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STREAMLINING THE NEW ZEALAND CIVIL JUSTICE SYSTEM

Is it time for further reform?

A thesis presented in partial fulfilment of the requirements for the degree of Master of Management (Dispute Resolution)

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Abstract

This paper examines the state of the New Zealand civil justice system and questions whether it is time for further reform. It has been just over a century since the legal profession was urged by Dean Roscoe Pound to address the problems of delay and poor administration. Since that time things have become progressively worse. The demand on court resources has been ever increasing and may even be greater today than what they were in 1906. Failure to address these mounting pressures on the judicial system could eventually render the affective administration of justice impossible. World-wide civil justice systems have experienced numerous problems – such as delay, excessive cost and complexity. Overseas jurisdictions have already examined their civil justice systems and implemented reform. Previously, New Zealand has implemented some of the reforms found overseas, for example, case management systems. However, like the overseas jurisdictions, these reforms have limited success. This limited success led to the Law Commission proposing a complete change of the lower Court system. This paper discusses the reforms which overseas jurisdictions have implemented, previous reforms of the New Zealand civil justice system and the Law Commissions proposed restructure of the courts. Finally, this paper recommends ways in which New Zealand could reform its civil justice system to ensure that it offers a cost effective, simple and speedy way to resolve disputes.

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INTRODUCTION

STREAMLINING THE CIVIL JUSTICE SYSTEM

This paper discusses whether the civil justice system in New Zealand is performing adequately, or whether the system is failing its users and needs to be changed. This paper sets the discussion in the context of the different approaches already established in other overseas jurisdictions, the differing objectives of the parties, the profession and the judiciary. This paper will also consider the shifting attitude towards litigation.

Like other democratic countries New Zealand operates under the Rule of Law. An important element of this is that the State provide its citizens with a court system for the orderly and impartial resolution of disputes in accordance with law. As Lord Diplock found in *Attorney-General v Times Newspapers Ltd*[1] there are 3 requirements for the due administration of justice. His Lordship noted that "all citizens should:

a) Have unhindered access to Courts for the determination of disputes as to their legal rights and liabilities;
b) Be able to rely on the Courts as free from bias against any party and for decisions based only on facts proved in evidence properly adduced; and
c) Once the dispute has been submitted to a Court, be able to rely upon there being no usurpation by any other person of function of the Court to decide it according to law".[2]

But court systems have limitations. One important limitation is that court cases generally produce a winner and a loser. This is because courts find the facts, identify the relevant law and then apply that law to the facts as found. But a "winner takes all" outcome may not be desirable in the long term.

[1] [1974] AC 273 at pg 307, cited in *Solicitor-General v Smith* [2004] 2 NLZR 540.
[2] *Solicitor-General v Smith* [2004] 2 NLZR 540 at pg 548.

Both nationally and internationally, alternative dispute resolution has been promoted as a way to encourage early case settlement and provide for greater flexibility in terms of outcome. Alternative dispute resolution delivers benefits not only to the parties, but also to the courts.[3] The problems which civil justice jurisdictions face in the resolution of disputes by the courts are basically the same world-wide. The concerns are based not only on the limited range of outcomes available but also on the court processes, which are seen as being too expensive, too slow and too complex. The cost, time and complexity of court processes are powerful disincentives to their use, and place some parties at a disadvantage when comparing them to their opponents.

One must be wary that efforts to divert disputes away from the civil court system may run the risk of destabilising the common law institutions. The rise in alternative dispute resolution mechanisms, whilst a good thing, does present a threat to the continued viability of a court system that relies on litigants to raise new, unexplored issues, which help develop the common law. Private alternative dispute resolution runs the risk of possibly ridding the Government of its responsibility to provide neutral decision making in a transparent court system. Even though this risk is present, it is still important to examine how New Zealand can integrate alternative dispute resolution into the civil justice system.

Alternative dispute resolution is aimed at resolving legal disputes outside of the courts. It encompasses mechanisms such as mediation, arbitration and other hybrid processes in which a neutral party facilitates the resolution of disputes. Alternative dispute resolution mechanisms are said to reduce the cost of resolving disputes as such mechanisms are likely to be cheaper and faster than the traditional form of dispute resolution which is judicial proceedings. Generally alternative dispute resolution processes do not focus on the application of law to facts as found (although many arbitrations do have this focus). Accordingly they enable the

[3] These benefits will be discussed later in this chapter.

reaching of resolutions that are best suited to the needs of the parties and their interests. These processes also experience improved *ex post* compliance with the agreed settlement.

Court processes involve adjudication by an independent judicial officer. Adjudication is the legal process by which a state authorised official (a judge) reviews evidence and argumentation, including legal reasoning, set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved. Lord Denning noted that "in the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role."[4]

Typically courts deal with three types of civil dispute:

1. Disputes between private parties, such as individuals or corporations.
2. Disputes between private parties and the state (including public bodies or officials).
3. Disputes between public officials or public bodies.

Negotiation

Broadly speaking, negotiation can be described as an interaction of interests and influences. Such interactions, for example, involve the process of resolving disputes, agreeing upon courses of action, bargaining for individual or collective advantage, or crafting outcomes to satisfy various interests. Accordingly in some contexts, negotiation is a form of

[4] *Jones v National Coal Board* [1957] 2 All ER 155, at pg 159.

alternative dispute resolution. Negotiation involves two basic elements: the process and the substance. The process refers to how the parties negotiate: the context of the negotiations, the parties to the negotiations, the relationships among these parties, the communication between these parties, the tactics used by the parties, and the sequence and stages in which all of these play out. The substance, however, refers to what the parties negotiate over: the agenda, the issues, the options, and the agreement(s) reached at the end[5]. Except where negotiation is maintained or controlled by law (as in the employment context) the parties have control over both process and substance.

Mediation

Mediation, a form of alternative dispute resolution, aims to assist two disputants in reaching an agreement. The key component of mediation is that whether or not an agreement is reached, and the nature of any such agreement, is determined by the parties themselves rather than being imposed by a third party. In any given case, the dispute may involve states, organisations, communities, individuals or other representatives with a vested interest in the outcome. Mediators use appropriate techniques and skills to open and improve dialogue between disputants, aiming to help the parties reach an agreement (with tangible effects) on the disputed matter. The role of the mediator is to act as a facilitator, communicator, motivator, and scene-setter. The mediator is responsible for creating the right environment for the process to be effective. Mediators must be independent of both the parties, and also impartial. In theory, they must not give legal advice, offer opinions or coerce parties into agreement. A mediator should check that all parties fully understand what they are agreeing to. Mediation can apply in a variety of disputes, such as commercial, legal, diplomatic, workplace, community and divorce or other family or relationship matters[6].

[5] http://en.wikipedia.org/wiki/Negotiation
[6] http://en.wikipedia.org/wiki/Mediation

Arbitration

Arbitration is a legal process for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound. Arbitration is generally described as a form of alternative dispute resolution, although often it has more in common with court proceedings than with processes such as mediation. So it may be more helpful simply to classify arbitration as a form of binding dispute resolution, equivalent to litigation in the courts, and entirely distinct from the various forms of non-binding dispute resolution, such as negotiation, mediation, or non-binding determinations by experts. Arbitration can be thought of as a mini-trial. Yet others may see a mini-trial as quite a distinct process from arbitration.

To some extent a mini trial is a bit of a misnomer because mini trials are not actual trials. They can be more accurately described as a form of non-binding settlement proceedings, which have been developed to resolve disputes between commercial entities. In a mini trial, each side gets a chance to present their case to the arbitral panel. The mini trial is confidential and consists of a summary of the evidence and testimony that would be presented at a full hearing (if required). At a minimum, a mini trial can narrow the issues, and if a settlement is reached, a mini trial can also reduce costs. On the other hand, mini trials can be more expensive when compared to other alternative dispute resolution mechanisms and may not be optimal when the dispute is small. Furthermore, mini trials may not be all that effective where the parties have substantially different bargaining power.

Presently, arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions and is sometimes used to enforce credit obligations. It is also used in some countries to resolve other types of disputes, such as labour disputes, consumer disputes or in some

jurisdictions even family disputes, and for the resolution of certain disputes between states and between investors and states[7].

Overseas jurisdictions have already embraced some alternative dispute resolution procedures to reduce the problems experienced with their civil justice systems. In 1996, the United Kingdom began to implement the recommendations found in Lord Woolf's Report "Access to Justice"[8] ("the Woolf Report"). These reforms include such things as court assisted mediations, active case management by judges and court staff, and imposing costly penalties on those parties that delay the resolution process. Case management can be defined as a structured and formal process, whereby a facilitator has a clear responsibility to help assist the disputing parties, in a planned way, to resolve their dispute. The process must deal with any needs or circumstances that impede the achievement of this resolution. To do this, the parties are helped to access the full range of available, relevant services, from services provided by the court right through to alternative dispute resolution mechanisms.

Since the introduction of these civil justice reforms, the United Kingdom civil justice system has experienced some benefits. For example, the delay that parties once experienced has been reduced. In the Small Claims Court, the time from issue (or filing) to hearing fell from 600 days in 1997 to 522 days in 2000. With claims of £5,000 or under, the time was reduced from 674 days in 1997 to 537 in 2000. Finally, claims for £5,000 or more experienced the largest reduction in delay, from 744 days in 1997 to 450 in 2000[9].

However, some of the perceived benefits of the reforms have not come to fruition. For example, Lord Woolf believed that as a result of his recommended civil justice reforms, costs to the parties would be reduced.

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[7] http://en.wikipedia.org/wiki/Arbitration

[8] Lord Woolf, *Access to Justice* (Final Report), July 1996, Department of Constitutional Affairs http://www.dca.gov.uk/civil/final/index.htm

[9] Department of Constitutional Affairs, *Emerging Findings: Evaluation of the Civil Justice Reforms,* Lord Chancellor's Department, March 2001.

Unfortunately the United Kingdom has not experienced this. In fact the opposite has happened. Costs have remarkably risen. There could be simple explanations for why costs have increased; for example inflation has increased costs regardless of the civil justice reforms. It could also be that counsel are now required to "do more", and to do it at an earlier point in the process, and therefore that has increased costs. For example, counsel are required to attend more case management conferences.

Other jurisdictions have also examined alternative dispute resolution mechanisms to determine how they could be integrated into the civil justice process. The United States, Canada and Australia have implemented procedures such as case management and court assisted mediation. These jurisdictions have noticed that there is a reduction in delay. However, like the United Kingdom, they have seen little or no effect on the cost of civil justice.

International literature[10] identifies five major advantages of alternative dispute resolution. They are:

- An increased rate of settlement;
- Improved party satisfaction with the outcome or the way in which the dispute is resolved;
- A reduced time involved in resolving the dispute;
- A reduction in costs relating to the resolution of the dispute; and
- An increase in party compliance with the agreed solution.

When examining overseas jurisdictions, it is clear that 4 out of these 5 advantages ring true.[11]

Some of the potential disadvantages of alternative dispute resolution are:

- Resolution of the dispute may be delayed if alternative dispute resolution mechanisms either do not work or are unsuccessful.

[10] As discussed in Ministry of Justice, *Alternative Dispute Resolution: General Civil Cases*, June 2004.
[11] This will be discussed further in Chapter 2.

Unsuccessful alternative dispute resolution could potentially make the problem worse;

- If alternative dispute resolution is unsuccessful, it adds to the total legal costs; and
- Settlements may be hard to enforce.

These disadvantages are dependent on the parties who participate in alternative dispute resolution mechanisms. There are limited ways in which to make a party attend or comply with alternative dispute resolution. For example, a party may be granted a stay of proceedings on the proviso that they attend some form of alternative dispute resolution. Outcomes achieved through alternative dispute resolution mechanisms can in some circumstances be enforced. For example, if a mediation results in a settlement agreement, that agreement may be able to be enforced as a contract. Arbitral awards can be enforced through the Courts[12].

Keeping in mind the variables found with the perceived disadvantages, one could reasonably conclude that the advantages outweigh the disadvantages of alternative dispute resolution.

The civil justice system in New Zealand has been slower than overseas jurisdictions to implement alternative dispute resolution mechanisms. The implementation of such mechanisms is dependent on three factors:

1. The awareness of parties and the legal profession of alternative dispute resolution processes;
2. Whether there is the infrastructure to support those who wish to take up alternative dispute resolution; and
3. The perceived advantages and disadvantages of alternative dispute resolution.

The awareness factor could easily be fixed. If information relating to alternative dispute resolution was available when parties filed in the

[12] Arbitration Act 1996.

courts, parties, along with their legal representatives, would be able to make informed decisions whether to pursue litigation or not. New Zealand's infrastructure would need examining to determine whether it could cope with the added responsibility of providing alternative dispute resolution. Even if New Zealand's infrastructure in its current form was not able to accommodate alternative dispute resolution fully, there are ways in which to strengthen it.