Managerial judging and alternative dispute resolution in Australia: an example for South Africa to emulate? (part 1)

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1 *Introduction*

The English common law heritage of the states and territories in Australia (most of which were former British colonies) ensured that these different jurisdictions all embraced the adversarial system of civil litigation.[1] Essentially, this meant that a passive role was accorded to the judge, especially during the pre-trial phase, while the parties, through their lawyers, played an active role during both the pre-trial and trial stages. By virtue of the principle of party control the parties were in charge of preparing their cases for trial and presenting their evidence and arguments at the trial. During the pre-trial phase the judge would react only if a party sought interlocutory relief, and even during the trial the judge assumed the role of a passive arbitrator, only ensuring that the lawyers conducted themselves in a seemly manner and complied with the "rules of the game".[2]

These characteristics of the civil litigation system in Australia became the subject of a reform movement in the 1980s which, over the course of the next 30 years, led to a sea change in the civil procedural landscape. This metamorphosis of civil procedure in Australia was aided by Lord Woolf's famous report entitled *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) and its implementation in the Civil Procedure Rules.[3] The reform of civil procedural law in Australia has manifested itself broadly in the following two closely related developments.

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1 See Carney *The Constitutional Systems of the Australian States and Territories* (2006) 1-2; Bamford and Rankin *Principles of Civil Litigation* (2014) 4-6; Colbran, Spender, Jackson and Douglas *Civil Procedure: Commentary and Materials* (2012) 16-18 and 37-38.

2 See generally Colbran *et al* (n 1) 17-18; Cairns *Australian Civil Procedure* (2016) 54; Andrews *English Civil Procedure: Fundamentals of the New Civil Justice System* (2003) 33-34; Jacob *The Reform of Civil Procedural Law and other Essays in Civil Procedure* (1982) 205; Jolowicz "Some twentieth century developments in Anglo-American civil procedure" 1978 *Anglo-American Law Review* 163 168; Cappelletti and Jolowicz *Public Interest Parties and the Active Role of the Judge in Civil Litigation* (1975) 168 187 191-192; the metaphor "rules of the game" has its origin in the famous speech of Roscoe Pound entitled "The causes of popular dissatisfaction with the administration of justice" originally published in 1906 *American Law Review* 729 and later re-published in 1956 *Baylor Law Review* 1 14-15; the *locus classicus* regarding the role of the judge during the trial is probably *Jones v National Coal Board* 1957 2 QB 55 63-64 where Lord Denning *inter alia* said: "[T]he judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large …. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

3 (1998) – Colbran *et al* (n 1) 51; Bamford and Rankin (n 1) 77.

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First, the principle of party control has been gradually curtailed and qualified by giving the courts greater control over the conduct of litigation by means of their newly acquired case management powers. The second development, closely related to the first, has been a move to minimise the court adjudication of civil cases by diverting them to a process of alternative dispute resolution, such as especially mediation.[4] Under the case management regime, which has been adopted in all the different jurisdictions in Australia,[5] judges have been accorded wide powers to control and manage the proceedings throughout the whole pre-trial phase up to the trial. Even certain facets of the trial became subject to judicial management. The traditional passive judge in the adversarial mould has made way for an active managerial judge firmly in control of the proceedings.[6] The underlying motive for this change of approach was to address the main ills of the traditional adversarial system, namely, delays and concomitant high costs.[7] Coupled with the notion of judicial case management, a new philosophy on the proper role of the courts in the context of dispute resolution has taken root all over Australia. This entailed a shift away from court-based adjudication of civil disputes to alternative dispute resolution methods, such as mediation. To achieve this outcome judges were given the power to order the parties, even against their will, to subject their dispute to mediation.[8] In this context case management and alternative dispute resolution methods therefore go hand in hand. In federal court proceedings parties are even compelled by legislation to make a genuine attempt to resolve the dispute by mediation before they may bring the matter to court.[9]

The notion underlying this relentless drive away from a trial presided by a judge towards alternative dispute resolution methods, especially mediation, is that the courts' resources are limited and costly and should therefore be available to the parties only if all other methods of resolving the dispute have failed.[10] Although this move away from courtroom adjudication and towards embracing alternative dispute resolution methods has been widely supported in Australia by the courts and the wider legal fraternity, some pertinent concerns have been raised in academic writings.[11] These concerns relate to the impact this phenomenon has on the role of the court as a state institute of governance and on the fundamental right of the parties to present their cases to a court for a judicial determination.[12]

To put these developments in proper perspective brief note should be taken of the constitutional dispensation in Australia. The country is a federation consisting of six states and two self-governing territories on the mainland, each having its own

4 Bamford and Rankin (n 1) 9.
5 Colbran *et al* (n 1) 41 *et seq.*
6 This development will be further explored below.
7 Bamford and Rankin (n 1) 74.
8 Colbran *et al* (n 1) 47. This development will also be further considered below.
9 ss 3 and 4 of the Civil Dispute Resolution Act 2011 (Cth); Colbran *et al* (n 1) 124.
10 See generally Colbran *et al* (n 1) ch 3; Bamford and Rankin (n 1) ch 9; Cairns (n 2) 63-64.
11 McIntyre "The implications of judicial theory for civil procedure reform", paper delivered at the Civil Justice Research and Teaching Symposium held at Flinders University, Adelaide on 15 and 16 Febr 2017, refers in this regard to the so-called "vanishing trial" literature, which includes: Kritzer "Disappearing trials? A comparative perspective" 2004 *Journal of Empirical Studies* 735; Ackermann "Vanishing trial, vanishing community? The potential effect of the vanishing trial on America's social capital" 2006 *Journal of Dispute Resolution* 165; and Dingwall and Cloatre "Vanishing trials? An English perspective" 2006 *Journal of Dispute Resolution* 51. McIntyre's paper is yet to be published.
12 *ie* the right of a party to have his or her day in court. These concerns will be further explored below.

legislation governing civil litigation and its own court structure.[13] Therefore, each state or territory has its own executive, legislature and judiciary (at the highest level in the form of a supreme court).[14] Superimposed on the state and territory structures is the federal system, also consisting of an executive, a legislative and a judicial branch.[15] A system of federal courts administers federal laws throughout Australia and at the pinnacle of the country's court structures is the high court of Australia, which is the highest court of appeal for both state and federal matters.[16]

Despite the federal structure of the constitutional dispensation in Australia there is considerable common ground between the states and territories in terms of court structures and legislation governing civil litigation. The common approach to the regulation of civil proceedings is especially evident in two broad areas: first, the legislative provisions and court rules setting out the overarching objects of the rules governing civil litigation and secondly, the legislative provisions and court rules providing for judicial case management and the use of alternative dispute resolution methods.[17]

The aim of this paper is, first, to describe the salient features of the judicial case management system in Australia. Some general observations will be made and the position in England will be briefly sketched, since it provides the background for reforms in Australia. The position in Australia is complex. Although there is a common approach in regulating civil litigation, as mentioned, there are significant differences between the states and territories as regards the detailed rules. Such detail cannot be accommodated within the ambit of this paper. Instead it will focus on the legislative frameworks in only the states of Victoria and Western Australia as typical examples of two different approaches adopted in other jurisdictions across Australia. This will be followed by a discussion of relevant case law. Secondly, the interaction between case management and alternative dispute resolution methods will be explored. This aspect will also be illustrated by reference to the two mentioned jurisdictions and relevant case law. In this context the proper role of the court in the sphere of dispute resolution will be addressed. And in the context of both case management and the use of alternative dispute resolution methods consideration will be given to the impact of these phenomena on the fundamental rights or guarantees of the parties to the proceedings. Finally, the position in South Africa regarding judicial case management and the use of alternative dispute resolution methods will be analysed with a view to assessing whether this country could take any lessons from the Australian experience.

[13] See Carney (n 1) 1 and 393. The six states are New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania while the two territories comprise Australian Capital Territory and Northern Territory.

[14] See generally Carney (n 1) ch 4, 8 and 10.

[15] See generally Carney (n 1) ch 4, 8 and 10.

[16] Bamford and Rankin (n 1) 6-7.

[17] See Willis *Civil Procedure* (2012) 36-45. These topics will be discussed in detail below with reference to further authority.

2 *The salient features of judicial case management in Australia*[18]

2.1 Overarching provisions

In the wake of Lord Woolf's *Access to Justice* report and the introduction of the Civil Procedure Rules in England[19] all jurisdictions in Australia adopted legislation or court rules stating the overarching objects of the rules governing civil litigation and several also imposed overarching obligations on the parties and their lawyers to assist the courts in achieving these goals.[20] These overarching provisions, which constitute the cornerstone of the civil procedural rules,[21] were adopted in England to address the three evils of the traditional adversarial system identified by Lord Woolf, namely high cost, delay and complexity.[22] The key mechanism in Lord Woolf's strategy to achieve the new goals of civil procedure in England was an elaborate system of judicial case management of civil cases.[23] It follows that there is a close link between judicial case management powers and the overriding purposes of the civil procedural rules. It is therefore apposite, first, to give a brief selected overview of the overarching provisions before focusing on the measures dealing specifically with judicial case management powers.

Since developments in England flowing from Lord Woolf's proposals provided a major stimulus for reform in Australia, brief reference to the overarching provisions in the Civil Procedure Rules will provide a fitting backdrop for an exposition of the equivalent measures in some of the Australian jurisdictions. The overriding objective stated in the Civil Procedure Rules is to enable "the court to deal with cases justly".[24] The rule defines the concept "dealing with cases justly" by stating that it "includes, as far as practicable" –

> "(a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate -
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues;

[18] There is an enormous body of literature on judicial case management in the common law world – see *eg* the sources cited in Andrews (n 2) ch 13. The following is a small selection of authorities on the topic in Australia. It does not purport to be exhaustive. See in general Bamford and Rankin (n 1) chapter 4; Colbran *et al* (n 1) ch 2; Willis (n 17) ch 2; Cairns (n 2) ch 2; Hemming and Penovic *Civil Procedure in Australia* (2015) ch 2; Ingleby "Court sponsored mediation: the case against mandatory participation" 1993 *Modern Law Review* 441; Arthur "Does case management undermine the rule of law in the pursuit of access to justice?" 2011 *Journal of Judicial Administration* 240; Rogers "The managerial or interventionist judge" 1993 *Journal of Judicial Administration* 96; Sackville "From access to justice to managing justice: the transformation of the judicial role" 2002 *Journal of Judicial Administration* 5; Lyons "Recasting the landscape of interlocutory applications: *Aon Risk Services Australia Ltd v Australian National University*" 2010 *Sydney Law Review* 549; Tyler and Bornstein "Court referral to ADR: lessons from an intervention order mediation pilot" 2006 *Journal of Judicial Administration* 48; Boniface and Legg " Cost, delay and justice: the high court of Australia recognizes the importance of case management in civil litigation – *Aon Risk Services Australia Limited v Australian National University*" 2009 *Common Law World Review* 157; Martin "Friendly persuasion – how mediation benefits case management" 1996 *Journal of Judicial Administration* 65.

[19] (n 3). Andrews (n 2) 38. By referring to England Wales is also included.

[20] Colbran *et al* (n 1) 51 and 53.

[21] Andrews (n 2) 38.

[22] Andrews (n 2) 31.

[23] Andrews (n 2) 37.

[24] (n 3) part 1, Civil Procedure Rules 1.1(1); Andrews (n 2) 38; Colbran *et al* (n 1) 50.

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.[25]

The rule further imposes an obligation on the court by providing that the 'court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules; or (b) interprets any rule'.[26] Finally, the rule also imposes a duty upon the parties 'to help the court to further the overriding objective'."[27]

It may safely be accepted that in the years following the introduction of the new civil procedural code the overriding objective stated in the Civil Procedure Rules has become the guiding philosophy of the courts. Andrews, in his mammoth work on civil procedure, refers to several decisions showing that courts have not treated the overriding objective of the Civil Procedure Rules as "empty rhetoric". To the contrary, they have resorted to this stated goal in several instances to assist them in resolving the matters at hand.[28] Andrews summarises the task of the courts succinctly:

"'The Overriding Objective' … is a resonant preamble to the procedural code. It requires all case-management and all exercises of judicial discretion in cases covered by the Civil Procedure Rules to be directed at the achievement of justice and its more specific facets, such as efficiency, speediness and proportionality. Similarly, interpretation of the Civil Procedure Rules's rules must also be guided by the same Overriding Objective."[29]

In Australia, as mentioned, some jurisdictions embodied these provisions in newly adopted legislation regulating civil procedure while others introduced these measures by way of new court rules or an amendment of existing court rules. It will suffice for purposes of this discussion to refer to the two focus jurisdictions by way of illustration. Victoria adopted the Civil Procedure Act 2010, which embodies an overarching purpose clause, while Western Australia opted for the incorporation of a new rule setting out the goals of the civil litigation system in this state.

2.1.1 Victoria

The state of Victoria followed the example of New South Wales[30] by adopting a new act, the Civil Procedure Act 2010, to regulate civil litigation.[31] Three aspects of the act are worthy of note. First, it states that the "overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute".[32] Secondly, the act imposes a duty on the court to "seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, …"[33] Finally, the act imposes a lengthy list of overarching obligations on *inter alia* the parties and their lawyers. They have the "paramount duty to the court to further

25 (n 3) Civil Procedure Rules 1.1(2); Andrews (n 2) 38; Colbran *et al* (n 1) 50.
26 (n 3) Civil Procedure Rules 1.2; Andrews (n 2) 38; Colbran *et al* (n 1) 51.
27 (n 3) Civil Procedure Rules 1.3; Andrews (n 2) 38; Colbran *et al* (n 1) 51.
28 (n 2) 5 and 39.
29 (n 2) 38.
30 Civil Procedure Act 2005 (NSW) regulates this state's civil procedure.
31 For an exposition and discussion of this act, see Cairns (n 2) 77-78; Willis (n 17) 36-39 and Hemming and Penovic (n 18) 58-62.
32 part 2.1, s 7(1) of the Civil Procedure Act 2010 (Vic).
33 (n 32) s 8(1).

the administration of justice"[34] and the overarching obligations *inter alia* "to act honestly"[35]; to ensure that "claims have a proper basis"[36]; "to only take steps necessary to facilitate resolution … of a dispute"[37]; "not to mislead or deceive"[38]; "to use reasonable endeavours to resolve a dispute"[39]; "to narrow the issues in dispute if unable to resolve the dispute"[40]; "to ensure that costs are reasonable and proportionate"[41]; and "to minimise delay".[42]

It should be noted that the Victorian supreme court rules also have an overriding objective. They provide that in exercising its powers under the rules the court "must endeavour to ensure that all the questions in the proceeding are effectively, completely, promptly and economically determined".[43]

2.1.2 Western Australia

Civil litigation in the supreme court of Western Australia is still mainly regulated by the Supreme Court Act 1935 and the Rules of the Supreme Court 1971. The supreme court of Western Australia Consolidated Practice Directions fulfil an important supplementary function in regulating civil litigation, including the case management of matters on the commercial and managed cases list.[44] As mentioned, the provisions setting out the main objects of the civil litigation system in Western Australia were not introduced by statute; nor are they framed under the banner of an overarching or overriding purpose. However, in the authors' view a more or less similar result was achieved by adopting new rules and using less dramatic wording. Two rules are pertinent in this context. Order 1.4A, which deals with elimination of delays, states that in all civil proceedings the "processes of the Court shall have as their goal the elimination of any lapse of time from the date of initiation of proceedings to their final determination beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial."[45] Order 1.4B, which governs the use and objects of case-flow management, provides that all civil matters in the court "will, to the extent that the resources of the Court permit, be managed and supervised in accordance with a system of positive case flow management".[46] The rule proceeds by listing certain objects of such case management, which include "promoting the just determination of litigation; … disposing efficiently of the business of the Court; … maximising the efficient use of available judicial and administrative resources; and facilitating the timely disposal of business".[47] The last two objects deal with the notion of proportionality, requiring

[34] s 16.
[35] s 17.
[36] s 18.
[37] s 19.
[38] s 21.
[39] s 22.
[40] s 23.
[41] s 24.
[42] s 25.
[43] r 1.14(1) of the Supreme Court (General Civil Procedure) Rules 2005; see also Cairns (n 2) 113; Hemming and Penovic (n 18) 46.
[44] Hemming and Penovic (n 18) 62.
[45] Rules of the Supreme Court 1971 (WA).
[46] (n 45).
[47] (n 45) o 1 4B (a)-(d).

that the applicable procedure and costs involved are proportionate to the importance of the case and the financial position of the parties.[48]

2.2 Case management powers

Although all jurisdictions in Australia have embraced the notion of judicial case management and adopted broadly similar mechanisms to implement this reform the detail of schemes vary significantly between the different states and territories.[49] The provisions on the court's case management powers are generally elaborate, setting out in minute detail all the powers the judge may exercise in striving to give effect to the overarching goals of the civil litigation system. In this regard the Woolf report and provisions of the Civil Procedure Rules in England also provided an important stimulus for reform in Australia.[50] The details of the English provisions fall outside the ambit of this paper. Suffice it to quote Andrews on the gravamen of the case management system in England:

> "Case-management is a corner-stone of Lord Woolf's procedural reforms. Accordingly it figures large within the Civil Procedure Rules. The essence of case-management is that the judicial system as a whole and the courts in individual cases regulate the content and the progress of litigation either by issuing standard directions or, in more complicated cases, by making *ad hoc* determinations of how the case is to proceed."[51]

In view of the elaborate nature of the provisions dealing with judicial case management powers and the substantial differences in detail between the different jurisdictions in Australia it will suffice again to refer by way of example to the position in Victoria and Western Australia. Only the gist of the provisions will be given.

2.2.1 Victoria

The Civil Procedure Act confers extensive powers on the court to ensure that a civil case is managed in accordance with the overarching purpose; more specifically, a court is empowered to "give any direction or make any order it considers appropriate", including an order or direction "in the interests of the administration of justice or in the public interest".[52] The act proceeds by authorising the court actively to manage a case by *inter alia*: giving directions to ensure that the case is conducted promptly and efficiently; identifying the issues at an early stage in the proceeding; deciding the order in which the issues are to be resolved; controlling the progress of the proceeding; limiting the time for the hearing, which may include limiting the number of witnesses and the time for examination and cross-examination; and considering whether the likely benefits of a particular step in a case justify the cost of taking it.[53] The act confers a number of other specific powers on the court, all aimed at furthering the overarching purpose of the rules governing civil litigation,[54] but in the authors' opinion the extract given above gives a clear enough picture of the

[48] (n 45) o 1 4B (e)-(f).
[49] Hemming and Penovic (n 18) 48.
[50] Hemming and Penovic (n 18) 45-46.
[51] (n 2) 337.
[52] (n 32) s 47(1)(*a*)-(*b*).
[53] (n 32) s 47(3)(*a*)-(*c*) and (*e*)-(*g*); Hemming and Penovic (n 18) 59-60; Cairns (n 2) 115.
[54] See Cairns (n 2) 115.

court's broad case management powers. In essence a judge can give any direction which in his or her view would further the overarching purpose of litigation.

2.2.2 Western Australia

The rules of Western Australia's supreme court deal comprehensively and in great detail with case management.[55] It is stated at the outset that the court is empowered to make any procedural direction, called a case management direction, that in the court's opinion is just to facilitate the attainment of the objects of case management stated in the rules.[56] In essence it is further provided that a judge may at any time require the parties to attend before him or her; the judge may review the progress of the case and make any interlocutory order, case management direction or enforcement order he or she considers just; the judge may direct the parties to comply with a timetable for any necessary procedural step; the judge may direct that a conference be held, which must be attended by the parties and their lawyers; and the judge may inquire into the number of witnesses to be called.[57]

2.3 Case law

Against the background of the legal framework embodying the paramount objectives of the civil justice system and judicial case management powers in the focus states it is now fitting to give a brief survey of a few cases decided under the new regime. Decisions of the high court on these features of the new procedural landscape are of special importance, since the supreme courts and other courts in all the states and territories in Australia are bound by the interpretations and pronouncements of this court.[58] However, decisions of the supreme courts and federal court also have an important impact and will be referred to where relevant.

2.3.1 The high court decision in *Aon Risk Services Australia Ltd v Australian National University*[59]

(a) Background

The *Aon Risk Services* case is no doubt the most important Australian decision on case management in the new millennium and, although it is close to ten years since it was delivered, it is still regarded as the ultimate authority on the subject.[60] The impact of this case must be assessed against the background of the high court decision in *Queensland v JL Holdings Pty Ltd*,[61] which was the leading authority on case management in the late 1990s. On the eve of the decision in the *JL Holdings* case there was debate in judicial circles about the proper role of case management in the civil justice system. Some judges expressed strong support for this notion, indicating that case management principles would often be the "dominant consideration" in considering interlocutory relief.[62] However, other judges had reservations about

[55] (n 45) o 4A.
[56] (n 45) o 4A(2)(1). See par 2.1.2 where these objects are set out.
[57] (n 45) o 4A(5), (6), (7) (19) and (20). See Hemming and Penovic (n 18) 62.
[58] Bamford and Rankin (n 1) 296.
[59] 2009 HCA 27; 2009 CLR 175.
[60] Bamford and Rankin (n 1) 95; Hemming and Penovic (n 18) 71.
[61] 1997 CLR 146; 1997 HCA 1.
[62] See *eg United Motors v Australian Guarantee Corporation* 1991 SASR 156, cited by Bamford and Rankin (n 1) 91.

case management and were concerned about its impact on a party's right to present its case. For example in *Cohen v McWilliam*[63] Priestly JA stated that he knew of no authoritative decision saying that court efficiency should take priority over deciding cases on their merits; the judge added that there was no example of a case where, due to procedural default, a litigant was shut out from litigating an arguable defence.[64] This controversy was laid to rest in the *JL Holdings* case, albeit for only a few years.

In the *JL Holdings* case the defendants, the State of Queensland and South Bank Corporation, sought to amend their defence at a late stage but still some six months before the trial. In the federal court this application was refused on case management grounds and this decision was upheld on appeal by the full federal court. The matter proceeded to the high court, which unanimously reversed that decision. In essence the court endorsed the principles of case management but emphasised that the achievement of justice is the ultimate goal.[65] The majority judgment argued:

> "Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."[66]

The majority further explained that justice is the paramount consideration in determining such an application and that, save for making an adverse cost order against the party seeking the amendment, a party should not be punished for its mistake or its delay in making the application.[67] In their view case management was a relevant consideration *in casu* but "it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties".[68] This decision had an adverse effect on the efficiency of case management systems country-wide and led to frustration among the judicial proponents of this regime.[69] Some judges were arguing that the *JL Holdings* case had "unfairly hamstrung courts"[70] and allowed the parties to reassume the management of litigation.[71]

(b) The *Aon Risk Services* case [72]

In this case the Australian National University instituted proceedings against three insurance companies to indemnify it for loss suffered to its property during the devastating bush fires in Canberra in 2003. In view of the defences raised the university then joined its insurance broker, Aon Risk Services, as a defendant in

63 1995 NSWLR 476.
64 (n 63) 478-479. In the same case Cole JA, on the other hand, embraced the new approach giving priority to case management considerations – 500; cited by Bamford and Rankin (n 1) 91-92.
65 (n 61) 1997 CLR 154-155. See Bamford and Rankin (n 1) 92; Hemming and Penovic (n 18) 65; Colbran *et al* (n 1) 57-59.
66 (n 61) 1997 CLR 154. Kirby J delivered a separate but concurring judgment in which he warned that "a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be solved" – 172.
67 (n 61) 1997 CLR 155.
68 (n 61) 1997 CLR 155.
69 Bamford and Rankin (n 1) 92; Hemming and Penovic (n 18) 71.
70 *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* 2007 FCA 1623 par 3-4, cited by Hemming and Penovic (n 18) 71.
71 *Aberdine Pty Ltd v Vineyard Estate Management Pty Ltd* 2001 SASC 442 par 45, cited by Bamford and Rankin (n 1) 93.
72 (n 59).

the matter. At the commencement of the trial the university settled its claim with the insurers and then applied for a substantial amendment of its statement of claim against Aon Risk Services, accompanied by an adjournment of the trial. Apart from the fact that the application was made at a late stage, without adequate explanation and necessitating a postponement of the trial, the amendment involved new claims against Aon Risk Services not previously raised, apparently for tactical reasons.[73] Despite these adverse factors the application for an amendment and adjournment was granted by the court *a quo* and upheld by the court of appeal on the authority of the *JL Holdings* case.[74] From there the matter proceeded to the high court, which then had the occasion to revisit the controversy surrounding the proper role of judicial case management, *in casu* in the context of the amendment of pleadings.[75]

French CJ, in a separate judgment, pointed out that on the facts the *JL Holdings* case was clearly distinguishable from the *Aon Risk Services* case. The applicant in the *JL Holdings* case had provided a proper explanation for the proposed amendment, the trial date was not affected and the point the applicant sought to raise was already apparent on the face of certain documents, making it unavoidable at the trial.[76] French CJ nevertheless aligned himself with the majority judgment by declining to uphold the authority of the *JL Holdings* case:

> "However, to the extent that the statements about the exercise of the discretion to amend pleadings in [the *JL Holdings* case] suggest that case management considerations and questions of proper use of court resources are to be discounted or given little weight, it should not be regarded as authoritative."[77]

After considering the overarching purpose, provisions and rules dealing with the amendment of pleadings applicable *in casu*, as well as all relevant authorities, French CJ concluded that both courts below failed to give adequate weight to case-management considerations and that the amendment should have been refused. Factors that weighed with French CJ were the fact that the amendment was sought at that late stage for deliberate tactical reasons; that the consequent adjournment caused delay in the proceedings; and that this had a negative impact on the time of the court, which is a publicly funded resource that must be used efficiently.[78]

The majority judgment agreed with this outcome but it was more explicit in denouncing the decision in the *JL Holdings* case.[79] In essence, according to the majority, the new philosophy of case management required a court seized of an interlocutory process not only to consider dispensing justice between the parties, but especially to take into account the interests of other litigants waiting to be heard and the impact of delay in the proceedings upon the court's resources and the proper conduct of its business. In their opinion the decision in the *JL Holdings* case did

[73] (n 59) 2009 HCA 27 par 4.
[74] respectively the supreme court and the appeal court of the Australian Capital Territory – (n 59) 2009 HCA 27 par 3 and 6.
[75] Bamford and Rankin (n 1) 93.
[76] (n 59) 2009 HCA 27 par 28.
[77] (n 59) 2009 HCA 27 par 6.
[78] (n 59) 2009 HCA 27 par 4 and 5.
[79] per Gummow, Hayne, Crennan, Kiefel and Bell JJ. Heydon J delivered a separate concurring judgment in which he castigated all concerned for the way the litigation was conducted. According to Heydon J the case merited a place in the precedent books since it afforded an example of how litigation should not be conducted. The judge added: "The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other" – (n 59) 2009 HCA 27 par 156.

not reflect a proper understanding of these considerations.[80] The majority judgment concluded on this note:

> "An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future."[81]

And it noted for good measure that the days when the preparation for trial was largely in the hands of the parties "are long gone";[82] today it is recognised "that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings".[83]

The impact of the *Aon Risk Services* case upon the conduct of litigation in Australia has been huge. Courts across Australia have embraced the new approach to case management espoused in the *Aon Risk Services* case with enthusiasm and, according to commentators, the case has been applied with "great vigour" in hundreds of cases.[84] In the words of an authoritative source on civil procedure in Australia, the ends of justice in the new era "are not simply considered from the perspective of a party seeking the court's indulgence":

> "The ends of justice encompass justice to the litigants, their opponents, current and prospective litigants who wish to have their proceedings adjudicated by the courts and the general public. Compliance with overriding objectives is not the concern of litigants alone but is essential for the functioning of the justice system in the interests of the public as a whole."[85]

2.3.2 A few other noteworthy cases

(a) *Tobin v Ezekiel*[86]

In the year before the decision in the *Aon Risk Services* case was handed down the supreme court of New South Wales, in *Tobin v Ezekiel*, had the occasion to comment on the proper role of case management, the rights of the parties and the obligations on all the role players in the proceedings. The case concerned a dispute between two brothers and two sisters over the will of their mother. At the stage when the court was approached for interim relief both sides had "already incurred enormous legal

80 (n 59) 2009 HCA 27 par 93 and 95.
81 (n 59) 2009 HCA 27 par 111.
82 *ie* when the principle of party control held sway.
83 (n 59) 2009 HCA 27 par 113.
84 See Bamford and Rankin (n 1) 95; Colbran *et al* (n 1) 64; and Hemming and Penovic (n 18) 71. See *Magi Enterprises Pty Ltd v Luvalot Clothing Pty Ltd* 2017 FCA 340 par 29 for a recent application of the *Aon Risk Services* case by the federal court. The *Aon Risk Services* case has been the subject of numerous academic writings – see the articles on the case cited above (n 18). Most commentators have been in favour of the new approach to case management but some have been more reserved in this regard – see Colbran *et al* (n 1) 66. The authors will make further comments and express their own views in this regard under par 4 below.
85 Hemming and Penovic (n 18) 71.
86 2008 NSWSC 1108.

costs, grossly disproportionate to the amount in dispute and to the issues involved".[87] Palmer J took the parties and their lawyers to task by saying:

> "If a person in full possession of his faculties wishes to expend the whole of his means and substance upon his lawyers, he is free to do so. If both sides to litigation, being in full possession of their faculties, choose to expend their collective assets and means on their lawyers then, likewise, they are free to do so. What they are not free to do is to expend, in the pursuit of their litigious obsession, as much of the Court's resources as they wish.[88] Litigants are entitled to a fair opportunity to present their case; that does not mean that they can take as long as they like in doing so. The judicial time and administrative [*sic*] of this State's courts are strained by the press of litigants seeking to have their cases heard quickly and efficiently. No one litigant has the right to insist that his case will consume as much of the Court's time and resources as his pockets will bear.[89]… The obligation to ensure that litigation is conducted justly, quickly and cheaply is placed equally upon the Court, the litigant and the legal profession …."[90]

In declining the relief sought by the defendants the judge concluded that the court could not, consistently with its obligations, allow the parties "to inflate the trial beyond all sensible proportions in order to vindicate their animosity towards each other, … at the expense of judicial time and resources which should be available to other litigants".[91]

(b) *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited*[92]

In this case, which came before the high court some four years after the *Aon Risk Services* case, the court again had the opportunity to consider the role of case management in the conduct of litigation, albeit in a different context. The issue arose in the context of the discovery of approximately 60 000 documents by Expense Reduction, which was conducted electronically. In the process of discovery the Expense Reduction lawyers inadvertently discovered some documents which were subject to legal professional privilege.[93] When this came to the notice of the Armstrong lawyers they informed the Expense Reduction lawyers and the latter immediately reasserted their clients' privilege and requested the return of the documents in question. However, the Armstrong lawyers adopted the strategy that Expense Reduction had waived its privilege by discovering the said documents. They persisted with this attitude until the matter finally came before the high court.[94] Having referred to the approach of the English courts under the Civil Procedure Rules, the overriding purpose of the Civil Procedure Act,[95] the duties of the parties to civil proceedings[96] and the decision in the *Aon Risk Services* case the high court made these comments:

87 (n 86) par 1.
88 (n 86) par 36.
89 (n 86) par 37.
90 (n 86) par 40.
91 (n 86) par 42.
92 2013 ALR 199; 2013 HCA 46.
93 In New South Wales, where the litigation commenced, it is known as "client legal privilege" – (n 86) par 11.
94 The matter wound its way through the supreme court and court of appeal of New South Wales before landing in the high court – (n 92) par 1-5.
95 (n 30) s 56(1).
96 (n 30) s 56(3).

> "It has been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants."[97]

The court proceeded by stating that in terms of this approach the conduct of litigation is firmly in the hands of the court and that the parties and their lawyers have the duty to assist the court in furthering the overriding purpose of the Civil Procedure Act.[98] In the conduct of litigation "[u]nduly technical and costly disputes about non-essential issues are clearly to be avoided".[99] The court concluded by castigating Armstrong's conduct in these proceedings and ordered the documents in question to be returned to Expense Reduction and Armstrong to pay Expense Reduction's costs in all the proceedings. The following comments are illustrative of the court's stance regarding the conduct of the proceedings:

> "It could hardly be suggested that the pursuit of satellite interlocutory proceedings of the kind here in question in any way fulfils the overriding purpose of the CPA. To the contrary, it is the very kind of conduct which should be avoided if those purposes are to be achieved. It involved a relatively minor issue relating to discovery, the resolution of which appears to have offered little advantage to the Armstrong parties. Its determination went no way towards the resolution of the real issues in dispute between the parties. Instead, it has distracted them from taking steps to a final hearing, encouraged the outlay of considerable expense and squandered the resources of the court."[100]

In the authors' view this judgment is not only an endorsement of the sentiments expressed in the *Aon Risk Services* case but it also provides further justification for judicial case management as the key mechanism to be used in the quest for achieving the overriding objectives of civil procedure in Australia.

(c) *Cement Australia Pty Ltd v Australian Competition and Consumer Commission (ACCC)*[101]

Although the Aon Risk Services case is the unquestionable authority on case management it should not be followed blindly without regard for the peculiar facts of each case. In the authors' opinion this is the *ratio* to be extracted from the *Cement Australia* case. In the latter case the ACCC commenced proceedings in the federal court against Cement Australia for contravention of the Trade Practices Act,[102] which involved the latter's activities relating to the acquisition and supply of fly ash in the building industry. The ACCC pleaded its cause quite widely and Cement Australia replied in a somewhat opaque manner, causing ACCC's lawyers not to fully grasp the nature of Cement Australia's defence.[103] At the commencement of the trial counsel for Cement Australia indicated that its case entailed a narrower ambit than what was alleged by the ACCC, causing surprise on the part of the latter's counsel. Thereupon counsel for the ACCC applied for leave to amend its statement of claim.[104] The court *a quo* granted the amendment and adjourned the trial,

[97] (n 92) par 51.
[98] (n 92) par 56
[99] (n 92) par 57.
[100] (n 92) par 59.
[101] 2010 ALR 147; 2010 FCAFC 101.
[102] 1974 (Cth).
[103] (n 101) par 32.
[104] (n 101) par 7-8.

whereupon Cement Australia took the matter on appeal to the full federal court.[105] Its case on appeal was that the trial judge had erred in not adopting a more rigorous approach to the ACCC's application in accordance with the decision in the *Aon Risk Services* case.[106] In the authors' view the full court responded in a measured manner by carefully considering whether the *Aon Risk Services* case was applicable to the facts *in casu*. Its judgment expressed the following caveat:

> "*Aon Risk* is not a one size fits all case. Whilst various factors are identified in the judgment as relevant to the exercise of discretion, the weight to be given to these factors, individually and in combination, and the outcome of that balancing process, may vary depending on the facts in the individual case. As the plurality in *Aon Risk* observed …, statements made in cases concerning amendment of pleadings are best understood by reference to the circumstances of those cases, even if they are stated in terms of general application."[107]

The court proceeded to note the circumstances under which an amendment was sought in the *Aon Risk Services* case and emphasised that the facts in the case at hand were completely different. *In casu* counsel for the ACCC offered an explanation why they were taken by surprise and why they needed to amend their statement of claim. The trial judge found that this was due to an error of judgment on their part but that this was excusable because the opaque manner in which Cement Australia had pleaded contributed to the problem. In other words, the application to amend was not motivated by a deliberate tactical decision.[108] The full court agreed with this reasoning and also rejected the argument by Cement Australia that the adjournment caused by the amendment should have swayed the trial judge to refuse the ACCC's application. The court reasoned:

> "[T]he objectives in s 37M of the Federal Court Act do not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay, as it inevitably will. Factors such as the nature and importance of the amendment to the party applying cannot be overlooked. There is nothing in *Aon Risk* or s 37M of the Federal Court Act which would suggest that the consideration that it is desirable that the case be decided on its merits, so as to preserve public confidence in the administration of justice, is a consideration irrelevant to the exercise of his discretion."[109]

In view of the conclusion that the *Aon Risk Services* case was distinguishable on the facts and that the amendment was justifiable in the circumstances the appeal was dismissed.[110]

It is submitted that the full court came to the correct conclusion. This result does not mean that the *Cement Australia* case detracts from the authority of the *Aon Risk Services* case. It merely endorses the trite common law maxim that a court is bound by the *ratio* of a higher court's decision only if the facts of the two cases are on par. It is of course true that different judicial minds may come to different conclusions regarding the applicability of a precedent. Another court might therefore have followed a stricter case management-oriented approach and concluded that the *Aon Risk Services* case was applicable. In the authors' view the court in the *Cement Australia* case was correct in adopting a fair and balanced approach, not allowing

[105] (n 101) par 11-12.
[106] (n 101) par 35.
[107] (n 101) par 51. See the comments by Lyons supporting this dictum (n 18) 573.
[108] (n 101) par 32.
[109] (n 101) par 67-68.
[110] (n 101) par 77-78.

case management considerations to blur its vision and lose sight of the rights of the party concerned.

2.4 The future of case management in Australia

In the authors' opinion case management is here to stay. It seems clear, furthermore, that the different case management regimes in the states and territories in Australia will continue to evolve.[111] However, before looking into the future it is proper in the authors' view to raise the question whether all the reforms so far relating to case management have been adopted with due regard to the proper role of the court in the context of dispute resolution and the fundamental rights of litigants. These issues will be addressed under paragraphs 3 and 4 below. As regards the future it seems probable that case management reforms would be extended to cover the trial as well. Bamford and Rankin are to the point:

> "[R]ecently there are signs that the concepts behind case management may extend beyond the pre-trial process, to the trial itself. Increasingly, judges are attempting to deal with issues around the length and cost of trials by influencing the way the trials are conducted. … These changes will undoubtedly be controversial and they need to be accompanied by rational debate based upon sound research. However, the history of the introduction of pre-trial case management does not provide grounds for great optimism that this will occur."[112]

It is submitted that these are valid concerns that should be heeded when the different jurisdictions in Australia embark on further reform relating to case management.[113]

3 *The interaction between judicial case management and alternative dispute resolution methods*

3.1 Legislative framework

In England the Civil Procedure Rules provides for a mechanism to motivate the parties to make use of alternative dispute resolution procedures with a view to settling their dispute. Under the court's managerial powers it has the responsibility *inter alia* to help the parties to settle the case and to encourage them to make use of an alternative dispute resolution procedure if the court considers it appropriate.[114] In addition the court may, if necessary, stay the action *mero motu* to enable such a procedure to be pursued.[115] Andrews has coined this court-inspired use of alternative dispute resolution aptly: "To use the jargon of this field, English procedure has now embraced 'semi-voluntary and court-annexed ADR', that is, that parties can be told by the court to halt litigating and consider mediation or conciliation."[116]

The court's role in persuading the parties may take a robust form but English procedure has stopped short of sanctioning mandatory mediation or other forms of alternative dispute resolution.[117]

[111] Bamford and Rankin (n 1) 97; Colbran *et al* (n 1) 66.
[112] (n 1) 97.
[113] See par 3 and 4 for further comments in this regard.
[114] (n 3) Civil Procedure Rules 1.4(2)(f) and 1.4(2)(e) respectively; Andrews (n 2) 339 and 543.
[115] (n 3) Civil Procedure Rules 3.1(2)(f); Andrews (n 2) 339 and 544.
[116] (n 2) 544.
[117] See further the discussion under par 3.2 below.

On the other hand, as alluded to above,[118] courts across Australia have been given the authority under their case management powers to order the parties to take part in alternative dispute resolution processes, even if they are disinclined to do so. Before discussing the impact of this procedure on the role of the court and the procedural rights of the parties note must be taken of the legislative provisions sanctioning this intervention. Victoria and Western Australia will again be used as examples in this regard. Furthermore, mention has been made above[119] of legislation governing proceedings in the federal court, which require the parties to make a genuine effort to resolve the dispute before approaching the court. The gist of these provisions will also be noted.

3.1.1 Victoria

Under its case management powers a court may encourage the parties *inter alia* to settle the matter and/or to make use of "appropriate dispute resolution".[120] However, a court is also authorised, at any stage of the proceedings, to refer the whole or part of the matter to "appropriate dispute resolution".[121] The act defines appropriate dispute resolution as a process in which the parties participate to negotiate a settlement or to narrow the issues in dispute.[122] Appropriate dispute resolution includes mediation, conciliation and other related dispute resolution methods.[123] In deciding to refer a matter for appropriate dispute resolution the court will determine which specific method is to be used in the case at hand.[124] The court may further make an order to this effect without the consent of the parties, except if the process the parties are ordered to embark upon is arbitration, reference to a special referee, expert determination or more generally, one which may result in a binding outcome.[125]

It seems clear that mediation does not fall under the exceptions requiring consent from the parties. It is further clear in the authors' submission that the court has the power to order the parties to submit themselves to mediation, even if they are disinclined to do so and the likelihood of settling the matter is remote. This form of mediation is referred to as "court-ordered mediation".[126] A provision in the Civil Procedure Act which required the parties to take reasonable steps to resolve the dispute prior to the institution of proceedings[127] has been repealed, thus leaving it to the parties to explore such an outcome on a voluntary basis.[128]

3.1.2 Western Australia

The case management regime under the Rules of the Supreme Court provides for three conferences to be held during the pre-trial phase, namely the status conference, the

[118] (par 1).
[119] (par 1).
[120] (n 32) s 47(3)(d).
[121] s 66 of the Civil Procedure Act (n 32); Cairns (n 2) 114.
[122] (n 32) s 3; Cairns (n 2) 114.
[123] Cairns (n 2) 114. The other methods included are: early neutral evaluation; judicial resolution conference; settlement conference; reference to a special referee; expert determination; and arbitration.
[124] Cairns (n 2) 114.
[125] (n 32) s 66; Cairns (n 2) 114; Colbran *et al* (n 1) 47.
[126] Hemming and Penovic (n 18) 102.
[127] (n 32) s 34.
[128] The Civil Procedure and Legal Profession Amendments Act 2011 (Vic) repealed this requirement; see Hemming and Penovic (n 18) 91.

case evaluation conference and the listing conference.[129] In the authors' view these conferences form the keystone of the case management framework under which the designated case manager or judge exercises his or her wide powers. Beyond the wide case management powers given to the court to control and manage the pre-trial stage of the proceedings,[130] a case manager is also specifically authorised to consider at the status and case evaluation conferences whether a conference of the parties with a mediator is needed and, if so, direct that such a conference be held.[131] It is not specifically stated that such a direction may be given without the consent of the parties, but in the authors' submission the tone of the wording makes it clear that the parties may be compelled to subject themselves to this process. It seems clear further that mediation orders are not confined to the two mentioned conferences but may be given whenever the judicial officer deems it appropriate.[132] This view is borne out by the supreme court's practice directions, which deal comprehensively with mediation.[133] The following directions are to the point:

> "Many cases benefit from early mediation prior to substantial costs being incurred and the parties becoming entrenched in their positions. *The Court will make mediation orders* prior to the filing of pleadings or affidavits in appropriate cases."[134]
>
> "Practitioners should discuss mediation with their client at the commencement of the case and consider whether it should be mediated early. Practitioners will be asked about the suitability of a case for mediation on a regular basis and must be instructed on the point… They must be able to justify a refusal to go to mediation, particularly where the matter is yet to be mediated or, in a case that has previously been mediated, the other side is willing to return to mediation. *Practitioners should bear in mind that, in general, no case will be listed for trial without the mediation process having first been exhausted*."[135]

In line with the rules mentioned above these directions do not state explicitly that the court may order the parties against their will to mediate, but it is also clear in the authors' opinion that compelled mediation is implicit in the wording.[136] It seems evident from the italicised phrases that the court has the power to insist upon mediation until the matter is settled or it is shown that the mediation process has been exhausted. The mediation process of the supreme court of Western Australia may likewise be categorised as "court-ordered mediation".[137] However, it is submitted that the effect of the practice directions quoted above is to provide an additional form of compulsion to mediate, independent of any court order.

3.1.3 The federal court

Civil proceedings in the federal court are subject to a process of legislative "pre-litigation dispute resolution", meaning that the parties are compelled to take

[129] (n 45) o 4A(18), (19) and (20).
[130] See par 2.2.2 above.
[131] (n 45) o 4A(8), (18) and (19).
[132] See *eg* (n 45) o 4A(2), which authorises the judge at the listing conference to "make any case management direction the judge considers just"; see also o 4A(7) and (8) which deal generally with the power to direct a conference with a mediator to be held.
[133] Supreme Court of Western Australia Consolidated Practice Direction 4.2
[134] (n 133) 4.2.1(7); own emphasis.
[135] (n 133) 4.2.1(8); own emphasis.
[136] See also s 69 of the Supreme Court Act 1935 (WA) that provides for a "mediation under direction" order; see further Hemming and Penovic (n 18) 108.
[137] See Hemming and Penovic (n 18) 102-103.

"genuine steps to resolve a dispute" prior to the institution of such proceedings.[138] Such steps include negotiation and other alternative dispute resolution processes facilitated by a third person aimed at resolving the dispute.[139] In order to ensure that the parties comply with this requirement each party is required to file a "genuine steps statement" specifying the steps that have been taken with a view to resolving the dispute; the applicant must do so at the time of filing his or her application and the respondent must respond before the hearing date.[140] Over and above these measures the parties are required, as early as practicable after commencement of proceedings, to consider alternative dispute resolution, including mediation, to resolve the dispute[141] and in addition the court may by order refer the matter to a mediator for mediation without the parties' consent.[142]

The federal court legislative provisions, which target both the stages prior to and after commencement of proceedings, appear in the authors' view to embody a more rigorous regime aimed at compelling the parties to make genuine attempts to resolve the dispute out of court, if not before trial then as early as possible after institution of proceedings. The purpose of these provisions has been described as follows:

> "The aims of this legislation are to change the adversarial culture often associated with disputes; to focus on resolution before parties become entrenched in litigation; and to ensure that, where disputes proceed to court, the issues are properly identified, ultimately reducing the time required for the court to determine the matter."[143]

3.2 The impact of alternative dispute resolution methods on the role of the court in dispute resolution

Research has shown that by far most actions that have been instituted are subsequently resolved by means of negotiation or mediation, thus obviating trials to bring matters to finality.[144] Another interesting phenomenon is that there has been a general decline in the number of actions instituted across Australia in recent years. There may be a number of reasons for this development, including increased use of alternative dispute resolution methods, instead of court adjudication, but reliable data to determine the exact causes is lacking.[145] Be that as it may, the reality is that fewer disputes than in the past proceed to trial and are resolved by judicial determination, because they are settled either before proceedings commence or during the pre-trial phase. According to commentators this transformation in the dispute resolution landscape over the past 20 years was caused by a change in the mind-set of all role-players, namely the courts, law reformers and the legal fraternity as a whole.[146] Instead of steering towards litigation and finally a trial to obtain a judicial determination, as in the past, the focus is now on finding ways to

[138] s 4(1A) of the Civil Dispute Resolution Act 2011 (Cth); Hemming and Penovic (n 18) 89-90.
[139] (n 138) s 4(1).
[140] (n 138) s 6(1) and (2).
[141] r 28(1) of the Federal Court Rules 2011; Cairns (n 2) 71.
[142] See s 53(1) and (1A) of the Federal Court of Australia Act 1976 (Cth); (n 141) r 28(2) authorises the court to refer the dispute to mediation or arbitration, but in the latter case the parties' consent is required.
[143] Hemming and Penovic (n 18) 89. The authors further point out that this legislation drew on the recommendations of the National Alternative Dispute Resolution Council (NADRAC) in its report entitled "The resolve to resolve: embracing ADR to improve access to justice in the federal jurisdiction" (89).
[144] See Colbran *et al* (n 1) 72.
[145] Bamford and Rankin (n 1) 16-23.
[146] Colbran *et al* (n 1) 72.

resolve the dispute, either before instituting proceedings or, if that fails, then as soon as practicable thereafter.[147]

Before dealing with the impact of this development on the role of the court it should be noted that alternative dispute resolution methods, such as mediation, have been part of litigation systems across the common law world for a number of decades. Such methods were initially regarded as an acceptable means, supplementary to courtroom adjudication, of resolving disputes. In a broad sense alternative dispute resolution was also seen as an alternative mechanism to provide justice to the parties. As such it formed part of the world-wide access to justice movement of the 1970s and 1980s, which drew its inspiration from Cappelletti, an eminent procedural scholar and fountainhead of the seminal studies entitled *Access to Justice*.[148] In the authors' opinion the promotion of alternative dispute resolution methods to supplement court adjudication processes is a cause worthy of support. The parties, assisted by their lawyers, certainly know what would be a satisfactory outcome for them, taking into account that concessions would have to be made in an alternative dispute resolution process, such as mediation. Therefore, if the parties proceed on a voluntary basis to resolve their dispute by means of an alternative dispute resolution process and succeed, the outcome should be accepted as fair and legitimate. Such a process has the added advantage of relieving court congestion and avoiding the emotional stress and cost involved in litigation.[149]

However, as alluded to above, alternative dispute resolution is no longer regarded as a process to supplement courtroom adjudication. The shift from trial adjudication to alternative dispute resolution processes has transformed the latter into the main focus in the litigation system. The issue calling for consideration is how increased use of alternative dispute resolution processes, aided by mandatory mediation, has affected the role of the court in the context of dispute resolution. For the purposes of this discussion the focus will fall mainly on mediation.

Broadly speaking the proponents of mediation argue that this process is generally quicker, cheaper, more flexible and less stressful than litigation.[150] It is therefore seen by some as a panacea to address the main ills of litigation.[151] The apparent advantages of mediation are very much aligned with the overarching objectives of civil procedure generally,[152] which is why, in the authors' view, judges adopted a robust approach to persuade and, if appropriate, order the parties to proceed to mediation. Alternative dispute resolution and case management are therefore entwined, as Hemming and Penovic explain:

> "Within the panoply of case management powers is the power to refer proceedings to ADR. Parties are increasingly expected to attempt to resolve disputes prior to resorting to litigation and managerial judges are engaged in encouraging parties to resolve disputes. Case management is

[147] Colbran *et al* (n 1) 72.

[148] The promotion of alternative dispute resolution was described as the 'third wave" in the access to justice project – Storme and Carpi (eds) *In Honorem Mauro Cappelletti* (2005) 11. On the place of alternative dispute resolution in the context of the access to justice project and the seminal role of Cappelletti in this context, see Cappelletti and Garth (eds) I *Access to Justice: A World Survey* (1978) part 1, par IV, especially 59-65; Kollmer and Olson (eds) *Mauro Cappelletti The Judicial Process in Comparative Perspective* (1989) v-vii;

[149] See Willis (n 17) 45; Pretorius (ed) *Dispute Resolution* (1993) 2.

[150] Willis (n 17) 56 and 411-412; Bamford and Rankin (n 1) 213.

[151] Bamford and Rankin (n 1) 213. These authors make a statement to that effect but they do not state it as their view. Also see Martin (n 18) 79.

[152] See par 2.1 above.

> becoming imbued with the processes of ADR and shares a common aim of promoting the efficient and cost-effective resolution of disputes."[153]

Since alternative dispute resolution processes have become the main focus of litigation systems it has even been argued by some commentators that the term "alternative dispute resolution" has become inappropriate because it suggests that litigation is the norm in the context of dispute resolution while other processes are alternatives to the norm.[154] Such a view is out of touch with reality, as Hemming and Penovic again explain: "The reality that these non-litigious means may provide a more effective and efficient means of resolving some disputes has resulted in the use of the term 'appropriate dispute resolution' which remains within the existing acronym of ADR."[155]

It has also been argued that the assumption underlying the alternative dispute resolution model is "that the legal system must ration access to adjudication in the civil courts"; and that it "is very much in the public interest" to provide a mechanism to the parties which enables them to achieve a consensual resolution of their dispute.[156] In an article dealing with case management and the rule of law Arthur raised the question whether settlement processes have a negative impact on the rule of law and expressed this view:

> "Neither the rejection of the merits of the case approach to justice, nor the contemporary emphasis on settlement as the primary dispute resolution process, compromises the rule of law. In the context of adjudication, the rule of law demands fair and transparent procedures which primarily focus on establishing the correct facts …. Adjudication of the merits is not synonymous with unrestrained adversarial practice. The replacement of adversarial litigation culture with a culture based on a cooperative ethos is likely to reduce the gap between the presentation of an arguable case with the efficient administration of justice."[157]

Although the judges, law reformers and commentators championing alternative dispute resolution processes, such as mediation, appear to dominate the litigation landscape, some critical questions, focusing on the proper role of the court in the context of dispute resolution, have been raised in Australia in recent times. As mentioned, the authors support the idea of voluntary mediation as a dispute resolution method supplementary to courtroom adjudication. However, in their view mandatory mediation and the present-day relentless drive to replace trials with mediation cannot be supported. Bamford and Rankin's critical comments are to the point:

> "There are significant questions associated with the move away from adjudicating cases in open court toward an emphasis on pre-trial settlement. If the common law is developed through court decisions, will reducing the opportunity for adjudication affect the evolution of the common law?"[158]

In the authors' opinion this is the crux of the matter. Apart from the fact that the common law was shaped over centuries by many court decisions it still evolves every time a court resolves a dispute by means of a judicial determination. In other words, the law is adapted or expanded to be made applicable to the facts found in the case at hand. Furthermore, every time the court interprets a statutory provision

[153] (n 18) 88.
[154] Hemming and Penovic (n 18) 73.
[155] Hemming and Penovic (n 18) 73. This is the term adopted in Victoria – see par 3.1.1 above.
[156] Andrews (n 2) 211 quoting *Naylor v Preston Area Health Authority* 1987 1 WLR (CA) 958 967-968.
[157] (n 18) 247.
[158] (n 1) 10.

or court rule in a certain way and applies it in a case it constitutes a precedent to be followed in future. In a recent paper, yet unpublished, McIntyre[159] argues persuasively that the court is an institution of governance and in that capacity it performs an important "social governance role" in society by interacting with the other two branches of government and by interpreting and applying rules to factual situations. The close link between the judicial authority and the other branches of government is, for example, illustrated by the fact that the court's decisions are enforceable through other state organs. McIntyre shows further that a court's decision in interpreting and applying a rule may: reinforce the rule; increase the predictability of the rule; maintain coherence between rules; and alter the substance of a rule. The authors fully align themselves with this argument. The court's role in the context of dispute resolution is crucial for the continuing evolution of the common law. This is the judiciary's core function and courts should not dilute this essential role by relentlessly directing cases from the courtroom to mediation. If this move away from courtroom adjudication continues unabated it may, in the authors' view, hamper the continuing evolution of the law by the courts. McIntyre refers to the minute number of cases making it to a judicial determination and states aptly: "If the underlying issue is that litigation is too expensive and too slow, civil justice reforms must make litigation more common, more affordable, faster and more efficient."[160] Genn also advanced a powerful argument against the excessive use of alternative dispute resolution in England, emphasising the important public role of the courts in civil dispute resolution.[161] The author argued: "The formal promotion of mediation as a central element in the new civil justice system trivialised civil disputes that involve legal rights and entitlements and redefined judicial determination as a failure of the justice system rather than as its heart and essential purpose."[162]

Genn concluded by saying that we are not only "losing the courts and access to them" but also "the language of justice in relation to a very wide range of issues affecting the lives of citizens".[163] The authors also endorse these sentiments.

[to be concluded]

[159] (n 11) part II of paper.
[160] (n 11) part I of paper.
[161] "What is civil justice for? Reform, alternative dispute resolution and access to justice" 2012 *Yale Journal of Law & the Humanities* 397; see also Hemming and Penovic (n 18) 101-102.
[162] Genn (n 161) 409; Hemming and Penovic (n 18) 102.
[163] Genn (n 161) 417; Hemming and Penovic (n 18)102.