C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into alternative dispute resolution

Melbourne — 10 December 2007

Members

Mr C. Brooks
Mr R. Clark
Mr L. Donnellan
Mr M. Foley
Mrs J. Kronberg
Mr E. O'Donohue
Mr J. Scheffer

Chair: Mr J. Scheffer
Deputy Chair: Mr R. Clark

Staff

Executive Officer: Ms K. Riseley
Research Officers: Ms K. Buchanan and Ms S. Brent
Committee Administration Officer: Ms H. Ross-Soden

Witnesses

Judge S. Davis, and

Judge M. Kennedy, County Court of Victoria.

The CHAIR — Welcome. I have a preliminary statement, which you probably do not need explained to you, but I am obliged to do so. The discussion we have here this morning is subject to parliamentary privilege, so all the benefits of that accrue to our discussion. Also, Hansard will be recording the discussion and you will be sent a copy of the transcript. This is pretty informal. We will give you an opportunity to talk about the submission you have made on the terms of reference. Then we will flesh out any details in questions. Does that suit you?

Judge DAVIS — That is fine. I might lead off, then, if that is all right, because I am the architect of the submission.

The CHAIR — Yes.

Judge DAVIS — Obviously your inquiry is very far reaching. We were able to contribute only that which was relevant to the County Court, but I think I have addressed those issues. We are of course very pleased to answer any questions you have.

I will just outline briefly what we have been doing in the past year in terms of trying to drive a cultural change within the court, which has involved and will involve substantial importance being placed on alternative dispute resolution mechanisms. The driver has been our objective of achieving low-cost, expeditious resolution of cases, consistent with the rights of justice. Obviously alternative dispute resolution mechanisms have a very substantial role to play in achieving that objective.

We have made a number of administrative changes in the way that we manage our respective lists in the civil jurisdiction, which have accomplished a number of efficiencies, but which probably do not really concern you and are not of interest to you, but they are part of the overall concern that we have to do whatever we can within the administrative procedures of the court to enhance speedy resolution to avoid interlocutory disputes and to list matters as efficiently as possible without requiring parties to attend et cetera.

The other aspect of that has been to try to identify kinds of cases which would be amenable to particular kinds of alternative dispute resolution. Virtually all cases in the civil jurisdiction are sent by the court to mediation — they are all referred to mediation, usually about three months prior to trial. Of course the mediation is not conducted by the court; it is conducted externally to the court, usually by mediators chosen by the parties. You are probably aware that generally 70 to 80 per cent of cases in the civil jurisdiction would settle any way prior to trial. Obviously trying to identify at what point mediation would assist in the resolution of matters and to what extent mediation is a useful catalyst — —

The CHAIR — These referrals are part of the 30 per cent, are they?

Judge DAVIS — No. One hundred per cent of our civil cases are referred to mediation. On the commercial side I think there may be slight differences.

Judge KENNEDY — Yes.

Judge DAVIS — Maree will address those. Certainly in the damages list and also civil cases are listed for mediation. It is part of the standard orders we make when we timetable a matter. Obviously if the parties have a view about the timing of the mediation, they will let us know, but generally it is after a first exchange of material, so the parties can understand each other's position, and about three months prior to the trial date. Interestingly, there is not too much empirical research to identify the optimum time for a mediation to be scheduled in the life of a proceeding.

Tania Sourdin, the professor who is currently involved in that research project which I know you have some questions about and which I am involved with as the liaison person for the County Court, says that at the moment the research identifies that that is probably not a bad time in the life of a proceeding to actually conduct a mediation. The research project itself will be looking more specifically at mediation by itself. Mediation is something that we already have included in part of our case management processes.

Case conferencing, which Judge Kennedy will address you on more specifically, has taken off in a very tangible way in the commercial areas. We are talking to the stakeholders in the various kinds of cases that we do about the possibility of introducing case conferencing in certain classes of cases where we think it might be particularly useful. That might be only one of a number of case conferencing mechanisms.

You would understand, of course, that with limited judicial resources the kinds of ADR that we might like to implement are probably well beyond the resources we have in terms of being able to find judges, to take them out of court to actually be involved in all the ADR processes. It may be that with greater resources we would have more flexibility to use panels of perhaps sessional people specifically to conduct possibly case conferences or mediations in certain classes of matters which might not require the intervention of a judge but might benefit from the case conference mechanism.

We have identified classes of cases which we are hoping to use ADR more aggressively for. One of those classes of cases is the de facto domestic property disputes area, where there are fixed pools of resources and we feel an adversarial litigation process is not really in the interests of the parties. That probably dovetails with your concern about restorative justice and how it is that persons who have grievances might benefit from resolution techniques other than by a court hearing and determination. There are always some cases where the day in court will be acceptable to the parties, but sometimes merely having a judicial officer present to conduct a case conference is almost the equivalent.

You speak directly to the parties, you do not have the interference of their lawyers and they can get a sense that they have been heard. Sometimes that will be sufficient, but we will have to work carefully to identify whether it is possible within our current resource framework to actually divert judges out of court to do those case conferences. That is one class of cases that we have already identified as potentially being able to benefit. There are a number of others and that is what we are working to identify.

We are working closely with the team that is conducting the mediation research project. That project really focuses on trying to assess the usefulness of the mediation data that is currently collected by the courts. We have conceded that the data collection mechanism is actually almost non-existent because the existing computer facilities that we have do not pick up this data.

Part of the objective of the project will be to generate a proper system for effectively collecting data on the successful results of mediations. Currently most mediators will send in a report after mediation, if it settles, letting us know. The difficulty at the moment is that our current processes do not pick that up and store it anywhere so that we can use that for statistical purposes. That is one of the things that the project is looking at doing for us, giving us a pilot for an appropriate system of information collection.

Then they are going to dig deep into the mediations that have been conducted to see what were the factors that made them successful. They will do that by the usual processes that they use — interviews and contacting the parties et cetera, discussions with the mediator. That is currently at its first stage: we have had a number of discussions, the tender has been granted, and Professor Sourdin is currently making a few visits to the court with her team to have a look at the data that we do collect. The next stage will be to get ethics approval for it, but we are meeting every few weeks or every month or so.

The CHAIR — Is the methodology still under development or has that been settled and now it is — —

Judge DAVIS — It has not been settled because it is part of what we think the project should be doing, to give us the methodology. That is one of the things that we are trying to get them to focus on — working out how to create a methodology by which we can keep this data for future. Until now the data collection method has been ad hoc and it is not picked up in the stats. That is very poor, it is worse than useless to us all.

We do not say that that reflects poorly on the usefulness of mediation as a process, because the fact is that they are two separate things. But we are very keen to acquire a tool for collecting this data so that we can use it effectively for projections. They are supposed to be trying to do both things but they feel, quite reasonably, that there is no way of doing that without drilling down into some of the existing cases to then pick up a profile of them and do their demographic study et cetera. I think they are going to be concentrating on a selection of commercial cases and possibly damages cases to see. That is where the project is at. It is progressing and the court is cooperating very enthusiastically with that.

I do not want to take up too much more time. From what I have said and possibly what you have read, we are actively trying to identify all the areas in which we can use alternative dispute resolution techniques to improve the way in which we collect data on the use of mediation in particular. We probably will then of course have to flag just how much extra we can introduce with the existing pool of judicial resources.

I would like to hopefully explore the possibility of using extra judicial resources to help take up that slack, because I think there are lots of things that the court could do in addition to what it is currently doing, but of course it is all dependent on being able to get the resources to do it. I think that I will leave Judge Kennedy then to talk to you about commercial cases.

Judge KENNEDY — As Judge Davis says, I have been involved with the commercial litigation court with Judge Anderson. In terms of alternative dispute resolution, what we do in the commercial area is generally always require parties to have a mediation or what is called a case management conference. That is something Judge Anderson piloted just before my commencement at the court earlier this year, and I have been running them and he has been running them all this year; I think he actually started at the end of last year. Essentially, as best we can determine, the case management conference is having quite good results. Just from some informal statistics, if we measure results by settlement, it is looking as though about 60 per cent or so are settling. That does not really count the ones that might settle subsequently, which of course we do not really see.

The case management conference gets ordered on the papers or else at a directions hearing. Essentially there are two purposes to it. It is not just to settle, although that is obviously a goal that we have through the process. The other thing it seeks to do is if we have some of the harder commercial matters — when I say 'harder' I mean ones that might be getting bogged down in terms of unnecessary interlocutory disputes — we use the case management conference as a methodology for bringing the parties in and trying to get the matter on track and get it on for trial. There are those two objectives, if you like, with a case management conference. We try and refine the issues through the use of a judge with some experience in commercial matters so that we stop the parties perhaps going down some rabbit holes that we do not want them going down.

In terms of getting the matter for a case conference, directions always include an order that the parties actually attend themselves, not just through lawyers. If it is a corporate entity, a person with authority to settle the case attends. That seems to be quite a pivotal part of why I think the process is generally a successful process. You have someone there who not only stands to be affected by the case but both parties have to sit there, as it were, and listen to the other side of the case, not necessarily sanitised through their own lawyers — not that I am saying lawyers necessarily do that but obviously to have that, as it were, from the horse's mouth and to have both parties present and having to see that the other side does have another side seems to be quite important from my experience of this process.

We also ask them to deliver a short position paper — two to three pages is what we require. We may even sometimes ask for a short affidavit, and we may ask for witnesses to attend. If we have a big expert case, we have ordered experts to attend and we have done what you might have heard of as 'hot tubbed' the experts — they are present in the case conference. We have used that process. It is an expression, 'the hot tub', that the Federal Court has tended to use, if you have heard that before. It just means you have them both there, you have a judge asking them directly questions to try to get to the heart of it, and both experts are there for you to actually ask them the direct questions. That has worked quite well.

It is conducted by a judge in open court, which sometimes people think sounds a little bit odd. But in my experience so far that works perfectly fine. The opening part of it tends to be a bit like the joint session of a mediation. Obviously it is in open court so people at that point do not tend to say without prejudice things but my experience, for what it is worth being a barrister for many years, was in the joint session of a mediation people were not really coming forth with many weaknesses anyway, they will tend to try and lead with their strengths. You then have both of us, with some degree of commercial experience, trying to delineate the issues a little more. It has got some lack of formality with it that would not necessarily be present in a trial. You try and work out where the issues are, where the weaknesses are. Obviously if you express any views that get too close to the bone, as it were, we always offer if it is me that Judge Anderson will hear the trial if we get too far into it and vice versa. So far that has not been an issue.

In terms of the without prejudice part of it, we then will stand the matter down for both sides to talk to each other. I will always ask them to give their clients a best-case and worst-case scenario in terms of dollars and cents so I am satisfied that people are understanding of what the costs of a trial will be, both emotionally and monetarily. We talk about all of those kinds of issues. We tend to the call matter on and off throughout the course of the day if it takes all day, and some of them do take all day, particularly complicated ones. As I say, by and large it has been a good outcome. They do not all settle, but even the ones that do not settle at least seem to get back on track as it were, and

get on expeditiously. It is relatively cheap for the parties in the sense that you do not have that private mediator, although as Judge Davis highlighted you are using a judicial resource from a court's perspective.

I think the fact that you have the involvement of judges — as best as I can see — does assist because the parties there can see a judge asking questions and perhaps highlighting weaknesses and strengths, and a judge who has some experience of commercial matters. I think the other aspect that has proved to be helpful is this thing that the parties have to hear the other side of the story through the other party. So far so good. There have been pleasing results, and we are certainly using that process throughout next year.

The CHAIR — After that conferencing

Judge KENNEDY — Yes.

The CHAIR — Which is issues clarification and some sort of system for getting back on track that you are describing?

Judge KENNEDY — Yes.

The CHAIR — Where it is not successful and there is no settlement?

Judge KENNEDY — Not settlement, yes.

The CHAIR — Could you just step us through what happens then?

Judge KENNEDY — What happens then is that we will set down some directions to get into for trial. If, for example, there has been some problem with documents or whatever we will make orders about who needs to give what to whom. We will make orders about what needs to happen to get the matter on for trial and we will set a trial date if a trial date has not already been set. Quite often in our court we are very quick to set trial dates because we find that making people work towards a trial date has the effect of concentrating the mind. We are pretty expeditious about our trial dates. But if for some reason a trial date has gone off the rails, we will set it down at a case conference for a trial date, and set down whatever steps we think are needed to make sure that a trial happens, or at least steps towards a trial happen, because very often cases still settle at the court door from there.

Judge DAVIS — I should say that everything Judge Anderson and I, and Judge Higgins and Judge Holt, are doing on the administrative side to make the system more streamlined to get cases listed for hearing in an efficient fashion, has all been coordinated. Our practice notes are effectively almost mirror images — —

Judge KENNEDY — Similar.

Judge DAVIS — Of one another; they are very similar because we are trying to drive the parties not to take interlocutory points. We do not do directions hearings unless the issue in dispute has first been attempted to be resolved between the parties, and we demand that they give an account of how they have attempted to resolve it before we simply list a matter for a contested directions hearing. We have found that over the course of this year, in fact, we have managed to drive away a lot of the interlocutory snarling that is very costly to the parties. We are sort of monitoring this as a team to try — —

Judge KENNEDY — It's the administrative system.

Judge DAVIS — Yes, but also just the practice notes. We have been watching what the Federal Court has been doing, and in terms of discovery, for example, which used to be a much vexed area of interlocutory stoushing at the court — which is a terrible time waster and a terrible consumer of resources — basically we have almost adopted Justice Finkelstein's rocket-docket kind of approach discovery which is, 'What is fair for other parties to see is what ultimately would be ordered, and therefore go and provide it anyway and do not come to court fighting about it'. That has proved to be very effective at sending people away because now as part of our standard consent orders when we timetable those discovery orders, if discovery is sought or made on the papers, usually by consent, we have very few arguments now about discovery and interrogatories whereas in previous years the practice court and the directions court — —

Judge KENNEDY — Were inundated.

Judge DAVIS — They were just clogged with these stoushes about, 'I don't want to answer interrogatory 21'. 'Well, don't answer it, give them an explanation that tells them why it is vexatious and see if they press the point'. But you would have people coming to the court almost without having had a conversation, and you would have to say, 'Why haven't you discussed this? You are the litigators. You are being paid by your clients. Why are you wasting their money arguing about this when you could resolve it?'.

That approach has really driven some of the responsibility back onto the profession which I think is where it should lie. It has also meant that we do not contribute to the winding up of costs in a proceeding, but to the contrary we are very controlling now about when we will give directions. Even if directions are requested we will often drive the parties back saying, 'Explain why you want it. Explain what you have done to attempt to resolve it. Explain what really needs to be resolved, and why it is that you as a litigator cannot resolve it'. We do this before we will give a directions hearing for an interlocutory matter. That has worked very well. They are also measures which are obviously designed to drive down costs. Of course, they are not ADR mechanisms, but effectively they are driving people out of the face of the court where it is costly to be into processes which are more streamlined which naturally require them to either think carefully or to get their lawyers to do more work appropriately for them.

The CHAIR — One of the issues that has been raised with us this morning by the Victorian Bar and the Law Institute of Victoria has been the importance in their view of not having judicial officers involved in the ADR process — the separation.

Mr CLARK — I think it is fair to say mediation.

Judge KENNEDY — Mediation is the bugbear.

Judge DAVIS — We understand that.

The CHAIR — Mediation, yes. We are talking to the Supreme Court later, and it has an involvement in that. Given what you said about case conferencing and so forth, can you just talk a bit about how the County Court sees that particular issue?

Judge DAVIS — The philosophical barrier to mediation by judicial officers is the obvious one. Private sessions with a judge with one party is inimicable really to the open justice framework in which adversarial litigation is conducted. I think perhaps the concern of the bar, and perhaps some judges, is that even by engaging in that process would serve to undermine the view that the publicly rightly holds that judges must be impartial at all times.

In mediation you run between the parties in private session. A compulsory conference conducted in open court does not raise those problems, and that is why we are all very comfortable with that because it does not raise those threshold issues. Also, of course, mediation needs to be conducted by people who are highly trained. With the greatest of respect to all our colleagues some of us are trained mediators. I am, and Judge Kennedy may be, but I would not regard myself as an expert mediator; it is a different kind of activity. If you are going to contemplate going past the philosophical hurdle you still have to deal with all the other down-the-line issues.

I think the philosophical issue is a very important one because when you deal with the parties in open court and you allow them to bounce off each other and you give them gentle indications of what the strengths and weaknesses might be, it is a very different thing from being the go-between and the messenger where they do not see what it is that you have been told, and they do not see what it is that you are taking back to the other side. It may well be that a lot of the concerns are around judges stepping into that role, because it contradicts directly that open-justice image that the public thinks that judges fulfil. One can be too precious about this, obviously. At VCAT, for example, although they are not judges, members mediate regularly. I used to run a couple of the lists at VCAT and conduct mediations, and that issue was never raised. It may well be that there is too much concern, and that it is possible to simply get over that by education or by a process of cultural awareness that it may not be inimical to what the courts do in open court to have judges mediating, but there might be a lot of reservations from the court.

I certainly do not speak for the court in saying that there would not be such reservations; I would have to have more discussions with the chief judge. At this point in time it has not been flagged that judges themselves would be conducting mediations, but no doubt if we move down the track in looking at ADR mechanisms, that is a question which arises. It may be possible, of course, for the court to auspice mediation, but there really is not much point in

just locating a mediation inside the court unless either a judge or some registrar does not conduct them. The Supreme Court has the advantage, of course, of having a master — who is it? Master Efthim?

Judge KENNEDY — Yes.

Judge DAVIS — The job was created for him because of his expertise, so the cart followed the horse, in a sense — because he was there and he had such expertise it was thought how to harness this expertise, so they put him in that role — but the point is that that role does not exist necessarily elsewhere. If you were going to create it, you would have to think carefully about what you are creating. The idea of just having registrars who conduct mediations may be a good thing. It needs to be done in a particular way, probably to stop it from becoming a perfunctory role.

Judge KENNEDY — Yes.

Judge DAVIS — The Magistrates' Court used to have a lot of those compulsory conferences, didn't they?

Judge KENNEDY — Yes.

Judge DAVIS — They became just, you know — you would walk in, you would sit down and the registrar might say to you, 'Do you think you are going to settle?' — 'No.' — 'Thanks very much for coming', and off you would go. If you are having that kind of perfunctory interaction, then it is not really worth much, and you do not necessarily stand to gain much. I can understand the reservations. In the Supreme Court they have judges conducting them at the moment, do they? I am not sure.

The CHAIR — It is the masters — —

Judge KENNEDY — Masters direct them.

Judge DAVIS — You see that is the thing. I think it is the master, and that is the point. He may be a judicial officer, but he is not sitting in — —

Judge KENNEDY — I think he gets involved.

Judge DAVIS — Is that right?

Judge KENNEDY — I think he might.

The CHAIR — Anyway, we will pick that up with the Supreme Court later.

Judge DAVIS — Yes. That is a matter for them entirely.

The CHAIR — Did you want to comment on that?

Judge KENNEDY — I suppose we do not engage in a mediation as such through these case conferences, because we do not go outside and walk in and out of the rooms, but I think it is certainly alternative dispute resolution in the way that they are conducted, because we do get into the issues. I think the fact that you have a judge with some experience or expertise, as I think the parties perceive — I will not speak for myself, but certainly with Judge Anderson — I think does help.

I think the standing of the person conducting this alternative dispute resolution is fairly important to practitioners out there — probably in any area, but certainly in commercial. As I say, at least initially sometimes people are a little bit put off by the idea that it is in open court so that it is not without prejudice, but we found that you can manage to confine the issues and bring parties to settlement through that process. Obviously you do not then get engaged as they go outside to do the actual nitty-gritty negotiating, but that has not stopped these matters settling. Whether you call this judicial mediation or alternative dispute resolution, whatever label we give to it I think it has been proved useful.

Mr CLARK — Case management conferences would seem very interesting for the reasons that you have you outlined. Can you say a bit more about how you are selecting the cases that go for this intensive case management? How much judicial time are they taking vis-a-vis the conventional approach, and how long is it taking these days for matters to get set down for trial in any event?

Judge KENNEDY — Going to the third point, we are roughly — I think as Judge Davis indicated — looking at six to seven months from time of issue to getting a matter on for trial. In terms of which ones we select, that will often be raised. There are two ways. Firstly, if both ask for it on the papers, we will give them a case management conference.

This is very early days for this, but it is starting to happen that people have heard about it and are asking for it. The more common way is the matter comes to us for directions. As Judge Davis said, that is not standard, because mostly we are trying to encourage people to do it on the papers. But if it comes to us for directions, it means there has been a problem often of some description that cannot be nutted out, then we will look at in that scenario a case management conference. If you like, they are the ones that are sometimes looking more difficult to begin with and looking like they might go off the rails. Others are done just by consent. They will come to a directions hearing in what we call our commercial pilot, which is our very expeditious list, and they will want one. They will ask for one, so there are various ways you can get one.

Mr CLARK — In terms of judicial time involved with this approach versus the conventional approach, does it end up taking more or less judicial time by the end of the day?

Judge KENNEDY — Do you mean in terms of if we let it just run to trial, for example?

Mr CLARK — Yes.

Judge KENNEDY — Compared to a mediation?

Mr CLARK — Is it working because a judge is putting more time in total into it than you would if you just let it run for a conventional trial?

Judge KENNEDY — I see. It is hard to answer that, because often they are the ones that were going to go off the rails anyway, so one suspects you would be back three or four directions hearings trying to manage. This is where statistics are difficult to find — an objective measure of, 'Is this working?' — so the 60 per cent rate I just measured by just looking at how many I have done and how many have actually settled on the day. Bear in mind these are the more difficult cases often, too, so that is why we are happy.

In terms of the other 40 per cent, you would probably have to do a scenario of what would happen if we left it alone. My guess would be, from what I have seen anecdotally, that they would be the ones that would be back to us for three or four directions hearings — that is my impression — because they are the ones that, for whatever reason, people are having a fight about everything. Sometimes that has to happen. Sometimes there are genuine issues in there. Sometimes, as Judge Davis said, they are just people who are not trying very hard, but, for whatever reason, they tend to be the more difficult cases that we are trying to manage and keep on track.

Judge DAVIS — We could do a pilot randomising those who come to first directions to one of two groups — either to the case conference management or to nothing, just the usual trial management — —

Judge DAVIS — To do a test.

Judge KENNEDY — And have a look at it six months on.

Judge DAVIS — The sorts of statistical analyses that we need to do, we are looking at what we need to do to capture a bit of this data so that we can look back. There are lots of issues that we are working on — the listing and predicting et cetera — so this is just one of them.

Judge KENNEDY — In terms of taking up how much judicial time, you would certainly always read one before you come out, so that you have some idea where to direct people. Of course I would almost try to flick before I hear a trial — try to look at the pleadings and the issues and so on before I came to a trial. In terms of comparing the trial versus the case conference, in a trial you would be sitting in there with the average commercial matter for four or five days, versus one day for a case management conference. Just looking at it in those terms, it seems to be a good outcome.

Mr CLARK — You mentioned that parties are in and out of court during the day. Are you able to do other matters while they are out of court?

Judge KENNEDY — You can. They have all depended. Where I 'hot tub' the experts — for want of an expression — that whole process took probably 2½ hours or so, and then I gave them a break and was back at 2 o'clock. Yes, you can do other things but perhaps not as much as you would like to do. Usually the two of us have both got commercial trials booked each week. So whoever's case is settled will try and fill in with the other case management conference the other one was going to do. We are sort of balancing out who has the extra half-hour here or there to do something else. I have certainly done two in one day before. I have done one backed up against a trial before, but the ideal is to have a fair degree of time, I suppose, like most things, because you have the ability to go back in. Sometimes they will call me back in. They will say, 'Something has arisen. Can we talk about that?'. It just depends.

Judge DAVIS — We wanted to use the case conferencing mechanism in a couple of categories of the civil cases — for example, in a de facto and domestic property cases. If we do, we may well try and find a judge who sits, for example, in the Practice Court, whose cases might finish by the end of the morning, who might be available to do one case conference in the afternoon so that we do not have to take a judicial resource away from trials. Obviously the real pressure is on. That works very well for the overall disposition of cases; it does not work well on the day, dealing with the reserve list of cases that need to get on in the day. There is a constant balancing. That is why in looking at ADR, firstly, we think that we should not limit ourselves to just considering mediation, because judicial mediation is only one kind of ADR mechanism, and there are lots of other mechanisms which are very flexible, which we might want to use a lot as well.

Secondly, if mediation were to be considered, the model that the Supreme Court currently has is not one that would not be considered in the County Court, it is just that we might want it to be a slightly more flexible mechanism. It might not be limited to mediation; it might be a person or a number of people who could be engaged to do the full gamut of ADR work. I think the hallmark of all this will be the flexibility of choosing your instrument to fit the kind of case and the time line that that you have and what you think the outcome should be in terms of what fits or what service you are delivering to the parties. If you need to put them in a quiet room where they can have somebody with a lot of judicial experience who can indicate how their case might go if it were to proceed to trial. That might take a different kind of person. We need to be able to juggle that effectively. We do not necessarily want a one-size-fits-all even for ADR, just as you do not want a one-judge-fits-all for your cases.

Mr BROOKS — We heard earlier in the hearings that there would be some level of difficulty or great difficulty in measuring the success or outcomes of mediation.

Judge DAVIS — I think it just depends on the questions you are asking. Quite clearly, most civil cases settle anyway prior to trial. The question is: what role does mediation play if it does not settle at mediation? Then you are going to ask down-the-line questions of, 'Did it help resolve the issues; refine the issues; make it more likely that the case would settle prior to trial?'. They are the sorts of questions that the research team is going to try to address. They will actually be looking in and drilling down into a number of mediations that have been conducted to do their focus groups and to find out from the parties, asking them a series of questions based on tested questionnaires that have been used, I think, in the Rand studies in the United States, to get the material that will give them a basis for profiling mediation — at what point it is successful and what contribution it makes to settlement.

Mr BROOKS — Does that include gauging the satisfaction levels of the parties?

Judge DAVIS — Yes, I believe that is one of things. It is a qualitative questioning. The questionnaires include that kind of rating. They have not settled the questionnaire yet, but I know they are flagging that. That will be one of the processes.

Mr FOLEY — Flagging in the County Court the judicial resources that you use, if you had your head, would there be extra judicial resources — either in conferencing or in mediation — that you might introduce?

Judge DAVIS — Absolutely.

Mr FOLEY — What might that look like? A corollary of that is, prior to matters getting to you — —

Judge DAVIS — Pre-litigation?

Mr FOLEY — Yes. Again, if you were starting out, how would you see ADR working in those circumstances?

Judge DAVIS — It is difficult because we are only seized when the party issues. The question is: how do you introduce a pre-litigation process? Obviously it may be possible to annex to any court or to any body the capacity to try and resolve an issue prior to litigation. Whether it is appropriate for the court to be doing it itself, that is an interesting question. It may be appropriate for government or for other bodies to consider trying to encourage parties into a pre-litigation process. I am not necessarily sure that should be the focus of a court which has enough trouble dealing with limited resources in trying to do to what it can once parties have issued. I am not against it and I am sure that we would all be for any dispute resolution mechanism that would assist parties to avoid an adversarial process. It is not necessarily the case that follows that the court itself should be the one itself taking the initiative on its limited resources to try and initiate that and run it and drive it.

We are all for it, obviously, because in any society it is desirable that parties have a range of ways in which to resolve their differences. Obviously one that avoids emotional and costly litigation is one that is to be preferred. If it can be demonstrated to be useful for all sorts of reasons, there is no reason why we could not be happy for it to be in existence. What we might do, given appropriate resources, is obviously to either pilot or to be able to engage — a bit like what VCAT does. It has a range of full-time permanent members who hear cases, it has a number of members who also do compulsory conferences, but it also has a number of sessional members or panel mediators who come in and who are employed on a sessional basis to do particular kinds of matters — people with expertise in building cases who come in and do case conferences on building matters.

I would like to see the court having that kind of flexibility to employ. It may even be a pool of retired judges, it could be experts from the law, it could be mediators. If I had my way and I wanted to fully develop our potential in terms of use of ADR resources I would be looking for that kind of flexibility. Considering how expensive it is to hire judges and how few of them there are, and how many cases there are to hear, it is not possible to take them out of circulation in order for them to drive, manage and engage in the day-to-day mediation or ADR processes because there are thousands and thousands of them. Between the commercial and damages cases we might have 6000 or 7000 cases. They are all going to mediation and it is impossible, given the case load of the court, for judges to be conducting those mediations.

It is not feasible for it to be done except by way of some kind of delegation or some kind of management through a pool of sessionals, unless we are offering only mediation to a certain percentage of cases. It would be possible, presumably, to refine the model so that one could contemplate judicial mediation for a particular kind of case. We have not yet got there, but there is no reason why the Supreme Court's idea could not be adapted for the County Court. I would want to see it being a much more flexible instrument. I would not want us to have one person, necessarily, there.

I would like to see the ability to have a pool of very expert people to be used on a horse-for-course basis. You choose the expert for the particular kind of case — for example, there are retired Family Court judges who would be perfectly suited to doing sessional work settling domestic and de facto property disputes, that sort of thing; or people with expertise in that area who are not currently engaged in the profession in the sense of coming before the court on a day-to-day basis, who might be perfectly suited to assisting in resolution of those cases. I would like to see the opportunity to implement that kind of project, even on a pilot basis, to see how it would assist, but, as I said, that is for the future, possibly.

Mr FOLEY — Equally, if there are some that are particularly suited to perhaps looking differently, are there any areas of the County Court's operation that would be particularly unsuited to ADR approaches?

Judge DAVIS — For example, just the serious injury jurisdiction of the court, which is a threshold set of applications which already has gone through its own ministerial-guideline-driven conciliation processes. That is a class of cases which are so highly geared already to just being listed for hearing and have already been through their processes in their statutory offers and counter offers that it would be just adding a mind-boggling layer of complexity to interfere with those and to force them through a court-based mediation process. At the moment our focus is on getting those threshold applications heard and determined so that they can go to trial. Once they have been determined and they are going to trial, they are then in the pool of cases that still get mediated in the usual way, but that would be one class of case, because of the complex statutory framework that is already there for them. It would be unnecessary in OTOs and confusing and very expensive and it just is not appropriate.

But, otherwise, we would say that we would look at everything. There are possession cases — ones which are straight out — and fights between insurers, where one might want to argue that really they are straight out cases, just about the dollar and contribution, where one might think that some expert assessors might assist the court in sitting down with the parties on a case-conflicts basis, trying to help them resolve the issue without the need to go through all the steps and hoops that you normally go through prior to trial.

We have identified three or four classes of cases that we would be very keen to use either an accelerated or an ADR-sort of strategy with, but developing that would depend on resources, I think, because we cannot get judges out of court to do all of this. There would be a lot of them and they need to be done by a team of expert people.

The CHAIR — We are almost out of time, but not just yet. The committee has heard evidence of both the County Court and Supreme Court having the power to refer matters to arbitration, but that power is rarely exercised. Could you throw some light on why that might be the case?

Judge KENNEDY — I do not think anybody wants it to be exercised, in my experience. We very rarely have people requesting arbitration. I do not know why that is, really. That is my experience anyway that people very rarely did, and in practice I very rarely did too.

Judge DAVIS — The idea of forcing parties who have engaged in and who have issued in the County Court, forcing them to go to arbitration where the outcome is binding, is the equivalent of saying, 'We are not going to hear your case, let somebody else hear it'.

Judge KENNEDY — Yes.

Judge DAVIS — That is really, in a sense, an abrogation of our responsibility. It is one thing to send them to mediation and say, 'We are going to force you to go and have a conversation and try to resolve your issues'.

Judge KENNEDY — But to be sent somewhere else to have your dispute resolved — people have made a choice to come to a court by the time they have come to us.

The CHAIR — It is there as an instrument that is available to you, nonetheless.

Judge DAVIS — Of course, I know, and we get submissions every year from the bar about why we do not use that power. Obviously arbitration is more suited to commercial and building cases.

Judge KENNEDY — Particularly in building it tends to be more utilised. Judge Shelton might have information; he is our building person.

Judge DAVIS — Most of those contracts contain arbitration clauses, so they should not be in the County Court anyway. If they have got an arbitration clause they would already be in arbitration. We are not necessarily against it. It is just that you have to think of the class of case that is coming. If it is a good old building dispute and they have not got an arbitration clause and they are happy to go to arbitration, we would probably send them to arbitration.

Judge KENNEDY — Particularly if we are asked.

Mr CLARK — I have a couple of questions about mediation. First of all, could you clarify how it fits together with the case management conference approach? From your submission it seems that everything other than statutory injury has gone to mediation anyway, so I presume that means there has already been an attempt at mediation before it comes to case conference?

Judge KENNEDY — No, because these directions tend to happen relatively early in the piece unless it is a really difficult case, so usually we look at either a case management conference or a mediation. We would never compel — I certainly have not compelled — somebody to do both. They are kind of alternatives.

Judge DAVIS — The default is that every case basically that is listed by us on the papers with its trial date comes with a set of standard orders, usually about discovery, about requiring the parties to cooperate with interlocutory rules et cetera, and it also timetables them for mediation about three months prior to the trial date. But the parties in commercial cases know about the case conferencing mechanism and ask for it. In our practice court it is available for parties in other cases. At the moment we are dealing with our stakeholders in our various user group

meetings, canvassing the appropriateness of trying a pilot with case conferencing, either on top of, or as an alternative to, mediation.

At the moment I am looking at that with the Transport Accident Commission on some of their cases. All the stakeholders there are getting together to discuss it, and it is not clear yet whether they want to take advantage of that because they also have very well-developed guidelines for attempting to resolve their matters and it may well be that it is unnecessary. But either way the mediation is still in there in virtually all the damages cases, three months prior to trial. Very rarely do we have a situation where one party is refusing to go to mediation and we have to have a directions hearing about it. Usually it is an argument about — I have got one arguing at the moment about — where they want to hold their mediation. It is almost embarrassing.

Judge KENNEDY — Mostly they do it, though, don't they?

Judge DAVIS — Of course they do; that is out of 5000 cases, I think, that I have had an argument about where the mediation is going to be, or who the mediator is going to be; in the whole year, so it is very rare.

Mr CLARK — The second aspect was how do you stop recalcitrant offenders using mediation simply to procrastinate and put off the evil day when they are ordered to pay up?

Judge KENNEDY — Because of the way, I suppose, we set the trial date, which is perhaps the ultimate alternative dispute resolver. I know that sound ridiculous, but even at a trial a lot of them still settle close to that trial date, I am finding. That really seems to bring everything to a head. If you know you have got a trial date and it is not going to be put off lightly, which is definitely the way we are moving in our court, then that seems to bring things to a head. They know they cannot just shove it off into the never-never.

Mr CLARK — So mediation is not adding to the time it would take to get to trial?

Judge DAVIS — No. We set the trial date.

Judge KENNEDY — We set the trial date first. The first thing I do is ask the associate, 'When is the next trial date?'. At the moment we are looking at May-June next year, and then we work back.

Judge DAVIS — And that process has been introduced specifically so that virtually from that time it is only about six weeks. Once an appearance is entered and a defence is filed, you have got to have time allowed under the rules for those various steps to take place, and within about a few weeks of that taking place the notice goes out to the parties of an administrative intervention notice, which requires them to get together and put their heads together so that we can organise a trial timetable. We give them a month to do that. They write in with their consent, and even if they do not consent we then give them a trial timetable. All the dates are set by reference to the trial date, so we work backwards three months for the mediation, unless they want another time — if they want it earlier, we will list it earlier — but it is all sort of geared around the trial date. As Judge Kennedy said, a trial date concentrates the mind wonderfully, and we shepherd them to that trial date. If anything is going to settle, it will settle along the way. But keeping them focused on that trial date is how to get the lawyers engaged.

Judge KENNEDY — In the old days it used to be that you waited until everything was ready; now we make them focus on the trial date.

Judge DAVIS — Yes.

The CHAIR — We are out of time. Judge Davis and Judge Kennedy, thank you very much for both the submission we received from the court and also your generous time today. You will receive a copy of the Hansard transcript, and you can make any small changes to that. Also Kerryn and Kate will probably be in contact with you as we move along, and I hope it is okay for you to perhaps provide further information.

Judge KENNEDY — Yes, of course, if you need that.

The CHAIR — Thank you very much. It has been very helpful.

Witnesses withdrew.