THE IMPACT OF CASEFLOW MANAGEMENT ON THE JUDICIAL SYSTEM

PETER A SALLMANN*

I. INTRODUCTION

On 18 May 1995 the Australian Prime Minister, The Hon Paul Keating, launched the Commonwealth Government's *Justice Statement*.[1] The Statement was a response to the report of the federal Access to Justice Advisory Committee ("the AJAC") which examined many aspects of the Australian legal and justice systems and produced a detailed action plan for improving access to justice.[2]

Both the AJAC report and the *Justice Statement* dealt with various aspects of courts and tribunals. A great deal of credit was given to courts and tribunals for the introduction of modern caseflow management systems to reduce delay. Substantial strides have been made in delay reduction, to such an extent that most of the access to justice debate now focuses on other areas such as the overall cost of justice, the structure and operation of legal services and the protection of rights. The courts and tribunals, however, still have a number of reform issues on their agenda and what is not readily appreciated is how strong a tool case management is for bringing about improvements well beyond delay reduction.

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* Executive Director, Australian Institute of Judicial Administration; Professorial Associate, Faculty of Law, University of Melbourne. A paper prepared for the Asia Pacific Intermediate Courts Conference, Singapore, 20-22 July 1995.

1 *The Justice Statement*, Commonwealth Attorney-General's Department, May 1995.

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

This paper is about the significant role and impact of caseflow management in bringing about substantial procedural, operational and cultural changes in the judicial systems of Australia over the last decade or so. While the paper is largely confined to what has occurred in Australia, it would be surprising if the trends and developments discussed have not also occurred in other countries which have introduced modern case management on a systematic basis. The theme of the paper is that, far from being simply a series of techniques for efficient case processing, caseflow management is in fact a driving force for a great many beneficial changes in the justice system.

Changes have been far-reaching and, in many respects, the judicial administration systems and procedures of today would not be easily recognisable to a student of the field ten or fifteen years ago. Many of the external signs are the same, such as court buildings, the roles and appearances of key court personnel and other external trappings, but a great many of the processes, procedures and, more importantly, the attitudes and expectations of the key actors (that is, the culture) have changed significantly. In many instances the changes have been rapid and profound.

The background to these changes need not detain us long because it is, on the whole, well understood and established. In recent history serious efforts have been made to overhaul, modernise and raise the efficiency levels of many key institutions and organisations in society, both private and public.[3] Somewhat belatedly, the court and judicial systems have been swept up in this process; belatedly, because the inherently conservative nature of the legal and judicial systems, together with a genuine and well-placed concern about the primacy of justice over efficiency considerations, have combined to obstruct much needed change. However, a pressure cooker situation developed; strong forces both within and outside the system could only be resisted for so long and, frankly, there was much about the operation of the judicial system that cried out for the quiet revolution which has occurred.

II. THE ILLS OF YORE

Many of the traditional strengths of the judiciary and the judicial system were also its weaknesses when it came to the need for courts to adapt to significant and rapid developments in the external environment. Being a separate and independent branch of government performing a highly specialised task in the community, the judicial system was often slow to adapt to circumstances which many objective commentators and critics thought demanded it. The system was often accused of being remote, its personnel uncommunicative and unresponsive, and of being obsessed with the pursuit of an extraordinarily high level of theoretical and applied justice with far too little regard for such matters as delay, cost and practicality.

The judiciary was frequently seen as ruggedly individual but with an inadequate sense of corporate responsibility for the justice enterprise and precious little idea

3 See for example Report by the Independent Committee of Inquiry, *National Competition Policy* (1993).

of courts as organisations in the modern society. There was no sense of courts as institutions in need of management and no systematic communication between the various component parts of the court system, let alone between courts and the many justice institutions related to them. Being former barristers, judges were on the whole poor 'organisation people' with little skill or inclination for innovative thinking about management issues and, in particular, better ways of conducting the core business of courts - processing cases in a quick, effective and appropriate way.

In fairness to the judicial system, it should be pointed out that, as far as litigation was concerned, the courts were expected to operate in a limited and essentially reactionary way. Lawyers effectively ran the litigation process, both at the trial and pre-trial levels, and judges generally behaved in the traditional 'cuckoo clock' style, popping out at some critical stage when the lawyers indicated that judicial intervention was required. Litigants who wished to press on with things and to get a quick result had to be extremely patient, generally passive and could do little to speed up the course of events. On the other hand, the system provided plenty of latitude for those who wanted to delay the process for any number of strategic or other reasons.

Other characteristics of the traditional judicial system included a strong *noblesse oblige* on the part of the judiciary; an unhealthy 'upstairs/downstairs' ideology in the relationship between judges and court-based administrators; maintenance of a significant distance between the judiciary and those in the executive branch of government responsible for supplying support services to the courts; precious little management and statistical information about case processing and disposition matters; and, apart from a very strong and admirable commitment to doing 'justice according to law' in individual cases, no real sense that the courts as a whole were providing a variety of community services and so should be geared to think more in terms of 'consumer orientation'. As Professor Thomas Church said:

> Most courts in which I have spent any time are organised for the convenience of judges, of court staff, and of lawyers; usually in that order. If the convenience of the public is considered at all, it comes well behind these courthouse 'regulars'. This implicit ranking of priorities is seldom examined, or even discussed. If it were, it would probably be justified as merely a recognition that judge time is the most precious resource a court dispenses, that court staff are overworked in these days of budget cutting, and that lawyers must be minimally accommodated if the courts are to function at all. Yet no *consumer-oriented* establishment could set its priorities in this way. Department stores and airlines and accounting firms, and even other professionalised bureaucracies such as hospitals and universities, must pay attention to the consuming public. With the exception of the prison service and perhaps a few unrepentant social welfare agencies, I know of no organisations, in or out of the public sector, which appear to be quite as cavalier about their clientele as are the courts of the English speaking world.[4]

The independence of the courts meant that the operation of the judicial system was left very much to the judges themselves and, in the absence of action from

4 TW Church, *A Consumer's Perspective on the Courts*, Second Annual AIJA Oration in Judicial Administration, AIJA (1990).

within, could not easily or appropriately be pressured into action by other agencies of government. In fairness, it should be pointed out that this was a system which evolved to serve the requirements of a more leisurely and less sophisticated age. The problem was one of inertia and lack of adaptability. The essential difficulty was that in seeking to uphold and promote the time-honoured values and processes of the justice system, those involved were often much more resistant than they should have been to legitimate pressures for change and modernisation.

III. THE REFORM ERA

There have always been changes and reforms of various kinds; it would be wrong to create an impression of a system remaining static for long periods of time. But most commentators would agree that the last ten years or so has been a period of unprecedented change and development in judicial administration, a key focus of which has been the caseflow management movement, which emanated largely from the United States. Systems of modern caseflow management began to be debated and introduced in Australia from about the mid-1980s and the period since then has been one of exponential change in very many aspects of the judicial system, with caseflow management as the key to many of the developments.[5]

In Australia, as in other common law countries, we have been resistant to suggestions for wholesale restructuring of the court system. Ours is not a culture of radicalism. Short of major restructuring, however, few features of the system have been immune from substantial change. Examples are large-scale jurisdictional shifts; revamping of court rules on the conduct of litigation; the introduction of caseflow management systems; an emphasis on issues of efficiency and productivity; a realisation of the importance of understanding courts as complex organisations; an almost constant process of fine-tuning of procedures; the introduction of computer technology; judicial education; increased professionalism and professionalisation of court administration and court administrators; a pronounced trend towards the judiciary taking far more responsibility for what goes on in the court system and, in particular, a much stronger role in court administration; a broader view of dispute settlement and, in particular, the embrace of a range of so-called alternative dispute resolution initiatives; and, finally, a discernible move towards customer service or consumer orientation on the part of courts.

IV. CASEFLOW MANAGEMENT AS THE ENGINE OF CHANGE

Far from being seen in narrow, procedural, managerial terms, modern caseflow management should be regarded as the basis and, in many instances, the centrifugal force for substantial and wide-ranging changes in our judicial systems.

5 On this topic generally see PA Sallmann, "Managing the Business of Australian Higher Courts" (1992-3) 2 *Journal of Judicial Administration* 80.

It may be worthwhile briefly to elaborate on this threshold point. One view would have it that caseflow management is simply a series of devices or techniques added to an existing system in order more efficiently to dispose of a court or court system's caseload; that it is, in other words, merely a piece of procedural machinery for oiling the wheels of the court system. Caseflow management is far more than this. One can identify a whole series of major and apparently unrelated judicial administration developments which are very much tied up with, and attributable to, the introduction of modern case management schemes.

It is no coincidence that, following the introduction of case management regimes into Australian courts from the mid-1980s, a number of key developments occurred in other major areas of the judicial system. In some instances the introduction of caseflow management acted as a 'cultural transformer' within the judicial system and thus laid the attitudinal basis for various changes to occur; in other cases, direct causal links can be sketched between its introduction and the development of specific initiatives.

Case management is essentially about the pre-trial conduct of litigation. The introduction of the so-called modern approach brought about what the Americans call a 'paradigm shift' in the way litigation is conducted. Instead of being substantially controlled by lawyers, courts have now assumed a good deal of control over the litigation process and timetable. This has involved a philosophical and practical revolution, with courts and judges being far more interventionist in the processing of cases than in the past. In addition, the necessary degree of judicial or court control has involved considerable strategic planning and other work to devise appropriate techniques and systems for the successful introduction and operation of case management. Courts and judges have become active as distinct from simply passive managers of caseloads and judicial affairs generally. This greater involvement has, in turn, led to a number of recent judicial administration developments which can be traced to case management initiatives. Individually they are important but collectively they constitute a revolution in the whole approach to judicial administration in Australia.

A. Rise of Managerialism

Caseflow management has by definition involved the courts in developing a much stronger management culture than in the past. This is particularly so in the case of judges and court administrators who have taken on responsibilities in the case management area. The growth of management expertise in one special field has generated a general interest in court management issues. In some courts and jurisdictions this interest has spread to a system-wide level. This has been a most important development because there is now a clear recognition that general management principles and techniques are appropriate for, and applicable to, courts. The significance of this should not be underestimated because it means that we have moved from a system which was not managed (in any real sense of the term) to one in which there is now active management by the judiciary and the assumption of overall responsibility for its operation.

B. Judicial Commitment and Leadership

An essential feature of modern caseflow management schemes is judicial commitment and leadership, usually at a senior level. Combined with the development of a management or organisational culture, this has led many courts to adopt a corporate and collective approach to the conduct of their work. They are now more attuned to issues of judicial administration. This orientation has come about quite recently as indicated by Sir Ninian Stephen:

> On the Victorian Supreme Court, in the early 1970s, judicial administration was not, it is fair to say, a subject that was on everyone's lips. It is after all a relatively new discipline, gathering together a range of activities that in the past were perhaps not seen as one coherent whole. So judicial administration, as a single subject matter, was largely unknown to us 15 or 20 years ago. I suspect that some of my more sporting fellow judges of the Supreme Court, had they then been asked what they thought of the prospects of judicial administration, might have taken a shot in the dark and said that it all depended on the state of the track and the barrier position the horse might draw.[6]

The point about this is that, having appreciated the significance of judicial administration for the successful performance of the judicial system, the judiciary, as the leaders of the system, were catapulted into taking key leadership roles. If they did not lead, nobody else was in a position to do so. Some have responded well to this while others have had difficulty.

C. Building Relationships in Judicial Administration

Another marvellous and long overdue development has been the forging of closer working relationships between the judiciary, court administrators and the legal profession. For far too long the judiciary made all the important policy decisions and court administrators, such as registrars and their staff, however skilled and experienced, spent most of their time simply processing the various forms and other pieces of paper required to set the litigation process in train and keep it moving. They were not, in other words, sufficiently involved in the higher level management processes.

These days, largely as a result of caseflow management, judicial officers and court administrators often work together in close-knit management teams. They combine forces in an effort to process cases in an efficient, expeditious way. These caseflow management working relationships have frequently improved the channels of communication in general between the two groups. This, in turn, has led to more effective 'team work' between the judiciary and administrators on a great variety of court management projects. The impact of this has been to improve the overall effectiveness of the court system.

D. Court Performance Measures

The court performance measures debate is still in its infancy in Australia. It is a divisive subject and one that needs to be handled carefully and sensitively. One

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6 The Rt Hon Sir Ninian Stephen, *Judicial Independence*, Inaugural Annual AIJA Oration in Judicial Administration, AIJA (1989) p 5.

school of thought holds that the process of 'doing justice according to law' is not conducive to performance or assessment measures, certainly not of a formal or administrative nature. There is also a strong concern, particularly in some judicial circles, that performance measurement systems are essentially creatures of the executive branch of government designed to bring the judges into line with productivity and other performance criteria. This is seen as inappropriate and unwelcome meddling in the exercise of the judicial function.

Another view has it that while there must not be interference with judicial independence and, in particular, the adjudicative functions of the courts, there is a good deal of scope for improvement in how the courts go about their business. It is part of this view that there are a number of features of court operations which can legitimately and appropriately be measured, at least in general terms, if not in a hard, scientific, empirical way. This approach is supported by reference to the need for courts to be more accountable for what they do, particularly in times of greater control over limited financial resources.

The debate about performance measures is a useful one and will no doubt continue, but we need to remember that a proper system of caseflow management is itself a seminal court performance technique and measure. Caseflow management provides a mechanism for dealing with court delay, assessing how a court is dealing with its caseload, and generally points the way to further improvements. In other words, this level of performance measurement is with us already and here to stay. Many judges and court administrators have latched on to the measurement capacities of case management systems, particularly the management information data they generate, and this has expanded their horizons to a broader and more general interest in court performance standards.

At this more general level it is no coincidence that in the United States the case management movement took root in the 1970s and early 1980s and was followed in the late 1980s and 1990s by the development of court performance standards. Developments have occurred in the same order in Australia. A connection between the two phenomena is hardly surprising; it is logical and inevitable that the introduction of case management, with its strong emphasis on basic management principles, will lead naturally to the development of a broader interest in court performance issues.

With the confidence gained from the successful introduction of case management schemes, a number of Australian courts and their support organisations are now experimenting with a variety of performance measures. It was noticeable that in the late 1980s, when most Australian courts were first introducing case management schemes based on the predominant American model, there was a distinct reluctance to incorporate time standards, a cornerstone of best practice arrangements in the United States. The reason for this was rather obvious; the courts were anxious to improve their efficiency by taking greater control of the process but not too keen to risk the possible embarrassment of setting case management standards which, subsequently, they were unable to meet.

However, many Australian courts have now incorporated time standards into their case management systems and there is even a move in some quarters for the

adoption of uniform, Australia-wide standards.[7] Given the diversity of courts and court systems in Australia a uniform approach may not be embraced, but it is likely that support by some senior judges and administrators of a suggested national approach will be influential over time throughout the country.

On a broader plane, it should be noted that two other international developments are beginning to have an impact in Australia. The first is the work of the Commission on Trial Court Performance Standards in the United States.[8] The standards produced by the Commission have been influential in Australia in raising awareness of the issue and also the potential of performance standards for improving the operation of the system. The second is the publication in Britain in 1992 by the Lord Chancellor's Department of *The Courts Charter.*[9] The Charter is a court performance standards document incorporating, among other things, a set of caseflow management standards. The Charter has also had an impact because a number of courts and court departments are now producing strategic and corporate plans which incorporate performance related aims and strategies.

These initiatives were given a fillip last year when the AJAC reported to the Attorney-General and the Minister for Justice.

> We think that courts and tribunals should, in so far as is consistent with the proper administration of justice, formulate and publish more comprehensive and specific performance standards and report regularly on the extent to which those standards have been achieved.[10]

The AJAC said that each federal court and tribunal should develop and implement a charter specifying standards of service to be provided to members of the public coming into contact with the court or tribunal. A number of courts and tribunals are now doing this; caseflow management was the initial springboard for much of the activity.

E. Court Governance

There have been significant developments in court governance arrangements in Australia over the last decade or so. The origins of these lie indirectly but clearly in caseflow management. The use of caseflow management, the emergence of an ethos of managerialism, an increase in judicial commitment and leadership and an interest in court performance standards have combined to focus attention on issues of court governance - how court administration is best structured and organised to produce the most effective working environment and the most satisfactory results for the community.

Many courts have experienced acute difficulties in implementing case management initiatives because of insufficient financial and human resources and

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7 See Chief Judge DM Brebner and R Foster, "The Development of National Objectives or Goals for the Disposition of Cases in the Higher Trial Courts" (1994) 4 *Journal of Judicial Administration* 100.

8 Commission on Trial Court Performance Standards, *Trial Court Performance Standards*, National Center for State Courts and the Bureau of Justice Assistance (1990). For a commentary see PA Sallmann, "Court Performance Standards: An Australian Perspective" (1991) 65 *Australian Law Journal* 195.

9 *The Courts Charter*, prepared for the Lord Chancellor's Department by the Central Office of Information (1992).

10 Note 2 *supra* p 365. For a commentary see The Hon Justice R Sackville, "The Access to Justice Report: Change and Accountability in the Justice System" (1994) 4 *Journal of Judicial Administration* 65.

lack of control of basic budget and management functions. This was due to the traditional arrangement that judges do the judging while resources and support services are provided by a branch of the executive government beyond the reach and control of the judiciary. Chief Justice Gleeson of New South Wales, in particular, has made the link between case management and delay reduction programmes on the one hand, and broader questions of court governance and court administration on the other.[11] In essence, his Honour asked how the courts can exercise a managerial, case processing role when they are not in control of their own resources, both human and financial.

Things are improving in this regard because over the last four or five years there has been a good deal of change in court governance arrangements with a pronounced tendency towards greater judicial involvement in court management. In some instances the judiciary has assumed full control over the administration of court affairs.[12] This approach is considered by its proponents and supporters to be more consistent with appropriate notions of full judicial independence and to provide the capacity for more efficient delivery of court services. While this trend in court governance developments might have emerged in any event, it is clearly linked to a range of other judicial administration movements which, in turn, owe their intellectual and strategic origins to the growth of caseflow management.

V. MORE IMPACTS OF CASEFLOW MANAGEMENT

The previous section of this paper highlighted some of the major judicial administration developments which have been heavily influenced by the adoption by Australian courts in the late 1980s of modern systems of caseflow management. The list of matters discussed was not intended to be exhaustive, but rather an indication of the main trends and initiatives which can be traced reasonably directly to the early Australian case management programmes and which emerged very soon after these programmes took root.

This part of the paper deals with a number of further impacts of case management. In the main, they are somewhat more subtle than those mentioned earlier and have taken a little longer to emerge. Like the others, however, they are matters of considerable significance in judicial administration, each deserving close attention and analysis in its own right, something which is not practicable in the context of this paper. Again, the selection of items is not by any means exhaustive and is inevitably tinged with elements of arbitrariness and subjective judgement. Having made that qualification, it should be said that the matters in question are all of some moment and have caseflow management at their core.

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11 Speech opening the 1989 Annual AIJA Conference in Sydney (published in (1989) 2(2) *AIJA News* under the title "The Genie is out of the Bottle").

12 For a summary of these developments see the relevant papers and commentaries published in (1994) 4 *Journal of Judicial Administration* 5-32.

A. Efficiency of the Trial Process

It is sometimes wrongly assumed that caseflow management is a technique simply for speeding up the processing of cases through the system. In fact, far more than this is involved. Most systems of case management are schemes for the overall management of court business and in that sense have a range of impacts and implications. One of these is to improve the prospects for an efficient trial in the small minority of cases which wend their way through the system to that point. As Moynihan J, Senior Judge Administrator of the Supreme Court of Queensland, has put it:

> ...an effective system of overall case flow management is an essential component of any process seeking to achieve a more efficient trial. I do not know that for present purposes it particularly matters which system you have - so long as it works. The most effective approaches...seem to be those which set dispositional goals, achievement of which is brought about in terms of compliance with time requirements for various steps with intervention, supported by the prospect of sanctions.[13]

His Honour later added:

> Modern management techniques provide some useful approaches to establishing more effective court administration and a more efficient trial. The approaches involve developing and stating, in a form understood by all participants, essential values, objectives and means of measuring effectiveness in attaining objectives, in a changing environment.[14]

Justice Moynihan also makes the point that a proper system of case management will have the dual strategic aims of sorting out as quickly and efficiently as possible the cases that are going to settle and smoothing the way for the most efficient possible trial of the rest. More specifically, the various processes and interventions involved in an effective case management scheme will be aimed at narrowing the key issues between the parties and generally ensuring that valuable trial time is kept to a minimum.

A similar point was made by Rogers J, when a judge of the Supreme Court of New South Wales. Referring to directions hearings as a key component of many case management operations, his Honour noted:

> They are used as a vehicle to define issues, control discovery, interrogatories and admissions, arrange for conferences between experts and generally drive the progress of the dispute at a speed which accords with the presumed wish of the actual parties, excepting only those who desire delay for ulterior reasons. As well as narrowing the areas of disagreement the process seeks to eliminate any unnecessary steps, whether due to abuse of process or inadequate thought.[15]

It is probably a rather obvious point when one stops to think about it but it is extremely important conceptually for any court or court system embarking upon a caseflow management programme to regard case management as 'management' in the broadest possible sense and, therefore, as having the potential to achieve a wide range of objectives and benefits, including smooth running trials.

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13 The Hon Justice M Moynihan, "Towards a More Efficient Trial Process" (1992-3) 2 *Journal of Judicial Administration* 39 at 45.

14 *Ibid.*

15 The Hon Justice A Rogers, "The Managerial or Interventionist Judge" (1993-4) 3 *Journal of Judicial Administration* 96 at 101.

Similarly, case management schemes should include provision for regular reviews to ensure that the system in question is capable of achieving the various strategic aims of a well-designed and constructed dispute resolution system. In that context, it goes without saying that detailed, collaborative planning is required at the highest levels to establish the aims and objects of the enterprise. If that is not done it will not be possible from a strategic point of view to structure the case management regime to achieve its full potential. The achievement of the most efficient trial possible should be one of the key system objectives and case management should in part be directed to that end.

B. Changes to the Adversary System

One of the most significant changes to occur as a consequence of the introduction of caseflow management and the managerial judging movement which has accompanied it, is that the actual *system* of dispute resolution and adjudication, commonly known as the adversary system, has undergone a significant transformation. The implications of this are important. The background to it is that case management, the increasingly interventionist role of judges and a constant process of manoeuvring and fine tuning to do things more efficiently (particularly changes to practice and procedure), together with a corresponding diminution in the role of lawyers as adversaries, have resulted in the adversary system taking on a number of inquisitorial features. The implications of this are important because the basic, philosophical premises and underpinnings of the system are thereby exposed to scrutiny and increasingly the subject of renegotiation.

The problem about this is not so much the fact that the system is undergoing change; this is no doubt a healthy and desirable thing to occur. The issue is that with so much disparate reform and activity going on, it is difficult to get a handle from a conceptual and practical standpoint on just what is happening, what it means for the system and where it is heading. As more and more of the features of the traditional common law adversarial system are discarded or watered down in the interests of modernisation and greater efficiency, the question arises at what point, if any, does the system cease to be of one kind and become something else.

This is not just a question of philosophical and theoretical interest - it is important for reasons of practice and procedure to maintain a sense of the ideas and values which determine the kind of adjudicative system we are to have; in other words, what does it mean these days to say that we have an adversarial system of adjudication? How does it differ from the more traditional adversarial system? If present trends continue at what point will it cease to be characterised as adversarial? With so much change occurring, a related issue is whether we want our system to continue to evolve in an incremental, patchy way, without the ability to take stock, or whether we should be in a position to plot a definite course for the future aware of the implications of various policy directions and with a sense of what is required on a system-wide basis.

Trends and debate in the criminal jurisdiction provide an indication of the kinds of tensions which exist. Instances of the old style criminal trial by ambush are increasingly rare. These days, in common law systems, parliaments and courts are

imposing considerable obligations upon the prosecution in criminal proceedings to provide disclosure to the defence. This is being done not just out of fairness to the accused, but in an effort to acquaint defendants in advance with the case against them and thus attempt to narrow the issues and areas of dispute at a trial. It is very much, in other words, an efficiency issue. And notwithstanding the philosophical traditions of the system - matters such as the burden of proof, for example - there are increasing pressures for defendants to be required to disclose, if not the specific details of their defence, then at least the broad nature of it. This is all part of a concerted campaign to limit the issues which are in contention and to achieve shorter, cheaper and more efficient trials.

These developments, and others which are proposed from time to time, all merit attention in themselves. The difficulty is that, as more and more changes occur, the system becomes less recognisable from its earlier versions and more removed from its fundamental, time-honoured, philosophical directions. This is not necessarily a problem because appropriate change is a desirable and necessary thing. The difficulty arises when a number of changes are looked at very much in isolation and when the cumulative effect is a result which might not have been contemplated by any of those responsible for the conduct of the system.

In the civil jurisdiction, the whole issue of so-called alternative dispute resolution is a case in point. The view seems to be rapidly emerging, if it has not done so already, that 'many flowers should be allowed to bloom' in the dispute resolution arena and that, provided all the various steps and procedures are handled in a fair, transparent and careful way, a whole series of techniques can and should be adopted to resolve disputes. This may be a legitimate and reasonable view, but there are immense complexities in working out the range of techniques and options which should be available, how they can be weaved into an appropriate system of dispute resolution (whether court-annexed or otherwise) and what training and accreditation processes should be required to ensure that the various procedures are handled in the most professional and acceptable way.

These are all important matters to consider and caseflow management is at the core of it. In looking at these issues, the AJAC quoted from a recent speech by the then Chief Justice of the High Court of Australia, the Hon Sir Anthony Mason, who asked: "[a]re we prepared to make more radical changes to the common law adversary system which would bring it closer to the civil law system?"[16] The Committee went on to note that as case management plays a stronger role in the Australian judicial system, it is likely that some of the key assumptions involved in the adversary process - for example, that the judge leaves the presentation of evidence and submissions very much to the parties themselves - will increasingly be challenged. The AJAC also commented that, in this sense, the move away from the traditional adversary system referred to by the former Chief Justice had already begun in Australia.

16 The Hon Sir Anthony Mason, "The Australian Judiciary in the 1990s", an address to the Sydney Institute, 1994.

C. Caseflow Management as an Evaluative Tool

The establishment of caseflow management systems, particularly where objectives and time standards have been included, provides a basis for the evaluation of particular measures and, more generally, promotes the establishment of an evaluation culture. For example, those courts which have established case management time standards, as well as the necessary case management information, are able to report on levels of compliance with the standards. That process itself leads to the growth of a culture or awareness of evaluation issues and a sensitivity to how the court is performing. This is new in judicial administration and has considerable potential.

The setting of goals and standards and the availability of relevant information, particularly on computer, enables those involved in the system to extract data on many aspects of how the system is performing. This capacity, combined with the development of an 'evaluation oriented culture' may lead, in turn, to longitudinal and cross-jurisdictional studies of court performance. It may also encourage useful experimentation with new procedures and their evaluation. As the AJAC put it:

> Of course, there are no perfect procedures that can be replicated in all courts, given that they each have different kinds of caseloads and litigants, different powers and different areas of concern. However, although there is no single ideal set of procedures, courts undoubtedly have much to learn from the experience of other courts. The evaluation of novel programmes would be greatly improved if the comparison was not simply between one court before and after a reform, but also between that court and similar courts. In this way, courts could identify what are 'best practice' procedures and apply them, so far as they are relevant, to their work.[17]

Caseflow management has, in other words, provided a mechanism for empirical assessment of how well the system is working. It is almost inevitable that this potential will be explored so that in the future we will increasingly be talking quantitatively as well as qualitatively about the performance of the courts.

D. Customer Service

Just a short time ago most courts, and especially judges, would have regarded the whole notion of courts having 'customers' as being anathema to the traditions and processes of court and justice systems. Even many of those prepared to concede that courts should make a greater effort to accommodate the information needs, creature comforts and general requirements of those having business before them, would have been decidedly uneasy about the language of 'customer service' and 'consumer orientation' being applied to the work of the courts. Such terminology would have struck a discordant note, and still does, in many judicial system circles.

The classic ethos and ideology of courts centred on their major purpose of hearing and deciding cases according to law; any other considerations were generally regarded as purely administrative and essentially extraneous to their core functions. For the most part, the only real concession to a 'customer service' orientation was the emphasis on delay reduction. Delay is recognised as a long-

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17 Note 2 *supra* p 405.

standing weakness in the system because it can affect the justice of the case and those following it in the queue.

Much has changed in this regard in Australia. Increasingly, the courts are thinking, talking and acting in terms of providing a key public service. And this developing orientation has gone well beyond concerns about getting decisions right and doing it without delay. It has extended to a range of aspects such as simplification of court forms and procedures, attention to the comfort and accessibility of court buildings and courtrooms, the standard of service provided by court staff, surveys of 'customer satisfaction' with the system, provision of information to the public through the media and so on. In short, there has been a significant change in the culture and orientation of the courts.[18]

Many of these changes stem indirectly from caseflow management. The fact that courts have now systematically taken much greater control of the litigation progress has provided the judiciary with the mindset and, more importantly, the practical tools, for taking greater control of the operation of the overall judicial system. This has brought the courts to a better understanding of their position in the community and what is needed to be more efficient and responsive in their functions, particularly to those who come to court in various capacities.

In the same lecture referred to earlier, Professor Church pointed out that the 'clientele' of the courts is very extensive indeed and mostly not physically before the court at any one time.[19] There are the litigants who are waiting for their cases to be heard, people who have decided not to pursue their claims in court because of cost and delay, crime victims, witnesses, jurors, media representatives, members of the general public and so on. He suggested that the courts often took an attitude towards lay persons who were involved in the system that was "frequently insensitive, if not cavalier".

If this was an accurate picture, and for many courts one suspects it was, the reason was essentially one of attitude and orientation. The courts seemed to adopt the stance that their role was to hear and decide cases when the lawyers brought them to court and at some point thereafter a judicial officer would move into action to hear and determine the case. Beyond that, there was very little sense of responsibility for the overall operation of the system, particularly from the standpoint of the users and potential users of the courts.

The courts are now in a much stronger 'consumer orientation' frame of mind and this reflects an international movement among the courts of the common law world. As mentioned earlier, there is now serious experimentation in the United States with court performance standards, many of which deal with what might be described as 'customer service' issues. In the United Kingdom *The Courts Charter* was a landmark development for the court system and specifically advanced the notion that courts have very definite responsibilities to their 'customers' and need to become a lot more active in responding to those needs.

18 Many of the relevant developments are referred to in the AJAC report note 2 *supra* and the *Justice Statement* note 1 *supra*.

19 Note 4 *supra*.

In Australia, the AJAC enthusiastically embraced the idea of courts developing a stronger consumer orientation and suggested that "in so far as is consistent with the proper administration of justice, [courts should] formulate and publish more comprehensive and specific performance standards and report regularly on the extent to which those standards have been achieved." The Committee went on to suggest that there would be great advantage in each court developing its own charter and standards; the areas to be canvassed in such charters would include:

- the physical facilities of the court, including child care facilities, separate waiting areas for opposing parties, wheelchair and pram access, and where refreshments can be obtained;
- information made available by the court, including availability and accuracy of pamphlets and other documentation, inquiries staff, community languages, simplified court forms, transcript costs and availability;
- timeliness and efficiency in delivery of services, including response to telephone inquiries;
- courtesy towards members of the public;
- access to the court, including location of courts, public transport details, sitting times and registry hours; and
- accountability, service delivery, including complaints and suggestion mechanisms, and review of performance against standards.

Many of these aspects were picked up in the Federal Government's *Justice Statement*. The Statement indicated the action to be taken by the Australian Government in response to the AJAC report and other inquiries and recommendations on justice and legal system issues. There are special emphases on the need for courts to become more responsive to the needs of regular court users and others who from time to time require court services.

> Flexibility in service provision is an important feature of a more consumer-oriented court system. Court facilities and services need to be available when and where the consumer requires them... Rather than requiring people to travel great distances to access the courts, innovations such as video conferencing and greater use of telephone conferencing are bringing the courts to their users.[20]

We can expect an increasing emphasis on these areas in the future. Indications are that the courts themselves are keen to improve their relationships with the public and are vigorously exploring ways of doing it. The culture in this respect has undergone a significant transformation.

E. Planning For Future Court Developments

It has long been part of conventional wisdom that at least some degree of planning is required for the management of a successful enterprise. An integral feature of caseflow management programmes is planning for what one hopes to achieve and how one intends to do it. Involvement in planning for case management has generated a broader interest in looking at court requirements for

20 Note 1 *supra* p 65.

the future, whether it be in relation to buildings, litigation trends, modernisation of structures and processes, staff requirements and training and so on.

A major obstacle to this in Australia is lack of resources. For the most part, the courts are struggling to get the funds to survive from month to month and year to year in dealing with the volume of litigation that arrives on their doorsteps. Anything beyond that is a luxury and very few have the financial or staff resources to commit to serious strategic planning exercises. Most of the planning they do focuses on how to continue to provide a service in the face of cutbacks in funds.

Caseflow management programmes were established quickly and efficiently in most Australian courts, beginning in the mid-1980s. Despite appearances to the contrary, the process was a real struggle for many of them. This was because in most instances additional financial resources were not provided to establish the programmes and what was required was a substantial investment of precious, skilled resources. Judges and administrators committed large amounts of their own time over and above their normal court and court-related duties to plan, implement and run the early case management programmes.

Financial support from governments was generally not available because it was assumed, often correctly, that courts and court processes were inefficient. The view seemed to be that additional resources should not be ploughed into inefficient enterprises and that the courts needed to sort themselves out and to introduce better ways of conducting their business, largely through the introduction of caseflow management, before any serious consideration would be given to providing additional resources. Executive branches of government also tended to make the convenient and largely false assumption that caseflow management programmes needed very few, if any, resources that could not be provided by the courts themselves from their existing budgets. Thus, the catch for the courts was that they knew they had to do something to improve their position but had to do it, and be seen to do it, very much under their own steam.

Once established, the various programmes helped the courts to get control of their caseloads and to improve overall management performance. This has given them the capacity to assess their caseload situation, to plot their progress for the future and to do a certain amount of low level planning. A key component of this has been the development of the court performance standards movement referred to earlier. The use of court performance standards in the United States has enabled courts to engage in detailed management and planning for the future. An additional boost to this programme has been provided by the conduct of a number of strategic planning conferences. Foremost among these was the 1990 Future and the Courts Conference.

This conference was held in San Antonio, Texas, in May 1990. It brought together some 300 participants - judges, lawyers, court administrators, legal scholars, social scientists, doctors, technologists, ethicists, futurists, and many others - whose conference goal was to produce visions and strategies for the American State courts of the year 2020. The mission of the conference was to "help the State courts of the nation better provide effective, fair and responsive justice to all Americans in a future filled with expected, but undefinable change." Using well established management conference techniques, participants discussed

trends, scenarios, visions and strategies. The results of the conference were published by the American Judicature Society.[21] Both the conference itself and the techniques it adopted have proved to be of significant influence in American judicial administration. It has inspired a number of States to set up special bodies to examine their requirements for the courts of the future.

Foremost among the examples of this is California which, in 1994, published its *Report of the Commission on the Future of the California Courts*, subtitled *Justice in the Balance 2020*.[22] The report represented over two years of intensive work by the Commission, whose members were drawn from a broad spectrum of professions and interests. The vision which united the group was the desire to produce a high quality justice system for California. With the support of a full-time staff the Commission produced a wide-ranging examination of almost every conceivable feature of the court system and what would be required for its future well into the next century. Not surprisingly, planning for the future was high on its order of priorities.

> The work of the Commission on the Future of the California Courts can serve as a point of departure for future judicial branch planning. The Commission's two years of work represent the most comprehensive, longest-range planning effort in the judiciary s history.[23]

In conducting these kinds of exercises the Americans are again providing an example which may well be worth emulating in other jurisdictions.

In the same way that guidance and inspiration were provided with the development of case management initiatives in the 1970s and court performance standards in the 1980s, coherent and systematic planning initiatives of the kind now going on in the United States could well be of assistance to other countries. It is clear, certainly as far as countries like Australia are concerned, that the resources to conduct such inquiries on the same scale are simply not available, but there is nothing to stop Australian courts from establishing planning groups on a smaller scale, which would be capable nonetheless of producing some very worthwhile results. In doing so, it would be important to follow the American lead of having a considerable diversity of backgrounds and professional positions represented on the committee or commission, including people from outside the courts and non-lawyers of various descriptions. The Americans have found the contributions of these people invaluable; in fact, the chairperson of the California Commission was a non-lawyer.

21 State Justice Institute and the American Judicature Society, *Alternative Futures for the State Courts of 2020* (1991).

22 Report of the Commission on the Future of the California Courts, *Justice in the Balance 2020* (1994).

23 *Ibid* p 180.

VI. CONCLUSION

The Australian court system has experienced extraordinary change in recent times. Much of it is due to the introduction of caseflow management. Case management itself has brought about a good deal of important change but, as suggested in this paper, its impacts have also been felt well beyond the relatively narrow confines of case processing.

The significant reforms achieved are much to the credit of the courts themselves; the pace of change has been frenetic and of necessity has in many instances occurred in a fragmented, incoherent way. Change is now an almost constant process within the court scene and is likely to be so for the foreseeable future. But as a result of the various side benefits of case management programmes the relevant territory has now been largely surveyed and directional markers for future requirements identified. For the future, a lot will depend on what happens in such areas as court governance, court system leadership, strategic planning and management, accountability issues and the need, in particular, for courts to establish the equivalent of a research and development capacity which they themselves control.

Despite their central role in democratic systems of government, the courts are still 'finding their place in the sun'. They are the weakest branch of government and in the past they have struggled to assert and maintain, not so much their judicial independence, in the sense of freedom from interference in making decisions, but freedom of institutional independence in being able to carve out their own destiny free from dependence upon the executive branch of government.[24] Their difficulties in this process have been exacerbated by the failure of governments to provide sufficient funding. Their financial dependence and absence of discretionary funding capacity have severely limited their ability as institutions to operate in a robust and healthy manner.

Resource difficulties are still apparent for the courts but there are many positive signs for the health of the enterprise as a whole. Caseflow management has been the well-spring for much of the positive activity. It has enabled most courts to get their caseloads under control (a major achievement in itself) and, as described in this paper, has spawned a large number of key strategic developments which have contributed a great deal to a much-needed modernisation of the system. If the present momentum can be maintained, the prospects for the future are good.

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24 The importance of adjudicatory and institutional independence and the relationship between them is lucidly and elegantly sketched in R Wheeler, *Judicial Administration: Its Relation to Judicial Independence*, National Center for State Courts (1988).