

# THE ROLE OF THE JUDGE IN ATTACKING ENDEMIC DELAYS – SOME LESSONS FROM FAST TRACK

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*The causes and detrimental effects of endemic delay in common law proceedings are explored in this article, with a view to advising judges on how to combat delay. Fast Track, a recent pilot programme in the Federal Court of Australia designed to achieve prompt resolution in commercial disputes, is discussed with a view to explaining why the programme manages to achieve positive results against endemic delay.*

*L'auteur s'intéresse aux causes et aux effets négatifs liés à la lenteur chronique que connaissent les juridictions australiennes, conséquences inévitables de la mise en oeuvre des règles du procédure dans la common law. Fort de ce bilan, il propose aux lecteurs quelques solutions pour remédier à ce dysfonctionnement, notamment en étudiant le récent programme pilote de la Cour fédérale Australienne qui dans les litiges commerciaux permet maintenant aux tribunaux de statuer dans de brefs délais.*

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It is uncontroversial that "Justice delayed is justice denied". Or, as William Penn put it "Our Law says well: To delay justice, is injustice". Our French colleagues say "Justice rétive, justice fautive". In the common law tradition the idea is reflected in Magna Carta but of course it is much older than that and Roman lawyers had an expression to the same effect: "*Justitiae dilatio est quaedam negatio*".<sup>1</sup>

We know too that delay is often closely associated with another enemy of justice, cost, and we now recognise that in all countries – but perhaps most noticeably in developing countries – cost and delay in systems of justice also discourage investment and retard economic growth. Of recent times this has been

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1 Attributed to Ulpian, who wrote at the end of the 2nd century and beginning of the 3rd century CE.

emphasised by the development of international indices that provide comparative measures of access to justice.

In the past it seems to have been accepted that cost and delay were endemic in the common law system but were the necessary price that had to be paid for the supposed perfection of adversarial justice. We now recognise that it is just not good enough to accept avoidable cost and delay and that perfection is illusory if the price is unaffordable.

Moreover, delay does more than deny justice. It has multiple cost implications, some more apparent than others. In commercial enterprise, for example, the uncertainty brought on by delay has costs both direct and incidental. Some of these costs will be measurable, and some not. In either case they may have a substantial impact upon an enterprise and the lives of those involved in it. In the private lives of people engaged in litigation, the uncertainty associated with delay has a social cost. Moreover, in all litigation – although most obviously in commercial litigation – there is the cost attributable to the time of those involved in the litigation as parties and witnesses.

There is a broader point about the role of courts with a commercial jurisdiction as part of what may be seen as the commercial infrastructure of a country. If courts are to perform that role – as well as their fundamental constitutional roles – commercial dispute resolution should function on a commercial timescale. The timelines for a commercial enterprise are quarterly, six monthly and yearly – so that matters that take more than a year to resolve are outside normal operational timelines for decision-making. As well, in some cases the principal remedy sought becomes redundant when a case is drawn out too long, such as where corrective advertising is sought as the most effective remedy for a misleading statement. Corporations see many courts as operating on a wholly different timescale of their own, which is foreign to commercial thinking.

I should also note that whilst delay is difficult enough for large corporations, for smaller corporations it may be life imperilling and can impose enormous personal costs on the owners of the enterprise. It also has to be acknowledged that large corporations may use this imbalance in their litigation because they know if cases against smaller players are delayed that delay may force a resolution. If competitive markets are to be maintained these imbalances should not be allowed.

In short, the need to reduce delay in litigation, and the uncertainties of costs associated with delay, is incontrovertible.

What then is to be done? For the past 20 or 30 years, active case management has been put forward as one of the answers and assisted dispute resolution as

another. In many jurisdictions active case management is now the norm but whilst some of its techniques have achieved a good measure of success, the extent of those successes varies significantly. Assisted dispute resolution (ADR) has also been accepted as having an important role to play in reducing cost and delay but the optimum relationship between case management and ADR is not always achieved. Moreover, it should be recognised that delay in judicial processes can push cases into ADR when justice might be better served by their speedy judicial resolution.

Problems remain. Proceedings still take too long to be resolved and backlogs still exist. Part of the problem is that some forms of case management do not come to grips with the endemic causes of delay. Moreover, some case management, whilst moving proceedings along more quickly than previously, has a tendency to add to the cost of litigation by introducing multiple appearances before a judge or a registrar for "case management directions", with each successive appearance involving cost and further delay.<sup>2</sup>

In this paper I suggest how judges can attack some – perhaps most – of the causes of endemic delay in common law proceedings and I do so by taking the experience of a recent pilot program in the Federal Court of Australia for the speedy resolution of commercial disputes. We call the process "Fast Track" and it has recently been adopted by the Federal Court nationally.<sup>3</sup> I aim to explain *why* Fast Track achieves the positive results reported to date and, whilst awaiting empirical analysis, advance some hypotheses.

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- 2 This criticism has been made of Lord Woolf's case management reforms in the United Kingdom: see Lord Justice Jackson, "Civil Litigation Costs Review: Preliminary Report" (8 May 2009) Part 8, Ch 43, 'Pre-action Protocol' <[www.judiciary.gov.uk/about\\_judiciary/cost-review/preliminary-report.htm](http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm)>. To remedy similar problems in the Family Court of Australia, the Australian Law Reform Commission (ALRC) recommended minimisation of the number of compulsory events in case management: see Australian Law Reform Commission, Report no. 89, "Managing Justice: A review of the federal civil justice system" (1999), Recommendation 14 <[www.austlii.edu.au/au/other/alc/publications/reports/89/index.html](http://www.austlii.edu.au/au/other/alc/publications/reports/89/index.html)>. In preparing the Report, the ALRC received submissions from interested parties, which included criticisms about delays caused by excessive case management and inflexibility: "the matters are fitted to the Court and not the Court to the matters"; "the process is too sophisticated for most cases ... there are too many processes"; "the perception of 'over servicing' derives from 'the number of interlocutory processes and the degree of case management'" (at 8.225).
  - 3 The Federal Court's pilot program should not be confused with the less ambitious Fast Track system provided for by the Civil Procedure Rules in England and Wales under which "Fast Track" procedures apply to cases in which the amount claimed is less than £25,000, the trial will take less than one day, and there are expert witnesses in no more than two fields. In Australia, such proceedings would take place in a District or County Court.

By examining some of the causes of endemic delay and the way in which they have been tackled in our pilot program, I aim also to explain why I consider the role of the judge in reducing cost and delay to be centrally important.

Accepting that delay is indeed endemic in the practices and procedures of traditional common law litigation, I argue that many of the causes are particularly amenable to judicial intervention. I also argue that, as a consequence of their special capacity to reduce cost and delay by attacking its endemic causes, judges have a duty to do so and that this is part of their overall duty to administer justice according to law. I suggest too that courts – as collegiate bodies of judges – have a duty to confront these problems.

I recognise that judges are not alone in having a responsibility to confront the causes of delay and its associated costs and the backlogs that often build up when delay occurs. It goes without saying that the legislative and executive branches of government have an overarching constitutional duty to provide adequate resources for the functioning of the judicial branch, and for the support of country's system of justice generally.

The point should be made, however, that even if resources are scarce there may still be opportunities for substantial improvement.<sup>4</sup> For example, one of the motivating factors for the introduction of a fundamental reform in the Federal Court of Australia – the establishment of our individual docket system in 1998 – was severe pressure on the Court's resources and the realisation that, as a self-administrating court, we could make much better use of the resources that we already had. The individual docket system was an internally generated response to resource pressures.

I should mention also that at about the time the Federal Court introduced the individual docket system in response to resource pressures, we overcame the reluctance that judges have to set performance targets and we set some performance targets of our own. I believe that such targets do assist in the reduction of delay. They can also assist in making a case to government for the provision of the resources necessary to meet the targets.<sup>5</sup>

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4 After all, as William Schwarzer and Alan Hirsch observe in their publication, "The Elements of Case Management: A Pocket Guide for Judges" (Federal Judicial Center, 2<sup>nd</sup> Edn, 2006) at 1 <[www.fjc.gov/public/pdf.nsf/lookup/eleme02.pdf/\\$file/eleme02.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eleme02.pdf/$file/eleme02.pdf)>: "[j]udges who think they are too busy to manage cases are really too busy not to".

5 The Federal Court has two time goals for the performance of its work. Time goal 1 is that 85% of cases should be completed within 18 months of commencement and this goal is consistently met, often by a significant margin. Time goal 2 is for the delivery of judgment within three months of judgment being reserved. In the most recent statistical period this was attained in 94% of appeals

I now turn to ask *why* it is that delay would seem to be endemic in many, if not most, of the common law processes for civil litigation. What are the seemingly endemic causes for delay in the disposition of civil proceedings? By focusing on *endemic* causes I do not mean to underestimate the importance of non-endemic causes, which certainly can include a failure to provide adequate judicial and other resources to courts. Failures of that nature ought not to be endemic but, as I have indicated, inadequate resourcing, dispiriting though it may be, should not be seen as a reason to delay procedural reform.

For well over 100 years the usual form of civil procedure in a common law action was that embodied in the White Book of the English Courts and its many counterparts elsewhere. The procedure required a series of steps commencing with the issue of a writ endorsed with, or followed by, a statement of claim. Then there was a defence, and then probably a reply and perhaps other pleadings. Disputes about the adequacy of pleadings and about particulars of pleadings were not uncommon. Then there was discovery, inspection and perhaps interrogatories. Each step had its own timelines and each had its own complexities and capacity for disputation. The process traditionally involved a timeline of steps, to be taken more or less in sequence. As to each of these steps, lawyers commonly adopted the approach reflected in what we would now call the precautionary principle, in which caution is an overarching virtue as a protection against the unknown. On this approach to litigation, a step needs no special justification other than that the step is provided for in the Rules of the Court and that a failure to take the step might, possibly, prejudice the client in some way. The concern was that some possible advantage might conceivably be missed or some possible detriment – not identified – might conceivably be suffered. On this approach it was unwise to reveal more of one's case, and especially unwise to reveal more of one's defence, than was absolutely necessary. The fear of surprise and the capacity to inflict it went hand in hand and had a synergy of their own. As well, some of the steps traditionally taken in common law litigation were cherished by lawyers who enjoyed their art – and why should they not enjoy their art? There was, and there still is, a delight to be taken in a well-drawn statement of claim or an elegant defence, even if the real issues of the case were not revealed by these documents.

A sequence of steps, each with their own timelines, necessarily encouraged cumulative delays and a general culture of delay. The delays were inherently liable to get worse because busy lawyers have a natural hierarchy of urgencies. An order

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and in 83.6% of cases at first instance. A special target for migration appeals is set at 90 days from filing to judgment; at present, the median against that target is 86 days.

of the court requiring something to be done within 30 days is most likely to receive attention towards the end of the 30 day period rather than on the first day when there are more urgent matters to attend to in other cases. Thus we can see a cascading effect of cumulative delay, and of consequent expense.

The uses and abuses of discovery make for a large topic in itself, about which much has been written, but there can be no doubt that a right to general discovery, without cause shown, is an endemic cause of serious cost and delay. There is now no such right in the Federal Court in any proceeding. In the Fast Track procedure discovery is very tightly controlled.

Paradoxically, some devices introduced to prevent delay in common law litigation have actually caused it. I have already mentioned the proliferation of case management steps but a worse example is the certificate of readiness and its several variants. The basic idea is that a case should not be set down for hearing until the parties are prepared to certify that it is ready for trial. I can recall, from my early days at the Bar, passionate debates about the rules for the signing of these certificates. They may have made sense in theory, but I doubt whether the certificates of readiness have ever been effective in bringing matters to a speedy resolution. They may avoid unnecessary adjournments of the trial, but when delay is still endemic in the system, nothing much has been gained and the trial date recedes still further.

Endemic tendencies to delay are liable to be exacerbated when a case is assigned to a judge only when it is ready for trial and when, in the years that might elapse between the commencement of the action and its trial, the case may be dealt with by any one of a number of Registrars, Masters, Prothonotaries, or quasi-judicial officers.

Another seemingly endemic cause for delay is the failure of parties to adhere to the timelines that the court itself has set, either by its rules or by specific order. Judges are reluctant to take strong action for non-adherence to time limits because to do so will often have the effect of penalising the client for the default of its lawyers. When added delay of this nature is factored into a process that involves sequential time-limited steps, already existing tendencies towards delay are magnified.<sup>6</sup>

The causes of delay that I have sought to identify can still exist to a greater or lesser extent where case management is employed. It is true that the tendency to

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6 The ALRC identified non-compliance as an "endemic problem" in Family Court proceedings. The Commission found deficient Court-administered case management to be a significant contributing factor towards the "culture of non-compliance" above n 2 at 8.233-8.249.

delay was worse in earlier times when the predominant notion was that courts had little or no business in guiding the process of litigation, that being a matter for the parties within the adversarial system. Whilst that is no longer the prevailing view, we have to recognise that some of its legacy remains. Moreover, some uncertainty exists still as to the proper limits of the exercise of judicial power in case management. In federal courts in Australia this has a constitutional aspect by reason of the limitations upon the exercise of judicial power inherent in Chapter III of the Australian Constitution. Constitutional limitations apart, there also remain limitations necessarily and rightly founded in the judicial fundamentals of impartiality and procedural fairness.

The legacy of the strictly non-interventionist past is however yielding to pressures for reform. First, there are the firmly stated views of the members of the judiciary who are concerned with these problems. There are also some important statements of principle. For example, in a Notice to Practitioners and Litigants entitled, "Case Management and the Individual Docket System"<sup>7</sup> issued by me as Chief Justice (with the agreement of the judges of the Federal Court) in May 2008, the overarching aim of our Individual Docket System is stated to be the resolution of disputes as *quickly, inexpensively and efficiently as possible*. The Notice then states that:

The parties and their representatives have an obligation to cooperate with, and assist, the Court in fulfilling the overarching purposes and, in particular, in identifying the real issues in dispute as early as possible and dealing with those issues in the most efficient way possible.

In some jurisdictions the legislature has declared there to be a similar primary purpose of the Rules of Court. In New South Wales the Parliament has enacted that a party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.<sup>8</sup> The Federal Court of Australia has sought legislative amendments along the same lines and on 22 June 2009 the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 was introduced into federal Parliament. Its important proposals include:

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7 Notice to Practitioners and Litigants issued by the Chief Justice, "Case Management and the Individual Docket System" (5 May 2008) <[www.fedcourt.gov.au/how/practicenotices\\_nat03.html](http://www.fedcourt.gov.au/how/practicenotices_nat03.html)>.

8 Civil Procedure Act 2005 (NSW) s 56; and see s 57 (Object of Case Management), s 58 (Court to follow the dictates of justice), s 59 (Elimination of delay) and s 60 (Proportionality of costs).

- incorporating in the Federal Court of Australia Act 1976 (Cth) an "overarching purpose" provision which provides guidance for the resolution of civil disputes according to the law and as "quickly, inexpensively and efficiently as possible";
- requiring parties to comply with that overarching purpose, and their lawyers to assist them in so doing; and
- providing the Court with a broad power to give directions about practice and procedure in civil proceedings.

Judicial support for change, and legislation imposing positive duties upon litigants and practitioners, will help to change attitudes and, within constitutionally permissible limits, will confirm that judges do have the power that they need to require parties to cooperate to bring about the just resolution of disputes as "quickly, inexpensively and efficiently as possible".

But to achieve these objectives endemic causes of delay need to be addressed directly, and common forms of case management do not necessarily do this. Concerns of this nature led to the development of "Fast Track" as a pilot program in the Victoria District Registry (Melbourne) of the Federal Court commencing in May 2007. The structure and "rules" for Fast Track are now set out in Practice Note No. 30 "Fast Track Directions" issued on 24 April 2009 and applicable to the Court's proceedings nationally.<sup>9</sup>

The results of the pilot program have been impressive. Of the 72 civil cases finalised in the Fast Track List since the pilot program began in May 2007, 17 were finalised by judgment, 33 at or following Court-annexed assisted dispute resolution (ADR) and another 17 were discontinued or settled by the parties, without ADR.<sup>10</sup> Five matters were removed from the List. For the small proportion of cases that were determined by judgment, the average time to finalisation was slightly over four months from commencement.. In those cases the Court met its benchmark of judgment within six weeks in 12 out of the 17 with an impressive overall average of judgments delivered within 36.6 days.

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9 <[www.fedcourt.gov.au/how/practice\\_notes\\_cj30.html](http://www.fedcourt.gov.au/how/practice_notes_cj30.html)>.

10 In the Federal Court, ADR is generally but not always in the form of mediation and, if court-annexed, is conducted by Registrars who have special training in ADR and have national accreditation as mediators.



Anecdotal commentary by practitioners suggests that legal costs, from filing to resolution, have been reduced by about two-thirds.<sup>11</sup> There have been only three appeals. One was discontinued, one was allowed and the case remitted to the primary judge, and in the third case judgment has been reserved by the Full Court. There have been no appeals on any ground relating to the procedures adopted or alleging any denial of procedural fairness.

In its present form, Fast Track is limited to cases with an expected duration of no more than five days.<sup>12</sup> Fast Track is also limited to cases that arise out of or relate to commercial transactions, an issue of importance in trade or commerce, the construction of commercial documents, an issue that is of importance in personal insolvency or cases that involve intellectual property rights (apart from patents). Many important features of Fast Track, however, including an insistence upon strict observance of time limits and the early identification of the issues, are reflected in other case management innovations in the Federal Court of Australia in taxation appeals,<sup>13</sup> patent cases<sup>14</sup> and admiralty and maritime cases.<sup>15</sup> A substantial reduction in the time for the disposition of tax appeals in the Federal Court is attributable to the adoption of a Fast Track approach and many of the Fast Track procedures.<sup>16</sup>

Judges and practitioners have commented that Fast Track is also likely to have a pervasive influence on the conduct of other civil litigation in the Federal Court with the prospect of savings in cost and delay through the adoption of many of its essential features.<sup>17</sup>

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11 A member of national firm of commercial lawyers recently advised the author that, in his view, Fast Track had resulted in cases progressing to the point of trial for about one-fifth the cost of cases not in the Fast Track list.

12 A five day case in the Fast Track List may, however, be an eight day case in an ordinary list, so the five day limitation is not a large constraint.

13 Notice to practitioners and litigants (taxation) issued by the Chief Justice, "Tax List Directions" (4 April 2008) <[www.fedcourt.gov.au/how/practicenotices\\_nat02.html](http://www.fedcourt.gov.au/how/practicenotices_nat02.html)>.

14 Notice to practitioners issued by District Registrar, "Proceedings under the Patents Act 1990 (Cth)" (4 September 2008) <[www.fedcourt.gov.au/how/practicenotices\\_nsw37.html](http://www.fedcourt.gov.au/how/practicenotices_nsw37.html)>.

15 Notice to practitioners and litigants issued by the Chief Justice, "Conduct of Admiralty and Maritime Work in the Federal Court of Australia" (18 December 2008) <[www.fedcourt.gov.au/how/practicenotices\\_nat01.html](http://www.fedcourt.gov.au/how/practicenotices_nat01.html)>.

16 See above n 13.

17 A wider prospect for change to the culture of delay may be gleaned from Carrie E Johnson's remark in her article, "Rocket Dockets: Reducing Delay in Federal Civil Litigation" (1997) 85 *California Law Review* 225 about US courts which have adopted a "rocket docket" system.

If the Commonwealth Parliament enacts the reform measures in the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, so that practitioners have a statutory duty to assist the Court to further the overarching purpose of facilitating the just resolution of disputes as "quickly, inexpensively and efficiently as possible", it is likely that the advances made as a consequence of the Fast Track procedure will produce a further impetus for their introduction in other litigation. The constitutional limitations inherent in the grant of federal judicial power cannot be validly modified by the legislature. Subject to that, however, any such legislative indication of policy must stand as a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the courts and the balances that have to be struck. Subject to any Constitutional limitations, these indications of legislative policy provide a robust legal framework within which active case management can occur. The policy of the legislature with respect to case management is a valuable – though not decisive – element of the legal context within which appellate courts would have to consider any challenge to particular case management decisions. Legislation of this nature can be seen as an important measure in encouraging and supporting the judiciary in taking an active case management role.<sup>18</sup>

The first essential feature of the Fast Track process is that instead of pleadings the parties must use Fast Track Statements, Responses and Replies<sup>19</sup>. These must avoid undue formality and must state in summary form the nature of the dispute, the issues that the party believes are likely to arise and the party's contentions, including the material facts upon which the party intends to rely. As well as specifying the relief claimed, the party must also state the legal grounds upon which that relief is sought. The answering document, the Fast Track Response, must deal with the substance of the case made against the respondent and must clearly state the substance of the respondent's case, both as to fact and as to law.

It has to be said that substitution of these statements for traditional pleadings is not without its critics, but those involved in the process consistently report that the statements have largely eliminated surprise, have avoided pleading arguments and have greatly assisted in the early identification of the issues.<sup>20</sup>

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Johnson says at 235, "[a]ttorneys appearing in these courts must adapt to the speed of litigation and respect the judges' refusal to tolerate unnecessary procedural foot-dragging".

18 See generally the Hon Ronald Sackville AO, "The future of case management in litigation" (2009) 18 *Journal of Judicial Administration* 211 at 217.

19 Practice Note 30, above n 9, Part 4.

20 The interest in elimination of surprise and the efficient clarification of the issues in dispute has prompted a parallel push for case management reforms within the Federal Court's newly

A second important feature of the Fast Track procedure is that before making any application concerning an interlocutory dispute (and such disputes are much discouraged by the procedure) the parties must meet and confer in an attempt to resolve their dispute in good faith. If they are unable to do so, any application to the Court about the issue must be accompanied by a certificate from the moving party's lawyer that the "meet and confer" requirement was completed, but unsuccessfully.<sup>21</sup>

The Fast Track Directions discourage the making of interlocutory applications and aim to have any that are made disposed of without an oral hearing if practicable. Although an oral hearing will generally be granted as a matter of course in applications for injunctions or for the appointment of receivers, oral hearings will otherwise be granted only if the judge determines that to do so would specifically add to, or further clarify, the issues in the case in a way that a written brief could not.<sup>22</sup>

To my mind, Fast Track is driven by two powerful "engines". The first of these is an initial directions hearing, called a Scheduling Conference.<sup>23</sup> This has the following defining features:

- It is held not less than 45 days from the date of the filing of the initiating application, although in urgent cases it may be held earlier.

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conferred jurisdiction to hear trials on indictment for cartel offences. Amongst the reforms, set out in The Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008, are provisions dealing with "pre-trial" disclosure, whereby the Court can order parties to provide notice of arguments and evidence prior to hearing. In discussing these reforms in a paper entitled, "Criminalisation of Cartel Conduct – Some Pre-Trial Management Issues" (presented at a joint Federal Court of Australia and Law Council of Australia Workshop, Adelaide, 3 April 2009), Justice Weinberg identified their importance in ensuring "clear identification of the matters in dispute," and in "[obviating] the need to call evidence not in dispute".

21 Practice Note 30 above n 9, para 5.2.

22 Practice Note 30, above n 9, para 9.3. In practice, the majority of these disputes are dealt with speedily, "on the papers". This does not require the parties to prepare formal submissions and appear before the judge for a ruling (although occasionally this does occur). Rather, these interlocutory disputes are often dealt with less formally, by email correspondence between the parties and the judge. The disputes are sometimes resolved in an hour or so, or perhaps within a day or two if further submissions are required. This procedure has shown itself to be a very efficient way of dealing with interlocutory disputes, at small cost to the parties.

23 Johnson acknowledges the potential of the US equivalent to further the goals of "expediting the disposition of the action", "discouraging wasteful pre-trial activities" and "facilitating the settlement of the case": above n 17 at 257.

- The date of the Scheduling Conference is fixed when the case is commenced, and whilst ordinarily not less than 45 days from the date of filing, it is generally not much later than that.
- The trial date is fixed at the Scheduling Conference in consultation with the parties. The trial is fixed early – as soon as two months and generally no later than five months from the time of the conference. If the case is particularly urgent, it may be heard within a shorter timeframe.

If the Scheduling Conference can be seen as one of the "engines" that drives Fast Track there is a second – perhaps more powerful – that begins to operate at the conference.<sup>24</sup> That engine is the early fixed trial date. The Scheduling Conference is conducted with the certain knowledge that this engine will be activated and will continue running. Vital to the process is that the trial date is not fixed autonomously by the judge but rather in direct consultation with the parties, thereby reducing the risk of claims of procedural fairness by either side.<sup>25</sup> This is only done when the critical issues for litigation and necessary witnesses have been identified, so that the date set corresponds with the time needed to prepare for hearing. Also importantly, once fixed the date cannot be changed by mere agreement between the parties; a party wishing to alter the trial date will need to show "good cause" – in practice, *very* good cause – for such an application.<sup>26</sup>

The Scheduling Conference is an open and relatively informal forum, generally held in a conference room (but still accessible to the public), in which the real issues of the case are identified and rigorously examined. It is usually presided over by the trial judge, who will have a very high level of familiarity with the case at that point, and those appearing at the Scheduling Conference are expected to be in a position to answer any question about the nature and conduct of their case. The practitioners who will have the conduct of the trial must be present and clients are encouraged to attend also. The conference is often held in a round-table setting but it is public and is part of the open hearing of the case. The product is a dynamic discussion of every aspect of the case, with the identification of the real issues in

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24 I must acknowledge that the concept of an "engine" is not new. It derives from the statement by a judge from the United States, whose name I regret I cannot recall, who said: "The trial date is the engine that drives case management." His memorable aphorism is, regrettably, too often forgotten.

25 Johnson warns of the "risk of judicial arbitrariness", and the attendant appearance of bias, where case management procedures are such that "[c]ase scheduling practices fall squarely within an individual judge's discretion": above n 16 at 247.

26 Practice Note 30, above n 9, para 6.12.

dispute and close examination of how the real issues might best be disposed of at the trial. This process may take several hours or it may be quite short; it will all depend upon the nature of the case and the remaining issues between the parties.

The Scheduling Conference has been described as the "blueprint" for the conduct of the case, since the program from that point until the fixed early trial date – two to five months distant – is set. When the blueprint is established against the certainty of a fixed trial date, the process becomes highly focused.

There is another aspect of the process that adds to the dynamics of the Scheduling Conference. As well as an early fixed trial date, Fast Track offers a speedy judgment. The judges who hear cases in the Fast Track List do so on the understanding that whilst the Court expects a high level of involvement and expedition from the parties, the Court will, in turn, deliver judgment very quickly.

As I have noted, the benchmark for delivery of judgment is six weeks and the average time achieved is 36.6 days. This tangible commitment by the Court *and by the trial judge* to an early judgment sets a very influential example to the parties. It also puts the Court in a strong "moral" position to insist upon strict compliance with its time limits – a compliance perhaps more easily achieved by moral force than the ultimate coercive powers that all courts possess but are reluctant to use.

The Scheduling Conference is also critically important as a forum in which, because the real issues have been explored, a sensible approach to discovery can be taken.<sup>27</sup> This process is dealt with in Part 7 of the Fast Track Directions which proceed on the footing that discovery will not be ordered as of right. If discovery is ordered it will be confined to documents upon which a party intends to rely and to those that "have significant probative value adverse to a party's case". The Directions also make provision for a "good-faith proportionate search" which requires a party to bear in mind that the cost of the search should not be excessive having regard to the nature and complexity of the issues raised by the case. If requested to do so by another party, the party giving discovery must provide a brief description of the steps it has taken to conduct a good-faith proportionate search to locate discoverable documents.<sup>28</sup>

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27 As Johnson highlights, the Scheduling Conference enables the parties to narrow the dispute so as to confine discovery to the proper purpose of helping to "resolve, not determine, what is in dispute": above n 17 at 257.

28 Lord Justice Jackson remarked in his Preliminary Report that the majority of practitioners exposed to the use of limited discovery in commercial cases in the Federal Court of Australia supported the "restricted approach to discovery": above n 2, Part 11, Ch 58, para 2.17.

The experience in the Fast Track List demonstrates that the cost and dimensions of discovery can be greatly reduced if the process is limited to cases where it is really needed for the fair determination of the issues, those issues having been defined. Many discovery problems have disappeared because the parties have taken a sensible approach to the issues that have emerged during the Scheduling Conference. Imaginative solutions are encouraged in such circumstances. For example, the judge might order staged, two-part, discovery with an assessment of the position upon the completion of stage one. Parties can be assisted to devise the orders best suited to their individual case. Much progress has been made in reducing the time, cost and complexity of discovery by the cooperation that some of these imaginative solutions encourage. Interrogatories will not be ordered at all, other than in exceptional circumstances of which there have been no examples.<sup>29</sup>

The dynamics of the Scheduling Conference have had another very beneficial effect, which is to encourage the proper exploration of opportunities for ADR. I emphasise "proper" because there is a danger that ADR – and usually only one form of it, namely mediation – is a "cure" for problems, including overcrowded lists. Approaching ADR as a "cure" debases it. ADR is correctly used when parties, having a good understanding of the strengths and weaknesses of their case and a desire to resolve their differences, can choose a form or forms of assisted dispute resolution that is suitable for them.<sup>30</sup> The removal of a case from the Court's lists should be seen as a consequential benefit, not as an end in itself. The most important benefit is that the parties have been able to resolve their dispute.

A Scheduling Conference conducted in the Fast Track procedure provides an opportunity for ADR to work at its best, for the real issues will have been identified and each party will be in a good position to make the necessary assessments of the strengths and weaknesses of their case. The presiding judge will also be very familiar with the case and, having sound knowledge of the different forms of ADR, may be in a position to facilitate their use. Some judges encourage the attendance of the Court's registrars with expertise and accreditation in ADR for consultation with the parties as may be useful and appropriate.

Obviously, settlement at an early stage in proceedings is likely to be more attractive than settlement at a later stage when most of the cost of the litigation has been incurred. Fast Track brings the parties face to face at a relatively early stage

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29 It is not clear whether interrogatories have ever been ordered in the Federal Court; certainly none have been ordered for many years.

30 As Schwarzer and Hirsch counsel in their judges' guide, "[j]udges should facilitate, not coerce, settlement": above n 4 at 9.

and since this occurs when they are also required to identify the real issues, there is natural encouragement to settlement, with or without ADR.

It must be acknowledged that it would be very difficult for Fast Track procedures to work if one of the parties adopted a consistently obstructive attitude. This, however, did not occur during the pilot program where the experience was that all parties cooperated. Unsurprisingly, a party that seeks to have its case determined in the Fast Track List – usually the plaintiff/applicant – has a strong incentive to make the procedure work. If a respondent objects to the proceeding being conducted in accordance with the Fast Track Directions<sup>31</sup> it may object to the Court, but it must do so within 14 days of service and must furnish a brief statement of its reasons for objection. The point is that a party who, having had this opportunity at an early stage, does not seek to have the matter removed from the Fast Track List is in no position to be uncooperative later. In any event, our experience has been that respondents who remain in the process do cooperate, and cooperation and open dialogue have been important elements in the success of the List. Fairness must of course remain paramount and any issues or concerns that are raised during or after the Scheduling Conference, such as sufficient time and access to relevant documents, are dealt with. Moreover, although at first sight delay might seem attractive to a respondent, a speedy outcome with limited expenditure on legal costs is likely to be more attractive to a commercial litigant. .

One other feature of the Scheduling Conference should be mentioned before I pass to the final distinctive feature of the process. That matter is the timing of the Scheduling Conference at a point generally not less than 45 days from the date of issue. To experienced case managers this may seem quite counter-intuitive but there are very good reasons for this choice. The lapse of time provided for by the Directions (which can be modified for good reason in particular cases) is designed enable to a respondent to come to grips with the applicant's case and to enable a respondent to work out, well in advance of the Scheduling Conference, what its response should be. As noted, a respondent may apply for the removal of the case from the List within 14 days of service but if the case remains in the List the respondent will obviously need time.<sup>32</sup> If the case is brought before the judge for directions too quickly – as traditional case management might suggest – the chances are that little would be achieved, other than the parties advising the judge they "do not yet have sufficient instructions and need more time". Better to work

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31 See objection to Fast Track Directions: Practice Note 30, para 2.4 (see above n 9).

32 The Fast Track Response has to be filed within 30 days after service of the Fast Track Statement: see Practice Note 30, above n 9, para 4.7(b).

towards the Scheduling Conference at which there will be focus on the issues and in which the blueprint for the trial will be set. This is consistent with the overall approach of the Fast Track Directions which is to minimise applications to the Court and to maximise the outcomes of the two principal pre-trial appearances: the Scheduling Conference and the Pre-Trial Conference.

The Pre-Trial Conference is the final distinctive feature of the Fast Track process, short of the trial itself.<sup>33</sup> The pre-trial conference, which is required by the Fast Track Directions, will usually be held about three weeks before the scheduled trial date. The conference is held with the presiding judge, the lawyers involved in the case and all parties. Its purpose is to provide a forum for any outstanding matters or applications to be dealt with before the start of the trial, for the list of witnesses on either side to be finalised and for the identification of the material facts that are agreed and the facts that remain in dispute. The parties are expected to be ready to deal with any objections to the evidence that is proposed to be tendered. By this stage in the proceedings the nature of all the evidence will be known so that it will frequently be possible to deal with objections in advance of the trial. If, however, it is more convenient to deal with objections at the trial, that course will be adopted. By these and other means, the progress of the trial is facilitated and its duration shortened.

Most<sup>34</sup> of the cases that have proceeded through the Fast Track process in the Federal Court's pilot program have involved only the two pre-trial attendances specifically provided for by the Directions: the Scheduling Conference and the Pre-Trial Conference. This, I suggest, is a remarkable achievement and one that gives effect to the often-ignored case management principle that there should be few events but large outcomes from each event.

The last stage of the process is of course the trial itself, followed by a speedy judgment. The Fast Track Directions contemplate that pressure to move ahead will remain, even at the stage of trial, so as to keep the process efficient. Time limits may be set and the parties will be required to keep to them. Each party will be given a fixed block of time and it is for their counsel to determine how to allocate and best use that time. Experienced advocates know that a case will expand to fill the time available and they also know that there are some minimum requirements

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33 See Practice Note 30, above n 9, Part 10: Pre-trial conference.

34 From 85 matters only 12 have required an additional Scheduling Conference. Whilst it is not uncommon for interlocutory disputes to arise (the parties having been unable to resolve the dispute themselves), this does not usually require a court appearance: see above n 22.



for the fair presentation of a case.<sup>35</sup> In none of the trials so far conducted under the Fast Track regime have there been any difficulties with the allocation of time. Counsel have allocated the time responsibly and kept within the limits.<sup>36</sup> In the early stages of the pilot program it was contemplated that "chess clock" timings might be introduced but this has proved to be unnecessary.

We can now ask what impact Fast Track procedures have had upon the causes of delay that I identified earlier in this paper as being endemic and, importantly, if there has been an impact, why this is so. Whilst I acknowledge that an empirical analysis of the outcomes of Fast Track to date should be undertaken, as well as a comparative analysis of other forms of case management, it is reasonable in the meantime to suggest some answers.

The essential problem identified earlier in this paper was the delaying effect of sequential steps, each with its own timelines, each with its own complexities and each with its capacity for disputation. Since, in the traditional system, an individual step was either required by the Rules or, if optional, needed no particular justification for being taken, the resulting delay was endemic. To take a good example, general discovery could be obtained as a matter of course, without any requirement to demonstrate the need for discovery. I also identified the tendency for delay to build upon delay as each sequential step approached, and often exceeded, the time limit for taking it.

The Fast Track procedures attack this directly and in doing so lower costs.<sup>37</sup> The experience of Fast Track to date suggests that this occurs because:

- There is no longer any automatic progression through a series of procedural steps with sequential timelines.
- There are very few pre-trial appearances before the judge, and usually only two. The two pre-trial appearances provided for by the Fast Track Directions – the Scheduling Conference and the Pre-Trial Conference – are

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35 What these minimum requirements may be is very much a matter of perception and this will vary substantially from jurisdiction to jurisdiction.

36 Our statistics show that of the matters that have proceeded to trial the time allocated has not been exceeded, i.e. all matters that proceeded to trial were heard within the prescribed timeframe (the lengthiest was a four day trial).

37 Lord Justice Jackson has noted the satisfaction with the operation of Fast Track in the Federal Court of Australia amongst practitioners and their clients, due to the reduction in delay and associated reduction in costs: above n 2, Part 11, Ch 58, para 4.15.

high input high output events; the procedures strongly discourage low output events.<sup>38</sup>

- Discovery is brought under control by adherence to the principle that discovery has to be by leave and only for good cause shown. The time and cost of discovery is also controlled by requirements for proportionality, good faith and cooperation and by imaginative orders for stage by stage discovery in appropriate cases.
- The early identification of the real issues is a focus of the whole procedure and is facilitated by the requirement for Fast Track Statements and Fast Track Responses and by active participation of the judge and the parties at the Scheduling Conference. Certainty of an early trial date also encourages the early identification of the real issues.

There are also, I suggest, more fundamental processes at work.

I suggest that Fast Track has reduced cost and delay because it also fosters discourse and cooperation between the parties. The "meet and confer in good faith" precondition for interlocutory proceedings and the conduct of the Scheduling Conference contribute to a "get on with it" approach to the litigation. Discourse and cooperation, and active judicial involvement, also reduce the risk of unfairness or perceptions of possible unfairness. To the extent that any parties might feel inclined not to cooperate, the tight timeframe, with a fixed date for the Scheduling Conference and then a fixed date for the trial – the two "engines" that drive the process – will promote a constant pressure to do so.

I would also advance the hypothesis that the Fast Track process directly attacks the overarching cause for delay that I identified earlier as the application of something like a precautionary principle. It is only natural that careful practitioners will be inclined to leave no stone unturned in the interests of their client. This becomes a very cost-intensive task in any system where the real issues of the case are not identified early in the proceedings. As I have stressed, Fast Track confronts this issue by insisting upon, and providing a framework for, the early identification of the real matters in dispute. As a bonus this promotes early settlement, as I have pointed out, and as our results suggest. The focal points of the system, identifying and knowing the issues in dispute as early as possible, setting an early trial date, minimising unnecessary interlocutory steps and exploring options for assisted dispute resolution as early as practicable, are all fundamental principles of case

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38 This is reflected, for example, in the requirement that the parties "meet and confer and attempt to resolve" any interlocutory dispute "in good faith" before making an application to have it heard: Practice Note No. 30, above n 9, para 5.2.

management. They were embraced in the early days of case management in the Federal Court and were amongst the objectives of the Individual Docket System when it was introduced in the Federal Court (and to Australia) in 1998.<sup>39</sup>

What Fast Track does is to provide a framework where, in appropriate cases, existing case management procedures are enhanced and more sharply focused, with some new procedures and more developed requirements added.

What implications does this have for the role of the judge? The point can be made very shortly: all the innovations that I have described have been the result of judicial action to develop procedures with the aim of managing cases in a way that will achieve the just resolution of disputes as quickly, inexpensively and efficiently as possible. The impetus has been internal and these reforms have not required additional funding. What they have required is a high level of judicial commitment and expertise.<sup>40</sup>

The reforms show that if judges are prepared to work strenuously and imaginatively to attack the causes of delay and unnecessary cost, the profession will respond with cooperation and enthusiasm. They show too that the concerns of the sceptics<sup>41</sup> can be answered convincingly and, most important of all, that legal culture can change.

It must follow that if judges can reduce cost and delay by focusing on the causes that they themselves can eliminate by well-focused case management,<sup>42</sup> they should surely do so. We are all committed to the cause of accessible justice and we are, I suggest, in a position by active case management to remove endemic causes of delay which operate to deny justice to those who seek it. By adopting rigorous

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39 The Individual Docket System, under which cases are allocated to an individual judge upon filing and remain in that judge's docket for subsequent management and trial, was adapted from a system used in federal courts in the United States. The Federal Court model has some important modifications, however, including panels in some specialist areas including admiralty and maritime, corporations, patents, competition and monopolies and tax.

40 Judges of course also need to be confident in their knowledge of the areas of law involved so as to take a firm hand in the identification of the central issues, both as to law and as to facts, and to avoid any misidentification of the issues. As Fast Track develops within the Federal Court nationally, procedures will be put in place to take advantage of the expertise of judges within the Court's specialist panels.

41 The pilot program shows the importance of the Court going to the profession to explain the process and the benefits of it. Fast Track was itself the result of extensive consultations with leaders of the profession.

42 Procedures are being put in place nationally to facilitate the regular exchange of case management experiences within the Court and the promotion of consistency of approach within Fast Track whilst recognising, of course, that every case will have its own distinctive elements.

new procedures with active judicial participation and with cooperation between the parties, we can reduce delay and cost. We can also, as an added benefit, thereby promote the early and, ideally, amicable settlement of disputes to the benefit of those who bring their disputes before the courts for resolution.