adversarial the quest for accuracy will need to be tempered by remaining within the landscape of the dispute as defined by the parties.

I return to the common factors between the German and common law methods, which are essential pre-requisites of an adversary system:

- the parties are entitled to be served,
- the parties define the dispute,
- the parties can end the dispute by agreement,
- the parties nominate the evidence to be brought to the court,
- the parties can question witnesses and can be heard on all issues,
- proceedings are conducted in open court in the presence of the parties and their legal advisers, and
- reasons for judgment are given, are subject to appeal and have an effect of res judicata.

Anything less and the process may become inquisitorial. Control of the process might slip from the parties' hands and they may come to court with a building dispute but when the evidence discloses that they work for cash they may find themselves defending an inquiry into their tax affairs. Thus in the telecom dispute discussed above if a party makes a considered decision not to bring a witness to court, the court must accept that and find a version on the basis of the evidence it has. On occasions there will be a tension between the quest for accuracy and the parties' right to define the landscape of the dispute and to limit the evidence they want aired in a court. The parties' rights on these issues must remain paramount or else a magistrate would no longer be resolving their disputes but rather seeking the holy grail of truth. However within the defined landscape of the dispute and with the evidence s/he is allowed to use, it is an appropriate aspiration to seek an accurate version, not merely one that suits either party.

This thesis is that lower courts in appropriate cases should exercise control over the

gathering and presentation of evidence. In the sometimes problematic area of opinion evidence the South Australian Magistrates Court has implemented this principle. This is an experience of the particular which supports this conclusion of general application.

Court use of experts

Precedents in Australia

In Australia, as in most common law countries, the parties retain their own experts and bring them, especially favourable ones, to court in numbers. These are then examined and cross examined often at length and sometimes to little relevant effect. It then falls on the court to resolve this often conflicting opinion in accordance with principles such as these (*Holtman* 1985):

1. A primary tribunal's duty is to find facts and, when expert evidence has been given, so far as it is reasonably possible to do so, to look not merely to the expertise of the expert witness but to examine the substance of the opinion expressed.
2. In cases where experts differ, the lay tribunal will apply logic and common-sense to the best of its ability in deciding which view is to be preferred or which parts of the evidence are to be accepted.
3. The evaluation of an expert's evidence will also involve questions of credit and credibility.
4. On appeal, by way of rehearing, against a finding of a disputed fact based upon the primary tribunal's view of the credibility of expert witnesses, the appellate tribunal will have regard to the significant advantages enjoyed by the primary tribunal in forming a judgment between the conflicting views of expert witnesses.

The cost of all this is great. Experts usually cost several hundred dollars per hour and the adversary oral evidence process, designed for jury trials, is very profligate of their, and the parties' legal advisers' equally expensive time. It is not unusual for expert evidence to take several days of a trial. In contrast in Germany, The Netherlands and France the court appoints its own expert who investigates the issues,

in consultation with the parties' experts where appropriate and reports the findings to the court. The call on court time is short. Just as with fact finding generally it is useful to consider whether the civil code approach can lead to improvements in our system.

The old common law position was that a court cannot call its own witnesses. A judge could not call a witness not called by either party except at the joint request of the parties or at least with their consent, express or implied (*Enoch* 1910). The High Court applied the same principle to criminal cases in Australia (*Titheradge* 1917). In this Barton J said at page 114:

> "A trial is a proceeding entre partes whether the Crown is a party or not and the conduct of the evidence subject to questions of admissibility is in principle a concern of the parties."

Against this line it was suggested by Lord Macnaughten (*Colls* 1904, p.192):

> "I have often wondered why the Court does not more frequently avail itself of calling in a competent adviser to report to the Court upon the question ..."

However, there has been little support for this approach until more recently (Justice Shepherd 1982).

In the USA Frankfurter J said (*Johnson* 1947, pp 54 and 55):

> " A trial is not a game of blindman's buff; and the trial judge - particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law - need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony. Federal judges are not referees of prize fights but functionaries of justice ... just as a Federal judge may bring to his aid an auditor without consent of the parties to examine books and papers, hear

> testimony, clarify the issues and submit a report ... he has the power to call and examine witnesses to elicit the truth."

Justice Frankfurter was a minority voice.

In Patent cases, where current scientific and engineering expertise is often required, Australian courts have on occasions appointed their own experts. Rich J (*Adhesives* 1935, p.580) noted and agreed with the use of scientific assessors by Evatt J. at first instance. He approved commentary urging the need for

> "... provision (to) be made so that authoritative, capable, and unbiased scientific aid may be available to the courts in all patent litigation."

Following this Nicholas J in the NSW Supreme Court appointed his own expert to undertake experiments in the light of conflicting evidence from the parties' experts (*Cement Linings Ltd* 1939).

Recent concerns about our present methods of dealing with expert evidence in other cases have led to some tentative attempts at a new approach. I cite some examples. Dean J said this (*Kingswell* 1986):

> " In that regard, there is much to be said in favour of the introduction of a system of "court witnesses" or expert "assessors" to advise or guide a lay jury in such areas."

He was speaking in the context of the difficulties that juries have assessing expert testimony in criminal trials, but his remarks are equally apposite to civil trials conducted by a Judge or Magistrate alone.

In the Federal Court Pincus J had a case involving a dispute about a tiling contract (*Newark* 1987). The estimated costs in the matter were larger than the amount claimed and would have used all the funds available to the applicant liquidator. He held that in view of the large saving of costs in comparison with the amount in issue,

the case was peculiarly suited to the appointment by the court of an expert to resolve matters of fact and opinion. Pincus J observed:

> "Experience suggests that too often expert witnesses display a degree of partiality, whereas the court appointed expert may be expected to be indifferent to the result of the case."

Surprisingly the expert was one of the respondents, but the principle is sound.

In England in a case involving complicated issues of genetic engineering, the High Court sat with an expert (*Genetech* 1989). The court acknowledged his valuable role in assisting them to understand the evidence but reiterated that the decision making responsibility remained the court's alone.

In his final report to the Lord Chancellor in England Lord Woolf recommended the use of a single expert 'wherever the case (or the issue) is concerned with a substantially established area of knowledge and it is not necessary for the court to directly sample a range of opinions' (Woolf 1996, p.141). He also recommended court ordered meetings of experts in private (Woolf, 1996 p.152). I identify that this is only valid if the expert has direct responsibility to the court. The issue here is to avoid having to choose between partisan experts who are expensive for the parties and in time for the court when they give evidence. The issue remains to appoint an expert who is competent.

In an attempt to address problems with expert evidence the Federal Court of Australia has issued a practice direction with guidelines to experts. (This is reproduced in full in endnote 2) In broad brush (and not in order) the effect of these is that:

- An expert has an over-riding duty to assist the court on matters relevant to the expert's area of expertise.
- An expert's paramount duty is to the court and not to the party retaining him or her.

- An expert must not be an advocate for a party.

In the last lies one of the rubs of our present litigation system. We have built up a lucrative industry of experts giving opinions for one side or another in relation to prospective or actual litigation. For example in South Australia, a state with a population of approximately one and a half million people, the State Government Insurance Commission (SGIC) held all insurance for motor vehicle personal injury claims. In the financial year 1991/2 it paid out $3.6m. on medical reports and evidence associated with claims against its fund. This formed part of a total medico-legal bill in that year of $44.2m. which was 22% of its total payout. Legislation reducing access to general damages and an aggressive policy to settle claims before proceedings were filed (see Chapter 6) saw the total medico-legal payout reduced to $26.2m. in the year 1994/5 which was 16% of the total payout. However the cost of medical reports and evidence was still $3.2m. (Cannon 1996).

Some experts tend to be briefed more by plaintiffs than by defendants and vice versa. Once their livelihood depends upon the continuing goodwill of one side or other of the adversary process they are under substantial pressure to take a slanted, if not outright biased point of view. That is not to criticise them, but to suggest that if courts want experts who will offer a conscientious, moderate and accurate opinion, there is much to be said for making them responsible directly to the court. In our society the most tangible statement of responsibility is for the court to select and pay them, even if it then collects the cost from the parties, or one of them. S/he who pays the piper calls the tune.

There have been and remain a number of specialist tribunals around Australia, most often dealing with building disputes, but also other matters, which routinely sit with lay members representing vested interests, such as building and consumer representatives, some of whom are also experts, and which appoint their own experts to advise the tribunal. These tribunals generally are accepted as neutral and credible fact finders and are in fact a type of lower court (Chapter 3). Their existence often owes much to the failure of mainstream courts to satisfactorily deal with fact finding

in technical disputes.

Courts should be willing to consider new ways of dealing with the complicated and at times mysterious factual matters involved in technical issues and the distillation of measured and fair opinions about them. Appointing their own expertise is a sensible approach and one that is regarded as routine in many developed democratic societies. In some quarters this is seen as an attack on the adversary process. It is nothing of the sort. It *is* a departure from party control over the fact finding process. The analysis above concludes that an adversary process is not incompatible with court management of the gathering and presentation of evidence. The proceedings can retain their adversary nature although the court exercises a managerial role. The essential protection of the adversary process is that the parties define the boundaries of the dispute, that all stages of the process occur in the presence of the parties and that the parties each have a reasonable opportunity to contribute to and test all matters upon which the decision will be based. Generally the court should limit itself to witnesses nominated by the parties. This limitation is part of the parties' right to define the boundary of the dispute. The pleadings and the substantive witnesses who will be called largely define the boundaries of the dispute. Opinion evidence does not go to the boundary of the dispute but explains technical aspects of it or makes expert observations. The use by courts of their own experts can be reconciled with the essential features of the adversary process remaining in place.

The practice in Germany

In Germany the court appointed expert is not a judicial officer but has a status different to other witnesses. His or her opinions are admitted as a type of evidence specially recognised by §§ 402-414 ZPO. The parties must identify any points requiring expert opinion (§ 403 ZPO). The court selects the required expert(s) from panels of court experts in different fields of expertise. The court may appoint the expert without consulting the parties. If none is available for a particular field, the court in consultation with the parties may appoint an expert who is not officially appointed to a panel (§ 404 ZPO). Often the Chamber of Commerce or other relevant professional body is consulted to provide a recommendation. In a rare case

where the parties had already engaged all the relevant experts the court may appoint an expert from each side and have them both report jointly and, where they could not agree, individually. A party may challenge an appointment of an expert on the same grounds as justify the challenging of a judge (§ 406 ZPO). These are bias, being a friend or competitor of a party and the like. An adverse ruling on an application for disqualification is immediately appellable.

Officially appointed experts have been given training in court procedures and are under a general oath to render opinions 'free from bias and according to his best knowledge and opinion' (§ 410 ZPO). A casual appointee is required to take an oath to the same effect. When an expert is appointed, the court briefs the expert on the matter upon which he or she is to report. The court may order the opinion to be in writing and fix a time limit for its delivery (§ 411 ZPO).

The court pays the expert but generally will recover the cost from the unsuccessful party. The expert is paid at the rate applicable in his or her field. The court may require the parties to pay moneys into court to anticipate the cost of the expert.

Generally in Germany the parties' own experts are not permissible as witnesses but merely assist the parties' lawyers, but a way around this is to have their party's own expert's written report annexed to the lawyer's submission on the facts. The judge reads these submissions before conducting the first hearing.

The expert may sit with the judge and participate in the hearing by asking questions. Parties can challenge a court expert's opinion and if this is successful the court may appoint another expert (§ 412 ZPO). Such challenges are usually by the lawyers in submissions to the court. Where the expert is called 'for proving past facts or circumstances, the perception of which required a special expertise, the provisions concerning evidence by witnesses shall be applicable.' (§ 414 ZPO). This distinction is recognised in common law (von Doussa 1987). Other than for this purpose, in practice the court expert is generally not called as a witness. However a party can insist that the court expert give evidence.

Ultimately the decision on matters involving expertise is the decision of the court, not of the expert. However, in reality a lawyer for a party has a very heavy burden to convince the court that it should not follow the recommendation of its expert on such matters. The lower courts, on occasions may have just adopted the expert's report by saying: 'It was convincing,' without justifying its decision. The higher courts have been more stringent in recent times in requiring the lower courts to actually justify their decisions on expert matters (Schlosser 1999).

Court appointed experts in the South Australian Magistrates Court

In 1992 the Magistrates Court established a panel of experts to report to it on technical aspects of building disputes. The court paid these experts with money collected from the parties. On the several occasions when the court used the services of this panel the process was successful in resolving technical issues. In 1995 the Magistrates Court (Civil Division) absorbed the trial work of the Commercial Tribunal which had specialist jurisdictions including domestic building and motor vehicle warranty claims. In finalising the business of the tribunal the court sat with the Consumer and Industry Panel representatives. These were not independent experts, although often the members from industry panels had expertise. As part of the winding up of the Commercial Tribunal, a Consumer and Business Division was created in the Magistrates Court with jurisdiction over domestic building disputes, vehicle warranty claims and retail shop lease disputes. Panels of assessors were appointed to be available to the court in matters involving technicality. This legislation specifically empowers the court to sit with experts from the panel. However in practice this rarely occurs. The court generally appoints expert assistance under its wide general powers to avail itself of its own expert advice. *The Magistrates Court Act* 1991(SA), provides that the court can refer technical matters for investigation and report by an expert in these terms:

> "29 (1) The Court may refer any question arising in an action for investigation and report by an expert in the relevant field.

(2) A person to whom a question is referred under this section becomes for the purposes of the investigation an officer of the Court and may exercise such of the powers of the Court as the Court delegates.

(3) The Court may adopt a report under this section in whole or part.

(4) The costs of the expert's investigation will be borne, in first instance, equally by the parties or in such other proportions as the court may direct, but the court may subsequently order that a party be reimbursed wholly or in part by another party for costs incurred under this subsection."

The court has a modest budget line to pay for these experts, and can order the parties or any of them to reimburse the cost. The court is now regularly referring matters for report by experts and sitting with experts. Rules of court permit the court to refer questions to an expert orally during a trial. When the court receives notice of a defended dispute, the parties are called to a directions hearing. At that hearing if it appears from the pleadings that matters requiring expertise are at issue the court offers to supply a court expert to advise on them. The expert will meet the parties on site where that may be helpful. He advises and reports to the court but also may endeavour to conciliate the dispute. The figures below show that the building expert settled nearly 50% and the accounting expert 75% of the cases referred to them. The court is providing this expertise most often in building disputes but also in accounting, mechanical, engineering and information technology disputes. There has been an appointment of an orthopaedic surgeon in a personal injury case. It is expected that the use of court medical experts will increase. Some data below on the results of the use of two of the experts is followed by a discussion of the issues involved in courts using their own expertise.

Table 5.3: Use of Building Expert 1/98- 2/99 Adelaide Magistrates Court Civil

	Cases	Settled	Site visit, no SM	Site visit with SM	Mediation with SM	Trial with SM	Av. time	Av. delay
No.	116	55	65	11	2	14	6hrs	6wks
%	100%	47%	56%	9%	2%	12%		

Source: reports by a building expert J. Robinson to the Supervising Magistrate, Adelaide Registry.

This expert is a retired master builder with decades of experience in the building trade and also extensive experience sitting as a lay member of the now defunct Commercial Tribunal. In the period analysed he was involved in various capacities in 116 cases, 47% of which settled. The figures show the number of site visits, alone and with a Magistrate and other cases where he assisted a Magistrate. In the balance of cases he conducted conciliations, meetings with parties' experts or provided other reporting functions, without site visits.

Table 5.4: Use of Accounting Expert 7/97- 12/98 Adelaide Magistrates Court Civil.

Please see print copy for image

Source: reports by an accounting expert J. Pridham to the Supervising Magistrate, Adelaide Registry.

This expert is a semi-retired chartered accountant with a broad experience. This data set is rather small. In all but 10% of cases he has investigated and reported to the court alone.

In addition for all types of dispute the court has a full-time mediator whose services are free to the parties. The present take up rate is about 5% of the defended cases. From this substantial experience some guidelines are suggested for the court use of experts.

Issues in the Court use of Experts

Choice of Experts

The opinion of expert witnesses is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without their assistance because understanding the subject requires experience of a course of previous habits, or study of a specialised field of knowledge. The opinion of such witnesses cannot be received when the inquiry is

into a subject matter the nature of which is not such as to require any peculiar habits or study in order to qualify to understand it. An expert may give in evidence statements based on his own experience or study, but he cannot be permitted to attempt to point out to a jury matters which the jury could determine for themselves or to formulate his empirical knowledge as a universal law. A person should not be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people (*Clark* 1960).

In much of the case law emphasis has been placed on the need for study to qualify as an expert. However this common law view of who can be an expert should be interpreted liberally for lower courts which deal with a very broad range of trade and consumer issues where the actual expertise often resides in people qualified by years of experience rather than university study. In fields of practical rather than theoretical endeavour depth of experience may qualify an expert to advise the court. Many tradesmen may have no educational qualification but years of experience of the habits of their trade may amply qualify them to express opinions about practical issues in their trade such as quality of workmanship, industry standards and appropriate methods and cost of rectification.

Experts whom courts appoint must be people of the highest probity, experienced, credible, competent in the field and sufficiently remote from the arena in which the dispute arose not to be open to accusations of actual or the appearance of bias. They should have a clear understanding of their role and, as appointees of and representing the court, they must be aware of the need to observe due process, act in a moderate way and not become involved in any issues outside their expertise. This touches on a training issue, which is briefly mentioned below.

It is undesirable that the expert is involved as a consultant advising other parties to other disputes before the court. This would give the expert the appearance of a special credibility in relation to those other disputes.

To identify suitable experts who meet these exacting criteria, the European approach

of obtaining recommendations from relevant professional and trade associations is a good starting point. In South Australia the Commissioner for Consumer and Business Affairs has already been through a process of selection of trade experts to establish a list of advisers to assist in consumer disputes. These are selected upon the recommendation of the relevant trade association and checked by the Commissioner for any adverse information. These lists have been a useful starting point. Some government departments may still have available expertise. Universities are an obvious place to find experts at a theoretical level. Expert witnesses who have shown they have a balanced viewpoint but are no longer involved in regularly giving evidence may be ideal because of their understanding of the court process. It is important when building up a panel of court experts that they are given appropriate support and a judicial officer reviews their reports.

Training and instruction of experts

Courts must ensure that court experts have a clear understanding of their role and, as representatives of the court, they must be aware of the need to observe due process, act in a moderate way and not become involved in any issues outside their expertise. They must be aware of the need to step down if there is a realistic perception of bias. Where an expert has previous experience with the court system much of this will already be in his or her ken, but it is worth restating even though to a lawyer this may seem trite.

If experts are to fulfil mediation or conciliation roles these roles should be understood by them and the appointing court and the order of appointment should be specific as to the role which the expert is being asked to perform. The South Australian Magistrates court has provided LEADR (Lawyers Engaged in Alternative Dispute Resolution) training to both the judicial officers making these appointments and to experts involved in conciliation and mediation. This type of training is also useful because it involves discussion of procedural fairness.

The role of the expert at the commencement of the proceedings

The court using its own expert advice is entirely consistent with the policy of the

court managing the collection and presentation of the evidence. An example of how it can be effective in eliminating unnecessary and potentially expensive inquiries was a small claim for A$4,205.13 the balance of the cost of installing a commercial air-conditioning unit. This was met by a counterclaim which included the following allegations (*Fehlman* 2000):

"SET-OFF/COUNTERCLAIM

1. The Plaintiff breached the contract and was negligent in the performance of the contract works.

PARTICULARS

1.1 The zincalume roof sheeting on the roof has been damaged such that many of the 'ribs' have been crushed and water can penetrate at the screw location and the sheet is subject to damage itself.

...

1.5 There has been substantial damage to the decking. The ribs have been dented and in some cases torn necessitating immediate repairs to be carried out to stop the leakage.

...

3. By reason of the Plaintiff's breach of contract and negligence the Defendant will have to repair/remedy the defects.

PARTICULARS

3.1 Removal of damaged roof sheeting to Autopro shop main area approximately 825 sq metres incuding crane hire and removal of building debris from the site at cost of $14,695.00.

3.2 ..."

At the first directions hearing the court ordered a report from its building expert Mr. J. R. Robinson. At an on site inspection with the parties he identified the dents to the roof as minor and found only one small tear to the zincalume sheeting due to a pop rivet having been used to pull out a dent. In his view the sheeting did not need to be

replaced and indeed the cost of repair to the roof would be only a few hundred dollars not the A$14,695.00 in the counterclaim. On site the parties agreed with this assessment. There were some other issues of real merit. Freed of the specious claim for the replacement of the roof for A$14,695 they were able to focus upon these. The parties settled all issues on site by a mutual withdrawal. Without this intervention the case would have become a general jurisdiction case with lawyers. The parties would undoubtedly have become engaged in an expensive exchange of their own expert inspections and reports. The case would have become protracted and the costs would have become as important as the original issues.

At the commencement of proceedings a court expert can clarify technical issues and give an immediate evaluation in so far as the facts are clear. In building disputes on site visits can be very helpful to clarify factual and quality of workmanship issues. It is much harder to exaggerate a minor defect of to defend a botched job if everyone is looking at it. Table 5.3 shows that our court building expert undertook site visits without a Magistrate in 56% of referrals. At these visits the parties are generally present with such experts and advisers as they wish. At this early stage the court expert may suggest an appropriate basis for settlement. He is not expected to take a mediator' position of remaining strictly neutral. With appropriate caution to ensure he does not leap to unwarranted conclusions he can apply his expertise. He is under instruction to make it clear that his view is not binding on the court, which will form its own view if the parties wish to go on. If the case is to proceed he can suggest steps to narrow and resolve technical issues. The statistics demonstrate that in cases where a court expert was engaged nearly 50% settled, without causing substantial delay. An average of 6 weeks was taken between the referral and the report or finalising the matter under the expert's guidance. Table 5.4 shows a settlement rate of 75% in disputes where an accounting expert was retained by the court. This higher rate was probably a reflection of parties' (and lawyers') general ignorance about accounting matters. Once they were forced to do a proper accounting most of the fertile territory for dispute was removed and the answer was too clear to argue about. The delay of 6.5 weeks between referral and report or settlement is acceptable. The average delay and the average time taken were inflated, on a base of only 20 cases, by

one case, which took 28 weeks to finalise and 16.5 hours.

In both areas the parties and the court saved substantial costs in settling cases which had the potential to run for weeks. The parties' and their advisors' time is an expense to them. On average the building expert spent 6 hours of his time on each referral. This includes his time writing the report so the contact time with the parties would be a good deal less than that. In cases that settled much would be saved by the parties and in those that did not the time spent clarified sufficient issues to save substantial costs in the long run. The time taken by the accountant, if one case which took 16.5 hours is excluded, was on average 2.5 hours. This was relatively short as a result of our accounting expert being rigorous in insisting that the parties bring their bookkeeping up to an acceptable standard before he devoted time to the resolution of the matter. That is an additional expense to the parties but one that would be necessary to business parties for taxation purposes. If that one case is included, the average time taken was 6.5 hours. Again there can be no doubt that the involvement of the court expert generally saved the parties substantial sums. Early settlements save the court and the parties substantial use of resources (see below). Where cases proceed with a court expert report on file the court it has proved to be of great assistance in narrowing the issues that actually need to be litigated. The use that can be made of it at trial is a matter that is discussed below. After a failed attempt to settle the parties are offered a fast track to trial. It is important that providing an expert should not become just an additional step in the very costly path to a conventional trial.

Expert conferences

Where a magistrate identifies a case where there are conflicting expert reports it can be very helpful to have experts for opposing parties confer before the trial in a non-confrontationist environment. A court expert can usefully convene, conduct and report on the results of such a meeting(s). The experience in the South Australian Magistrates Court is that party experts, in an informal setting, usually can resolve most of their disagreements, and the court expert can in co-operation with them report to the court on what issues remain outstanding. It is essential to carefully

record what is agreed, preferably as a joint statement, to avoid time being wasted on the same areas at the trial. This process often produces a settlement.

It is the opinion of the court experts that sometimes lawyers can hinder the process of resolving technical issues. However many allow the experts a free communication and indeed are often content to leave the experts and parties alone to thrash out these issues, remaining available to advise if any legal issues or settlement discussions arise. The NSW Supreme Court has held that on an expert referral, lawyers can be excluded (*Trident Properties* 1993 per CLRS 1998):

> "Although the right of legal representation is an ordinary incident in court proceedings, in certain circumstances it is open to the court to exclude lawyers from a part of the proceedings. Thus, where under Pt 72, r 2 of the Supreme Court Rules 1970 (NSW), the court refers a technical issue to an expert referee for an inquiry assisted by other technical experts and the subsequent production of a report, it may also direct under Pt 72 that the proceeding take place in the absence of lawyers (even though the parties themselves may be present)."

The Magistrates Court is loath to exclude lawyers but the profession needs to ensure that its involvement for a client is effective. Provided the party and his or her experts are properly briefed and know to refer any legal issues to the experts on legal issues, there should be few occasions for lawyers to advise on technical issues outside their expertise. If they are present they should not get in the way of a proper exploration of technical issues. The barrister's craft, designed to carefully place oral testimony before a jury, is not the most efficient, or even an effective way of understanding and fairly deciding complicated technical matters usually in fields outside the expertise of the factfinder.

Experts sitting with the court

Table 5.3 shows 14 trials when the building expert was sitting with the Magistrate. Most of the 11 site visits by a Magistrate with the expert were trials. There are

another 2 trials in which the accountant sat with the Magistrate. I have done this myself on several occasions. The expert sits with the Magistrate at the bench. He can ask questions of witnesses relevant to technical issues. He can explain technical matters to the Magistrate, both in court and in chambers. Although the decision is the Magistrate's, the expert will often be involved in frank discussions about the technical issues with the Magistrate away from the parties. I note that the expert is contributing to the decision making process without the extent of that contribution or the extent or relevance of his expertise being tested by the parties. That may not be a problem because the judicial officer is in control of the process and is taking responsibility for the decision. He or she should be able to be trusted to not allow the expert to step beyond the role of an assistant and to personally understand sufficient about technical issues to be satisfied about the decision. However there remains in this process a lack of transparency about the expert's role. It is my view that where the court uses an expert for a purpose beyond the mere explanation of technical issues and seeks to rely upon its own expert's opinion it should adopt the following procedure.

Court experts' reports as evidence

Some of the above may be adventurous but it fits easily enough into established principle. Once the court uses a report from its own expert as a basis to decide an 'inquiry which is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without their assistance' (*Clark,* 1960) some knotty issues of principle emerge, and maybe some more rubicons need to be crossed. An appointment made under section 29 of the Magistrates Court Act set out above raises these issues. A person to whom a question is referred under this section becomes for the purposes of the investigation an officer of the Court. If the expert so appointed is then treated as a witness problems arise. There is the obvious problem of whose witness he or she is for purposes of examination in chief and then cross examination. If no counsel is willing to adopt the court expert, the court could examine her in chief and allow all counsel to cross examine her. However there is an inconsistency in appointing someone to the status of an officer of the court and allowing him or her to be cross examined. This would diminish his or her role and defeat the objective of a

more efficient method of inquiry into technical issues. Further it diminishes the status of the court to treat an officer of the court in the same way as any other witness. If the court expert is to be treated in the same way as any other witness, then the parties must still be allowed to call all their own experts. The court expert then becomes an addition to the process, prolonging it, rather than a means of greater efficiency. The court is expressing confidence in an expert by appointing him or her to advise it and to manage the collection and presentation of expert opinion including, where appropriate conducting expert conferences. That confidence is obvious to everyone involved in the case. The process must recognise this status but at the same time still protect the parties' need to ensure that the court expert's opinions are sound.

Some precedents suggest that the court expert should be immune from cross examination. Phipson suggests that where an expert has been appointed in a quasi-judicial role he should not be sworn or examined as a witness. (Phipson 1976, para. 1224)

A court can appoint an expert for the pretrial management of technical issues discussed above, without issues of the status of the expert's own opinions being a problem. However, once a case goes to trial if the court wishes to rely on an opinion of its own expert it should acknowledge the status of that expert by sitting with, and taking him or her into chambers in recognition of the court's confidence in the opinion of the expert. This is implicit in the appointment and it is better to make it explicit in the practice of the court.

To protect the parties from errors by the court expert, the opinion generally should be in writing and available to the parties. The written report should state the expert's qualifications, instructions, the factual background and the basis upon which the opinion is given. The parties should be given an opportunity to question the court expert about the opinion. This should not be a cross examination but the process should be recorded. The expert should not be sworn in and should remain on the bench. This procedure recognises the status of the court expert and protects the

parties' rights to clarify and question his or her opinions. It would then be incumbent on the court in adopting any controversial opinions of the expert to justify that decision or to refuse to adopt them and appoint another expert or proceed by the usual process of expert evidence. This process is more transparent than sitting with an expert without canvassing the extent or basis of his or her role. It is similar to the role that experts fulfil in the civil code systems in Germany, The Netherlands and France. It should resolve routine technical issues without wasting trial time and inform the court effectively on difficult technical issues.

The recently adopted rule giving effect to these policies in the South Australian Magistrates Court is as follows:

> "69A. Where the Court refers a question arising in an action to an expert for investigation and report under section 29 of the Act it must:
>
> (1) make the curriculum vitae of the expert available to a party upon written request,
>
> (2) require the expert to give an undertaking to this effect:
> 'I undertake to limit my expressions of opinion to matters within my expertise, to disclose the factual material upon which my opinions are based, and to be fair, unbiased and accurate in my expression of opinion.'
>
> and where the Court intends to adopt any part of the report which a party contests the Court may require the expert to attend for the parties to question the expert about the basis for any opinion, but not as a witness.

Savings of judicial time

Here the cost issue is all in favour of the court use of its own experts. In addition to the savings to the parties the practice of the court appointing its own experts has saved substantial judicial time. From the data upon which Tables 5.3 and 5.4 are based the hours experts were involved without a Magistrate have been extracted. They were 598 hours in building disputes and 122 hours in accounting disputes. If a

broad axe assumption is made that a Magistrate would have had to spend the same time as the experts that is a saving of 720 judicial hours. On a basis of 20 sitting hours per week that is 36 sitting weeks. This grossly understates the actual savings. There is no doubt that a magistrate solving these issues using adversary oral procedures, in accordance with the rules of evidence, would take many more hours than the expert using informal discussions to inform himself. For example I am aware of one building dispute, that counsel told me had no prospect of settlement. It was set for an estimated 22 days of trial. In an endeavour to shorten the trial I referred it for an expert conference conducted by the court expert. It settled after a day and a half of conferring. It is clear that the use by the court of its own experts has freed up substantial judicial resources to concentrate on cases not amenable to settlement by these processes and has drastically reduced the use of judicial time used to resolve technical issues. From the Court's point of view the cost of the expert can be defrayed by insisting that the parties pay all or part of the cost.

The experience in the South Australian Magistrates Court of the benefits of using their own experts early in the proceedings to determine non controversial issues, to narrow technical disputes in preparation for trial and at trial to assist the court determine issues requiring technical expertise is a specific example of the advantage of courts taking control of the fact gathering and fact finding process. It is also an assertion that the court is interested in the truth of the matter rather than deciding between competing expert opinions. Within this process the court needs to develop protocols for the selection of experts, and to acknowledge their status as officers of the court, whilst preserving the parties' proper needs to question the experts' opinions.

This experience is a particular example of a lower court exercising the selective control over the gathering and presentation of expert evidence which the discussion above concludes it should be willing to do over all types of evidence.

The suggestion that the common law tradition could be improved by adopting aspects of the German system is not new (Langbein 1985). The so called 'German

advantage' in relation to expert evidence has been dismissed by defenders of the status quo in America on the basis that the present system works well and criticisms that it leads to abuses such as lawyers coaching witnesses and witnesses becoming advocates for clients were overstated (Allen and others 1988). A more recent rejection of this suggestion is based on the supposedly impossibly high expense of the German judicial establishment. I have already dealt with the issue of whether lower courts should be willing to exercise control over the gathering and presentation of evidence and have concluded that they should. I now discuss whether this involves impossibly expensive resource implications.

The resource implications of the exercise of judicial control over the gathering and presentation of evidence

The conclusion that lower courts should be willing to exercise greater judicial control over the gathering and presentation of evidence is drawn in part from comparisons with the civil code method in Germany and so comparisons there are also a starting point for the resource implications of these conclusions. Some commentators criticise the European civil code model as too expensive of judicial resources to implement in the common law legal world. They suggest the 'inquisitorial' model in Germany uses greater judicial resources per population of lawyers than the adversarial model where fact gathering is left in the hands of the lawyers. The argument runs that the higher number of judges necessary to adopt features of the German model would be too expensive (e.g. Galanter 1999, p.126).

> "Judicial capacity in common law countries is presently stretched thin. In an era of distrust of government, downsizing and privatisation, it is difficult to imagine a major enlargement of judicial facilities and authority."

This is based on a precept that the number of judicial officers in Australia is about 800 and the number of lawyers 35,000 (1:43). In comparison the German establishment is about 1 Judge to every 3 lawyers (Galanter 1999, p.126). If these figures are right then indeed the resource argument is compelling. However the background information upon which the argument is based may be wrong. The figures for judicial officers,

lawyers and case loads in South Australia have been collated for comparative purposes. For an accurate comparison the net of what is a court and judicial officer must be cast wide because in Germany the court system covers all types of civil disputes (the right to a lawful judge mentioned above).

Table 5.5: Courts and Tribunals in SA December 1998, repeat of 2.1

Court or Tribunal	full time judicial officers	part time judicial officers	FTE judicial officers	Civil cases per year
Federal Court	4		4	450
Family Court	5		5	5,258
Administrative Appeals Tribunal	2	4	2.5	951
Human Rights & Equal Opportunity Tribunal		1	0.5	33
Supreme Court	17		17	1,080
District Court	21		21	1,886
District Court Appeals tribunal			counted elsewhere	464
Youth Court	4		4	Not applicable
Environment Resources and Development Court	5	24	5	337
Magistrates Court	33		33	4,861
Industrial Relations Court and Commission	14		14	Court 1,141 Comm. 1,565
Workers Compensation Tribunal	15		15	7,441
Residential Tenancy Tribunal	1	15	5	8,098
Guardianship Board	1	unknown	4	1,743
Coroners Court	1		1	60
State Ombudsman	1		1	3,651
TOTALS			132	39,019

Sources: SA Law Calendar, CAA 1998, various judicial officers and registrars in these courts and tribunals, and annual reports. Ombudsmen, judicial registrars and tribunal members are all included for comparative purposes with Germany where all such jurisdictions are within the court system. Figures for the Supreme, District, ERD, Magistrates and Coroners courts are for the financial year 1998/9. The Federal and Family Courts are figures for SA 1998 calendar year. The ERD court figures exclude criminal matters and s.38 documents. The Coroner considers about 3000 matters a year but proceeds to an oral inquest only in about 60. The other matters have been left out in similar fashion to uncontested debt. The Guardianship Board figures are for 1999. It counts hearing outcomes at 4,099 but I have taken the lower figure of applications (one applications often has multiple hearings dealing with different aspects. Part time members have been reduced to Full Time Equivalents by dividing the total budget on them by their rate for four hours and assuming 40hrs per week for 50

weeks, again if anything understating the figure. As in Table 5.6 no attempt to distinguish between judges and magistrates who do criminal cases has been attempted but the workload statistics are for civil disputes for comparative purposes in Tables 2.7 and 5.6.

A comparison of case loads and judicial numbers for The Netherlands and Germany compared to South Australia are set out in the following table.

Table 5.6: Judges, Lawyers and Claims filed per 100,000 population in The Netherlands, West Germany and South Australia, repeat of Table 2.7

	The Netherlands	Northrhine-Westphalia	South Australia
Judges	12	24	9
Lawyers	51	110	161
Civil claims filed	2,258	3,535	2,601
Civil claims per judge	188	147	289
Civil claims per lawyer	44	32	16

The figures for The Netherlands and Northrhine- Westphalia are adapted from figures published by Prof. Erhard Blankenburg (Blankenburg 1998) He uses Northrhine- Westphalia as representative of the former West Germany because of its cultural similarity to The Netherlands and to remove the effect of inclusion of data from the former GDR. The figures are for 1992. His figures have been modified by adding prosecutors to lawyers. The German figures do not include the Mahnverfähren (uncontested debt) procedure which are another 10,588 claims per 100,000. The SA figures are taken from Table 2.1 and are reduced on a population of 1.5million in June 1998 (Australian Bureau of Statistics). The cases in the Magistrates Court likewise exclude uncontested debt cases which were another 46,932 (derived from Table 2.4). The figures for judges and lawyers include all of them. The number of cases are only non criminal proceedings. Lawyers include all with a current practicing certificate- June 1998, 2,419, June 1999, 2,423 (Law Society Annual Report). In South Australia prosecutors are counted as lawyers.

These figures suggest the ratio of judges to lawyers is nowhere near as different as Marc Galanter suggests. It is 1:5 in Germany and 1:18 in Australia (rather than 1:43). The difference is still notable. The German system deals with more cases per 100,000 population than the South Australian system with two and a half times as many judges but only two thirds as many lawyers. The high number of cases probably reflects the tight court and lawyer monopoly on dispute resolution in Germany in contrast to the relatively diffuse dispute resolution services of industry ombudsmen and mediation services in Australia (Chapter 3). Leaving any effect of that aside, when the systems are analysed by lawyer and judicial input per case numbers the comparison reduces to twice as many judges in Germany but half as many lawyers to do the same work as in South Australia.

However, comparisons between the South Australian common law and European models are hard to make accurately. There are many reasons other than the different approach to litigation in the civil system which may explain the apparently high level of judges in Germany. Judges doing criminal work are included in the count of judges so more judicial input under European inquisitorial criminal processes may explain some of the higher numbers of judges. Then there are judges in Germany fulfilling functions that are regarded as administrative in South Australia. An example is that judges in Germany have responsibility for the administration of companies. In Australia this is the role of a substantial bureaucracy, the Australian Securities Commission. The fact that the choice of a judicial career is made at law school in Germany means inexperienced judges are included in these comparisons whereas in South Australia judicial appointments are made later in life. Presumably more experienced appointees take a full work load more quickly. More difficult civil cases in the higher first instance court in both The Netherlands and Germany are often heard by a panel of three judges, whereas all first instance hearings in South Australia are heard by a judge or magistrate sitting alone. Such cases obviously return a statistical result of three judges per case compared to one in South Australia. Judges doing first instance work in Germany have no support staff beyond access to a typing pool compared to magistrates in South Australia who have a full time designated clerk and an orderly for in court work and judges in higher courts who in addition have access to a graduate lawyer, known as an associate to assist with legal research. Presumably the extra staff in South Australia allows a more effective use of judicial time compared to Germany. Judicial workloads may vary due to factors other than differences in case handling techniques. In The Netherlands there is no tradition of administrative law reviewing government decisions (although that has recently changed) which explains a portion of the reduced number of cases and judges relative to Germany. In The Netherlands both methods of appointment occur, that is after the state exams and later in the career.

There are some figures to suggest that the rate of settlement before trial is lower under the European Civil Code method (see Chapter 2, Appendix 2.A). However, under that method, what we would call a first directions hearing is the

commencement of the hearing by the judge, and what we would call a settlement at that stage of the process may well, under their view that the trial has commenced, not be a settlement. All this suggests that accurate comparisons without going behind the raw figures are difficult. These factors explain away a proportion of the higher numbers of judges in Germany. The other impression from these comparative figures, is that a major difference between the German and South Australian method of court procedure is not so much that the German method is expensive to the state for judicial resources but rather the South Australian method requires many more lawyers for the number of cases. The South Australian method comparatively appears to be expensive to the community of lawyer resources. However it is not my conclusion that the German method be adopted in toto in the South Australian Magistrates Court. Merely that in selected cases aspects of the judicial management of evidence seen in Germany be adopted. The bulk of the routine work of the court should continue to proceed as it does at the moment. Further the use of court appointed experts, which is a particular type of court management of evidence has proved to save court resources. There is nothing in this comparison to prohibit adapting some civil code techniques, as exemplified by Germany, to improve the traditional common law adversary approach. On the contrary it might save the litigants lawyer resources.

Another measure of the comparative use of judicial resources between the European system of more judicial control of pretrial processes and fact finding compared to the South Australian traditional common law adversary model is the case loads for each judge in different systems. The case load for each judge in Baden-Württenburg in south western Germany doing civil work in the lower court (Amtsgericht) is 600 per annum and in the higher court (Landgericht) case loads of 200 per annum are usual (Richters 1999). Published figures suggest a case load of 580 in the Amtsgericht for the whole of Germany in 1992 (Vultejus 1998, S.603). The case load per Magistrate in the South Australian Magistrates Court, Adelaide civil registry, which specialises in civil claims in 1997 was 380 small claims (<A$5,001), 229 general claims a total of 609 cases. The case load is remarkably similar to the equivalent Baden-Württemburg court, the Amtsgericht. This comparison has some difficulties because

the jurisdiction of the Magistrates Court is somewhat higher (A$30,000 and A$60,000 limit depending on the type of case compared to 10,000DM in the Amtsgericht. A$1 was worth slightly more than 1DM in 1999). However this is balanced somewhat by the higher small claims limit in the Magistrates Court (A$5,000 compared to 1,500DM- §295 ZPO). Although direct figures on the higher courts in South Australia are not available because the judges do not specialise in civil work, the much lower figure in Germany in the higher court likewise would be reflected in South Australia. This implies similar case loads despite the different procedures. On this comparison the greater control over fact finding exercised by judges in Germany is not more expensive of judicial resources than the traditional common law adversary model.

The difference between Germany and The Netherlands is more reliably informative because the underlying legal systems and cultures are relatively similar. The Netherlands court system has less claims, half the number of judges and less than half the number of lawyers than Germany. It is closer to South Australia. It cannot be that the civil code approach to case management and fact finding that causes these differences because they use the same approach.

The conclusion by Professor Erhard Blankenburg is that it is not the method of determining disputes that causes high numbers of judges and the relatively high use of the judicial system in Germany compared to The Netherlands. It is lawyer and court monopolies over dispute resolution that are underpinned by a predictable system of cost shifting, that discourages unnecessary activity. This results in litigation being relatively cheap in Germany. In contrast in The Netherlands unpredictable cost recovery, loose lawyer monopolies and a diverse system of ADR institutions are features of the Dutch system that militate against too ready resort to litigation (Blankenburg 1998). The notably different usage of courts and judicial resources under apparently the same system suggests that factors other than the method of judicial process affect the usage of courts and the need for judicial resources. This leads to the conclusion that a shift of control over pretrial processes and fact finding need not necessarily be prohibitively expensive of judicial resources,

provided these other factors affecting usage of courts and judicial resources are taken into account. Clearly 'the desirable features of a system' need to include a wide range of system settings. It is not just a choice between the traditional common law adversary model and the European 'inquisitorial' model. There is nothing in this comparative data to preclude, for resource reasons, the adoption of the conclusion that it is desirable for lower courts in appropriate cases to manage the gathering an presentation of evidence.

Summary of Conclusions

The protest of Felix Frankfurter quoted above rings through this chapter, "Federal judges are not referees of prize fights but functionaries of justice...". If Magistrates in lower courts are to be functionaries of justice they need to be willing to exercise control of the process. The prize fighters cannot be trusted with the control of the process in all cases. The following conclusions follow from the above discussion:

- The following are essential characteristics of an adversary system:
    - the parties are entitled to be served,
    - the parties define the dispute,
    - the parties can end the dispute by agreement,
    - the parties nominate the evidence to be brought to the court,
    - the parties can question witnesses and can be heard on all issues,
    - proceedings are conducted in open court in the presence of the parties and their legal advisers, and
    - reasons for judgment are given, are subject to appeal and have an effect of res judicata.
- Within those characteristics the common law tradition for fact finding can be improved in lower courts if they exercise a degree of control over the gathering and presentation of evidence in appropriate cases.
- Some particular types of cases that will benefit from court management of fact finding will be those:
    - where the parties have a marked difference in resources,
    - that have a narrow factual or legal issue whose determination can be

expected to resolve the matter,

  - where the expected length of the trial is excessive due to the proof of detail not essential for the resolution of the key issues, and
  - that are not progressing at a satisfactory rate through pretrial processes.

- The parties must disclose the evidence they wish to bring to bear on the issues and the same magistrate will need to manage each case from the defence until the trial.
- If a court manages the collection and presentation of evidence it will first need to ascertain the key issues. Consequent upon that, other issues can be grouped into those that assist in determining the key issues and those necessary to complete the required findings but not expected to assist in determining the key issues. Where there are competing versions, courts should ensure that the parties efficiently gather the detail of the circumstances surrounding the key issues.
- In some cases it will be better to bring evidence of issues that assist in determining the key issue to court at the earliest reasonable time, rather than leaving it hidden as a trap to catch the liar at the oral trial which is the barrister's instinct. The detail may correct errors or overwhelm the liar without the necessity of the trial.
- It follows that in some cases the trial will not be continuous.
- Innovative ways to reduce factual controversies should be tried, such as mediation style conferences and expert conferences, and the reversal of the onus of proof where the alternative is to seek to prove by discovery matters that are in the other party's hands.
- The collection of evidence of facts that are not expected to assist in the resolution of the key issue should be given less priority and should not be allowed to become the subject of discovery abuse.
- Lower courts should accept a purpose to decide an accurate version of facts, within the confines of the adversary process set out above.
- Consistent with the exercise of control over the collection and presentation of evidence, lower courts should retain their own expertise to advise them is relation to opinion evidence in appropriate cases.
- Lower court experts should be of the highest probity, be accepted experts in their field, preferably be out of the commercial mainstream of their field and be trained in issues of procedural fairness.

- Tradesmen should be accepted as experts in matters of their trade.
- Lower court experts should be used to advise the court and the parties on technical issues at the earliest possible and all stages of the litigation process, to chair conferences of experts and to provide reports to the court to be used as evidence.
- Before a lower court accepts the opinion of its expert generally the opinion should be written and the qualifications of the expert, the factual material upon which the opinion is based and the basis of the opinion should be known by the parties who should have an opportunity to question the expert as an officer of the court, but not as a witness.
- Lower courts should be able to exercise greater control over the collection and presentation of evidence, including opinion evidence, in appropriate cases, without substantially increased resources.

ENDNOTES

(1) In Australia case flow management systems are in place in most states and in federal courts of first instance. In South Australia it was first introduced in the District Court in the late 1980s. It is accepted as part of the landscape and there is no serious attack on its appropriateness except the debate over whether it increases cost. A review of the cost of civil litigation in the District Courts of Queensland and Victoria (known as the County Court) published in 1992 showed that costs were affected by the stage in the process at which the case was finalised rather than how long it took (Williams and others, 1992). A NSW survey suggested that delay did contribute to cost when loss of use of the money was taken into account (Guest and Murphy 1995). The defence of the traditional common law adversary system in the United Kingdom in the face of the Woolf reforms includes the fear that case flow management increase costs (essays in Zuckerman 1995). There must be little doubt that undifferentiated case flow management does increase costs by institutionalising all the pretrial steps. My own research suggests that involving the parties and magistrates at the beginning of the process saves costs by increasing the number of cases that settle early (Cannon 1996). The RAND research on the Civil Justice Reform Act in the USA identified four types of case management that reduced delay and supports the view that greater judicial management increases costs. The four case management procedures that showed consistent, statistically significant effects on time to disposition were (Rand 1996, vol.1 p.14):

- early judicial management,
- setting the trial schedule early. This, by itself, produced a reduction of 1.5 to 2 months in estimated time to disposition without any significant change in lawyer work hours,
- reducing time to discovery cut off,
- having litigants at or available on the telephone for settlement conferences.

The survey concluded that the combined effect of these procedures reduced median time to disposition by about four to five months or about 30% of median time to disposition.

Using lawyer hours as an indicator of costs, only judicial management of discovery with a shorter median discovery cut off reduced lawyer work hours. In contrast,

cases with earlier judicial management tended to require more lawyer hours. The authors estimate a 1.5 to 2 months reduction in median time to disposition for cases that last at least nine months, but an approximately 20 hours increase in lawyer work hours. The data also shows that the cost to litigants are also higher in dollar terms and in litigant hours spent when cases are managed early. These results debunk the myth that reducing time to disposition will necessarily reduce litigation costs. Early management also means more cases are managed, i.e. some cases are managed that would have settled anyway.

(2) Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia

Practitioners should give a copy of the following guidelines to any expert witness they propose to retain for the purpose of giving a report and giving evidence in a proceeding. The guidelines are not intended to address exhaustively all aspects of an expert's duties.

M.E.J. BLACK

Chief Justice

GUIDELINES

General Duty to the Court

An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise. An expert witness is not an advocate for a party. An expert witness's paramount duty is to the Court and not to the person retaining the expert.

The Form of the Expert Evidence

An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report. All assumptions made by the expert should be clearly and fully stated. The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment. Where several opinions are provided in the report, the expert should summarise them. The expert should give reasons for each opinion. At the end of the report the expert should declare that: "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no

matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court." There should be attached to the report, or summarised in it, the following:

(i)all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report;

(ii)the facts, matters and assumptions upon which the report proceeds; and

(iii)the documents and other materials which the expert has been instructed to consider.

If, after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert's report or for any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness's report has been provided and, when appropriate, to the Court. If an expert's opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report. The expert should make it clear when a particular question or issue falls outside his or her field of expertise. Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.

Experts' Conference

If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement on matters of expert opinion, they should specify their reasons for being unable to do so.

(The footnotes to these guidelines have been deleted.)

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CHAPTER 6: THE USE OF ADR BY THE LOWER COURTS

Courts have increasingly adopted ADR techniques in recent years. This has been controversial. This chapter reviews some American and English academic concerns about court involvement in ADR and contrasts this concern with German experience. Some ADR which has been used in the South Australian Magistrates Court is evaluated and some other possibilities are discussed. Conclusions are drawn about proper ways that lower courts should use ADR and including the thorniest issue, the extent to which magistrates can properly involve themselves in settlement attempts.

What are the dangers of courts using ADR?

One American view is that settlement should be discouraged because there is an intrinsic worth in a judicial determination of parties' disputes has already been discussed. It was most famously expressed by Fiss (1983, p.1085).

> "To be against settlement is only to suggest that when parties settle society gets less than what appears and for a price it does not know it is paying. Parties might settle while leaving justice undone."

This view has much support in the literature. In the United States this view was reported by Lind and others (Lind 1989, p.5).

> "Society has an interest in maintaining a structure for dispute resolution that comports well with the political and social values of society. Procedures express our value structure. Thus society has concerns about dispute resolution which can be distinct from those of the litigants. In addition, the accumulation of individual decisions in trials and appeals provides a body of law to guide the actions of people in circumstances similar to those involved in the suit. Moreover, society may have an interest in awarding particular outcomes of disputes such as agreements that might benefit the plaintiff and defendant but would harm the community as a whole. Once society's institution for resolving disputes has been engaged it is argued society's interest must always be

considered in responding to the resolution of - and presumably in choosing the process of resolving- the dispute."

The special role that courts have as the arbiters of community standards as well as striving to do justice between the parties in a particular dispute has been described in the Australian literature in the context of tribunals in these terms (Ratnapala 1990, p.94 from E. Eugene Clark 1992, p.117):

> "Accountability to the individual alone means that the process fails to address one very important requirement of justice. It is that justice must be done not only in relation to the individual but also in relation to the community. This requirement applies whether one talks of commutative justice or distributive justice. In the case of commutative justice it expresses the need to ensure that the established rules of conduct are upheld and their breach is remedied. In the case of distributive justice the requirement translates as the need to ensure that the benefits and privileges conferred from public wealth are distributed according to rules and criteria agreed to by the public."

The defenders of the traditional trial process point out its strengths to assert that the judiciary should stick to their traditional role of detached determination of disputes rather than being involved in settlement (Lind 1989, p.5):

> "case outcome, delay and costs were less strongly related to perceived fairness and satisfaction than is generally thought."

It follows that:

> "These findings raise doubts about whether costs or time-saving innovations will increase individual tort litigants' satisfaction and perceived fairness."

Their finding was that: "Trial engendered higher levels of perceived control and participation as well as higher levels of litigant comprehension." Importantly, that study suggested that:

> "the perception of unbiased and dignified procedures, perceived carefulness of the process, ... comfort with the procedure and perceived control over case events and outcomes were more important for system and outcome satisfaction than cost or delay."

Professor Dr. Deborah Hensler expresses the concern that departures from the trial process remove the protection of openness, formality, due process, a record of proceedings and the setting of normative precedents. Her review of research on arbitration shows a high degree of litigant satisfaction in common with the trial process. She reports that (Hensler 1990, pp.417-418):

> "Litigants believe that both arbitration and trial are more fair than settlement conferences. ... Again the importance of the process being seen to be procedurally fair was paramount to litigant satisfaction."

It is important however to note that in the United States settlement conferences are often held in the absence of the parties which obviously diminishes their appeal to the absent parties.

Abel has identified the serious dangers of informal processes where substantial power imbalances exist and the risks of covert manipulation (Abel 1982).

The same concerns have been articulated in response to the Woolf proposals (Woolf 1995) in the United Kingdom (Roberts 1993, pp.461-2).

> "Worries about court-linked schemes of 'alternative dispute resolution' have been widely articulated, notably in North America. These fall into two broad categories: those anticipating that general harm will come to the polity if the

integrity of adjudication is damaged through judges' involvement with ADR; and those forecasting that disadvantage will be suffered by individual litigants or particular classes of litigant if judicial authority is lent to informal processes. Looking at the first of these worries, the argument is that judicial authority can be compromised if judges involve themselves, or even are perceived by the public to be involved in the sponsorship of settlement through the management of negotiations. ...

There is a specific problem when the form of settlement-directed intervention involves the judge seeking to act as a mediator when a dispute first comes before the court. Facilitatory mediation demands a posture of the intervener, and a relationship between the intervener and disputants, quite different from those prevailing when the third party is authorised to make an imposed decision. It remains unclear whether it is feasible to shift back and forward between these two roles, even if it is understood that no intervener may exercise more than one role in a particular dispute.

The establishment of alternative agencies and the ensuing informal procedures, which enjoy the authority of the court but which are stripped of the procedural safeguards of adjudication, carry the risk of unregulated coercion and manipulation of weaker parties by stronger ones, and of both parties by the intervener. Attempts by courts to oversee and regulate hitherto private settlement-directed negotiations present the same dangers. These dangers flow from the nature of the authority which successful courts must of necessity enjoy. Courts are places where dominant seniors tell us what to do and judges are equipped with coercive powers in the event of our failure to comply with their orders. This circumstance in itself makes court sponsored negotiatory processes potentially problematic: and the evidence so far available in Britain suggests the parties subject to such processes experience them as coercive. ... there is a serious risk that that meanings will become muddled in the minds of disputants if the processes over which they

> supposedly retain control are conflated with those which are essentially directed towards the delivery of an imposed decision."

Roberts is explicitly concerned at courts mixing their roles between encouraging settlement and determinative judgment (Roberts 1993, pp.469-70).

> "The authority of the court, historically deployed in the delivery of 'judgment' becomes linked to 'settlement' so eroding the line between negotiated outcome and imposed decision which it has hitherto been in the hands of the parties to cross."

However many commentators are proponents for courts adopting ADR techniques into their systems (e.g. Sander 1985, p.260). The concept of the Multi-Door Courthouse is established in the United States (Galanter 1999, p.127) and is among the Woolf recommendations in the United Kingdom.

> "... an ideology of 'process pluralism'; the notion that there is no single best way of resolving disputes, and that adjudication is only one of many ways to address problems. On the whole, the legal establishment has accepted process pluralism and with it the notion that the courts should preside over a repertoire of dispute-resolving methods."

However Marc Galanter points out that in the United States the civil courts (Galanter 1999, pp.132-3):

> "... are occupied in large part by cases in which individuals seek to hold corporate entities to account. In a study of civil jury trials in the 75 largest counties in 1992, individuals were 87.5% of the plaintiffs, but only 30.2% of the defendants; the breakdown of defendants was 7.9% government, 52.9% business, 9% hospitals. ...Departures from adversariness should be assessed in light of how they preserve or promote protections and remedies for individuals in a world increasingly dominated by corporate actors.

> Adversarial litigation is costly. Modern societies cannot afford to provide it in the run of cases: most cases will be resolved by some form of 'bargaining on the shadow of the law'. It is important to ensure that the small fraction of cases that get the full treatment generate powerful signals that will be useful in resolving the great majority of cases and generating measures that prevent injurious practices."

This does not describe the users of the Magistrates Court in South Australia. It still has a large plaintiff small business clientele in its cases that are listed for trial (see Tables 6.1 and 6.2 below). However the point that cases that go to trial need to receive careful and accurate treatment to provide clear and consistent guidance for future conduct and to assist others to settle is true regardless of the nature of the plaintiff clientele. This is part of what distinguishes a court system from ADR (see Chapter 3) and the fact that accurate decision making increases the number of cases that settle is supported by the economic modelling discussed in Chapter 7.

The most recent and comprehensive research on the topic of court involvement in ADR was the Rand Report on CJRA reforms in the United States. The fact the reforms were imposed and in some courts had already been adopted before the imposition both contributed to the reforms not causing much observable effect. It did not support the view that ADR by courts reduced costs or delay, but neither did it increase it. Lawyer surveys suggest that timing was as important to whether a case settled as discovery information. No difference in settlement results between mandatory and voluntary ADR was recorded. Litigant involvement was an important factor in favourable impressions by them of the process (endnote 1).

A recent defence of the trial process and criticism of courts using ADR is found in Professor Resnik's commentary on the Rand report on the CJRA reforms. She makes the point that the judiciary has a unique function in the adjudication and enforcement of civil claims. However if it fails to deliver on this process but rather diverts all cases to ADR techniques (over which it does not have a monopoly) then the very reason for the judiciary's existence and its claim on society's resources may cease to exist. She

expresses concern at the change in judicial function from decision-making by public adjudication (Resnik 1997, pp 212-213). "Instead judicial leaders have transformed the practice of judging and shifted the centre to the pretrial phase, during which they offer advice and make informal decisions." She notes concerns about the proliferation of judges to embrace previously quasi-judicial officers and says this:

> "While one can marvel at the creation of these 'judicial officers' and the delegation of work to them as an innovative response to the longstanding need for more judges and the political limitations on enlargement of the life-tenured judiciary, the transition of the entire work force of judges into 'judicial officers' makes it difficult to explain why some of them should continue to have either life tenure or awesome authority, much of it discretionary." And concludes (Resnik 1997, pp.218-9):
>
> "Moreover the charter of discretionary powers over civil pretrial processing rests on the special role of the judge, the unique vantage point, not only of disinterest but also of knowledge and experience of what adjudication offers in contrast to other forms of disposition. If judges have altered the practice of judging and made it a kind of manager-facilitator job that many officials of courts and private parties can do, why give them either substantial discretion in pretrial processing or in adjudication? At issue is the role of the judge, the practice of judging and the reason for celebrating or limiting the work of the Third Branch."

The view that the judicial role is to dispense justice and this has nothing to do with broking deals has been vigorously expressed (Spiegelman CJ 1999):

> "There is a tendency today to treat the courts as some form of publicly funded dispute resolution service. Such an approach would deny the whole heritage we have gathered here today to commemorate. This court does not provide a service to litigants as consumers. This court administers justice in accordance with the law and that is a core form of government."

However views of what is justice may not be clear cut (Abel 1982, p.1):

> " ... Underlying this wide diversity of judgments upon particular types of issue are a set of conflicting conceptions of justice, conceptions which are strikingly at odds with one another in a number of ways. Some conceptions of justice make the concept of desert central, while other deny it any relevance at all. Some conceptions appeal to inalienable human rights, others to some notion of social contract, and others again to a standard of utility. Moreover the rival theory is that justice which embodies these rival conceptions also gives expression to disagreements about the relationship of justice to other human goods about the kind of equality which justice requires, about the range of transactions and persons to which considerations of justice are relevant and about whether or not a knowledge of justice is possible without a knowledge of God's law."

Whatever one's view of justice may be, it is compelling that ADR should not impede access to the core functions of the lower courts, enforcement of obligations and adjudication of the extent of them. Those core functions must be intellectually rigorous and surrounded by the protection of openness, careful dignified procedures, procedural fairness and due process and appellability that its defenders correctly identify as desirable.

Here then are several reasons to be cautious of lower courts being involved in ADR activities. In summary they are:

- The loss of precedent and the risk of bargains contrary to society's interest.
- Courts diminish their credibility by giving their authority to ADR methods conducted by non judicial officers.
- Judicial officers have a special role of determining facts and applying discernible community standards (law) to those facts. They diminish that role if they use ADR methods.

- ADR lacks openness and procedural safeguards and courts are diminished by being associated with it (a conflation of the last two above).

The first assertion is that settlements themselves deprive society of the benefit of a judicial precedent and may result in bargains that are not in the best interests of society. These possibilities will not apply to all disputes. Fact situations that fit well into established precedent, such as failure to pay for goods that were supplied in accordance with a contract of purchase between the parties, or a rear end motor vehicle accident without untoward activity by the car in front nor other unusual circumstance, have nothing to offer precedent. Many of the obligations that lower courts are being called upon to verify are of the type that have no potential to create valuable precedent. If the parties can agree these without judicial determination this is no loss to society. Further, lower courts are mostly involved in fact finding rather than establishing precedent, although it is true that as more work is pushed down to them their role in establishing precedents is increasing. The loss of the potential of a precedent is a lesser danger in lower courts than superior courts.

The view that once a dispute comes to the attention of the courts they need to satisfy themselves that the result comports with society's values is paternalistic. It flies in the face of the reality that about ninety percent of the defended cases in courts in fact settle without adjudication (endnote 2). Under traditional common law adversary procedures the court does not monitor settlement terms but leaves them to the parties and their advisers. Often the terms are secret. It may be desirable that some agreements should be precluded for reasons of illegality, other paramount public policy or unfairness. However for courts to concern themselves with the terms of settlement for every case would be a departure from the very adversary model of judicial detachment and party control that the argument is defending. In Chapter 5 it is argued that greater control by magistrates over management of fact finding is desirable and a consequence of this might be greater judicial knowledge of settlement terms. On the 'Against Settlement' approach that may be a collateral advantage of a shift of control from the parties to the court. However most cases settle and often on terms that the parties will not seek the court to approve. What is important is that once a court's procedures are engaged

power imbalances, alienating court processes, and cultural barriers do not disadvantage some parties causing them to accept an unfair bargain. This is best addressed by the design and practice of the court procedures to address these issues and ensuring that parties have adequate advice. If these matters are attended to judicial scrutiny of settlements is probably unnecessary. If they are not it is doubtful whether judicial scrutiny would be able to remedy the problem. What is important is that adjudication is available, if the parties, properly advised, decide that the alternatives are unsatisfactory. As Ms. Hensler points out the trial process offers many desirable features. The aim should be to offer choice, and importantly not to make ADR an obstacle to adjudication by a court. It follows from this that there is no in principle reason to prevent courts from encouraging ADR before nor after a claim has been commenced at the court provided it is not an obstacle to the court's primary function of adjudicative dispute resolution. The corollary is that courts should not make ADR compulsory.

The more problematic concern is the proper role of the court in offering ADR processes. A distinction can be drawn between the court offering ADR by non judicial personnel and magistrates undertaking ADR procedures.

If courts allow non judicially qualified personnel to undertake ADR in the court's name and they appear or are styled as part of the judiciary then indeed the judicial currency may be devalued. The need to clearly distinguish non judicial registrars clearly is emphasised in the survey results discussed below, where several respondents thought the registrar was a magistrate (and preferred him!) even though he did not represent himself as such and conducted his hearings in informal surroundings not on the bench. However, if the distinction is made successfully there can be no philosophical objection to courts providing ADR in various forms conducted by non judicial personnel, provided high standards are maintained and the procedures are not an obstacle to the adjudication of disputes.

The more difficult issue is whether magistrates undertaking pretrial management of cases and ADR at any stage of the process diminishes the value of judicial currency. The involvement of the judiciary in pretrial management in the first place was a

response to unacceptable delays under a system which left management to the parties, in fact more usually their legal advisers. The unacceptable delay itself brought the judicial system into disrepute. The Woolf report in the United Kingdom recommends the same response to the same problem, i.e. judicial case flow management to solve problems of delay (Woolf 1995). In Chapter 5 I suggest a desirable progression from greater judicial control of the progress of cases is for the judicial officer to exercise earlier and greater control over the fact gathering process. If they do they are likely to become involved in settlement suggestions. Is this a problem?

It is instructive to find that the view that the judiciary should confine themselves strictly to their adjudication role is a peculiarly common law one. Under the European civil code it is typical for a case to be allocated to a judge soon after its filing and that judge manages it to conclusion. As part of that process the judge will explore options of settlement. In fact the German code of civil procedure obligates the court to attempt to negotiate a settlement. § 279 ZPO provides (Goren 1990):

> "(1) The court shall bear in mind at every stage of the proceedings an amicable settlement of the case or of individual points of controversy. It can refer the parties for an attempt of amicable settlement to a commissioned judge or a requested judge.
>
> (2) The personal appearance of the parties may be ordered for an attempt of amicable settlement. ..."

An diary of a case in Germany where the judge was involved in settlement discussions is in Appendix 6.A. In practice the presiding judge may attempt to settle the case and continue to hear it if the attempt fails. In The Netherlands, which for the purposes of this discussion has a similar code to Germany, the kört geding, or preliminary injunction procedure has been adapted to allow parties to obtain a judicial assessment of the likely outcome of the case on the basis of what we would describe as affidavit evidence. This is conducted in open court. The parties' lawyers summarise the merits of each case and the judge gives an intimation of his view of the likely outcome. If a party declines to accept the evaluation the case is then heard by another judge and if the

party does not better the evaluation in the ultimate determination it will pay all the others' costs. This is the judiciary providing a type of case appraisal function which is provided by senior lawyers in some Australian jurisdictions. The point is, the practice of courts managing cases and being involved in attempts to settle them, is accepted as the norm. In these systems judges engage in ADR and adjudicate. This is not seen as a confusion of roles, nor is the status of the judicial system apparently diminished by judicial involvement in attempts to settle cases.

The issue is whether in principle a magistrate can assist parties in ADR roles without diminishing his or her status as a society appointed adjudicator. The answer is in the detail. Provided a magistrate spells out any role which is a departure from the adjudication role and ensures that he or she is not defacto performing an adjudication role without the usual safeguards of that role, there should not be any fundamental objection to the magistrate participating in the process in a different role. What is important is that the parties, and the magistrate, understand the role that the magistrate is fulfilling. For example a magistrate may be ideally equipped to give an independent evaluation of the likely result in a case but in doing so must make it clear where the evaluation may be wrong if factual assumptions are incorrect. Where such an evaluation is given one would expect another magistrate to hear a subsequent trial. If the first magistrate heard the trial there may seem to be pressure on him or her to uphold the evaluation. Indeed Koch and Deidrich in commenting on the German courts acknowledge this danger. The authors suggest that where a judge suggests a settlement, the parties are unwise not to accept it, because the judge may (Koch 1998, para. 112) 'react very unfriendly and unfavourable to the party who was in particular opposed to the settlement.'

Even under a strict adversary common law model it is not unusual, nor improper, for a judge to intimate the likely result during a trial given stated assumptions about important factual matters. It is essential any such intimation is not based on false assumptions nor an improper attempt to bring proceedings to an early and from the judge's point of view a satisfactory result, that does not need a judgment and cannot be appealed. This is merely a comment on the need to have judges of the highest probity

with a good work ethic. If judges did not have these qualities they could do as much damage in the trial process as in settlement discussions. Once it is acknowledged that a judge may make settlement suggestions during a trial it is not a large leap to judicial involvement in other ADR processes.

There does not appear to be any issue of principle preventing judges being involved in ADR, but if they are, protocols to prevent any perceptions of bias or prejudgment need to be observed. The fact that this mixing of roles between the judge conciliator and judge adjudicator is so readily accepted in the civil code countries is further reason to be confident that there is no fatal contradiction in the two roles. ADR must not become a barrier to accessing their core function. Alternatives should mean just that and should not be allowed to supplant, nor be an obstacle to the trial process. Professor Resnik's point is powerful if courts force all litigants into mediation. In appropriate circumstances ADR might be part of a judicial officer's proper work. However once a judicial officers are involved in ADR, they must bring the same intellectual rigour that they bring to their core function to ensure the procedures are dignified, procedural fairness and due process are observed and agreements fit with the system's view of justice. If judges do use ADR they need to be careful to ensure that any departure from their traditional role is clear to the parties.

Proper ways for courts to encourage ADR, preaction, by non judicial court officers once an action is commenced, and proper circumstances for magistrates to use ADR and appropriate safeguards when they do are now discussed from the experience of the South Australian Magistrates Court.

Types of court ADR in the South Australian Magistrates Court

In assessing court ADR who the court is serving may be important. If it is predominantly for a few individual plaintiffs to assert rights against large corporate defendants, it has been suggested that the strict adversary model serves that purpose (see Galanter above). However accurate that view may be that is not the profile of defended cases in the South Australian Magistrates Court. Uncontested debt cases by definition are excluded as not relevant to considerations of the best ways of resolving

contested obligations. Figures profiling the parties to all defended actions are not available. Information on a sample of cases listed for trial in the Adelaide Registry is available and this is set out in Tables 6.1 and 6.2. The Adelaide Registry does about half the civil work of the court in the state. This profile would be representative of a metropolitan court and not necessarily country courts where regional idiosyncrasies may occur.

Table 6.1: Users of court trials in 3 months- Adelaide Registry, general cases

Please see print copy for image

Source: An analysis of all general cases listed for trial in the Adelaide registry of the South Australian Magistrates Court in the months of May, August and September 1999 (figures for June and July were not available). They did not necessarily proceed to verdict.

Table 6.2: Users of court trials in 3 months- Adelaide Registry, small claims

Please see print copy for image

Source: An analysis of all small claims listed for trial in the Adelaide registry of the South Australian Magistrates Court in the months of May, August and September 1999 (figures for June and July were not available). They did not necessarily proceed to verdict.

An analysis of 3 months cases that were listed for trial in the Adelaide registry of the court in 1999 showed that in general cases 45% were brought by individual plaintiffs and 45% of defendants were individuals. In small claims 59% were brought by individual plaintiffs against 69% individual defendants. In classifying parties, legal and business partnerships were classified as business. The majority of the business clients were small businesses not large corporations. Although large corporations and government are present as parties they do not dominate as either plaintiffs or defendants. The exception to this is personal injury claims where behind almost all defendants is a large insurance company or the government.

In the profile of the type of claim 'Debt ' covers many types of claims including most typically goods sold and delivered but would also cover other claims for a liquidated sum as opposed to damages.

More than 85% of defended cases in the South Australian Magistrates court are finalised without a verdict. This is typical in common law courts (endnote 2). Most settle by bilateral negotiation between the parties and their advisors. Here they bargain in the shadow of the law, indeed close to law itself. Between twelve and sixteen per cent leave settlement until the court steps (see Table 6.6 below). More than half the cases listed for trial settle without verdict. This is not always an exercise in brinkmanship. Some only defend to achieve delay and once the trial is about to commence little more delay is left and the trade off of expense is becoming prohibitively high. Others may leave facing reality until the last moment. Sometimes cases may be prepared on a wrong assumption of fact or law. No doubt there are other reasons for late settlements. Settlements left late in the process are expensive to both the parties and the court. The South Australian Magistrates Court has undertaken several policies to assist settlement earlier in the process. The court in concert with other courts in South Australia has encouraged preclaim negotiations by requiring

notice of a formulated claim in personal injury claims. Once a claim has been filed and defended the court has involved parties personally early in the process, offered mediation by non judicial court staff and provided expert advice to the parties all at no fee to them. Mediation and expert advice are only provided if the parties consent. Magistrates in the court have been given LEADR (Lawyers Engaged in Alternative Dispute Resolution) training, primarily to inform them about mediation rather than to train them to conduct mediation themselves. However in a few cases assessed as particularly appropriate magistrates have conducted mediations.

The effect of prelodgement notices in personal injury claims has been previously researched by the author and the conclusions from that research are briefly discussed. A new internet scheme is too recent to be evaluated. Quantitative and qualitative research on the effect of offering mediation by court officers is described. There is a study of two similar cases, on finalised by trial, one by mediation conducted by a magistrate.

Prelodgement notice of personal injury claims

In the early 1990s the then State Government Insurance Commission (SGIC) initiated a policy of trying to settle personal injury claims from motor accidents against those it insures. It held all motor vehicle third party personal injury insurance in SA. This was unashamedly to save medico legal costs. The courts in South Australia adopted a rule requiring ninety day notice of claim prior to it being filed in the court under threat of loss of party party costs for failure to do so. The effect of the SGIC policy and court rule change was to reduce SGIC's medico legal bill from A$44m. in 1991/2 to A$26m in 1994/5. Although that reduction can be partly explained by a legislative reduction in the level of damages in such cases, the costs as a percentage of total pay out reduced in the same period. The number of all personal injury claims commenced in South Australian court reduced by approximately 75%, without a prior sufficient reduction of casualty accidents sufficient to explain the fall. The following table demonstrates this:

Table 6.3: Casualty accidents and claims against SGIC 1987-1995

Please see print copy for image

Source: Cannon 1996, Appendix C sheet 5.

It is clear that these reductions were a result of aggressive attempts to settle cases by relative generosity early. In effect some money that previously would have been paid as costs was diverted direct to the claimant. The success of this initiative was more as a result of the attitude change by SGIC rather than the rule change itself. This has been the subject of detailed analysis by the author (Cannon 1996). In terms of achieving early settlements and saving costs this has been the most successful ADR initiative in recent years. SGIC have paid potential plaintiffs their reasonable medico legal cost (reasonable in plaintiff lawyers' assessment) and there is no compromise to the court.

The South Australian Magistrates Court in 1999 also provided a final notice of claim which encourages the use of ADR by offering court expert advice and mediation free of charge to the parties. This is available at a website, www.claims.courts.sa.gov.au, for a fee of ten dollars. It is too early to evaluate the effect of that. Such schemes encourage bilateral negotiations by reminding people of 'the shadow of the law'. These are ways the court can encourage ADR without compromising its core function of determinative dispute resolution in accordance with society's standards.

Court expert appraisal

The court has a scheme of court appointed experts to advise parties on technical matters. This is a form of court management of fact finding and accordingly is discussed in Chapter 5. However the court experts inevitably have a function of assisting the parties to settle. Hence this is mentioned here. They settle between half and three quarters of the cases they are involved in as the figures repeated from Chapter 5 demonstrate. For further discussion of their role refer to that chapter. For these purposes if the service is provided on a consent basis so it is no barrier to the court's core adjudication function of adjudication, and the court is satisfied that the experts are of the highest probity, have the relevant expertise and observe natural justice principles in their conduct with the parties, then it is a useful ADR service provided by non judicial staff of the court. Although the parties' view of this service has not been surveyed since the scheme was introduced at the beginning of 1998, there have been no complaints about the work of the court experts to the author. Although there is no formal complaints procedure if complaints were made they would be referred to me. The court also provides mediation by non judicial staff and the party perception of this has been surveyed and the results of this are set out below.

Table 6.4: Use of Building Experts 1/98- 2/99 Adelaide Magistrates Court Civil, repeat of Table 5.3

Please see print copy for image

Source: reports by a building expert J. Robinson to the Supervising Magistrate, Adelaide Registry.

Table 6.5: Use of Accounting Expert 1/98- 2/99 Adelaide Magistrates Court Civil, repeat of Table 5.4

Please see print copy for image

Source: reports by an accounting expert J. Pridham to the Supervising Magistrate, Adelaide Registry.

Party involvement and mediation

Settlement discussions at case management conferences in the South Australian Magistrates Court are typically bilateral negotiations by the parties, assisted by their advisers usually without active intervention by the court as an independent conciliator. Such conferences may also have a role other than resolving a dispute. They are used for orders for discovery and to prepare for the ultimate step, the trial.

In 1995 the South Australian Magistrates Court introduced mediation free to the parties conducted by a senior LEADR trained non judicial court officer. The litigants were required to attend in person at the first directions hearing. The cost and risks of litigation were explained. The offer of mediation was made but only ordered if all parties agreed. Mediation is at no charge and can be within a few weeks. If the parties try mediation and it fails to settle the case it is fast tracked to trial. Under this model mediation is in practice an alternative to negotiations that occur at the settlement conference at which a trial date is fixed if no settlement occurs (known under the rules as a conciliation conference).

The effect of the introduction of mediation was evaluated quantitatively by the comparison of two sets of defended cases tracked to conclusion. The first was all the defended cases filed in the general claims division of the Adelaide Registry of the South Australian Magistrates Court (this excludes small claims and some specialist and appellate work) in a three month period in 1992, collected for benchmarking purposes before the change. After the introduction of mediation a further sample of defended general claims filed in a three month period was analysed. The author previously analysed this data for its effect on the parties' costs (Cannon 1996, pp.54-64). Since that analysis further survey work has been undertaken.

A computer record is kept of all court files. The computer captured both samples of files. The data was taken from the hard copy of the file wherever that was available to minimise data entry errors. Where the file was not available the computer record of the

file was used. The data was entered on an MS Excel spreadsheet. The type of case and the result at each stage was recorded by number code. The date of each step in the process and of final disposal was recorded. The data entry of the 1992 sample was done by an experienced court officer and checked at that time. The data entry of the 1996 sample was done by a casual employee. The data entry was checked by the author.

The profile of the types of cases changed between 1992 and 1996. This was principally due to the dramatic drop in claims for damages for personal injury from 43% in the 1992 sample to 19% in 1996. The profile of the other cases was fairly consistent. This drop in personal injury claims is to be expected due to the operation of the 90 day preaction notice and the efforts of the SGIC settlement team mentioned above. The efforts of the settlement team had its effect too late to significantly affect the sample of 1992 cases. It is appropriate to leave personal injury cases in that sample because they are cases that had no special attempt to settle them before the claim was issued. The remaining personal injury claims in the 1996 sample, would have had the preaction notice given to the insurer for the defendant and in most a preaction conference in an attempt at settlement. They were therefore cases that were not likely to settle and so were not a fair test of the new procedures designed to encourage an early settlement. Only 2 out of 26 (7.6%) motor vehicle personal injury claims had settled at or before the directions hearing at the time of data collection. Had these been excluded from the sample the rate of settlement at directions hearing would have slightly increased.

There have been five magistrates in the court from 1992 (and long before) until 1996. Three have been there for all that period, one joined the court at the beginning of 1994 and one in 1996. There is no reason to suspect that these personnel changes affected the manner or time of disposal of cases.

A comparison of the time of disposal of cases before and after the introduction of mediation is set out in the following table. In this discussion the term settlement is used to describe any means of finalising an action other than a court verdict after trial.

Table 6.6: Point of case disposal and delay, general claims, Adelaide Civil Registry 1992 and 1996

Defended general cases in the Adelaide Civil registry	1992		1996		variance
finalised by the end of directions hearing	60	16%	77	36%	+20%
finalised by the end of concil. or mediation conference	245	65%	56	26%	-39%
finalised at trial without verdict	47	12%	35	16%	+4%
verdict after trial	27	7%	31	15%	+8%
transfer to District Court	n.a.		3	1%	+1%
other	n.a.		13	6%	+6%
total	379	100%	215	100%	0%

Note: in the 1996 sample 15% went straight from the Directions Hearing to trial. This did not occur in the earlier sample. The figures are the result at each stage not cumulative.

Table 6.7: Delay between filing defence and finalisation

	1992	1996
<270 days between defence and finalisation	85%	84%
<365 days between defence and finalisation	91%	96%
>365 days between defence and finalisation	9%	4%

Source: internal CAA data and data collected by the author.

The increase in settlement of cases at the first stage of the process, the directions hearing, is most likely a consequence of direct party and judicial involvement. The reduced number (-39%) which settled at the next stage, the conciliation or mediation conference, in part would reflect the removal from the second sample of the personal injury cases which were amenable to settlement and also the extra 20% of cases already settled at the earlier directions hearing. It is noted that 15% of cases in the second sample went direct from the first directions hearing to trial. These were cases that magistrates identified would either not settle at all and a significant number that magistrates identified as being defended rather to achieve delay than because of any real merit in the defence. No doubt some of the latter assessments were correct and explain the increased settlements at trial where the defendant surrendered on terms (+4%). The increased number of cases going to verdict may again in part reflect the removal from the sample of personal injury cases amenable to settlement but the 24%

reduction personal injury claims has been largely exhausted to explain the reduced settlements at the second stage of the process and is probably insufficient to explain all this increase in verdicts. I do all the trial allocation in the court and it was not my impression that the cases that went to verdict were markedly more personal injury claims in the second period. The conclusion seems to be that greater judicial involvement at all stages of the cases increased early settlements but also increased the number of cases that went to verdict. This fits with the Stuttgart statistics (Appendix 2.A) discussed in Chapter 2.

In the 1996 sample of general cases only 10 (4.5%) chose mediation. Half of these did not settle and went direct from mediation to trial and half settled. Some of those that went to trial still settled. There was apparently an unwillingness to accept mediation by parties and or their advisors in cases where court proceedings had been commenced.

Between 1 May and 30 September 1996 figures kept by the court mediation officer show that he conducted 58 mediations. Twenty one of these were in general matters, the rest small claims. 19 reached a mediated agreement and 11 were finalised due to non attendance of parties due to settlements reached between the parties or other reasons. That is 30 were finalised. Over the period of 5 months 16 mediations were adjourned, some to allow terms agreed between the parties to be carried out. The final result of those is not known. Thus the figure of 50% of cases referred to mediation having settled is conservative and information from the mediator suggests as high as 75% ultimately may be finalised.

The mediations occurred at the same stage of the process as the standard Conciliation Conference and were treated the same for data collection purposes. One effect of the changes was to increase settlements at the first stage of the process from 16% in 1992 to 36% in 1996. However at the second stage of the process, the Conciliation Conference or mediation, this change was more than reversed with 65% of the 1992 sample settling compared to only 26% of the 1996 sample. One cause of this change was that as a result magistrates conducting the Directions Hearing rather than a court officer, 15% were sent direct to trial because the magistrate assessed there was no

prospect of settlement or the defendant had no real defence and was merely buying delay. Even allowing for that, the net effect of the changes was only to effect more settlements at the Directions Hearing. The offer of mediation had no effect at the conciliation/mediation stage and indeed by the end of that stage not as many cases had settled under the new procedures. Slightly more cases actually went to verdict probably due to the fact of personal injury motor vehicle claims that could settle being largely removed from the system. The change in procedure was not associated with any substantial change in the time taken to finalise cases.

The settlement of more case at the directions hearing was a substantial saving to the parties and the court. It is clear that the prime determinant of costs is not delay but the stage of the process the case has reached (Williams 1992, Worthington and Baker 1993, p 62) The author estimated the saving of legal costs to each party would exceed A$1,000, not bringing their own and expert witnesses time into account (Cannon 1996, p.59).

The differences in the conduct of those hearings between the two samples was that in the second they were conducted by a magistrate rather than a non judicial court officer, the parties were made to attend (although this rule was not universally complied with) and a conscious effort was made to advise the parties of the nature of the process, cost issues and possible ways of achieving settlement. It is apparent that one or more of these changes assisted early settlements, but those cases would have settled at the conciliation conference without that intervention.

Party interviews

A qualitative assessment of these changes was undertaken by interviews of four different groups of parties. This sample included small claim cases. Directions hearings and the offer of mediation as an alternative to going direct to trial was introduced coincident with the changes described above for general claims. 40 parties were interviewed, 10 each who finalised their cases at mediation, directions hearing, a small claim trial and a general claim trial. A detailed analysis of the process and results

is in Appendix 6.B. Interesting comments from the interviews are included. In tabular form the results were:

Table 6.8: Litigants' level of satisfaction with case outcome according to the mode of finalisation

Satisfaction	Means of finalisation			
	Mediation	Directions hearing	Small Claim Trial	General Claim Trial
Very satisfied	3	2	3	1
Satisfied	5	5	2	5
Unsatisfied	1	3	2	2
Very unsatisfied	1	0	3	2

Note this is Table 6.B.3 in Appendix 6.B which has its own numbering protocol. It has been renumbered in accordance with the protocol in this chapter and the following tables likewise.

Table 6.9: Litigants' level of satisfaction with the time taken to settle their matter according to the mode of finalisation

Satisfaction	Means of finalisation			
	Mediation	Directions hearing	Small Claim Trial	General Claim Trial
Very satisfied	2	7	1	
Satisfied	6	2	7	6
Unsatisfied	2	1		4
Very unsatisfied			2	

Table 6:10: Whether or not respondents believed that they saved money by settling at the directions hearing or by mediation

	Directions hearing	Mediation
Yes	10	8
No	0	1
Don't know	0	1
Total	10	10

Table 6.11: Litigants' level of satisfaction with the opportunity provided to present their side of the dispute according to settlement method

Satisfaction	Means of finalisation			
	Directions hearing	Mediation	Small Claims Trial	General Claims Trial
Very satisfied	5	5	2	3
Satisfied	5	5	3	2
Unsatisfied	0	0	3	4
Very unsatisfied	0	0	2	1

The dangers of any generalised conclusions from such a small sample are noted in the annexed report and are repeated here. However even given those reservations and the fact that parties who have settled is itself a bias for reasonable people, the mediation and directions hearing processes delivered a satisfactory result to most litigants and importantly they were universally satisfied with their opportunity to present their side in those processes.

As one might expect in a determinative process the satisfaction with trial processes tends to follow the result but the fact that even some winners were unhappy with the process is indicative that the process does not always appear dignified and careful to the parties. In small claims where parties are unrepresented and the method adopted by the magistrate is necessarily more 'hands on' the magistrate is much more likely to be criticised than in the traditional more remote role in an adversary trial with lawyers.

Unless very clear signals are given the parties tend to assume that court registrars are magistrates.

People who declined mediation did so because they believed they were entitled to succeed in full and saw no reason to compromise or their assessment was that the other side were unreasonable, obsessive or it had become a matter of principle (about half). The rest said they were willing to mediate but the other side was not. It is noted that some parties who wanted to try mediation were frustrated that their opponents would

not and suggested it could be made compulsory. Those who chose mediation did so because they saw it as less terrifying, less antagonistic, good business to be seen as flexible, amicable, honest and several also because it saved time and the cost of preparing for trial which they had discussed with their lawyers. It is clear that some were very pleased to have the opportunity to resolve the dispute outside the trial process. Those who settled their case were not only satisfied but generally full of praise for the directions hearing and mediation process.

However some of those who did settle at mediation had found that the other party had reneged on the agreement and were worried about the difficulty of then enforcing it. In these the mediator apparently had not put in train a procedure to monitor the agreement. Procedures exist to readily convert such an agreement into a judgment but those interviewed were not aware of this. If the system is to work a simple procedure to ensure the agreement can be enforced is essential. Subject to this, the clear impression is that for some mediation is a process with which they are far more comfortable and which offers flexibility and other advantages over the trial process.

Interviews of lawyers in previous research by the author showed a high acceptance of mediation. They thought it was an advantage having magistrates conduct the first directions hearing but lawyers acting for repeat users of the court reported that their clients regarded attending in person as a waste of time. Several commented favourably on the docket system in the Federal Court and suggested one magistrate controlling all pretrial proceedings for each file would be an advantage (Cannon 1996, pp.61-63).

Mediation by magistrates

This has only occurred in a few cases. One such case was a claim for damages arising from alleged assaults on prisoners by prison officers after a gaol riot in the Adelaide Remand Centre. Several years earlier in 1993 the author heard a trial involving similar claims arising from alleged assaults on prisoners after an earlier and more widespread riot at the Yatala high security prison. In the earlier case one prisoner was successful. Factual findings were made that after he had been handcuffed and was face down on the ground under the restraint of several prison officers 'he was hit on the head with a

baton, kicked on several occasions and then he was later picked up and punched to the upper nose.' It was held that once a prisoner 'was clearly and unequivocally restrained any assault committed thereafter is actionable at common law' Findings were made that the prison authorities adopted policies of cell allocation that caused antagonism by the prisoners and a dispatch of certain prisoners to security and detention exacerbated this and prompted a passive protest. The Emergency Response Group were deployed in breach of departmental guidelines and this precipitated the riot (*Bromley* 1993, pp.12-13). Damages of A$3,000 were awarded as compensation for the personal injury, and a further A$10,000 exemplary damages, reduced to A$4,000 because Bromley was a ringleader in the violence. Bromley has a shocking history of violent offending including murder and rape. In the event he did not receive the damages awarded. Due to compensation paid out by the State of SA to victims of his various violent crimes the State was able to notionally seize the award of damages to defray Bromley's debt to the victims of crime fund.

The trial itself went for three and a half sitting weeks and attracted considerable notoriety in the press.

I also conducted the mediation and shall make my comments in the first person. When the second case came to my attention I noticed that the allegations again involved excessive use of force after a violent incident in a gaol (although not on the same scale as the Bromley case). The seizing of the damages awarded to Bromley had subsequently come to my attention and I pointed out this possibility to the prisoners. I pointed out to the prison officers the potential dangers to them of adverse findings. I offered to mediate the case. They agreed. The mediation took place in 1998 over a day and a half separated by several weeks. The prisoners and their lawyer (paid by the Aboriginal Legal Rights Movement), the prison officers, their lawyer and their union representative (the union financed the legal costs of their defence) and a senior officer of the Department of Corrections and a lawyer from the Crown Law department were present. I believe it was important that most of the incidents leading up to, and the alleged assaults were recorded on a security video which was available at the mediation. This provided a factual anchor around which the discussions occurred. The

case settled. A confidentiality agreement prevents me from discussing the terms of settlement. I can say that at the end of the process there was a genuine outbreak of relief and goodwill between the prisoners and the prison officers. They shook hands, congratulated each other and laughed and joked. I can also say that the agreement involved matters which would not have been possible in a court judgment.

In 1999 at my suggestion two judges associates in the District Court, Kerry Antoniou and Michelle Birrell, undertook a survey of the lawyers and parties in each case. Unfortunately the response rate was low. From the earlier trial one party and one lawyer responded and from the mediation one party and two lawyers responded. All comments were favourable to both processes. From such an incomplete response little can be concluded. However some of the remarks are instructive.

The party from the case that went to trial had this to say about why processes other than trial were unsuccessful:

> "Because if you are a prisoner, the authorities believe correctional staff before they believe you. Society's perception that we are all liars does make us vulnerable. We are always guilty until we prove otherwise."

> "Because the correctional services department would never have admitted any wrong doing. Its the way things were."

He thought the trial was very fair and was very satisfied with the final outcome. The lawyer who responded likewise thought the trial was very fair and was satisfied with the outcome.

The party to mediation said this:

> "The mediator gave both parties a chance to fully explain their side of the story of the dispute."

> "Yes, choosing mediation was the right decision. If I was involved in a similar dispute I would choose mediation again."... "I would recommend the use of mediation for all dispute resolution."

The two lawyers from the mediation thought it was fair or very fair and both were very satisfied with the final outcome. In relation to that outcome they said:

> "The result was one which a court could not order" and

> "Mediation provided an opportunity for the parties to air issues and thus gain satisfaction that would not have been possible in the usual course of a legal action."

One also said:

> "(they chose mediation) to help my client avoid the trauma and anxiety of litigation"

In a sense these remarks bear out the views of both the proponents of the process of determinative trials and mediation. The party to the trial was almost certainly correct that without a precedent the Correctional Services Department would not have admitted liability.

The public finding of the facts and consequences was important to the party to the trial and there is no doubt it made the mediation of the second incident possible. In a very real sense the mediation proceeded in the shadow of the finding of the earlier trial and would not have been possible without it. Given the precedent had been established, the parties in the second case achieved a result that in my assessment was better for both sides than they could have achieved had the case gone to trial. Although under the ethics of LEADR training the mediator's view of the outcome is unimportant, the result was in my view appropriate to the circumstances described during the process. I do not think that society was disadvantaged. In my assessment nothing in this process and

outcome diminished the impact that the precedent in the earlier case had, nor lent encouragement to prisoners to riot nor to correctional services officers to use excessive force. The court lost no status, on the contrary the party and counsel who responded were highly complimentary of my role. I have noted the LEADR ethic that a mediator is not ethically concerned at the appropriateness of the result. This cannot apply to a judicial officer. S/he can use the process of mediation but once s/he is involved in the detail of a dispute s/he must be concerned that any settlement bears a close relationship to the rights of the parties, or where it does not the departure is for a considered and appropriate reason. This is only compliance with the judicial oath: (section 11 Oaths Act 1936 (SA)) "... I will do right to all manner of people after the laws and usages of this State, without fear or favour, affection or illwill."

I conclude that there are circumstances when it is appropriate for a magistrate to undertake mediation. What the court needs to do is to develop protocols for its use. From this experience I identify the following factors as favourable for mediation by a magistrate:

- A clear factual background.
- Settled legal principles.
- Benefits open to the parties that cannot be ordered in a court judgment.

One particular observation that I make about this and some other mediations I have conducted is the impressive way that complicated factual matters can be traversed in a short time, especially when contrasted to the oral adversary process. True it may not be possible to determine the areas of disputed facts. However these can be readily identified and quarantined and the surrounding circumstances ascertained and agreed very quickly. It would be very useful to transport this ability to the trial process and in a sense this is what occurs in civil code cases where a round table discussion of the facts ascertained from written submissions and documents quickly narrows factual issues. That is discussed in Chapter 5.

Discussion

At the beginning of this chapter the following dangers of courts using ADR were identified:

- The loss of precedent and the risk of bargains contrary to society's interest.
- Courts diminish their credibility by giving their authority to ADR methods conducted by non judicial officers.
- Judicial officers have a special role of determining facts and applying discernible community standards (law) to those facts. They diminish that role if they use ADR methods.
- ADR lacks openness and procedural safeguards and courts are diminished by being associated with it.

These concerns can be answered seriatim:

Most cases settle in the pretrial processes. The fact that the traditional common law adversary model leaves the gathering of evidence and terms of settlements in the control of the parties means the court is not monitoring those settlements under that model. It cannot be a greater loss of precedent nor result in more unfair bargains for the court to provide assistance in settlement processes.

The above survey results suggest that provided proper standards are in place court officers conducting ADR need not diminish the credibility of the court. On the contrary party perceptions of ADR by non judicial officers were very favourable.

In appropriate cases magistrates can conduct mediations without diminishing their role and status. They might better use types of ADR other than mediation. Independent evaluation conducted under the court umbrella is a method of ADR which appears to fit well with the court adjudication model. Following my viewing of the kört geding procedure in Amsterdam, a rule has been introduced in the South Australian Magistrates Court to recognise such a procedure by magistrates (rule 106(10) *Magistrates Rules* 1992):

> "The Court may give an intimation of the result of a case at any time and if it does so that intimation must not be available to the trial magistrate until after judgment when the trial magistrate may take it into account in relation to costs."

I have tried this procedure myself to promising effect, but too recently to draw conclusions for the purpose of this research. Because it involves the judicial skills of drawing inferences to make factual conclusions and the application of law to those conclusions, it sits more comfortably with the judicial role than mediation, where the third party neutral avoids advising the parties of the outcome of the dispute. Independent evaluation by senior lawyers has been tried in some other courts in Australia (endnote 3). Where a magistrate is involved unsuccessfully in ADR in a case there are manifest dangers in the same magistrate hearing the trial.

As long as a court does not allow ADR to become a barrier to its primary role as an adjudicator, using it in appropriate cases need not diminish its role.

In Chapter 5 a shift of control of fact finding from the parties to the court is suggested. If this is accepted and courts narrow the factual controversy between the parties a logical corollary will be greater involvement of the court in assisting settlements. These conclusions suggest it need not shrink from this greater diversity of roles but will need to develop appropriate protocols to ensure its primary role of determining facts and applying and developing principle is not compromised. Indeed an increased role of courts in settlements should alleviate some of the concerns about settlements occurring contrary to society's interest.

Marc Galanter commenting recently on these issues draws a distinction between (Galanter 1999, p.124):

> "Hard non-adversarialism (which) refers to a shift to a more controlling, paternalistic forum, less party control, and enhanced responsibility of the judge to manage the assembly of proofs and arguments. The model here is

> the civil law system (not necessarily what it is but what it is imagined to be). Soft non-adversarialism refers to the shift toward a *less* definitive and authoritative decision-maker, to abandonment of the commitment to an all-or-none win-or-lose outcome based on application of generalised norms on favour of an emphasis on compromise, harmonisation and individuation. The model is the replacement of adjudication by mediation."

The two can be combined. An enhanced responsibility of the magistrate in the management of the assembly of proofs can (and should) result in the court managing and in appropriate cases the magistrate him or herself using a range of techniques other than adjudication. The above research suggests that involvement of parties personally in the process and magistrates conducting the first directions hearing results in more cases settling early in the process. Having non judicial staff available to assist the parties in mediation and expert appraisal is a benefit to the court in fulfilling its role. The right to adjudication must be retained as the court's primary role but courts should accept responsibility for managing and assisting the best and fairest way of settling the 90% or so of cases that will be resolved without a court verdict. They are after all most of the contested work of the court.

Summary of conclusions

- The primary role of lower courts is to enforce obligations and where necessary to determine the existence and extent of them. ADR should not be a barrier to this role.
- Judicial officers should take a greater role in managing their cases and managing attempts at settlement should be part of that role.
- Involving parties in processes increases early settlement.
- Court prelodgement requirements can be a proper way of courts encouraging settlement before action.
- Mediation, expert advice and, by logical extension, other methods of ADR can properly be provided by non judicial staff of courts on a consent basis.

- Judicial officers can undertake mediation where the right factors are in place. These include a clear factual background, settled legal principles and benefits open to the parties that cannot be ordered by a court.
- Judicial officers might better use types of ADR which fit with the judicial method such as independent evaluation.
- Where judicial officers are involved in ADR their judicial office requires that they be concerned to ensure that any settlement is in accordance with the parties' rights or where it is not the departure is for sensible and principled reasons.

ENDNOTES

(1)Some conclusions about court use of ADR from the Rand Report (Kakalik and others 1996) follows. This has been extracted from a paper by the author (Cannon 1998).

There were six different types of ADR programs studied by the Rand Report. This is a summary of ADR in the pilot districts.

DESCRIPTION OF ADR						
	Pennsylvania	California	Okalahoma	Texas	New York (mediation)	New York (evaluation)
Type	Mandatory mediation. Experimental. Parties not present. Pro bono by lawyers.	Mandatory evaluation. Free to parties by magistrates/ judges.	Voluntary mediation. Lawyer/ mediators. Cost to parties US$660.	Voluntary mediation. Lawyer/ mediators. Cost to parties US$1,800.	Mandatory mediation. Experimental. Pro bono lawyers.	Mandatory evaluation. Lawyers. No charge to litigant.
Days from filing to referral	90	56	99	232	271	248
Days from filing to hearing	120	124	169	336	446	337
Stage in process	Early	First conference	First conference	First conference	When a track is assigned	Any time

- ADR - if voluntary, it was not used extensively. Where voluntary, it was used in about 5% of cases and had little effect on cost or delay (Kakalik and others 1996 Vol. 1, p.18 & 20).

- "The rationale for all ADR programs is of course the hope that they are faster, cheaper and/or more satisfactory than formal court adjudication. Although past research has not confirmed all these putative benefits, it does seem to suggest that litigants are more satisfied when ADR has taken place even if they do not settle their case at that time. Perhaps this is because they feel they have had their 'day in court' without the expense of a formal court trial. However because most court-connected ADR is non-binding and because the vast majority of cases do not go to trial, ADR primarily offers an alternative mode of settlement, not trial." (Kakalik and others 1996, Vol. 2, p.40).

- Based on the comparison of lawyer work hours per litigant, there was no difference in costs in four of the districts between cases that went through ADR compared to a comparison sample of cases that did not. In Texas and California lawyer work hours were significantly higher for ADR cases. This is explained in the instance of Texas by the fact that cases that appear tougher were encouraged by the judiciary to "volunteer" for mediation. In California, which has automatic mandatory early neutral evaluation, it was impossible to distinguish between the effects of the appointment of magistrate/judges to deal with the early management of cases from the effect of the neutral evaluation (Kakalik and others 1996, Vol. 4, pp.36-37).

- Ninety per cent of lawyers in all programs felt that mediation or neutral evaluation as a process was fair. A slightly lower percentage of litigants agreed with a lower completion rate for litigants, meaning no significance should be attached to that slightly lower result from them. The lowest percentage of litigants who felt that the process was fair was in Pennsylvania where litigants usually did not attend the mediation session. Here the litigant report that ADR was fair reduced to 65% compared to 75-82% in the other districts. This is support for the view that litigant involvement in processes is important to their sense of fairness (Kakalik and others 1996, Vol. 4, p.42).

- There was no substantial difference with either lawyers' or litigants' views between case management with mediation and that without it. In three of the four mediation districts a greater number of litigants from mediation cases reported satisfaction than from comparison cases. The exception was Pennsylvania. Pennsylvania was exceptional because mediation occurred without the party being present (Kakalik and others 1996, Vol.4, pp.42-43). The findings in relation to case management which involved neutral evaluation was inconclusive.

- No useful conclusions can be drawn from this survey as to differences between mandatory/voluntary ADR, independent evaluation/mediation, except of course that mandatory ADR results in a higher take-up rate (Kakalik and others 1996, Vol.4, p.53).

- The cost per case to the court ranged from US$130 per case to US$490 per case (Kakalik and others 1996,Vol.4, p.39).

- The settlement rate correlates to the stage of the proceedings at which the ADR technique is applied; that is, the later the stage in the proceedings, the better chance of settlement (Kakalik and others 1996, Vol. 4, p.41). "The likelihood that a case referred to mediation or neutral evaluation settles just before or as a result of ADR session ranges from 31% to 72% across the six districts ... there appears to be a correspondence between the likelihood that the case settled just before or as a result of the ADR session and how early the session is held in the life of the case. The sessions held later appear more likely to result in settlement just before or as a result of the session. The programs in order of lowest to highest percentage of ADR-related settlements are Pennsylvania, California, Okalahoma, Texas, New York (evaluation), New York (mediation) (the State descriptions here are not a direct quote but have been expanded for clarity). This is the same sequence of programs seen when ordered by shortest to longest time from case filed to holding the ADR session. Since discovery may be completed and cases may be more ready to settle by the time of the

later session the fact that lawyers and parties must meet together face to face for mediation (or any other purpose such as judicial settlement conference) may be the precipitating event required to get the agreement finalised." (Kakalik and others 1996, Vol. 4, p.41). This comment reflects in part the fact that parties are not required to attend settlement conferences in America.

The above view that the completion of discovery and the parties meeting face-to-face are key factors in achieving settlements at ADR conference is not supported by lawyers' views recorded in the report.

LAWYERS' OPINIONS ON POSSIBLE PROBLEMS WITH ADR (Kakalik and others 1996 Vol.4- This is an extrapolation from the individual tables of lawyers' opinions of each program, in particular Tables 5.47, 6.47, 7.50, 8.50, 9.44 and 10.45.)

	Pennsylvania	California	Okalahoma	Texas	New York mediation	New York evaluation
Lawyers &/or parties were not ready to settle	77 %	57 %	25 %	40 %	45 %	53 %
Facts not sufficiently known - more discovery was needed	55 %	29 %	8 %	15 %	20 %	19 %

These are in order of the stage in the process when ADR occurs, i.e. Pennsylvania early; New York (evaluation) late.

It is not surprising that the voluntary mediation in Okalahoma, and to a lesser extent in Texas, have a lower percentage of failure in lawyers' eyes due to the parties not being ready to settle, since they consented to the process. However, in the other States the imposition of mediation or independent evaluation early in the

proceedings, in lawyers' views, mainly fails because the parties are not ready to settle at that stage. It is important to differentiate between the time and the stage of the proceedings. The report suggests "... it may well be that the time from filing is not as important as the point in the case in which the session occurs." (Kakalik and others 1996, Vol. 4 p.46).

A conclusion which is obvious but which is not drawn in the report is that there are many litigants who, for reasons outside the direct processes made available to them, are just not willing to settle until late in those processes. Such factors as the lessening of heat with the passage of time, the distraction of new influences in their lives, the realisation of the expense of the processes in which they are involved and other factors are all matters which may combine to impose a different attitude to settlement later in the proceedings than exists at the commencement of them. This accords with the lawyers' view in the survey that, especially in the early attempts at ADR, the reason that the matter did not settle was not so much the facts not being known but, rather, the parties or the lawyers were just not ready to settle at that time. I have heard this expressed bluntly in terms that "some parties are not willing to settle until they have bled a little". An alternative, more depressing possibility is that some litigants choose ADR and settle late in the process in despair of the system delivering a fair result.

Use of judicial time

Research on the amount of judicial time per civil case under the CJRA procedures showed no significant difference in the judicial time per case under the CJRA procedures compared to time per case previously (Kakalik and others 1996, Vol. 3, p.249). This, of course, needs to be qualified by the above conclusion that the CJRA implementation in most districts had, in fact, little effect.

Client involvement

The above suggests that client presence and presumably giving accurate information to clients are important factors in them forming a favourable perception of fairness.

(2) In a sample of three months defended general claims in the Adelaide Civil Registry of the Magistrates Court in SA in1992 tracked to conclusion only 27 out of the total sample of 379 had a trial commenced (seven percent). In a similar sample in 1996, 31 out of 215 (15%) had a trial commenced. These figures are discussed in the text. Williams and others 1992, p 45 found that of cases commenced in the samples in VIC and QLD 10% went to trial. Professor Judith Resnik, then of the University of Southern California (1996, p. 4) reported that research in America showed less than 4% of civil cases go to verdict. The balance do not all settle-some are summarily determined or are finalised by default.

(3) ADR by courts elsewhere in Australia

Independent evaluation or case appraisal

This is a process where the litigants present their case to a case appraiser who makes a determination. Either party can challenge the decision, but if neither does, that decision becomes binding. Costs penalties can be provided for punishment of those who challenge the decision but do so unsuccessfully. In The Netherlands a preliminary injunction procedure, kört geding, has been adapted by courts to allow judges to provide this service. This has much to commend it. Although the cautionary remarks of the need for caution in making untested factual assumptions, mentioned in the context of conciliation are apposite, under this procedure the parties are not pressured as they might be in a private conference conducted by a judge. The process is in open court and either party can ignore the recommendation. Errors and injustice are not final.

In Queensland a case appraisal system has been on foot since 1995 under procedures established by the *Courts Legislation Amendment Act* 1995 (Qld). New South Wales has some experience in this area, under the style of neutral evaluation, particularly in personal injury claims. Typically, witness statements of the main points are given to the appraiser with a brief oral presentation and perhaps some

evidence if there is a major factual dispute. These are typically conducted in less than a day. The appraiser is paid by the litigants. The decision is not binding but there are cost incentives to encourage acceptance. Not to accept it results in long delays. The idea of case appraisal has much to commend it. However there are some obvious concerns about the detail of the scheme. The delay if the appraiser's result is not accepted may be a significant compulsion to accept the award even if it is thought to be different from the entitlement from the court. This implies the scheme is a panacea for existing unacceptable delay in the court providing its core function, adjudication. The principled sanction for failing to accept a case appraisal is an order to pay the other party's costs if the appraisal is not bettered in the court adjudication. Offering the appraisal on the basis that no court adjudication is available in a realistic time frame is a failure by the court to perform its core function. If the appraisal is an adequate adjudication it should be adopted as the judgment of the court. If it may not be the alternative of court adjudication should be available. The fact it is not may be due to inadequate resources or other cause. Regardless of the cause an appraisal scheme which is not backed by available court adjudication is not acceptable. Further, there are significant costs both of the appraiser and probably more for preparation and attendance by the parties' advisers. This is lucrative for the legal profession from whom the appraisers are drawn, but may be an unwarranted expense for the parties who after all are all ready paying their own lawyer to give them a professional appraisal of the value of their claim.

The Victorian County Court has used a similar procedure in relation to Workcover personal injury litigation. Its process is voluntary. The plaintiff and defendant enter into an agreement, the outcome of which requires the Workcover authority to make an offer in accordance with the expert's determination. The expert is drawn from a panel of experienced personal injury barristers. The Workcover Corporation pays the cost of the evaluator and the plaintiff's costs at around A$1,200 to A$1,500 if the plaintiff accepts the evaluation. However, if the plaintiff does not accept the evaluation and proceeds to trial to recover less than the evaluation, the plaintiff pays its own cost and the defendant's costs of the evaluation. The settlement rate has been

93% (Jones 1996). Given that the process is voluntary and free to the plaintiff there can be no objection to this innovative ADR scheme.

Mediation has been used in both New South Wales and Victoria to address the problem of chronically long lists and trial delays. In the Supreme Court in NSW it is offered as part of Differential Case Management in common law cases (Supreme Court (NSW) Practice Note 88). Recently the *Supreme Court Amendment (Referral of Proceedings) Act* 2000 (NSW), has empowered the court to force mediation or neutral evaluation on parties, provided by barristers at the expense of the parties. In Victoria they had a so-called spring offensive in 1992 and an autumn offensive in 1995, where hundreds of Supreme Court civil cases were referred to mediators. This radically reduced trial lists. In Victoria this has led to an institutionalisation of mediation under a scheme entitled 'Portals', which commenced in October 1995. This extends mediation over all jurisdictions in Victoria. Where trial delay is unacceptably long extreme measures may be needed and may be justified. As a general principle courts' defining function is adjudication and mediation should not be imposed on parties as a precondition or the only way of resolving their disputes. Courts should offer multiple opportunities to parties to settle cases (exit points from the litigation process) but if they want to use the adjudication process these alternatives should not be a substantial barrier to them doing so, in terms of cost, delay or otherwise. However, there can be no protest at imposing the other party's costs on litigants who are advised by court arranged processes of the likely result and fight on only to do worse.

More recently mediation has been imposed on litigants in Victoria as a precondition of obtaining a trial date, and as a requirement before trial in Western Australia and Queensland. Imposed mediation is a substantial expense to the parties who are entitled to expect from a court the function that distinguishes it from other dispute resolution services, adjudication. When courts make mediation a barrier to accessing adjudication that raises serious issues of whether the court is fulfilling its appointed role. It may be true that as many cases referred to compulsory mediation settle as do with voluntary mediation (Kakalik and others 1996). However that begs

the question of why they settled. Perhaps for some it was in despair of accessing the courts' appointed role of adjudication.

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ZPO is an acronym for the *Zivilprozessordnung* (1887), the German code of civil procedure. References are to sections.

CHAPTER 7: DESIGNING COST POLICIES TO PROVIDE SUFFICIENT ACCESS TO LOWER COURTS

I have described policies to enable lower courts to effectively manage the verification and enforcement of debt, to manage the fact finding process where the existence or extent of an obligation is in dispute, and their proper role in assisting parties to settle disputes. However this is all to naught if the parties cannot afford to access lower courts. Costs issues affect how parties to disputes use lower courts and in designing cost policies for lower courts those effects need to be identified and used strategically to achieve desired outcomes. I argue that lower courts should have cost shifting to the victor. Fixed rate cost scales are preferable to activity based scales. Where a third party pays a litigant's costs and protects him or her against adverse cost orders, access is improved, but it is important that the person who is actually paying the costs exercises a degree of control over the litigation to prevent claims being made that have no chance of success. An affordable and efficient court system can result in a too ready access to courts. Countervailing policies such as a gap between actual costs and recovered costs, and diverse structures of alternative dispute resolution are necessary to maintain a proper balance between dispute resolution within and outside the courts.

Introduction

There are three key issues in this topic. A key issue is the effect that cost shifting has on how parties use court processes for disputes that are resolved by lower courts. Another is how policies that pass a party's costs to a neutral such as an insurer affect access to courts. The third key issue is how the cost to parties of access to courts affects the balance between how many disputes are resolved in lower courts and by other means. Other factors which may affect access such as cultural and other alienation from official systems are not discussed in this thesis.

To explore this topic some theoretical modelling is used to predict the effect of some different policies on cost shifting. The apparent effects of the predictable scales on court usage in Germany and Northern Ireland are compared to similar legal cultures in The Netherlands and England respectively which have activity based scales. Some

research on the effect of the predictable cost scale in the South Australian Magistrates Court leads to similar conclusions. Ways of spreading the burden of cost by various forms of cost insurance are discussed, again drawing on comparisons with Germany and The Netherlands. Finally the role of price of legal services and delay in rationing use of courts is discussed.

The costs to parties of resolving disputes in court are the actual cost to the parties (legal fees, court fees, costs of gathering evidence and the time of the parties), plus or minus the extent of successful shifting of those costs to the loser (cost shifting or party party costs) less contributions from schemes to spread the burden of costs to others (legal aid and insurance). Costs increase the more steps a case goes in the litigation process, culminating in a trial which is very expensive. There is also a cost to society of resolving disputes in court. There are two aspects to society's costs, the total cost to the parties and the cost to government. The cost to government is significantly defrayed by fees charged to litigants. In the South Australian Magistrates Court the same fees are charged to commence a claim whether it is contested or not. Fees on the relatively high number of uncontested debt cases subsidise the dispute resolution function of lower courts making it relatively cheap to government and the parties. Parties' other costs are so high the court fees have little role in any decisions that are influenced by cost factors. In contrast in Germany the court fees are higher and increase with each step in the process (Appendix 7.A). They are a significant factor in total costs and are discounted to encourage settlements (see below).

Where parties use dispute resolution agencies other than lower courts, whether that is a greater or lesser overall cost to society depends on a comparison of whether their systems are more or less expensive to the system and the parties per case. Such comparative cost analysis would be a useful enquiry but is outside this thesis.

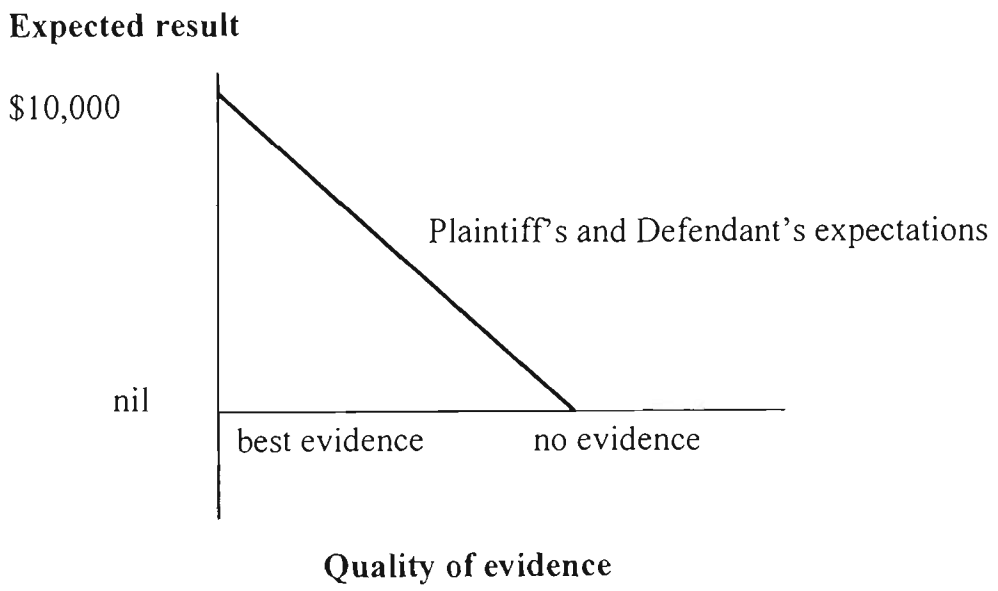
An economic analysis of the effect of costs on court usage

The assumption in the following economic models is that parties to disputes make decisions in an economically rational way. This is not always the case. Social and

other factors discussed below also affect decision making. However on the basis of that assumption some effects of cost shifting policies may be predicted.

There have been various attempts at modelling court systems (endnote 1). This discussion and the graphs in it are drawn in large part from Main (1997) and have their origins in Tullock (1980). The start of the analysis is to postulate a valid liquidated claim for say $10,000, and to consider the parties' rational choices as the quality of evidence available to the plaintiff diminishes with a consequential reduction in the probability of success. It is assumed that the court system accurately assesses the evidence according to its quality, so evidence of 100% quality will have a 100% chance of success and nil quality a nil chance of success and a continuum between the two. The probability of success is equivalent to the quality of evidence. Both parties know the evidence available before the claim is commenced. The actions of each are determined by each of their assessment of their probability of success. With costs ignored they will have the same expectations and it may be graphically represented like this:

Figure 7.1: Expected result according to quality of evidence, costs ignored



With perfect knowledge and consequentially identical expectations about the results of litigation all cases will settle without recourse to the courts.

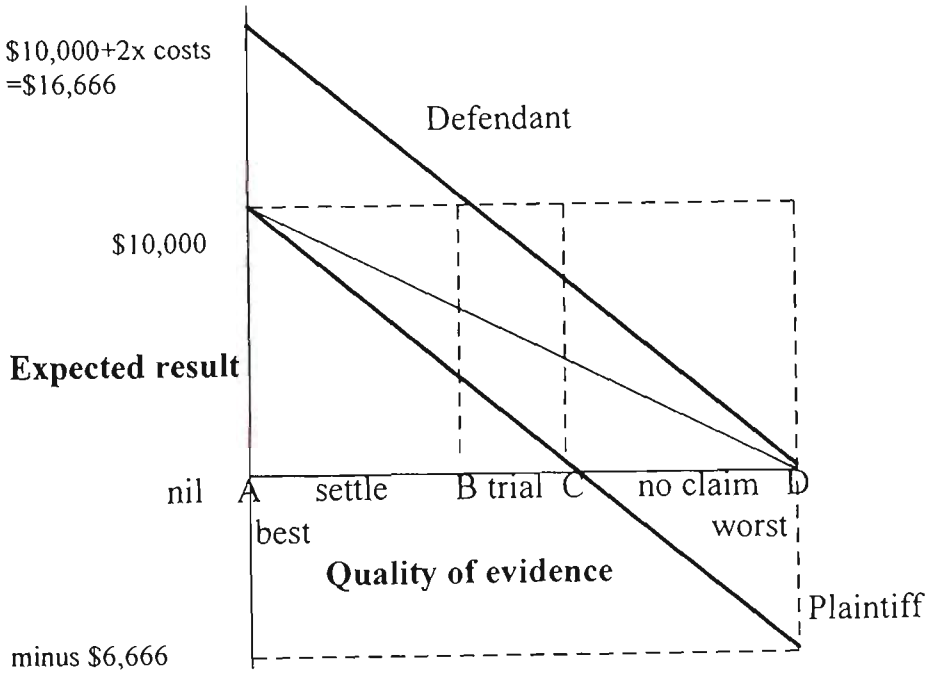
The effect of full cost shifting

If the effect of the cost to each of litigating is taken into account the expectations of each are changed. Assume actual costs are 1/3 of the amount in dispute and the winner will be reimbursed for all those costs. This is full cost shifting, or to a common law lawyer, indemnity costs.

The Plaintiff with the best case will expect to win the case and have its costs reimbursed ($10,000 net). On the worst case it will lose the case and pay its own and the defendant's costs ($3,333+$3,333=$6,666).

The defendant facing the best case will expect to lose the case and pay the claim, the plaintiff's and its own costs ($10,000+$3,333+$3,333=$16,666). On the worst case it will successfully defend the case and have its costs paid. These now different expectations can be represented like this:

Figure 7.2: Expected result according to quality of evidence with 1/3 cost shifting which equals actual costs

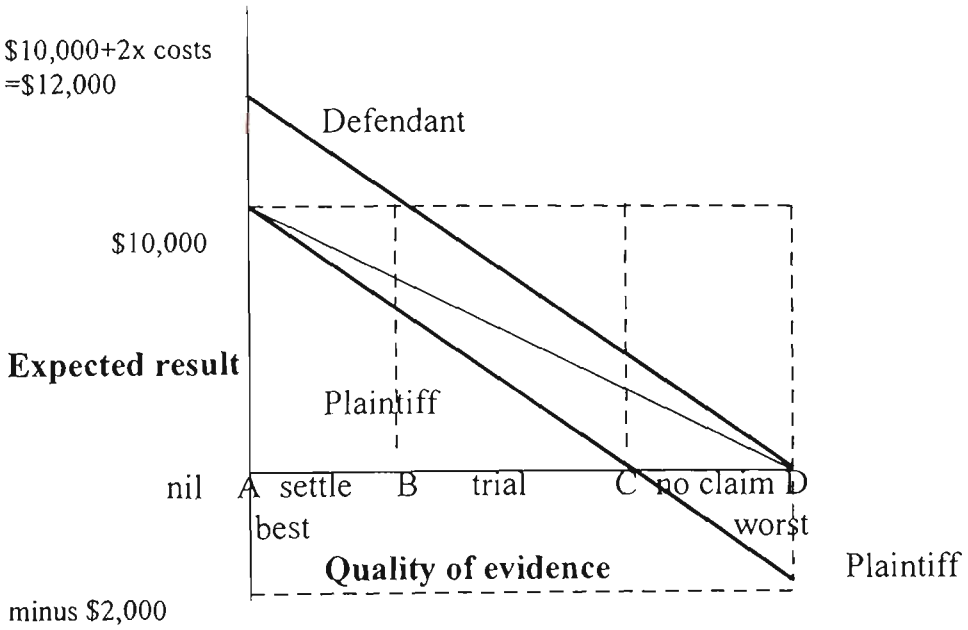


When the Defendant expects to pay more than $10,000 it will offer the plaintiff's entitlement without litigating and the plaintiff will accept it (AB cases). When the plaintiff expects the cost risk to exceed its likely success it will not pursue the claim

(CD cases). BC cases will go to trial. Trials can be expected between a probability of 2/5 and 3/5 (endnote 2).

If the actual costs and cost shifting are both reduced to 10%, the gap of cases which go to trial between settlements and not proceeding of the case will expand. Trials now occur between probabilities of 1/6 and 5/6 (endnote 2).

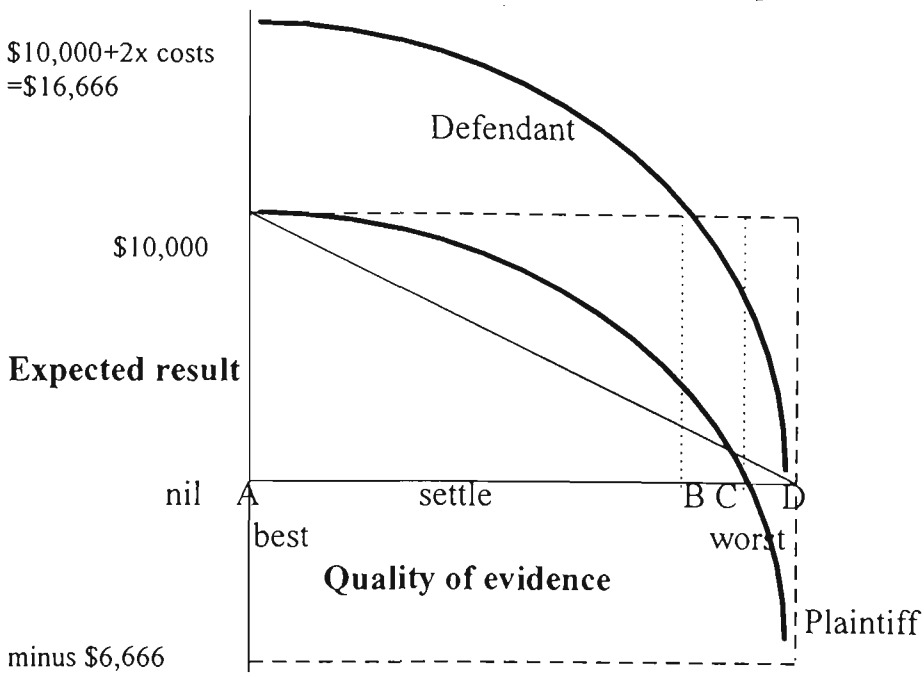
Figure 7.3: Expected result according to quality of evidence with 1/10 cost shifting which equals actual costs



The reduction of the cost risk makes the risk of trial more affordable. The suggestion that a low cost regime which offers full cost recovery will generate a high usage of the courts to decide results accords with the German experience where a relatively low cost regime, the BRAGO, is associated with a high usage of courts. (Blankenburg 1994) The BRAGO fee is commonly accepted by lawyers as their actual costs. This is discussed in more detail below.

Now assume that the courts' fact finding does better than just to follow the quality of the evidence in a continuum. It continues to find for the plaintiff, who remember has a valid claim, as the quality of its evidence declines. This will change the expectation of both parties improving the expectation of success by the plaintiff. For convenience assume actual costs equal cost shifting at 1/3 of the amount in dispute (as in Figure 7.2).

Figure 7.4: Expected result according to quality of evidence with improved fact finding- still 1/3 cost shifting which equals actual costs



The Defendant expects to pay more than $10,000 in many more cases and will offer the plaintiff's entitlement and the plaintiff will accept it (AB cases). The number of cases that settle without recourse to the courts significantly increases with increased accuracy by the court in fact finding. The number of cases which go to trial and the number the plaintiff will not pursue both are reduced (BC and CD).

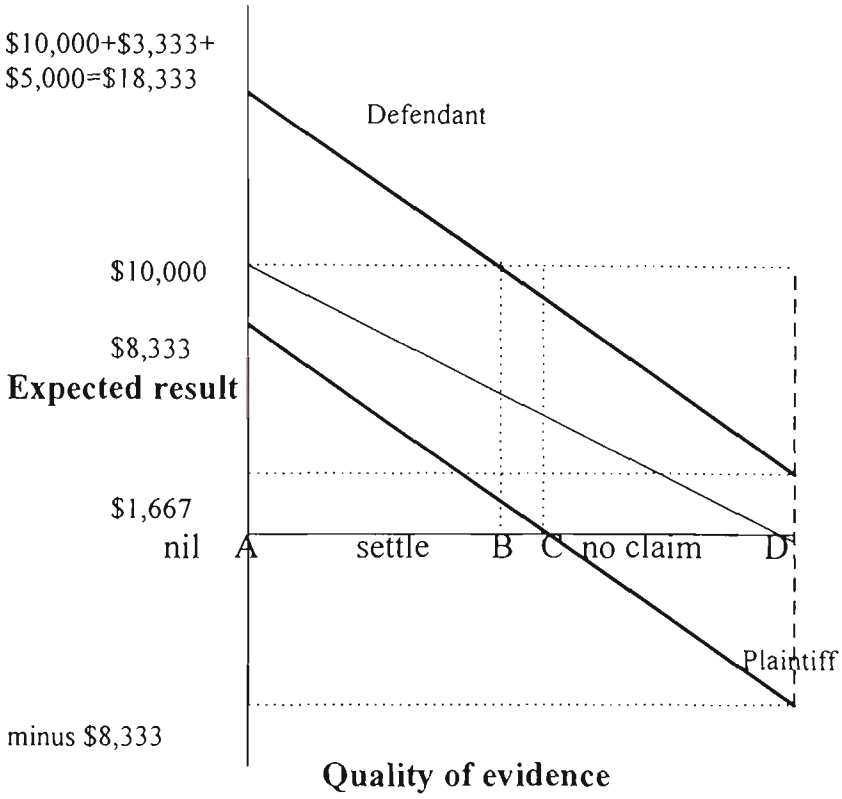
The effect of partial cost shifting

Here assume the cost shifting is 1/3 and the actual costs are 1/2 of the claim.

The Plaintiff with the best case will expect to win the case and have its costs of 1/2 of the claim reimbursed to the extent of 1/3 ($10,000+$3,333-$5,000=$8,333). On the worst case it will lose the case and pay its own cost of 1/2 of the claim the defendant's costs to the extent of 1/3 of the claim ($5,000+$3,333=$8,333).

The defendant facing the best case will expect to lose the case and pay the claim, the plaintiff's costs of 1/3 and its own costs of 1/2 ($10,000+$3,333+$5,000=$18,333). On the worst case it will successfully defend the claim but still pay it own costs which will exceed the shifted costs ($5,000-$3,333=$1,667).

Figure 7.5: Expected result according to quality of evidence with partial cost shifting (1/3 shifting, ½ actual costs)



Where the Defendant expects to pay more than $10,000 it will offer the plaintiff's entitlement and the plaintiff will accept it (AB cases). When the plaintiff expects the cost risk to exceed its likely success it will not pursue the claim (CD cases). Partial cost shifting has made the defendant ready to settle at lower levels of the quality of the plaintiff's evidence and the plaintiff will need a better claim before s/he pursues it. The losers face higher losses. Winners at trial suffer some net loss after costs are taken into account.

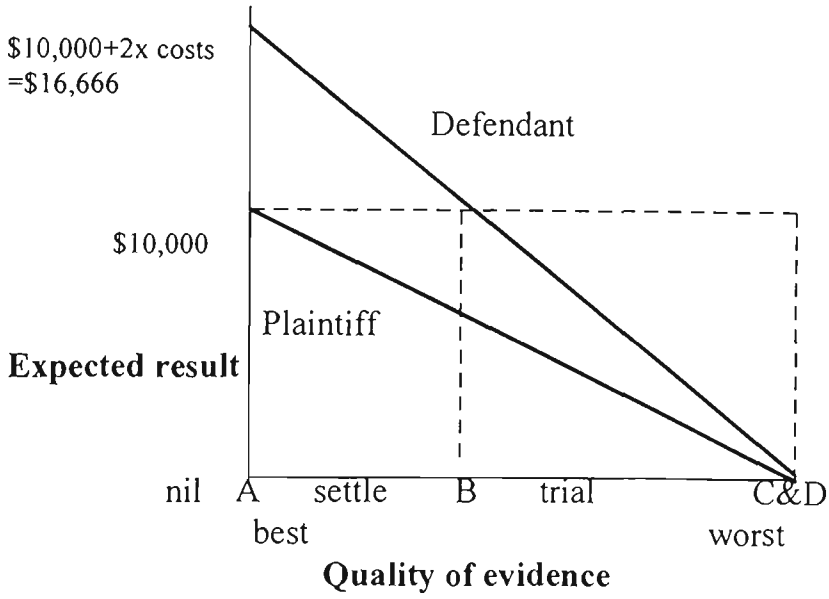
The effect of a gap between the amount of cost shifted and actual costs is to reduce the number of trials; the greater the gap the greater the reduction (endnote 2).

The effect of the removal of costs for one party

Where one party is insured or legally aided against its own and any cost shifting risk, it will be much more inclined to go to court. Assume a plaintiff has no cost risk. If the plaintiff has any prospect of success s/he will sue. The defendant facing a cost

risk will still offer to settle where the strength of evidence makes it strategic to do so (AB).

Figure 7.6: Expected result according to quality of evidence with 1/3 cost shifting which equals actual costs for D- no cost risk for P



Here the party without cost risk is at a great advantage and many more case will go to trial at great expense to the opponent and the court. The converse is true if the situation is reversed. It has not been graphically represented. A defendant without cost risk detecting any weakness in a plaintiff's case will defend, but the unsupported opponent will be still making decisions taking cost risks into account.

Removal of cost risk in a cost shifting regime can occur with legal cost insurance or legal aid. In such cases the substantial advantage over the opponent may need to be tempered by countervailing controls to prevent unfair exploitation of the advantage. Of course a very wealthy party or an indigent party also may be advantaged by cost shifting because the cost risk may be relatively unimportant to either, one because they can afford it and the other because they have nothing to lose.

In summary then this modelling suggests:

- Accuracy in court decision making increases the rate of settlement without trial. Presumably this would apply to disputes both outside and within the court system.

- The greater the rate at which cost shifting is set, the more inclined parties are to settle without going to court.
- A gap between actual costs and shifted costs increases the likelihood that parties will settle but penalises a party that wins at trial by the gap.
- If one party has cost risks and the other does not (or they are unimportant to it), more cases go to trial and the latter party is advantaged.

These findings are based on the assumption that parties act in an economically rational way. For this to be a valid assumption costs must be ascertainable. Thus:

- the ability to make economically rational choices depends on costs being calculated on a predictable basis known to the parties.

These conclusions accord with common sense. Although many litigants make decisions based on other factors as well as price, it is fair to assume that litigation decisions in total will be affected by these considerations.

The only power of lower courts is to set party party costs. Different methods of calculating costs may affect how lawyers deal with a case, which affects both the cost burden to the client and to the court as a result of the manner of conduct of the claim. Methods of calculating costs and their effect are now considered.

The effects of different methods of calculating cost shifting

Whether it is desirable to have cost shifting

The first issue is whether to have cost shifting at all. This is a well ventilated topic in Anglo American literature, due to many courts in the United States of America not having cost shifting. The LPG approach (endnote 1) to pretrial negotiation strategies suggests that with cost shifting (the 'English' rule) there is less likelihood of trials than with no cost shifting (the 'American rule') because the anticipated costs can be shared between the parties to their mutual benefit. This accords with the conclusion from the modelling that increased cost shifting reduces the number of trials. There is little empirical evidence. There is research by Snyder and Hughes (1990 and 1995) on slightly more than 10,000 medical negligence case in Florida where the rule

changed from the American rule to the English rule in an attempt to discourage low merit cases. This was valuable as a research subject because presumably the other cultural and legal system factors that may have affected the progress of cases through the courts remained constant. There was an indication that more cases were commenced although this conclusion was subject to caution due to interpretation problems. Of cases that did commence the evidence supported the view that the English rule caused less trials. They reported 57 trials per 1,000 under the English rule compared to 107 per 1,000 cases under the American rule (Snyder and Hughes 1990, Figure 3, p.365). Of cases that finalised without a trial more were withdrawn under the English model and more settled under the American model. The research suggested that the English rule encouraged the commencement of more high merit low value cases but adverse information would cause these to be dropped. The American rule caused more low merit cases. The English rule substantially increased the amount of cost incurred on each case whether it settled or went to trial: 61.3% increase in cases at trial and 46.6% increase for those that settle (Snyder and Hughes 1990, Table 6, p.375). The experiment ended because from the defendant doctors' point of view it was a failure because the courts commonly allowed the full contingency fee to be cost shifted thereby often inflating the cost allowance above the actual value of legal work done and further adverse cost orders against plaintiffs sometimes could not be collected (nothing to lose above). Apparently the medical defence lobby was influential in that state.

In litigation in common law lower courts actual costs are often equal to, or exceed the amount in dispute (Woolf 1995, p.35, Cannon 1996, p.70). Not to have cost shifting would have the following effect on economically rational people who use a lawyer. Plaintiffs with assets, but no aid often would not be able to risk suing at all because most or all of the success would be taken by their own lawyer's non shifted costs. Plaintiffs without assets could still sue if they can find a way of funding their own lawyer, but contingency fee arrangements would be unattractive because the potential stake, without any addition for costs, often is too low to share between the lawyer and the client. Defendants who defend and win would still pay their own lawyer, somewhere near to the amount claimed. They may as well offer the plaintiff a large part of their potential cost burden before proceedings commence. Simply no-one

could afford a trial unless someone else is paying their legal costs. The sensible policy in first instance is to put the burden of paying the winner's legal costs on to the loser. Otherwise the only parties who would afford to access a trial would be those to whom the principle is worth more than the expense. This unfairly advantages the very wealthy to whom the expense is unimportant and disenfranchises everyone else. No cost shifting would encourage litigants in person which is undesirable because they have more difficulty navigating the system and the court has additional problems achieving a result that is, and is seen to be, fair. Further, the above research suggests that an effect of cost shifting is to discourage low merit cases being commenced and from proceeding to trial which is a benefit for the court and defendants. Discouraging plaintiffs with low merit claims cannot be regarded as an unreasonable policy. After all cost shifting substantially advantages plaintiffs in lower courts with a meritorious claim, because their costs are shifted, in part or whole, to the defendant.

I conclude that in lower courts cost shifting is necessary to allow access and has desirable policy aspects. The identified adverse effect in the Florida research was to increase the overall cost to parties of each case. It follows that cost shifting rules should include policies to discourage unnecessary costs being incurred. In Australian court systems activity based cost shifting scales are the norm. These may be undesirable because they encourage expensive abuses of court procedures.

The effect of activity based cost scales

The trinity of cost scales that reward activity, fear of being sued for negligence and a party controlled adversary based litigation process drives lawyers to leave no stone unturned in litigation at a cost to the parties which often overwhelms the amount of the actual dispute (some of this discussion is drawn from Cannon 1996, p.36 et seq.).

Cost scales and fear of being sued for negligence are parallel factors which may lead to abuses of the present litigation system. There is a good deal of literature to suggest that the cost factors are the primary source of the problem and unless activity based scales are replaced with a cost shifting method with better incentives improvements to court systems will founder. Dispute resolution has the highly singular feature (Ogus 1995):

> " that it is sought and purchased by two (or more) parties whose interests in the outcome are diametrically opposed: if one party wins, the other loses. This fact, combined with the adversarial culture in the legal process, means that the parties are locked into a classic Prisoners' Dilemma situation (endnote 3). Rationally, each would prefer a low-cost solution, but each knows that the more she spends, the greater will be her chance of victory. ... Moreover, what one party spends will influence the spending decision of the other, with an obvious spiralling effect on the legal cost. Also, the client is normally poorly informed regarding both the prospects of success and the extent to which those prospects may be enhanced by additional time and effort devoted to the case by the lawyer. In other contexts, the usual method of constraining the principal agent problem is for the contract to contain some term which generates incentives for the agent loyally to pursue the principal's interest. But here the very reverse is the case: since lawyers are typically paid by the hour (all day), they are motivated to prolong the process and add to the client's costs. The use of the contingent fee in the USA and the arrival of the conditional fee in the UK may partially solve the problem for plaintiffs (but not defendants). Since these devices shift the risk of losing from the client to the lawyer, the latter has a stake in the outcome and will not wish to deploy extra effort where this will not materially increase the chances of success.
>
> It should be noted that neither device provides the perfect set of incentives. Under the contingent fee, the lawyer is motivated to reach an early, and perhaps inadequate, settlement for the client since he bears all the costs of further work but gains only part of the benefit... Under the conditional fee the lawyer who takes on a strong case for the client has the opposite incentive: he knows that, provided he wins, all the cost of his additional effort is borne by the client."

In relation to the Woolf solution of judicial management and our changing culture away from adversarial to more inquisitorial, Ogus (1995) comments:

> "The standard justifications for the adversarial approach are that it enhances information flows and exposes inaccuracies and potential excesses in the opponent's case... But as we have seen, given the combination of the prisoner's dilemma and the principal agent problem, the dominating effect may rather be to prolong the process (at excessive cost) and to influence the decision-making process away from the goal of optimum accuracy... As Tullock has pithily put it, 'in the adversary proceedings a great deal of the resources are put in by someone who is attempting to mislead (the court)' (Tullock 1980, p. 95). If this is right then transferring some of the controlling power to an external, skilled agent - the judge - would seem to make good sense. ..."

However, good intentions of judicial control may be hijacked if the wrong cost incentives remain in place. Lord Woolf identified inadequate enforcement of current rules as one of the present problems and there is no reason to expect that new rules and procedures will be better enforced (Ogus 1995):

> " Lawyers have an interest in complex rules not only because the latter may be manipulated to benefit their clients but also because they generate an increased demand for lawyers' services... There is a real danger that an increase of judicial control will only be effectively achieved ... by a dense set of complex rules."

Ogus suggests that greater attention needs to be given to a well-designed set of financial incentives. For example, he suggests that: "To deal with excessive requests for discovery it might be preferable to shift some or all of the cost to the requesting party, rather than leave it to the judge to appraise the value of the request and rule accordingly..." Shifting the onus of proof to the alleged wrongdoers is another way used in Germany to avoid the need to obtain detailed discovery from an alleged wrongdoer (Chapter 5).

A.A.S. Zuckerman shares similar concerns (Zuckerman 1996, p.781 & p.786).

> "Any attempt at rendering procedure more affordable can and will be defeated by those with an economic interest in doing so. ... Although admirable in many respects, the indirect strategy that Lord Woolf adopts for controlling multi - track cases has a soft underbelly. This is due to the fact that the economic incentives possessed by lawyers to complicate litigation remains unaffected. True, judges will have the authority to resist lawyers' pressure to intensify the litigation process. But a system in which the courts continually pitch themselves against the lawyers' economic incentives is bound to be inefficient."

He discusses the German system and is attracted to its fixed cost scales. He concludes that (Zuckerman 1996, p.796):

> " Attempts to cut down costs by simplifying procedure, by judicial pressure or by encouraging clients to resist rising costs have all been tried and found wanting. There is no alternative to a direct attack on the economic incentives to complicate and protract the litigation process."

More recently in Australia a fixed rate scale has been proposed for the Federal Court for the same policy reasons (Williams 1999).

If a cost shifting scale that is not activity based is to be used then the effect that such scales have and their relationship to actual costs need to be considered. Cost shifting in lower courts may be calculated on a different basis than actual costs. In South Australia actual costs often are calculated on a scale prescribed by the Supreme Court which is based on reward for all legitimate activity. A fee is allowed for a folio (72 words) in any document or on a time basis for other activities. Although lawyers are limited by the Supreme Court scale they can contract out of it provided they advise the client of the basis of their charges in writing and have the client agree. Such agreements are usually on a time charge costing basis although large corporate customers may negotiate a more favourable basis in return for a large volume of work. Both the Supreme Court scale and time costing suffer from the deficiency identified above of encouraging over servicing. They also are deficient in not leading to a cost total that is predictable before the litigation commences or indeed at any time until the end. Add

the 'prisoners dilemma' and the lawyer's risk of being sued if every possible thing is not done and they provide the very set of incentives that leads to the conduct of litigation in a manner that can be so expensive that the costs overwhelm the dispute and may force a party to settle short of its rights for fear of the costs. To remove these incentives cost shifting scales must give predictable costs which do not reward activity for the sake of activity but must still substantially fulfill the basic reason for a party/party cost scale, namely to compensate the successful party for his or her legal expenses with the collateral effect of discouraging frivolous claims. In the appendices to this chapter three alternatives to activity based scales are set out. These are the German scale, or BRAGO (Appendix 7.A), the scale in Northern Ireland (Appendix 7.B) and the scale in the South Australian Magistrates Court (Appendix 7.C). Now follows a discussion of the effect of these scales.

The German cost scale (the BRAGO)

The German civil procedure code provides for cost shifting against the loser (§§ 91-102 ZPO). Court fees, costs of experts, witness fees and the party's time are reimbursed by the loser. Where there is a partial victory costs are awarded on the scale applicable to the claim and apportioned according to the result. A defendant can avoid costs by admitting the legitimate claim and if a plaintiff does not accept this and does no better the plaintiff will then pay the defendant's costs.

Court fees are prescribed by the Court Fees Act (GKG), and the lawyers' costs in accordance with the Federal Attorneys' Fees Act (BRAGO). Both provide a fee unit which is proportionate to the amount in controversy (see Appendix 7.A). One fee unit is provided for taking instructions and filing a claim, a second for preparation for trial and the third once the main trial commences. Lawyers normally charge the BRAGO as the actual charge to their clients. A party can, with a written contract, agree to pay higher fees than the standard fees paid in the BRAGO (§ 3 BRAGO). These may be calculated on a time charge basis but more usually are calculated as a percentage uplift on the BRAGO. These higher costs cannot be passed on as party/party costs. Contingency fee agreements generally are void. It is only recently that lawyers have been permitted to charge less than the BRAGO.

There is an uplift for lawyers' fees when a case settles. Where a case settles before the commencement of proceedings, the BRAGO entitlement to lawyers is 1.5 units each. Where it settles after proceedings have commenced, the BRAGO entitlement of lawyers is one extra unit for each lawyer for achieving settlement. If a case settles at the commencement of the hearing, two of the three court units which will have been charged at that point are refunded. This is an incentive to parties to settle and a recognition of the savings of court resources resulting from a settlement. The court fees are substantial (Appendix 7.A) but this discount will be less than the additional lawyers' charges the parties incur upon a settlement.

This example explains the application of the BRAGO cost rule. Assume P claims DM100,000 and wins DM40,000 by a judgment after oral evidence. P and D are both entitled to 3 fee units calculated on DM100,000 and P will have prepaid court fees of 3 units. There are costs of the court expert, witnesses and sundry expenses such as photocopying, which the parties must pay. One fee unit is 2,125 and court fee 955. The costs are awarded as follows:

Table 7.7: BRAGO cost and court fee calculation

Plaintiff's costs 3x 2,125	DM6,375
Defendant's costs 3x 2,125	DM6,375
Court fee 3x 955	DM2,865
subtotal	DM15,615
+Court expert, witnesses and incidentals say **Total**	**DM18,000**
P recovers 40%	DM7,200
D recovers 60%	DM10,800
NET P pays to D	**DM3,600**

Source Richter Schmitz 1999. DM1 is worth slightly less than A$1. Note that if the plaintiff were 100% successful the defendant would pay his/her costs as well as his or her own and vice versa if the defendant were 100% successful.

It is notable that for a claim of DM100,000 that is successful to the extent of DM40,000 the total of costs and disbursements to both sides is DM18,000. The rate

of charging in Australia for a case over the same level of controversy would be substantially higher. The German basis of calculation takes both parties' costs into account calculated on the amount of the original controversy and then apportions them between the parties according to the result. This contrasts to most cost shifting in Australia where the scale rewards the victor only. If it is the plaintiff, typically the costs are calculated on the amount of the judgment (without penalty for it being less than the amount claimed) and if it is the defendant it is calculated on the amount of the plaintiff's unsuccessful claim. The German basis of calculation is a better incentive against inflated claims. In the typical Australian models the other side is left to make offers that can affect the application of the basic cost shifting rule. As in Germany a defendant can protect itself against an inflated claim by offering what it is really worth and after that offer the plaintiff has to pay its costs if it fails to better it. However if the defendant does not file an offer the plaintiff can make an exaggerated claim with no penalty.

Germany's neighbour The Netherlands has cost shifting awarded on a discretionary basis and calculated on the basis of activity. The court structure and legal code under which each country operates is very similar. Professor Erhard Blankenburg has done considerable comparative research between the two legal systems. He chose the neighbouring state of Northrhine-Westphalia for direct comparisons because of its close cultural similarity to The Netherlands. The following table adapted from his work shows the differences in use of the courts to resolve disputes.

Table 7.8: Judges, Lawyers and Claims filed per 100,000 population in The Netherlands, West Germany and South Australia. (repeat of Tables 2.7 & 5.2)

	The Netherlands	Northrhine-Westphalia	South Australia
Judges	12	24	9
Lawyers	51	110	161
Civil claims filed	2,258	3,535	2,601
Civil claims per judge	188	147	289
Civil claims per lawyer	44	32	16

The figures for The Netherlands and Northrhine-Westphalia are adapted from figures published by Prof. Erhard Blankenburg (Blankenburg 1998) He uses Northrhine-Westphalia as representative of the former West Germany because of its cultural similarity to The Netherlands and to remove the effect of inclusion of data from the former GDR. The figures are for 1992. His figures have been modified by adding prosecutors to lawyers. The German figures do not include the Mahnverfähren (uncontested debt) procedure which are another 10,588 claims per 100,000. The SA figures are taken from Table 2.1 and are reduced on a population of 1.5million in June 1998 (Australian Bureau of Statistics). The cases in the Magistrates Court likewise exclude uncontested debt cases which were another 46,932 (derived from Table 2.4). The figures for judges and lawyers include all of them. The number of cases are only non criminal proceedings. Lawyers include all with a current practicing certificate- June 1998, 2,419, June 1999, 2,423 (Law Society Annual Report). In South Australia prosecutors are counted as lawyers.

Northrhine- Westphalia has twice the number of lawyers and judges as The Netherlands and 60% more civil claims filed. However there are other differences that may account for this difference in usage. The most obvious is legal cost insurance which is much more prevalent in Germany than elsewhere in Europe. The following table illustrates this:

Table 7.9: Revenue, claims handled and external costs of legal cost insurance schemes (1989) (repeat of Table 2.6)

Please see print copy for image

Please see print copy for image

(Blankenburg 1999)

Table 7.9 amply demonstrates that the overwhelming use of European type legal cost insurance was in West Germany.

Which is the chicken and which is the egg? Does legal cost insurance cause litigation, or vice versa, or are both the high litigation rates and the high level of cost insurance in West Germany consequences of the some other factor such as the cost scale? Almost certainly the latter is the case. Both high litigation rates and the high level of cost insurance are a consequence of a legal culture underpinned by predictable and relatively moderate legal costs shifting to the loser of litigation in West Germany. Lawyers generally limit their actual costs to the shifted costs. In Australian terms, solicitor client costs are generally the same as party party costs. Provided the opponent has funds, a claimant in a case in Germany can assess the cost risk at the outset and can expect to recover all his or her costs if s/he wins. A tight lawyer monopoly and an efficient court system that is informal in approach and incorporates conciliation by the judge as a matter of policy, encourages people to resort to the courts for dispute resolution. There is in consequence a greater chance of being sued and a greater need for insurance. Insurance companies are more willing to offer cost insurance in Germany than in other countries because the predictability of costs allows more accurate actuarial calculation of risk. This is a self reinforcing loop of insurance and litigiousness sustained by the predictability of cost scales. Cost insurance is further encouraged by compulsory third party property damage insurance of motor vehicles. These policies do not include legal cost insurance and motor vehicle damages claims are often litigated in Germany, with the attendant cost risk and potential to increase premiums if one is at fault. The Dutch legal system has the same basic precepts as Germany (including compulsory third party property damage insurance of motor vehicles), but without the relatively high usage of courts that characterises Germany. The distinguishing feature, which underpins the difference in patterns of use, is the predictability of the cost scales.

Whether such high use of the courts to resolve disputes is a good thing is doubtful. Professor Blankenburg argues that a desirable legal system has a diverse network of dispute resolution and advice to assist the resolution of disputes and although courts should be accessible they should be the means of last resort in dispute resolution (Blankenburg 1994). He is probably right. There is much to be said in favour of parties to disputes remaining in control of their resolution. They may all retain 'face', remain in control of the solutions which can be more creative than those available to a court and preserve future relationships.

This comparison suggests that predictable moderate cost shifting scales that are often accepted as actual costs encourages use of courts to resolve disputes. This research does not tell us if the different methods of cost shifting affect the way in which litigation is processed through the courts. The German courts are apparently efficient and have acceptable delay but there is no information to suggest the Dutch are less so. A comparison of the effect of the fixed rate cost scale in Northern Ireland with that in England and Wales may inform this topic.

Northern Ireland

Northern Ireland has a resident population of just over 1.66 million people most of whom live in the greater Belfast area. The civil justice system in general is based on that in England and Wales. The High Court established under the Judicature (Ir) Act 1887, is modelled on the English High Court and this continued after 1920 when Northern Ireland was created as a separate legal jurisdiction. The Northern Ireland County Courts retain a 'Civil Bill' tradition dating back to the 17th Century, which has some unique characteristics, but for these purposes the County Court procedure is sufficiently close to that in England and Wales for direct comparative purposes.

The present structure of the courts is a Supreme Court divided into a Court of Appeal and a High Court of Justice, the latter of which has plenary civil jurisdiction for matters above £15,000. Below the High Court are the County Courts. These are regionalised. They have jurisdiction in civil matters in contract and tort up to £15,000, jurisdiction in equity, disputes relating to the recovery of possession or title of land and probate of wills up to various financial limits. They also have

jurisdiction to hear uncontested divorces and applications for adoption. They have an appellate jurisdiction dealing with government offers for compensation to victims of crime. The County Court is an appellate court for matters in the Magistrates Court Division. The County Court can be constituted of County Court Judges and also Deputy County Court Judges, District Judges and Deputy District Judges with various limits to their jurisdictional ability. The court has a Small Claims Division for cases up to £1,000 in contract and tort but not including motor vehicle accidents. The fixed rate cost scale in Appendix 7.B has been in place for many years.

In contrast to the position in England and Wales the Northern Ireland County Court has much less problem with delay. This is evident at all levels of the courts but most markedly so at the lower court level, as the following table demonstrates.

Table 7.10: Delay in weeks between issue and disposal in Northern Ireland compared to England and Wales

	Northern Ireland	England	ratio as %
Queen's Bench div. 1996	117	179	65%
Queen's Bench div. 1997	126	178	71%
County Court 1996	30.5	83	37%
County Court 1997	38.9	86	45%

Adapted from The Civil Justice Reform Group, 1999, Table 4 at p.41

The fixed rate scale applies in the County Court in Northern Ireland. In the Queen's Bench division in Northern Ireland there is no court scale for calculating costs although some of the culture of costs in the County Court is evident in informal cost scales on a fixed rate basis published by the legal profession (e.g. the Comerton Scale- The Civil Justice Reform Group 1999, p.159). Surveys by the Group led them to conclude that (ibid, p.37):

> "Our studies appear to suggest that the cost of litigation in the province is usually lower- and in the case of the County Court litigation, often significantly lower- than comparable proceedings in England and Wales."

Anecdotal evidence from judges suggests that the trials are relatively short compared to England and Wales (Hart 1999 and Wells 1999). The obvious difference that

causes these differences is the cost scale which provides the same lump sum regardless of the stage at which the case finalises. The only distinction is a reduced scale for cases that are not defended. Obviously some files that settle early will be very lucrative and others that go to trial are not so lucrative. Lawyers are used to this 'swings and roundabout' approach to costs. In Northern Ireland lawyers often charge the scale to their clients but if the client agrees at the outset they can charge more.

Here the effect of a predictable lump sum scale that loads the bulk of the costs that can be shifted to the commencement of the process has been to reduce the abuses of procedures later in the process that have caused such endemic delay in England and Wales, to reduce costs to the parties and to keep trials short. There is no evidence that the scale has encouraged the increased rates of litigation evident in Germany compared to The Netherlands. For example the number of writs and originating summonses issued in the Queens Bench division in 1997 was 121,446 in England and Wales and 4,294 in Northern Ireland, a ratio of 28:1, close to the population ratio of 30:1 (The Civil Justice Reform Group 1999, p.13).

The South Australian Magistrates Court

A lump sum cost scale has been in place since 1992 in the Magistrates Court in SA (Appendix 7.C). I did research on the effect of the scale in 1996 (Cannon 1996). The scale provides a predictable level of costs for each stage of the process and reaches about a third of the amount in dispute for each side if it goes to a one day trial and continues to increase as the trial goes on. Lawyers often charge more than the scale to their clients and there are special cost rules to exploit any gap between actual costs and the scale costs to encourage offers (also set out in Appendix 7.C). The conclusion from my research was (Cannon 1996, p.74):

> "The unambiguous conclusion from the interviews was that the policies in the magistrates rules have been successful in limiting the legal costs of litigation in the court. The fixed rate cost scale has been the driving force in maintaining a cost saving culture in the court. The other policies have allowed that to happen but as the pleading experience demonstrates the same rules in different environs can lead to vastly different results (i.e. there is much less argument over

particulars of pleadings in the Magistrates Court where the cost scale does not reward the arguments). There is no reason to quarrel with the view of the lawyers interviewed that the difference is primarily the result of the cost scale which does not reward activity. It is also clear that the cost penalties have discouraged excessive ambit claims and have been a factor in encouraging realistic and on occasions strategic offers. Some of these must have led to settlements occurring which reduced the costs to the parties."

Conclusions

The conclusion from these examples is that the basis of calculating cost shifting may affect the extent of use and the way procedures within a court system are used. Fixed rate predictable cost scales may:

- increase the use of courts to resolve disputes,
- reduce the costs actually incurred,
- reduce unnecessary activity and consequentially,
- reduce delay.

I have noted in the context of the discussion about The Netherlands and Germany that the tendency of increasing resort to courts to resolve disputes is not necessarily a good thing. Cost policies may need a countervailing incentive to ensure ADR outside the courts remains attractive.

We are now in a position to draw some conclusions about cost shifting policies for lower courts.

- Cost shifting is necessary to allow access and to discourage low merit claims. An identified adverse effect is to increase the cost to parties. It follows that cost shifting rules should include policies to discourage unnecessary costs being incurred.
- Fixed rate cost shifting scales discourage unnecessary activity and reduce costs.
- Fixed rate cost shifting scales allow the parties to predict the cost shifting at any stage.

- Cost shifting and actual costs should not be so low that too ready access to courts is encouraged. In Australia high actual costs will cause the likelihood of a gap between shifted costs and actual costs which modelling suggests will discourage excessive use of courts.
- Cost shifting should either deal with both parties' costs (as in Germany) or use offers and penalties to encourage strategic offers to protect a partial loser.

Modelling suggests that:

- Accuracy in court decision making increases the rate of settlement without trial. Presumably this would apply to disputes both outside and within the court system.
- If one party has cost risks and the other does not (or they are unimportant to it), more cases go to trial and the latter party is advantaged.

Cost shifting is only a part of the mechanisms for the payment of legal costs that affect usage of lower courts. Despite the effects of cost shifting, litigation is labour intensive and it will remain too expensive for many people to afford to access the courts to assert or defend their rights unless strategies are in place to share the cost risk. The two main ways of sharing the cost risk are various forms of cost insurance and legal aid. Legal aid is generally not available in Australia for civil disputes outside family law and there is little chance of this changing. In this thesis I have not considered it as an option. Accordingly I have focussed on cost insurance. Spreading cost risks to non parties can increase access but the modelling above suggests that the removal of the risk from one side substantially disadvantages the opponent. Bearing these risks in mind strategies to share the risk of incurring costs in litigation and the effect they have on access to courts are now discussed.

Sharing cost risks by insurance

There are many forms of legal cost insurance. The most common are:

- insurance against legal costs incurred recovering loss or defending liability which is itself insured.

- insurance against the cost of making or defending a claim in court (insured or not), including any adverse cost orders. This type of insurance is rare in Australia but is common in continental Europe, most especially in Germany where a predictable fee regime makes actuarial calculation of risk possible.
- insurance against the risk of an adverse cost order in relation to a particular claim in a court. This is appearing in the United Kingdom in response to pressure to replace legal aid for personal injury plaintiffs with contingency fees and in Australia where there is little or no legal aid in civil disputes other than family law. There are various forms briefly mentioned below under the generic description of After the Event Insurance (AEI).
- a further variant on AEI policies is that lawyers may insure against the risk of a contingency fee not being earned due to a particular claim in a court being unsuccessful.
- contingency, conditional and speculative fees themselves are a form of risk shifting that can be regarded as insurance provided by the lawyer (these are variants on a similar theme distinguished in endnote 4).
- group financing plans which are common in the United States of America where a culture of negotiated payments of benefits by employers for employees, exempt from tax, is in place (Law Foundation of NSW 1999). Such schemes are often limited in the events they cover and the extent of fees covered. They offer early free advice purchased at cheaper than usual rates. A recent development of this is a "Law Card" credit card which guarantees a lawyer a portion of his of her fee.

Incidental cost insurance is common in Australia. Third party motor vehicle property insurance and various personal and business liability insurance, such as householders' liability for persons injured on their property, commonly known as 'public risk' and product liability and business negligence insurance typically give to the insurer the right to prosecute and defend any claim, in the policy holder's name, but at no cost to the policy holder. This right of subrogation is for the benefit of the insurer not the insured. The legal costs incurred by the insurer prosecuting and defending claims for and against the insured and if unsuccessful any adverse cost shifting against the insured, are all paid by the insurer. Examples of policy conditions are (QBE 1998):

- Indemnity: 'Such indemnity includes all law costs and expenses incurred by you with the consent of QBE or recoverable from you by any claimant.'
- Insurer control: 'QBE has and may exercise all legal rights of the Persons Insured relating to the interest insured and may undertake, prosecute or defend any legal proceedings in the name of the Persons Insured. QBE will have full control of and total discretion in the exercise of your or the Persons Insured's legal rights and in the administration, conduct or settlement of any claim or proceedings.'

Terms to similar effect are found in most policies. This delivers the control of litigation arising from insured incidents into the hands of the insurance company. The insurance company may conduct any litigation in accordance with its own strategic interests, which may not be coincident with the interests or wishes of the insured. The insured is consoled by the fact that the insurance company (apart from any excess) has already reinstated the insured's loss or will indemnify its liability. Although this is insurance of the insured's legal costs it is not offering access to courts to the insured. It is a protection offered to the insured against costs incurred whilst the insurer goes about its work minimising its liability and recovering losses from others, when this is done in the name of the insured.

In contrast, with the second type of legal cost insurance, which is common in Germany and is well represented elsewhere on the continent, the insurance of legal costs leaves a substantial amount of control in the insured's hands. Such policies may be a stand alone policy of legal cost insurance or may be a policy extension on a liability policy. Third party property motor vehicle insurance is compulsory in Germany, but it comes without legal cost cover. Legal cost insurance is a common add on to this, and to comprehensive motor vehicle insurance. The add on insurance covers the legal costs of prosecuting and defending future claims. Typically, the insured has control in first instance over the litigation and the choice of lawyer and may conduct the litigation for his or her own interest, for example to prove that s/he was not at fault in a motor vehicle accident to preserve a no claim benefit. This may be contrary to the interest of the insurance company.

In Australia there is little legal cost insurance for individuals before the event. Estimates put the number covered at 100,000 to 150,000 (The Law Foundation of NSW 1999, para 239). Some policies are available for businesses. An example is the Royal and Sun Alliance 'legalpower and small business cover' (Legalsure Pty Ltd, FAI, HIH, and Zurich also have policies, ibid. para. 240). Under this policy the costs of pursuing and defending claims in contract, property and trade practices can be covered. An extension can be obtained for Commercial Motor Vehicle damage, personal injury and contracts including costs awarded against the insured. The cost of the defence of claims by employees and prosecutions in respect of employment obligations and the use of commercial motor vehicle and some appeal rights are covered, up to an agreed limit. A further extension for cover against costs incurred in a tax audit, again up to an agreed limit is available. Premiums depend on turnover. In 1999 a cover for a maximum of A$20,000 per claim with a total cap of A$40,000 was A$250 with an additional A$100 for the motor vehicle cover and A$120 for the tax audit cover. The policy gives the insured the right to nominate a solicitor but the insurer has the ultimate right to take over the conduct of any claim (clause 2 (d)&(e)).

Contingency and conditional fees are themselves a form of legal cost insurance. The lawyer agrees to relieve the client of the risk of paying his or her legal fees if the suit is unsuccessful. The lawyer is also a credit provider, because the client's conditional liability for fees is deferred until the claim is finalised. The premium for taking the risk and the notional interest for the deferral of payment of these services, is the margin charged in the event of success over normal fee rates.

After the Event Insurance (AEI) policies are risk spreading arrangements by lawyers to make payment of costs for contingency and conditional fee based litigation more certain. Typically part of the expected contingency or conditional fee is prepaid to insurers to fix a certain cost fee regardless of the outcome and the prospective claim is made more attractive to the client by protection against the risk of an adverse cost order. The fact that the risk of litigation is being assessed and laid off after the event is the origin of the name.

AEI policies may be individually assessed on a case by case basis by the insurance company itself and underwritten according to that assessment. This is expensive and may increase the premium by the cost of undertaking the assessment. Alternatively they are issued under delegated authority. Under delegated authority schemes the insurers assess a firm as having an acceptable risk record and whenever the firm takes a case under a conditional fee arrangement, cover is automatic. If the firm departs from its acceptable record the delegated authority is withdrawn (Moorhead 1999).

In Australia some AEI policies on an individual case by case basis are available at a premium generally calculated at 10% of 40% of the lawyer's assessment of the worst case cost scenario.

Legal cost insurance effects on access to courts

Incidental legal cost insurance

This litigation typically is contested in the name of the insured who has no control over it. Generally the insured will have been paid out, and the insurance company is seeking to recover the payout, or the insured will be indemnified against the potential liability in any litigation. The only interest of the insured will be whether any finding affects his or her entitlement to future insurance, for example by losing a no claims bonus. The liability insurance to which it is incident and the manner of the conduct of the 'incidental' litigation does have a profound effect on usage of the courts by providing a fund for compensation of personal and other damages. These are the funds which self and contingency funded plaintiffs may access. An example of the extent that litigation is driven by liability insurance schemes was discussed in the context of a prelodgment scheme in South Australia for personal injury claims (Chapter 6). In a state with a population of about one and a half million people the State Government Insurance Commission (SGIC) held all insurance for motor vehicle personal injury claims. In the financial year 1991/2 it paid out a total of A$201m., 22% of which was medico-legal costs of A$44.2m (A$40.5m legal fees). Even after legislation reducing access to general damages, coincident with an aggressive policy to settle claims before proceedings were issued, the total payout

was A$159.6m with a total medico-legal payout reduced to A$26.2m. (A$23m. legal fees) in the financial year 1994/5 (Cannon1996, pp. 81- 83).

A sample of all defended case in the Adelaide Magistrates Court in May, June and July 1996 showed that personal injury claims arising from motor vehicle accidents, which had been reduced to about one quarter the number as in 1990, were still 12% of the defended cases. Other personal injury cases were 8%. Almost all the defendants would have been insured and would have had no control over the conduct of the defence. Thus 20% of the contested claims were plaintiffs seeking personal injury compensation from insurance companies (Internal Courts Administration data collated by the author and authority staff). This proportion is substantially higher in the higher courts. A further 7.4% of defended claims were for the recovery of motor vehicle property damage. In contrast to personal injury cases where uninsured plaintiffs are accessing insurers funds, most motor vehicle property claims are filed by insurance companies in the name of their insured drivers to recover damages, usually from uninsured drivers. Where both parties are insured, insurance companies usually sort out disputes on a 'knock for knock' basis or according to a standard 'barometer of responsibility' according to the configuration of the accident. Uninsured plaintiffs do not usually drive cars that are more valuable than the small claims jurisdiction (A$5,000). On these figures more than a quarter of the contested claims involve an insurance company which is paying the fees of their party.

The 'incidental' cost insurance with which we are familiar in Australia has little effect on access to courts by the insured. It is a transfer of the insured's rights to the insurance company so that it can minimise its payout and maximise its recovery of any compensating rights to damages which vested in the insured.

The other types of legal cost insurance may affect the ability of people to access courts. General legal cost insurance along European lines has been championed in some quarters as a valuable instrument of social policy to achieve a similar effect as health insurance. Legal cost insurance is seen by some commentators in Europe and elsewhere as an alternative to government funded legal aid at a time of shrinking

welfare budgets (e.g. Belgium lawyer Hans Smeyers 1983). Some information on the extent and effect of legal cost insurance is therefore now considered.

European type legal cost insurance

Insurance against legal costs is common in western Europe and finances a substantial amount of civil litigation. The obvious concerns in adopting a scheme of legal cost insurance will be that it will lead to too ready use of courts to resolve disputes and unfairly advantage the insured.

The highest level of legal cost insurance in western Europe is in Germany (Table 7.9 above). The conclusion already has been drawn that this is only part of a group of factors that contribute to, and is not the main cause of, high usage of German courts. This is borne out by research that establishes that outside traffic tort there is no difference in the usage of courts by legal cost insured rather than uninsured lawyer clients (Blankenburg and Fiedler, 1981). A later study by the University of Giessen over five years of 5,200 lawyer and court files showed only 5% to 10% increase in the rate of litigation as a consequence of insurance (Jagodzinski and others 1994, reported in Prais 1995, p.439). This increase was principally in both traffic tort and tenant claims against landlords (Blankenburg 1999). I watched some motor vehicle accident cases in Stuttgart and Freiburg during a study tour under a South Australian Law Foundation Fellowship in 1999. From interviews with parties and the Judges it was obvious that some of this litigation was only economically viable as a consequence of legal fees being paid by insurers. The litigation was not frivolous but it well might not have been undertaken in this manner had the parties had to pay their lawyers. An example appeared in Appendix 5.B and the cost implications are repeated in endnote 5. Cases that would be regarded as a small claims in South Australia, with the consequential exclusion of lawyers for pragmatic cost reasons, are being retained in the normal court system at a significant cost to the insurance fund and the courts.

Both studies suggest that individuals with legal cost insurance do not litigate in a profligate way. This is consistent with research that suggests that decisions whether or not to litigate are not made solely on the basis of cost considerations. Social and

other risks influence decisions to litigate as well as purely economic considerations. Indeed some commentators doubt the efficacy of cost regimes as policy instruments (e.g. Gravelle 1993 and Rickman 1995). There is research that the effect of price on decisions to litigate is more akin to investment decisions, rather than consumption (van Tulder 1990). It appears that high and increasing rates of legal cost insurance might be more a consequence of the increased risk of being sued as litigation rates increase, rather than the main cause of an increase in litigation rates that has been apparent in Europe in recent years (Blankenburg 1999). Also decisions by repeat players may be driven by strategic considerations, such as deterrence for credit providers discussed in Chapter 4. However, once the decision to litigate has been made the above evidence clearly suggests that cost policies do affect the way that lawyers use court processes.

The modelling above shows that insured parties to litigation are at a substantial advantage compared to an uninsured opponent. However the shift of the cost risk to the insurer mitigates against the exploitation by the party of this advantage provided the insurer protects its risk by exercising a degree of control over the conduct of the litigation. One strategy adopted by insurers in Europe to manage the risk under less certain cost regimes than Germany, is to require the parties to consult in first instance in house lawyers employed by the insurer who attempt to solve the problem without the need for litigation. The use of in house insurance lawyers acts as a barrier to frivolous litigation. The lower rate of external costs incurred by insurance companies in Table 7.9 in countries other than Germany suggests this is effective in limiting the number of disputes that go to outside lawyers and litigation. Insurance company lawyers have a clear potential for a conflict of interest between the insured who may seek to pursue a claim that is cost risk free and their employer which will not wish to finance an expensive claim. To protect against this such policies should (and do) leave with the client the right to seek independent advice, in contrast to the similar problems inherent in 'incidental' cost insurance discussed above. However there must be some restraint against frivolous claims in place because of the inherent advantage their insured client has over the uninsured litigant in a cost shifting regime. The French legal cost insurance policy attached in Appendix 7.D gives the client the ability to use a lawyer of his or her choice. This lawyer can form an assessment of

the merits of the claim and argue that to the insurer. The insurer retains the ultimate right of control of the litigation (Appendix 7.D, Article 6). This offers a workable balance to provide the client with access to the court but leaves a restraint against that access being abused.

A further potential for conflict would occur if the cost insurer for the plaintiff was the insurer of the liability being pursued by the plaintiff. An EEC directive requires separation of these functions by insurers, or independent legal advice to the client (87/344/EEC, The Law Foundation of NSW 1999, footnote 32).

Legal cost insurance has much to offer middle class clients who have every reason to fear involvement in any substantial litigation. The problems identified in relation to small traffic cases can readily be guarded against by a small claims system where lawyers are excluded (as in South Australia, which applies to all claims not exceeding A$5,000). European experience is that middle class insured litigation tends to be defensive of property, e.g. as landlords or of employment contracts (Blankenburg 1999) rather than pro-active. Assuming insurers adopt a regime of diversion of disputes outside the court system, to put a check on the unfair cost advantage their clients have over their uninsured opponents, which they will have to do to minimise expenses, it should not impose an excessive burden upon the court system. Where there are substantial factual or legal issues of principle that should be ventilated in the courts this would offer an opportunity to finance them to people who are effectively excluded from doing so at the moment by the cost risk. It has little to offer people of limited economic means who cannot afford the premiums and are unlikely to be attracted to the idea of cost insurance because they have little to lose. If they have a substantial meritorious claim, prosecution of it probably can be arranged by other means discussed below. Legal cost insurance could only finance litigation by defendants in poverty if it was compulsory with the premiums of the middle class inflated to subsidise the indigent (Blankenburg 1999).

Attempts at introducing substantial legal cost insurance in Australia have thus far gained insufficient market penetration to have a significant effect or to be viable (endnote 6). To achieve substantial penetration in the market place predictable cost

calculation may be necessary. This is a further reason to adopt fixed rate cost shifting which at least would allow insurers to calculate the risk of an adverse cost order and may form the basis of fee arrangements that insurers could negotiate with lawyers.

The effect of contingency and conditional fees and AEI insurance

There are obvious dangers in these cost risk sharing arrangements. Contingency and conditional fees remove lawyers' traditional detachment from their clients' cause. On the contrary the lawyer under these fee arrangements has every interest in the client winning. The direct interest of the lawyer in the result may lead to uncritical assessments of evidence, or worse, chasing partisan experts and exaggerated positions during negotiations. Competitive pressures may exacerbate this with exaggerated predictions of success in attempts to tout. These lead to inevitable disappointment at the end when the reality of the prospects of success becomes known. Under these incentives the lawyer may be reduced to the salesman rather than the detached professional which is the profession's ideal. If they maintain that professional detachment it may be at the expense of losing clients and income. Once instructed the lawyer's cost incentive is to settle modestly for minimal work under a contingency fee arrangement but to maximise the work regardless of its effect on the result under a conditional fee arrangement.

Recent American commentary by Richard Painter reports this critical view (Painter 1999, p.50):

> "Furthermore, contingent fees in some situations may cause lawyers' and clients' interests to conflict. Professors Schwartz and Mitchell have developed an economic model demonstrating that '[t]he contingent fee does not necessarily put the lawyer on the client's side or automatically lead him to do what the client would desire if the client could understand the nature of his case and the intricacies of litigation. In some situations, a contingent fee may lead lawyers—who know that each additional hour worked comes at the expense of work on other cases—to work fewer hours on a case than a fully knowledgeable client paying an hourly rate would choose to have the lawyer work.' (Painter 1999 quoting Shwartz and Mitchell p.1126 et seq.)

> Professor Lisa Bernstein has observed that a contingent-fee lawyer not only 'always has an incentive to encourage his client to settle', but, because the value of his services prior to arbitration will probably be small, also 'has a strong incentive to encourage his client to accept an arbitration award. A lawyer paid at an hourly rate also has interests that may conflict with his clients' interests, although in the opposite direction; fees from discovery and trial give him an incentive to encourage a client to litigate. These incentives affect not only advice given to clients, but also affect lawyers' entire outlook on ADR. In at least one state, a recent study showed that plaintiffs' lawyers, working mostly for contingency fees, were strongly in favor of a court-connected ADR program, while defence lawyers, paid by the hour, were strongly against it'".

What these studies cannot show is that parties who settled earlier under a contingency fee arrangement settle for less than they would have received settling later, or if they had gone to trial under a conditional fee arrangement. Indeed a strategic defendant insurer may save costs by making generous offers early, in effect offering a realistic sum plus some extra, but less than the substantial sums it will incur for legal fees and other costs if the case goes to verdict. It is easy to be generous at the lower end of claims where actual legal costs for each side will substantially exceed the amount in dispute by the end of a trial. It was noted above (and in Chapter 6) that a preaction notice scheme and an aggressive settlement policy by SGIC in South Australia allowed it to reduce its total medico-legal cost payout by A$18m. from A$44.2m.. Interviews with plaintiff lawyers suggest that the reduction in costs was largely due to an SGIC experienced settlement team making relatively generous offers before proceedings issued (Cannon 1996, p.50). In this context it shows that the utilisation of courts and results of litigation can be strongly influenced by strategic decisions by regular parties. Viewing the results of litigation as solely driven by venal motives of lawyers to maximise their fees is simplistic and unfair. The parties are involved in litigation choices. Strategic choices by large clients may be as or more important than lawyer advice. Plaintiffs' lawyers may have more to

fear from being sued for recommending a settlement that was too low than any incentive to do so to minimise effort under a contingency fee arrangement.

Cost regimes and schemes to pay them need to encourage attempts at reasonable pacification of the dispute without the involvement of the court. They also should ensure that parties who have been wronged know they can afford to pursue redress and those falsely accused of doing wrong can afford to successfully defend a claim. Contingency and conditional fees provide access to wronged plaintiffs who otherwise could not afford litigation at all and particularly not against well resourced insurance companies standing behind defendants. This is desirable. That it comes with risks of generating spurious or exaggerated claims driven by party greed with the complicity of lawyers is no reason to deny the meritorious claimant access, which would otherwise be denied. Policies need to discourage spurious claims and to compensate defendants where they occur. Accurate and prompt fact finding by the court is the best protection against these. Cost shifting to the victor provides an appropriate countervailing incentive to discourage the spurious claimant and to compensate the defendant at least for a substantial amount of its costs if the spurious claimant is not discouraged. The target of a spurious claimant is likely to be a well financed business. Any excess of costs to a business over cost shifting usually will be tax deductible. In the USA where contingency fees have been identified as generating speculative actions and forced settlement of them to avoid onerous discovery expenses and the risk of inflated jury damage awards, cost shifting against such claimants often does not apply and pretrial discovery procedures are more elaborate than in Australia. Accordingly the experience from that jurisdiction is not applicable to lower courts which have a cap on total damages which prevents grossly inflated judgments and have cost shifting which compensates the successful defendant for a substantial part of his or her costs.

Under AEI insurance schemes the risk of the adverse cost order can be laid off to the insurer. This still leaves intact the compensation to the defendant and introduces a new player, the AEI insurer, whose strategic interest is to filter out specious claims by independent assessment or delegation of that assessment to the lawyer under delegated authority schemes. The lawyer wishes to maintain his or her trusted

position so s/he has an overwhelming incentive only to pursue claims with a realistic prospect of success. The involvement of the AEI insurer also ensures that a cost order in favour of the defendant against its client will be paid. Painter suggests that parties could be required to lodge a bond, or proof of insurance, at the outset of litigation to assure the opponent's costs (Painter 1999, p.317). The market in Australia is too immature to require this at this time but the proposal may have merit not only to discourage spurious plaintiffs but also defendants whose only reason for defence is the time it buys them. The danger in this of course is that the bulk of litigation would then be filtered through what may be the too narrow focus of an insurer's assessment of its merits. Under this test it might be the poor who would never pass through the eye of the needle!

As between contingency and conditional fee arrangements an English view is that the client is better served by conditional fees. It is contended that (Moorhead 1999):

> " conditional fees also contain incentives for quality (they only get paid if they win) and what they get paid is related to how many hours they have spent on their case."

It also allows lawyers in relatively small cases to preserve a basis of charging and work practice that results in a level of costs for each side in excess of the amount in dispute and then provides an uplift to that for the plaintiff's lawyer. In an example Moorhead posits legal costs for each side of £6,000 on a claim of £5,000 with an uplift for the plaintiff's advisors of 100% but capped by law society guidelines at 25% of the damages. This results in a total legal bill of £12,250 (6,000 for D +6,000 for P + uplift 1,250 + VAT) to assess the merits and quantum of a claim of £5,000. These are no doubt realistic (if not low) figures but only a lawyer could seek to design a system which is patently so cost inefficient. Contingency fees do at least limit the plaintiff's adviser to a portion of the amount in dispute. Where this is insufficient a small claims system which excludes lawyers or some other strategy to provide access at an expense less than the amount in controversy needs to be devised.

If contingency fees do lead to more early settlements that is a considerable saving of court time and a substantial saving to the parties in costs, their own time and stress. Potential plaintiffs to whom the system provides no access without contingency fees are still better off even if they are encouraged to settle too cheaply if contingency fees are allowed. It is best to allow both contingency fees and conditional fees and ensure information about them is available to the client to negotiate the best for the circumstances and risk of the particular case. Professional practice rules should cap rates to ensure the client retains a realistic portion of the award.

Thus cost insurance in its various forms has much to offer potential litigants as a means of financing access to the courts. Spreading the risks involves other players with incentives to prevent spurious cases. It may provide access to indigent plaintiffs with large meritorious claims and to the middle class to defend their property and to pursue their rights. This may remedy a substantial gap in our present system, which offers little but expensive risks to potential middle class litigants.

However insurance has little to offer indigent defendants or indigent plaintiffs with small claims. Small claims can be accommodated by special procedures that do not allow costs to be shifted and do not allow the involvement of lawyers in the processes before the court. Here an imbalance may lie between well resourced parties who may still obtain legal advice in preparation for trial. In the South Australian Magistrates Court this problem is addressed by having the magistrate conduct the trial as an inquiry (s. 38, *Magistrates Court Act* 1991, (SA)). The shift of control over the process from the parties to the magistrate is seen as a way of ensuring that differences in the sophistication and resources of parties does not give an unfair advantage to one over the other. In my experience it is generally effective in that.

This still leaves indigent defendants facing large claims with no resources to pay for legal representation at trial. For these there is no encouragement for a lawyer to do the case on a speculative basis because even in victory the only money available is the shifted costs. There is no uplift to compensate the lawyer for having taken the risk of getting nothing and waiting until the end to be paid. Legal aid may be the

only option for these. Legal aid in principle has many parallels to cost insurance. The cost risk is passed to another who exercises a degree of control over the litigation, although the motives of legal aid offices may be substantially different from legal cost insurers. Legal aid offices may be more willing to finance speculative social issue litigation that fits into their policy objectives. An interesting policy model in this respect is the German system that gives the decision whether to grant legal aid to the court. However I have not included legal aid in this thesis for the simple reason that in Australia it largely ignores civil disputes, outside family law and this is unlikely to change. Legal cost insurance could only fully supplant legal aid if it was compulsory with the premiums of the middle class inflated to subsidise the indigent (Blankenburg 1999). Again whether it is more acceptable for the taxpayers to accept that role through legal aid is beyond the scope of this thesis.

Having discussed the effect of cost shifting regimes and other ways of defraying legal costs I now turn to the issue of how costs affect the balance of how disputes are resolved in lower courts and by alternative means.

Rationing access to courts by costs

There is a view that justice is priceless and accordingly society should make unlimited resources available to courts to dispense it. What is justice may be controversial (Chapter 6). However whatever the view one takes of this it is clear that the work of lower courts in determining the existence and extent of obligations according to established legal principle is an important part of government. It provides to citizens the means to predict and measure the extent of their rights and that is the reference point against which they can negotiate. However the community's resources are not infinite and cannot be used to determine every dispute (which would not in any event be desirable). If access to courts is to be rationed cost (to an economist the price to buy it) is the obvious mechanism to use. However, if access to lower courts is too expensive for most people they negotiate from a position of weakness. The right balance needs to be struck.

From the perspective of an economist the "justice is priceless" view and the consequent policy that should always aim at improving access to justice is wrong (Gravelle 1995, p. 279).

> "This assertion is based on a conflation of the two senses of justice and is mistaken. It is not true that increasing access to justice services is always welfare increasing. First, producing justice in the sense of the services of the courts and the legal system has a cost. Increasing the provision of legal services has inputs which could produce other goods and services. The benefits from improving access to justice services must be compared with the benefits forgone from a smaller output of other commodities.
>
> Second, justice services are peculiar commodities. In many cases individuals use them to define and enforce their legal rights against others. But once a legal dispute has arisen an enhancement of one person's rights is necessarily a diminution of another's. Justice services are different from other services such as health care: one person's consumption of health care may make that person better off but it does not makes anyone else directly worse off. Even if a costless increase in the supply of legal services is possible it would not necessarily be welfare enhancing."

The economic rationalist approach would be to treat dispute resolution as a service, remove barriers to entry to all parts of the industry and let the suppliers compete in the market for consumers leading inevitably to the holy grail of optimal allocation of resources. This state is known as Pareto efficiency (Gravelle 1995, p.291):

> "The allocation of resources is said to be Pareto efficient when it is impossible to change the allocation so as to make at least one individual better off and no-one else worse off. The output of a commodity is efficient in this sense if the benefit from the consumption of an additional unit is equal to the cost of producing that extra unit: marginal benefit equals marginal cost. Under certain circumstances unregulated markets result in an efficient allocation of

> resources. Each consumer takes the price of the commodity as given and adjusts consumption until the marginal benefit is equal to the cost to them of an additional unit which on a market is its price. Since competitive suppliers are forced to sell at a price equal to marginal costs the price mechanism leads to efficiency where marginal benefits to consumers equals marginal cost of production. Hence if markets are competitive and complete in the sense that there are markets for all commodities a market economy is efficient.
>
> This result, known as the first theorem of welfare economics, when coupled with the second theorem of welfare economics which deals with distributional issues, has powerful and simple implications for policy. The second theorem establishes that, provided certain conditions on technology and preferences are satisfied, the best way to deal with inequities in distribution is not to intervene directly in the working of markets but to make lump sum redistribution of initial endowments amongst individuals and then to leave individuals to operate in the markets with their redistributed endowment. Policy in a world where the conditions of the Theorems are satisfied would consist of redistribution by lump sum transfers and, if necessary, ensuring that markets are complete and competitive."

However legal services do not readily lend themselves to this approach. They are surrounded by restraints of trade. Even if these were removed (and some of them may be desirable, such as lawyers' professional conduct rules which give courts a sanction over attempts to mislead them) there are aspects of the legal system that make it difficult to treat in conventional economic terms. Even if the value of access to the legal system is not 'priceless' important things distinguish it from the sale and purchase of other commodities and services. The supply price in litigation services is not particularly demand sensitive. Court scales of fees setting criteria by which lawyers can charge their clients and also the way of calculating cost shifting in favour of the successful litigant provide a strong indicative pricing structure in the legal market. Departures from these cost scales in the litigation market are not particularly sensitive to demand although large players may negotiate different rates.

Equally neither is the demand side (parties to disputes) sensitive to supply cost. There is evidence that consumers of legal services do not primarily make their decisions by the price of them. In economic terms their decisions are inelastic to price. For example I have discussed research in Europe on the effect of legal cost insurance that showed that outside traffic tort and tenant claims there is little or no difference in the usage of courts by legal cost insured rather than uninsured lawyer clients (Blankenburg and Fiedler 1981 and Jagodinski 1994). People sue and defend cases for many reasons. The dominant reasons differ according to the type of dispute. Much personal injury litigation is affected by the availability of an insurer of the potential liability so that any judgment can be paid as well as cost factors. Parties to a domestic dispute are more likely to be driven by emotional reasons than a repeat business user. The latter is more likely to be price sensitive but may also be driven by factors such as deterrence of other debtors. That is to be known amongst its client group as relentless in collecting debts. Thus it may be willing to pay a high price in one case because it is notionally distributing the value to it of being seen to pursue the debtor over many other accounts which are thereby encouraged to continue to perform. This is a particular example of a unique attribute of a judgment, its value as a precedent. Often this value accrues to others who did not buy it. Economic analysis of this is hard to do because the cost of obtaining the judgment is not shifted to these other parties who enjoy that benefit of the judgment.

The underpinning of economic rationalism is that the first and second theorem of welfare economics leads to a Pareto efficient allocation of resources. Here the best way to allocate resources is by the collective decisions of individual consumers. It is an egalitarian notion. This is the antithesis to the determinative model of court resolution of disputes which relies on the notion of a higher authority imposing a decision according to higher principles for a greater community good. As long as a society retains a government which imposes policies (laws) on its citizens then the role of lower courts will be to enforce obligations in accordance with those laws and to decide the facts necessary to determine their existence and extent. Designing court systems on economic rationalist principles would be deficient because it would ignore the government role of courts in imposing decisions. Although lower courts

have a lesser role than higher courts in developing legal principle, because the overwhelming number of cases enforcing obligations based on those principles proceed in lower courts, their role is of paramount importance to the legal system.

The work of courts in enforcing obligations and determining the extent of them, together with the penumbra of ADR services, is not a closed system and its efficiency also affects the way people conduct themselves to manage the risk of not being able to enforce obligations or being liable for conduct. Easy cheap prompt access with effective enforcement may increase risk taking such as the easy advance of credit in the knowledge it is likely to be collectable. An expensive, ineffective court system may result in higher barriers to the sale of goods on credit and loans because the ability to collect against defaulters is less certain. The converse may be true in tort suits such as personal injury claims based on negligence. Here easy, cheap, prompt access with effective enforcement may increase strategies by property owners to avoid risk (better lighting, cleaning up spills etc.) and less efficient, more expensive, slow access may leave risk taking by property owners in place. The difference is whether the party with assets to protect is a potential plaintiff or defendant. This highlights the fact that ease of access to courts can affect the distribution of assets in very different ways, in these examples by enforcing the collection of them in debt matters and allowing access to them in tort matters. The point for this purpose is the same, rationing access to courts affects the divide between court determination of disputes and ADR outside the courts and it may also affect conduct which has the potential to give rise to disputes.

Having all disputes resolved very efficiently by lower courts would not be desirable. Some rationing is desirable. This view has been expressed by Professor Erhard Blankenberg in the comparative studies between The Netherlands and Germany (Blankenburg 1994) reported above. The German experience suggests that too great an efficiency coupled with certain and full cost recovery can lead to excessive litigation. This causes a substantial expense to the community both in publicly funded judicial expenses and in legal resources generally which are much higher per capita than is the norm in Europe.

This point is made another way by Ogus in commenting on the Woolf report in the United Kingdom (Ogus 1995):

> "There is an equilibrium level of court case loads and costs. If the cost of proceedings in a particular court is high because, for example, hearings are subject to considerable delay, the effective stakes of the litigation to the parties are reduced and at the margin this will deter some from litigating. Conversely, if the costs are reduced that will encourage more to litigate. The obvious but depressing implication of this for the Woolf proposals is that if they are successful in reducing court costs that very fact may induce more parties to avoid settlement and ADR and resort instead to the courts."

Simply paying the parties' legal costs (justice is priceless) would leave rationing in place. The depressing result of the traditional common law adversary model is that the effort put into dispute resolution is likely to increase to the extent of the funds available raising new types of rationing of access as a result of the increasing personal expense to the parties and delay. For example Fenn and Rickman (1997) identified that legally aided or union funded plaintiff's lawyers in England dragged cases out. Delay is also a way courts ration their services. But if this is remedied by more resources, as with highways and hospitals (Lindsay and Feigenbaum 1984), demand for them is liable to increase to fill the increased supply. Indeed in an internet economy where the nature of intellectual property in particular and business generally is changing rapidly delay may become a more important factor in rationing the use of legal systems than cost.

Accepting that it is desirable to have some rationing of access to courts, and it is inevitable, how is it best achieved? In this thesis it is necessary to answer that by reference to the whole system. The following policy recommendations have been identified that bear upon this.

- In Australia there is a diverse system of dispute resolution available and developing. This offers a culture of dispute resolution outside lower courts and competition which must tend to reduce use of them (Chapter 3).
- If enforcement processes of lower courts make available the knowledge they have about chronic debtors that will discourage wasted use of them. The use of the threat of credit referencing as a threat to encourage payment outside the court system may reduce the need to access courts. Court management of enforcement processes will reduce total costs incurred (Chapter 4).
- Court management of fact finding in appropriate cases should improve efficiency and reduce costs (Chapter 5).
- Lower courts can encourage parties to settle outside the court process by prelodgment procedures and within it by the provision and use of ADR by the court (Chapter 6).
- The policy of fixed rate cost shifting recommended in this chapter makes costs predictable which allows the parties to make realistic assessments of their cost risk and gives them a basis upon which to negotiate with their lawyers the basis of actual costs charged. It should encourage cost efficient use of court processes. The gap in many cases between the actual costs and the cost shifting scale is a factor rationing use of the court.

The role of a lower court is to enforce obligations and where the existence and extent of them is contested to publicly determine their extent in accordance with the established facts and established principle. This is an appropriate set of policies which will encourage people to resolve disputes outside the court system, but where they cannot, it will provide a lower court system which gives realistic expectations and an effective system to enforce obligations and determine their extent where that is contested.

Summary of conclusions

- Modelling suggests accuracy in court decision making increases the rate of settlement without trial. Presumably this would apply to disputes both outside and within the court system.

- The basis of calculating cost shifting may affect the extent of use and the way procedures within a court system are used. These effects must be viewed in context with the whole of the policies dealing with the work of lower courts.
- The evidence is that the effect of price in the decision to litigate is more akin to investment decisions, rather than consumption. Social and other risks influence decisions to litigate as well as purely economic considerations.
- Cost shifting is necessary in lower courts to allow access and discourage low merit claims. An identified adverse effect is to increase the cost to parties. It follows that cost shifting rules should include policies to discourage unnecessary costs being incurred.
- Cost shifting scales should be calculated on a fixed rate to allow the parties to predict the cost shifting at any stage. Fixed rate predictable cost scales:
    - increase the use of courts to resolve disputes,
    - reduce the costs actually incurred,
    - reduce unnecessary activity and consequentially,
    - reduce delay.
- Cost shifting and actual costs should not be so low that too ready access to courts is encouraged. In Australia high actual costs will cause the likelihood of a gap between shifted costs and actual costs which will discourage this.
- Cost shifting should either deal with both parties' costs (as in Germany) or use offers and penalties to encourage strategic offers to protect a partial loser.
- If one party has cost risks and the other does not (or they are unimportant to it), more cases go to trial and the latter party is advantaged. Ways of spreading a party's cost risks need to have countervailing influences to prevent unfair exploitation of this advantage.
- Incidental legal cost insurance has little effect on the ability of the insured to access the courts but the strategic decisions of the insurer can profoundly affect the amount and conduct of litigation in lower courts.
- Legal cost insurance has much to offer middle class clients who have every reason to fear involvement in any substantial litigation. However to achieve substantial penetration of the market place predictable cost calculation may be necessary. Policies must protect against a potential for conflict if the cost insurer for the plaintiff was the insurer of the liability being pursued by the plaintiff.

- Some control by the insurer over the litigation is necessary to provide a check against abuse in larger cases. The problems identified in relation to small traffic cases can readily be guarded against by a small claims system where lawyers are excluded (as in South Australia, which applies to all claims not exceeding A$5,000).
- Contingency and conditional fees provide access to wronged plaintiffs who otherwise could not afford litigation at all. Both should be available. Professional practice rules should cap rates to ensure the client retains a realistic portion of the award. These fee arrangements come with risks of generating spurious or exaggerated claims driven by party greed with the complicity of lawyers. Accurate and prompt fact finding by the court is the best protection against these.
- Cost shifting to the victor provides an appropriate countervailing incentive to discourage low merit claims and to compensate the defendant at least for a substantial amount of its costs where they are not discouraged. After the Event Insurance merely spreads this risk to a third party who exercises the same countervailing control.
- These policies leave the indigent defendant facing a claim which is larger than a small claim without assistance. Some form of legal aid or compulsory cost insurance is necessary to cover such cases.

ENDNOTES

(1) The Tullock (1980) model as developed by Main (1997) is used in this thesis. The LPG approach to pretrial negotiation strategies was developed by Landes, (1971), Posner (1973) and Gould (1973). It works on the assumption that trials are caused by different expectations of the result. This has been developed to suggest that with cost shifting (the 'English' rule) there is less likelihood of trials than with no cost shifting (the 'American rule') because the anticipated costs can be shared between the parties to their mutual benefit (Main 1997, p.12). There is little empirical evidence but research by Snyder and Hughes (1990) and Hughes and Snyder (1995), the latter an update, on litigation in Florida where the rule changed from the American rule to the English rule supported the view that the English rule caused less trials. They reported 57 trials per 1,000 cases under the English rule compared to 107 per 1,000 cases under the American rule (Snyder and Hughes 1990, Figure 3, p.365) The research suggested that the English rule encouraged the commencement of more high merit low value cases but adverse information would cause these to be dropped but the American rule caused more low merit cases. The English rule substantially increased the amount of cost incurred on each case whether it settled or went to trial- 61.3% increase in cases at trial and 46.6% increase for those that settle (Snyder and Hughes 1990, Table 6, p.375). Recent discussion of these issues can be found in Katz (1997), (Rickman 1995), The Chicago-Kent Law review (1995) (and in particular Painter quoted elsewhere in this chapter), Fenn (1998) and Ogus (1999).

(2) This is an algebraic analysis of the graphs.

Full cost shifting

P is the probability of success. X is the liquidated claim ($10,000 in the graphical representation). Y% is the cost allocation to the winner. Actual costs equal this allocation.

The plaintiff's expected result from trial is:

P(X+Y%X-Y%X), which simplifies to PX, if it wins and (1-P)2Y%Xif it loses. If it wins it receives the liquidated claim plus costs which it pays to its lawyer. If it loses, the reciprocal probability, it pays its own and the defendant's costs. The combined expectation is:

$P(X+Y\%X-Y\%X)-(1-P)2Y\%X$, which simplifies to:

$PX-(1-P)2Y\%X$.

If the plaintiff's combined expectation is zero:

$PX-(1-P)2Y\%X=0$, or

$PX=(1-P)2Y\%X$,

$P=(1-P)2Y\%$,

$P=2Y\%-2PY\%$. This can be simplified to $P=2Y\%\div(1+2Y\%)$.

It follows that as long as Y is larger P is larger. I.e. the greater the cost shifting the greater the proportion of cases for which it will not be worth the risk for the plaintiff to bring.

In the example of 1/3 complete cost shifting the probability at which the plaintiff has zero expectation is:

$Px\$10{,}000-(1-P)x2x1/3x\$10{,}000$ and the probability is 2/5, i.e. the plaintiff will only pursue the case if the probability exceeds 2/5.

The defendant's expectation from trial is:

$PX+P2XY\%$ if it loses and $(1-P)(Y\%X-Y\%X)$, i.e. nothing, if it wins. It can settle by paying the plaintiff the claim. It will do so when the expected loss exceeds the claim. The combined expectation is:

$PX+P2XY\%-(Y\%X-Y\%X)$ or $PX+2PXY\%$

If the defendant's expectation is the amount of the claim:

$PX+P2XY\%=X$,

$P+P2Y\%=1$,

$P(1+2Y\%)=1$ which can be simplified to $P=1\div(1+2Y\%)$. It follows that as long as Y is larger P is smaller. I.e. the greater the cost shifting the lower the probability at which the cost to the defendant of going to trial will equal the cost of settlement and the defendant will settle more cases.

In the example of 1/3 complete cost shifting the probability at which the defendant's expectation from trial is equal to the cost of settling is:

$1 \div (1+2/3)=3/5$. If the probability of the plaintiff succeeding exceeds 3/5 the defendant will settle. Trials can be expected between a probability of 2/5 and 3/5.

If the cost shifting regime is reduced to 10% the plaintiff's zero expectation is at a probability of:

$2/10 \div (1+2/10)=1/6$,

and the defendant's expectation from trial equals the cost of settling at a probability of:

$1 \div (1+2/10)=5/6$,

and trials now occur between probabilities of 1/6 and 5/6.

The higher the rate of cost shifting the less the number of trials.

Partial cost shifting

Now assume that the cost shifting regime is less than the actual costs. Partial cost shifting can be analysed as follows. The same nomenclature is used with the addition of C% being the % actual cost bears to the sum claimed.

The plaintiff's expectation is $P(X+Y\%X-C\%X)-(1-P)(Y\%X+C\%X)$. When this equals zero it may be simplified to:

$P=(Y+C) \div (1+2Y)$, the same as complete cost shifting ($P=2Y \div (1+2Y)$, except as Y (cost shifting) is less than C (actual costs), the probability must be greater before the plaintiff will commence proceedings. The defendant's expectation is:

$P(X+XY\%+XC\%)-(1-P)(C\%X-Y\%X)$. This simplifies to

$P(X+2XC)-XC+XY$. If the plaintiff accepts X to settle the point of settlement is

$P(X+2XC)-XC+XY=X$, which simplifies to

$P=1+C-Y \div (1+2C)$. The plaintiff should accept in settlement its best possible result from trial, which is $X+Y\%X-C\%X$. The defendant will settle when the probability leads it to expect to pay more than this. Equality of expectation and the sum the plaintiff should accept then occurs when:

$P(X+2XC)-XC+XY = X+Y\%X-C\%X$ which simplifies to

$P=1\div(1+2C)$

No cost shifting

At the extreme assume the parties have costs but there is no cost shifting. The same nomenclature is used as before, except that under this assumption Y has no value and will be ignored. C is the actual level of costs.

The plaintiff's expected result from trial is:

$PX-C\%X$. The costs are incurred regardless of the probability of success. There is no penalty for losing. If the plaintiff's expectation is zero:

$PX-C\%X=0$,

$P=C\%X\div X$,

$P=C\%$

The probability of success must be more than the percentage of costs for it to be worth the risk of the plaintiff commencing a claim. If costs increase the greater the proportion of cases for which it is not worth the risk for the plaintiff to bring. At costs equal to the claim it is not worth the risk of commencing any claims.

The defendant's expected result from trial is:

$PX+C\%X$. if it loses and $C\%X$ if It wins. The combined expectation is:

$PX+C\%X-C\%X$,

PX. It can settle if it pays not the plaintiff's claim but the plaintiff's best possible result after a trial, $X-C\%X$. Its expectation from trial equals the cost of settlement when:

$PX=X-C\%X$,

$P=1-C\%$. The higher the costs the lower the probability at which the defendant will settle. Once the costs equal the claim the defendant may as well settle all claims. Compared to full cost recovery the plaintiff with a valid claim and powerful evidence is disadvantaged but the plaintiff with a weak case is advantaged by costs encouraging defendants to settle.

In the case of costs being 1/3 of the claim, the plaintiff will only pursue claims where the probability exceeds 1/3 and the defendant will settle any claim where the probability exceeds 2/3, not very different to the cost shifting regime set at 1/3 (2/5-3/5).

One party has cost insurance

Where the plaintiff is free of cost considerations, eg insured against all costs from the action, but the defendant is subject to a full cost shifting rule the plaintiff's expectation is:

PX if it wins and nil if it loses. If PX=0, P=0. I.e. it will be worth P bringing any case where the probability of success is greater than zero. The defendant will still pay costs if it loses (they will be taken by the plaintiff's insurer). It will settle all cases, assuming a full cost shifting regime discussed above where the probability is greater than:

P=1÷(1+2Y%). If cost shifting is 1/3, the defendant will settle whenever the plaintiff's probability of success exceeds 3/5. If cost shifting applied to the plaintiff the plaintiff would not pursue cases where the probability was less than 2/5. If the insurance is shifted from the plaintiff to the defendant the reverse occurs, namely the defendant defends everything but the plaintiff will not pursue cases below a certain probability (2/5 for 1/3 cost shifting).

(3) The prisoners' dilemma is an economic paradox based on two prisoners, each faced with the choice of giving evidence against the other and receiving a lenient sentence in return. If neither 'grasses' the police can only bring evidence to convict them on a lesser charge for which they would be sentenced to a medium term. Their joint interests demand silence but individually each would be better off serving self interest.

(4) A conditional fee is charged conditional upon the client's success in the action at a rate which is more than usual to reflect the lawyer carrying the risk. The calculation is still founded in the amount of work done but a multiplier is applied to the figure calculated (e.g. 1.5 x normal fees). A contingency fee is also charged

conditional upon the client's success but is calculated as a percentage of the result. A conditional fee without the uplift is sometimes described as a speculative fee. Speculative fees are not likely to survive the availability of arrangements which are more generous to lawyers. These are all variants on the same theme. The common feature is no success no fee. Only the basis of calculating the quantum of the fees is different. It is theorised that the conditional fee is a greater incentive for conscientious and thorough legal work because the work is rewarded, whereas in a contingency fee arrangement provides no incentive to do any work. However to the extent that doing conscientious and thorough legal work increases the client's chance of success the incentive to do the work is little different in either arrangement. If the work does not enhance the prospect of success it is dubious whether it should be encouraged. Once an opponent makes a 'halfway' reasonable offer, under a contingency fee arrangement the lawyer's economic incentive is to have the client accept it and receive the fee rather than devoting further work on the uncertain prospect of bettering the offer.

(5) CASE STUDY:Amtsgericht, Stuttgart, Germany, April 1999

A diary of the hearing of this case which arose from a motor vehicle accident appears in Appendix 5.B. The cost implications are repeated here.

Cost Implications

On the BRAGO scale each lawyer is entitled to costs on the amount of the claim, which was for about DM6,000. The BRAGO fee for that is DM1,125. The court fees were DM525. The expert, who was probably an engineer, would have cost about DM1,000. The parties pay this in the same proportion as the settlement. Of course, the BRAGO fee for lawyers is an entitlement to each of them. Therefore, the total fees and legal costs was about DM4,000. As between the parties, all these fees and disbursements were split in the same percentage as the settlement, namely 70/30. That is, the defendant would pay 30% of approximately 4,000DM, about 1,200DM and the plaintiff 70%, about 2,800DM. The plaintiff received a judgment of 2,000DM and had a notional liability in costs and disbursements of 2,800DM. It can be seen that were it not for cost insurance this litigation would not have been economically worthwhile.

Afterwards I interviewed the plaintiff. She was quite cheerful about the result. Her car had already been repaired by her insurance company. She had legal costs insurance so that her liability to costs for the other side would be discharged by her insurance company and it would also pay her costs to her own lawyer. On her understanding, the defendant was insured for the third party cost, so he would not have to pay anything for the claim or costs.

In another case in the Amtsgericht for DM6,000 I interviewed the defendant's lawyer afterwards. The lawyer said this was quite a good case for him. It took him two to three hours and he earned about DM1,000 (three fee units) for it. He wants to earn about DM400 per hour and six chargeable hours per day. He works five days a week from 8 a.m. to 6 p.m. with half an hour for lunch. His client is an insurance company, which is a very good client. Many small cases do not pay, but then there are big ones which pay well.

(6) In the report on the legal expense insurance scheme backed by the Law Foundation of NSW the conclusion was that legal cost insurance may only offer access to justice by offering legal advice for routine and predictable legal problems rather than catastrophic events. It implicitly recommends the American model. It doubts whether it can make a significant impact on use of legal services as a private enterprise product under the present legal structure (Law Foundation of NSW 1999, paras 269-273). The European experience suggests that without a predictable basis for calculating legal costs legal cost insurance will be slow to penetrate the Australian market. However a regime of cost insurance along the lines of that in European countries with uncertain cost calculation and shifting should be able to be offered in Australia. It would fill a substantial gap in our present access for justice by providing the middle class with access to courts, which they cannot afford to risk at the moment. The existing regimes in place in most states and territories, which deal with the cost problems in small claims by excluding lawyers from them, should avoid wasteful use of legal expenses in small claims. Small claims should cover all cases below the nominated value and in particular motor vehicle property cases. At present in some states the small

claims regime excludes motor vehicle property claims.

(7) Champerty was derived from "Champart," *campi pars* or *campi partus*, a type of medieval feudal tenure consisting of "a grant in which the *reddendum* was a specified quota of the actual produce of the land granted. The tenant by champart then was only a partial owner of the land he held. He was bound to share its rents and profits with the grantor." (Radin, 1936 at p. 61, from Painter 1999).

Maintenance, "the support given by a feudal magnate to his retainers in all their suits," was unlawful under the Star Chamber Act of 1487 and the Statute of Liveries of 1504. Radin, (citing 3 Henry VII, c. 1 Statutes of the Realm ii, 509; 19 Henry VII, c. 14; Statutes of the Realm ii, 658). (Radin 1936 p.64, from Painter 1999)

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CHAPTER 8: SOME DESIRABLE FEATURES OF LOWER COURT SYSTEMS TO VERIFY AND ENFORCE CIVIL OBLIGATIONS

Lower courts are themselves a complicated system which resonates throughout society affecting conduct, assessment of risk taking and dispute resolution outside the courts. Desirable features of lower court systems cannot be considered in isolation because they affect and are affected by the rest of the system both internal and external to the courts. At the end of each chapter there is a summary of conclusions from that chapter. These define the role of lower courts and conclude desirable features for lower courts to fulfil different aspects of that role. Those features stand alone for each topic. I now extract the key themes from each topic, followed by the detailed conclusions for each.

The role of lower courts

This analysis defines the role of lower courts primarily to be the enforcement of obligations. Their role in dispute resolution, where obligations are contested is to determine their extent using an adjudication model. The growth of ADR is in part evidence that at present lower courts may not be as effective as they should be in fulfilling their adjudicative role. The danger if they are ineffective is that other systems will fill the gap resulting in agreements remote from legal rights and pluralism of rights. This is undesirable because it is chaotic. A consequence of such chaos will be that the power to determine community standards of conduct will shift from the elected government and the arm that mediates the enforcement of its power, the courts, to other groups that are powerful in society. Most of them are not subject to democratic control and the accountability that imposes.

The detailed conclusions are:

- The primary role of lower courts is to enforce obligations.
- Where the existence and extent of obligations are contested lower courts must publicly determine their extent in accordance with the established facts and established principle.
- This adjudication function is a defining characteristic of lower courts but the particular procedure used to perform the adjudication function is not.

- The growth of industry dispute resolution schemes and government tribunals is an indication that sectors of industry and government see existing court processes for adjudicating disputes as deficient.
- There is nothing in the defining characteristics of lower courts to prevent them using dispute resolution techniques other than adjudication.
- Access to lower courts underpins ADR and ensures that if it is deficient citizens have a place to enforce their rights. The cost of having cases adjudicated in lower courts is a major impediment to going to them to adjudicate a dispute.
- Alternative dispute resolution schemes, such as industry ombudsmen, which use the adjudication model, should not be allowed to develop into private lower courts. This is prevented as long as they do not combine enforcement powers against the client industry with the ability to bind the customer to solve the dispute within the scheme.

The first desirable features to consider are those to fulfil the primary role, the enforcement of obligations

Verifying debt and enforcing judgments

It is appropriate to retain this primary role of enforcing obligations within lower courts. To discharge this role effectively magistrates must take a more collegiate and managerial role in exchanging information gained about abuses and using it to prevent inflated and invalid claims being successfully converted into judgments in uncontested matters. When dealing with chronic debtors lower courts should make information about their inability to pay available to ensure creditors have realistic expectations and should manage the creditors to ensure costs are minimised and the return to creditors is fairly distributed. These features are a substantial change from the traditional role of common law lower courts which deal with their work on a case by case basis.

The detailed conclusions are:

Verifying debt

- Verifying debt should remain within the court system.

- Under the common law pleading system there is no advantage in having a separate procedure for uncontested debt claims.
- A system of checking uncontested claims against abuse is necessary. It is most efficiently achieved by magistrates, on a collegiate basis, using knowledge of inflation of and invalid claims obtained from applications to set aside judgments and contested hearings to prevent similar claims in other cases being successfully converted into judgments in uncontested matters.

Enforcement

- Existing processes left in the control of creditors are satisfactory for debtors with the means to pay.
- Ways of preventing debtors from hiding assets should be further researched. It is noted that the Germans have a presumption that assets of a marriage are owned solely by a debtor and hence they are available for creditors and in France there is a criminal offence for 'organisation of poverty'. In South Australia the ability to charge one joint owner's assets with a debt to prevent it being further dealt with is a useful innovation.
- Imprisonment should be retained as a sanction for contempt of court processes but not used as a backdoor way of sanctioning future payments, because things may occur to the debtor that make the future payments impossible. Likewise powers to restrain absconding debtors and assets should remain.
- Debtors should be protected by ensuring that court enforcement does not reduce their income below the level of social security benefits, nor remove their tools of trade.
- Existing court enforcement processes are ineffective in dealing with chronic debtors.
- Enforcement of obligations against chronic debtors should not be left to ad hoc activity by creditors. The court should collect information about the financial state of chronic debtors, on its own initiative if necessary, which should be available to creditors to ensure they have realistic expectations and do not waste costs on claims and enforcement which will be fruitless.
- Where a lower court determines that the debtor cannot repay all of several creditors, it should manage all judgment creditors, determine fair priority and

order a scheme of repayment to be distributed between them. Lower courts should develop principles that give a fairer distribution than either a first come first served, or a most aggressive takes most basis as occurs with ad hoc management of debtors.

- These factors are relevant to priority and they should have the following effect:
    - older debts should have some priority over recent debts, but
    - if a creditor has not attempted to collect a debt the inactivity removes the priority on account of the age of the debt,
    - payments which are apportioned should be apportioned pro rata to the size of the debts between which they are apportioned, and
    - creditors who could have known the debtor was a bad credit risk and with that knowledge could have avoided the debt arising should have priority behind creditors who did not have that opportunity.

  This list is not intended to be comprehensive.
- The court should give attention to the mechanics of payment and distribution. At the present many payments are made by money orders purchased from Australia Post. These are relatively expensive for small payments and the cost is increased if they are posted or delivered. If payments are to be distributed among several creditors a system of direct debit from a bank to a single account from which it is then automatically distributed should be in place. It is probably most convenient for the court to provide this service although it may be possible to subcontract it.
- Where the debtor has no ability to pay, the court should discourage fruitless enforcement processes by making an order preventing creditors from shifting the costs of further processes to the debtor unless the creditor can show that the debtor misled the court or has had an improvement in his financial circumstances.
- The fear of the effect that a judgment has on credit rating can be used as a sanction to encourage compliance with an agreed schedule for repayment. A final notice procedure can encourage creditors to offer an agreement for delayed payment of an agreed sum of debt in return for an agreement that if the debtor fails to comply with the terms of payment the creditor can enter a summary judgment for that agreed sum. The same procedure can be used to record agreements at other stages of court processes.

- Lower courts should have a procedure to allow a debtor to consent to a potential plaintiff entering judgment in respect of a claim of which the debtor gives details. Where the creditor accepts that the consent is accurate the legal costs to which the creditor is entitled for obtaining a judgment should be reduced because the creditor should only need perfunctory legal advice about the validation of the claim.

A necessary incident of enforcing obligations is to determine their existence and extent where they are contested.

Effective fact finding

The protest of Felix Frankfurter rang through this chapter, "Federal judges are not referees of prize fights but functionaries of justice...". If Magistrates in lower courts are to be functionaries of justice they need to be willing to exercise control of the process. The prize fighters cannot be trusted with the control of the process in all cases.

Here again the need is for lower courts to exercise managerial control. In this instance magistrates must in appropriate cases exercise control over the gathering and presentation of evidence. This necessitates the definition of the margin of control between the parties and the court, the identification of which cases are appropriate and the development of strategies for effective fact finding. It also requires a change in the purpose of lower courts from choosing between the parties' versions to seeking an accurate version of the facts.

These conclusions were drawn in this discussion:

- The following are essential characteristics of an adversary system:
    - the parties are entitled to be served,
    - the parties define the dispute,
    - the parties can end the dispute by agreement,
    - the parties nominate the evidence to be brought to the court,
    - the parties can question witnesses and can be heard on all issues,
    - proceedings are conducted in open court in the presence of the parties and

their legal advisers, and

- reasons for judgment are given, are subject to appeal and have an effect of res judicata.

- Within those characteristics the common law tradition for fact finding can be improved in lower courts if they exercise a degree of control over the gathering and presentation of evidence in appropriate cases.
- Some particular types of cases that will benefit from court management of fact finding will be those:
    - where the parties have a marked difference in resources,
    - that have a narrow factual or legal issue whose determination can be expected to resolve the matter,
    - where the expected length of the trial is excessive due to the proof of detail not essential for the resolution of the key issues, and
    - that are not progressing at a satisfactory rate through pretrial processes.
- The parties must disclose the evidence they wish to bring to bear on the issues and the same magistrate will need to manage each case from the defence until the trial.
- If a court manages the collection and presentation of evidence it will first need to ascertain the key issues. Consequent upon that, other issues can be grouped into those that assist in determining the key issues and those necessary to complete the required findings but not expected to assist in determining the key issues. Where there are competing versions, courts should ensure that the parties efficiently gather the detail of the circumstances surrounding the key issues.
- In some cases it will be better to bring evidence of issues that assist in determining the key issue to court at the earliest reasonable time, rather than leaving it hidden as a trap to catch the liar at the oral trial which is the barrister's instinct. The detail may correct errors or overwhelm the liar without the necessity of the trial.
- It follows that in some cases the trial will not be continuous.
- Innovative ways to reduce factual controversies should be tried, such as mediation style conferences and expert conferences, and the reversal of the onus of proof where the alternative is to seek to prove by discovery matters that are in the other party's hands.
- The collection of evidence of facts that are not expected to assist in the resolution of the key issue should be given less priority and should not be allowed to become

the subject of discovery abuse.

- Lower courts should accept a purpose to decide an accurate version of facts, within the confines of the adversary process set out above.
- Consistent with the exercise of control over the collection and presentation of evidence, lower courts should retain their own expertise to advise them is relation to opinion evidence in appropriate cases.
- Lower court experts should be of the highest probity, be accepted experts in their field, preferably be out of the commercial mainstream of their field and be trained in issues of procedural fairness.
- Tradesmen should be accepted as experts in matters of their trade.
- Lower court experts should be used to advise the court and the parties on technical issues at the earliest possible and all stages of the litigation process, to chair conferences of experts and to provide reports to the court to be used as evidence.
- Before a lower court accepts the opinion of its expert generally the opinion should be written and the qualifications of the expert, the factual material upon which the opinion is based and the basis of the opinion should be known by the parties who should have an opportunity to question the expert as an officer of the court, but not as a witness.
- Lower courts should be able to exercise greater control over the collection and presentation of evidence, including opinion evidence, in appropriate cases, without substantially increased resources.

In fact most contested cases settle and the role of lower courts in that is next discussed.

The use of ADR by the lower courts

It has already been identified that the ability of the parties to settle a case is an essential part of the adversary process. It follows that there is no bar in principle to lower courts assisting parties to settle cases before proceedings are filed and at all stages of the process. However lower courts should not allow settlement processes to become a barrier to their role of determining the existence and extent of an obligation. Here again judicial officers should have a role in assisting settlement processes as part of their management of cases but where they become involved in

settlement discussions they must ensure that any settlement is on a principled basis. In particular the conclusions are:

- The primary role of lower courts is to enforce obligations and where necessary to determine the existence and extent of them. ADR should not be a barrier to this role.
- Judicial officers should take a greater role in managing their cases and managing attempts at settlement should be part of that role.
- Involving parties in processes increases early settlement.
- Court prelodgement requirements can be a proper way of courts encouraging settlement before action.
- Mediation, expert advice and by logical extension other methods of ADR can properly be provided by non judicial staff of courts on a consent basis.
- Judicial officers can undertake mediation where the right factors are in place. These include a clear factual background, settled legal principles and benefits open to the parties that cannot be ordered by a court.
- Judicial officers might better use types of ADR which fit with the judicial method such as independent evaluation.
- Where judicial officers are involved in ADR their judicial office requires that they be concerned to ensure that any settlement is in accordance with the parties' rights or where it is not the departure is for sensible and principled reasons.

Once all these desirable features are in place there remains the important issue of costs.

Designing cost policies to provide sufficient access to lower courts

All these excellent policies can be undone if cost precludes some with good claims from access and allows others to use cost factors to defeat opponents with valid claims. However, it is not desirable for all of society's disputes to be resolved in lower courts and some rationing of access is desirable. Costs are preferable to delay as a means of rationing use.

The only aspect of the total costs that can be controlled by lower courts is the extent that costs are shifted from the winner to the loser. The evidence is that costs should

be shifted to the loser, but calculated on a fixed predictable scale. Various strategies to share the cost risk and potential rewards of litigation can assist access. These are desirable as long as the body carrying the cost risk exercises sufficient control over the litigation to prevent abuse. However, despite these strategies, the indigent defendant in low value claims will not have the benefit of legal assistance without legal aid.

The detailed conclusions are:

- Modelling suggests accuracy in court decision making increases the rate of settlement without trial. Presumably this would apply to disputes both outside and within the court system.
- The basis of calculating cost shifting may affect the extent of use and the way procedures within a court system are used. These effects must be viewed in context with the whole of the policies dealing with the work of lower courts.
- The evidence is that the effect of price in litigation is more akin to investment decisions, rather than consumption. Social and other risks influence decisions to litigate as well as purely economic considerations.
- Cost shifting is necessary in lower courts to allow access and discourage low merit claims. An identified adverse effect is to increase the cost to parties. It follows that cost shifting rules should include policies to discourage unnecessary costs being incurred.
- Cost shifting scales should be calculated on a fixed rate to allow the parties to predict the cost shifting at any stage. Fixed rate predictable cost scales:
    - increase the use of courts to resolve disputes,
    - reduce the costs actually incurred,
    - reduce unnecessary activity and consequentially,
    - reduce delay.
- Cost shifting and actual costs should not be so low that too ready access to courts is encouraged. In Australia high actual costs will cause the likelihood of a gap between shifted costs and actual costs which will discourage this.
- Cost shifting should either deal with both parties' costs (as in Germany) or use offers and penalties to encourage strategic offers to protect a partial loser.

- If one party has cost risks and the other does not (or they are unimportant to it), more cases go to trial and the latter party is advantaged. Ways of spreading a party's cost risks need to have countervailing influences to prevent unfair exploitation of this advantage.
- Incidental legal cost insurance has little effect on the ability of the insured to access the courts but the strategic decisions of the insurer can profoundly affect the amount and conduct of litigation in lower courts.
- Legal cost insurance has much to offer middle class clients who have every reason to fear involvement in any substantial litigation. However to achieve substantial penetration of the market place predictable cost calculation may be necessary. Policies must protect against a potential for conflict if the cost insurer for the plaintiff was the insurer of the liability being pursued by the plaintiff.
- Some control by the insurer over the litigation is necessary to provide a check against abuse in larger cases. The problems identified in relation to small traffic cases can readily be guarded against by a small claims system where lawyers are excluded (as in South Australia, which applies to all claims not exceeding A$5,000).
- Contingency and conditional fees provide access to wronged plaintiffs who otherwise could not afford litigation at all. Both should be available. Professional practice rules should cap rates to ensure the client retains a realistic portion of the award. These fee arrangements come with risks of generating spurious or exaggerated claims driven by party greed with the complicity of lawyers. Accurate and prompt fact finding by the court is the best protection against these.
- Cost shifting to the victor provides an appropriate countervailing incentive to discourage low merit claims and to compensate the defendant at least for a substantial amount of its costs where they are not discouraged. AEI insurance merely spreads this risk to a third party who exercises the same countervailing control.
- These policies leave the indigent defendant facing a claim which is larger than a small claim without assistance. Some form of legal aid or compulsory cost insurance is necessary to cover such cases.

I make some general conclusions. Enforcing obligations is the core activity of lower courts. Determining the extent of obligations using an adjudication model is a necessary incident of their core role. The traditional common law adversary model leaves the control of court processes in the hands of the parties and their advisers. This model can be improved. Lower courts should take responsibility to perform their roles effectively rather than leaving the management of them to the parties. They should manage collection by multiple creditors against chronic debtors to ensure creditors have realistic expectations, expenses of collection are minimised and the funds collected are distributed equitably between the creditors. They should manage the fact finding process within the boundaries defined by the parties to seek an accurate result. They should assist parties to settle disputes by providing alternatives to adjudication, without letting that be an obstacle to adjudication. They should ensure that cost policies are used strategically to ensure sufficient but efficient access.

It is important for lower courts to fulfil their role effectively or else it will be done by other organisations. These may not have the institutional safeguards of procedural fairness and independence that are an accepted part of court structures and they are not accountable to the democratic institution of government. Pluralism of legal remedies will result.

Lower courts should retain their present role but if they are to do so they must accept the responsibility to define their objectives and manage their systems to ensure they are effective as well as principled.