ALTERNATIVE DISPUTE RESOLUTION IN SOUTH AUSTRALIA'S COURTS

Do such processes go far enough in improving the cost of justice?

LUCYNA. A.J. TURONEK

FOREWORD

My initial interest in alternative dispute resolution was kindled at an Adelaide conference convened in July 1991, by the South Australian Dispute Resolution Association (S.A.D.R.A.) and Lawyers Engaged in Alternative Dispute Resolution (L.E.A.D.R.).[1] The papers presented were extremely varied, discussing the application of ADR in the courts, family law, community mediation, environmental law, civil and commercial disputes and victim/offender confrontations. One of the expressed aims of the conference was to make recommendations for future legislation and government policy in the field of ADR practice in South Australia in response to the state Attorney-General's Green Paper on "Alternative Dispute Resolution" released in July 1990. The Green Paper, designed to encourage public submissions in the area of ADR, discussed the existing methods of ADR in South Australia both within and outside of the court system, interstate ADR services and ancillary issues pertinent to ADR, ie the training of mediators, confidentiality of ADR proceedings and tortious liability claims against mediators.[2]

The subject of this thesis arises from a topic discussed in the Green Paper and at the ADR Conference ie the current and potential uses of alternative dispute resolution procedures in the courts.[3] It was the presence of ADR within the courts that intrigued me most, since whilst I was familiar with the existence of ADR techniques in the Family Court, Industrial Court and various tribunals, I was unaware of the

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[1] Joint SADRA/LEADR Conference "From Competition to Co-operation: A Necessary Change of Focus" 19-20 July 1991.
[2] Passim, Attorney-General (S.A.) "Alternative Dispute Resolution" Green Paper (1990).
[3] Ibid at pp9-13.

numerous dispute resolution options available to litigants during the litigation process in the mainstream courts of South Australia. I had previously considered the pretrial process as simply a preparation for trial, rather than a continuing dispute resolution process. What interested me further in my examination into the ADR processes within the courts and other non-ADR reforms was their exhibited trend towards shaping the pretrial process into an inquisitorial dispute resolution forum, reverting from the traditional adversarial litigation process.

My decision to link the examination of the effectiveness of the ADR processes within the courts as to whether they went far enough in improving the cost of justice and to thereafter advocate reform, arose from my preliminary reading which revealed numerous assertions of cost benefits to be gained by employing ADR, with an overwhelming lack of accompanying data to support such assertions. It was only later, that I discovered (to my delight!) the Senate Committee's 'Cost of Justice' Inquiry which included an investigation of ADR as part of the inquiry's terms of reference into the costs of litigation.[4] A similar state inquiry was commenced in April 1992 which also scrutinised the current and potential use of ADR processes in the courts.[5] The 'cost of justice' indeed became a pertinent topic to examine in the 1990s.

1992 has been a challenging year in which to undertake a research project in the area of civil procedure, due to the many changes that were introduced into the courts on 6 July 1992. It has however been an excellent year within which to

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[4]In 1989 the Senate Standing Committee on Legal and Constitutional Affairs began the 'Cost of Justice' inquiry into the cost of legal services and litigation in Australia.

[5]On 8 April 1992, the Legislative Review Committee commenced the "Inquiry into the Courts System". Unfortunately evidence submitted to the inquiry was not publicly tabled during the course of my thesis. Thus, whilst I was kindly permitted by the Secretary, Mr. D. Pegram, to read the transcript of evidence, such material could not be transcribed. I was advised that a Discussion Paper is to be issued in March 1992.

encouraged that the cost of justice is an issue that is being addressed with cooperation and enthusiasm by the legislature, courts and legal profession in South Australia.

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This work is dedicated to my parents whom I thank wholeheartedly for their support and encouragement throughout all of my endeavours.

DECLARATION

This dissertation is submitted in fulfilment of the requirements for the Honours Degree of Bachelor of Laws at the University of Adelaide, 1992.

I declare that this dissertation is my own work and to the best of my knowledge contains no material previously written or published by another person except where due reference is made.

Lucyna A.J. Turonek
December 1992

CONTENTS

CHAPTER ONE

DEFINING THE PARAMETERS

1.0 Alternative dispute resolution within the courts

It is not a paradox that a thesis on ADR should discuss alternative dispute resolution within the courts. Whilst the acronym itself may engender a belief that ADR is both a new form of dispute resolution and one that exists in a mutually exclusive relationship to adjudication, ADR is not the adversary of adjudication nor is its presence an entirely new and 'alternative' feature in the courts of South Australia. Non-litigious methods of dispute resolution such as mediation, conciliation and arbitration have a long established history of use in South Australia, particularly in the areas of family law, neighbourhood disputes and industrial law.[1] Similarly, many of the court ADR processes that will be described in chapter two have been in existence, if not always utilised to their maximum potential, for some time.[2] What is novel about ADR is the renewed examination it has received, particularly during the 1990s, reflecting in many ways the growth of the ADR movement in the United States.

The ADR movement that arose in the United States in the late 1960s and 1970s was initiated co-operatively by the judiciary and legislature to act as a solution to the escalating increases that were occurring in court caseloads, court delays and in the costs of litigation.[3] The result was a process of rediscovery of non-litigious methods of dispute resolution such as mediation, conciliation and arbitration together with an expanded and increased application of such methods to a variety of disputes both

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[1] Eg mediation under the Family Law Act 1975 (Cth); conciliation under the Industrial Conciliation and Arbitration Act 1972 (S.A.) and Equal Opportunity Act 1984 (S.A.); arbitration has been provided for since the Arbitration Act 1891 (S.A.), now superceded by the Commercial Arbitration Act 1986 (S.A.).

[2] See chapter 2 passim.

[3] American Bar Association, Legislation on Dispute Resolution (1990) at 1-2. The Pound Conference in 1976 was an influential factor, with the appointed taskforce advocating the increased use of compulsory arbitration, contractual arbitration and the commencement of pilot projects of Neighbourhood Justice Centres throughout the United States.

within and outside of the court system. The ADR movement developed not merely from a dissatisfaction with the disadvantageous effects of adversarial proceedings ie increasing court costs and delays, but from a growing dissatisfaction with the "unrestrained adversariness" of the litigation process itself.[4] ADR offered flexibility to disputants. The ADR process and the choice of the most appropriate dispute resolver could be tailored to the nature of the dispute. How the disputants themselves wished to resolve their dispute and how quickly a resolution was sought could also be considered where ADR processes provided for greater participation by the disputants in the resolution process. The redress that could be sought within an ADR process was also more expansive, permitting the consideration of non-legal remedies.[5]

In similarity with the growth of the United States ADR movement, the rising costs of litigation and court delays have prompted the courts and the legislature to seek "ways of resolving disputes which minimize the burden of costs which litigation casts upon both the parties and the public."[6] This has led to the implementation of both ADR and non-ADR reforms throughout Australia with the most recent ADR reforms in South Australia's courts introduced as of 6 July 1992 by both state legislation and revisions to the courts' rules.[7]

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[4]Goldberg, Green and Sander, Dispute Resolution (1985) at 4.

[5]Eg the parties could seek a complete renegotiation of a contract. See David, "Alternative Dispute Resolution - What Is It?", Alternative Dispute Resolution (ed Mugford), Seminar Proceedings No 15, Australian Institute of Criminology (1986), pp25-61 at 54.

[6]King CJ, "The Current and Potential Use of Alternative Dispute Resolution Processes in the Courts", Paper presented at the Joint SADRA/LEADR Conference, 19-20 July 1991 at 2. For a discussion into the factors behind the courts' increased focus upon greater efficiency see Mason, "Research to Improve Judicial Administration Through Insititutes of Judicial Administration - the A.I.J.A." (1991) 65 ALJ 78.

[7]For an overview of ADR reforms implemented throughout Australia see Astor and Chinkin, Dispute Resolution in Australia (1992) at pp1-11. For a discussion of the new rules and legislation that introduced and faciliated new ADR procedures in South Australia's courts see Chapter 2 passim.

ADR within the courts is an additional process in the path of litigation, not an alternative.[8] Further, it should be regarded as a multi-purposive tool in the litigation continuum. ADR offers litigants both an early dispute resolution forum where it will not be considered a sign of weakness to attempt to settle a dispute prior to trial and also acts as a preparation for the court hearing where settlement is not achieved, by its generated information exchange.[9] The relationship between ADR and adjudication is thus linear whereby the ADR process employed is "a step towards achieving resolution which if unsuccessful can be followed by litigation."[10]

ADR exhibits great potential for improving the litigation process. Firstly, it is considered that ADR can alleviate two of the major defects present in litigation, namely cost and delay.[11] Secondly, it is regarded that ADR can assist in the reduction of court caseloads and maximisation of the courts' resources, improving the efficiency of the courts.[12] Finally, ADR may improve the quality of the litigation process itself by offering additional dispute resolution options to litigants with the litigants' right to proceed to trial upheld.[13]

It is regarded that ADR achieves the first two benefits by its ability to settle disputes at an early stage of legal proceedings.[14] It is a well recognised fact that approximately 95% of cases that commence in the courts will be disposed of by either court assisted or informal processes of settlement negotiations prior to a court

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[8]Street, "The Court System and Alternative Dispute Resolution Procedures" (1990) Vol. 1 No. 1 ADRJ 5 at 6.

[9]Pengilley, "Alternative Dispute Resolution: The Philosophy and the Need" (1990) Vol. 1 No. 2 ADRJ 81 at 93.

[10] Supra n8 at 9.

[11]Attorney-General (S.A.) "Alternative Dispute Resolution" Green Paper (1990) at 1.

[12]Newton, "Alternative Dispute Resolution:Towards a Social Framework" (1990) Vol. 1 No. 4 ADRJ 179 at 180.

[13]For a discussion of the importance of maintaining the right to trial see Pincus, "Judge Asks Why Old Methods are Still Used to Resolve Disputes" (1988) Vol.23 No. 10 Australian Law News 11 at 12-13.

[14]Supra n12.

hearing.[15] ADR processes can assist in the early, efficient resolution of such 95% of cases, "diverting attention away from the inevitability of trials following exhaustive and expensive interlocutory procedures, back to the obvious desirability of early, negotiated settlement."[16] The final benefit, that of improving the quality of the litigation process is thought to occur from the introduction of flexibility into adversarial proceedings in that the overall dispute resolution process can be adapted to the nature of the dispute.[17] For example, in a building dispute involving complex and technical issues of fact, such factual issues may be referred to an arbitrator or referee possessing expertise in the subject matter of the dispute for inquiry, saving costs that would otherwise be incurred by educating a bench unfamiliar in the nomenclature and problems present in the building trade.

1.1 ADR as a solution to improve the cost of justice

It is an appropriate time to evaluate the effectiveness of ADR processes within the courts in terms of how such processes presently improve or could further improve the cost of justice. While concern regarding the cost of justice is not a new phenomenon, it is becoming a more common complaint that the excessive costs of litigation are prohibitive to many persons desiring to resolve their disputes in the courts with only the poor or very wealthy possessing access to litigation and 'middle Australia' largely excluded.[18] Indeed the high cost of litigation and access to justice were the two most prominent themes arising from the Senate 'Cost of Justice' Inquiry.[19] Together with the continuing pressures that are placed upon the courts

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[15] Supra n6 at 1 per King CJ.

[16] De Jersey, "Alternative Dispute Resolution (ADR): Mere Gimmickry?" (1989) Vol. 63 ALJ 69 at 71.

[17] Limbury, "Messianic Propagandist Replies" (1992) Vol. 27 No. 11 Australian Law News 9.

[18] Australia, Senate Standing Committee on Legal and Constitutional Affairs, Cost of Legal Services and Litigation, Discussion Paper No. 4, Methods of Dispute Resolution (1991) at 19.

[19] Vanstone, "ADR and the Cost of Justice", Paper presented at the First International Conference in Australia on ADR, 29-30 August 1992 at 1.

to maximise existing resources with growing caseloads, the need to improve the cost of justice is self evident.[20]

It was noticeable from the submitted reforms proposed at both the national and state 'cost of justice' inquiries that the reforms emphasised the necessity to improve the court process rather than simply advocating the increase of public legal aid assistance. Whilst the provision of legal aid has contributed much to increasing access to justice, budgetary constraints limit the granting of legal aid as to who is eligible, what disputes warrant the provision of legal aid and what litigation costs legal aid will fund.[21] In the 1990/91 financial year, for example, 44% of the legal aid applications received by the Legal Services Commission (S.A.) were eligibile for legal aid in terms of income assessment and the merits of the claim, but were refused aid on the grounds that the matters did not come within the Commission's guidelines.[22] Further, in the same year, 10.8% of the legal aid applications approved provided legal representation in the civil law jurisdiction, with the focus of public legal assistance lying indisputably in defending in criminal proceedings.[23] The increasing limitations of legal aid highlights the need to implement reforms that will address the underlying causes of the high cost of litigation.

ADR is being raised more frequently as a solution that will improve the cost of justice at the causative level.[24] The growth of ADR Australia wide has however remarkably

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[20]Young, Introduction, Papers presented at the Ninth Annual AIJA Conference (ed AIJA), 1990 at 3.

[21]For a description of the relevant eligibility requirements see Legal Services Commission of South Australia, Thirteenth Annual Report, 1 July 1990 to 30 June 1991 at 12-13.

[22]Ibid, Table 7 at 24.

[23]Ibid at 6. The focus upon assisting in criminal matters is in accordance with one of the Commission's fundamental principles: "that legal assistance should be granted where the public interest or the interests of justice require it" Ibid at 12. I was advised by Ms. S. Churchman, Legal Services Commission of S.A. that legal representation in civil proceedings was further reduced to a ballpark figure of 6% in the 1991/92financial year.

[24]Particularly in submissions presented to the Senate Standing Committee 'Cost of Justice" inquiry and also the state inquiry into the South Australian court system that was referred to the Legislative Review Committee in April 1992.

not been accompanied by any detailed research of the effectiveness of such processes.[25] It is necessary therefore before any significant ADR reform is implemented from either of the 'cost of justice' inquiries that the current ADR processes that exist within South Australia's courts be evaluated to determine whether they do in fact improve the cost of justice or whether they are simply another costly pretrial step in the path of litigation.

It is important too, that the ADR processes within the courts be examined as to whether the quality of the overall litigation process is also improved. ADR within the courts must not merely exist to alleviate judicial concern over the disposition rate of cases and governmental concern over the cost of court resources.[26] The ADR techniques must improve the pretrial process itself, not simply the cost of the litigation process. There has been an observed trend, for instance, in New South Wales and Victoria, towards implementing mandatory court-annexed ADR procedures in respect of monetary claims of a certain amount.[27] Such developments have exhibited a tendency for ADR reform within the courts to be shaped as a substitute for an adjudicatory court hearing rather than as a part of the overall pretrial process, reinforcing the danger that ADR will be perceived by litigants as a 'second class system of justice' within the courts. It is important therefore that an evaluation of the effectiveness of the ADR processes within the courts in terms of improving costs must not be divorced from a consideration as to how such processes affect the quality of the overall litigation process.

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[25]The first detailed empirical study to evaluate the operation of ADR processes within Australian courts was conducted by Dr. Richard Ingleby in 1991. See Ingleby, In the Ball Park - Alternative Dispute Resolution and the Courts (1992).

[26]ADR should not become a "bullying process to get settlement at any cost." See Slattery, "ADR: A Legal Overview", Paper presented at the Joint SADRA/LEADR Conference, 19-20 July 1991 at 10.

[27]In NSW compulsory arbitration is compulsory in the Local Courts and District Courts for civil claims up to $10,000. In Victoria, civil claims of less than $3000 are referred to compulsory arbitration by the Courts (Further Amendment) Act 1986 (Vic) and by the Magistrates' Court Act 1989 (Vic) s102 the court must refer claims under $5000 to arbitration. For a more detailed description of such procedures see supra n7 at pp151-155.

Once the ADR processes within our courts are thus examined, only then is it appropriate to consider whether the ADR processes within South Australia's courts go far enough in improving the cost of justice and what reforms should be advocated. The final part of that discussion must involve an inquiry as to the 'alternatives' to ADR reform ie what other reforms currently or potentially improve the cost of justice. There is little merit in advocating reform to the ADR processes within the courts if the objectives of such reform could be achieved by simpler means or indeed if the effectiveness of any proposed ADR reforms is dependant upon the implementation or continuation of other non-ADR reforms.

The argument of this thesis is therefore framed around three central questions:

1 What are the current ADR procedures that exist within South Australia's courts and do they improve the cost of justice and the quality of the overall litigation process?

2 What reforms are required to make such processes operate more effectively?

3 Are there alternative or additional reforms to ADR that either currently or potentially improve the cost of justice in South Australia?

1.2 Outline of argument

Chapter 2

Shall describe the ADR processes that exist within the courts, providing a brief account of their history and current application. The changes to the court system introduced on 6 July 1992 has led to this chapter becoming more descriptive and lengthy than was initially anticipated, due to the implementation of additional ADR techniques into certain courts and alterations that were made to existing processes. As a consequence, the ADR processes will be not be evaluated or discussed in an entirely uniform manner.

Chapter 3

Shall consider whether the ADR processes that exist within our courts both improve the cost of justice and the quality of the overall litigation process. This proved to be

the most difficult task to investigate in this thesis. Because of the 6 July 1992 changes to the courts, not all of the ADR processes have been in operation for a great length of time. In addition, court records of certain ADR processes were either not kept or unavailable. Consequently, while it was considered necessary that each ADR process should be subjected to both qualitative and quantitative analysis, such quantitative evaluations were limited to the ADR processes where the necessary records could be obtained.

Chapter 4

Shall consider what reforms would make the ADR processes operate more effectively in improving the cost of justice and quality of the litigation process. Ideally such a chapter should be preceded by an overview of all of the ADR reforms that have been made within the courts both interstate and overseas. It is beyond the scope of this thesis however to describe all of the reforms that could possibly be introduced into the courts and to explain why they should be implemented or alternatively, why they are inappropriate. Instead I have considered such interstate and overseas ADR reforms where I have viewed them to be applicable reforms that would improve the effectiveness of particular ADR processes. As a consequence, this chapter may be viewed as displaying a distinctly parochial focus! The reforms proposed in this chapter will be specifically directed at improving the effectiveness of the particular ADR processes within their particular courts with certain general reforms also proposed to improve the ADR processes within the courts as a whole.

Chapter 5

Shall consider what other non-ADR reforms have been implemented in South Australia that either currently or potentially improve the cost of justice. The reforms described will not be an exhaustive list, rather a selection of the major and most recent reforms. Notably, a discussion on legal aid will be absent from this chapter as indisputably the introduction of legal aid has increased access to justice

and the affordability of justice to many within the community.[28] A discussion of ADR reform cannot be separated from considering other means of improving the cost of justice and non-ADR reforms to the pretrial process and how all such reforms must work cooperatively in improving the cost of justice.

1.3 SETTING THE PARAMETERS

At the outset it is important to set the parameters and define the terms that will be employed throughout this thesis, particularly in the field of ADR where definitions of various ADR techniques can be quite varied depending upon the area of legal practice. The remainder of this chapter shall therefore define 'ADR', the 'cost of justice' and the courts to be examined. The process of evaluation of the ADR processes within the courts shall be explained, together with the sources for such analysis.

1.3.1 The Definition of 'ADR'

ADR defines all methods of dispute resolution that are non-adjudicative.[29] The ADR techniques that have been adapted and employed by the South Australian courts comprise mediation, conciliation, arbitration and expert/referee appraisal. They are thus defined:

Mediation is defined as "a process whereby the mediator acts as a catalyst to help the parties identify mutually compatible interests and reach settlement."[30] The process enables the parties to resolve their dispute by agreement.

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[28] I would refer the reader to the following texts which describe the contributions of legal aid to improving the cost of justice: Senate Standing Committee on Legal and Constitutional Affairs, Costs of Legal Services and Litigation, Discussion Paper No. 7 Legal Aid 'For richer and for poorer' (1992); National Legal Aid Advisory Council, Legal Aid for the Australian Community (ed AGPS, 1990).

[29] David, "Are Lawyers Becoming Obsolete as Dispute Resolvers" Paper presented at C.L.E. Seminar, University of Adelaide at 3.

[30] Supra n18 at 13.

Conciliation is essentially an adapted form of mediation.[31] The main function of the conciliator is "to bring the parties together in an attempt to create the process by which their disputes can be settled."[32] Sometimes the process will involve the conciliator in identifying the strengths and weaknesses of each party's case to assist in settlement or will require the conciliator to act as a conduit between the parties' in exploring various solutions to achieve a negotiated settlement.[33]

Arbitration in the courts largely mirrors the process of private arbitration whereby the dispute is submitted to a neutral third party who, after considering the evidence and arguments from both parties to the dispute, makes a determination.[34] Such a simplistic definition could be said to apply to adjudication, however the difference between adjudication and arbitration lies in the role of the third party. An arbitrator has the freedom to conduct the arbitration in the form of an inquiry in such manner as the arbitrator sees fit, unlike a judge who will be bound by the rules of evidence and the adversarial form of pleadings. Further, a court arbitration, unlike adjudication need not necessarily decide the whole case, but may determine specific issues in dispute.[35]

Expert/Referee appraisal is a procedure whereby the court refers to a neutral third party (expert/referee) any question or matter pertinent to either part or the whole of the proceedings for inquiry and report. The process enables technical and factual issues to be referred for inquiry and report to a person possessing the requisite expertise with the legal issues remaining for the court to determine.[36]

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[31]Ross-Smith, "Use of ADR Processes in Resolving Commercial and Corporate Disputes", Paper presented at the Joint SADRA/LEADR Conference, 19-20 July 1991 at 4.
[32]Supra n26 at 3.
[33]Supra n11 at 5.
[34]Supra n31 at 11.
[35]See chapter 2 at 2.5-2.7.
[36]Tyrril, "Arbitration Clauses and Court Reference-Out" (1991) Vol. 2 No. 4 ADRJ 179 at 180.

The characteristic intrinsic to each of these techniques is their inquisitorial nature.[37] It is this symbiosis between such inquisitorial forms of dispute resolution within the adversarial setting of adjudication that makes the relationship between ADR and adjudication such an intriguing one. For with the expansion and development of further ADR processes throughout the courts Australia-wide there has developed a different legal culture. The role of the judiciary has changed from that of 'passive', adjudicators with control of adversarial proceedings placed largely in the parties' hands, to 'active' adjudicators that have a public duty to direct the conduct of proceedings with expanded inquisitorial powers.[38] As stated by Chief Justice King:

"The widely felt need to provide to litigants the opportunity of resolving their differences without incurring the cost and destructive effects of fully fought out litigation, has led the courts, and continues to lead them, in the direction of greater involvement in the alternative dispute resolution process."[39]

This trend towards embracing inquisitorial powers is reflected in other reforms that have been made within the courts such as the wide adoption by courts today of managerial techniques during the pretrial process.[40] The inquisitorial ADR techniques shall be examined in chapter 3 as to whether they are a positive reform of the pretrial process that improves both the cost of justice and the quality of the litigation process.

1.3.2 The 'Cost of Justice' defined.

What exact costs are encompassed in the 'cost of justice' equation are most aptly described by the Australian Law Reform Commission:

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[37]The European 'inquisitorial' system of justice is often compared with our adversarial legal system. The main point of comparison often highlighted between the two systems is the extent to which a European judge (inquisitor) has the power to control the conduct of litigation, call and examine witnesses and encourage the parties at any stage of the proceedings to settle or reach agreement upon issues (eg Section 279(1) ZPO (Code of Civil Procedure, Germany). Such judicial powers are seen as either absent or not utilised in the adversarial system. See Senate Standing Committee on Legal and Constitutional Affairs, Cost of Legal Services and Litigation, Discussion Paper No. 6, The Courts and the Conduct of Litigation (1992) at 29.

[38]See chapter 5 at "Reforms by the courts".

[39]Supra n6 at 2.

[40]Supra n38.

"The 'cost of justice' is the cost (total cost) of resolving disputes between citizens...This cost includes:

- amounts paid by individuals or by legal aid authorities as fees for professional legal services
- time spent and production foregone while disputes resolved
- resources in running courts and administering departments and agencies."[41]

Opinions differ as to what factors most influence the 'cost of justice' equation. The cost of the litigation process, the proliferation of legislation and its increased complexity, a lack of government funding to adequately resource the courts, increased court fees and charges, practices of the legal profession have all been raised as influential factors upon the cost of justice equation.[42] The factor that will be concentrated upon in this thesis will be the litigation process and how ADR processes can improve both the cost and quality of that process. Whilst both the national and state 'cost of justice' inquiries have yet to produce final reports, ADR has been considered by the Senate Committee to display "some scope for reducing legal costs.", based upon the premise that costs to litigants will be less the earlier a dispute is resolved by ADR's action in bringing forward the settlement time.[43] The presence of ADR within the courts has also been viewed as increasing the choice of dispute resolution procedures available.[44]

1.3.3 The Courts to be examined

Because of the necessary limitations that must be placed upon the scope of an Honours dissertation, this paper will be confined to examining the ADR procedures within the civil jurisdictions of the mainstream courts of South Australia ie the

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[41]Senate Standing Committee on Legal and Constitutional Affairs, "The cost of legal services and litigation in Australia today", Tuesday, 28 August 1990, (Official Hansard Report) pp1387-2188 at 1753.

[42]See Law Council of Australia, The Cost of Justice Submission by Law Council of Australia (1989) at 26; Barnard & Withers, Financing the Australian Courts (1989) at 74; De Jersey, "ADR: Why All the Fuss?" 67, Papers presented at the Ninth Annual AIJA Conference (ed AIJA), 1990 at 68; On the 8 May 1992 the Trade Practice Commission commenced its study into the "restrictive practices and rules in the legal profession". The State Government has also released a White Paper with respect to the legal profession identifying 'anti-competitive' practices.

[43]Supra n19 at 1.

[44]Miles, "ADR and the Cost of Justice." 72, Paper presented at the First International Conference in Australia on ADR, 29-30 August 1992 at 73.

Supreme Court, District Court and Magistrates Court of South Australia. To discuss the effectiveness and application of ADR processes within the Family Court of Australia, or the Industrial Court of South Australia or indeed to discuss the use of ADR within the criminal jurisdiction of the courts would involve separate dissertations in their own right.

1.4 THE PROCESS OF EVALUATION

1.4.1 Do the ADR processes improve the cost of justice?

(a) The base assumption

The evaluation of any dispute resolution mechanism will always be fraught with difficulties since all dispute resolution procedures are influenced by a number of variables: the attitudes of the disputants towards negotiations and settlement, the complexity of the dispute, the history of the dispute, the attitudes of opposing counsel will all influence the conduct and subsequent resolution of a dispute.[45] It is therefore impossible to conduct a complete quantitative analysis of the effect of ADR processes upon the 'cost of justice' within the confines of a thesis. Such an inquiry would require a detailed examination of the professional fees charged, a breakdown of court costs and resources employed and the indirect costs incurred by the disputants (in terms of what influence the time taken to resolve the dispute had on lost productivity), in respect of cases that utilised the various ADR processes. Consequently a base assumption has to be made in terms of how the effectiveness of the ADR processes in improving the cost of justice will be measured. Hence, the base assumption that will be made is that the earlier a dispute is resolved the greater the following 'costs of justice' are decreased ie the costs of professional legal assistance, the costs incurred in the time taken for the dispute to resolve and the costs in utilising court resources. The common factor that will therefore be examined amongst the ADR processes will be the extent to which such processes resolve

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[45]Supra n19 at 10.

disputes at an early stage of the adjudicatory proceedings. The base assumption follows the premise upon which ADR reform is based in that ADR has the potential to assist in the settlement of the approximate 95% of cases commenced in the courts that resolve prior to a court hearing.

(b) Sources of research

Statistics were sought from the Supreme Court and District Court to provide the following information on an annual basis:

a the number of civil matters listed in each court;

b the number of civil matters settled prior to the pretrial conference;

c the number of civil matters settled after the pretrial conference but prior to the hearing;

d the number of civil matters settled during the hearing but before judgement;

e the number of matters referred to a referee/arbitration/conciliation/court expert.

Information sought from the Magistrates Court (again on an annual basis) included:

f the number of 'minor civil actions' commenced in the Magistrates Court;

g the average hearing time of such an action;

h the number of minor civil actions settled at the 'conciliation' stage;

i the number of civil matters commenced in the General Claims Civil Division;

j the number of matters settled prior to the conciliation conference and the number of matters settled at the conciliation conference and the number of matters settled during trial;

k the average hearing time for a civil action in the General Claims Division.

It was intended that once all of the above initial information had been obtained, a second stage of research could then be undertaken as to the settlement rates of the particular ADR processes, so that a comparison could be made with the disposal rates of cases at various stages of the legal proceedings eg in the District/Supreme Court the disposal rates at points b and d could be compared with the disposal rate of cases

referred to particular ADR processes. It was expected that such comparisons would also assist in determining whether the ADR process was applied at an appropriate stage of the legal proceedings, ie whether it was applied too late or too early in the proceedings. As an exception to this general intention the settlement rates of pretrial conferences were sought in the initial stage, as firstly, because such conferences were compulsory in all civil actions in the District Court and Supreme Court I considered that such statistics could also act as another point of comparison to the settlement rates of other ADR processes, and secondly, because pretrial conferences were compulsory this increased the likelihood that such statistics would be kept by the courts.[46]

Unfortunately, the second stage of research was not commenced due to the following combined reasons: statistics had not been kept of the particular ADR process, the statistics were in a raw unprocessed form (and hence unavailable), the process had ceased to be utilised by the Court or, regarding the ADR processes that were introduced as of 6 July 1992, had yet to commence their operation. Consequently, the only ADR process that can truly be examined in a quantitative manner is the pretrial conference - even this however is limited to only the District Court and Supreme Court, as no records were available from the Magistrates Court in respect of the number of matters settled by the recently introduced conciliation conferences.

Despite the lack of data available with regard to most of the ADR processes, it is still possible to examine whether such processes are capable of producing settlement at an early stage of litigation. In the qualitative analysis that will be described below, for example, the seventh criteria will examine at what stage the ADR technique operates in the litigation process. Whilst such criteria is by no means conclusive, it will be indicative of the <u>potential</u> of the ADR process to resolve a dispute at an earlier

[46]Indeed my reading of past annual reports of the Court Services Department, suggested that such statistics on pretrial conferences must be kept by the courts.

point in the proceedings. Further, in some instances the Court Registrars were able to discuss with me the effectiveness and operation of certain ADR processes or alternatively conference papers or court reports delivered by either Judges and/or Court Registrars described the application of certain ADR techniques in the courts indicating the successfulness of such processes. Nevertheless, the effectiveness of the ADR processes in improving the cost of justice cannot be discussed in a uniform manner. In particular, the processes of arbitration and expert/referee appraisal were extremely difficult to analyse even in terms of what potential improvements to the cost of justice were indicated, since not only were the processes rarely employed but the stage at which such processes could be invoked was unclear. The current use of the ADR processes therefore greatly limited the extent to which such processes could be evaluated.

1.4.2 Do the ADR processes improve the quality of the litigation process?

(a) Evaluation criteria

The effectiveness of ADR within the courts will not solely focus upon the cost benefits that can be achieved, but will include an examination as to how the quality of the overall litigation process itself is improved. There exists the need to ensure that the ADR process available are appropriate to the jurisdiction and needs of the particular litigants [47] The ADR techniques should also possess flexibility to be tailored as closely as possible to the nature of the dispute with the aim of achieving expedition, economy, equity and an end to the dispute.[48] I have chosen to examine the following factors in each of the ADR processes within the courts:
The role of the third party, confidentiality, entry into the ADR process (ie whether the ADR process is employed voluntarily or at the court's direction), party

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[47]Skehill, "ADR and the Cost of Justice - Is the Jury Still Out?" Paper presented at the First International Conference in Australia on ADR, 29-30 August 1992 at 77.
[48]Nosworthy, "Claims and Disputes - Alternative Procedures", Paper presented at the National Construction Seminar, October 1991 at 32.

involvement in the process, extent of information exchange, expertise of the third party and the stage of adjudication at which ADR is employed.

1 Role of the third party

The role of the third party will be surveyed in each of the ADR processes. It will be perceived that the third party's role will shape the dispute resolution process itself, in that where the role of the third party is to guide the parties to negotiate, the resolution process is termed mediation, where the third party's role becomes more active, the mediation process develops into conciliation, and where the third party not merely inquires into the dispute but then provides an opinion or determination, the process becomes one of expert/referee appraisal or arbitration.[49]

2 Confidentiality

It is vital that ADR processes within the courts should provide for confidentiality. The parties must be assured that all efforts made to settle will be kept on a 'without prejudice' basis and shall not be permitted to be revealed at any successive court hearing. To what extent the ADR processes protect the confidentiality of the proceedings shall be examined.

3 Entry into the ADR process (ie voluntary/mandatory)

It has been noted by some ADR commentators that ADR does not work effectively unless both parties are genuinely willing to try and resolve the dispute.[50] This has not however prevented interstate and overseas courts from directing parties to enter into ADR processes without the parties consent. To what extent the current ADR processes allow litigants and the courts to enter into ADR processes at their own volition will be examined.

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[49] Ibid 30-31.
[50] Ibid 31.

4 Party involvement in the process

A benefit of ADR that is often expressed is the way in which it allows the disputing parties to participate in the resolution process.[51] To what extent this benefit is present in the ADR processes within the courts will be surveyed.

5 Extent of information exchange

In a study conducted by the Australian Institute of Judicial Administration (A.I.J.A.) into the costs of civil litigation in intermediate courts, it was expressed that "settlement is more likely the closer are the predictions of the parties as to outcome of a court hearing." [52] An early information exchange between the parties was advocated in the study as a major reform that should be implemented into the pretrial process.[53] Such an early exchange of information between the parties enables each party to assess the strengths and weaknesses of their case, assisting the parties to reach an agreed resolution of the dispute. To what extent the ADR processes enhance an exchange of information between the parties will be examined.

6 Expertise of third party

The increasing complexities of the modern scientific world has also witnessed an increasing complexity in the nature of legal disputes. Disputes that arise in the field of intellectual property (such as computer software disputes) and construction law for example, give rise to complex issues of fact with which most members of the judiciary and counsel possess no knowledge or experience in the subject matter of the dispute. This results in both tedious and costly adjudication.[54] As stated by Nosworthy:

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[51] A common complaint with respect to the litigation process is that the parties lack participation in the resolution of their dispute. Supra n18.

[52] Williams and others, The Cost of Civil Litigation before Intermediate Courts in Australia (1992) at 62.

[53] Ibid 63.

[54] From personal observations made during 1990-1991 in which I worked as a law clerk on a major construction dispute.

"there are particular problems in using litigation to resolve construction disputes. One of the major problems is the need which often arises to spend time educating the judge, solicitors and counsel on technical issues and basic engineering concepts. When the process is repeated two or three times in the same matter there is a considerable waste of time and cost involved."[55]

It is considered that ADR techniques possess the benefit of being able to match the dispute resolver to the nature of the dispute.[56] Whether the ADR processes within the courts exhibit this benefit will be discussed.

7 Stage of adjudication

In a study conducted by the A.I.J.A. it was found that the stage of litigation at which a case was disposed of was the "strongest influence" upon the costs of litigation. It has previously been proposed that the earlier a dispute is resolved the scope for reducing the costs of litigation is greater. At what stage of the litigation process the various ADR techniques are invoked will therefore be an important criteria to examine.

(b) Sources of research

It was beyond the scope of this thesis to personally observe the ADR processes in operation. This would have been extremely difficult to undertake, due to the fact that the processes are conducted 'in camera', are employed haphazardly by the courts (with the exception of pretrial conferences) or have yet to commence operation having only been introduced into the courts as recently as of 6 July 1992. Analysis with respect to how the ADR processes improve the quality of the overall dispute resolution process will therefore be objective with some subjective analysis provided from either articles written by Court Registrars or Judges who have witnessed the operation of certain ADR processes or from discussions with the Court Registrars in

[55]Supra n48 at 7.
[56]Ibid 18.

certain instances. The processes will therefore be examined in terms of the above criteria without the influence of subjective variables

ADR within the courts must be accessible and protect the rights of disputants. It should be efficient, fair, just, aim for a final resolution of the dispute and be viewed as a credible and legitimate part of our system of justice.[57] The need to improve not merely the costs of litigation but also the quality of the litigation process are self-evident:

"the adversary system has failed to keep pace with the increasing complexity of litigation and sophistication of litigants. That it has remained virtually unchanged since the Judicature Act should, I believe, be a cause of regret rather than self-congratulation. It requires radical surgery..."[58]

The catalysts that gave rise to the growth of the ADR movement have challenged all participators in the administration of justice to examine the shortcomings of our system of justice and to explore ways of improving that system. Reforms to the litigation process are now directed towards remedying the underlying causes of the high costs of litigation rather than the effects of such prohibitive costs. It was stated at the beginning of this chapter that it was not a paradox that a thesis on ADR should discuss ADR <u>within</u> the courts. Perhaps the only paradox that arises from the presence of ADR within the courts is the extent to which the cost benefits offered by ADR have overshadowed the need to examine whether what is also required to improve the administration of justice is an increase in the value that we place upon it. [59]

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[57]Supra n9 at 90.

[58]Davies, "Judges Responsible for Survival of Civil Trial System - Change Needed to Meet Competition (1989) Vol 24 No. 5 Australian Law News 12.

[59]Chernov, "The Cost of Justice", Paper presented at the 27th Australian Legal Convention, Adelaide 1991 at 55-56.

CHAPTER TWO

THE ADR PROCESSES WITHIN SOUTH AUSTRALIA'S COURTS

2.0 The Courts' power to develop ADR within the Courts.

The 4 broad ADR techniques that currently exist within South Australia's courts are mediation, conciliation, arbitration and expert/referee appraisal.[1] There does exist the potential however, within the District and Supreme Courts to introduce additional ADR mechanisms. Rule 2.08 of the Supreme Court and District Court Rules provides: "The Court may from time to time provide or facilitate alternative dispute resolution options to aid the efficient and early disposal of appropriate cases."[2] The introduction of this rule succeeded the State Government's expressed intention that judges should both encourage parties to explore settlement options and also consider whether a dispute could appropriately be referred to either an arbitrator, conciliator, mediator, or facilitator.[3] It is presently unknown to what extent Rule 2.08 will be used to expand the employment of ADR within the courts. The Rule clearly provides the District and Supreme Courts with the freedom to develop and apply both current and new ADR procedures. The present ADR techniques within the courts will now be described separately, to display some of the differences in application of particular ADR methods in each of the courts.

A CONCILIATION

2.1 The Courts' power to conciliate

The conciliation procedures present within the courts, developed from the enactment of the Conciliation Act 1929 (S.A.). Up until the 6 July 1992, the Act empowered all of

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[1] It is beyond the scope of this thesis to discuss the enforcement of arbitration and other dispute resolution clauses by the courts. It is noted that this is a significant area in which the courts can assist in the private use of ADR in the event of disputes.

[2] On 6 July 1992, Rule 2.08 came into operation in the District and Supreme Courts.

[3] Attorney-General (S.A.) "Alternative Dispute Resolution" Green Paper (1990) at 12-13.

the courts to act as conciliators in both civil and criminal proceedings.[4] From the 6 July 1992, the District Court[5] and Magistrates Court[6] were provided with specific powers of conciliation under which the present conciliation procedures within these courts operate. It is presently unclear whether the Conciliation Act 1929 remains applicable to the District and Magistrates Courts after the 6 July 1992 changes to the court system [7] The specific conciliation powers and processes will now be examined:

2.2 CONCILIATION PROCESSES IN THE SUPREME COURT

2.2.1 The power to conciliate in the Supreme Court

Section 3 of the Conciliation Act 1929 (S.A.) provides:
"If before or during the hearing of any proceedings in any court it appears to the court either from the nature of the case or from the attitude of the parties or their counsel or solicitors that there is a reasonable possibility of the matters in dispute between the parties being settled by conciliation...the court shall thereupon-
(a) interview the parties in chambers with or without their solicitors or counsel as the said person or persons think proper;
(b) endeavour to bring about a settlement of the proceedings on terms which are fair to both parties."

Whilst Section 3 empowers the Supreme Court to invoke the process of conciliation largely when it sees fit, the Court has, since 1 March 1990, provided for conciliation to be considered at a defined point in the legal proceedings.[8] On the first return of the application for directions (A.F.D.), a Master of the Supreme Court will enquire of the parties as to whether the provisions of the Conciliation Act 1929 should be invoked so that the parties may be assisted by the court in settling their dispute.[9] The form of settlement assistance offered by the Court is the convening of a conciliation conference. Even if the parties do not request such a conference, if the Master is

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[4]The 'courts' were defined in Section 2 of the Act as encompassing the Supreme Court, Local Courts and Courts of Summary Jurisdiction. In the criminal jurisdiction the Act applied only to cases where the court was empowered to order a defendant to pay compensation to an injured party.

[5]District Court Act 1991 (SA) s32 (1)(b).

[6]Magistrates Court Act 1991 (SA) s27 (1)(b).

[7]Section 2 of the Conciliation Act 1929 defines"court" to include "local court" but Section 23 of the Statutes Repeal and Amendment (Courts) Act 1991 does not refer to a "local court" as having any equivalent in the new court system.

[8]Part II, Practice Direction No. 12, Supreme Court (1 February 1990) NB It is not applicable to cases conducted under Rule 50 Supreme Court Rules 1987 (as amended).

[9]Ibid. NB This occurs approximately 8 weeks after the entry of an appearance by the defendant.

satisfied that there is a reasonable possibility of the matter being settled by conciliation, a conference will be held.[10]

2.2.2 The origins of the current conciliation process

The conciliation conference was introduced on the basis of the recommendations made by a working party, formed to examine the pre-trial procedures of the Supreme Court on the initiative of Chief Justice King.[11] Two main criticisms emerged from the Committee's 1989 Report, namely that pre-trial processes were applied too late in the proceedings and that there was not enough emphasis on conciliation in such processes. The report highlighted that the pre-trial conference was the first court process at which the parties could consider settlement which did not occur in the Supreme Court until all of the interlocutory processes were completed.[12] As noted by King CJ, the pre-trial conference occurred at a stage when considerable costs had already been incurred by the parties.[13] The committee therefore advocated that a court process, where settlement negotiations could be conducted at an earlier stage of litigation was highly desirable.[14] If settlement at an earlier stage could be achieved, the incurring of 'wasted' costs from interlocutory steps could be prevented. It was recommended that the process be a form of active conciliation that would involve the Master in considering the merits of the case.[15]

2.2.3 The Current Conciliation Conference Procedure

The date and time at which the conciliation conference is convened is determined at the application for directions, taking into account "the need for the exchange of

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[10]Conciliation Act 1929 (SA) s3 and Ibid.

[11]Bodzioch, "Conciliation Procedures in the Supreme Court of South Australia", Paper presented at the Inaugural Biennial AIJA Higher Courts Administrators Conference, 24-25 May 1990 at 2.

[12]Approximately 20 weeks after the filing of an appearance would be the earliest point at which a pre-trial conference could be held. Ibid 3.

[13]King, "The Current and Potential Use of Alternative Dispute Resolution Processes in the Courts", Paper presented at the Joint SADRA/LEADR Conference, 19-20 July 1991 at 10.

[14]Supra n11 at 4.

[15]Ibid.

information between the parties before the conference."[16] The time taken to convene and conduct a conciliation conference will not delay the progress of the case.[17] Conciliation is an addition not an alternative to the court process, which continues notwithstanding the invocation of the conciliation process.[18]

The parties are specifically required to exchange certain documents no later than 7 days prior to the date of the conference and attendance by the parties at the conference is compulsory [19] At the conference, the parties' legal representatives present a brief submission of their case to a Supreme Court Master.[20] The role of the Master is more than merely facilitative: "Whilst the conciliator will attempt to establish common ground between the parties [they] will not necessarily remain detached. [They] may have to get 'beside' one party and then the other. [They] may also suggest solutions or give [their] views in relation to disputes."[21]

If the conciliation process produces a settlement between the parties, the Court may make any order it considers appropriate with respect to costs.[22]: If settlement is not achieved, the opportunity for a further conciliation conference may be provided.[23] Nothing said or done in the course of the conciliation process can be submitted as evidence in subsequent court proceedings.[24]

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[16]Supra n8 at para 4.
[17]Supra n13 at 11.
[18]Supra n8.
[19]Ibid paras 1-3. Documents to be exchanged include the pleadings, witnesses' proofs, medical and expert reports, a summary of the plaintiff's claim for damages, relevant documentation with respect to liability and any other necessary relevant documentation.
[20]Ibid para 5.
[21]Supra n11 at 1.
[22]Supra n10 ss4(a) and (b).
[23]Supra n8 para 5.
[24]Supra n10 s5.

2.2.4 Conciliation at trial

The Court is empowered to employ conciliation during a court hearing where there exists a reasonable possibility of settlement being achieved by conciliation.[25] Further, the conciliator is not to be disqualified from continuing to hear the proceedings if they think fit to do so.[26] In *Baroutas v Limberis & Sons*, however, Bray CJ was of the opinion that if the conciliator was requested by either party to disqualify themself, after an ineffectual attempt at settlement during a court hearing, the request should be heeded if it could be "done without injustice to the other party."[27] In comparison, King CJ would advocate that a decision to abort a trial cannot be made solely upon the grounds of a mere appearance of injustice and that considerations of increased costs being incurred by the parties, delays and wasted court resources would lead a judge of the nineties to "be very much inclined to continue with the trial unless he felt that he had been disabled by what had occurred from rendering impartial justice."[28] The early consideration of conciliation at the first A.F.D. is designed to avoid problems of bias that may arise by employing conciliation during trial.

2.2.5 Conciliation in the Expedited Case List

Cases conducted pursuant to Rule 50 also employ conciliation. Conciliation is similarly considered at the first return of the A.F.D. and may also be applied during the course of any direction hearings where the Master sees fit.[29], The Master is empowered to give special directions with regard to any conciliation conference convened.[30]

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[25]Ibid s3.
[26]Supra n24.
[27]*Baroutas v Limberis & Sons*(1973-1974) 8 SASR 136 at 142.
[28]Supra n13 at 9.
[29]Practice Direction 14, Supreme Court at para 7, effective as of 1 March 1990.
[30]Supra n13 at 11 per King CJ.

2.3 CONCILIATION PROCESSES IN THE DISTRICT COURT

2.3.1 Conciliation prior to 6 July 1992 - 'Conciliation meetings'

Prior to 6 July 1992, the District Court, as a Local Court of Full Jurisdiction was empowered under the Conciliation Act 1929 to provide for conciliation procedures within its jurisdiction.[31] In 1989 a 'conciliation meeting' forum was introduced into the District Court.[32] Unlike the Supreme Court conciliation process, the decision to conduct a 'conciliation meeting' was considered at the pre-trial conference, whereby the chairperson of the conference could "require the parties and their respective solicitors to attend a conciliation meeting at such time and place as [the chairperson] shall appoint".[33] A report, detailing the reasons for convening a conciliation meeting were required to be prepared and placed upon the court file which could be inspected by any party and the conciliation chairperson prior to conciliation.[34]

All of the conciliation chairpersons appointed by the Senior Judge of the District Court had formerly held judicial office.[35] In similarity with the Supreme Court, their role was 'active', with conciliation meetings often resembling a mini-trial.[36] This was within the scope of the conciliator's obligation:"to assist the parties and their solicitors in reconciling all or any of the issues in dispute between them prior to the trial of the action."[37] Discussions at the conciliation meeting were confidential and inadmissible at the subsequent trial unless the parties agreed to admit certain evidence which was certified by the conciliation chairperson.[38]

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[31]Supra n10 s3.
[32]Local Court Rules 1970-1990 r 8(4)(h)(iv)
[33]Ibid.
[34]Ibid.
[35]Supra n32 r 8A(1) Conciliation chairmen appointed included Dame Roma Mitchell, Justice Zelling and Master Drysdale-Smith (as advised by Mr. P Hocking, Deputy Registrar).
[36]As advised in discussions with Mr. P. Hocking, Deputy Registrar, District Court.
[37]Supra n32 r8(A)(2).
[38]Ibid r8A(3).

If the parties reconciled all of their differences at the conciliation meeting an order or judgement could be entered by a clerk of the Court.[39] If settlement did not occur, the conciliation chairperson could either list the action for trial, refer the case to a further pre-trial conference, or adjourn the meeting where it was considered appropriate.[40] In such unresolved cases, the conciliation chairperson was required to place upon the court file a report, relating to the negotiations of the parties and the outcome of the conciliation meeting, including any agreed issues, evidence, facts or other matters which would expedite the subsequent hearing.[41] Such a report was sealed and not inspected until judgement was pronounced. It could then be perused by the trial judge to assist in the consideration of cost applications.[42] Conciliation meetings operated within the District Court for a period of 2 years, from 1989-1991.[43]

2.3.2 Conciliation after 6 July 1992- 'Mediation Conference'

Section 32 of the District Court Act 1991 (SA) provides:

"(1) If it appears to the Court at or before the trial of an action that there is a reasonable possibility of settling the action, the Court may -

(a) appoint, with the consent of the parties, a mediator to endeavour to achieve a negotiated settlement of the action; or

(b) itself endeavour to achieve a negotiated settlement of the action."

The current power for any court directed conciliation clearly derives from sub-section 1 (b). In comparison to the former conciliation power, the District Court is no longer confined to solely employing conciliation as a means of achieving settlement.[44] The manner in which the District Court may "endeavour to achieve a negotiated settlement" is left entirely open, allowing a variety of ADR procedures to be utilised.[45] Rule 56.09 reflects this new found flexibility.[46] The rule replaces the former conciliation meeting procedure with a mediation process and provides that a

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[39] Ibid r8A(5).
[40] Ibid r8A(4).
[41] Ibid r8A(6).
[42] Ibid r8A(7).
[43] Supra n36.
[44] Cf Conciliation Act 1929 (SA) s3.
[45] Supra n5.
[46] District Court Rules 1992.

pretrial conference chairperson may at their discretion seek the consent of the parties to the appointment of a mediator to assist the parties in negotiating a settlement of the dispute. Once the consent of the parties is obtained, a time and place for the mediation is convened.[47]:

The major difference between the former conciliation meeting and the present mediation process is in the change from 'conciliation' to 'mediation'. The second difference to be noted, lies in the condition of obtaining the parties' consent before entry into the ADR process. Despite the power of the Court to "itself endeavour to achieve a negotiated settlement", the new mediation process does not utilise this power.[48] Changes in the actual procedure are unclear since the new rules do not provide how such mediations will be conducted. It is uncertain whether the role of the mediator will be similarly 'active' as in the former conciliation meetings.[49]

The District Court Act 1991 provides that a mediator appointed will have "the privileges and immunities of a Judge and such of the powers of the Court as the Court may delegate."[50] The mediators to be appointed are however undefined. Whether the 'mediator' will be a retired judicial officer, Master or court clerk is entirely unknown. It is clear from the Court rules however, that the appointed mediator will not continue to hear the action if the mediation is unsuccessful.[51] If the mediator appointed is a Judge, Master or other judicial officer, this rule would appear to contradict express legislation that provides that such persons are not disqualified from continuing to hear and determine an action where settlement has been attempted.[52]. The rule

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[47]Ibid r 56.09 (b)

[48]Supra n5.

[49]I am advised by Mr. P. Hocking, Deputy Registrar, District Court, that to date the mediation process is not currently employed in the District Court due to a lack of court resources.

[50]Supra n5 s32(2).

[51]Supra n46 r 56.09 (b) provides that the trial judge is only permitted to view the pretrial conference report after judgement to assist in cost applications. This cannot therefore be the mediator.

[52]Supra n5 s32(4).

indicates a greater level of judicial concern over the prospect of alleged bias consistent with Baroutas.[53]

In agreement with the former conciliation meeting the mediation process provides that the terms of settlement may be embodied in a judgement and that evidence of anything said or done in any settlement discussions remains inadmissible in a subsequent court hearing.[54] Confidentiality is also extended by the revised rules to make negotiations inadmissible in a 'related' action.[55]

2.3.3 Conciliation in the Expedited Case List of the District Court

An alternative conciliation process is provided for cases that are conducted in accordance with Rule 50 of the District Court Rules 1992. The process commenced in the former Commercial Causes List from 1 January 1991, whereby cases in the list at the first hearing of the summons for directions would be considered for referral to a conciliation conference.[56] The Master would enquire into the general nature of the claim to ascertain whether an early settlement appeared imminent.[57] Where it was apparent that the dispute would not be resolved within a short period of time, the Master would offer the parties an early, without-prejudice conference before a judge to assist the parties in resolving their differences before substantial costs were incurred.[58] If the offer to conciliate was accepted, the summons for directions was adjourned and a time fixed for the conference which required the attendance of the parties and their legal advisors before a "supervising judge".59 Cases not referred to conciliation would be given all such directions by the Master as were necessary to

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[53]Infra at 2.2.4 "Conciliation at trial".
[54]Supra n5 ss32(3) and (5).
[55]Ibid s32(5).
[56]Practice Direction, District Court (3/12/90) "Directions as to the Management of Cases entering the Commercial Causes List after the 1st January 1991" at para 2.
[57]Ibid.
[58]Ibid para 3.
[59]Ibid paras 4, 5.

bring the action to trial in accordance with the appropriate time-table.[60] From 6 July 1992, the Commercial Causes List was replaced with a list that provided for the expeditious management of commercial and other cases by the Court. The conciliation process of the Commercial Causes List continues its application in respect of matters conducted in accordance with Rule 50.[61] Entry into conciliation remains identical, together with the process of conciliation.

At the conciliation conference the "supervising judge" explores settlement with the parties and uses such techniques appropriate to the particular case.[62] The supervising Judge is thereafter responsibile for the management of the case. If settlement occurs the Judge make such orders as are necessary to carry the settlement into effect. If settlement does not occur, directions are then made that are necessary to ensure that the action proceeds to trial in accordance with the Court's time-table.[63] This is another example of an ADR process that ensures that the overall progress of a case is not prejudiced by entry into ADR.

2.4 CONCILIATION PROCESSES IN THE MAGISTRATES COURT

2.4.1 Conciliation processes prior to 6 July 1992

Prior to 6 July 1992, the only specific conciliation process employed was in the small claims jurisdiction of the Local Court.[64] If it appeared to the Court either before or during the hearing of a small claim that there was a reasonable possibility of the dispute being settled by conciliation, the Court could interview the parties in chambers and attempt settlement.[65] This power to conciliate was discretionary and applicable in only small claims.[66] If conciliation failed, any discussions made in an

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[60] Ibid para 8.
[61] Supra n36.
[62] Supra n56 para 6.
[63] Ibid para 7.
[64] The Local Court had the same conciliation powers prescribed at supra n10.
[65] Local and District Criminal Courts Act 1926-1981 (SA).ss152c(1)(a) and (b).
[66] Ibid s152c. The power to conciliate could also derive from those at supra n10.

attempt to settle the dispute were inadmissible in subsequent proceedings, however the conciliator/Judge was not disqualified from continuing to hear the dispute if they thought fit to do so.[67] Where conciliation was employed prior to the hearing of a small claim, the entire small claim procedure could be viewed as an ADR process of concilio-arbitration. If conciliation at the initial stage failed, the small claim would proceed to be heard in a forum where the court was not bound by the rules of evidence and could inform itself upon any matter in such manner as it thought fit.[68] In essence, a small claims hearing was conducted by the Court in the form of an inquiry very similar to arbitration.

2.4.2 The nature of small claims

The small claims jurisdiction was introduced into the Local Court of Limited Jurisdiction in 1974.[69] Unlike interstate small claim courts and tribunals, there was no restriction placed upon who could initiate and defend a small claim.[70] Nor was there a limitation on the types of claims that could be brought within the jurisdiction, beyond prescribed upper monetary limits.[71] Thus the small claims jurisdiction included all or most kinds of civil claims.[72]

2.4.3 Conciliation processes after 6 July 1992

From 6 July 1992, the Magistrates Court replaced the former Local Court of Limited Jurisdiction. In comparison to the former conciliation powers under the Conciliation Act 1929, the Magistrates Court's power to conciliate is now discretionary. Where it appears to the Court either at or before trial that there exists a reasonable possibility of settling the action the Court <u>may</u> endeavour to achieve a negotiated settlement of

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[67] Ibid s152c(2).
[68] Ibid ss152a(1)-(3).
[69] Ibid Part VIIA.
[70] Cf small claims tribunal states where the jurisdiction is confined to consumer claims.
[71] Originally this limit was the sum of $500.00. This was subsequently increased to $1000.00 by Statutes Amendment (Jurisdiction of Courts) Act 1981 (SA) s11 and then $2000.
[72] Crawford, <u>Australian Courts of Law</u> (1st ed 1982) at 241.

the action.[73] This power mirrors that of the District Court, being similarly flexible in that the Court is not obliged to employ conciliation when "endeavouring to achieve a negotiated settlement." Also, there exists the power to appoint a mediator to attempt settlement subject to the consent of the parties.[74] The new 'settlement' powers of the Magistrates Court have not been accompanied by the introduction of any new ADR processes, with the exception of the conciliation conference program that shall be discussed under the section on mediation.

2.4.4 Conciliation in minor civil actions

Conciliation still remains operative in small claims which are now termed 'minor civil actions'. The legislative power of the Court to attempt settlement has however become obligatory within this jurisdiction. Section 38(2) of the Magistrates Court Act 1991 provides: "At or before the trial of a minor civil action, the Court should explore any possible avenues of achieving a negotiated settlement of the matters in dispute." It is not expected that this legislation will produce any substantive change in court practice in respect of conciliation. Some of the new provisions do suggest that some changes will occur in respect of minor civil actions.[75] Firstly, the number of minor civil actions that will commence in the Magistrates Court will increase, due to the expansion in the jurisdictional limits of such claims from $2000 to $5000. Secondly, the inquisitorial nature of the minor civil action trial is expanded. It is now specifically provided that the trial will be in the form of an inquiry by the Court into the matters in dispute between the parties rather than an adversarial contest.[76]: It will be the task of the Court itself to elicit from the parties and witnesses, the issues in dispute and the facts necessary to decide those issues.[77] Further, the Court will act

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[73]Supra n6 (cf Conciliation Act 1929 s3 the use of 'shall').
[74]Ibid s27(1)(a).
[75]The new provisions largely reflect the former 'small claims' procedure in that legal representation is refused, the Court is not bound by the rules of evidence, costs will not generally be awarded and the Court may itself call and examine witnesses Supra n6 ss 38(4), 38(1)(e), 38(5), 38(1)(c).
[76]Supra n6 s38(1)(a).
[77]Ibid s38(1)(b).

according to "equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms".[78] One could conclude, from this, that the trial of a 'minor civil action' is itself a new ADR technique! Traditional adversarial proceedings do not appear within this jurisdiction of the Magistrates Court.

2.4.5 Informal conciliation without solicitors

Rule 102 of the Magistrates' Court Rules 1992 is an interesting addition to the new rules which empowers the Court to exclude solicitors from discussions in Chambers with the parties to a dispute. The rule reflects a change in judicial attitude, with the Court's active willingness to assist the parties to achieve settlement with or without the cooperation of the legal profession.[79]

B ARBITRATION

2.5 ARBITRATION IN THE SUPREME COURT

2.5.1 The origins of the power to arbitrate

Prior to 6 July 1992, the Supreme Court was the only court empowered to refer matters to arbitration. While the current powers of referral to arbitration were introduced by the Supreme Court Act 1935, the origins of such powers can be traced to the Common Law Procedure Act 1854 (UK), whereby the courts of common law were given the power to refer "matters of account" to arbitrators, court officers or county court judges.[80] The courts' powers of referral were then extended by s57 of the Judicature Act 1873 which authorised the compulsory referral of <u>issues</u> to be tried which was further extended by s9 of the Judicature Act 1884 to enable the <u>whole</u> of an action to be referred for trial to a referee. From this combination of legislation the Arbitration Act 1889 (UK) evolved which provided a procedure for "References under Order of Court" which included references based upon the agreement of the parties to

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[78] Ibid s38(1)(f).

[79] Cf judicial attitude in *Worden v Leviton* (1974) 7 SASR 20.

[80] *Leighton Contractors (SA) Pty Ltd v Hazama Corp Ltd* (1991) 159 LSJS 381 at 386 per Debelle J.

arbitrate and by court direction.[81] Many of these provisions were subsequently enacted in the Arbitration Act 1891 (SA).[82] Prior to this enactment, ss26 - 28 of the Supreme Court Act 1878 (SA) enabled the Supreme Court to order references out of court before such provisions were subsequently repealed by the Arbitration Act 1891.[83] It was not until the introduction of the Supreme Court Act 1935 (SA) that the present court powers of referral came into existence.[84]

2.5.2 The current arbitration process

A referral to arbitration in the Supreme Court may occur by 2 methods. Firstly, the parties may agree to the appointment of an arbitrator to try the whole dispute or any issues referred.[85] Alternatively, the Court may order arbitration where a dispute involves either matters of account, the prolonged examination of documents or an investigation which cannot conveniently be made by the court. The Court's power to direct arbitration in these circumstances however is limited in that the consent of the parties to the appointment of the arbitrator must be obtained.[86]

The referral to the arbitrator is flexible in scope, in that the reference may involve the arbitrator in hearing and determining the whole matter or any question or issue of fact arising in the matter referred. This ADR process is extremely useful where technical issues are involved, allowing the referral of complex fact finding to the arbitrator while preserving the power of the Court to determine the 'legal' issues.[87] Once the arbitrator is appointed they are deemed to be an officer of the court with the

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[81] Ibid.
[82] Ibid 387.
[83] Ibid.
[84] Until the enactment of the Commercial Arbitration Act 1986 which repealed the Arbitration Act 1891, from 1935-1986, parallel provisions of Court referral to arbitration operated in the Supreme Court. Supra n82.
[85] Supreme Court Act 1935 s66(a).
[86] Ibid s66(b).
[87] Supra n80 at 389 (cf Supreme Court Act 1935 s69).

power to conduct the arbitration in such manner as the court directs.[88] By Rule 76.08 of the Supreme Court Rules, an arbitrator also possesses the same powers and obligations of a "referee" such that an arbitrator will have the freedom to dispense with the rules of evidence and conduct the arbitration in the manner considered appropriate. The arbitrator will have the right to compel the attendance of any witnesses at the arbitration and may submit during the arbitration any questions arising for determination by the Court.[89]. The report or award of the arbitrator "shall, unless set aside by the court...be equivalent to the verdict of a jury." and the remuneration of the arbitrator will be determined by the Court.[90]

2.6 ARBITRATION IN THE DISTRICT COURT

Prior to 6 July 1992, court referred arbitration did not exist within the District Court. Section 33 of the District Court Act 1991 now provides that:

"(1) The Court may refer an action or any issues arising in an action for trial by an arbitrator.
(2) The arbitrator may be appointed either by the parties to the action or by the Court."

In comparison to the Supreme Court process, the appointment of the arbitrator may be made by the Court. While the legislation does not specifically provide for party referral, a party may apply to refer a matter to arbitration by interlocutory application.[91] The issues to be referred in the application must be clearly specified.[92] Where the parties are joined in seeking a reference to an arbitrator appointed by them, they must include in the application the consent of the proposed arbitrator to act.[93] A District Court referral to arbitration may therefore be voluntary, by

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[88]Supra n85 s67(1).
[89]Supreme Court Rules 1987 as amended rr76.03-76.06.
[90]Supra n85 ss67(2) and 67(3) respectively.
[91]Supra n46 r 76.01
[92]Ibid r76.02.
[93]Ibid r76.03.

interlocutory application, or mandatory, at the Court's direction whereby a referral to arbitration may occur without the consent of the parties.[94]

The arbitrator appointed becomes an officer of the Court and may exercise such powers of the Court as the Court delegates.[95] An arbitrator's award must be made in writing and delivered to the District Court Registrar, a copy of which shall be provided to each party.[96] The award will be adopted by the Court "unless good reason is shown to the contrary".[97] A party that wishes to show why the award should not be adopted must make an interlocutory application to the Court within 30 days of the receipt by the Registrar of the arbitrator's award. If an application is not made, the Registrar will enter judgement on the action or issues referred in the terms of the award.[98]

2.7 ARBITRATION IN THE MAGISTRATES' COURT

Arbitration was entirely absent in the former Local Court of Limited Jurisdiction. From 6 July 1992, Section 28 of the Magistrates' Court Act 1991 now provides the Court with identical powers of arbitration as described above in respect of the District Court. There are as yet no comparable rules provided in respect of arbitration. Both the District and Magistrates' Court have yet to elucidate how often and in what circumstances, the new arbitration powers will be utilised in the courts.

C MEDIATION

2.8 Pretrial conferences as a form of mediation

Whilst it may be argued that pretrial conferences resemble a process of 'managerial judging' rather than a process of mediation, in terms of the 'mediation' definition

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94 *Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd & Ors* (1987) 8 NSWLR 123.
95 Supra n5 s33(3).
96 Supra n46 r76.04.
97 Supra n5 s33(4).
98 Supra n46 r76.05.

adopted in chapter one the pretrial conference is correctly described as "a process whereby the [pretrial conference chairperson] acts as a catalyst to help the parties identify mutually compatible interests and reach settlement."[99] It is on this basis that pretrial conferences will be discussed under 'mediation'.

2.9 PRETRIAL CONFERENCES IN THE SUPREME COURT

2.9.1 The origins of the pretrial conference process

Pre-trial conferences originated in North America. They were first instituted by a circuit court judge in the state of Michigan in 1930 and subsequently spread to most State Courts and Federal District Courts throughout the United States.[100] Pre-trial conferences were introduced into the Supreme Court in 1983.[101] The purpose of their introduction was primarily to assist the parties to define and narrow the issues in dispute to enhance the conduct of the subsequent trial.[102] The conferences have since 8 October 1986 become compulsory in all civil actions of the Supreme Court unless a case is specifically exempted.[103]

In 1987, the rules with regard to pretrial conferences were revised, including the original purpose of the conferences.[104] The policy of the pretrial conference became that of "composing differences" as well as simplifying the issues in dispute and thereby facilitating the disposition of the proceedings.[105] "Composing differences" meant exploring settlement. The pre-trial conference was now a forum in which "to encourage and facilitate and complete any settlement negotiations...with

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[99] Australia, Senate Standing Committee on Legal and Constitutional Affairs, Cost of Legal Services and Litigation, Discussion Paper No. 4 Methods of Dispute Resolution (1991) at 13.

[100] Cranston and others, Delays and Efficiency in Civil Litigation (1985) at 191.

[101] Supreme Court Rules 1983 O 30 r 3(4)(e), came into operation on 12/5/1983.

[102] Ibid O 30 r 3(4).

[103] Part III, Practice Direction 12, Supreme Court (operative from 1/3/90) para 1. A pretrial conference will not be held where it would cause undue hardship to a party.

[104] The new Supreme Court Rules commenced operation on 1 January 1987.

[105] *Rigney v Rigney* (1987) 48 SASR 291 at 305 per Legoe J.

a view to either resolving the dispute completely or at least in part, and thus narrowing the issues. "[106]

Prior to the 1987 revisions, the practice of the Supreme Court was already indicative of a shift towards a 'settlement' focus even though this was absent from the rules.[107] The 1987 Rules therefore merely formalised what had already developed in the practice of the Court with regard to pretrial conferences.

2.9.2 The current pretrial conference process

The current rules that govern pretrial conferences in the Supreme Court are largely the same as those introduced in 1987. The conferences are held before a Master unless otherwise directed by the Court.[108] A pretrial conference is convened by order of the Master at the A.F.D. once the Master is satisfied that the matter is ready to proceed.[109] Attendance by the parties and their legal representatives at the conference is compulsory.[110] Attendance by the general public is not permitted.[111]

To facilitate either the settlement negotiations and/or the expedition of the trial, the parties are required to deliver to the Master at the pretrial conference a list of all expert reports in their possession and any other such reports that the Master considers desirable for the conduct of the pretrial conference.[112]

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[106]Ibid 310 per Legoe J.

[107]Eg Practice Direction, Supreme Court,1986 stated: "[the pretrial conferences] are meant to exhaust the possibilities of settlement before the Court has to list the case for trial. They will also give the parties a better opportunity to make important decisions about settlement without being under pressure from an impending trial."

[108]Supra n89 r 56.02. A party may apply for a judge to hold the conference where there exists good reason. See Lunn, Civil Procedure South Australia Vol 2 (1992) 8906.

[109]Supra n103 para 12. Approx. 2-3 months before the anticipated trial date. Supra n13 at10 per King CJ.

[110]Ibid.

[111]Practice Direction 6, Supreme Court at para 9.

[112]Supra n89 r 56.02A.

The present pre-trial conference is really a combination of two conferences. The first task of the Master is to determine if the case can be settled.[113] This is the "settlement conference" stage, whereby the Court provides a conducive 'without prejudice' environment to facilitate settlement negotiations. At this stage, consideration is given to the desirability of settlement and the possibility of compromise between the parties.[114] The latter consideration is assisted by the Master's power to direct the parties' to disclose offers of settlement and a breakdown of the components of such offers and by the Master's freedom to intervene in the discussions to the extent that is considered appropriate.[115] If the claim does not settle, the pretrial conference proceeds to the second stage ie preparation for trial.[116] The Master's task is then to assist the parties to reach agreement regarding the issues in dispute and to consider all matters that will facilitate the smooth expedition of the trial.[117] In addition, the Master may do any or all of the following acts at the pretrial conference:

a reopen the A.F.D. and deal with it in such manner as the Court sees fit;[118]

b any of the acts specified under Rule 55.12;[119]

c require the attendance of any party (unless it would be unreasonable);[120]

d require the attendance of a representative of a party;[121]

e require the disclosure of offers of settlement made by any party;[122]

f give directions as to the course of the trial;[123]

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[113]Supra n103.

[114]Supra n89 r56.05.

[115]Supra n13 at 9-10 per King CJ.

[116]It is expected that at the date of the pretrial conference, the parties will be ready to proceed to trial, satisfying the Court that all of the necessary preliminary steps have been completed, Rule 2.04, Supreme Court Rules.

[117]Eg simplifying the issues, amending the pleadings, limiting the no. of witnesses, submitting written arguments on issues of law and fact, and any other matters that might facilitate disposition of the proceedings. Supra 114.

[118]Supra n89 r56.03.

[119]Ibid r56.06(a).

[120]Ibid r56.06(b).

[121]Ibid r56.06(c).

[122]Ibid r56.06(d).

[123]Ibid r56.06(e).

g prepare a pretrial conference report on any matters of the conference.[124]

The consequences of failure to comply with any of these directions are severe.[125] Pretrial conferences are another excellent example of a linear ADR process.

2.10 PRETRIAL CONFERENCES IN THE DISTRICT COURT

2.10.1 Pretrial conferences prior to 6 July 1992

Compulsory pretrial conferences were introduced into the civil jurisdiction of the District Court on 1 January 1987.[126] The conferences were convened at the direction of the Court by notice from the Court Registrar.[127] The main objective of the conference was to provide the parties with a court forum in which to negotiate settlement.[128] If the case did not settle, the pretrial conference chairperson would then proceed to inquire into the matters necessary to ensure that the parties were ready to proceed to trial.[129] If the action was considered to be ready for trial, the earliest possible date for the trial would be set.[130]

Prior to the conference, certain pretrial procedures were required to be completed by the parties, such as the filing of particulars in personal injury actions.[131] Like the Supreme Court procedure, the parties were required to attend the conference with their solicitors.[132] Any settlement discussions at the pre-trial conference were conducted without prejudice to the legal rights of the parties. Such evidence was

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[124]Ibid r56.06(f).

[125]Ibid r56.08 eg contempt proceedings, dismissal, striking out of the action or pleadings, adjournment of the pretrial conference or trial, or a report to the trial judge.

[126]Practice Direction No. 1/86, District Court.

[127]Ibid paras 1 and 2: Minimum of 2 months notice of the date and time of conference was provided by Supra n32 rr8(4)(a) and (b).

[128]Ibid para 3. See also Supra n32 r8(4)(e).

[129]Eg agreement of any facts, the tendering of expert reports, availability of witnesses and the estimated length of trial Supra n32 r8(4)(g).

[130]Supra n126 at para 11.

[131]Ibid para 7.

[132]Ibid para 8.

inadmissible in a subsequent hearing except where agreed between the parties and certified by the conference chairman.[133]

2.10.2 Pretrial conferences from 6 July 1992

The conduct of pretrial conferences in the District Court is now equivalent to that of the Supreme Court process subject to some minor variations, such as the time requirements for the delivery of expert reports and the increased choice of chairpersons at the pretrial conference.[134] Identical matters are considered at a District Court pretrial conference and a District Court Judge or Master possesses the same powers at the conference as that of a Supreme Court Master.[135] The consequences of a party's default of any of the directions made at a pretrial conference are also identical to that of the Supreme Court.[136]

There are differences between the two courts that should be noted. Firstly, the new District Court Rules retains the former provision that protected the confidentiality of the parties' settlement discussions at the pretrial conference which is not comparably provided for in the Supreme Court Rules.[137] Discussions as to "settlement, compromise or agreement of all or any of the issues in dispute" at the pretrial conference are conducted "without prejudice to the legal rights of the parties" in the District Court. The new rule also provides that the parties may waive this privilege by agreement and subsequent certification by the conference chairperson.[138] Pretrial conferences remain unopen to the public.[139]

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[133]Supra n32 r8(4)(f).

[134]Supra n46 rr56.03 (1) and (2) Copies of all expert reports must be delivered to the Registrar at least 2 days before the pretrial conference See rr 56.03, 56.02 PTC may be held before a Judge, Master, or an officer of the Court nominated by the Registrar.

[135]Ibid rr56.05, 56.06, 56.04 respectively.

[136]Ibid r56.08.

[137]Ibid r56.05(2).

[138]Ibid.

[139]Ibid r62.07(3).

Another difference in the District Court's pretrial conference process lies in the paths a case may take at the conclusion of a conference.[140] The outcome of a pretrial conference may be a listing for trial, a mediation conference or a transfer of the action to the Magistrates Court.[141] The only outcome from a pretrial conference in the Supreme Court is an adjournment, a settlement or a referral to be listed.

Another difference is that the District Court has in place, a formalised caseflow management system, whereby certain pre-trial steps must be completed within specified time periods. The pretrial conference is no exception and is required to be held not more than 152 days after the service of the summons.[142]

2.10.3 Pretrial conferences in the pre-1990 case list

In 1991, a special "Task Force" of four judges was established in the District Court to assist in the disposition of cases in the pre-1990 case list that were not subject to the Court's system of caseflow management. The action was considered necessary to the maintenance of the Court's civil delay reduction programme.[143] The judges were assigned to conduct pre-trial conferences both during and outside of Court sitting hours. Such conferences held were distinctive in that they were conducted by judges, where the present majority of conferences are conducted by Masters or officers of the District Court. It was also commented that the judges' role in promoting settlement discussions was 'active' producing promising rates of settlement in the pre-1990 case list.[144]

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[140] Ibid r56.09.

[141] Ibid rr56.09 (a)-(c) respectively.cf Supreme Court where a Certificate from a Judge or Master is required.

[142] Ibid r2.03(2). Cf Supreme Court supra n89 r2.

[143] Supra n36.

[144] Ibid.

2.11 CONCILIATION CONFERENCES IN THE MAGISTRATES COURT

Conciliation conferences were introduced into the Magistrates' Court Civil Division as of 6 July 1992. Essentially they are pretrial conferences, as exemplified by the matters that must be considered at the conciliation conference ie settlement or compromise of the action, the simplification of the issues for trial, the avoidance of unnecessary evidence, limitations to the number of witnesses and any other matter that will facilitate the disposition of the action or trial.[145] Apart from these considerations the Court has the power to conduct a conciliation conference in the manner it thinks fit.[146] Any disclosures or admissions made at a conciliation conference remain confidential in that such matters are inadmissible at any subsequent trial.[147]

In similarity with the District Court procedure, the conciliation conference is convened by notice from the Registrar of the Court. When a notice is received, the parties must ensure that certain matters are attended to before the conference.[148] The conferences are presently compulsory in all personal injury motor vehicle claims in both the Minor Civil Claims and General Claims Divisions of the Court.[149] Conciliation conferences are not obligatory in other personal injury cases but if a notice is received by the parties, the same procedure applies as in running down claims. The Magistrates Court has indicated that conciliation conferences will be convened by the Court in respect of any actions that have remained in the trial list for 5 months or more.[150] In actions that do not concern personal injury the only procedural requirement to be fulfilled is to file a book of expert reports not less than

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[145] Magistrates Court Rules 1992 r89(5)(a).

[146] Ibid r89(4).

[147] Ibid r89(3).

[148] Eg discovery and Form 22 details must be filed at Court and the parties are required to file a copy of all expert reports, not less than 7 days before the conference.

[149] Supra n145 r89(2).

[150] Advised by information supplied from Mr. Szewczuwianiec, Deputy Registrar, Magistrates Court.

7 days before the conference. The consequences of failure to provide such reports may result in the Court refusing to hear the expert at trial.

D EXPERT/REFEREE APPRAISAL

2.12 The dual benefits of expert/referee appraisal

As previously defined, expert/referee appraisal is a process which enables technical and factual issues to be referred for inquiry and report to a person possessing the requisite expertise in the subject matter of the dispute. Thus litigants have the dual advantage of having the legal issues determined by a judge and the complex technical issues determined by an expert in the field of the dispute.[151]

2.13 EXPERT APPRAISAL IN THE SUPREME COURT

The Supreme Court has the power, by either the application of a party or of its own motion, to appoint one or more experts to inquire and report upon any question of fact or opinion not involving questions of law or of construction.[152] The Court may also direct the appointed expert(s) to make a further or supplemental report or enquiry and may make such orders necessary to enable the expert to carry out the Court's instructions (including the making of experiments and tests).[153]

Where possible, the court expert appointed will be a person agreed upon by the parties, otherwise the expert is nominated by the Court.[154] Similarly, the questions and instructions to be submitted to a Court expert shall where possible be agreed upon by the parties, failing which, such matters shall be settled by the Court.[155]

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151 *Hooper Bailee Associated Ltd v Natcon Group Pty Ltd* (1990) 6 BCL 142 at 144 per ColeJ.
152 Supra n89 r82.01(a).
153 Ibid rr 82.01(b) and (c).
154 Ibid r82.02.
155 Ibid r82.03.

In what circumstances a court expert should be appointed was considered by the Federal Court in *Newark Pty Ltd v Civil & Civic Pty Ltd*. The Court held that where the litigation costs of the matter were estimated as likely to exceed the amount of the claim the appointment of an expert by the court was appropriate.[156] It was anticipated in that case that the report of the court expert would assist in resolving the dispute before greater legal costs were incurred.[157] An additional benefit of the appointment of a court expert was expressed to be the assured impartiality and independence of the expert appointed. It was suggested that expert witnesses too often display a degree of partiality in a matter, whereas a court appointed expert is indifferent to the result of a claim.[158]

Expert referral is quite similar to referee appraisal, but unlike the latter process, an expert may be ordered by the Court to be submitted to cross examination, upon the application by a party after the receipt of the expert's report.[159] It is also possible after the report is made by the court expert for a party to call another expert on the same issues of referral.[160] Any part of the expert's report not accepted by all of the parties to the dispute shall be "treated as information furnished to the Court and be given such weight as the Court thinks fit."[161]

2.14 REFEREE APPRAISAL IN THE SUPREME COURT

The use of referees in the Supreme Court has a similar history to that of arbitrators, with the process of court referrals to referees originating in the Common Law

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[156](1987) 75 ALR 350.
[157]Ibid.
[158]Ibid 351 per Pincus J.
[159]Ibid.
[160]Supra n89 rr82.07(a)(i) and (ii). This is subject to the party satisfying the Court that it has given to the other parties reasonable notice of an intention to call an independent expert at trial and the court expert has been cross-examined on the substance of the material for which the party's expert will be called.
[161]Ibid r82.04(2).

Procedure Act 1854 (UK).[162] There are 2 methods of referee appraisal ie the referee conducts an inquiry and thereby reports to the court or the referee conducts a trial, deciding the matters referred. The 2 processes are herein described:

2.14.1 Referral for report

A reference under Section 65 of the Supreme Court Act 1935 (SA), is to refer to an official or special referee, for inquiry or report, any question arising in a civil matter. This reference can be directed by the Court without the parties consent.[163] The report of the referee may be adopted wholly or partially by the court and if adopted may be enforced as a judgement or order of the Court.[164] A party may apply to the Court to adopt, vary or remit the report of the referee for rehearing or further consideration to the same or another referee.[165]A report will not however be lightly rejected by the Court.[166] As stated by Debelle J: "Litigation of technical issues cannot be endless and, where the requirements of justice have been met and the parties have had a full opportunity to place all their material before the referee, the Court will be disinclined to re-open the issue."[167]

2.14.2 Referral for trial

A reference for trial may occur in 3 ways.[168] Firstly, the Court has the power on its own motion to order either an official referee or officer of the court, to hear and determine the whole matter, or any question or issue of fact referred. This power can be exercised by the Court without the parties consent only where the case concerns matters of account, or is one in which a prolonged examination of documents or

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[162]The history of references out of Court are described in *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1 at 15-20, 28-35 per Stephen and Jacobs JJ respectively.
[163]Supra n85 s65(1).
[164]Ibid s65(2).
[165]Supra n89 r76.07.
[166]Dawson, "The Court Appointed Referee's Report" (1992) 3 ADRJ 184.
[167]Debelle,"Arbitration, Expedition and ADR" (1990) Vol. 3 No. 1 Corporate and Business Law Journal 69 at 74.
[168]Supra n85 s66.

scientific investigation is required.[169] Secondly, the Court has the power to order a reference for trial of the whole matter or questions referred by either a special referee or arbitrator. This power of referral can only be exercised in the same circumstances described above but also requires the parties consent to the appointment of the referee. The third method by which a matter can be referred to a referee for trial is by the consent of the parties.[170] A report or award resulting from a referral to trial is equivalent to a jury verdict unless set aside by the Court.[171]

2.14.3 Features applicable to both forms of referee appraisal

The range of referees is quite varied. A "special referee" must be a practitioner of at least 6 years in practice.[172] An "official referee" is a Master.[173] "Officers of the court" are described in Rule 5 of the Supreme Court Rules 1987. In every case of court referral the referee is deemed to be officer of the court, with the authority to conduct the reference in such manner as the court may direct and empowered with the jurisdictional and procedural powers of the Court..[174] There are 2 important differences in referee appraisal that must be compared with adjudication. Firstly, the referee is not bound by the rules of evidence and can thereby conduct the trial in such manner as the referee considers appropriate and conducive to the expedition of the case. Secondly, the referee may also utilise their own assessors to assist in their process of inquiry or trial.[175]

Prior to making their report or award, a referee may submit any question arising for determination by the Court.[176] When the report or award is made, the referee shall

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[169] Ibid.
[170] The referee could be a special referee, official referee, officer of the Court or arbitrator.
[171] Supra n85 s66(2).
[172] Supra n89 r76.02 (2).
[173] Ibid r76.01.
[174] Supra n85 s67 (1).
[175] Supra n89 r76.03.
[176] Ibid r76.05(1).

give notice of the award to all of the parties and transmit the report or award to the Registrar.[177] The Court may upon the receipt of the report or award either require the referee to provide reasons for the decision, remit the reference back in total or in part to the same or another referee, or decide the question or issue referred to the referee on the evidence taken before the referee, either with or without additional evidence as the Court may direct.[178] An order as to the costs of an inquiry or trial by a referee shall be made by the court on such terms thought fit.[179]

2.15 EXPERT APPRAISAL IN THE DISTRICT COURT

Expert appraisal was introduced into the District Court on 6 July 1992. The procedure permits the Court to refer any questions of a technical nature to an expert to investigate and report.[180] An expert appointed becomes, for the purposes of the investigation, an officer of the Court.[181]

It is required that a Court referral be made in writing, specifying the question(s) for investigation and report and any powers delegated.[182] Prior to the Court's referral, the parties are entitled to be heard as to the need for the appointment of an expert, the expert to be appointed and the matters to be referred.[183]

The expert's report may be adopted in whole or in part by the Court.[184] It is required to be sent to the Court Registrar, who shall then provide copies of the report to the

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[177]Ibid r76.06.
[178]Ibid rr76.05 (2)(a)-(c).
[179]Supra n85 s70.
[180]Supra n5 s34(1).
[181]Ibid s34(2).
[182]Supra n46 r82.01.
[183]Ibid r 82.02.
[184]Supra n5 s 34(3).

parties.[185] Costs of the referral are borne equally or in such other proportions by the parties, as the Court directs. [186]

2.16 EXPERT APPRAISAL IN THE MAGISTRATES COURT

Although the current Magistrates Court Rules do not provide any expert appraisal procedure, the Court does possess the same power as the District Court, to refer "any question of a technical nature arising in an action for investigation and report by an expert in the relevant field."[187] Such an expert appointed is deemed to be an officer of the Court able to exercise such powers as the Court may delegate, with the same provisions applicable with regard to the adoption of the expert's report and cost awards that may be made by the Court.[188]

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[185]Supra n46 r 82.03.
[186]Supra n5 s 34(4).
[187]Supra n6 s29(1).
[188]Ibid ss 29(2)-(4) respectively.

CHAPTER THREE

DO THE CURRENT ADR PROCESSES BOTH IMPROVE THE COST OF JUSTICE AND THE QUALITY OF THE LITIGATION PROCESS?

A CONCILIATION

3.1 CONCILIATION CONFERENCES IN THE SUPREME COURT

3.1.1 Do conciliation conferences improve the cost of justice?

Whilst statistics were unavailable from the Supreme Court in respect of this process, the conciliation conference does exhibit the potential to improve the cost of justice in that the procedure provides an early court forum in which the parties may explore settlement with the assistance of the Court and the process of conciliation.[1] A conference may be instigated by either the Court or the disputants as early as 8 weeks after the entry of an appearance by the defendant which provides the possibility of settlement being achieved at an early stage of the litigation process. The effectiveness and application of the procedure in assisting settlement has been described by the former Supreme Court Registrar, Bodzioch:

"there have been very few matters that have proceeded to conciliation since the 1st March this year [1990]. It seems that the ones that have are either commercial in nature or matters such as inheritance claims. What I can say, however, is that all of the matters which have proceeded to a conciliation conference have indeed been resolved at that conference."[2]

From this, it is apparent that when the conciliation conference was applied, an early settlement was achieved, but it is also evident that the application of the process was limited to a minor number of matters. The reason underlying this restricted application of the conciliation conference lies with the reluctance of the legal profession to engage in conciliation.[3] Such reluctance has been linked to a lack of

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[1]Conciliation in the Expedited Case list also demonstrates this potential, as conciliation conferences are considered at the same stage of litigation ie the first A.F.D. There were no records available with respect to conciliation applied during a court trial.

[2]Bodzioch, "Conciliation Procedures in the Supreme Court of South Australia", Paper presented at the Inaugural Biennial AIJA Higher Courts Administrators Conference, 24-25 May 1990 at 14-15. Emphasis added.

[3]King, "The Current and Potential Use of Alternative Dispute Resolution Processes in the Courts", Paper presented at the Joint SADRA/LEADR Conference, 19-20 July 1991 at 11.

familiarity and knowledge of the conciliation process as observed at the directions hearing of the A.F.D. when conciliation is first considered.[4] The remedy to this situation cannot simply be to recommend that the Master order the referral of all matters to a conciliation conference at the first A.F.D. It must be remembered that the Court's power to direct conciliation is limited by the requirement that there must exist a reasonable possibility of settlement by conciliation which may be indicated by the nature of the case or the attitude of the parties or their solicitors.[5] If the parties or their solicitors express a reluctance to conciliate this will naturally affect the decision of the Master to direct conciliation.

It is therefore concluded that while the conciliation conference does appear effective in aiding the early resolution of cases when the process is applied, the legal profession must become more informed as to the desirability and advantages of engaging in this process before the conciliation conference can operate to its maximum advantage. Despite the fact that a seminar was convened, by the Supreme Court to inform the legal profession of the new conciliation process, it is apparent that extended education measures are required.

3.1.2 Is the quality of the litigation process improved?

Examining the conciliation conference against the evaluation criteria listed in chapter one, it is evident that this ADR technique exhibits flexibility, fairness and does improve the quality of the overall litigation process. Looking at the role of the third party (first criteria), it is observed that the Master takes an active role in the conciliation process, outlining the strengths and weaknesses of each party's case, or facilitating the negotiations by suggesting solutions.[6] Confidentiality (second criteria) is provided in that.nothing said or done in the course of the conciliation

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[4]Supra n2 at 6-7.

[5]Conciliation Act 1929 (SA) s3. Emphasis added.

[6]See earlier discussion at 2.2.3 "The Current Conciliation Conference Procedure".

process can subsequently be admitted in evidence.[7] Entry into the ADR process (third criteria) has the flexibility of being either voluntary or mandatory.[8] The process can be instigated at either the parties' request or by the Master's direction, if satisfied that the parties would benefit from the process of conciliation. Involvement by the parties in the process (fourth criteria) is limited to only a requirement of attendance at the conciliation conference and the opportunity to present brief submissions of their case through legal representation. The extent of information exchange (fifth criteria), requires the parties to exchange prescribed documents that will assist in defining the issues in dispute prior to the conciliation conference.[9] The timing of the conference considers the need for the above information exchange to occur prior to the conference. The expertise of the third party (sixth criteria) is that of a Master or judicial officer. I made no discovery of specific disputes being matched to particular Masters or judicial officers during my enquiries. The stage at which conciliation is considered is at an early point of proceedings ie the first A.F.D.

In conclusion the conciliation conference improves the quality of the litigation process in that a flexible, confidential and early dispute resolution process is offered to the parties which does not prejudice the right of the parties to proceed to trial and furthermore assists in defining the issues in preparation for trial. The linear relationship between adjudication and ADR is thus maintained.

3.2 CONCILIATION PROCESSES IN THE DISTRICT COURT

3.2.1 Mediation Conferences

(a) Do mediation conferences improve the cost of justice?

Unfortunately the direct answer to this question is no, on the simple basis that the mediation conference that replaced the former conciliation meeting procedure has

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[7]Supra n5 s5.

[8]The Court's power to direct conciliation is subject to the limitations discussed above.

[9]Supra n6.

not been employed in the District Court due to a lack of court resources.[10] Whilst statistics were not kept with regard to the former conciliation meetings that were conducted in the District Court from 1989-1991, the program was extremely successful and only ceased because of a reduction in the court's resources to maintain the programme.11 Despite recommendations made to the State Government that the appointment of 2 conciliators and the provision of necessary funds were required to maintain the programme, such recommendations were not acted upon.[12]

(b) Could mediation conferences improve the cost of justice and the quality of the litigation process?

If the requisite resources were to be provided, it is nevertheless uncertain as to whether the new mediation process would improve the cost of justice in terms of the base assumption ie if the ADR technique resolved disputes at an early stage of the litigation process the cost of justice would be improved. If settlement resulted from the mediation process it would occur at a late stage of the litigation process, since entry into the mediation process occurs after the pretrial conference.[13] This would not appear to produce a great improvement to the cost of justice in that significant costs would have already been incurred by the parties at the stage of mediation. The former conciliation meetings however, operated at the same stage as the mediation process now provided. Further, it was specifically intended that the convening of the conciliation meetings would be considered at the pretrial conference as it was considered by the Court that there were often cases that required just "one more step" to achieve settlement.[14] The conciliation meetings were very successful, suggesting that a continuation in the provision of an ADR process after the pretrial conference is worthwhile in assisting certain cases to reach settlement.

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[10]As advised in discussions with Mr. P Hocking, Deputy Registrar, District Court.

[11]Brebner and others, "Second Report of the Committee of Investigation into Delays in the Civil Jurisdiction of the District Court", March 1991 at 6, 17-18.

[12]Ibid 32.

[13]District Court Rules 1992 r2.03 (2).provides that a pretrial conference is required to be held within 152 days from the service of the summons.

[14]Supra n10.

Whether the new mediation process could improve the quality of the litigation process is uncertain since most of the evaluative criteria cannot be discussed because the process is inoperative. What is apparent however is that confidentiality is provided for and that entry into the process is voluntary, requiring the consent of the parties.[15] It is submitted that the mediation process in its present form does not reflect a full utilisation of the power of the Court to assist the parties in negotiating settlement.[16]

3.2.2 Conciliation conferences in the Expedited Case List

(a) Do conciliation conferences improve the cost of justice?

The conciliation conference procedure that operated in the former Commercial List of the District Court is currently applied to cases conducted in accordance with Rule 50 of the District Court Rules 1992.[17] Statistics were again unavailable, but the procedure does exhibit the potential to resolve cases at an early stage of litigation in that conciliation is considered at the first hearing of the summons for directions. The results of the conciliation conferences are described:

"These conferences have been most successful. When confronted with the realities of what they are letting themselves in for, the parties have, generally, become much more realistic than in the past in their attitudes towards discussing compromise. Even where settlements have not been agreed, many arrangements have been made which result in large savings in terms of costs because the parties have agreed facts not really in issue and the trial is concentrated upon the real issues between the parties." [18]

(b) Is the quality of the litigation process improved?

From the evaluation criteria, the District Court conciliation conference resembles in many ways the Supreme Court conciliation process. The role of the "supervising judge" is flexible by the power to employ such conciliation techniques as appears

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[15]District Court Act 1991 (SA) ss 32(3) and (5) & District Court Rules 1992 r56.09 respectively.
[16]Ibid s32(1)(b)
[17]The procedure described in Practice Direction, "Directions as to the management of cases entering the commercial causes list after the 1st January 1991" (3/12/90) remains operative.
[18]Brebner and Foster, "Case and Caseflow Management in the District Court of South Australia", Draft paper for presentation at the AIJA,dated 31/10/91 at 12.

most appropriate to the case.[19] This power offers scope to the supervising judge to tailor the dispute resolution process to the nature of the dispute, the attitude of the parties and the multiple of variables that may arise in a legal dispute. The second criteria, that of confidentiality is provided in the 'without prejudice' conference forum. Any settlement discussions in the conciliation process will be inadmissible in a subsequent court hearing or in related legal proceedings.[20] Entry into the conciliation process is voluntary, whereby the Master will offer the process of conciliation to the parties at the first summons for directions. Party involvement in the process is restricted to attendance at the conciliation conference and the extent of information exchange appears to be entirely within the discretion of the supervising judge. The expertise of the third party is evidently judicial. Entry into the conciliation process occurs at the first summons for directions, at an early point of the legal proceedings. In conclusion, this process does exhibit the potential to improve the cost of justice and enhance the overall quality of the litigation process where it is invoked by the parties. The process maintains the 'linear' ADR/adjudication relationship in that where settlement does not evolve, directions will ensure that the case proceeds to trial in accordance with the Court's timetable.[21]

3.3 CONCILIATION IN MINOR CIVIL ACTIONS MAGISTRATES COURT

3.3.1 Does conciliation improve the cost of justice?

The Court is obliged to explore, either at or before the trial of a minor civil action, any possible avenues of negotiating a settlement of the dispute. This continues to involve the Court in utilising the process of conciliation as it was formerly applied by the Court prior to 6 July 1992. The average hearing time for a minor civil action is approximately 30-45 minutes.[22] Seemingly, conciliation operates very successfully. The powers of settlement persuasion must indeed be finely tuned when the number

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[19]Supra n17 at para 6.
[20]Supra n15 ss32(3) and (5).
[21]Supra at 2.3.3 "Conciliation in the Expedited Case List of the District Court".
[22]As advised by Mr. R. Szewczuwianiec, Deputy Registrar, Magistrates Court.

of such actions entering the Magistrates Court annually are extremely high.[23] Whilst, no specific statistics were available, conciliation appears to be an integral part of the process of resolving minor civil actions before a court hearing, thus improving the cost of justice.

3.3.2 Is the quality of the litigation process improved?

The role of the third party is the dominating feature of the entire dispute resolution process in minor civil actions.[24] Prior to the commencement of the trial of a minor civil action the Magistrate will actively assist the parties to negotiate a settlement of the dispute.[25] The second criteria of confidentiality, while it may be provided for in the Magistrates Court Act 1991 (SA) is largely illusory, since a minor civil action hearing will continue if settlement is not achieved through the process of conciliation.[26] Entry into conciliation as of 6 July 1992 is now mandatory since the Court is obliged to explore with the parties ways of achieving settlement. Party involvement in the minor civil action process is greater than in any other ADR procedure in the courts since legal representation is specifically refused, unless special circumstances exist. Information exchange between the parties is directly assisted by the Court and indeed information may be provided by the Court itself.[27] The nature of information exchange in a minor civil action reflects an entirely inquisitorial process in that the Court elicits the issues in dispute and may itself call and examine witnesses.[28] The expertise of the third party is either that of a Magistrate or officer of the Court.. Finally, as mentioned previously, conciliation is considered prior to the trial of the minor civil action, ie at the first available opportunity conciliation is employed. It is considered that conciliation in

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[23]See Table 1 in Appendix A, where the number of small claims commenced annually during the past 3 years has been in excess of 40,000 matters.

[24]See the broad powers of the Court, in Magistrates Court Act 1991 (SA) ss38(1)(a)-(f), 38(2).

[25]Ibid s38(2).

[26]Ibid ss27(3), 27(4).

[27]Supra n24 ss38(1)(a)-(f).

[28]Ibid. NB. In minor civil actions that involve personal injury claims the information exchange will follow the requirements specified in general claims.

conjunction with the entire minor civil action process improves the cost of justice in its consideration of conciliation at an early stage of the proceedings. It is also considered that the extent of party involvement and the role of the third party in the process are the strongest qualitative features that improve the litigation process and confidentiality the weakest.

B ARBITRATION

3.4 ARBITRATION IN THE SUPREME COURT

3.4.1 Is the cost of justice improved by arbitration?

Whilst provision for court-referred arbitration has existed in the Supreme Court for some time, the procedure has been rarely used.[29] Consequently, statistics were not kept by the Court of matters referred to arbitration. Any conclusions therefore as to whether this process can improve the cost of justice must remain speculative. It must be noted too, that the flexibility of the arbitration procedure itself cannot clearly indicate whether the cost of justice is improved in terms of the stage at which the ADR process is employed. The scope of an arbitration may range from determining a single issue, or deciding the whole of the matter in dispute. Thus, arbitration may operate as a linear part of the litigation process or as an alternative in that where the whole matter is referred to arbitration the intent of the Court is to replace the court hearing altogether. Even the earliest stage at which arbitration can potentially resolve a dispute cannot be examined, in that the Supreme Court Rules do not indicate at what stage arbitration is even considered.[30] Despite the difficulties of reaching firm conclusions, a statistical report collated by the Institute of Arbitrators Australia does indicate that the process of arbitration possesses clear time benefits.[31] From the

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[29]Debelle, "Arbitration, Expedition and ADR" (1990) Vol. 3 No. 1 Corporate and Business Law Journal 69 at 75.

[30]Presumably by rr55.10, 55.11(o) and (t) Supreme Court Rules 1987 (as amended) the Court may consider arbitration at an A.F.D.

[31]The Institute of Arbitrators Australia, "Statistical Report Scheme", 30 July 1992. This report was very kindly provided to me by Mr. Howard Ambrose, Chief Administrative Officer, The Insitute of Arbitrators Australia.

report for instance, 22.55% of the matters referred to arbitration were resolved in less than one day, 63.72% were resolved in less than one week. In addition, 90.69% of the recorded disputes were resolved by either agreement between the parties or by the formal award or decision of the arbitrator. The applicability of these statistics to court arbitration must be tempered by the fact that in 59.8% of the recorded disputes, the parties had a contractual obligation to employ arbitration, with only 7.35% of the disputes referred to arbitration by the courts.

The process of arbitration does appear to be particularly suited to the resolution of complex factual disputes which are assisted by the expertise of an arbitrator who has a familiarity with the subject matter of the dispute. This was reflected in the report 's statistics whereby 80.87% of the disputes were in one of the following industries: accountancy, architecture, building and construction or engineering. There are currently 25 arbitrators listed in the South Australian Chapter of the Institute of Arbitrators with the main areas of expertise being in the fields of architecture, building and construction and engineering.[32] The report informed that 1.96% of the recorded disputes were referred to arbitrators in South Australia. While it is evident from the report that arbitration is not a popular form of dispute resolution in this state, it is a process that could be usefully employed in resolving matters which would be assisted by a dispute resolver possessing a specialised knowledge in the subject matter of the dispute.

3.4.2 Does arbitration improve the quality of the litigation process?

The role of the arbitrator is flexible in scope in that the arbitrator may decide the whole matter and consequently replace the court hearing, or alternatively determine any question or issue of fact that is referred. While the powers of the arbitrator will largely reflect the powers of an arbitrator under the Commercial Arbitration Act

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[32]This information was kindly provided by Ms. E. McGregor, Chapter Administrator TheInstitute of Arbitrators Australia, SA Chapter.

1986 (S.A.), the arbitrator is empowered to conduct the arbitration in such manner as is most conductive to the "speedy disposal" of the case, informing and inquiring in the manner thought fit without being bound by the rules of evidence.[33] An arbitrator is however also obliged to conduct the arbitration in such manner as the court may direct.[34] The second evaluative criteria of confidentiality is considered to be indirectly provided for in that the arbitrator is required to observe the concepts of natural justice. Entry into arbitration (third criteria) may be either voluntary or mandatory. Voluntary arbitration arises with the parties' agreement to refer the whole matter or any questions or issues to arbitration. Mandatory arbitration occurs when the court orders a reference to an arbitrator where either the matters referred require prolonged examination or an investigation which cannot conveniently be made by the court or the dispute involves matters of account. A court referral in these circumstances must first obtain the parties consent to the appointment of the arbitrator. In respect of the above matters, the court's power to direct arbitration is limited. Party involvement in the process, the fourth criteria, is undefined. From the statistical report however, legal representation is usually present in most arbitrations, indicating that in the court process of arbitration, an increased level of party involvement in the process is unlikely. The fifth criteria, ie the extent of information exchange is flexible in scope and is a matter that is within the arbitrator's discretion. This flexibility is often highlighted as one of the greatest advantages of arbitration in that the onerous requirements of discovery and interrogatories under the court rules may be dispensed with, as well as the rules of evidence. The arbitrator "may inform his mind in such manner as he thinks proper" with the only requirement being to observe the rules of natural justice.[35] The sixth criteria ie the expertise of the third party displays an excellent matching between the subject matter of the dispute and the knowledge and expertise of the dispute

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[33]Supra n30 r76.03.
[34]Ibid rr76.03, 76.08 and s67(1) Supreme Court Act 1935 (SA) respectively.
[35]Ibid r76.03 (c).

resolver. It is the specialised expertise of the arbitrator that is the strongest feature of this ADR process. That expertise may be utilised by the court to either totally resolve the claim or instead determine identified questions or issues of fact in dispute between the parties. The final criteria, that of the stage of adjudication at which arbitration is entered into is uncertain. Supposedly if the referral to arbitration is to determine the whole matter, arbitration in this instance will be the final stage of the dispute resolution process. At what stage particular questions or issues are referred to arbitration is unclear.

It is stated speculatively that arbitration has the potential to improve the cost of justice, particularly where it is employed in the resolution of matters that involve complex and technical factual issues such as building and engineering disputes. While improved costs cannot be indicated in terms of the stage at which arbitration is employed, cost savings are indicated in the flexibility to shape the dispute resolution process to the nature of the dispute by the arbitrator's broad powers of inquiry.[36] Further, the quality of the litigation process is enhanced by utilising the skills of the arbitrator to determine complex issues of fact which require particular expertise.

3.5 ARBITRATION IN THE DISTRICT AND MAGISTRATES COURTS

3.5.1 Is the cost of justice improved by arbitration?

Provision for court-referred arbitration has only existed in the District Court and Magistrates Court from 6 July 1992. To date, arbitration has not been employed by either Court. In addition, it is in the District Court only that a process by which the parties may apply to refer questions or the whole matter to arbitration is provided. It is anticipated however, that future cases in both Courts which involve building and construction disputes may be directed towards arbitration.[37] On the basis of the

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[36]Supra at 2.5.2 "The current arbitration process."

[37]See Cannon:"We intend to identify potentially drawn out cases, such as building disputes, and allocate them to a Magistrate at an early stage for directions, arbitration etc." Cannon, "Legislative changes to the courts system" CLE Law Society Seminar, delivered 12 February 1992

arguments raised above, it is submitted that arbitration exhibits the potential to improve the cost of justice within the District and Magistrates Courts.

3.5.2 Does arbitration improve the quality of the litigation process?

The flexibility in the role of the arbitrator is identical to that described in the Supreme Court in that the arbitrator may hear and determine either the whole action or any issues referred. The powers of the arbitrator comprise such powers as the Court delegates to the arbitrator.[38] Confidentiality is similarly prescribed by the obligation upon the arbitrator to observe the rules of natural justice. The third criteria ie entry into the arbitration process is however distinguishable from the Supreme Court process in that in both the Magistrates and District Courts, any matter may be referred to arbitration.[39] In further contrast to the Supreme Court process, the appointment of the arbitrator in either the Magistrates or District Court does not require the parties' consent.[40] Consequently, entry into arbitration is either voluntary or mandatory. Party involvement in the process is limited in the District Court to the parties' specifying the issues they wish to be determined by arbitration.[41] It is unclear in both the Magistrates and District Court as to what information exchange is required by the process. The same comments that were made in in respect of the latter two criteria of the Supreme Court's arbitration process are again applicable to the present courts, in that the expertise of the arbitrator is suited to resolving disputes that require a specialised field of knowledge in the subject matter of the dispute and that the stage at which arbitration is invoked is unclear. Presumably arbitration will be considered at the A.F.D. in the District Court.[42] In similarity with the Supreme Court process, it is considered that

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at 3. NB Even though there are no formal rules provided in the Magistrates Court Rules with regard to parties initiating arbitration procedures, it appears the parties may nevertheless do so.

[38]Supra n15 s33(3), District Court; Supra n24 s28(3), Magistrates Court.

[39]Ibid s33(1), District Court; Ibid s28(1), Magistrates Court.

[40]Ibid.

[41]Supra n13 r76.01.

[42]Ibid r55.11(o) ("trial of any issue"), r55.11(t) ("mode of trial").

arbitration can improve the quality of the litigation process where it is employed in complex, technical disputes.

C MEDIATION

3.6 PRETRIAL CONFERENCES IN THE SUPREME COURT

3.6.1 Do pretrial conferences improve the cost of justice?

It has been expressed that the ability of ADR to resolve disputes depends upon the willingness of parties to engage in ADR. This does not appear to be reflected in the pretrial conference procedure which is mandatory and exhibits a high settlement rate. Pretrial conferences have played a major role in assisting in the settlement of cases in the Supreme Court since their introduction in 1987. The settlement rates achieved by such conferences comprise 64.9% in 87/88, 41.3% in 88/89, 23.8% in 89/90 and 33% in 90/91, calculated as a percentage of the matters commenced.[43] Clearly the pretrial conference process does improve the cost of justice by assisting in the early resolution of a significant number of disputes. The early settlement of cases not only provides savings in litigation costs to the parties but maximises the court's resources with respect to hearing cases that cannot be settled by agreement between the parties. As stated by Justice White:

> "Pre-trial procedures have been devised with a view to sifting the grain of genuine litigation from the chaff of those disputes quite readily capable of settlement...the appropriate use of the avenues and facilities for settlement and compromise should tend towards a lessening of costs and delay."[44]

3.6.2 Do pretrial conferences improve the quality of the litigation process?

Pretrial conferences in the Supreme Court are held before a Master whose prime role is to facilitate settlement negotiations between the parties. The Master is free to become involved in the negotiations to the extent considered desirable.[45]

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[43]SA, Parl, Annual Report of the Court Services Department for the Year Ended 30 June 1991, Third Session, Forty-Seventh Parliament, (1992) at 18.

[44]*Rigney v Rigney* (1987) 48 SASR 291 at 297-298 per White J.

[45]Supra n3 at 9-10.

Confidentiality of the proceedings is provided in that discussions in respect of settlement will be inadmissible in subsequent court proceedings.[46] A Judge or Master that conducts an unsuccessful pretrial conference will not however subsequently be disqualified from any further involvement with the case unless they consider it appropriate to disqualify themself.[47] Fortunately, the scope for conflicts of confidentiality rarely arise in practice, despite the apparent contradiction between the Conciliation Act 1929 and the Court's rules. Entry into the pretrial conference is mandatory in all civil actions of the Supreme Court. Party involvement in the process is limited to the requirement that the parties attend the conference. The extent of information exchange is prescribed and detailed. Not only are the parties required to deliver to the Master a list of all expert reports in their possession and any other such reports considered desirable for the conduct of the pretrial conference, but it is also expected that at the pretrial conference the parties are ready to proceed to trial - hence all of the necessary interlocutory steps have been completed such as discovery, interrogatories, notices to admit and so forth.[48] In addition, each party is required to positively review the pleadings prior to the pretrial conference to ensure the adequacy of the pleadings in light of the issues known to be in contention at that time.[49] The extent of information exchange between the parties is the most important ingredient behind the settlement rates achieved by this process.[50] The expertise of the third party is that of a Master or in special circumstances a Judge. In similarity with the conciliation conference process, no discoveries were made of specific disputes being matched to particular Masters of the Supreme Court. The stage at which the pretrial conference is entered into is at at the direction of the Court or Registrar.[51] An order is made by the Master

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[46]Supra n5 s5.
[47]Supra n30 r56.07.
[48]Ibid rr56.02A, 2.04.
[49]Ibid r2.05.
[50]Williams and others, The Cost of Civil Litigation before Intermediate Courts in Australia (1992) at 63.
[51]Supra n30 r56.01.

at the A.F.D. for the convening of a pretrial conference when the Master is satisfied that the action is ready to so proceed.

Pretrial conferences unequivocally improve the cost of justice by aiding the resolution of a significant number of disputes prior to the parties incurring the costs of an expensive trial. In addition, pretrial conferences improve the overall adjudication process in that even where cases do not settle, the pretrial conference may shorten the subseqent court hearing by "narrowing the issues, eliciting admissions and eliminating non-contested matters."[52]

3.7 PRETRIAL CONFERENCES IN THE DISTRICT COURT

3.7.1 Do pretrial conferences improve the cost of justice?

Other than in exceptional circumstances the pretrial conference will be held not more than 152 days after the service of the summons which usually results in the convening of the pretrial conference approximately 2 to 4 months before trial.[53] Pretrial conferences are compulsory in all civil actions of the District Court and are convened at the direction of the District Court Registrar. The settlement rates that are achieved by this process are extremely high. As observed in Table 2, the percentage of cases settled at or before the pretrial conference over the 1989-90 period, comprised 75% of the matters commenced. The settlement rate of such conferences for the same period but by referral to the number of cases listed, totalled a 65% settlement rate.. Examining Tables 3 and 4, the average monthly settlement rate of such conferences was 32.8% of the cases listed per month. Table 4 also highlights a large monthly percentage of matters that are adjourned from pretrial conferences, with the average monthly rate of adjournment in 1991 exceeding 42%.

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[52]Cranston and others, Delays and Efficiency in Civil Litigation (1985) at 190.
[53]Supra n13 r2.03.

In comparison to the settlement rates identified at other stages of the litigation process, pretrial conferences produce significant results.[54] That still remains current today. For instance the current average monthly rate of the number of civil matters that settle prior to the pretrial conference is approximately 3% of cases listed/month.[55] Records of the number of civil matters that settle during the hearing but before judgement average 5.5% of cases listed/month. The number of civil matters that settle after the pretrial conference but prior to the hearing was calculated as an average of 30% of cases listed/month. Such statistics demonstrate how the stage of the litigation process becomes a significant consideration as to when ADR should be employed.[56]

3.7.2 Do pretrial conferences improve the quality of the litigation process?

The role of the pretrial conference chairperson is to primarily explore the possibility of settlement between the parties. If the case fails to settle, the role becomes one of discussing the matters necessary to ensure that the parties are ready to proceed to trial. Confidentiality is provided for specifically within the rules relating to pretrial conferences.[57] Such confidentiality protections may be waived by agreement between the parties.[58] Entry into the ADR process is compulsory and at the direction of the Court.[59] Party involvement in the process is limited to compulsory attendance.[60] The fifth criteria, the extent of information exchange is prescribed in detail with the parties' expected to be ready to proceed to trial at the time of the conference.[61] The success of pretrial conference settlements lie in the

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[54] See Table 2 of Appendix A.

[55] The above averages were very kindly calculated by Mr. P. Hocking, Deputy Registrar, District Court as at 22 June 1992.

[56] Ibid.

[57] Supra n13 r56.05(2) and supra at 2.10.2. "Pretrial conferences from 6 July 1992".

[58] Ibid r56.05 (2).

[59] Ibid r56.01.

[60] Ibid r56.02.

[61] This means that the necessary interlocutory steps are completed ie pleadings finalised, discovery and interrogatories completed and in personal injury matters, rule 46.15 details provided and expert reports exchanged.

depth of the information exchange between the parties. By the time of the pretrial conference, the parties are fully aware of the strengths and weaknesses of each party's case. It is correctly expressed that: "In general terms it is expected that the more the case is prepared, the higher the probability of settlement."[62] The sixth criteria, ie the expertise of the third party is varied in that the pretrial conference may be chaired by either a Judge, Master, or officer of the Court nominated by the Registrar.[63] To the best of my knowledge there is no matching process between the dispute resolver and the nature of the dispute. The final criteria ie the stage of adjudication has already been highlighted as occurring no later than 152 days after the listing for trial. The specific timing that is set for pretrial conferences considers the time period that must be allowed for the requisite information exchange to occur and for the parties to essentially prepare and be ready for trial at the time that the pretrial conference is convened. In similarity with the reasons expressed above, pretrial conferences in the District Court both improve the cost and quality of the litigation process.

3.8 CONCILIATION CONFERENCES IN THE MAGISTRATES COURT

3.8.1 Do conciliation conferences improve the cost of justice?

Conciliation conferences were introduced into the Magistrates Court on 6 July 1992. While statistics were unobtainable from the Magistrates Court in respect of the settlement rates currently achieved by the conciliation conferences it has been expressed by Cannon S.M. that "attendance at the conferences has been very good and the settlement rate high."[64] The effectiveness of the process in improving the cost of justice is evident in terms of the estimated reduction in trial delays that has already been calculated in the Magistrates Civil Division Court:

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[62]Supra n50 at 35.

[63]Supra n13 r56.02.

[64](1992) Vol. 14 No. 11 Law Society Bulletin 28.

"The result of this programme [conciliation conferences] in combination with the conversion under the new Rules of 480 matters from the previous Limited Jurisdiction list to the Minor Civil claims list has resulted in the trial delay in this Court being reduced from 32 weeks as at 6th July 1992 to 22 weeks at the moment."[65]

Such results are indeed indicative of the benefits of the conciliation conference process. Unlike the District and Supreme Courts, conciliation conferences are not compulsory in all civil actions of the Court being mandatorily convened in only personal injury motor vehicle accident cases.[66]. Further, in comparison to pretrial conferences in either the District or Supreme Court, there is a restriction upon the number of adjournments permitted from a conciliation conference.[67]

3.8.2 Do conciliation conferences improve the quality of the litigation process?

The role of the third party is identical to that previously discussed above. In addition the Court has the power to conduct the conciliation conference in such manner as it thinks fit.[68] The conciliation conferences are conducted by Court Services staff with a magistrate available to intervene in detailed settlement discussions or impose sanctions if it is considered appropriate.[69] Confidentiality is provided in that offers or admissions made at a conciliation conference are not admissible at the subsequent trial.[70] Entry into the process is compulsory in all personal injury motor vehicle claims but is not obligatory in other personal injury cases, subject to the exception that a notice will be received by the parties if the action has remained in the trial list for 5 months or more.[71] Party involvement in the process is limited to compulsory attendance by the parties when a conciliation conference is convened by the Court Registrar.[72].The extent of information exchange prescribes that when notice of a

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[65]Ibid per Cannon SM.

[66]Conferences will also be convened in all other actions that have been in the trial list for 5 months or more. Supra n37 at 2

[67]Ibid They can only be adjourned on 2 occasions and to a fixed date not more than 3 months ahead.r89 (5)(c) Magistrates Court Rules 1992.

[68]Ibid r89 (4).

[69]Supra n66.

[70]Supra n67 r89 (3).

[71]Ibid r89 (1)(b).

[72]Ibid r89 (1)(a)

conciliation conference is received in respect of a personal injury claim, the parties must ensure that discovery and Form 22 details are filed at Court. Further, the parties are required to file a copy of all expert reports, not less than 7 days prior to the conference. Conciliation conferences in respect of non-personal injury cases however have only one requirement, that the parties file a book of expert reports not less than 7 days prior to the conference.[73] The expertise of the third party is that of an officer of the Court, with a magistrate available to make any necessary Court orders where appropriate. In similarity with the reasons expressed above, conciliation conferences in the Magistrates Court both improve the cost and quality of the litigation process.

D EXPERT/REFEREE APPRAISAL

3.9 EXPERT APPRAISAL IN THE SUPREME COURT

3.9.1 Does expert appraisal improve the cost of justice?

There exists no reported authority upon the use of this process. It is an ADR process designed to replace the adversarial system of expert evidence whereby expert evidence is presented by each party. The potential of this process to improve the cost of justice in terms of whether the process aids settlement at an earlier stage of the litigation process is entirely speculative. A court expert may be appointed by the parties or Court where independent evidence appears to be required in any civil proceeding. It is apparent that the appointment of a court expert will be considered at either the A.F.D. or the pretrial conference.[74]

3.9.2 Does expert appraisal improve the quality of the litigation process?

The role of the third party in this process is to act as an independent expert and inquire into and report upon any question of fact or opinion referred to the expert by the Court or the parties to the dispute. Additionally, a court expert may be

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[73]Ibid r69(2).

[74]Lunn, Civil Procedure South Australia Vol. 1 (1992) at 9859.

required to make a further supplemental report or inquiry.[75] The second criteria that of confidentiality is not pertinent to this process. Any part of the expert's report that is not accepted by the parties shall be treated as information furnished to the Court and given such weight as the Court thinks fit.[76] The third criteria, entry into the ADR process can be voluntary or mandatory ie by application of the parties or at the direction of the Court.[77] Party involvement in the process may be quite detailed in that the court expert may be agreed upon by the parties in addition to the questions and instructions to be submitted to the expert.[78] The extent of information exchange that occurs between the parties depends upon the terms of referral to the court appointed expert. The expertise of the appointed expert is suited to determining the questions referred and may be further enhanced by an agreement to the appointment between the parties. In regard to the final criteria, the consideration to appoint a court expert must presumably arise at either a directions hearing or at the pretrial conference.[79]. The circumstances in which it will be considered appropriate to appoint court expert is where the anticipated legal costs are likely to exceed the amount claimed.[80]

The cost of justice may be improved by utilising this process in that no other expert evidence is permitted in respect of the matters referred to the court expert.[81] This saves the incurring of duplicative costs by the parties. Further, the quality of the litigation process is improved by the indisputable impartiality of the court-appointed expert.

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[75]Supra n30 r82.01 (b).
[76]Ibid r82.04 (2).
[77]Ibid r82.01.
[78]Ibid rr82.02 and 82.03 respectively
[79]Ibid rr55.11(v), 56.05(f) respectively.
[80]*Newark Pty Ltd v Civil and Civic Pty Ltd* (1987) 75 ALR 350.
[81]Supra n30 r82.07. Expert evidence from other sources is permitted in certain limited circumstances.

3.10 REFEREE APPRAISAL IN THE SUPREME COURT

3.10.1 Does referee appraisal improve the cost of justice?

The process of referring matters for inquiry or trial by a referee is employed very rarely in the Supreme Court. The stage at which such referral is considered is also unclear. Nevertheless the dual benefits of referee appraisal would suggest that there are cases which could appropriately be determined either in combination with adjudication or prior to a court hearing that would improve both the cost of justice and the quality of the overall litigation process, in that the costs of educating the dispute resolver in the subject matter of the dispute where technical issues are involved would be removed by having such complex issues reported or tried by an expert or referee.

3.10.2 Does referee appraisal improve the quality of the litigation process?

The role of the third party is flexible, in that the referee may be required to produce a report or conduct a trial upon the matters referred which may comprise certain issues or the whole action. Referee appraisal may be a linear or alternative part of the adjudication process. An award of a referee, unless set aside by the court shall be equivocal. Similarly a referee's report will not lightly be rejected. A determination from a referee presents therefore a degree of finality. Confidentiality (second criteria) in similarity with arbitration is restricted to observing the rules of natural justice.[82] Entry into this ADR process (third criteria) may be voluntary or mandatory depending upon the nature of the referral. A referral for inquiry and report for instance may be made without the parties consent, by the direction of the Court. A referral for trial however, can only occur without the parties consent if the referral is made to an official referee or officer of the court and the case concerns either matters of account or matters of investigation that the Court cannot conveniently conduct. In all other circumstances the parties' consent to a referral for trial or the

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[82] Xuereb v Viola (1989) 18 NSWLR 453.

appointment of the referee is required. In this respect the ability of the Court to refer a matter for inquiry or trial to an expert in the subject matter of the dispute is limited if the person does not fulfil the criteria of either an official or special referee. Further, it is currently unclear as to whether the Court is able to order a determination by a referee against the express wishes of a party.[83] Party participation in the process (fourth criteria) is undefined. The level of information exchange (fifth criteria) is at the direction of the referee, with the referee empowered to conduct the proceedings in such manner as is most conducive to the matter's speedy disposal, without being bound by the rules of evidence.[84] The expertise of the referee is varied. A referee may be a Master, a practitioner of at least 6 years' standing, or an officer of the Court. Finally, in similarity with the process of arbitration, the stage at which referee appraisal is entered into is unclear.

3.11 EXPERT APPRAISAL IN THE DISTRICT AND MAGISTRATES COURTS

While both the District and Magistrates Courts possess the power to refer matters of a technical nature to be investigated by an expert, the current Magistrates Court Rules do not provide any formalised process of expert appraisal that can be assessed.[85] In the District Court there is a prescribed process of expert appraisal where the evaluative criteria can be examined. The role of the expert (first criteria) is to investigate and report upon the matters referred by the District Court. Confidentiality while not specifically noted in the form of the process, would be provided in the form that the expert would be obliged to observe the rules of natural justice. Entry into the process is by the direction of the Court, hence mandatory. Party involvement in the process provides that the parties to the dispute are entitled to be heard by the Court before an expert is appointed as to the need or otherwise for the appointment of a court expert, the identity of the expert to be appointed and the question or questions

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[83] *Honeywell Pty Ltd v Austral Motors Holdings Ltd* (1980) Qd R 355 at 359

[84] Supra n30 rr76.03(a)-(e).

[85] s34(1) District Court Act 1991; s29(1) Magistrates Court Act 1991.

to be asked of the expert.[86] The extent of information exchange (fifth criteria) will depend upon the directions of the Court. For the purposes of the reference, an expert appointed becomes, for the purposes of the investigation an officer of the Court.[87] This entails possession of all the requisite powers to direct discovery or the provision of information required for the court expert to conduct their enquiry. The expert appointed will possess the requisite expertise to conduct an independent inquiry into the matters referred for inquiry and report by the Court. Finally it is anticipated that this process will be considered to be invoked at either the A.F.D. or pretrial conference in the District Court on the basis of the same reasons described above in respect of the Supreme Court process of expert appraisal.

As stated earlier in respect of the Supreme Court process of expert appraisal it is submitted that the process as provided for in the District and Magistrates Court presents the potential to save parties the excessive costs that may be incurred in preparing adversarial expert evidence. The qualitative benefits are to be found in the assured impartiality of the court-appointed expert.

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[86]Supra n13 r82.02.
[87]Supra n15 s34 (2).

CHAPTER FOUR

LAW REFORM PROPOSALS TO THE ADR PROCESSES

A CONCILIATION

4.1 REFORMS TO CONCILIATION CONFERENCES - SUPREME COURT

4.1.1 Reform to improve the cost of justice

The analysis of the conciliation procedure provided in the Supreme Court in chapter 3, demonstrates that it can improve the cost of justice where the process is employed.[1] It is evident however that the reluctance of practitioners to conciliate is preventing this ADR technique from being utilised to its maximum potential. As stated by Bodzioch: "Solicitors in some instances, will not recommend or discuss the notion of conciliation because they are not armed with the information to enable them to advise their clients in respective actions."[2]

From the encountered lack of awareness exhibited by legal practitioners at the first A.F.D. as to even the existence of the conciliation process, it is extremely important that the nature of the process and conduct of the conciliation conference should be described in greater detail than in its present form.[3] To simply state that the conference procedure involves 'conciliation' is inadequate, since conciliation will not necessarily be a familiar form of dispute resolution to all practitioners.

The conciliation process itself requires clarification. Currently the only matters of procedure prescribed are the identification of the requisite documents that must be exchanged between the parties prior to the conciliation conference, the required attendance of the parties and the provision that at the conference the parties' counsel will be given the opportunity to put their case briefly to the Master.[4] The

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[1]Supra at 3.1.1."Do conciliation conferences improve the cost of justice".

[2]Bodzioch, "Conciliation Procedures in the Supreme Court of South Australia", Paper presented at the Inaugural Biennial AIJA Higher Courts Administrators Conference, 24-25 May 1990 at 7.

[3]Supra n1.

[4]Part II, Practice Direction 12, Supreme Court (1/2/90) paras 1,2,3,5.

powers of the Master, the scope of the Master's role and matters that can or are likely to be discussed at conciliation conferences are left unstated. Whilst the creation of a lengthy list of formalised procedures is not advocated - indeed, one of the inherent advantages of the conciliation process is its flexibility, there must be some semblance of what the conciliation process may involve ie what matters may be considered at the conference, what the parties are required to do before and at the conference, the role and powers of the Master at such conferences. This does not mean that the flexibility of the process would be compromised by clarifying such matters. It would merely increase the parties' awareness and understanding as to what the process involves, so that at the consideration stage of whether or not to conciliate, the parties will be better informed to advise the Court as to whether there exists a reasonable possibility of achieving settlement by employing conciliation.[5] For the conciliation processes to become utilised to its maximum potential, the attitudes of the legal profession must change to view conciliation as an integral part of the litigation process. It must become a norm, not a rare occurrence.

In its present form, Part 2 of Practice Direction 12 is not drafted in a manner that is designed to encourage the parties to conciliate. It should be stated clearly that the conciliation process is an opportunity for the parties to achieve an <u>early</u> resolution of their dispute, or if settlement is not achieved, that the process will assist in defining the major issues in dispute. It should be emphasised that the process provides an opportunity for the parties to become better informed about the strengths and weaknesses of their case. Further, the benefits of the parties formulating an agreement should be promoted.[6]

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[5]Ibid.

[6]See discussion in Ingleby, <u>In the Ball Park: Alternative Dispute Resolution and the Courts</u> (1991) at chapter 6.1 (passim).

With the aim of improving the cost of justice, reform must primarily consider how the use of conciliation conferences can be increased. Reform cannot simply lie with the Master directing more parties to conciliate, especially where the attitude of the parties is against conciliation.[7] If the conciliation conference is to be invoked more frequently, the legal profession must become better informed as to how the process works, the advantages to be gained from utilising this ADR process and additionally be reassured that entry into conciliation will not prejudice their client's rights or the normal conduct of litigation.

The primary reform that is therefore proposed is a redrafting to the form of Part II of Practice Direction 12, in a manner that will clarify and emphasise what the conciliation conference process involves, the benefits of convening a conciliation conference and an assurance that the conference will not prejudice the parties' legal rights. Notably, the conciliation conference is the only ADR process not to be enshrined in the Court's rules. This must be reviewed. If conciliation is to become as natural a part of the conduct of litigation as attending an A.F.D. or pretrial conference, the conciliation conference described in Part II of Practice Direction 12 must be revised and inserted within the Supreme Court Rules 1987. A Practice Direction regarding conciliation conferences should still remain, but in the revised form of an explanatory memorandum that explains the advantages and aims of the ADR process.

4.1.2 Reform to improve the quality of the litigation process

A consideration of the evaluation criteria in chapter 3, displays an ADR technique that possess flexibility and fairness. There is however some scope for improvement in two areas ie confidentiality and the role of the conciliator.

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[7]Supra at 3.1.1 "Do conciliation conferences improve the cost of justice?"

Confidentiality

Any dispute resolution process that involves settlement negotiations must ensure that confidentiality of such discussions is maintained. Whilst the conciliation conference process presently remains confidential by the protection of both the settlement privilege and Section 5 of the Conciliation Act 1929 (SA), it is not prescribed in Practice Direction 12 that the conferences are conducted in a 'without prejudice' forum. It is submitted that the confidentiality of the process should be emphasised in the above revisions to the form of the process.so that there exists no doubt that the 'without prejudice' nature of the process is assured.

Role of the conciliator

It is also advocated that there exists scope for expanding the role of the conciliator ie the Supreme Court Master. The current role of the conciliator is active, allowing the Master within their discretion to suggest solutions or their views in relation to the dispute.[8] This role could be further expanded to include the ADR process of Early Neutral Evaluation (E.N.E.) which would involve the Master in specifically considering the case on its merits and providing a non-binding assessment of the likely outcome of the claim.

Early Neutral Evaluation is currently applied in the United States District Court for the District of Columbia and the Northern District of California.[9] It is also about to become employed in the Federal Court in Western Australia in the form of a pilot project.[10] The operation of the E.N.E. process in the District Court of Columbia displays some similarities as well as differences to the conciliation procedure in the

[8]Supra at 2.2.3 "The Current Conciliation Conference Procedure".

[9]Astor and Chinkin, Dispute Resolution in Australia (1992) 170.

[10]Black, "The Response of the Courts and Tribunals to the Challenges of ADR" Paper presented at the First International Conference in Australia on Alternative Dispute Resolution, 29-30 August 1992 at 13-14. A similar pilot project is planned for the Federal Court in Victoria.

Supreme Court.[11] The similarities are that an information exchange precedes both processes, attendance of the parties is required and each party has the opportunity to present their case. Neither process interferes with the normal course of litigation and confidentiality is ensured.[12] Finally, both the evaluator and Supreme Court Master have a wide discretion in terms of conducting the ADR process.[13]

The differences are that firstly, an evaluator is appointed by the Court on the basis of their expertise in the area of law that is the subject of the dispute.[14] There is currently no such matching process between the Supreme Court Master and the nature of the dispute. Secondly, the E.N.E. process specifically involves the evaluator in providing the parties with a non-binding, reasoned, oral assessment of the case on its merits.[15] Currently it is only within the discretion of the Master to present views on the strengths and weaknesses of each party's case.

In a study conducted by the AIJA into the cost of civil litigation in intermediate courts, it was advocated that E.N.E. be introduced into the pre-trial process as a means of encouraging the early preparation of a case and obligatory consideration by the parties and their lawyers of the realistic merits of the case in a forum that would encourage settlement.[16] It is the latter consideration that offers the primary motivation for expanding the present role of the Master to include E.N.E. in the conciliation conference . It has been expressed by King CJ that the present

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[11] A description of the E.N.E. process is provided in Appendix C: "Program Procedures for Early Neutral Evaluation in th United States District Court for the District of Columbia." in French, "Hands-on Judges, User-Friendly Justice" 75 Papers presented at the Ninth Annual AIJA Conference, (1990) at 93.

[12] Ibid 93-94 (E.N.E.) and supra n4 (conciliation).

[13] Ibid 94-95 (E.N.E.) and ibid (conciliation).

[14] Ibid 93.

[15] Ibid.

[16] Williams and others, The Cost of Civil Litigation before Intermediate Courts in Australia (1992) 65-66.

conciliation process is flexible enough to accommodate an early independent evaluation of cases in the form of a mini-trial as an aid to settlement. [17]
It is proposed that E.N.E. should be incorporated into the conciliation conference by its inclusion in the Court's Rules and explanatory memorandum that the Master shall provide a non-binding assessment of the merits of the claim. There does appear to exist some scope for also including the appointment of Queen's Counsel or senior practitioners as conciliators to enhance a 'matching' process of dispute resolvers to particular disputes. Such conciliators could be appointed by the Chief Justice and deemed to be officers of the court.[18] Nevertheless, it is concluded that such an expansion to the choice of conciliators would be more appropriately considered as a second stage of reform, after consultation between the courts and the legal profession had occurred and after the introduction of E.N.E. has been observed.

In my drafting of E.N.E. into the conciliation conference process (described below) I have relied upon its operation in the United States District Court for the District of Columbia. I declined from retitling the conciliation conference to that of early neutral evaluation, since the procedure is so integrally linked to the conciliation powers provided by the Conciliation Act 1929 (SA).[19]

In summary, it is proposed that the cost of justice and the quality of the litigation process could be improved by the redrafting of Part II of Practice Direction 12 into the form described below, together with its insertion into the Supreme Court Rules 1987. The remaining Practice Direction is revised into an explanatory memorandum. Cases conducted in accordance with Rule 50 could apply the same rules when conciliation is considered at the first A.F.D.[20]

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[17]King, "The Current and Potential Use of Alternative Dispute Resolution Processes in the Courts", Paper presented at the Joint SADRA/LEADR Conference, 19-20 July 1991 at 15.
[18]Necessary revisions could be made to Rule 5 of the Supreme Court Rules 1987.
[19]Conciliation Act 1929 (SA) s3 and supra n7.
[20]Practice Direction No. 14, Supreme Court (2/3/87) para 7 (this was effected as of 1/3/90).

It is proposed that the following drafted rules in respect of conciliation conferences be inserted into the Supreme Court Rules 1987

CONCILIATION CONFERENCES

R55A.01

If the Court is satisfied that there is a reasonable possibility of matters in dispute in any proceedings being settled by conciliation, under Section 3 of the Conciliation Act 1929 (SA), the Court may at the parties' request or of its own motion direct that a conciliation conference be convened in which event the following directions will apply.

R55A.02 Conferences to be held

(1) A conciliation conference shall be held in any action whenever directed by the Court under Rule 55A.01.

(2) The date at which the conciliation conference is convened will take into account the need for the parties to comply with Rule 55A.07 before the conciliation conference..

[The above rules clarify when and by whom the conciliation process can be invoked.]

R55A.03 To be held before a Master

The conciliator of the conference shall be a Master unless the Court otherwise directs.

[It should be open to the parties in special circumstances to request that a conciliation conference be held before a Judge, for the same reasons such a power exists in respect of pretrial conferences.]

55A.04 Conciliation conference to be without prejudice

The discussions at a conciliation conference as to settlement, compromise or agreement of all or any of the issues in dispute between the parties shall be conducted without prejudice to the legal rights of the parties and, save as may be agreed between the parties and certified by the conciliator presiding over the conference, evidence shall not be given at the trial of the action or otherwise communicated to the trial Judge of anything said or done in an attempt at compromise or settlement at the conciliation conference.

[This rule assures the confidentiality of the ADR process in the same manner that is provided in Rule 56.05 (2) District Court Rules 1992 in respect of pretrial conferences]

55A.05 Matters to be considered at a conciliation conference

(1) At a conciliation conference consideration shall be given to:

(a) the identification of areas of agreement between the parties;

(b) the simplification of the issues in dispute between the parties;

(c) further information exchange to expedite settlement discussions; and

(d) any other matters that might facilitate the disposition of the case.

(2) If the parties to a conciliation conference agree upon the terms of settlement or compromise, the Master presiding over the conference may enter up such judgement as the parties shall agree upon.

[This rule clarifies what will be considered at the conciliation conference and what may eventuate from the ADR process.]

55A.06 Powers of a Conciliator at a conciliation conference

Subject to any Act, the conciliator may conduct a conciliation conference in such manner as thought fit and shall:

(a) permit each party's counsel to make an oral presentation of their case;

(b) provide a non-binding evaluation of the merits of the claim;

(c) require the attendance of any party unless in the circumstances it would not be reasonable for that party to attend;

(d) where any party is other than a single natural person, or where the case for a party is being conducted on his behalf by an insurer, to require the attendance of a representative of such party or the insurer at the conference who has authority on behalf of such party and/or insurer to enter into a compromise on behalf of that party to the greatest degree to which that party is prepared to compromise unless in the circumstances it would not be reasonable to require the attendance of such a representative or insurer;

(e) require the attendance of the parties' respective solicitors who have the care and conduct of the matter as described in the Civil Information Case Sheet provided under Rule 10.01;

(f) have the powers referred to in Rules 55.11 and 55.12.

[In addition to formalising the requirements of attendance by the parties and the oral presentation by each party of their case, the rule additionally specifies the

powers of the Master, including the power to give a non-binding evaluation of the merits of the case (E.N.E.) and the same powers upon the hearing of an A.F.D (para (f)). The latter addition it is considered would enhance the linear relationship of the ADR process to adjudication, in that if settlement did not eventuate, other matters may then be considered that would assist in the efficient conduct of the trial.

55A.07 Documents to be exchanged before the conference

(1) Unless a contrary direction is made by the Court an indexed set of the following documents shall be exchanged between the parties and lodged with the Court no later than 7 days prior to the conciliation conference:

(2) Documents to be prepared and indexed by the Plaintiff

(a) the pleadings;

(b) witnesses' proofs;

(c) medical reports (where applicable);

(d) expert reports (where applicable);

(e) summary of plaintiff's case on damages and copies of documents relied upon;

(f) relevant documentation on the question of liability;

(g) any other relevant documentation prescribed by the Court.

(3) Documents to be prepared and indexed by the Defendant

(b) witnesses' proofs;

(c) medical reports (where applicable);

(d) expert reports (where applicable);

(f) relevant documentation on the question of liability;

(g) any other relevant documentation prescribed by the Court.

[This rule merely formalises the documents required to be exchanged in the present Practice Direction.]

It is proposed that the following memorandum be inserted as the new Practice Direction with regard to conciliation conferences.

Conciliation Conferences - Explanatory Memorandum

The conciliation conference is a dispute resolution process available to litigants in which they may explore settlement at an early stage of litigation. The process is entirely confidential and will not prejudice either the conduct of a case or its listing for trial. The 2 main advantages of the process are that firstly, the parties may obtain

a non-binding, reasoned, oral evaluation of their claim on its merits from the conciliator and secondly the parties have the opportunity to achieve a settlement of their claim with the assistance of the court before further costs are incurred.

A conciliation conference will be ordered to be convened by a Master at the first A.F.D. at either the parties' request or by the direction of the Master. A conference will be convened by a Master where it is considered that there is a reasonable possibility of settlement of the dispute by conciliation. Conciliators will be Supreme Court Masters. In special circumstances a Judge may conduct a conciliation conference where it is ordered by the Court. The convening of a conciliation conference at the A.F.D. shall allow sufficient time for the preparation and exchange of information between the parties. The documents to be exchanged, prior to the conference, will be discussed at the A.F.D. Such information exchanged will not be filed at Court.

At the conference, each party will have the opportunity to briefly present their case to the Master. During the conference the Master will assist the parties to identify areas of agreement, the main issues in dispute and explore options for settlement. If settlement does not occur, the Master will offer a non-binding opinion as to what would be the likely outcome of the case at trial, including where appropriate the estimated likelihood of liability and range of damges. After providing such an opinion, the Master will then encourage the parties to discuss settlement either with or without the Master's assistance If settlement remains unlikely, the conference will conclude by discussing what other matters will assist in the conduct of litigation.

4.2 REFORM OF CONCILIATION PROCESSES IN THE DISTRICT COURT

4.2.1 The desirability of introducing mediation conferences

While it is simplistic to state that the greatest reform that could be made to make mediation conferences more effective would be the injection of the necessary

government funding to resource this technique, the situation is perhaps not as grim as it initially appears. Firstly, it must be considered that in the present absence of the mediation process (which would operate after the pretrial conference), an average 30% of civil cases listed per month settle after the pretrial conference but prior to a court hearing by way of informal settlement negotiations between the parties.[21] It is suggested that such statistics indicate that there may not exist a need to implement the mediation process when parties are already informally resolving cases in significant numbers before trial. It could also be argued that the pretrial conference is the most appropriate final ADR option before a court hearing and that it is not cost effective for the courts to provide two settlement forums before trial.

It is concluded that despite the success of the former conciliation meetings in resolving cases that required 'one more step' towards reaching settlement, the present resources of the District Court would not make the introduction of the mediation process worthwhile. Instead it is advocated that where there exists cases that require just 'one more step' towards settlement, the pretrial conference be adapted so that the conference chairperson actively assists the parties to negotiate a settlement in the same manner as the "Task Force" judges have conducted pre-trial conferences in the pre-1990 case list of the District Court.[22]

4.2.2 The introduction of conciliation conferences

It is submitted that the primary conciliation reform that would improve the cost of justice and the quality of the litigation process in the District Court would be the introduction of the revised Supreme Court conciliation conference described above. The implementation of such conferences would provide <u>all</u> civil cases in the District Court with the opportunity to utilise the process of conciliation at the first A.F.D.,

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[21] As advised by Mr. P. Hocking, Deputy Registrar, District Court from calculations made at 22 June 1992.

[22] Supra at 2.10.3 "Pretrial conferences in the pre-1990 case list".

expanding the current application of conciliation that is offered to only cases listed for expeditious management.

The proposed reform is also based upon the 6 July 1992 changes made to the courts whereby the civil jurisdiction of the District Court is now effectively the same as that of the Supreme Court at first instance, ie unlimited.[23] It is presently, a matter of choice to determine in which court to initiate an action subject to the consideration that cost penalties are awarded if a plaintiff recovers less than a prescribed amount for their particular claim.[24] It is also considered that conciliation conferences would reflect a full utilisation of the power of the District Court to assist the parties in negotiating settlement at the Court's own volition.[25]

The present resources of the District Court may present difficulties in implementing conciliation conferences in that there are only 2 District Court Masters in comparison to 4 Masters of the Supreme Court. Such resource difficulties would present a persuasive reason to expand the appointment of conciliators to include for example senior practitioners. The appointment of such conciliators could be made under Section 32(1)(a) of the District Court Act 1991 whereby a District Court Master at the first A.F.D.could appoint a conciliator with the consent of the parties. The conciliators appointed would thereby possess the privileges and immunities of a Judge of the District Court with such powers as the Court may delegate.[26] The confidentiality of proceedings would be assured by Section 32 (3) of the District Court Act 1991. Further, if the case settled at the conciliation conference, the terms of settlement could be embodied in a judgement. [27]

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[23]NB The District Court does not have jurisdiction with respect to probate or admiralty matters, nor can it grant relief of the nature of a prerogative writ.

[24]Cost penalties are in the form that an order for recovery of costs will not be awarded to the plaintiff if prescribed amounts are not recovered at judgement. See Supreme Court Act 1935 s40(2) and District Court Act 1991 (SA) s42(2).

[25]District Court Act 1991 (SA) s32(1)(b).

[26]Ibid s32(2).

[27]Ibid s32(5).

It is proposed that in the first instance, a pilot program of conciliation conferences should be introduced into the District Court with only Masters acting as conciliators. Depending upon the success of the initial pilot program the appointment of Queen's Counsel and senior practitioners as conciliators may be considered at a later stage. The District Court conciliation conference should mirror that of the Supreme Court procedure described above with the the only revision required to the expressed power of conciliation in Rule 55A.01 ie "Section 3 of the Conciliation Act 1929" would be replaced with "Section 32 (1)(b) of the District Court Act 1991".

4.2.3 Reform of the Conciliation Process in the Expedited List.

Improving the cost of justice by increasing the frequency with which conciliation is invoked, raises similar proposals for reform that enhance the clarification of the conciliation process.[28] For example, it is prescribed that the supervising judge will "use such techniques as appear to the Judge to be appropriate in the particular case."[29] The "techniques" that may be employed at the conciliation conference should be identified. The similarities between the District Court and Supreme Court conciliation processes suggest that the proposed Rules and Explanatory Memorandum described above could be equally applied to cases in the expedited list of the District Court. Rule 55A.03 would permit conciliation conferences in the expedited list to remain conducted by a supervising Judge, and the powers of the Judge to remain responsible for the management of the case and provide the necessary directions to ensure that an action proceeded to trial expeditiously where settlement did not occur, would not be compromised, by Rule 55A.06(f). The proposed rules would also introduce flexibility of entry into the present conciliation process by permitting the District Court Master to order a case to be referred to conciliation where it was considered that there existed a "reasonable possibility of settling the action".[30] In

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[28]Procedure described in Practice Direction (3.12.90) District Court "Directions as to the management of cases entering the Commercial Causes List after the 1st January 1991".
[29]Ibid para 6.
[30]Supra n25.

conclusion it is proposed that the cost and quality of the litigation process could be improved by the adoption of the proposed rules and memorandum described above in respect of cases conducted in accordance with Rule 50 of the District Court Rules 1992.

4.3 CONCILIATION REFORMS IN THE MAGISTRATES COURT

In comparison to the conciliation processes of the above Courts, it is not proposed that the conciliation process in minor civil actions become more formalised as a means of improving the cost of justice. The nature of minor civil actions, whereby litigants are unrepresented is more suited to conciliation being provided in an informal manner at the direction of the Court.[31] Further its invocation before trial saves the parties the unnecessary and wasteful costs that arise through detailed interlocutory procedures, thus improving the cost of justice to such litigants.

In terms of improving the quality of the litigation process it has been discussed in chapter 3 that the weakest evaluative criteria was that of confidentiality. In minor civil actions where the parties are integrally involved in the dispute resolution process, the potential for bias to be viewed as arising when a minor civil action proceeds to be heard by the same person who attempted settlement is great. However, it must be noted that the minor civil action trial is not conducted in an adversarial manner but in the form of an inquiry, whereby the Magistrate's role is not that of an impartial, passive adjudicator but that of an active inquisitor.[32] The Magistrate or judicial officer's involvement in conciliation before trial is merely a part of the overall process in respect of minor civil actions. Consequently the same concerns in respect of confidentiality are not applicable in this jurisdiction. In cases where bias would appear great, it is expected that the Magistrate or judicial officer would disqualify themself from continuing to hear the matter.[33] Reforms to conciliation in

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[31] Cf the conciliation processes in the Supreme Court and District Court which are conducted by legal practitioners.

[32] Magistrates Court Act 1991 (SA) ss38(1)(a)-(f).

[33] Ibid s38(1)(f).

minor civil actions is therefore not advocated. What is advocated is the inclusion within the Court's rules that conciliation be considered in all actions where such a process would be appropriate. The specific reform is described below at "Clarifying the stage at which ADR is considered."

B ARBITRATION

4.4 REFORMS TO ARBITRATION IN THE SUPREME COURT

4.4.1 Reform to improve the cost of justice

Because of the rarity with which arbitration is employed in the Supreme Court it was stated speculatively in Chapter 3 that arbitration could improve both the cost and quality of the litigation process, particularly in cases that required the determination of complex factual issues. Such technical matters were mooted as being able to be determined more efficiently and expeditiously by a dispute resolver possessing expertise in the subject matter of the dispute. Returning to the base assumption however ie the earlier a dispute is resolved by an ADR process the greater the cost of justice will be improved, it is currently unclear, from both the Supreme Court Rules 1987 and a lack of court practice as to the stage of litigation at which arbitration is both considered and employed. Presumably at the hearing of the A.F.D. the Court's power to give directions with respect to the "mode of trial" and "the trial of any issue" permits an assessment of the appropriateness of referral of certain issues or indeed the whole matter to arbitration.[34] In terms of what reforms could improve the cost of justice, however, it is proposed that arbitration should be considered at the first A.F.D. as discussed below at " Clarifying the stage at which ADR is considered".

4.4.2 Reform to improve the quality of the litigation process

It is proposed that there is scope for reforming the arbitration process in two areas. Firstly, the Court's present ability to refer matters to arbitration and appoint

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[34]Supreme Court Rules 1987 (as amended) r 55.11

arbitrators is restricted.[35] It is submitted that the Supreme Court should be permitted to refer matters involving complex and technical factual issues to arbitrators who possess the expertise to conduct an inquiry into such matters. The Court should have this power whether the parties consent or not, in uniformity with the current power of the District Court and Magistrates Court to direct arbitration. Such reform would promote the purpose at the A.F.D. to "give all such directions as shall seem appropriate with a view to promoting the expeditious and economical prosecution of the action and as may best define and resolve the issues between the parties."[36] If the case involves complex, lengthy and technical matters in dispute, arbitration will best fulfil such purposes.

It is therefore proposed that ss65-70 of the Supreme Court Act 1935 (SA) be repealed and the following section inserted to provide the Supreme Court with the power to refer matters to arbitration and appoint arbitrators at their own volition, in uniformity with the District & Magistrates Courts.[37]

s65 Trial by arbitrator

(1) The Court may refer an action or any issues arising in an action for trial by an arbitrator.

(2) The arbitrator may be appointed either by the parties to the action or by the Court.

(3) The arbitrator becomes for the purposes of the reference an officer of the Court and may exercise such powers of the Court as the Court delegates to the arbitrator.

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[35]Supra 3.4.2."Does arbitration improve the quality of the litigation process".
[36]Supra n34 r55.10.
[37]In *Leighton Contractors (SA) Pty Ltd v Hazama Corporation (Australia) Pty Ltd & Ors* (1991) 159 LSJS 381 at 389 Debelle J advocates the introduction of such reform.

(4) The Court will, unless good reason is shown to the contrary, adopt the award of the arbitrator as its judgement on the action or issues referred.

(5) The costs of the arbitrator will be borne, in the 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 by reimbursed wholly or in part by another.

(6) The court or a judge shall, in relation to referrals to an arbitrator, have all the powers that are conferred on a court by the Commercial Arbitration Act 1986, in relation to the appointment of arbitrators and the conduct of proceedings under that Act.

(7) An arbitrator may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference.

Secondly, it is proposed that the parties to the dispute should be provided with a clear method of application to the Court to submit their case or specified issues to be determined by arbitration as exists in the District Court.[38] The following Rule 76A should be introduced into the Supreme Court Rules 1987:

R 76A.01
Any application by a party pursuant to section 65 of the Act to refer an action or any issues arising in an action for trial by an arbitrator shall be made by interlocutory application.

R76A.02
An application to refer issues arising in an action for trial by an arbitrator shall clearly specify the issues sought to be referred.

R76A.03
If the parties join in seeking a reference to an arbitrator appointed by them, the consent of the proposed arbitrator to act shall be put before the Court at the time when the interlocutory application is made.

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[38]District Court Rules 1992 r76.

[NB: Rules 76.04 and 76.05 of the District Court Rules are not added to the Supreme Court Rules, since similar rules are already provided by r76, Supreme Court Rules.]

It has already been expressed by King CJ, that the use of arbitration will be increased in the Supreme Court, by the Court applying more pressure on the parties to accept arbitration, particularly in relation to building and engineering disputes.[39] It is considered that the above reforms will enhance the ability of either the parties or the Court to invoke the process of arbitration.

4.5 REFORMS TO ARBITRATION IN THE DISTRICT COURT

4.5.1 Reform to improve the cost of justice

In similarity with the Supreme Court arbitration process it is proposed that the cost of justice could be improved by considering arbitration at the first A.F.D. as discussed at "Clarifying the stage at which ADR is considered". Such reform would make it expressly clear that arbitration would be considered by both the Court and the parties at the earliest opportunity of the litigation process.

4.5.2 Reform to improve the quality of the litigation process

The only scope for improving the quality of the arbitration process lies in specifying the powers of the arbitrator, including the power for the arbitrator to subpoena the attendance of witnesses. It is proposed that Rule 76.03 of the Supreme Court Rules 1987 be inserted as Rule 76.06 in the District Court Rules 1992 and that Rule 76.04 be inserted as Rule 76.07 in the District Court Rules as follows:

R76.06 Powers of an arbitrator

An arbitrator shall have all the powers of the Commercial Arbitration Act 1986 (SA) and by these Rules and subject to any order of the Court:

To hold trial or inquiry and to have views

(a)may hold the trial at or adjourn it to any place which the arbitrator may deem most convenient, and have any inspection or view, either by themself, or with their

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[39]Supra n17 at 5.

assessors (if any) which the arbitrator may deem expedient for the better disposal of the controversy before them;

Conduct proceedings as the arbitrator see fit and not to be bound by the rules of evidence

(b)may conduct the proceedings in such manner as is most conducive to their speedy disposal and may inform in such manner thought fit without being bound by the rules of evidence

Same jurisdiction as the Court except as to committal

(c)shall have the same jurisdiction as the Court, other than for the committal of any person to prison or for the enforcement of any order by attachment or otherwise;

Have procedural powers of the Court

(d)shall have the procedural powers of the court with respect to claims relating to or connected with the reference, including the right to order a counterclaim or third party proceeding to be struck out or tried separately;

May direct judgement to be entered

(e)shall have the same power as the Court to direct that judgement be entered for any or either party.

[The above Rule, transcribes Rule 76.03 of the Supreme Court Rules 1987 with the main revisions being the replacement of the term "referee" with the term "arbitrator" and the removal of non-inclusive language]

R76.07 Subpoena to enforce attendance before an arbitrator

Rule 76.04 of the Supreme Court Rules 1987 would be inserted with the only revision being the substitution of "arbitrator" for "referee".

4.6 REFORMS TO ARBITRATION IN THE MAGISTRATES COURT

It is similarly advocated that the cost of justice could be improved by an early consideration and employment of arbitration in respect of complex, technical, factual disputes. The specific reform proposed is described at "Clarifying the stage at which ADR is considered". The scope for improving the quality of the litigation process lies in providing a procedure by which the parties may apply to arbitrate within the

Magistrates Court Rules. It is advocated that the District Court application procedure provided in Rules 76.01-76.05 of the District Court Rules 1992 be replicated and introduced into the Magistrates Court Rules 1992. Further, it is also proposed that the powers of arbitrators (as drafted above) be specified and introduced into the Magistrates Court Rules 1992.

The primary advantage of employing the arbitral process, "lies in its ability to provide speedy determination of the real issues...the parties enjoy the benefits of natural justice consistently with the requirements of arbitrators for dispensing with technicalities, with discovery, and doing away with interrogatories. " [40] Such advantages should be open to all claims. It must be recognised that complex technical disputes that are particularly suited to being resolved by the process of arbitration may possess a wide range in the quantum of such claims.[41]

It will be noted with regard to the total arbitration reforms proposed that the introduction of court-annexed arbitration schemes, as exist in New South Wales and Victoria, has not been advocated. The reasons are two-fold. Firstly, the applicability of such schemes to our State courts has already been considered and determined as not feasible in that it was thought that difficulties would arise in terms of providing the necessary arbitrators required to resource such schemes.[42] Secondly, the essential factor that motivated the introduction of such schemes interstate, namely civil caseloads and delays of overwhelming proportions has been alternatively and successfully addressed by the adoption of caseflow management principles.[43]

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[40]Nosworthy, "Claims and Disputes - Alternative Procedures", Paper presented at the National Construction Seminar, October 1991 at 21.

[41]Eg in a study of dispute resolution conducted by the Institue of Arbitrators Australia, 45.1% of the matters arbitrated involved a quantum of claim less than $50,000. The Institute of Arbitrators Australia, "Statistical Report Scheme", 30/7/92 at 2.

[42]Attorney-General South Australia, "Alternative Dispute Resolution" Green Paper (1990) at 9.

[43]Infra Chapter 5.

C MEDIATION

4.7 REFORM OF PRETRIAL CONFERENCES IN THE SUPREME COURT

The effectiveness of the pretrial conference process is unequivocal. It is clearly an excellent example of an ADR process that both improves the cost of justice and the quality of the litigation process by its two-fold role of assisting the parties achieve a negotiated settlement and/or preparing for trial.[44]

While it is considered that the present form of the pretrial conference has reached its limits in terms of improving the cost of justice and the quality of litigation, two minor reforms are recommended. The first proposed reform is that the confidentiality of the process be formally enshrined in the rules of the Supreme Court as is currently provided in the District Court Rules 1992.[45] It is submitted that Rule 56.05 of the current Supreme Court Rules be renumbered to become R56.05(1) and that Rule 56.05(2) of the District Court Rules 1992 be inserted as drafted:

R56.05 (2)
The discussions at a pretrial conference as to settlement, compromise or agreement of all or any of the issues in dispute between the parties shall be conducted without prejudice to the legal rights of the parties and, save as may be agreed between the parties and certified by the Master of the Court presiding over the conference, evidence shall not be given at the trial of the action or otherwise communicated to the trial Judge of anything said or done in an attempt at compromise at the pretrial conference until after judgement or judgement on liability, as may be appropriate, has been pronounced.

Secondly, it is advocated for the purposes of promoting uniformity with the District Court Rules and the principles of caseflow management, that Rule 56.04 of the Supreme Court Rules be revised to include the requirement that on every occasion of adjournment of the pretrial conference, a report as to the reasons for the adjournment and an order in respect of costs shall be placed upon the Court file by

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[44]Supra at 3.6.1 and 3.6.2 passim.
[45]Supra n38 r 56.05 (2).

the Supreme Court Master. It is proposed that the present Rule 56.04 of the Supreme Court Rules 1987 be renumbered to become Rule 56.04(1) and that the following Rules 56.04 (2) and 56.04 (3) be inserted into the Supreme Court Rules (taken from Rule 56.10 District Court Rules 1992):

R56.04 (2)
On every occasion upon which a pretrial conference shall be adjourned, the Master or Judge presiding over such conference shall place upon the Court file relating to the action a report as to the reason for such adjournment and may make such order as they shall think fit as to the costs of the adjournment.

R56.04(3)
Upon any order being made in respect of the costs of any proceeding in an action, the Judge or Master may have regard to any report filed pursuant to the provision of subrule (2) of this Rule.

4.8 REFORM OF PRETRIAL CONFERENCES - DISTRICT COURT

The effectiveness of this ADR process in both improving the cost and quality of justice is self-evident.[46] It is however the combination of this process with the system of caseflow management that achieves such a high resolution of civil cases from their commencement within a period of approximately 5 to 8 months.[47] Pretrial conferences in the District Court are a clear illustration of the proposition that ADR cannot be viewed as a singular solution the cost of justice. The introduction of pretrial conferences into the District Court was designed to address the problem of increasing court caseloads and ensuing court delays that were occurring in the District Court. Such mandatory pretrial conferences were very successful but the ongoing increased influx of cases prevented the pretrial conference program from singularly remedying the problems of increasing court caseloads and delays.[48]

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[46]Supra 3.7.1. and 3.7.2. (passim).
[47]This variation arises from the fact that a period of 3 months is prescribed within which to serve the summons.Supra n38 r2.03(2).
[48]Brebner and others, "Second report of the Committee of Investigation into Delays in the Civil Jurisdiction of the District Court", March 1991 at 1.

4.8.1 Reform to improve the cost of justice

The primary reform advocated to improve the cost of justice in respect of this process is the inclusion of a restriction upon the number of times such conferences may be adjourned. This proposal arises from the high proportion of adjournments of pretrial conferences that occur in the District Court as identified in Table 4. For example, in 1991 the month of June was the only period in which the monthly percentage of cases adjourned at a pretrial conference was less than 50%, ie 42%. Adjournments incur wasted time and costs both to the court and to the non-defaulting party. A restriction upon the number of adjournments should be introduced as is currently provided in the Magistrates Court Rules where there is a requirement that a conciliation conference may be adjourned on no more than 2 occasions and that the period of adjournment must not exceed 3 months.[49] The necessity for this reform is considered to be greater in the District Court than in the Supreme Court, due to the system of caseflow management in the District Court which sets prescribed time limits by which steps in the litigation process shall be completed. It is proposed that a limit on the number of adjournments and the period of adjournment will assist in achieving the goals of the caseflow management system in the District Court.[50] The insertion of the following drafted rules into the District Court Rules is recommended:

R56.04

(3) A pretrial conference may be adjourned on no more than 2 occasions;

(4) The period for which a pretrial conference may be adjourned must not exceed 3 months.

4.9 REFORM OF CONCILIATION CONFERENCES - MAGISTRATES COURT

The effectiveness of conciliation conferences in improving the cost of justice is already evident, despite their recent introduction as of 6 July 1992 into the Court. The only scope for reform is to make such conferences compulsory in all civil matters.

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[49]Magistrates Court Rules 1992 r89(5)(c)(i) and (ii).

[50]Supra n38 r2.02(2).

D EXPERT/REFERREE APPRAISAL

4.10 REFORM OF EXPERT APPRAISAL IN THE SUPREME COURT

It is difficult to advocate reforms to this process that would improve the cost and quality of the litigation process when its operation in practice is untested. It is advocated that the cost of justice could be improved by the consideration to appoint a court expert at the first A.F.D. where independent evidence would prevent the incurring of duplicative costs in the preparation of expert evidence by the parties to the dispute. Reform is described at "Clarifying the stage at which ADR is considered".

4.11 REFORM OF REFEREE APPRAISAL IN THE SUPREME COURT

4.11.1 Reform to improve the cost of justice

Referee appraisal is employed very rarely in the Supreme Court, making the consideration of reforms, a difficult task. It is advocated however, that there exists potential to improve the cost of justice where the process of referee appraisal is applied at an early stage of litigation, eg the first A.F.D., in respect of matters that are particularly suited to resolution of technical issues by a person possessing expertise in the subject matter of the dispute.[51] The specific reform is described below at "Clarifying the stage at which ADR is considered."

4.11.2 Reform to improve the quality of the litigation process

It has been suggested that the rarity with which referee appraisal is currently utilised is due to the present limitations upon the operation of the process.[52] The process is both flexible and restrictive, in that while a referee may either report or conduct a trial in respect of a range of either selected issues or the whole dispute, the appointment of referees by the Court is restricted, the eligibility requirements of referees are restricted, consent of the parties to the referral is required in most circumstances and referrals are largely limited to cases that concern either matters

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[51] Supra n37 at 389 per Debelle J.
[52] Ibid.

of account or matters of investigation that the Court cannot conveniently conduct. It is therefore advocated that there exists scope for improving the quality of the process by removing such limitations. It is therefore proposed that ss65-70 be repealed and the following sections inserted:

s66 Report by referee

(1) The Court may, in any proceedings in the Court, subject to this rule, at any stage of the proceedings, on application by a party or of its own motion, make orders for reference to a referee appointed by the Court for inquiry and report by the referee on the whole of the proceedings or any question or questions arising in the proceedings.

[This permits the Court to invoke the process of referee appraisal in any proceedings, removing the limitations with respect to parties' consent and the nature of the dispute]

(2) The report of a referee may be adopted wholly or partially by the court or a judge, and if so adopted may be enforced as a judgement or order to the same effect.

[This section simply removes the former specifications with regard to "official" and "special" referees]

s67 Trial by referee

(1) The Court may refer an action or any issues arising in an action for trial by a referee.

(2) The referee may be appointed either by the consent of both parties to the action or by the Court.

(3) The referee becomes for the purposes of the reference an officer of the Court and may exercise such powers of the Court as the Court delegates to the referee.

(4) The Court will, unless good reason is shown to the contrary, adopt the award of the referee as its judgement on the action or issues referred.

(5) The costs of the referee will be borne, in the 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 by reimbursed wholly or in part by another.

(6) The court or a judge shall, in relation to referrals to a referee, have all the powers that are conferred on a court by the Commercial Arbitration Act 1986, in relation to the appointment of arbitrators and the conduct of proceedings under that Act.

(7) An referee may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference.

[The above reforms introduce similar flexibility into the referee appraisal process in that either the parties or the court can invoke the process]

Further flexibility could be introduced into the process by expanding the eligibility of referees in Rule 76 of the Supreme Court Rules. To widen the class of referees would be a particularly useful reform, both in terms of enhancing the expertise of the referee and maximising court resources.[53] It is therefore proposed that the following reforms be implemented. Firstly, Rule 76.01 (1) be redrafted to state:

R76.01 Master to be a Referee

(1) A Master shall be a referee for the purposes of Section 66 or 67 of the Act.

It is further proposed that Rule 76.02(2) be revised in the following form:

R76.02 Appointment of a referee

(1) For the purposes of Section 66 or 67 of the Act a referee may be appointed by the Court as and when the necessity arises.

[This would permit the appointment of referees who are not legal practitioners to report on technical and scientific issues]

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[53] Ibid 389-390.

and that R76.02 (2) which prescribes for "special" referees be repealed and R76.02 (3) and (4) be renumbered to R76.02(2) and (3) respectively.

The only other alteration that is advocated to the Supreme Court Rules is to R76.03 namely, that it be updated and redrafted to state:

R76.03 Powers of a referee to be those in the Commercial Arbitration Act and:
A referee shall on a reference have all the powers given to a referee by the Commercial Arbitration Act 1986, and by these Rules and subject to any order of the Court: (the remainder of the rule should be retained).

4.12 REFORM OF EXPERT APPRAISAL IN THE DISTRICT AND MAGISTRATES COURTS

The recent introduction of the power to appoint court experts into both the District and Magistrates Courts, does not permit the formation of expansive reforms. Currently there is no procedure of expert appraisal provided in the Magistrates Court Rules, despite the power for the Court to appoint such experts.[54] It is therefore proposed that a procedure of expert appraisal be implemented into the Magistrates Court Rules in uniformity with the District Court Rules.[55]

Further, in similarity with the arguments raised above in respect of the Supreme Court process it is advocated that the decision to appoint a court expert should be considered at an early stage of litigation to prevent the incurring of duplicative costs by the parties. In the District Court, such appointment could be considered at the first A.F.D., in the Magistrates Court at a directions hearing. The specific reforms are described at "Clarifying the stage at which ADR is considered."

4.13 MANDATORY ADR vs VOLUNTARY ADR

The third evaluative criteria has examined whether the ADR processes within the courts are entered into voluntarily by the parties or at the direction of the Court.

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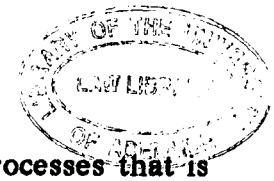
[54]Supra n32 s29(1).
[55]Supra n38 r82.



Outside of the court system, it is the consensual nature of ADR processes that is regarded as the most important factor in achieving a resolution of a dispute.[56] Is it therefore contradictory that ADR processes within the courts can be invoked regardless of the wishes of the parties and further does a lack of consensuality render the ADR process ineffective?

In *A.W.A. Ltd v George Richard Daniels T/A Deloitte Haskins & Sell & Ors.* expressions of judicial policy were made by Rogers CJ in respect of whether a Court's decision to override a party's objections to enter into mediation, renders the ADR process futile and whether the mediation process itself was compatible with a compulsory direction to mediate.[57] Rogers CJ considered that the court should have power to order the parties to mediate even where there existed a greater or lesser reluctance by a party to mediate.[58] The rationale behind the Court's proposition was expressed by an analogy to the enforcement of contractual dispute resolution clauses, whereby such clauses are established to deal with parties in dispute who believe that settlement of their problem is impossible.[59] Initial resistance to court directed mediation it was advocated, should not mean that the mediation process would be futile.[60] The Court stated:

"In reality, most disputes that reach our courts are likely to be considered at some time by one or both parties as being incapable of settlement, yet approximately ninety per cent of these cases are settled prior to trial. Add to that the fact that third party neutrals such as mediators are highly trained individuals who are expert at reducing conflict between parties and the futility argument becomes less appropriate." [61]

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[56]Supra n9 at 105.

[57]Unreported, NSW Supreme Court Comm D (no. 50271, 24 February 1992).

[58]Ibid 5.

[59]Ibid.

[60]Ross-Smith, "Use of ADR Processes in Resolving Commercial and Corporate Disputes", Paper presented at the Joint SADRA/LEADR Conference, 19-20July 1991 at 23-24.

[61]Supra n57 at 9 and Shirley, "Breach of an ADR Clause - A Wrong Without A Remedy" (1991) 2 ADRJ 117 at 118.

The power of the Courts to direct ADR regardless of the objections of a party can no longer be discounted. In the Queensland Supreme Court, for example, the Court introduced in April 1992 a Practice Direction in respect of Commercial Causes stating "Early trial dates will ordinarily not be allotted unless a genuine resort to mediation has been made."[62] Mandatory pretrial conferences/conciliation conferences in South Australia's courts operate to the same effect, in that a listing for trial will only be considered after settlement negotiations have failed.

It could however be viewed that compelling parties during litigation to enter into an ADR process when the attitude of the parties is totally against employing ADR may run the risk of incurring wasted and unwanted costs if the dispute remains unresolved after the ADR process.[63] In the above case, for example, the process of mediation was unsuccessful and litigation continued. Based upon this risk, it should be noted in the proposed conciliation conference reforms, the inclusion of Rule 55A.06 (f) will permit the conciliators of such conferences to make any necessary directions in respect of the management of the case to trial if settlement negotiations fail. With regard to arbitration, the risk of incurring wasted costs where the parties do not wish to arbitrate may be surmounted by narrowing the scope of the arbitration, so that merely the complex factual disputes are determined by the arbitrator with the remaining adjudication of the legal issues in dispute to be decided by a Judge. This could similarly be applied to the processes of expert/referee appraisal. The structured dual role of pretrial conferences ensures that if settlement discussions fail, costs incurred by the process are not 'wasted' in that the conference then proceeds to discuss all the necessary matters to expedite the court hearing. It is advocated that where the courts employ compulsory ADR without the parties' consent the ADR process must be structured to have a <u>linear</u> role in the litigation process.

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[62]Note, Queensland Resolution No. 2 April 92.

[63]Vanstone, "ADR and the Cost of Justice" Paper presented at the First International Conference in Australia on ADR, 29-30 August 1992 at 13.

Does compulsory ADR however produce greater settlement success in comparison to voluntary processes? Pretrial conferences in the Supreme Court and District Court are mandatory in all civil cases unless they are exceptionally excluded.[64] In the Magistrates Court, conciliation conferences are compulsory in running down claims.[65] The effectiveness of such processes in promoting settlement is undisputed. In terms of how the cost of justice can be improved, should further mandatory mediation processes be introduced into the courts?

4.14 Should mediation be a condition precedent to litigation?

Out of all of the various ADR techniques that exist, it is mediation that is most often mooted as a process that litigants should enter into both as a condition precedent and subsequent to litigation.[66] The maxim behind mediation as a condition precedent is that: "No-one should be entitled to litigate a dispute until he or she has made a bona fide attempt to resolve it by agreement and anyone who fails to accept a reasonable offer should be penalised in costs."[67] It has been mooted that parties could be compelled to mediate prior to the commencement of litigation by either a judge or court officer, to avoid any impressions of weakness in the parties' desire to discuss settlement.[68] Where reasonable offers of settlement were refused at such mediations, penalties could be ordered upon judgement by the Court.[69] Such mediation conferences, it is argued, would ensure that the courts became a dispute resolution forum of last resort, resulting in the improvement of court caseloads, the maximisation of court resources and decreasing costs to potential litigants.[70]

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[64]Supra at 3.6.2 and 3.7.2.
[65]Supra at 3.8.2.
[66]Davies & Limbury, "ADR - How Should It be Used?" Paper presented to 27th Australian Legal Convention, Adelaide 1991 at 4.
[67]Ibid 10.
[68]Ibid 4.
[69]Ibid.
[70]Ibid.

Whilst the introduction of mediation as a condition precedent to litigation may appear a foreign and untenable proposition, an informal 'mediation' programme commenced by S.G.I.C. this year is producing promising results in the settlement of personal injury claims before litigation is commenced.[71] It must be noted that the programme is voluntary and is not attached to the courts. The success of such a programme does however lead to questioning whether mediation prior to litigation should be made mandatory, whether it should be attached to the courts and whether it should be extended to attempt the resolution of all civil cases before litigation is commenced. The potential improvements to the cost of justice would appear great especially when it is considered that 95% of disputes will settle before a court hearing in any event.

This dissertation will not however advocate the introduction of mediation as a condition precedent to litigation as a means of improving the cost of justice. To compel parties to mediate prior to the commencement of litigation would be an usurpation of the constitutional function of the courts "to entertain the grievances of litigants and judge their rights."[72] The fact that 95% of cases resolve before a court hearing does not follow that 95% of cases are appropriately ready to be resolved before the commencement of litigation. It must also be recognised by those who wish to encourage a mentality within the profession that litigation be viewed as a dispute resolution method of last resort, that to some degree this maxim is currently upheld by the profession. Most litigation does not commence without settlement being attempted either formally or informally through verbal and/or written communications between the parties.[73] Indeed, even without the presence of a compulsory pre-litigation mediation conference the commencement of litigation is indirectly discouraged by a number of factors. Caseflow management in the District

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[71] Infra chapter 5.
[72] Supra n57 at 4 per Rogers CJ.
[73] Eg the traditional letter of demand.

Court, for example has already had a significant effect upon the reduction in the civil caseload of the Court, in that the prescribed caseflow management timetable has encouraged greater preparation to be undertaken by the parties before commencing litigation. Cost sanctions that can be imposed for commencing civil actions in the 'wrong' civil Court have also encouraged parties to carefully consider the merits of their claim in a realistic and careful manner before commencing litigation.[74] Such necessary preparation and evaluation encourages informal settlements to occur or a reconsideration as to the commencement of litigation.

4.15 Should voluntary ADR processes be introduced?

Compulsory ADR processes do not possess a monopoly in respect of settlement success rates. Whether the cost of justice could be improved by the introduction of voluntary mediation programmes shall be discussed with reference to two such examples: the mediation programme of the Federal Court of Australia and the Queensland Personal Injury Programme that is conducted by the Australian Commercial Disputes Centre (Qld) Ltd.

4.15.1 'Assisted Dispute Resolution' in the Federal Court

In September 1987 the Federal Court commenced a mediation pilot study in the Principal Registry in Sydney, whereby after 4 directions hearings a judge could refer a matter to a Court Registrar for mediation.[75] If unsuccessful, the Court Registrar would then proceed to make the necessary directions for the case to be prepared for trial.[76] In September 1989, the program was extended to the South Australian Registry of the Federal Court.[77] The programme was initiated because of the Court's concern with the growing number of cases under Part V of the Trade

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[74]Supra n24.
[75]Federal Court Act of Australia Act 1976 (Cth) s35A.
[76]Ibid.
[77]Howard, "Federal Court of Australia - Assisted Dispute Resolution"(1991) Vol 2 No. 4 ADRJ 240.

Practices Act 1974 (Cth), where the costs incurred were often disproportionate to the amount of the claim. Such cases were considered appropriate for mediation.[78]

On 7 May 1990, the introduction of Practice Note 8 on 'Assisted Dispute Resolution' provided the parties with the opportunity to voluntarily request a mediation conference and also ensured that priority in the case list would not be compromised and that the process would be entirely confidential.[79] The 'Assisted Dispute Resolution' programme was integrated with principles of caseflow management in that new matters would come before a judge for directions within a short period of filing, whereby suitable matters for referral to ADR were identified and if the parties consented to such referral, mediation commenced at an early stage.[80]

On 1 January 1992 the commencement of the Courts (Mediation & Arbitration) Act 1991 (Cth) provided an express statutory basis for the above program. Further, the Act introduced a provision for the Court, with the consent of the parties, to order the referral of the whole or part of any proceedings to mediation or arbitration in accordance with the amended rules of the Federal Court.[81] The new programme emphasised the following features: early intervention by a judge as to the consideration of ADR, flexibility of ADR processes offered (ie mediation/arbitration), a recognition that the ADR dispute resolver would not hear the trial if ADR failed and that the ADR process would also involve (where mediation was employed) steps to prepare the parties for trial, so that a case's listing remained unaffected by the ADR process.[82] Since the parties have largely invoked the process of mediation with only one case referred to arbitration, the mediation programme shall now be discussed.[83]

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[78]Supra n10 at 9.

[79]The practice note coincided with an amendment to the Federal Court Rules, namely Order 10 Rule 1(2)(g).

[80]Supra n10 at 3.

[81]Supra n75 s53A. Order 72 Federal Court Rules came into operation on 1 January 1992. To cease operation on 1 January 1993.

[82]Ibid.

[83]Supra n10 at 5.

The mediations are conducted informally and are held with either a Court Registrar or Judge in the role of mediator. A mediation is convened after consultation with the parties' solicitors as to the date and time of the mediation and whether it is desired that the parties attend. At the initial meeting, the process and course of mediation that will follow is explained.[84] Parties are assured that the mediation process is confidential and that the mediator will not subsequently adjudicate the case if it proceeds to trial.[85] The mediation then proceeds on whatever basis is considered most appropriate in the circumstances. The mediator will generally negotiate with the parties to identify areas of agreement and disagreement.[86] Documents used in the mediation process, are only those filed with the Court to the date of the mediation, supplemented by a quantification of the applicant's claim which is not included on the Court file.[87]. Little comment is made by the mediator with regard to the merits of the claim.[88] If mediation is successful, the parties' settlement agreement may be embodied in a consent order of the court. If the matter remains unresolved, the matter may be adjourned to enable the parties to consider and discuss their positions, or alternatively the matter is returned to the judge who made the initial referral to ADR. An unresolved mediation does not render the process futile, since the Registrar is empowered to give any directions necessary that will assist in the identification of the issues in dispute to ensure that priority in the case list is maintained.[89]
The objective of the ADR program is clear: "a settlement earlier rather than later saves the resources of the parties and of the courts."[90] As at 21 August 1992, 33 matters had been referred to a Court Registrar for mediation in the South Australian

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[84]Order 72 rule 7 Federal Court Rules.
[85]Supra n10 at 18.
[86]Supra n75 s53B.
[87]Supra n10 at 11.
[88]Ibid 7.Also where the parties have completed affidavits, the Federal Court mediation may follow a mini-trial with the strengths and weaknesses of the respective cases being discussed.
[89]Eg Directions are often made for the exchange of potential witnesses' statements and for the exchange of experts' reports. Howard, Federal Court of Australia - Alternative Dispute Resolution"(1989) Vol. 2 No. 4 Resolution of Commercial Disputes at 7.
[90]Supra n10 at 15.

Registry of the Federal Court, 64% of such matters had settled, 12% had proceeded to trial and 24% matters were adjourned or awaiting a mediation conference.[91] In light of the success of the programme it is considered that there are 2 key features that could be introduced to improve the effectiveness of the ADR processes in South Australia's courts. Firstly, an early consideration of the employment of ADR, with a choice of ADR processes offered to the parties. Secondly, the incorporation into the ADR processes of a dual role whereby if the ADR process fails steps can then be undertaken to prepare the parties for trial so that a case's listing remains unaffected by invoking the ADR process. The first feature could be introduced by the proposal described below at "Clarifying the stage at which ADR is considered." The second feature has been discussed above in respect of compulsory ADR.

4.15.2 Queensland Personal Injuries Programme (P.I.P.) [92]

The Queensland Personal Injuries Programme is an illustration of a successful voluntary mediation programme that can be distinguished from the above ADR programme in that it does not operate under the direction of the Courts.[93] The programme has been well received by insurers, the legal profession and plaintiffs. Based upon the success of the Queensland programme, the A.C.D.C.(NSW) has initated a similar scheme in conjunction with the New South Wales Road Transport Authority.[94] The programme is voluntary, no compulsion is placed upon either party to participate in the programme. Cases are referred by either the solicitors acting for the plaintiff or the defendant, with an increasing number of cases being referred by both solicitors. Once the A.C.D.C. has received the parties' agreement to participation

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[91] Ibid.

[92] The following information regarding the Queensland Personal Injury Programme was very kindly provided by correspondence from Mr. David Paratz, Manager, Australian Commercial Disputes Centre (Qld) Ltd.

[93] The programme commenced in late 1989 as a joint initiative of the ACDC (Qld) in cooperation with the relevant licensed insurers to introduce a means of resolving personal injury claims arising out of motor vehicle accidents. I am advised that the programme has been extended to conduct mediations for the Workers' Compensation Board in respect of work related injuries.

[94] Note, Queensland Resolution No. 2 April 92.

in the programme, a standard mediation agreement is entered into which details the confidential and "without prejudice" basis of the ensuing negotiations . A panel of 2-3 mediators is then offered to the parties with an order of preference requested. On the basis of the parties' responses a mutually agreeable mediator is appointed. The stage of referral to the program is usually after litigation has commenced and after the filing of the Statement of Loss and Damage[95] has been made or alternately, at the time of answering interrogatories.[96] Prior to the mediation, materials are exchanged on a voluntary basis in the form of a short summary of the claim with supporting relevant documentation.

The process of mediation utilised is one in which the mediator assists the parties to negotiate. The procedure is extremely flexible and responsive to the requirements of each claim and conducted on a confidential and "without prejudice" basis. Any party is free to withdraw from the program at any time or adjourn the process to obtain further material or advice. It is however left to the discretion of each party as to how many and what representatives they bring. If a plaintiff seeks to proceed without legal advice or representation a caution is provided by the A.C.D.C. It is considered essential that the personal injury claimant attend. Normally the mediations are conducted at the A.C.D.C. with the parties in attendance being the plaintiff with their solicitor and barrister, a representative from the defendant's insurance company with their solicitor and the mediator. One mediation is conducted per matter, lasting for approximately one hour.

The rate of settlement success from the mediation process has been "virtually every case" with only two cases that did not settle at the mediation conference or shortly

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[95]SA equivalent is Form 22 details (Magistrates Court) and r46.15 details (Supreme and District Courts).

[96]Usually a period of 2-6 months from the date the A.C.D.C. is first advised of the matter is when mediation is convened, allowing a suitable time for parties to prepare and attend the mediation.

thereafter.[97] Indirectly the programme has triggered the settlement of many hundreds of insurance cases annually.[98] I was informed that on average, personal injury cases with a settled value of about $2.2 million annually are proceeding to mediation through the A.C.D.C. Seemingly the results suggest that a similar programme in South Australia would also provide improvements to the cost of justice in respect of promoting the early resolution of personal injury claims. Additionally such a programme would not be subject to the concern that arises in respect of compulsory mediation ie that entry into the process would incur wasted and unwanted costs, since firstly, such a programme would be provided at no cost to the plaintiff and secondly, the programme would be entered into voluntarily or not at all. It is pleasing to note at this point that a similar programme has been introduced into South Australia upon the initiative of S.G.I.C.[99] Indeed the operation of this programme in terms of improving the costs incurred by litigation are even more advanced, in that most of the personal injury claims referred to informal settlement conferences are referred prior to the commencement of litigation. The results of the S.G.I.C. programme are described in Chapter 5.

The scope of employing mediation processes and compulsory and voluntary ADR processes both within and outside of the court system is extremely broad.

4.16 GENERAL REFORMS TO THE COURTS' ADR PROCESSES

4.16.1 Clarifying the stage at which ADR is considered

It is unclear from the present Supreme Court Rules 1987 at what stage of the litigation process arbitration, expert and referee appraisal are considered and employed. In the District Court and Magistrates Court a similar lack of clarity exists in respect of arbitration and expert appraisal. It is advocated, in terms of the base assumption, that

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[97] Supra n92.
[98] Ibid.
[99] Infra Chapter 5.

the cost of justice would be improved if all of the above ADR processes were considered at the first A.F.D in the District and Supreme Courts (in addition to conciliation) and at a directions hearing convened by the Registrar, in the Magistrates Court.[100] Indeed Rule 55.10 of the District and Supreme Court Rules, suggests that the A.F.D. is the most apposite time at which the employment of ADR should be considered. [101] This must be clarified The rules must specify that all of the above ADR processes will be considered at the first A.F.D or at a directions hearing convened in the Magistrates Court at an early stage of the litigation process.[102]

The decision behind the selection of this particular stage of the litigation process is based upon 2 reasons. Firstly, each ADR process involves varying information exchange requirements that will either depend upon the discretion of the dispute resolver, as in arbitration, referee and expert appraisal or will be prescribed as in the current conciliation conference. Such information exchange requirements will generally be more simplified and expedient to the discovery process that is entailed before a court hearing, the costs of which have been identified as contributing significantly to the high costs of litigation.[103] It is therefore proposed that if ADR processes are considered at the earliest opportunity ie the first A.F.D or an early directions hearing, cost savings may be achieved where the information exchange requirements are less onerous than the normal process of discovery. Indeed where settlement occurs through the early employment of ADR, the costs of discovery will not needlessly have been incurred by the parties.

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[100]Supra n49 r89 (1)(a).

[101]See below.

[102]With the exception of pretrial conferences which should remain unchanged in terms of the stage at which conferences are convened. An earlier PTC would disrupt the dual function of such conferences as both a court forum before trial for the parties to reconsider settlement, and also a conference to prepare for trial where settlement is not achieved.

[103]Cranston and others, Delays and Efficiencies in Civil Litgation (1985) at Chapter 9 (passim).

The second reason behind the selected stage lies in the need to improve the quality of the litigation process by encouraging the parties to consider at the earliest opportunity the best overall means of resolving the dispute. The parties should consider ALL of the dispute resolution options available in the court system and determine what techniques either singularly or in combination are best suited to resolving the dispute. The parties at this stage have the opportunity to shape the dispute resolution process to the nature of the dispute. For example, in a building dispute, referral of the whole matter or certain questions to an arbitrator or referee with expertise in the subject matter of the dispute could be considered at the earliest opportunity.

It is therefore proposed that in the Supreme and District Courts that Rule 55.10 of the Supreme Court Rules 1987 and rule 55.10 of the District Court Rules 1992 be renumbered to become Rule 55.10(1):

R55.10(1)
In dealing with an application for directions the Court shall give all such directions as shall seem appropriate with a view to promoting the expeditious and economical prosecution of the action and as may best define and resolve the issues between the parties.

and that the following rule be inserted be inserted in the **Supreme Court Rules:**

R55.10(2) [SUPREME COURT]
At the first return of the application for directions consideration shall be given to:

Conciliation

(a) The possibility of the claim being settled by the process of conciliation provided in Rule 55A;[104]

Arbitration

(b) The desirability of the parties resolving selected questions or the whole matter by the process of arbitration under Section 65 of the Supreme Court Act 1935 (SA);[105]

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[104] See above.
[105] Ibid.

Appointment of a Court Expert

(c) The desirability of appointing a court expert under Rule 82 where independent evidence appears to be required.

Referral for trial or report

(d) The desirability of referring an action or specified questions to a referee for either trial or inquiry and report under Section 66 or 67 of the Supreme Court Act 1935 (SA).

and that the following rule be inserted in the District Court Rules 1992.

R55.10(2)[DISTRICT COURT]

At the first return of the application for directions consideration shall be given to:

Conciliation

(a) The possibility of the claim being settled by the process of conciliation provided in Rule 55A; [106]

Arbitration

(b) The desirability of the parties resolving selected questions or the whole matter by the process of arbitration under Section 33 of the District Court Act 1991 (SA);

Appointment of a Court Expert

(c) The desirability of appointing a court expert under Section 34 of the Act..

In the Magistrates Court it is proposed that under Rule 89(1)(a) the Court Registrar could compel the parties to attend a directions hearing at an early stage of the litigation process . It is advocated that Rule 89(2) be renumbered to become Rule 89(2)(a) and the following provisions be inserted:

R89(2)(a)

At a conciliation or listing conference or directions hearing the Court may make any order or do any act or thing that it is empowered to make or do under these rules.

R89(2)(b)

At a directions hearing the Court and parties must consider:-

Conciliation

(a) The possibility of the claim being settled by the process of conciliation under Section 27(1)(b) of the Magistrates Court Act 1991;

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[106] Ibid.

Arbitration

(b) The desirability of the parties resolving selected questions or the whole matter by the process of arbitration under Section 28 of the Act;

Appointment of a Court Expert

(c) The desirability of appointing a court expert under Section 29 of the Act..

It is submitted that the proposed reforms are in unity with the Courts' new philosophy as of 6 July 1992 that:

"It may be anticipated that, in the higher courts in particular, the court will seek to intervene at a much earlier point than heretofore, in the ongoing conduct of litigation, to ensure that the status of cases is reviewed, the case is assigned to an appropriate track and alternative dispute resolution processes are considered at the earliest possible time."[107]

While it is advocated that the above ADR processes should be considered at an early stage of litigation, it is not proposed that the Courts should refrain from considering ADR at any other appropriate stage where there exists a reasonable possibility of settlement by employing a particular ADR process.

4.16.2 Educating the legal profession in the utility of ADR processes in the courts.

The common link in the lack of utilisation of many of the current ADR processes lies in a lack of awareness in the legal profession as to what options of dispute resolution exist in the courts, how such ADR processes work and the advantages and disadvantages of using such processes. It must be emphasised at this point that the legal profession cannot be blamed for its unfamiliarity with the dispute resolution options available, since firstly, the subject of civil procedure receives only a cursory treatment in the Graduate Diploma of Legal Practice [108] and secondly, many of the current ADR processes provide little detail as to what the process involves and in what circumstances the ADR process can be invoked. For the current ADR processes

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[107]Court Services Department, "Legislative Changes to the Courts System (as of July 1992) An Information Statement for the Legal Profession" at 16.

[108]Civil procedure is incorporated into the subject Civil Claims. However the emphasis of the course lies with the civil procedure of the Magistrates Court only. The compulsory subject Procedure was removed from the Bachelor of Laws degree at the University of Adelaide from 1988.

to become more effective in their operation there exists the need not merely for the insertion of a generous dose of clarity, but also an essential need to educate and inform the legal profession as to what dispute resolution options are available in the courts. The need for such education to occur cannot be underestimated. As stated by King CJ:

"the initiatives developed and the opportunities offered by the courts depend very largely for their effectiveness upon the co-operation of the legal profession...For this reason the first goal of any movement to promote the resolution of disputes by means other than fully fought out litigation, should be the development of a legal culture which recognizes non-ligitious dispute resolution as the norm. That can only be accomplished by a process of education of members of the legal profession."[109]

A process of education in ADR has already commenced. The aim of Lawyers Engaged in Alternative Dispute Resolution (L.E.A.D.R.), formed in 1989, is to inform and promote the use of ADR by the legal profession, encouraging the use of ADR both within and outside of the Courts. The joint conference convened by SADRA and LEADR in 1991 would have directly assisted in promoting these goals.

It is advocated however that a reintroduction of the course of Procedure as a compulsory component of the Bachelor of Laws degree would be an additional means of promoting the use of ADR within the courts, in addition to a series of CLE seminars that could be conducted by the courts. A legal education in the methods of dispute resolution should be accorded the same importance with which the training in the identification of legal rights and obligations receives.

The main task of the above reforms are to intensify and expand the scope, the awareness and use of the ADR processes within the courts, to improve the cost and quality of the litigation process. It is a task that must be undertaken jointly by the courts and the profession.[110]

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[109]Supra n17 at 2-3.

[110]Ibid 15-16.

CHAPTER FIVE

ALTERNATIVES TO ADR

5.0 Introduction

This chapter shall consider what alternatives to ADR exist that either currently or potentially improve the cost of justice in South Australia. It is not intended that this chapter will be a conclusive study of all of the alternatives to ADR. Rather, in my selection I have sought to identify the major reforms that have been implemented from each of the various sectors of our legal system. In comparison to the ADR reforms proposed in chapter 4, not all of the reforms that will be described, seek to improve the litigation process.

It may be considered that a chapter on 'alternatives' to ADR that succeeds a lengthy list of ADR reform proposals is somewhat contradictory! It must therefore be emphasised that ADR cannot be viewed as a singular solution to the problems inherent in our adversarial system of justice. Even if the proposed reforms to the current ADR processes were to be introduced, the balance in the cost of justice equation may be easily disrupted.[1] Indeed, the following reforms emphasise the fact that improving the cost of justice requires a multi-pronged approach, with the cooperation of the legislature, the judiciary, the legal profession and the community.

A REFORMS BY THE COURTS

5.1 Managerial Techniques and Principles

From the evidence submitted at the Cost of Justice Inquiry, the Senate Committee summised that reducing the cost of litigation could primarily be achieved by changes in attitude on the part of judges and the legal profession and through the increased use of managerial techniques within the courts.[2] The latter recommendation has

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[1] Supra at 4.8.

[2] Australia, Senate Standing Committee on Legal and Constitutional Affairs, Discussion Paper No. 6 The Courts and The Conduct of Litigation (1992) at 4.

been a major focus of court reform in South Australia particularly by the introduction of caseflow management principles and various court rules.

5.1.1 Caseflow Management

(a) The principles and objectives of caseflow management

Principles of caseflow management are based upon an "explicit assertion of judicial responsibility for the expeditious progress of all matters before the court, through all stages of the process from first filing to final disposition."[3] Traditional notions of judges as passive referees do not exist in a caseflow management system.

The objectives of caseflow management are identical in all of the courts ie to promote the just determination of litigation, maximise the efficient use of court resources, eliminate court delays and facilitate the timely disposal of cases at a cost affordable by the parties.[4] The only differences arise in the various Court Rules that implement the time limits by which prescribed steps in the litigation process must be completed in accordance with the principles of caseflow management.

In the Supreme Court, caseflow management principles became formally enshrined in the Court's rules from 6 July 1992.[5] Effectively, the new rules mean that the parties are expected to be fully ready for trial by the pretrial conference and at any applications hearing the parties will be ready to proceed with all the matters required to be heard.[6]. The rules of caseflow management also permit the Court to review the progress of proceedings, whereby the Court may make any necessary orders or directions that will lead to a case's efficient disposal [7] Within the principles of caseflow management the Court may also place cases upon a differential

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[3]Church & Sallmann, Governing Australia's Courts (1991) at 4.

[4]Supreme Court Rules 1987 (as amended) rr2.02, 2.03 and District Court Rules 1992 rr2.0.2, 2.03(1).

[5]Ibid r2.

[6]Ibid rr2.04, 2.05.

[7]Ibid r2.07.

case management basis and publish time performance standards that may subsequently change from time to time.[8]

The operation of caseflow management in the Magistrates Court has set performance standards in the Civil Division to fix the first trial date within six months of the date of the close of pleadings and to deliver a final judgement within one year of the date of the close of pleadings.[9]

Caseflow management in the District Court is virtually identical to that of the Supreme Court, with the only exception being in the District Court's prescribed timetable in relation to caseload dispositions ie a timetable is formulated for the conduct of "average" or "run-of-the-mill"cases, whereby 90% of cases commenced will be disposed of within 9 months of service of the summons upon the defendant, 97.5% cases will be disposed of within 15 months of service and all cases concluded within 18 months of service.[10] To achieve the above goals, time limits are prescribed by which identified steps in the litigation process must be completed by the parties.[11] The caseflow management system is based upon "management by exceptions" ie only those cases not complying with time standards are summoned before a Master for a directions hearing to require the practitioner responsible to explain the non-performance. If the practitioner fails to comply with the directions given at the hearing the action is struck out.[12] Caseflow management is the central civil delay-reduction reform in the District Court.

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[8]Ibid r2.06.

[9]As advised in an untitled policy document of the new rules provided to me by Mr. R. Szeczuwianiec, Deputy Registrar, Magistrates Court at 2.

[10]Supra n4 r2.02 (2) outlines the current timetable.

[11]Ibid r2.03.

[12]Committee of Investigation into Delays in the Civil Jurisdiction of the District Court, "Implementation of a caseflow management system in the civil jurisdiction of the District Court, August 1989 at 1.

The District Court was the first court to research and implement the principles of caseflow management as a means of addressing the vast increase in court caseloads that occurred in the civil jurisdiction of the Court during 1987-1988 and the resultant court delays.[13] Indeed it was the success of the District Court's caseflow management system implemented and enforced from 1 January 1990 that became the catalyst for such principles being adopted in the remaining civil courts.

(b) The effect of caseflow management

Caseflow management, particulary within the District Court requires that the parties be well prepared before issuing proceedings. It is apparent for instance in the District Court, from the reduced number of cases commenced, after the introduction of caseflow management, that there exists a disinclination to commence proceedings unless and until it is seen that the action will run smoothly to trial in accordance with the Court's prescribed timetable.[14]

The effect of caseflow management in the District Court, in terms of improving the cost of justice is evidenced by the reduced number of cases listed for trial since its introduction. The trial list of the Court is now drastically reduced from a peak of 6,647 cases in September 1988 to 2151 cases as at the end of April 1992. Unequivocally, caseflow management is a significant reform, that has not merely reduced court caseloads and thus maximised court resources, but has encouraged the development of a change in attitude within the legal profession towards conducting cases in a more expedient and efficient manner. This attitude has largely been shaped by the continued emphasis by the courts that the profession must comply with the principles of caseflow management as demonstrated below.

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[13]Brebner, "Moves to Reduce Litigation Cost and Delay in the Civil Jurisdiction of the District Court" (1992) Vol. 4 No. 5 Law Society Bulletin 12.

[14]Brebner and others, "Second Report of the Committee of Investigation into Delays in the Civil Jurisdiction of the District Court" at 11.

(c) Judicial support for caseflow management

Two decisions of the Supreme Court have indicated the importance with which the parties' compliance with caseflow management principles is regarded.[15] In United Motors Retail Ltd v AGC Ltd the Full Court dismissed an appeal against a decision of the District Court whereby 2 applications by the plaintiff, to amend the pleadings at trial and adjourn the trial had been refused.[16] The basic argument led by the appellant was that if the applications had been allowed it would not have caused prejudice to the defendant and led to the result that the plaintiff was now required to commence the action afresh. The appellant's argument was rejected. King CJ indicated that such earlier cases relied upon by the appellant were determined before the adoption of caseflow management principles by the District Court. The Full Court highlighted the importance of compliance with the Court's rules and emphasised that in the exercise of a discretion to grant a late application to amend pleadings or adjourn a trial, principles of caseflow management "will be an important and often dominant consideration in considering the application".[17]

In Trebilcock v The Nominal Defendant[18] the Full Court examined the District Court's requirement that all expert reports be obtained and disclosed to the other parties prior the pretrial conference.[19] The plaintiff had not complied with these prescribed time limits. The Full Court again upheld the time limits set by the District Court's caseflow management rules, emphasising the important objectives of the rules in maintaining an efficient caseflow management system as well as discouraging a return to trial by ambush.

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[15]Walsh, "Courts Case Flow Management: Pitfalls for Practitioners" (1992) Vol 14 No. 3 Law Society Bulletin 22.

[16]United Motors Retail Ltd v AGC Ltd, unreported, SA Supreme Court (no 2237, 24 December 1991).

[17]Supra n16.

[18]Trebilcock v The Nominal Defendant, unreported, SA Supreme Court (no 2584, 24 December 1991).

[19]r126A Local Court Rules 1970-1990.

5.1.2 Expeditious Management of Commercial and Other Cases

Commercial Lists can be found in most of the civil jurisdictions of the intermediate and Supreme Courts throughout Australia. Such lists are considered to improve the cost of justice, in that the commercial cases so listed, have the advantage of proceeding more expeditiously and being accorded earlier priority in the civil trial list.

As of 6 July 1992, Rule 50 of the Supreme Court and District Court Rules has expanded the scope of the former Commercial Causes List to now provide for the "Expeditious Management of Commercial and other cases" in both courts. The matters to be considered by the Court before listing a case for expeditious management are the likely length of trial, the complexity of the factual and legal issues, the volume of discoverable material, and any other reason why the disposal of the proceedings should be expedited.[20] Entry into the list can occur by the application of either party or at the Court's direction.[21] Such reform has addressed the inequity of the former "Commercial Causes" list that offered an expeditious dispute resolution process to only commercially defined cases.

The expeditious management of such cases are ensured by the Court's obligation to "give all such directions as may seem desirable in the interests of justice and in order to secure a speedy and economical determination of the proceedings".[22] This is an extremely broad power that considerably expands the scope of the Court's directions prescribed in Rule 55. The Court may for instance, direct that issues be defined by other means than the delivery of formal pleadings, or direct that the evidence to be adduced from witnesses be submitted in the form of a signed written statement that may be received at trial as evidence in chief.

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[20] rr50.02(a)-(d) Supreme Court Rules 1987 (as amended) and rr50.02(a)-(d) District Court Rules 1992.
[21] Ibid r50.01(4).
[22] Ibid r50.03.

It is considered that the introduction of such lists described above, permits the District and Supreme Courts to 'sift' cases into different case management streams. Indeed the introduction of the civil case information sheet that must now be provided at the commencement of civil matters in the District and Supreme Courts by both parties, will assist the Courts in assigning cases to one of the following categories: 'normal', 'expedited' or 'long/complex' , that will allow the Courts to adapt caseflow management principles to the classification of the case.

It is advocated that the ability to adapt the dispute resolution process to the nature of the dispute is the most important ingredient in improving the cost of justice and the quality of the overall dispute resolution process, as through this process of 'matching', the most expedient, efficient and appropriate method(s) of resolving a dispute may be adopted.

Other managerial techniques that have been introduced into the courts comprise the rules in respect of the conduct of applications for directions. In dealing with an A.F.D. the Court is required to give all directions appropriate "with a view to promoting the expeditious and economical prosecution of the action and as may best define and resolve the issues between the parties." [23]

The hearings in the Supreme Court Masters' Chambers has decreased from 15.099 (1986/87) to 10,791 in 1990/91.[24] This significant decrease in the number of attendances under Rule 55, has occurred largely as a result of the expected compliance by the Supreme Court Masters with the time limits or directions set by the Court,.reducing the overall costs of litigation and delays.

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[23]Supra n20 r55.10.

[24]SA, Parl, Annual Report of the Court Services Department for the Year Ended 30 June 1991, Third Session, Forty-Seventh Parliament, (1992) at 18.

While the above court reforms described are certainly not exhaustive, they are indicative of the deserving statement made by Senior Judge Brebner that "South Australia is a leader in this country in the reduction of litigation cost and delay".[25]

B LEGISLATIVE REFORMS

5.2 Improving the litigation process

The Evidence Act, 1929-1974 (S.A.) has been continually amended over the years to aid the tendering of documentary evidence, business records and computer transcripts during legal proceedings. Each of these enactments has greatly assisted the conduct of hearings by aiding the admissibility of such evidence. Recently, the Evidence Act has been further amended to permit the courts to order that the strict rules of evidence may be dispensed with in circumstances that lie within a very broad discretion of the Court.[26]

The recent introduction of Section 59(j) of the Evidence Act, permits the court at any stage of civil or criminal proceedings to dispense with the rules of evidence in proving any matter that is not genuinely in dispute, or where compliance with the rules may involve unreasonable expense or delay.[27] The court may for example, dispense with the proof of a document or its execution, the handwriting or identity of a party; or the conferral of an authority to do a particular act.[28] Further, a court is not bound by the rules of evidence in informing itself on any matter relevant to the exercise of its discretion under this section.[29]

It has been stated in an information statement provided to the legal profession in July 1992 that in all of the civil jurisdictions of the courts "it is likely that there will,

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[25]Supra n13 at 13.
[26]Section 59(j) Evidence Act, 1929-1974 (S.A.) Inserted by Act No. 26 of 1992.
[27]Ibid ss59(j)(1)(a) and (b) respectively.
[28]Ibid ss59(j)(2)(a-d).
[29]Ibid s59(j)(3).

in the future, be costs sanctions related to any insistence on formal proof of matters, where that insistence is found to be unreasonable. " [30] In the Magistrates Court Rules this policy has been formally enshrined in Rule 96.

It is submitted that Section 59(j) where it is employed by the Courts, will prevent unreasonable costs and delays being incurred by both the parties and indeed the courts, assisting in improving the cost of justice. In particular, this provision will improve the costs of litigation at court hearings in the ability to dispense with the rules of evidence in circumstances where such rules would involve "unnecessary expense or delay."[31]

C REFORMS BY THE LEGAL PROFESSION

5.3 Litigation Assistance Fund [32]

The Litigation Assistance Fund was launched jointly by the Law Society of South Australia and the State Attorney- General on 31 July 1992.[33] It is one of three such schemes in the world.[34] The Fund provides litigation assistance upon the basis that if the applicant's claim is successful it is agreed that the Fund will receive 15% of the award.[35] The purpose of the Fund is "to provide middle-income earners and small businesses with the opportunity of bringing legal claims before the courts." [36] Unlike the eligibility requirements of legal aid, corporations and incorporated

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[30]Court Services Department, "Legislative Changes to the Courts System (as of July 1992) An information statement for the legal profession"at 16.

[31]Supra n26.

[32]The following discussion is referenced from correspondence with Mr. Darian Partington, Manager, Litigation Assistance Fund, and 2 brochures published by the Litigation Assistance Fund entitled "What do lawyers need to know about the litigation assistance fund?" & "Need financial assistance to pay legal fees?".

[33]The fund is a self-funding charitable trust set up by a $1 million establishment grant provided by the Legal Practitioners Guarantee Fund.

[34]Two other schemes operate in WA and Hong Kong.The first such fund was instituted in Hong Kong, the second fund commenced in W.A. two years ago.

[35]As advised in discussions with Ms. Susan Churchman, Legal Services Commission of SA.the 15% award is unrelated to the amount of time taken over the claim, in comparison to the practice of taking instructions "on spec" where the solicitor receives a loading.

[36]The Law Society of South Australia, Media Release, 31 July 1992.

associations may apply to the Fund for assistance. The types of cases eligible for assistance by the Fund are personal injury claims, commercial and property disputes, inheritance claims, and negligence cases. Assistance is not provided in criminal or family law matters nor will an applicant that is a defendant without a counterclaim be funded except in unusual circumstances where the defence litigation would be in the public interest. While the Fund primarily assists in civil matters commenced in each of the State courts and the Federal Court, minor Magistrates Court matters are not eligible for assistance.

In similarity to legal aid, applicants to the Fund must satisfy a means and merits test and they may be required to make a contribution towards the cost of the litigation.[37] The applicant may also choose their own lawyer to conduct their matter. Assistance is granted by the Fund for a defined stage of litigation. At the conclusion of each stage, further assistance from the Fund may be sought. .The basis behind this form of funding is that the Assessment Panel must continue to be satisfied that the merits of the claim still persists

It must be noted that lawyers do not share in the contingency amount involved with the Fund. If the applicant's action is successful, 15% of the award is forwarded by the applicant's solicitor to the Fund and the solicitor's fees are paid by the Fund which are based upon the average work required for the particular stage of the claim that is funded. If the ensuing litigation is unsuccessful, the Fund pays only the applicant's solicitor's fees. The applicant remains liable to pay the legal costs of the successful party, as assessed by the Court.

Assistance may be cancelled by the Fund if the client doesn't follow the reasonable advice of their solicitor, details of an applicant's claim or financial position are

[37]The application fee is $100. If an application requires urgent assessment, the fee is $250.

misrepresented to the Fund, circumstances have arisen that diminish the prospect of success of the claim, or the client or their lawyer fails to comply with any request or direction of the Fund.

The institution of the Litigation Assistance Fund is clearly designed to address the shortfall in legal aid assistance that is provided in civil matters.[38] It is anticipated that through the funding of successful actions and the resulting receipt of 15% of the consequent awards, the Fund will be enabled to increase the number of litigants assisted.

Unfortunately, records were unable to be provided by the Litigation Assistance Fund in respect of its operations to date. I was informed however, that such details would be provided in the ensuing annual report of the Fund in 1993. Nevertheless it is submitted that the Fund will improve the cost of justice, in terms of sharing more equitably, public legal services with the middle sector of the community that currently falls outside the scope of legal aid.

D COMMUNITY REFORMS

As stated by King CJ: "the first goal of any movement to promote the resolution of disputes by means other than fully fought out litigation, should be the development of a legal culture which recognizes non-litigious dispute resolution as the norm."[39] The following work of the community mediation centres illustrates that there is a working towards that goal, by promoting the resolution of neighbourhood disputes by non-litigious forms of dispute resolution.

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[38]Supra at 1.1 "ADR as a solution to improve the cost of justice".

[39]King, "The Current and Potential Use of Alternative Dispute Resolution Processes in the Courts" Paper presented at the Joint SADRA/LEADR Conference, 19-20 July 1991 at 2.

5.4 Community Mediation/Dispute Resolution Centres in Sth Australia

There are 3 community mediation/dispute resolution centres currently in operation in the Adelaide metropolitan area that additionally provide outreach services to surrounding districts in South Australia.[40] The services were each established by community legal centres to provide an inexpensive, expeditious and fair means of resolution of primarily neighbourhood disputes.[41] The 4 techniques of dispute resolution employed by the services comprise counselling, conciliation, mediation and case conferences. [42] Each of the services are assisted by the work of volunteer mediators.

During the 1989/90 financial year, an evaluation study of the 3 services was conducted which presented a number of interesting results. As anticipated, the study reflected that a very high proportion of disputes referred to the 3 services involved neighbour disputes (ie 95%).[43] However, in terms of the number of contacts made with the services for the 1989/90 year (total 3278) in comparison to the recorded 29,297 legal advice interviews and the 43,055 telephone advice calls provided by the Legal Services Commission of S.A. for the same period, the study indicated that:"mediation services are not yet seen by the public as a main source of help with problems."[44]

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[40]Community Mediation Service, based at Norwood commenced in 1984; Neighbourhood Dispute Service, Brompton commenced in 1986; and Noarlunga Community Legal Service commenced 1987 (formerly called the Southern Community Mediation Service).The Para District Counselling service now also provides mediation services in respect of family law matters. The service has been in operation for approximately 28 years.

[41]Evaluation Committee,"An Evaluation of Community Mediation Services in South Australia", May 1991 at 8

[42]The form of conciliation employed involves the conciliator as a third party conduit who negotiates between the parties. In this form of conciliation the disputing parties may never meet each other. Ibid at 3-4. Each service also has a different ADR focus eg Community Mediation Centre prefers mediation, Noarlunga service emphasises counselling and the Neighbourhood Dispute Service has a wide range of methods. Ibid at 23.

[43]Ibid 46.

[44]Ibid.

Clients of the mediation services were also surveyed as part of the evaluation study.[45] The survey indicated that the mediation centres were used by a very small proportion of the community with the clients in general characterised as mature adults, with an Australian or English speaking background, existing in paid employment and living in a detached dwelling that was owned by the client seeking assistance from the mediation service.[46] The user response to the community mediation services was quite positive with the majority of clients expressing satisfaction with the quality of services provided and the outcome achieved through the assistance of the service.[47]

The Evaluation Committee concluded that the ADR techniques employed by the 3 services were particularly suited to the resolution of neighbourhood disputes which involved on ongoing relationship between the parties.[48] It was expressed, during discussions with the Coordinators of these services, that many of the cases would have proceeded to commence litigation without the intervention of the advice and dispute resolution processes provided by the Centres. It is therefore considered that the work of such dispute resolution centres is important in improving the cost of justice, by assisting in the resolution of disputes that would otherwise be litigated, where the ongoing neighbour relationship may not necessarily be improved by such an adversarial dispute resolution process.

E REFORMS BY LEGAL CLIENTS

5.5 Initiatives from SGIC

As outlined by the Attorney-General:

"courts have no control over the volume of cases entering the system. If substantial reductions are to be made in the number of civil cases entering the court system

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[45] Ibid 55.
[46] Ibid 53.
[47] Ibid 74.
[48] Ibid 109-110.

processes must be developed and employed to encourage settlement of disputes prior to the commencement of legal proceedings." [49]

During 1992 SGIC introduced an informal conference programme, designed to encourage the early settlement of personal injury claims prior to the commencement of litigation. The introduction of the programme replicated a former conference scheme that had operated in 1991, the main purpose of which had been to provide an early conference forum in which plaintiffs could present their detailed claim and receive SGIC's 'final' offer of settlement..Out of the 270 conferences held between the period 8/4/91 - 30/6/91, 57.4% cases settled, 18.1% conferences were adjourned, 9.3% of cases offers remained to be considered and 15.2% matters remained deadlocked. [50]

The above conference scheme was discontinued in 1991, but towards the end of August 1992, another informal conference system was initiated with the major difference being that claims referred to settlement conferences were not limited to matters where legal proceedings had commenced - all SGIC claims were to be considered.

A referral to an informal conference is currently made upon the recommendation of the SGIC clerk in charge of the file which occurs generally at the time that the plaintiff's formulated letter of claim is received by SGIC and before legal proceedings are issued by the plaintiff. The conference is convened, by SGIC with the persons present at such conferences comprising the plaintiff, their solicitor and a representative from SGIC. Attendance by the plaintiff is not compulsory. If litigation has commenced, the defendant's solicitor is also present.

The general procedure at such conferences involves initially the plaintiff's solicitor providing the plaintiff's offer of settlement. SGIC then responds with their offer of

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[49] Attorney-General (S.A.) "Alternative Dispute Resolution" Green Paper (1990) at 24.

[50] Daniel & Brooks, "More Settlements From New Conference Approach" (1991) Vol. 13 No. 8 Law Society Bulletin 11 at 13.

settlement together with an explanation of the reasons for the offer and that the offer expressed by SGIC is their best offer. I was informed that the conference procedure mirrors in effect a pretrial conference without the formality of reporting to a Master. The average length of time for the conduct of such conferences is approximately 30 minutes with the costs to the plaintiff for preparation and attendance at the conference being generally included in SGIC's settlement offer to the plaintiff which incorporates the plaintiff's legal costs.

The average number of cases that are currently being referred to an informal conference on a monthly basis is approximately 100 cases per month. Settlement rates achieved for the month of September, 1992 were 97% and in October, 95%. Cases referred have ranged in vintage from accidents that occurred in 1979 to February 1992. It was expressed that the few cases that did not achieve settlement were because the parties were either not ready to discuss settlement or required further documentation, with very few cases deadlocked.[51]

The high settlement rates demonstrate the importance of a detailed information exchange preceding the settlement process and a willingness to negotiate by both parties. It is considered that these conferences will contribute greatly to reducing court lists and savings in litigation costs where settlement is achieved before litigation is commenced. Even where settlement does not occur, the preparation involved in the process will assist in the necessary interlocutory steps that follow personal injury litigation.[52] The scope for this informal conference process to significantly improve the cost of justice is evident from the fact that a large

[51]The above information was kindly provided by Mr. Galloni, Manager of the Conference Programme, from S.G.I.C.

[52]Eg discovery and the preparation necessary for Rule 46.15 particulars.

proportion of civil disputes involve such personal injury claims, eg 75% of civil matters in the District Court are personal injury claims.[53]

5.6 CONCLUSION

The thrust of the proposed reforms described in Chapter 4 considered ways in which the ADR processes could be reformed to improve both the cost of justice and the quality of the litigation process. A common thread in most of the reforms advocated was the insertion of clarity and uniformity amongst the ADR techniques as to what each dispute resolution process involved. Clarity was considered primarily important to improve the effectiveness of the ADR processes within the courts, since apart from pretrial conferences and conciliation conferences in the Magistrates Court, the remainder of the ADR processes were discovered to not be utilised to their maximum potential. It is advocated that the reforms proposed in chapter 4 will not improve the cost of justice and the quality of the litigation process until the ADR processes are utilised to their maximum potential within each of the courts. Further, ADR cannot be viewed as a singular solution to the cost of justice. ADR reform within the courts cannot assist those who are financially prevented from utilising the courts and who come within the budgetary gaps of legal aid assistance. Reforms such as the Litigation Assistance Fund and the formation of community dispute resolution centres both address such problems of access to justice to persons who are prohibited financially from entering into the court process. It is submitted nevertheless, that the scope for improving the cost of justice by reforming the litigation process is great.

Perhaps the most appropriate way to describe how I consider the ADR processes within the courts should be employed is by the following analogy: It is submitted that when a case commences litigation and enters the dispute resolution workshop of

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[53]Brebner & Foster, "Case and Caseflow Management in the District Court of South Australia", Draft Paper for presentation at the AIJA, 31/10/91 at 5.

the courts, the raw materials of the case should be examined carefully at an early stage, to consider what are the most appropriate dispute resolution tools within the workshop, that will shape the case into a resolution in the most fair and expeditious means possible. Surveying the workshop, the dispute resolution tools that exist are extremely varied. Some of the tools are quite old and appear somewhat rusty (arbitration and referee appraisal for instance), other tools look quite promising but possess no instruction manuals as to how the dispute resolution tool should be used (expert appraisal). The instruction manuals of some tools can be found, but can often be vague and difficult to understand (conciliation). There are also favourite tools that are used frequently in the workshop.(pretrial conferences/conciliation conferences).

The point I am emphasising is that contrary to popular belief, the litigation process offers numerous dispute resolution options to litigants that can be employed both singularly and jointly with adjudication, to shape the most appropriate method of resolving a party's dispute. Perhaps some of the dispute resolution tools need oiling or practice in their use. Other tools may require the redrafting of their instruction manuals, or may be conducive to a little experimentation into different methods of application. Litigants need not however feel limited that it is solely a laborious and costly trial that awaits them. Entry into litigation should be regarded as entering into a continuing dispute resolution process, not simply a preparation for trial. The focus upon the "trial" must be removed from the pretrial process. As advocated by the Senate Committee in the 'Cost of Justice inquiry:

"While pretrial procedures remain directed principally towards the preparation for that hearing. It has been suggested that litigation ought instead to be seen as a process which includes a court hearing only when pretrial procedure has shown that a hearing is inevitable, and sharply defined the issues "[54]

[54]Supra n2 at 3.

The reasoning behind this proposition is self-evident. If it is clearly a recognised fact that approximately 95% of cases commenced in the courts will resolve at varying points of the litigation path prior to a court hearing, the pretrial process must reduce the emphasis that is placed upon preparation for a court trial that in 95% of cases will not eventuate. The nature of the dispute, the attitude of the parties, the relief sought in the claim, the solicitors involved and other variables, will all influence to varying degrees the stage at which settlement will occur.

The greatest scope for improving the cost of justice and the quality of the litigation process lies in reverting from the costly adversarial pretrial process to a litigation process that is shaped into an inquisitorial forum of dispute resolution, that offers at least 95% of cases commenced in the courts the opportunity to utilise expeditious, fair and early dispute resolution processes within the safe workshop of the court system.

APPENDIX A

TABLE 1 ANNUAL NO. OF CLAIMS ISSUED IN THE MAGISTRATES COURT

Period	Small Claims	General Claims
1/7/89-30/6/90	40,083	9,621
1/7/90-30/6/91	41,841	10,654
1/7/91-30/6/92	42,223	10,181

[NOTE: Small claims = claims < $2,000].

TABLE 2 DISPOSITION OF CASES IN THE CIVIL DIVISION OF THE DISTRICT COURT IN 1989 AND 1990.

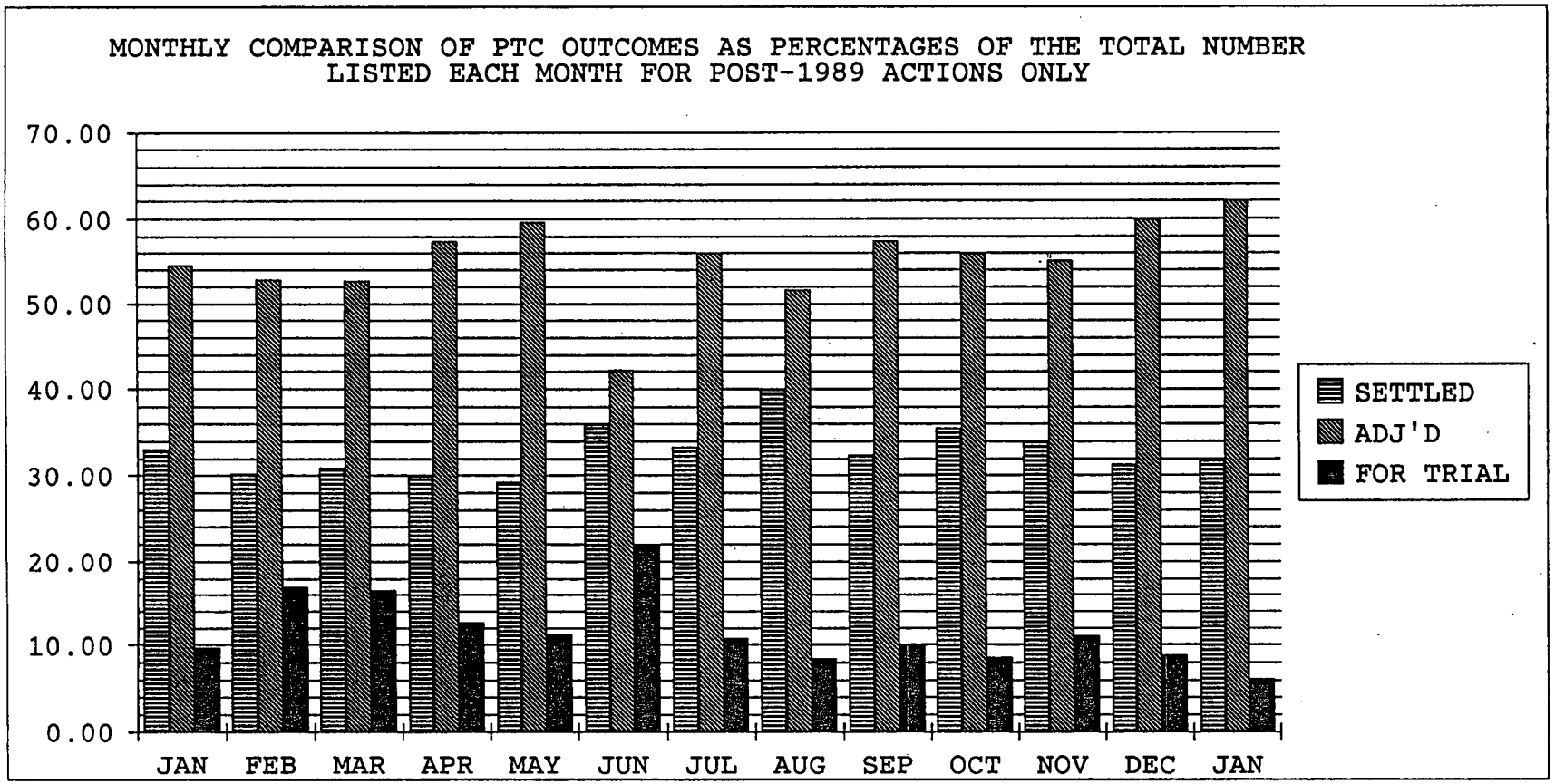
	1989	1990	total	% (actions commenced)
Actions commenced	4990	4272	9262	
Actions listed	3916	4323	8239	89%
Action settled at or before conference	2771	3282	6053	65% (75% actions listed)
Actions settled after conference but before trial	789	694	1483	16% (18% listed)
Actions which proceeded to trial	371	643	1014	11% (12% listed)
Total of trials commenced	371	643	1014	11% (12% listed)
Total tried to judgement	243	425	673	7% (8% listed).

APPENDIX B

TABLE 3 COMPARISON OF MONTHLY OUTCOMES FROM PRETRIAL CONFERENCES DURING 1991 FOR POST-1989 ACTIONS IN THE DISTRICT COURT (expressed as a percentage % of total no. cases listed/month)

MONTH	PERCENTAGE SETTLED	PERCENTAGE LISTED FOR TRIAL
Jan	33.1%	9.38%
Feb	30.0	16.9
Mar	30.6	16.3
Apr	30.0	2.5
May	29.4	10.9
Jun	35.6	21.9
Jul	33.1	10.6
Aug	40.0	8.1
Sep	32.5	10.0
Oct	35.6	8.4
Nov	33.8	10.9
Dec	31.2	8.8
Jan 92	31.9	5.9
AVERAGE	32.8	11.6

DISTRICT COURT



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