VOLUME I

PARTS FOUR AND FIVE

TABLE OF CONTENTS

PART FOUR

CHAPTER 1

A SUMMARY OF THE MAIN ORAL SUBMISSIONS MADE BY INTERESTED PARTIES IN REGARD TO THE DESIRABILITY AND FEASIBILITY OF IMPROVING ACCESS TO JUSTICE IN SOUTH AFRICA :

CHAPTER 2

(A) WESTERN AUSTRALIA

(B) SYDNEY, NSW

CHAPTER 3

(A) WELLINGTON

(B) AUCKLAND

CHAPTER 4

(A) BRITISH COLUMBIA

(B) OTTAWA, ONTARIO

(C) TORONTO, ONTARIO

CHAPTER FIVE

(A) DENVER, COLORADO

(B) MINNEAPOLIS , MINNESOTA

(C) CHICAGO, ILLINOIS

(D) NEW YORK, NY

CHAPTER 6

(A) EDINBURGH , SCOTLAND

(B) LONDON , ENGLAND

CHAPTER 7

CHAPTER 8

CHAPTER 9

CHAPTER 10

PART IV CHAPTER 1

A SUMMARY OF THE MAIN ORAL SUBMISSIONS MADE BY INTERESTED PARTIES IN REGARD TO THE DESIRABILITY AND FEASIBILITY OF IMPROVING ACCESS TO JUSTICE IN SOUTH AFRICA :

(1) BY THE INTRODUCTION OF A SYSTEM OF CASE MANAGEMENT AND COURT ANNEXED ALTERNATIVE DISPUTE RESOLUTION ; AND BY REQUIRING THE EXCHANGE OF WITNESS STATEMENTS OR WITNESS SUMMARIES ;

(2) BY A CIRCUIT COURT SYSTEM FOR THE ADJUDICATION OF CIVIL CASES ;

(3) BY THE CREATION OF A COMMERCIAL COURT SUCH AS THE COMMERCIAL COURT FUNCTIONING IN JOHANNESBURG ;

1.1 MR M.J.D. WALLIS, SC, ON BEHALF OF THE GENERAL COUNCIL OF THE BAR, AT A PUBLIC SITTING IN DURBAN ON 28 NOVEMBER 1995 [SEE PAGES 1 TO 10 IN VOLUME III OF THIS REPORT] :

1.1.1 *" The concept of civil circuits, when one starts with it in principle, it ought to work in the same way as a criminal circuit. The major difficulties are the logistical ones which flow from the fact that…civil work involves the filing of pleadings and notices and so on…and far more record-keeping and administration than the prosecution which is in effect managed by the Attorney-General's Office…I have given thought to that problem and I think that there would be grave difficulties in trying to constitute regional civil registries in South Africa."*

1.1.2 *"There are differing views within the different Bars around the country, on this aspect* [the desirability of otherwise of Specialist Courts]. *So I hesitate to express a collective view…Firstly I am firmly of the view that the strength, the merit of the Roman Dutch law, call it South African law…is its general application of legal principle. Notwithstanding the impression one occasionally gets, we have still not adopted the English precedent, case-by-case approach to the development of the law, with all the erratic shifts and changes and the lack of relationship between one area of the law and another which that implies…we are a legal system of broad principle and we develop within the*

framework of those broad principles…It is amazing, when one discusses with foreign lawyers…the solution they arrive at by statute, judicial decision or otherwise, how closely it bears a resemblance to what evolves from the principles of the Roman and Roman-Dutch law ; and I think we lose that the moment we start saying, Judge So-and-So is an intellectual property Judge, Judge X is a common law Judge, Judge Y is a criminal law Judge, Judge Z will do maritime matters and so forth. Of course the maritime law internationally is the classic example of those broad principles applied on the scale of the whole world. That's the first reason I'm against it."

1.1.3 *" The second reason I'm against it is that I believe that overall we are a country which has vast potential, but limited skilled resources at this point…the end result is we need to conserve and use our resources as best we can, and…to take Judges away to seat them in special courts…is just wasteful of talent. Durban is to the best of my knowledge, the third or fourth largest centre for maritime litigation in the world… Nonetheless, there is not enough work here …to keep one Judge busy as an Admiralty Judge all the time. No doubt if we did have one Judge here we could almost eliminate delays in Admiralty cases in Natal, but it would be to the detriment of other litigants, because the Judge would not be available to do other work. So that's the second reason I think it's a bad use of resources."*

1.1.4 *" And the third reason is that I think it makes the judicial job less attractive to those who have been trained and brought up in the wide range of the law…I think we need to attract people of quality to the bench. So those are my three reasons why I'm actually hostile to any fragmentation…"*

1.1.5 *" What happens when you have six judges who are sitting in a Commercial Court in Johannesburg, they are happily doing commercial work, most or all of the time, which perhaps lots of their colleagues would prefer to do rather than knocking around crime and doing personal injuries cases and so on, which are not as exhilarating frankly. What happens when Judge A is duly and properly elevated to the Appellate Division and Judges X and Y would both like to go to the Commercial Court. X gets it and Y doesn't. I can see room for a great deal of tension."*

1.1.6 *" That is not how the Commercial Court works in London. Appointments, whilst they are all Judges of the Queen's Bench Division, the Judges who sit in the Commercial Court are appointed as members of the Commercial Court*

and they are appointed from the Commercial Bar. And you must understand, because of the size in London where there are 7½ thousand Barristers, you have a very distinct body. There is a Commercial Bar Association. The Commercial Bar is in fact a separate member of the International Bar Association, which is the biggest international body of Bars around the world. It has only 800 members. So 6,700 of the Barristers are not doing commercial work by and large."

1.1.7 *" Largely, for the sort of reasons I've been canvassing, I do not believe that the notion of a statutory Commercial Court in South Africa is workable. I think the figure given by the Judge President of the Transvaal is in the two years since this experiment started they've handled about 50 cases on that basis."*

1.1.8 *" Notwithstanding the proud hopes of the system, I have recently been involved in a major case set down for a month, involving millions of Rand, a construction contract case, which right from the outset we were told by the Judge President, was to be dealt with as a commercial case, don't worry we will always have a Judge allocated. Well pressure of work was such that the Judge never arrived and we had this interlocutory application and that interlocutory application…One was told, well you'd better set down an application to compel the supply of further particulars for trial in the ordinary Motion Court. You better deal with applications for further discovery in the ordinary Motion Court. And the problem that generates is that every time you do it in a major case, a new Judge has to familiarise himself with the papers…We never got this Judge allocated. Eventually the case settled."*

1.1.9 *" I question how many Judges…in proper commercial court cases, would be kept fully busy, even in Johannesburg. But that it would only be a handful, at the most the JP has 6 there out of 53. Now, the benefits seem to me limited and the im`poverishment of the Bench overall seems to me catastrophic, particularly bearing in mind our system of elevation to Appeal Courts."*

1.1.10 *" A grave danger for the Appellate Division is to acquire as a Judge someone who says, look, all I have done for the last 30 years of my life is a fairly narrow range of commercial cases. That is the expertise I bring. Sorry, crime I know nothing of, defamation - I can't help you ; administrative law is a closed book to me, intellectual property is intellectual to somebody else's property. That is, you actually take bright and talented people and then by making them very narrowly focussed you make them unfit for the appointment to the Appellate*

Division. That can't be right."

1.1.11 *" I think the better method is to evolve appropriate rules for the management of Commercial Court cases, or what will be broadly regarded as Commercial Court cases ; and, far more importantly, one needs to revisit the proposals which were rejected by Judge Galgut some number of years ago, because of the overwhelming opposition they met with from members of the Bench as it was then constituted."*

1.1.12 *" The members of the Commission have available to them, as I understand it, Lord Woolf's first Interim Report ; I brought it back for the Rules Board, I may say, which didn't have it. I have read it. If one looks at Lord Woolf's analysis, one looks at his solutions to it, they are very largely the solutions which were put up hy the Bars, including the Natal Bar and I think the GCB to Judge Galgut."*

1.1.13 *" The greater judicial role which was suggested to Judge Galgut by the Bars, at the time I think perhaps in a narrower context of presiding at Rule 37 conferences and pre-trial conferences. That is really the case management system, as it is called in Australia, which is a doctored Lord Woolf's fast track, multi-track case management system. They are all variations on the self-same theme. From my point of view, and I believes the Bars', we remain committed to that procedure as the best way of managing cases, of getting irrelevancies out of the way."*

1.1.14 *" And I'd like here to respond particularly to what Mr Maluleke said to me about elitism. We see no particular reason why Commercial Courts should be blessed with such benefits of management…In one sense, and I'm not saying it is a good thing, businesses are better capable of bearing delays than the person who is a quadriplegic."*

1.1.15 *" I would like to see the breadwinner who has lost a limb being able to get into Court because the case is properly and firmly managed from an early stage, and firm management in those cases can more readily be given because very often the practitioners who are appearing in them, for the plaintiff, may be novices, may be a little inexperienced, may not have the logistical back-up which could happen and the hoary old guard of the insurance company's lawyers sets out resolutely to raise the drawbridge and hold them off."*

1.1.16 *" I'm mot sure that's the right approach and I believe that proper case management would stop that where it is improper ; would stop the abuses of our pleading system, such as denying that a collision occurred to force somebody to give evidence ; refusing to agree or make a tender as to what the proper quantum of damages is. A Judge, who could say to people up front, look, I'm directing you, the insurance company, put in now a sealed expression of your views, one as to the likelihood of apportionment and the degree of it, and two, the proper quantum. And I'm going to bear that in mind when it comes to an award of costs at the end of the case. I think that might be a salutary inducement to settling cases timeously. It is that kind of thing which can be done and which benefits the ordinary litigant."*

1.1.17 *" Now, may I go to the witness statements. The underlying theory of exchanging witness statements was that it avoids trial by ambush and surprise. In principle that is acceptable, though I have some qualifications where you are bringing a case or defending a case where questions of fraud arise. Because there, by giving a warning to the other side who, may we presume for this purpose, is guilty of fraud, you merely compound the fraud. So that is one potential drawback."*

1.1.18 *" The system, when it was instituted in the early 1980's in England, had a great advantage. The parties agreed to it and they put up fairly clear, simple statements…rather more a witness summary. That was taken up by the Rules Board and then in 1986 they acquired the power to order disclosure of witness statements ; then in 1992 it became standard that you had to exchange witness statements. And then one got to the stage now where it is perhaps in the majority of cases, say 70%, more or less routine for the Judge to say, well, the witness statement will stand as the evidence in chief."*

1.1.19 *" That has had two major problems…it is grossly unfair to witnesses. They get no opportunity to get the feel of the witness box before they are confronted with hostile cross-examination…They don't prepare their witness statements, their lawyers do. They read them over with the eye of a layman and the first question that gets put is, why did you lie in page three, line 5. What do you mean did I lie ? Well, you said this, look at the letter over there, you were lying. ' Utterly unfair, but it happens, in that situation."*

1.1.20 *" That's the one side. The other side of that, and in an endeavour to meet that is…we put up witness statements, they're going to be exposed to*

cross-examination, you're not going to be able to lead anything in addition to this statement. Well, we've got to make the statements as complete and thorough as possible.' "

1.1.21 *" And, if I may then return to the article* [in "Counsel", the Journal of the Bar of England and Wales Nov/Dec 1994 issue] *:-*

> *'The current practice with witness statements thus has the following drawbacks. First it gives a significant edge of advantage to the well financed litigant over the legally aided client of a small High Street practice. Secondly, if the statements stand as evidence in chief the ascertainment of the truth is made considerably more difficult. The Judge no longer observes the witness telling his own story in his own words. Thirdly, the cost of trial preparation has been greatly increased…The twenty thousand word statement may take only two minutes to verify, but it then takes a fortnight to be challenged in cross-examination…' "*

1.1.22 *" That is the real flaw of the system, there is no management to do it and there is no ethos to do it. But I don't believe we are going to solve those sort of problems by setting up some independent Commercial Court, we need the rules, we need training, we need change of attitude and…we need change of attitude and…*

CHAIRMAN : *Co-operation ?*

MR WALLIS, SC : *Yes, Once that is done then, and, the important change as I see it in the managed approach is that the Judge is enabled to overcome the lack of co-operation. That's the key to it working. The ability of the Judge to overcome the lack of co-operation and the willingness of the Judge to do so."*

1.2 THE HON MR JUSTICE I.G. FARLAM OF THE CAPE OF GOOD HOPE PROVINCIAL DIVISION AT A PUBLIC SITTING IN CAPE TOWN ON 8 JANUARY 1996 [SEE PAGES 11 TO 12 IN VOLUME III OF THIS REPORT] :

1.2.1 ***"CHAIRMAN" :*** *…For the record may we invite you briefly to tell us the essential mechanisms in the Cape Rule 37 techniques which represent a modest*

but a real step in the direction of caseflow management.

"FARLAM J : *There are basically two points. The first is, there is provision for the Rule 37 conference, the one held after the close of the pleadings, to be presided over by a Judge. He sits in chambers - he normally sits in this court as a matter of fact - but it is notionally sitting in chambers and he does not come robed or anything of that kind. But before that, and this is the second part, the parties have to fill in a questionnaire. They are obliged to discover, they are obliged to request further particulars for trial and to respond to such requests automatically without request being filed for that within a certain period after the close of pleadings. They are supposed to have done all those things before the meeting is held over which the Judge presides. Both attorneys have to fill in a questionnaire and the rule requires the forms should be filled in by the attorney who is actually handling the case. And also it is desirable - it does not always happen in practice, but it is regarded as desirable - that that attorney should attend the conference himself or herself."*

1.2.2 *" The Judge then considers the matter. The parties are invited to say whether there are any directions that they require to be given by the Judge and the Judge can very often then and there, if there has not been compliance with the requirements in respect of discovery of the filing of requests for further particulars or the filing of a response thereto, to order that it be done and to fix time limits for them and to provide normally that the case may not be enrolled for trial until that has been complied with. The Judge can sometimes postpone the conference for a date in the future on the clear basis that everything that has not been done yet must be done before the resumed conference."*

1.2.3 *" The Judge can also deal with matters like separating issues. An order can be made under Rule 33(4)… for the separation of issues at that stage already. The questions of amendments to pleadings must be dealt with before the close of the conference. Very often the Judge is able to suggest ways of shortening proceedings which the parties had not thought of. Very often the parties themselves make suggestions, sometimes both of them, sometimes one of them and the suggestions are adopted at the conference."*

1.2.4 *" It is also not unheard of for the Judge even to suggest a possible basis for settling the case. The attorneys sometimes get up and say very candidly that they are very close to settling the matter, but there is a certain problem and the*

Judge then informally will give an indication as to how he thinks the problem can be dealt with which is acceptable and the case is settled then and there."

1.2.5 *" …our impression…is that the system does encourage settlements, that more cases are being settled….than would otherwise be the case…some attorney friends of mine say that they like the system because it enables them to come face to face with their opponents. So often they have been trying to get hold of their opponent to see if they cannot settle the matter and because the attorneys who are handling the matter are encouraged to be at the conference themselves, they get an opportunity and very often cases are settled in the passage outside while they are waiting for the conference to take place. So more cases are being settled, more cases are being settled earlier and that has the important knock-on effect also that it means delays are being reduced and other cases which cannot be settled are able to come up for hearing earlier."*

1.3 THE HON MR JUSTICE G. FRIEDMAN, JUDGE PRESIDENT OF THE CAPE OF GOOD HOPE PROVINCIAL DIVISION AT A PUBLIC SITTING HELD IN CAPE TOWN ON 8 JANUARY 1996 [SEE PAGES 13 TO 18 IN VOLUME III OF THIS REPORT] :

1.3.1 In regard to Rule 37 Friedman JP explained to the Commission that he and his colleagues :-

> *" are at present working out suggestions for improving the present procedure which we will again put before the profession when we have formulated them. Hopefully we will be able to come up with some suggestions which will be put to the Rules Board which will make the Rule 37 procedure even more effective than it is at the moment. That roughly is what the situation is."*

1.3.2 Next Friedman JP addressed the Commission on the matter of case flow management :-

> *" The main thrust of case flow management involves, I feel, from what has been written and what we have gleaned from other countries, is that there has to be a far more hands-on policy on the part of the judiciary. This culture of involvement of the judiciary in the running of cases, must be accepted by the profession. These are fundamental principles.*

Because if you are going to have a system of case flow management it is no good having a system which does not involve the Judge in the running of the case. Because the present system in this country is such that the litigants and their legal advisers control the pace of litigation."

1.3.3 In developing his theme Friedman JP made copious references to an article published in two parts in the September and October 1995 issues of The Australian Law Journal entitled " Reforms to the Adversarial Process in Civil Litigation " by the Hon Mr Justice D.A. Ipp of the Supreme Court of Western Australia. In what follows reference to this article will be made as " the Ipp article ".

1.3.4 Judge Ipp is a graduate in Commerce and Law of the University of Stellenbosch. After practising as an attorney in Johannesburg he was a member of the Cape Bar from 1973 to 1981. Having joined the Western Australian Bar Association in 1984, he was appointed as Queen's Counsel in 1985 ; and as a Judge of the Supreme Court of Western Australia in 1989. Judge Ipp has made outstanding contributions to the development and application of case management in Western Australia. In 1994 he was a Fulbright Senior Scholar. The Ipp article is based on research carried out by Mr Justice Ipp at the Law School of the University of Virginia in the USA.

1.3.5 The Ipp article is a comprehensive analysis extending over some 56 pages of the ALJ. The ALJ [at page 705 and again at page 790] gives the following useful synopsis of the Ipp article :-

[p. 705] *" The judicial system cannot cope with the increased demand for its judicial services and there is a pressing need for reform. The modern adversarial process is an historical development, not a planned, logical system, and has always been subject to pragmatic change. Although aspects are immutable, such as the elements relating to fairness in the proceedings, there is considerable flexibility within other elements. A striking change is the extension of judicial control. The changing role of lawyers has led to many difficulties in the system and legislative intervention to enforce appropriate standards of conduct is inevitable.*

[p. 790] *Reforms of the pre-trial process through case management are*

continually occurring. The trend is to make orders at pre-trial conferences governing as much of the conduct of the trial as possible. There is a pressing need for discovery reform. The use of written statements as evidence in chief is becoming prevalent, as is mandatory mediation. Judicial intervention to avoid injustice during the trial is growing in acceptance. There is a need for judicial power to limit the length of trials in appropriate cases. The appellate process is particularly in need of reform. Possible reforms include limiting the length of appeals, limiting the need to deliver full reasons, introducing two-judge panels and mediating appeals."

1.3.6 At page 790 of the Ipp article the learned author describes thus the two basic models of pre-trial case management :-

" There are many different permutations in the techniques of pre-trial case management. There are, however, two basic models, and all pre-trial management techniques are, in some form or other, adaptations of them. These two models are, first, management involving continuous control by a judge, who personally monitors each case on an ***ad hoc*** *basis, and, secondly, management where control is exercised by requiring the parties to report to the court (often in the form of a master or registrar) at a few, fixed, strategically determined, intervals or occurrences (sometimes called 'milestones') where the management of the case is part of the routine and structure control by the court over all or most of the cases in its registry.*

Most forms of the first model are expensive, as they require constant attention by the judge and frequent interlocutory appearances by the parties. This is usually most suited to complex cases. There is a compelling need for all complex cases to be subject to case management of this kind.

It is worthy of mention that there is a form of this model which has proved to be extraordinarily successful for the management of all kinds of cases, and not only complex litigation. That is the case management system implemented by the United States District Court for the Eastern District of Virginia, known throughout the United States as the 'Rocket Docket.' "

1.3.7 Having referred to the above-quoted passages in the Ipp article, Friedman JP expressed the following views as to which of the two basic models would be suitable for South African conditions :-

> *" The first one which involves continuous control by the Judge is employed in certain States in America where when a case comes in, when someone files a summons, that summons is immediately referred to a Judge who from that moment onwards controls the course of the litigation. That is, I would suggest, not the type of case management that we could possibly employ here because it involves too much time and it involves a certain amount of specialisation which we are not in a position, I do not think, to introduce here. I think that it is far better if we follow the second system of the Judge intervening at certain milestones and the parties being required and the litigants being required at certain stages in the proceedings to do certain things and for the Judge to exercise overall control over the progress of the litigation at those milestones."*

1.3.8 *" This brings me onto another topic under this same globular heading of 'Access to Justice' , and that is the question of ADR, Alternative Dispute Resolution. It would seem from our investigations that the leaders in this field are the United States, State Courts and Federal Courts. The Federal Judicial Center published a special issue in December 1994 on Alternative Dispute Resolution, and it deals in a fairly succinct form in a 26-page document with the various forms of Alternative Dispute Resolution."*

1.3.9 At page 801 of the Ipp article the following is said under the heading of "Mandatory Mediation" :-

> *" Mandatory mediation occurs when courts order mediation between the parties. Mediation of this kind is a service provided by the court and is part of the adjudicatory process. There are some jurisdictions in which compulsory mediation may be ordered, a typical example being the mediation procedures of the Supreme Court of Western Australia. Mandatory mediation is to be distinguished from forms of voluntary alternative dispute resolution, which involve the voluntary submission of disputes to private mediators.*
>
> *The provision of mediation provided by the courts is another important*

modern reform of the civil litigation process. It is part of the court's attempt to reduce backlogs and to cope with inadequate resources. It also reflects the belief that some disputes are better resolved through a consensual process rather than an adversarial one.

In mediation the mediator holds a series of joint sessions and separate meetings with the parties in an effort to facilitate agreement. If it is not possible for the mediator to effect a settlement of the entire action, he or she will endeavour to facilitate the resolution of independent issues in the case. Because settlement depends upon mutual agreement, the success of the cooperative process requires both the presence and meaningful participation of all relevant parties."

1.3.10 Having referred to page 801 of the Ipp article Friedman JP stressed the importance of mediation :-

" It is well-documented in the United States because they feel that a great deal of litigation - we all know it, it happens here too -they say that 90% of litigation in the United States is settled at trial or just before trial. That is our experience too. Because if it were not so we would not be able to function. But the problem is that these cases are settled at too late a stage. If they could be sent to mediation at an earlier stage then many of these cases would be settled without having to incur the costs of a full-scale trial eventually or even the procedures which lead up to a full-scale trial even if it is settled on the morning of the case. That is why alternative dispute resolution is so important."

1.3.11 Mentioning that a number of the American Courts have court-annexed systems of Alternative Dispute Resolution Friedman JP pointed to the lack of awareness of mediation on the part of local litigants as well as the comparative paucity of mediation facilities in South Africa :-

" I think that the problem, certainly in this country, is that litigants are not aware of the fact that they can go to mediation. That is the one problem. And even if they are aware, there are no proper structures in this country yet to which they can go. The result is that cases are settled really by the legal practitioners themselves and that happens at too late a stage in most cases. That is why, when one is considering access to justice one cannot leave out a consideration of the whole

question of alternative dispute resolution."

1.3.12 In response to a question by Mr Maluleke about the cost implications of mediation Friedman JP replied as follows :-

> *" There are costs involved in mediation because mediators would not spend of their time without being paid for it. But the costs involved are minimal compared to the alternative, which is to go to the Supreme Court in a full-scale trial. Because if mediation is employed at an early stage, it would obviate all the additional costs over a long period of time with attorneys and counsel and witnesses being involved, expert witnesses, so the alternative dispute resolution, although it involves a cost structure, certainly has a tremendous advantage over the full-scale trial, if it can avoid that."*

1.3.13 In the course of his address Friedman made particular reference to the destructive potential of discovery procedures in trial litigation :-

> *" If you have regard to the Report of the Woolf commission gentlemen, you will see that a very important aspect of that Report is the manner in which he approaches the question of discovery. Because discovery can overburden the proceedings. It can put a litigant, who is not wealthy, into a very disadvantageous position because he could be flooded with documentation which is not really relevant ; and with the aid of the photostat machine these days it is very simple for a practitioner to just roll of documents and flood his opponent with unnecessary documentation. That is why Lord Woolf has suggested a curtailment should be placed on the question of discovery."*

1.3.14 Friedman JP also explored the advantages of treating witness statements as evidence-in-chief :-

> *" In England Lord Woolf has suggested that a deposition should be taken down from the witness and that should stand as evidence-in-chief. It not only cuts down the time taken in court, but it also makes the case which the plaintiff is intending to bring clearer, so that the defence knows what case it has to meet, so that you do not have these games going on where people keep their evidence, as far as possible, up their sleeves and do not reveal it until the last minute, all of which leads to*

more expansive and more expensive litigation."

1.3.15 In connection with the issue of a possible Commercial Court for Cape Town Friedman JP said the following :-

> *" As far as establishing a Commercial Court is concerned, we do not feel it necessary for us to introduce a Commercial Court in Cape Town.*
>
> *LEON J : I have been told it is not working very well in Johannesburg.*
>
> *FRIEDMAN JP : But whether it is or is not functioning, I am not prepared to comment on. All I can say is I have read the rules that apply to it as far as we are concerned it is not practical to introduce such a system in the CPD. The reason is a logistic one. We have at the moment 24 permanent Judges in this Division and we have had an extra one since the beginning of last year to cope with the additional criminal work which we have here. But 10 Judges are engaged daily in criminal trials in this Division which leaves you with 15 Judges to deal with the rest of the work. Two of those are permanently engaged in the motion court every week…So that half the complement of the Bench is already involved. Then we have the Income Tax coming here three times a year which we have to assign a Judge to. Then we have Water Court sittings. So if we were to introduce a Commercial Court in this Division I would have to allocate the work which would be identified as Commercial Court work to, say, five Judges. It cannot work if you have less than five, I do not think. Then one would not have enough Judges to deal with the ordinary run-of-the-mill work."*

1.3.16 Friedman JP considered not only that a Commercial Court was unnecessary for the Cape, but further that in principle it was wrong to accord preferential treatment to commercial cases over certain other cases in which urgency was a paramount consideration :-

> *" We feel that the system that is in operation here works sufficiently well. If a case is identified as being one to be dealt with urgently, the practitioners know that they can approach me and I will make whatever arrangements are necessary to have the case expedited, whether it be a commercial case or any other kind of case. One of the main objections, both from the judiciary and the practitioners in this Division to the*

establishment of a separate Commercial Court, is that there is no reason why a commercial case should receive preference over a case of personal injuries where the person is desperately awaiting an outcome so that he can carry on with his life after he has been injured. So unless one can devise a system whereby Commercial Courts are not given preference timewise over cases in which the community is involved on a personal level, it would be unfair. You could only do that, we feel, if you have a large Bench like you have in the Transvaal where you have over 55 Judges, and to allocate five of them to a Commercial Court does not interfere with the rest of the work and does not give commercial cases priority over cases which are as deserving."

1.3.17 In connection with civil circuit courts Friedman JP remarked :-

" As far as the second aspect of the Terms of Reference of the Commission is concerned, namely the question of civil circuit courts. We have such a system in the CPD. At least twice a year a Judge is sent down to the Southern Cape Circuit Division, where approximately 30 cases are disposed of over a period of two or three weeks. Most of them are settled there, but those which have to be heard are heard and witnesses are in the area, they do not have to come to Cape Town. We do it regularly there because that is where the bulk of the work is.

But if there is a civil case in any other Circuit Division we will send a Judge to that Division. We do it on an ***ad hoc*** *basis and it…works well. We do not need to change the rules for that. And of course the Judge on circuit, to whatever circuit town he goes, does the unopposed divorces. I do not know whether that happens in other Divisions."*

1.4 MR ATTORNEY M.T. STEYN, ON BEHALF OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE, AT A PUBLIC SITTING HELD IN CAPE TOWN ON 9 JANUARY 1996 [SEE PAGES 19 TO 23 IN VOLUME III OF THIS REPORT]

1.4.1 *" As far as the Commercial Court is concerned, we can have a Commercial Court if the need for that has been identified. The problem with the Commercial Court in Johannesburg is that it is based on agreement between the*

litigants. The litigants have to agree to go into the commercial lane. Where you have a recalcitrant defendant he does not agree to anything, so he would rather dig in his heels and say that I am not agreeing to that because I would prefer, without saying that, to stick to the common law or normal lane because that takes much longer and gives me more time to get my money together."

1.5 <u>ADV D. BOSMAN, A FULL-TIME MEDIATOR OF STELLENBOSCH, AT A PUBLIC SITTING HELD IN CAPE TOWN ON 9 JANUARY 1996 [SEE PAGES 24 TO 27 IN VOLUME III OF THIS REPORT]</u> :

1.5.1 *" Ek het twee grade, een in drama en ek het 'n LL.B. Ek het in 1978 begin by die landdroshof, daar gepraktiseer tot 1979 met landdrosrang. Toe het ek my leerklerkskap gedoen by mnr Steyn se firma, Silberbauers. Sedert 1982 was ek 'n prokureur in die Paarl. In 1986 het ek by die Kaapse Balie begin praktiseer tot 1992. Toe het ek bedank by die Balie en sedertdien praktiseer ek voltyds as 'n mediator in Stellenbosch."*

1.5.2 *" Wat ek wil sê hierso is, dit is belangrik om daarop te let dat daar 'n wesenlike verskil is tussen mediasie en skikkingsonderhandeling. Heelparty regspraktisyns, prokureurs en advokate, verkeer onder die indruk dat hulle mediasie toepas terwyl hulle inderdaad skikkinsonderhandelings toepas…Mediasie is die kliënte praat self en hulle besluit self en die mediator is 'n neutrale derde. Trouens, ek wil sover gaan deur te sê dat dit sou eerder tot die partye se nadeel wees dat regsverteenwoordigers teenwoordig is tydens 'n mediasie proses, want dit is my ervaring in die praktyk. Want as jy jou weer kom kry het die twee prokureurs die gesprek heeltemal oorgeneem en die ouens wat eintlik moet praat sit daarso en hulle sê nie 'n dooie woord nie."*

1.6 <u>MR ATTORNEY O.D. HART OF VENN, NEMETH AND HART, WITH WHOSE SUBMISSION THE PIETERMARITZBURG LEGAL CIRCLE ASSOCIATED ITSELF, AT A PUBLIC SITTING HELD IN DURBAN ON 30 MARCH 1996 [SEE PAGES 31 TO 33 IN VOLUME III OF THIS REPORT]</u> :

1.6.1 *" I firstly cover the question of a Circuit Civil Court in Natal. Mr Commissioner, I am of the view that a Circuit Civil Court will not be necessary. Apart from the expense of setting up such a Court, it seems to me that for civil*

matters one may well find oneself in a position of going out on a circuit with five or six matters on the roll, all of which are settled, and a Circuit Judge sitting there with nothing to do…I do not see the necessity for Civil Circuit Courts in Natal, particularly as I do not believe there is any place which is more than three hours travel from either Maritzburg or Durban."

1.6.2 *"CHAIRMAN : Do you support the idea of case management ?*

MR HART : Case management, I do. And if it is thought that that is not a….responsibility for Judges, then it seems to us that maybe there should be legally qualified registrars or the like, with management experience, with executive powers, to jog along cases and see that they get to court and to spend time in things like rule 37 conferences. Because if that is done, the parties will have to apply their minds to things properly and early and, in our view, that will reduce the time delays in litigation."

1.7 ADV A.J. DICKSON, SC. ON BEHALF OF THE PIETERMARITZBURG BAR, AT A PUBLIC SITTING IN DURBAN ON 30 MARCH 1996 [SEE PAGES 34 TO 35 IN VOLUME III OF THIS REPORT] :

1.7.1 *" As far as the Commercial Court…is concerned there is no difference between the opinions of Durban and Pietermaritzburg, and we support Durban in the creation of a Commercial Court, probably to be based in Durban…we feel that Durban is big enough to have such a Court ?"*

1.7.2 *" CHAIRMAN : One of the criticisms levelled against the Commercial Court in the Witwatersrand Local Division is that thus far it is dependent on the consent of both sides…*

MR DICKSON : Mr Chairman, I certainly don't believe that it should be a matter of choice…I believe that the plaintiff should make a decision and if he wishes to take it to the Commercial Court, that should be the place it goes."

1.8 THE HON MR JUSTICE C.F. ELOFF, JUDGE PRESIDENT OF THE TRANSVAAL PROVINCIAL DIVISION, AT A PUBLIC SITTING AT MIDRAND ON 9 APRIL 1996 [SEE PAGES 36 TO 42 IN VOLUME III OF THIS REPORT]

1.8.1 *" I felt the need to do something for Johannesburg what was being done for London for the London Commercial Court. The London Commercial Court was established at the turn of the century to cater specifically for what was termed 'commercial cases of some complexity'. The merchants and tradesmen and everybody were dissatisfied with what was going on and I just took it upon myself to start investigating this.*

I set up a small informal Commission with myself as the self-appointed Chairman, members of the Johannesburg Bar, Attorneys Association, the Law Society and some judges and we had exploratory discussions and I found support for this. I also touched the other Judges President and the Chief Justice on this and they thought it was an idea which was well worth exploring. The Law Society was to such an extent supportive of this that they arranged for me to fly to London to explore, to examine the workings of the Commercial Court there."

1.8.2 *" I went to London, I had discussions with the President of the Commercial Court, I was in fact invited to sit on the High Court in the Commercial Court and to see its workings. When I returned I decided to take the plunge and set up a Commercial Court.*

I have not, of course, the statutory power to set up a court as such but I did the next best thing and that was to issue a Practice Direction which in terms amounted to this that if two parties to a civil suit in Johannesburg wished their case to be dealt with as a commercial case they could join and ask me to do that."

1.8.3 *" The Practice Direction I issued then was discussed by the Minister of Justice in Parliament, he also supported the idea strongly and the original Practice Direction was altered later on, various procedures were provided and one important element in the set up of the Commercial Court was that once the Judge President designates a case as a commercial case a judge is assigned to the case and he lives with that case and all the little procedural hiccups which occur as the case proceeds is dealt with by him. The judges who are designated*

to this court are known to be judges who have had considerable experience in commercial matters and can deal quickly with these cases."

1.8.4 *" Apropos something mentioned by Judge Flemming, I was concerned when I set up this court or arranged for this court by the Practice Direction about the danger of setting up a judicial elite.*
This problem I discussed when I was in London with Lord Steyn, an expatriate South African who practised in the Commercial Court extensively, I asked him whether one does not create the danger that you create a judicial elite and he said no, it has not been the experience in London. The fact is that certain judges are known to have expertise in intellectual property matters, expropriation matters, criminal matters and all sorts of matters and they do not become elites because of this."

1.8.5 *" The motivation was to cater for Johannesburg being the commercial centre in Southern Africa, the problem was to cater for that litigating problem in the same was as the London Commercial Court caters for cases of that sort in London.*

The problem about the informal way in which this court was set up is that there are many persons, litigants, who prefer not to co-operate in having their case assigned or becoming commercial cases. The defendant who wants to drag his heels and gain as much time is not going to do that and that is why it needs statutory foundation so that as in London the case can be designated a commercial case, whether or not both parties like it."

1.8.6 *" <u>CHAIRMAN</u>: Now in explaining to us what you had done in regard to the Commercial Court you will recall that you used the vivid phrase that once a case has been designated a commercial case, a particular judge is assigned to it and he then lives with that piece of litigation. Very broadly, what is your reaction to the notion of, not merely in relation to a Commercial Court but generally speaking in civil litigation, the notion of court management as a regular feature of civil litigation?*

<u>ELOFF JP</u>: Yes that is a popular idea of Judge Ipp of Western Australia, and I have given this some thought. Yes, court management; but within limits. The difficulty is you have to deal in Transvaal with numbers, large numbers of cases. It is an idea which the Cape likes of having some sort of court management in the sense that every case has to have a judge presiding over it

pre-trial. That is just not on as far as Transvaal is concerned because of the numbers."

1.8.7 *" I mentioned earlier that we set down in Johannesburg 28 cases per day. If you have to have a judge presiding over a pre-trial minute of that you have to have a bench of 20 judges presiding over nothing but pre-trial conferences and I can assure you that some of these cases are quite complicated. For a judge to exercise a meaningful role over a pre-trial conference with a court file this thick, and complicated issues, is going to require an hour to deal with this. That sort of court management is not practicable."*

1.8.8 *" The next best thing is something which occurs in the Commercial Court but also in other cases where a matter is somewhat complicated. The parties approach me as Judge President or any Judge President and ask him to make special arrangements, I can give you a case in point. There was a very complicated case running into several millions involving the importation of Teak from the East and it was complicated and the pleadings bundle looked like this so the parties came to see me, I assigned a judge to this case and there were about four or five times when they had to come before him on all sorts of procedural wrangles and because of his understanding of the case, because he had been - I use the phrase living with the case - he understands it and he could quite rapidly resolve any disputes as they arose. But that, because of practical reasons can only occur in regard to certain particular cases.*

Another sort of case that lends itself to that treatment is expropriation cases and I have done this quite often. When an expropriation case is pending then I call in the parties or they come to see me, I designate a judge to the case and he takes part in the pre-trial management of the case. But the sort of Judge Ipp idea will not work in Johannesburg."

1.8.9 *" <u>CHAIRMAN</u>: Of course on the North American continent something much in vogue is the technique of Alternate Dispute Resolution, either as a completely voluntary option or in some jurisdictions annexed as a procedure annexed to the court as part of the litigation process. Briefly your ideas on that subject as a device for saving time and money?*

<u>ELOFF JP</u>: That has happened and with some success. The question is who shall take the initiative and at what stage and how? I am aware of a very complicated engineering dispute which was threatening to go on for years and

the parties themselves then agreed for the appointment of a senior advocate from Natal to sit as the mediator.

There is, in Johannesburg, this body that takes on these cases; but what is required is that somebody should take the initiative of invoking these people. Question, should not the judge do that? Yes, but at the stage when a case comes before a judge the parties are ready and the costs are incurred and it is a little late then to do it."

1.8.10 *" Possibly some procedure could be invoked whereby cases could be identified at an early stage which call for mediation. In the United States, you refer to that, I have knowledge for instance of Denver, Colorado there they have got what they call a Court Manager and he, with computers, picks up cases which call for that sort of treatment and designates that.*

It is a complicated matter, I simply do not know how one identifies in good time what cases are of that sort, not every case lends itself to mediation. I think the initiative should come from the parties themselves but often the lawyers would prefer to have a good and a healthy fight in court rather than submit to mediation."

1.8.11 *" I now pass on to a few words about the Commercial Court. May I just recap and deal with certain important functions and advantages of the Commercial Court and these advantages were spelt out to me when in London. As I mentioned earlier I spoke to judges who had served on the Commercial Court and with advocates who had practised there and also with the Senior Commercial Court Judge in London.*

The first and important thing is that the judges who serve there are known to be men who have had considerable experience in their practices of commercial matters. Now theoretically any judge should be equipped to deal with a commercial matter but it goes so much quicker if you do not have to explain to a judge what a charter party or a bill of lading or demurrage is or if he can interpret a balance sheet or if he is familiar with business practices in certain matters. It so greatly assists and the duration of the trial is cut down very substantially."

8.1.12 *" It is also the London experience, if the judge who is on the Commercial Court is known to have had a very considerable commercial experience, whether at*

the Bar or his years on the bench, parties accept that he is an interventionist. It is very often necessary for a judge to be an interventionist, and to say to counsel now this second defence of yours, is it really worthwhile and they accept it.

The third feature is the one which I mentioned earlier that very often the commercial disputes are very complicated or perhaps lawyers make them so and when the matter comes to trial you have a pleadings like this and if the Commercial Court judge is assigned to the case at the close of pleadings and has quite an understanding of the pleadings, any interlocutory matters are dealt with expeditiously, he knows what the case is about, he can on short notice sit on an interlocutory application, when there is an application for leave to amend or an exception or an objection.

I can mention one case where there was a very big action in the WLD involving several millions of rands, it was a very complicated case and before the case came to trial there were about three or four interlocutory applications, I assigned this case to a particular judge and he dealt with all of these really expeditiously and then he also presided over a sort of pre-trial conference and the actual hearing time was reduced from a potential two months to three weeks."

1.8.13 *" As far as the litigant is concerned, the advantage is that many litigants who are involved in a commercial dispute sometimes resort to arbitration. They resort to arbitration because then they know who the arbiter is. They fear, and let us spell it out with plain language, they fear that if they take their chances in court the case might come before a judge who is not that familiar with commercial matters, it can be long and drawn out and there is some uncertainty. Therefore, they resort to arbitration.*

If they resort to arbitration it costs them an enormous amount, they have to pay the arbitrator, they have to pay for the venue, they have to pay for the cost of preparing a record and there is no appeal and it is for that reason that it is a very good next best thing to have a Commercial Court when it is known who the judges are and it is known that those are the judges who have commercial experience and can deal rapidly and expeditiously with the cases that come before them."

1.8.14 *" May I just then respond to a point that was made that the Commercial Court*

in Johannesburg started off with a flourish and then did not attract all that much custom. I think there was, I gave one reason already and that is that certain parties would prefer not to have their case stamped or labelled a commercial case, they prefer to fight in the old system and gain time.

Another, I think more practical reason, is the following: when I created the Commercial Court in Johannesburg with a Practice Direction the rules of procedure which I then agreed upon were those which the Bar and the Side Bar agreed upon in discussions with me and they were fairly simple rules. But thereafter some rules were added, I think I myself was party to additional rules. I issued a varied Practice Direction which added further new rules including one which gave the right to the commercial court judge to require the parties to exchange witness statements.

That was a mistake, with hindsight I can say that now, and several senior counsel have come to see me and tell me that that is the reason why they would rather not use that avenue because they firmly believe that it is not in the interest of their client to do so. Whether that is the correct attitude I do not know, it is not for me to decide."

1.8.15 *" I believe that in time to come we will follow what is done in Great Britain and that is to require, perhaps make it obligatory in most cases, for a short summary of the statements of witnesses to be produced. However, that is the reality, there was that sales resistance to the use of the Commercial Court largely because parties were concerned about the novelty of having to exchange witnesses statements.*

In consequence of that I issued a new Practice Direction, the copy of which you have before you which again adopts the simpler procedure and only opens the door of the parties exchanging witnesses statements if they all agree. I altogether agree with Advocate Van der Linde who says that the way of dealing with this is perhaps to do it on a basis similar to that appertaining to Admiralty Courts where a case can be designated a commercial case and then special rules applicable to the commercial courts apply.

In London the Commercial Court has a practice of sitting every Friday dealing with what we might term interlocutory matters and it is then that most of the hiccups in a case are dealt with and disposed of and that is a very important part of a case and perhaps some sort of procedure can be adopted in the

Commercial Court in South Africa.

I think that there is a real need for that court, given statutory foundation. It will be in the public interest, particularly having regard to the fact that Johannesburg is already the commercial centre of Southern Africa and is likely to increase playing that role. It is just possible that also, as in the London Commercial Court, the parties there will very often be foreign corporations who find it to their advantage to litigate in the Commercial Court in Johannesburg. So much for the Commercial Court."

1.8.16 *" I should mention that it has been mentioned by Judge Flemming that judges going on circuit could hear divorces and unopposed motions. With respect, that is just not on. In these days judges going on circuit have such full programmes they can hardly cope. They are loaded, they start the morning very often at 08:00 and sit through to 20:00, Judge Curlewis just recently finished the Eastern Circuits and he finished 70 cases in a short space of two months and to do that he had to start in the mornings at 08:00 and sometimes sit through it until 20:00."*

1.9 <u>THE HON MR JUSTICE H.C.J. FLEMMING, DEPUTY JUDGE PRESIDENT OF THE WITWATERSRAND LOCAL DIVISION, AT A PUBLIC SITTING AT MIDRAND ON 9 APRIL 1996 [SEE PAGES 43 TO 46 IN VOLUME III OF THIS REPORT]</u> :

1.9.1 *" Coming to the Commercial Court, you would have seen on the memorandum that I am in favour of the continued existence of the Commercial Court on the informal basis. If the people involved with that can work out the product which is wanted, we use it. But the situation is this, it is no good trying to keep up with the Joneses and say the London people have a Commercial Court, therefore, we also have one. Birmingham's works, therefore, we also want one. The London court, more specifically than the others, really originated about a century ago at the realisation of the need for expedition, the need for judicial intervention, let me stop there.*

That embryonic idea, that realisation, the Englishmen never developed properly. It took the Canadians, the Americans, the Australians and Hong Kong to say we need something more of the same, call it fast lanes if you want to give it a name. We do fast lane without giving it a name and I am certain

that I will give you facts and figures to show that we perhaps do better than the Cape with all the names."

1.9.2 *" On the bench it has become a cliquish business, at the moment I do not even know who all the Commercial Court judges are but it does not work satisfactorily.*

What has happened in fact is that whereas in the beginning there was a number of cases to come on, the figure has just sloped, and sloped and sloped and now there is, it went out with a fizzle. The rules originally were as one wants it, judicial intervention, special attention, exchange of witnesses statements, because it was so unattractive I believe that is the reason, the exchange of witness statements was abandoned.

Then all special rules were abandoned and it is now according to the ordinary rules of the court which means it is simply another case but with a special court…The fact is that the public do not want it. If defendants do not want to consent, why must they be forced" ?

1.9.3 *" This is one of those rare cases where one can put the product on the market and see what the response is. It has been put on the market, the fact that the people do not want to consent shows that they do not want it. Now on what basis must people now be forced and then, in addition, it is not because of necessarily the complicated nature, the largeness of the amount or whatever the jurisdiction is and then I find that the dispute about the main lease with the lessee goes to the Commercial Court but I sit in Motion court with the same lease on the same grounds of dispute between the lessee and sub-lessee. So I decide the same issue, not in the Commercial Court. Again my statement is not against the Commercial Court, it is its operation. If we can develop it or if those involved with it can develop it into an acceptable product by all means yes, I am always in favour of experimenting and going forward, looking for solutions. But to force people, institutionalising it, no."*

1.10 THE HON MR JUSTICE P.E. STREICHER OF THE TRANSVAAL PROVINCIAL DIVISION, AT A PUBLIC SITTING AT MIDRAND ON 9 APRIL 1996 [SEE PAGES 47 TO 49 IN VOLUME III OF THIS REPORT]

1.10.1 *" Mr Chairman, I just wanted to add a few words in respect of the Commercial*

Court and that I do in my capacity as one of the judges of the Commercial Court. The establishment of a Commercial Court was criticised by Judge Flemming, he said that the rules in that court are the ordinary rules of the court and he said that it merely created an elite and caused dissatisfaction. The Commercial Court may have certain disadvantages but on the other hand it is a necessity.

The attorneys and the advocates wanted a Commercial Court and in my view, the Judge President had no choice but to accede to their request to establish that facility. Judge Flemming said that he had no objection and that he was actually in favour, as I understood him, of retaining the Commercial Court on an informal basis.

That is the problem with the Commercial Court, it is under-utilised at the moment that is so but one of the reasons at least is that the parties can only come to the Commercial Court with the consent of the other party.

CHAIRMAN: So you suggest it ought to be made compulsory?

STREICHER J: It should be made compulsory and I can see no reason why it should not be made compulsory and for a party to object to that."

1.10.2 *" CHAIRMAN: Just to assist the Commission could you give us a few practical illustrations from your own experience of the sort of civil trial which is designated a commercial case?*

STREICHER J: Well there is a very broad definition of matters that can be designated commercial matters. It will be matters involving a substantial amount or an important principle. Only those matters will be designated commercial matters.

CHAIRMAN: And a matter of some complexity?

STREICHER J: Yes, complexity - that is complexity, a substantial amount and an important principle maybe."

1.10.3 *" CHAIRMAN: Have you observed a disinclination on the part of certain defendants to submit to the ministrations of the Commercial Court?*

STREICHER J: Oh definitely and that is both the advocates and the attorneys I am sure will tell you that that is the problem, that you have difficulty in getting the other party to consent. In many cases you have defendants who are not that keen to have their matter heard and if that is the case then they will be reluctant to consent to the jurisdiction of the Commercial Court."

1.10.4 *" CHAIRMAN: In a nutshell what do you see as the obvious advantages of the Commercial Court?*

STREICHER J: Well the advantages are and that is what the attorneys wanted, they wanted a pool of judges, they wanted to have certainty - that is the attorneys and the advocates, they wanted to have certainties that their matters would be heard by one of those judges; they wanted the advantage of one judge dealing in so far as possible with the particular case, that is right through from the time that the pleadings are closed …(intervenes)

CHAIRMAN: Shepherding it through ?

STREICHER J: Yes. I may add to this, the rules have been changed and it is correct that unless the parties approach the judge to whom the matter has been allocated for directions, the ordinary rules of court will apply. But there is provision in the Practice Direction for the parties to apply for directions and by that provision, flexibility is built into the whole procedure and that is an advantage to the parties."

1.10.5 *" CHAIRMAN: And in your experience is the hearing substantially expedited?*

STREICHER J: I think the hearing is expedited by the fact that the judge was involved right from the start, he becomes involved at a very early stage. He certainly, unlike other civil trials where you get the file on the morning of the trial, you will have the file long before the time, the parties can be called in, you can make suggestions to them as to how to curtail the duration of the trial and that is certainly an advantage.

CHAIRMAN: Judge Flemming rather suggested that the requirement of the device of exchanging witness statements, that it be discarded.

STREICHER J: Yes that is so, at one stage the Practice Direction made provision for the exchange of witnesses statements and it provided that the

designated judge could order the parties to exchange witnesses statements. The advocates and the attorneys objected and they thought that that was a reason for parties being reluctant to come to the Commercial Court and from then onwards the rules were changed and they now provide that where the parties object, the judge will not order them to exchange witnesses statements."

1.11 THE HON MR JUSTICE J.F. MYBURGH OF THE TRANSVAAL PROVINCIAL DIVISION AT A PUBLIC SITTING AT MIDRAND ON 9 APRIL 1996 [SEE PAGES 50 TO 53 IN VOLUME III OF THIS REPORT] :

1.11.1 *" Mr Chairman may I begin by dealing with the Commercial Court of which I am a member and just to say this that when the attorneys and advocates requested the Judge President to consider the creation of a Commercial Court, one of the reasons that we supported that was that we saw arbitration as a real threat to the Supreme Court unless the Judge President agreed and you are aware possibly that there is now an arbitration facility being established in Sandton.*

At that stage that was merely a threat, it has now come into operation and the fact is that this is one answer to arbitration, to be able to say to practitioners and their clients that there is this specialist court consisting of judges acceptable to the practitioners to deal with commercial matters."

1.11.2 *" CHAIRMAN: Before you leave the topic of the Commercial Court, as you see it what are the merits and demerits of an exchange of witness statements? I know that in England there has been a lot of criticism because this has developed into a mammoth industry, producing very elaborate statements and there is a feeling in some quarters that perhaps summaries would suffice. What are your own feelings on the subject?*

MYBURGH J: Can I just tell you first of all about the development in England? Their Commercial Court is about 100 years old and it arose not because of any dissatisfaction with procedure, but with the quality of the bench. That was the beginning of it, it was believed that many of the judges were unable to do justice to the cause."

1.11.3 *" A great advantage of the witness statement is that it allows the parties to get to grips with the true dispute between them prior to doing so in court and the*

emphasis in the London Commercial Court is to arrive at the truth as soon as possible. In other words after 100 years of experience they said we are not concerned with defences or points, we are concerned with what will put an end to the litigation in the interests of justice and that is how the witness statement tradition grew in England.

In South Africa there has been resistance to that where we still have this idea of

an adversarial system where you are entitled to hold your cards to the chest until the witness goes into the witness box and then starts putting his points and quoting cases to him.

I think one of the difficulties is this industry of making witness statements and the reason for that industry is that the lawyers have to be very, very careful of what goes into the witness statements because their clients are going to be cross-examined on the content of those statements. So the element of surprise goes and of course another experience they have had in England is that the witness gets cross-examined on the minutiae of the statement, so it is undoubtedly that that is a danger."

1.11.4 *" CHAIRMAN: And I suppose that the production of these witness statements can involve a tremendous escalation in costs, I think that has been the English experience as well?*

MYBURGH J: I must immediately say that we always accepted that there would be an escalation in cost in the preparation of a Commercial Court case but there should be a saving in the trial costs and ultimately the English experience has been that there has been a saving.

We were also told that foreign litigants are using the London Commercial Court to the extent that 60% of their cases involves litigation between parties, neither of whom is an English resident and I include, obviously, corporations. In other words foreigners come to London, to their Commercial Court and consent to the jurisdiction. That system has been so successful."

1.11.5 *" Our experience in our Commercial Court has been this and each judge has had his own way of dealing with it but it has saved evidence-in-chief. The way I have run the Commercial Court when I have sat, is that the witness merely*

confirms his written statement. His counsel asks him if he wants to add anything to it and he does and then the cross-examination starts and, of course, the cross-examination in the hands of an experienced advocate is very pointed because he knows exactly what points he wants to make, he makes the points and he gets on with it. So the trial, not only are more disputes able to be settled if the case as a whole is not settled, but the trial goes much quicker than it would in the normal course.

CHAIRMAN: There has been some criticism of using the witness statement to stand as testimony-in-chief on the basis that it may do the witness a disservice. It may be unfair to him because he is, as it were, thrown in at the deep end before he has had an opportunity of acclimatising, becoming accustomed to the unfriendly atmosphere of the courtroom. What is your experience in that regard?

MYBURGH J: What I have done there is to let the witness read his statement and by the time he has read his statement onto record, he is relaxed and he feels more at home. That deals with the problem so that he does not suddenly start with cross-examination."

1.12 ADV E. BERTELSMANN, SC, OF THE PRETORIA BAR, ON BEHALF BOTH OF THE PRETORIA BAR AND THE PRETORIA ATTORNEYS ASSOCIATION AT A PUBLIC SITTING AT MIDRAND ON 10 APRIL 1996 [SEE PAGES 55 TO 57 IN VOLUME III OF THIS REPORT] :

1.12.1 *" MR BERTELSMANN: In our submission we have recommended that civil circuit courts be introduced. We believe that such a system should be as flexible as possible. Frankly, personally I doubt whether the administrative problems which might arise would be so very serious. If there is a need for a Civil Circuit Court sitting in Standerton, to issue process from Standerton or from the nearest other centre where such process could or should be issued, should not present us with insurmountable problems. Obviously to ensure that the necessary infrastructure is there some administrative steps would have to be taken but that should be easy and we would be in favour of the institution of Civil Circuit Courts wherever there is a proven need for such a circuit court to sit and that need should be established in close co-operation with and under the continued control of the Judge President."*

1.12.2 *" We are a little concerned about forcing litigants into the Commercial Court who would prefer to go somewhere else but if Johannesburg and the practitioners who are active in that court are satisfied with that submission, well we would not be directly affected necessarily but we would prefer a Commercial Court on a voluntary basis as we have it at the moment rather than with a statutory and forced basis. But in principle we are in favour of the existence of a Commercial Court and we would hope that the voluntary participation therein and the use thereof would provide a sufficient basis and justification for its existence."*

1.13 <u>ADV W.H.G. VAN DER LINDE ON BEHALF OF THE JOHANNESBURG BAR AT A PUBLIC SITTING AT MIDRAND ON 10 APRIL 1996 [SEE PAGES 60 TO 62 IN VOLUME III OF THIS REPORT]</u> :

1.13.1 *" As far as the Commercial Court is concerned the argument will simply be that there is a need for it and that the practical way to go about it is the statutory creation of a Commercial Court jurisdiction for the Supreme Court as is, for example, the case with Admiralty Court jurisdiction.*

The Supreme Court, when it sits as a court of Admiralty, sits in the exercise of its jurisdiction confirmed by that Act and it is a practical way, it retains the Commercial Court as an integral part of the Supreme Court. That such a statute ought also to make provision for the power of a Judge President in the division in which the court will sit to make rules that govern the proceedings of the Commercial Court."

1.13.2 *" I have made the submission that from a practical point of view the approach ought to be to by statute create a Commercial Court jurisdiction for the Supreme Court of South Africa or the High Court of South Africa.*

That Act ought to provide that the Judge President of the particular division will have authority and power to make the rules necessary for the conduct of cases in the Supreme Court, sitting in the exercise of its Commercial Court jurisdiction.

The jurisdictional provisions must provide, we submit for the following: firstly for a consent to jurisdiction without attachment, there would have to be something said about attachment and that you could come to that court without

having to attach to found or confirm jurisdiction; secondly that one would have to make provision for concurrent jurisdiction with the High Court or the Supreme Court in commercial matters so that the plaintiff decides whether he wants to go to the one or the other and thirdly one would have to make provision for the Judge President of that particular division to define the category of cases that would be described as commercial matters or commercial cases."

1.13.3 *" We know that there were problems with the pilot project but we submit the following: firstly the creation of a Commercial Court will not involve great cost,*

the structures are in place; secondly if it flops it is a nice to have; thirdly if it succeeds you will have a court in which complex commercial disputes will be heard instead of in arbitration tribunals.

It will, therefore, give the litigant a fairer choice because he will be having his case heard by one of a panel of specialist judges and he will have all the advantages of not having to pay for his room, for his recording, for his judge; he will have an appeal. More important, and it is with respect a sound principle, that the structures of the court ought to provide sufficiently also for the large commercial matters to run through courts of first instance and, ultimately, through courts of appeal. If you do not do that, if you shut the doors of the courts of the land to the complex commercial matters, inevitably the standard with respect to your adjudication at appeal court level will be affected."

1.14 <u>MR ATTORNEY C.H. COHEN OF JOHANNESBURG, AT A PUBLIC SITTING AT MIDRAND ON 11 APRIL 1996 [SEE PAGES 98 TO 100 IN VOLUME III OF THIS REPORT]</u> :

1.14.1 *" With the indulgence of the Commission I beg leave to deviate slightly in order to raise before the Commission the issues of divorce mediation…Unless mediation becomes court annexed the chances are, and again I say this from my own personal very deep personal involvement in this, the chances are that mediation as a mechanism for resolving matrimonial disputes is going to take many years before it has any meaningful impact on the general community.*

That it has a positive contribution to make in matrimonial dispute resolution is beyond doubt. Not only are costs substantially reduced and time saved but it is suggested the preservation of the post-divorce parenting relationship has a far greater chance of happening in the interests of the children than is the case in the aftermath of an acrimoniously fought divorce action even if settled prior to trial. The costs are determined by the rate charged by the mediator if in private practice as well as the number of hourly sessions held."

1.14.2 *" The key to propagating the use of mediation is education. This in turn requires funding without which little visible progress is possible as events over the past five years have shown. I would say that one of the big mistakes that has been made Sir is to aim the appeal at the legal profession. The legal*

profession

is conservative. The legal profession is traditional and of course when one legitimately asks what is in it for me there are more fees to be generated in litigation than mediation.

The greatest single factor in successful mediation is confidentiality. Usually this creates an atmosphere of trust and open communication. In the result mediators are apprised of all the issues and their nuances; and would therefore seem to be well suited to adjudicate upon those issues upon which the spouses are unable to agree."

1.15 MR ATTORNEY C.K. PETTY ON BEHALF OF THE LAW SOCIETY OF TRANSVAAL AND THE ASSOCIATION OF LAW SOCIETIES AT A PUBLIC SITTING AT MIDRAND ON 12 APRIL 1996 [SEE PAGES 102 TO 110 IN VOLUME III OF THIS REPORT] :

1.15.1 *" Mr Chairman, then if I may move on to the question of the commercial courts. You have seen the joint submissions which the Transvaal Law Society and the Johannesburg Bar have made in this regard. And the Transvaal Law Society in summary supports the view that the commercial court should be placed on an independent statutory basis and that, at least at this stage, matters which fall within the area of jurisdiction of the Johannesburg court it should compulsory - commercial matters should be compulsory for them to be dealt with in the commercial court.*

CHAIRMAN: It will not depend upon the consent of the defendant?

MR PETTY: No, I think that that has been the weakness in the commercial court that the defendant who wishes to thwart the right of a plaintiff can actually do so by simply not consenting and then the whole procedure must go through the Supreme Court."

1.15.2 *" It is also our view, Mr Chairman, that this court must have separate rules and that they must certainly not be the rules that are applicable to the Supreme Court. And that these rules must be flexible and they must allow the commercial court to deal with matters in a way that meet the individual needs of cases. And that that would then make the commercial court a viable proposition.*

We also feel, Mr Chairman, that there should be a proviso which would allow people who wish to litigate in that court to consent to the jurisdiction of that Court…If somebody in Cape Town has a commercial matter and the parties agree that they wish to be subject to the jurisdiction of that commercial court with all of its expertise they should be allowed to consent to it irrespective of the fact that that court would normally not have jurisdiction."

1.16 <u>MR ATTORNEY A TUGENDHAFT OF MOSS-MORRIS INC. OF SANDTON, AT A PUBLIC SITTING AT MIDRAND ON 15 APRIL 1996 [SEE PAGES 158 TO 159 IN VOLUME III OF THIS REPORT]</u> :

1.16.1 *" I would just like to very briefly amplify what I said in my letter to the Commission,…of 13 June 1995. In essence what I was trying to suggest was a more pro-active civil procedure in commercial matters, one in which the Commercial Court would be seized of the matter at inception, not as it is at the moment. It is a voluntary submission to the jurisdiction of the Commercial court.*

I understand that in England commercial matters designated as such appear on the Commercial Court roll and it is not a matter of consent on the part of the defendant. They are automatically designated as commercial matters and then receive the attention of the Commercial Court.

That is what I was proposing here both in respect of matters which commence by way of Summons and matters which commence by way of Application. I understand the procedure at the moment is that application proceedings cannot be referred to the Commercial Court although there may have been some amendment to that, I am not quite sure but certainly that was the position until relatively recently."

1.16.2 *" So in essence I am suggesting that those matters be designated as commercial matters at inception and that a Judge is assigned those matters immediately or that particular matter immediately at the close of pleadings stage and with the help of the judicial officer who would supervise pre-trial formalities, I think one would be able to curtail the proceedings quite drastically.*

<u>CHAIRMAN</u>: You want to see case management?

MR TUGENDHAFT: Case management, absolutely. I realise that one may not be able to go as far as they have gone in certain American jurisdictions because there the Judge of course is sitting more as an umpire and he is not ultimately going to hear the case, that the case will be decided by a jury but I still think within the confines of our own system we could have much more effective case management.

For example, a number of years ago I remember being involved in a case where there were about a dozen witnesses called on really trivial issues, it took a lot of time of the court and all of that could have been curtailed I think with the intervention of a judge at the pre-trial stage where he could have clarified exactly what the issues are and effectively cut out the nonsense and that is the kind of pro-active steps that I am suggesting should be taken."

1.16.3 *" It may also be an idea, and I mention it in the letter, to have a compulsory exchange of witness statements, following on the American procedure where you do have interrogatories. You have an opportunity of canvassing witness statements in such a way that you may decide that in the case of certain witnesses you do not want to contest their evidence at all. You could be quite content to accept a witness statement, be it in affidavit form or signed, without contest instead of having to call that witness, inconvenience him and inconvenience the court and, of course, the parties.*

CHAIRMAN: Of course in England in certain quarters the preparation of witness statements for the purpose of exchange has burgeoned into a fair industry and has resulted in chasing up costs. Some suggestions to the Commission have been that perhaps a summary of a witness statement, the exchange of summaries rather than a statement in extenso might be better. Have you any thoughts on that?

MR TUGENDHAFT: I would tend to agree with that in the same way as we exchange at the moment expert summaries. At least one could see what the outline of that evidence is, is it going to be necessary to contest, is it going to be necessary to call that witness or can we just agree at a pre-trial conference on the evidence?"

1.17 <u>MR ATTORNEY L. VILJOEN OF PRETORIA AT A PUBLIC SITTING AT MIDRAND ON 16 APRIL 1996 [SEE PAGES 163 TO 167 IN VOLUME III OF THIS REPORT]</u> :

1.17.1 *" My derde voorstel gaan oor 'n inkorting van hofprosedure. Die voorstel wat ek daar het, het ten doel om die hofprosedure in te kort deur middel van voorverhoor-konferensies waar 'n regter voorsit. Die eerste van hierdie voorverhoor-konferensies geskied net na die sluiting van pleitstukke en dan gebruik 'n mens basies die uitbreiding van Hofreël 37 soos wat ons dit deesdae nog ken.*

Maar my ondervinding die afgelope 20 jaar is dat wanneer ons in 'n hof land en die geskilpunte is basies uiteengesit, dan kom 'n regter baiekeer na die regsverteenwoordigers en sê: Gaan skenk oorweging aan skikking. Dit het nou al baie gebeur waar ek self betrokke is of waar ek teenwoordig was. Dan het die partye uitgegaan en dan kry 'n mens hierdie populêre uitdrukking van: Hierdie saak is op die trappe van die hof geskik.

My voorstel het veral ten doel waar jy die leek-litigant het want nou het hy nie presies kennis van die hofreëls nie. Nou sit hy voor 'n regter by 'n voorverhoorkonferensie; die geskilpunte word uitgestip; hy word nie geïntimideer deur sy opponent wat 'n prokureur of 'n advokaat is nie, want nou sit daar 'n onafhanklike persoon voor hom wat sê: Gaan kyk 'n bietjie na hierdie en ek dink miskien moet julle kyk om eerder hierdie saak te skik voordat die kostes te hoog word."

1.17.2 *" Die voorverhoor-konferensie deel ek op in twee fases, want as daar dan nou nie geskik kan word en blootlegging en dies meer plaasvind by daardie eerste voorverhoor-konferensie nie, om oor te gaan na 'n tweede en finale wat kort voor verhoor is.*

Daar word dan stukke voorgelê waarvan 'n baie goeie voorbeeld is dié van deskundige getuies. 'n Deskundige getuie word baie kere wekelank ondervra in 'n hof terwyl daar deur middel van verslae en beëdigde verklarings voor die tyd 'n mens al klaar die geskilpunte kon identifiseer en dan kan 'n mens by een van hierdie twee voorverhoor-konferensies sê: Nee, maar ons erken sekere van die punte of ons erken die hele verslag. Die gevolg is dat 'n mens nie daardie hoë koste van 'n deskundige nodig het om twee of drie weke in 'n hof te wees

nie.

Dit is wat my voorstelle ten doel het, dat wanneer 'n mens kom by 'n tweede voorverhoor dat jy 'n klomp van jou erkennings klaar afgehandel het en 'n mens is in staat om 'n verhoor in enkele dae klaar te maak in plaas van weke."

1.18 ADV D.D.J. ROSSOUW OF NELSPRUIT ON BEHALF OF THE PREMIER OF THE PROVINCE OF MPUMALANGA AND ALSO ON BEHALF OF THE ASSOCIATION OF ADVOCATES OF NELSPRUIT AT A PUBLIC SITTING AT NELSPRUIT ON 22 APRIL 1996 [SEE PAGES 170 TO 173 IN VOLUME III OF THIS REPORT] :

1.18.1 *" VOORSITTER: Wat dink u van die moontlikheid van 'n Rondgaandehof vir siviele sake op 'n redelik deurlopende basis? Is dit prakties uitvoerbaar, ja of nee?*

MNR ROSSOUW: Nee dit is nie prakties uitvoerbaar nie om een rede en ek is jammer, ek gaan dit weer herhaal wat ek gesê het, so 'n voorstel of 'n aanbeveling is om die werklikheid daarvan te plaas in die hande van een man wat diskresionêr sal besluit ek gaan daardie howe instel, ja of nee. Daar gaan nie iets wees wat vir hom sê jy moet dit doen nie, kom ons aanvaar dit moet uit Pretoria uit gaan, hulle het nie regters nie, dit is die maklikste verskoning onder die son, ek het nie regters nie so julle moet maar hier litigeer."

1.18.2 *" VOORSITTER: As daar 'n statutêre verpligting geplaas word op 'n RP wat dan?*

MNR ROSSOUW: Die vraag is of dit kan gebeur, of the uitvoerende gesag so 'n statutêre verpligitng sal plaas en dan sal dit altyd nog maar wees, dit kan ek voorsien met alle respek, dat die besluit gaan aan die Regter President oorgelaat word om hierdie dinge te reël … Praktiese oorwegings wat 'n mens daarteen instel is dat daar moet nou dokumentasie, leêrs, dit moet geskryf word, waar gaan die administratiewe funksies vervul word, gaan dit in Pretoria wees, gaan dit op Middelburg, Nelspruit, waar die hof ookal gaan sit, hoe gaan dit werk? Leêrs raak weg, dokumentasie raak weg, ek persoonlik voorsien baie probleme wat dit aanbetref en op die lang duur met alle respek, gaan dit nie goedkoper wees nie, dit gaan duurder wees want daardie regters wat kom en kom sit daar is die S en T wat aan hom betaal moet word bo en behalwe sy

salaris en sy klerk, almal, dit is 'n hoër uitgawe."

1.19 <u>THE HON MR JUSTICE J.J. KRIEK, JUDGE PRESIDENT OF THE NORTHERN CAPE DIVISION OF THE SUPREME COURT, AT A PUBLIC SITTING AT KIMBERLEY ON 25 MAY 1996 [SEE PAGES 184 TO 187 IN VOLUME III OF THIS REPORT]</u> :

1.19.1 *" I may mention that during 1995 not more than ten of the civil trials set down for hearing in Kimberley emanated from the Gordonia district and I got this figure from an attorney, the Chairman of the Attorneys Circle in Upington. He phoned around and phoned me back and said that not more than ten trials in the whole of 1995 came to Kimberley from the Gordonia district.*

Mr. Chairman, if I may now go to the first addendum to the document you have before you , paragraph (b) of that addendum: with regard to my proposal concerning the establishment of the civil circuit I should suggest that I add the following sub-rules to Rule (4) of the Rules of this Division, a copy of which is annexed, should the Commission decide against creating a local division in Upington. Then I set out draft rules which provide for a civil circuit in Upington and that the judge-president may also, at the request of the parties, designate any place in the Northern Cape for the hearing of a civil trial.

Now, having written that, I had a meeting this week with the Bar and the Side Bar and the attorney-general and as far as the second leg of that submission is concerned, that is the establishment of <u>ad hoc</u> circuits at the request of the parties. I have other ideas. Mr Chairman, may I hand up copies of what I wrote after my meeting with the Bar and the Side Bar and the attorney-general?

<u>CHAIRMAN</u>: Yes thank you."

1.19.2 *" Now in this document which I have just handed up, I say this: I still hold the same views with regard to the Upington circuit, but as far as the proposed Rule 4 (14) (b) is concerned, an alternative suggestion has occurred to me. It may be preferable to provide that the judge-president may establish such other permanent or <u>ad hoc</u> circuits for the hearing of civil cases at such venues in the Northern Cape as may appear to him to be necessary and/or convenient.*

<u>CHAIRMAN</u>: That puts it at its widest.

JUDGE KRIEK: Yes, then if there are three trials to be heard from Springbok, they can approach me and I will arrange a civil circuit in Springbok for the hearing of those three trials. That makes it as flexible as it possibly can be.

When the variation of the proposed Rule 4 (14) (b), which I have suggested above, is adopted, some pattern will develop over the next few years and further civil circuits can be introduced if and when they become necessary. The rule will be flexible enough to cater for the future needs of the outlying areas of this province."

1.20 MR E.M. DIPICO, PREMIER OF THE NORTHERN CAPE PROVINCE AT A PUBLIC SITTING AT KIMBERLEY ON 25 MAY 1996 [SEE PAGE 188 IN VOLUME III OF THIS REPORT] :

1.20.1 *" CHAIRMAN: Civil circuit courts?*

MR DIPICO: Yes. Our division has been applying this system in respect of criminal matters as well as unopposed divorce matters and this has proved to be more than efficient. I have requested the judge-president … to extend the system to all cases, including civil matters, and he has indicated his enthusiasm in this regard, also indicating that he is prepared to amend the rules of the Supreme Court in order to alleviate any inconvenience that may result from the change in territorial jurisdiction. My submission in this regard is that for the system of circuit courts, for the hearing of all matters, criminal as well as civil, the administration of justice will be brought right to the doorstep of all members of different communities in the province, whether advantaged or otherwise."

1.21 THE HON MR JUSTICE R.H. ZULMAN AT A PUBLIC SITTING AT BLOEMFONTEIN ON 21 AUGUST 1996 [SEE PAGES 193 TO 199 IN VOLUME III OF THIS REPORT] :

1.21.1 *" The great drawback of the Commercial Court as it now is structured, amongst one or two other matters, is the problem that it requires the consent of the defendant. In my years of practice at the Bar I very rarely was privileged to act for a defendant who was in a hurry to get to Court. Delay was often the best form of defence unfortunately, but there are some people who want to resolve their disputes quickly and expeditiously."*

1.21.2 *" Most of those kind of people resort to arbitration, but in England, in the Commercial Court which we tried to base it upon in London, the consent requirement is not necessary at all. You issue a writ out in the Commercial Court and the defendant has no choice as to whether he consents or he does not consent.*

I believe that if one overcomes that difficulty in the Commercial Court and deals with one or two other matters of practical moment, the Commercial Court, and certainly in Johannesburg, can be adapted to take in matters relating to bankruptcy. I would earnestly request this Commission to look very seriously at what has happened from a practical point of view in Canada."

1.22 ADV L. MPATI ON BEHALF OF THE PORT ELIZABETH REGION OF NADEL AT A PUBLIC SITTING AT EAST LONDON ON 5 OCTOBER 1995 [SEE PAGES 75 TO 79 IN VOLUME II OF THE FIRST INTERIM REPORT] :

1.22.1 *" I think I might as well deal with even the accessibility of the courts to the people. Our view is that even the best arrangements therefor will never please everybody, and we submit that the best that can be done to ensure maximum accessibility is by way of a circuit court system, which applies in the area of jurisdiction of the Eastern Cape Division presently."*

1.22.2 *" And talking about the circuit system of the Eastern Cape Division I may add that this needs to be extended to more centres than it goes to presently and it could also be extended …I speak under correction here, at present the court sits for instance at Graaff-Reinet, it sits at Aliwal North, it sits at Queenstown, it sits - I once appeared in King William's Town, so I believe that it does sit in King William's Town, and also East London. We believe that towns such as Cradock, and it may well be that it has sat in Cradock, I am not hundred percent sure here …(intervenes)*

CHAIRMAN: It has in fact sat in Cradock.

MR MPATI: Yes, Cradock, Middelburg.

CHAIRMAN: There again it has sat.

MR MPATI: Colesberg.

<u>CHAIRMAN</u>: I believe it has also sat there, but any way.

<u>MR MPATI</u>: Yes, and maybe closer to the hinterland, places like between Steynsburg, which is something like one and a quarter hour's drive from Queenstown, so in those smaller towns it could also be extended to cover the area. And we believe that the circuit court should also be extended so as to also hear civil matters in those places where criminal matters are presently heard."

CHAPTER 2

THE COMMISSION'S INVESTIGATIONS AND OBSERVATIONS IN AUSTRALIA

(A) WESTERN AUSTRALIA

2.1 A NOTE ON THE SIGNIFICANT ROLE OF THE DISTRICT COURT OF WESTERN AUSTRALIA :

2.1.1 This Court exercises original jurisdiction within the State of Western Australia in both civil and criminal matters. The civil jurisdiction extends to causes of action up to a value of $250,000 and up to an unlimited amount in respect of personal injury claims. In civil cases there is an effective system of compulsory mediation. This results in more then 70% of the cases entered for trial being settled.

2.1.2 The criminal jurisdiction is in respect of all indictable matters other than the most serious crimes (such as murder and aggravated sexual assault). The District Court comprises 19 Judges and 5 Registrars. Almost 75% of the court's business is conducted in Perth. The balance is disposed of on circuit at 11 regional centres. The District Court is an intermediate Court between the Magistrates Court and the Supreme Court. There are 16 Judges on the Bench of the Supreme Court. Appeals from a judgment of the District Court are heard by a three-Judge bench of the Supreme Court. Throughout Australia District Courts such as the District Court of Western Australia play a very important role in the administration of justice in the Commonwealth. Judges of the District Court are generally appointed from the ranks of senior practitioners.

2.2 A PRE-TRIAL MEDIATION IN THE DISTRICT COURT

2.2.1 Through the good offices of Judge Peter Blaxell (who gave the Commission every possible assistance during its visit to the District Court at 30 St George's

Terrace in Perth) we sat in (with the prior consent of the parties) on a pre-trial mediation conference in a personal injuries case in which all the issues save the ***quantum*** of damages had already been resolved. The mediator was Principal Registrar Harding. He formerly practised as a solicitor in England ; and he is now a Registrar/Magistrate who performs both administrative and judicial duties in the District Court.

2.2.2 The parties were accompanied by their respective legal representatives. The mediator spoke first with the one side in the absence of the other, and then the process was reversed. The Commission was impressed with the dispassionate fashion in which the mediator discussed the imponderables of determining ***quantum*** with each side in turn ; with the complete neutrality displayed by him throughout ; and with his constant reminders to the litigants that while he (the mediator) from time to time ventured his own opinion as to what a court might or might not award in the way of damages in the particular case, the litigants should avail themselves of the advice of their respective attorneys.

2.2.3 When the mediator had spoken to each side in turn the proceedings were adjourned to enable the parties and their legal advisers to meet in private. Some 15 minutes latter they returned to the conference room to announce that they had agreed on ***quantum*** ; and the terms of the settlement were recorded.

2.3 THE FAST-TRACK CRIMINAL COURT IN THE DISTRICT COURT :

2.3.1 Within the District Court the following system has been adopted in order to expedite the disposal of criminal trials. An accused who is prepared to record a plea of guilty within a period of two months after his arrest is brought before the Fast-Track Court for sentence. There the presiding Judge explains to him that because of his promptness in pleading guilty the Court will impose upon him a sentence less stiff than that which the Judge would ordinarily have considered to be appropriate. He then sentenced him accordingly.

2.3.2 The Commission witnessed a matter being despatched in the Fast-Track Court presided over by Chief Judge Hammond. In the opinion of the Commission this is a procedure which might be usefully adopted in South Africa - both in the lower Courts and in the High Court. Upon the adjournment of the Court Chief Judge Hammond explained to us that although the Judge presiding in the Fast-Track Court has an unfettered discretion in fixing the reduced sentence,

on account of the fact that the accused's appearance in this Court spares the complainant in a sexual offence the ordeal of testifying in open court, judicial policy favours a liberal "discount" (about 40%) in the case of sexual offenders and (about 30%) for other offenders who avail themselves of the Fast Track Court.

2.4 CIVIL CASEFLOW MANAGEMENT IN THE DISTRICT COURT :

2.4.1 Chief Judge Blaxell and members of his Registry gave the Commission a thorough and instructive guided tour of the District Court Registry. In particular we were shown how the computerised system enables the progress of a particular case through the caseflow system at any given stage to be determined within seconds.

2.4.2 Although the Supreme Court Rules governing caseflow management apply also to the District Court, the implementation of caseflow in the District Court is a recent innovation. Moreover, it has not been possible to adopt the same system of caseflow management as has been developed in the Supreme Court because of the greater volume of litigation in the District Court and the lack of a sufficient number of Registrars to provide "hands-on" management in every action.

2.4.3 Although the District Court caseflow management system is more rudimentary than that of the Supreme Court, it appeared to the Commission to function very effectively. A fairly full description of it is here necessary because, in the opinion of the Commission, it may provide a useful model for South Africa with its limited manpower and financial resources. What follows is based on a paper on Civil Caseflow Management in the District Court delivered by Judge Blaxell on 25 October 1995 to a Seminar of The Law Society of Western Australia.

2.4.4 The District Court relies on a system of computer monitoring with "hands-on" management confined to the minority of actions which fail to follow a pre-determined standard path. The computer identifies those actions in need of special attention.

2.4.5 There is a single standard "track" for all actions, regardless of type, which can nevertheless be varied to meet the needs of an individual case. The timetable

for the great majority of actions is as follows :-

Action	**Maximum time from filing of appearance**
Close of pleadings	60 days
Completion of discovery	180 days
Entry for trial	210 days
Pre-trial Conference	270 days
TRIAL	400 days
JUDGMENT	490 days

2.4.6 Once an appearance is filed the Court computer automatically generates and sends to each party a "case timetable". Thereafter a computer generated "reminder notice" is sent to the parties 14 days ahead of the deadline for each milestone. The notice states that summons for directions will issue if the deadline is not met. Whenever a milestone is not met the computer issues a summons for directions returnable before a Registrar. At the hearing of each summons, and in addition to the usual powers in respect of default, The Registrar also has the power to vary the timetable for the particular action.

2.4.7 As appears from 2.4.5 above the timetable applies also to the Court. The standard period for delivering judgment is 90 days from the completion of the trial.

2.5 CASE MANAGEMENT IN THE SUPREME COURT OF WESTERN AUSTRALIA :

2.5.1 The Commission is deeply indebted to the Hon Mr Justice D.A. Ipp for his generous assistance to it in devising a suitable programme for matters to be seen both in the District Court and in the Supreme Court ; and for the time and trouble taken by him in explaining to us the system of case management employed in the Supreme Court of Western Australia. Judge Ipp further arranged for the Commission to spend some time with Master Registrar Martin and two of her assistants. They went to great pains to demonstrate the functioning of the computer system employed in the monitoring of case

management in Perth.

2.5.2 The Commission's visit to Perth took place at the end of August 1996. In November 1996 the ambit of case management in Western Australia was considerably expanded. The brief description of the case management system in the Supreme Court of W.A. which follows is based on Judge Ipp's explanation to us in his Chambers in Perth and on the contents of a speech on case management delivered by Judge Ipp as the main speaker at a seminar held in Johannesburg on 24 January 1997 (and therefore subsequent to the changes to the system effected in November 1996).

2.5.3 The Expedited List in the Supreme Court of Western Australia :

In 1990 the Expedited List was introduced in order to provide speedy justice to cases meriting expeditious adjudication. The list is not limited to commercial cases and the consent of both parties is not necessary. The administration of the list is in the hands of one Judge who has a wide discretion to make orders to meet the exigencies of the particular case. Interlocutory hearings are swiftly despatched. The parties file written arguments which are read overnight by the Judge ; and at the hearing each side is allowed no more than 15 minutes for argument. There is no appeal against interlocutory orders. Through closely supervised deadlines imposed by the administering Judge, 70% of the cases on the Expedited List are disposed of within four weeks. A feature of the Expedited List which soon became very popular was court-appointed mediation.

2.5.4 The Long Cause List :

As the benefits of continual supervision by a single Judge of long and complex cases became apparent, there was established for cases of an estimated duration of 10 days or more a Long Cases List which likewise fell under the control of a single Judge who heard both all important interlocutory applications and the trial itself.

2.5.5 The 1991 Changes :

In 1991 the entry for trial rules were amended so that no case could be entered for trial unless the solicitor concerned certified -

(1) that they held signed statements from all lay witnesses ;
(2) that statements of expert witnesses had been exchanged ;
(3) that counsel was of the view that no amendments of the pleadings were necessary ; and
(4) that a written advice on evidence had been received and complied with.

Once a case was entered on the trial list it was treated like an Expedited List Case.

2.5.6 The November 1996 Changes :

In November 1996 there was introduced case management for all cases not falling within either the Expedited List or Long Cases List. Control is exercised by requiring the parties to report to the court at fixed strategically determined "milestone" dates. Here it is important to mention that in the Supreme Court of W.A. "Registrars" are officers of the Court who have had experience as lawyers in the legal profession for 8 years or more. The parties have to report for the following three conferences :

(1) a conference before a case management registrar within 28 days after appearance to defend has been entered ;
(2) a conference before a registrar within 28 weeks after entry of appearance ; and
(3) a listing conference before a Judge after the case has been entered for trial.

At the conferences before the registrar orders are made governing the interlocutory steps preceding trial ; dates for the completion of the various interlocutory stages are set and monitored. All interlocutory applications are ordinarily heard by the registrar.

2.5.7 Mediation :

Critical to operation of the case management applied in Western Australia is the certainty of the trial date. One problem with predetermined trial dates is that settlement either at, or very shortly before, the trial makes it difficult to find a replacement case on the trial date. In order to obviate the waste of judge-time which might then ensue the Court has recourse to mediation. Once the case is entered for trial the Judge in charge of the Civil List generally orders mediation

before a mediation registrar. This takes place more than a month before the trial date, the object being to facilitate settlement on a date sufficiently early to replace the settled case with another in the trial list. The combination of fixed trial date and the mediation procedure has been very effective. Some 70 % of the cases sent to mediation are settled.

2.5.8 Exchange of Witness Statements :

It has become customary to order the exchange of witness statements in most cases. The approach of the Bench to witness statements is, however, flexible. Witnesses are readily allowed to augment their written statements by oral evidence ; and awareness of this judicial flexibility removes the temptation towards over-elaboration in the drafting of written statements.

2.5.9 Curtailment of Discovery :

In terms of the rules the court is empowered :-

(1) to order discovery in regard to particular issues alone ;
(2) to confine discovery to documents which are directly relevant to the issue ; and
(3) to limit discovery where its cumulative effect is considered to be unreasonable or where the burden or expense of discovery would outweigh its probable benefit.

2.5.10 The roles of the Bench and the practising professions in implementing case management :

Judge Ipp explained to us that the successful implementation of case management depends not merely on the content of the rules made to govern its procedures. What is essential is a change in the culture of thinking of Judges and practitioners alike. Judges have to be firm in their insistence on compliance with deadlines. The co-operation of practitioners is vital. The innate conservatism of lawyers is resistant to change. In Perth practitioners had initially displayed antagonism to the innovations. Having witnessed the benefits of case management, both for their clients and for themselves, they were now enthusiastic about it ; and their co-operation was assured.

(B) SYDNEY, NSW

2.6 A PANEL DISCUSSION ON MEDIATION AT MACQUARIE UNIVERSITY :

2.6.1 The Commission participated in a panel discussion with Mr C. Tidwell, a senior lecturer in the Graduate School of Management, Mr Andrew Heys, a lecturer in the same department ; and two members of the University's Law School : Mr Frank Astill and Mr Michael Noone.

2.6.2 Mr Tidwell expressed certain reservations about mediation as an effective form of Alternative Dispute Resolution. The theory was that parties in a conflict situation should through communication ***via*** the mediator achieve their own solution. A problem which tended to arise in practice, however, was that the mediator often imported into the process his own agenda. In the result the solution achieved was that of the mediator rather than that of the parties themselves. According to Mr Tidwell this position frequently arose when a lawyer acted as the mediator. Mr Noone, on the other hand, took the view that the success of mediation as a form of ADR depended heavily on the support and co-operation of the practising professions.

2.6.3 During 1995 Mr Noone had spent two months in South Africa. During his visit he had travelled about a good deal, and he had seen much mediation in practice. He had met many members of IMSSA and ADRASA. While their level of training and experience had impressed him, Mr Noone was interested to note that none of them was engaged in mediation involving legal disputes. The South African mediators appeared to him to be occupied chiefly in the mediation of labour disputes.

2.6.4 During the ensuing panel discussion one of the views strongly expressed by our hosts was that actual practical experience in conducting mediation was more important than mere theoretical training in the art.

2.7 A MEETING WITH THE HON MR JUSTICE M.E.J. BLACK, CHIEF JUSTICE OF THE FEDERAL COURT OF AUSTRALIA, AND A NUMBER OF SYDNEY-BASED JUDGES OF THE AUSTRALIAN FEDERAL COURT :

2.7.1 In the course of an instructive discussion with the Chief Justice (who is based in Melbourne but who happened to be in his Sydney chambers) and a number of the Judges of his Bench, we were told that the Federal Court had been a pioneer in the introduction of case management in Australia. From the beginning of a trial the whole progress of the case is subject to supervision. Directions hearings are conducted by a Federal Judge and not a Registrar. It was mentioned to the Commission that mediation as a form of ADR had become very popular in recent times. The consent of both parties is required for mediation. Mediation in the Federal Court is strictly confidential. In court proceedings evidence as to anything said during mediation is inadmissible.

2.7.3 The Federal Court has a well-developed system of court-annexed mediation. Its history and its likely future expansion are usefully reviewed in an article by Black CJ entitled "The Courts, Tribunals and ADR" published in the Australian Dispute Resolution Journal [vol 7, May 1996, No 2, 138-152]. The system began with a pilot project in New South Wales in 1987 ; and it is now firmly established throughout the Federal Court. Here follow brief quotations from the article at pages 138-139 :-

> *" During the eight years the programme has been in operation more than 1,100 matters have been referred to mediation…A few mediations have been conducted by judges but more than 97 percent have been conducted by those of the Court's registrars who have been trained in mediation. There are 25 such registrars in the Court's registries in the eight capital cities.*
>
> *The Court trains its own mediators and this training may be supplemented by attendance at external courses. Five judges and nine registrars have attended the Harvard Law School's Program of Instruction for Lawyers, taking either the negotiation or mediation workshop courses and in some cases, two or three of these courses…*
>
> *The Court's ADR programme is integrated with its programme of caseflow management under which a new matter filed in the Court must ordinarily come before a judge for directions within a short time of filing and before any further procedural steps are taken. This enables matters suitable for ADR to be identified and, if the parties consent, referred for mediation at an early appropriate stage. In some cases the parties themselves will, at a directions hearing, ask for the case to be*

referred to one of the Court's mediators…"

2.7.4 In the course of its visit to the Federal Court on Queen's Square in Sydney the hospitality extended to the Commission included an excellent lunch. While the Commission records its warm appreciation of the kindness shown to it by all the Sydney-based Federal Court Judges whom it was privileged to meet, it wishes to extend a special word of thanks to both the Chief Justice of the Federal Court and to the Hon Justice Bryan Beaumont of that Court for the contemporary Australian legal literature generously presented to the Commission by each of them. A study of these publications has been of material assistance to the Commission in its quest to learn more of the Australian legal system in general and the functioning of its Courts in particular. Due to his temporary absence from Sydney at the time of its visit the Commission was unable to meet the Hon Justice Ian Sheppard of the Federal Court. To him as well the Commission wishes to record its indebtedness for his valuable assistance in the shape of the **Sheppard letter** to which reference has already been made in Chapter Eight in Section A of Part Three of this Report.

CHAPTER 3

THE COMMISSION'S INVESTIGATIONS AND OBSERVATIONS IN NEW ZEALAND

ACKNOWLEDGMENTS :

In Wellington the Executive Judge in the High Court is the Hon Justice Tony Doogue. The Judge Administrator to the Chief Justice of New Zealand is His Honour Judge N.C. Jaine. The comprehensive itinerary and schedule of consultations for the Commission's visit to New Zealand were arranged in advance by these two gentlemen, neither of whom was in New Zealand during our brief stay in that country. To both these members of the New Zealand judiciary the Commission gives warm thanks for the excellent arrangements which enabled us to learn a good deal within a short space of time.

(A) WELLINGTON

3.1 COURTESY CALLS ON SENIOR JUDGES AND A VISIT TO THE REGISTRY OF THE HIGH COURT IN WELLINGTON :

3.1.1 In Wellington the Commission payed courtesy visits to the Acting Chief Justice of New Zealand, Sir Ian Barker, at the High Court in Molesworth Street and to the President of the New Zealand Court of Appeal, Sir Ivor Richardson, at the Court of Appeal in Aitken Street.

3.1.2 Sir Ivor Richardson informed us that during the first half of 1996 the newly-formed Department for Courts had devoted particular attention to the practical functioning of the Court of Appeal. Two reviews of the Court's functioning were being undertaken in tandem. The first related to the organisation of case processing and management. The second involved an analysis of the present and the probable future workload of the Court of Appeal. Sir Ivor and the General Manager, Case Processing, of the Department for Courts, were the co-chairmen of the steering committee for this project.

3.1.3 The President of the Court of Appeal told the Commission that his Court was fortunate in not having to labour under any significant backlog of appeals. In 1978 the Court had dealt with 214 criminal and 85 civil appeals. For the year 1995 the corresponding figures were 606 criminal and 181 civil appeals. At the end of 1995 there were 42 civil appeals outstanding. At the end of June 1996 this figure had been reduced to 23. As far as criminal appeals were concerned the picture was less rosy. At the end of 1995 190 criminal appeals were outstanding. By the end of June 1996 this figure had been reduced to 164.

3.1.4 The expedition with which the Court of Appeal delivers its judgments on appeal is impressive. In the case of most civil appeals judgment is given either on the date of hearing or within a period of two or three weeks thereafter.

3.1.5 At the Wellington High Court Registry the Commission had a useful interview with Ms Diane Totten, the Deputy Registrar of the Court. She gave us an overview of the administration of the High Court ; and she explained to us briefly in what circumstances, and for what purposes, the New Zealand Department for Courts had been established.

3.2 A MEETING WITH THE CHIEF JUDGE OF THE DISTRICT COURT OF NEW ZEALAND :

3.2.1 The Commission further had the benefit of a lengthy interview with Chief Judge Young of the District Court. As in the case of Australia, the District Court of New Zealand represents a very significant component in the New Zealand hierarchy of Courts. Members of the Bench of the District Court are appointed from the ranks of experienced members of the practising profession ; and their status in the community is deservedly high.

3.2.2 There are more than 100 District Court Judges in New Zealand of whom 16 are women. The qualification required of a candidate for appointment to the District Court Bench is 7 years experience as a barrister or solicitor of the High Court. The appointment is formally made by the Minister of Justice, but in practice the Minister selects one of two or three names from a short list of likely candidates identified by the Chief Judge. The salary of a District Judge is 80% of that of a Supreme Court Judge.

3.2.3 The District Court in New Zealand has a broad jurisdiction which encompasses virtually every form of civil relief, whether founded in common law or equity, or provided for by statute. In monetary terms the general limit for civil jurisdiction is $200,000. In general the High Court insists that claims falling within this ceiling be dealt with in the District Court. In special cases only will such litigation be permitted in the High Court. The District Court is a very busy forum. Annually it disposes of some 2000 jury trials. The average duration of a jury trial in the court is almost three days. Typical criminal offences dealt with in jury trials are robbery, rape and drug-trafficking.

3.2.4 The New Zealand Family Court is part of the District Court. Some 28 Judges (of whom roughly a third are women) hold warrants as Family Court Judges. Chief Judge Young explained to us that typically a Family Court Judge would be appointed to the Bench of the Family Court in his or her mid-forties or mid-fifties. He or she would be drawn from the ranks of those practitioners who have either long specialised in Family Law or have had long exposure to Family Court work.

3.2.5 Chief Judge Young also described in some detail the essential features of the system of Civil Caseflow Management being implemented under an Auckland District Court pilot project. It is designed to improve, simplify, and expedite

the pre-trial process.

3.2.5.1 The project involves the use of different tracks (Immediate ; Simple ; Standard ; and Special) ; track allocation being done on the anticipated complexity of the particular case. The significant difference between the tracks lies in the extent of judicial intervention prior to the stage of actual trial.

3.2.5.2 Simple mechanisms are used to monitor progress. Conferences take place only when they are essential or likely to conduce to early resolution of cases. It is sought to identify the real issues in a dispute at an early stage ; and to encourage settlement through negotiation or by the use of ADR techniques such as mediation or reference to arbitration.

3.2.5.3 In terms of the time lapse from the stage of filing of a defence to the stage of completion of the hearing at trial, the objectives are :-

Simple Track……six months ;
Standard Track….nine months ;
Special Track……twelve months (complex) ;
six months (swift).

3.2.5.4 Reserved judgments are delivered as soon as is practicable. Any delay beyond three months may be drawn to the attention of the Executive Judge.

3.3 A VISIT TO THE NEW ZEALAND DEPARTMENT FOR COURTS :

3.3.1 In Wellington the Commission had a most instructive meeting with Mr Wilson Bailey, the Chief Executive Officer of the Department for Courts, and Mr Brian Murray, the General Manager, Case Processing, in the Department.

3.3.2 In New Zealand public concern had in recent times been increasingly felt that the services provided by the justice system were slow and unresponsive to the practical, cultural and emotional needs of the community. Other concerns were the declining public support for jury service ; and the need to improve accessibility to the Courts.

3.3.3 In October 1994 the Courts Services Review Committee [" the CSRC "] recommended the establishment of a separate Department to administer courts

and tribunals as the best means of providing effective and efficient services responsive to the needs of the public. The Department for Courts came into existence on 1 July 1995.

3.3.4 The Department is a large undertaking. It has a staff of over 1700 located throughout New Zealand ; and it provides support to some 150 Judges, as well as other Judicial Officers such as Coroners, Disputes Tribunal Referees and Justices of the Peace. It has a budget of approximately $190 million. It is a complex and ambitious undertaking. The Commission gained the impression that it was run on business rather than on bureaucratic lines. Although Mr Murray is a lawyer, it is interesting to note that Mr Bailey is a mathematician by training. It is also noteworthy that the Department has seven permanent statisticians on its staff.

3.3.5 The CSRC identified defective support for the judiciary as one of the main areas crying out for improvement. The Department recognises that the administration must be willing to respond promptly and in a professional manner to the requirements of Judicial Officers. The Courts Executive Council has been established to provide a forum for liaison between the Department and the Judicial Officers. The unique character of the relationship between the Department and the country's Judicial Officers is reflected in the very title of the Department : for rather than of Courts.

3.3.6 The Department hopes that management practices will evolve, resulting in greater participation by Judicial Officers in decisions on the nature and level of support to be provided to them. The Department recognises that particular attention has to be given to improving standards of administration and research support ; to provide information and library services tailored to judicial needs ; and to improve judicial accommodation and personal security.

3.3.7 One of the Department's priorities is the elimination of backlog in trial work, and the development of strategies to manage present workloads and to predict the volume of future workloads. Over the past five years the number of jury trials (High Court and District Courts combined) has increased by 84% ; criminal appeals to the Court of Appeal have increased by 56% ; and there have been very substantial increases in all areas of Family Court operations. The Department is already working closely with the Judiciary, the legal profession and the Police to develop caseflow management in New Zealand Courts. The Department has also embarked on major projects to redesign litigation

procedures and systems. These changes require the widespread introduction of information technology. The Department recognises that improvement in the quality of court services depends upon the calibre of the staff. Various possibilities for improving the skills and qualifications of court staff are being developed.

3.3.8 The Department is, however, fully alive to the risks involved in the whole undertaking. There is, first, the problem in a tight labour market of recruiting the necessary quality of staff required to support its strategies. Second, its strategies will take a long time to develop and put into operation. Last but not least, there is the risk in undertaking changes of great magnitude in a climate of fiscal restraint.

3.3.9 During the Commission's visit to the Department for Courts Mr Bailey kindly undertook to furnish the Commission in due course with additional information on a number of topics raised in our discussions. The Commission wishes to record its thanks to Mr Bailey for a very comprehensive file of documentary material relating to the Department since forwarded by him to the Commission through the South African High Commission in Canberra. The additional matter, which has been studied with much interest, includes the Minutes of the 1996 meetings of the Courts Executive Council (the primary consultative committee between the Judiciary and the Department) and the Executive Summary of the Department's Strategic Business Plan.

3.4 A MEETING IN WELLINGTON WITH TWO SPECIALISTS IN MEDIATION :

3.4.1 At the BNZ Centre, 1 Willis Street, Wellington, the Commission had the benefit of a lengthy discussion on mediation with Mr John Marshall and Mr Ian Macduff. Mr Marshall is a partner in Buddle Findlay, one of New Zealand's largest commercial legal firms. It employs a variety of dispute resolution methods, including alternatives to litigation. Mr Marshall is also convenor of the Wellington District Law Society's ADR Committee. Mr Macduff is a senior lecturer in Law at the Victoria University of Wellington and the Director of the Institute for Dispute Research and Resolution.

3.4.2 Of the many different forms of ADR (as, for instance, mediation, arbitration, conciliation, and mini-trials) our hosts considered that, from a practical perspective, mediation was probably the most effective. Until recently

mediation had been used in New Zealand primarily in industrial or employment disputes ; and in the Family Courts. Now, however, it was beginning to be used more often in civil and commercial disputes ; and this trend was likely to accelerate.

3.4.3 Our hosts stressed that while successful mediation required on the part of the mediator specific skills to enable him or her to facilitate communication between the parties, it was of crucial importance that the mediator should not resort to coercion or in any way contrive to impose his or her own solution upon the parties. Nor was it any part of the mediator's function to offer any legal advice to the parties. The essential function of the mediator was to promote mutual trust between the parties and thereby to help them to achieve their own solution.

3.4.4 While a solicitor may recommend a suitable mediator for a particular dispute, it is open to the parties themselves to approach "Lawyers Engaged in Alternative Dispute Resolution" [LEADR]. This is an Australian organisation with a strong New Zealand presence.

3.4.5 Once appointed the mediator usually arranges a preliminary meeting between the parties to discuss procedural arrangements for the mediation session. This meeting may be attended by the solicitors alone or accompanied by the parties.

3.4.6 At the mediation itself introductions are made and then the mediator summarises the nature of the mediation ; the procedure ; and the rules to which the parties have already agreed. The issues falling to be resolved are listed and all possible solutions are explored. During the course of the session the mediator may see each of the parties separately. If agreement is reached its terms are written down and signed.

3.4.7 Some of the chief advantages of mediation were summarised by our hosts as follows :-

(1) It is generally a good deal quicker than litigation. There are none of the delays naturally inherent in litigation.
(2) Mediation is much less expensive than litigation. From the nature of things the expenses of engaging the services of a mediator are far less than the costs of a defended trial action.
(3) The parties may determine their own informal procedures for a

mediation ; and they remain in control of it at all times. They are free to adjourn the session or to withdraw from it as they wish.

(4) When there subsists between the parties an on-going business or personal relationship, that relationship is likely to be preserved (and, indeed, it may be strengthened) through successful mediation. On the other hand litigation is almost bound to impair or even destroy the relationship.

(5) Mediation permits of a solution which commercially or from a common sense point of view is eminently satisfactory to the parties, but which solution may have been entirely unattainable upon an application of strict legal principles in a trial action.

(6) Confidentiality is preserved and there is no publicity unless the parties themselves decide otherwise.

(B) AUCKLAND

3.5 A MEETING WITH THE EXECUTIVE JUDGE IN THE HIGH COURT, WATERLOO QUADRANT, AUCKLAND :

3.5.1 The High Court Executive Judge in Auckland is Justice J Robertson, who impressed us as a person with very considerable managerial skills. He ensured that his Brethren were kept usefully occupied in Court by the overloading of case lists in the allocation of work to individual Judges ; and by keeping his finger on the pulse by a regular call-over system.

3.5.2 Our interview with the Executive Judge was brief because his presence was urgently required in Hamilton. In the short time available to us, however, one of the significant points he made was the following. He pointed out that if the judiciary itself is unable to maintain a firm grip on the management of the Courts, and if inefficient use is made of scarce judicial manpower, one of the unfortunate consequences is that judicial independence is eroded and tarnished.

3.6 AN INSPECTION OF THE HIGH COURT AND AN INTERVIEW WITH MS MARION NELLER IN CONNECTION WITH THE AUCKLAND CASE MANAGEMENT PILOT PROJECT :

3.6.1 In Waterloo Quadrant we were shown over the impressive High Court building by Ms Marlene Shipman, the Executive Assistant to the Chief Justice. She then introduced us to Ms Marion Neller.

3.6.2 Ms Neller is the person who has been responsible for the administration of the Civil Case Management Pilot in Auckland. The Commission had the benefit of a long and very informative interview with Ms Neller, from whom we were able to learn a good deal not only about the Pilot in Auckland but about case management in general.

3.6.3 Ms Neller is not herself a lawyer but she holds a university diploma in management. She illustrated her excellent talk to us with reference to diagrammatic visual aids. As an example of the benefits flowing from case management, Ms Neller cited personal injury damages cases. Whereas previously the time lapse between the date of the accident and the beginning of

trial had been of the order of 3 to 7 years, this period had now been reduced by half.

3.6.4 We were informed by Ms Neller that much of her own knowledge on the subject of case management had been acquired under the tutelage of Maureen Solomon of Denver, Colorado. Ms Neller presented us with a copy of "Caseflow Management in the Trial Court" [1987] by Maureen Solomon and Douglas K. Somerlot, a work to which reference will be made in Chapter Five of this Report.

3.7 AN OUTLINE OF THE CASE MANAGEMENT SYSTEM IN AUCKLAND :

3.7.1 What follows in paragraphs 3.7.2 to 3.7.9 is based on the contents of Case Management Pilots in the High Court Practice Note reprinted in January 1996 by the Department for Courts.

3.7.2 Management Tracks :

Apart from admiralty proceedings ***in rem***, all cases are on filing assigned by the Registrar to one of the following four management tracks :-

(i) The Immediate Track :

This is for those cases (such as petitions in bankruptcy, applications for interim relief or summary judgment) which receive a hearing date on filing.

(ii) The Swift Track :

This is for urgent cases which should be brought to finality expeditiously, such as civil appeals and cases involving limited factual or legal issues.

(iii) The Complex Track :

This is for cases which require more judicial management than that required for cases on the standard track, such as trials likely to last longer than 5 days or cases involving complex factual or legal issues.

(iv) The Standard Track :

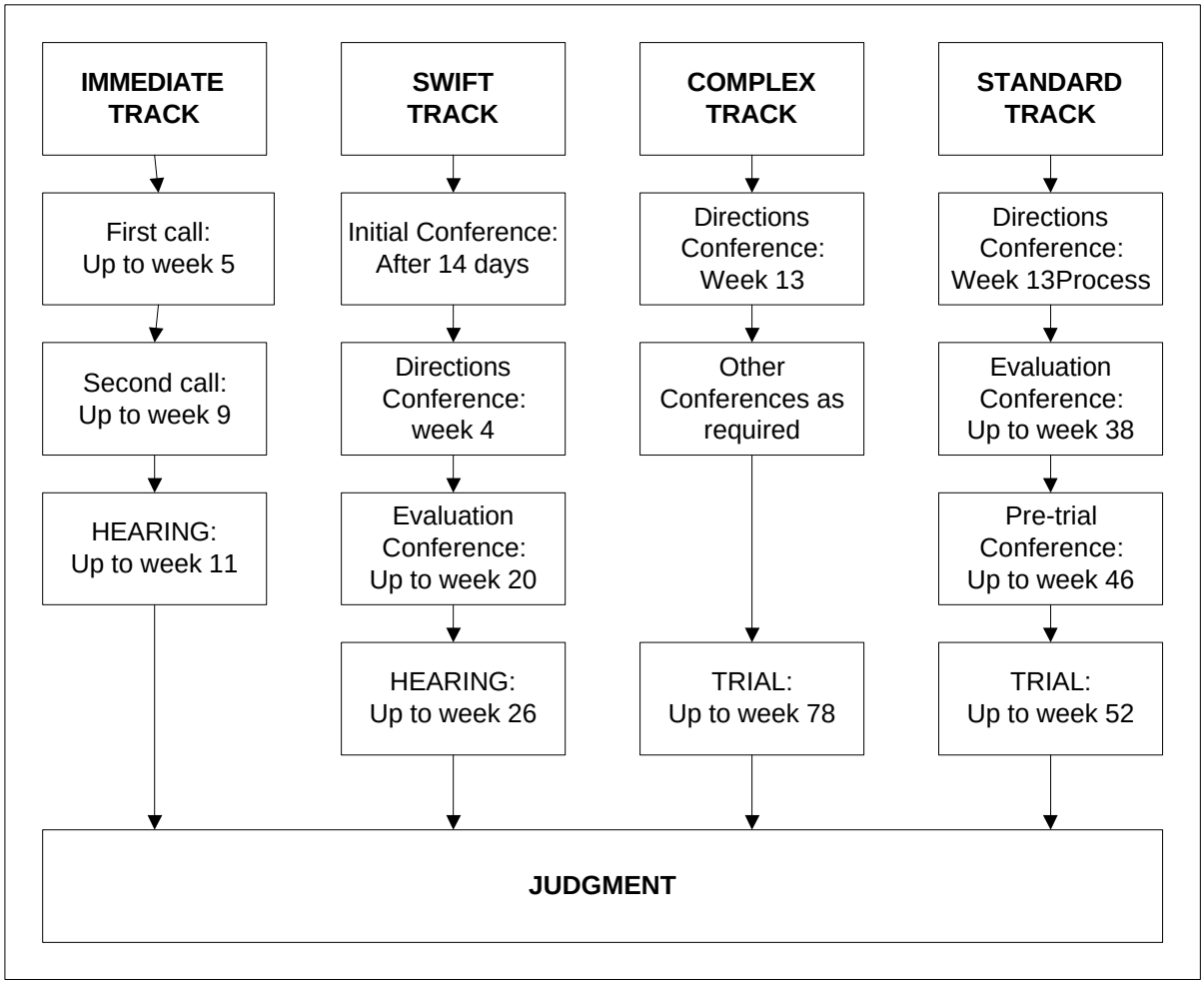
This is for all cases not assigned to any other track.

3.7.3 Timelines :

3.7.3.1 The timeline is the period of time from filing to disposition (settlement or judgment).

3.7.3.2 Each Track has its own timeline. In the Immediate Track supervision is exercised when the cases are called in open Court. The Swift, Complex and Standard Tracks are punctuated with conferences.

3.7.3.3 The timeline and conference goals are the following :-



3.7.4 Conferences :

Conferences are convened by notice issued upon the fixing of their dates. Save for initial conferences 45 minutes are allowed for each conference. Conferences are before a Master with the following exceptions :-

SWIFT TRACK	COMPLEX TRACK	STANDARD TRACK
Initial and Directions: DUTY JUDGE	Evaluation & Pre-Trial ASSIGNED JUDGE	Pre-Trial TRIAL JUDGE (if possible)

3.7.5 The Directions conference :

The Directions Conference enables the Court to conduct an in-depth review of the case with the parties and counsel ; to explore the possibility of settlement ; and to plan the future conduct of the case.

3.7.6 The Evaluation Conference :

Progress of the preparation for trial is reviewed while there is still time in which to resolve outstanding problems and issues before trial ; the possibility of settlement is explored ; and overall timeline compliance is ensured.

3.7.7 Technological Aids :

All case management data are recorded on a computer. All notices of relevant dates are computer generated. Conference listings are recorded in an electronic diary.

3.7.8 ADR Options :

Parties and counsel are encouraged to adopt some form of ADR (such as mediation, a settlement conference or a reference to arbitration) whenever appropriate.

3.7.9 Goals for Judgment Dates :

The Court strives to deliver judgments (orally or in writing) within the following time frames :-

75% within 14 days of hearing ;
90% within 28 days of hearing ;
100% within 91 days of hearing.

CHAPTER 4

THE COMMISSION'S INVESTIGATIONS AND OBSERVATIONS IN CANADA

(A) BRITISH COLUMBIA

ACKNOWLEDGMENT :

In seeking to arrange meetings with members of the Judiciary and leading jurists in British Columbia the Commission was fortunate in having available to it in advance the advice and expertise of Ms Kathleen Keating of Vancouver. Ms Keating is an experienced legal systems researcher. She was one of the organisers of the Eleventh Commonwealth Law Conference which was held in Vancouver during August 1996, shortly before our visit to the city. The Commission records its warm thanks to Ms Keating for the excellent programme in Vancouver and Victoria arranged by her on our behalf.

4.1 A VISIT TO THE LAW COURTS EDUCATION SOCIETY OF BRITISH COLUMBIA :

4.1.1 The Law Courts Education Society of B.C. [LCES] was established in 1989 in response to recommendations of the Justice Reform Committee of British Columbia. This Report stressed that in order to gain access to the justice system citizens should be given the information they need in a meaningful manner. One of the Report's recommendations was that :-

> *" The Ministry of the Attorney General should make the provision of information to teachers, students and the public generally, a priority."*

4.1.2 The LCES was given a mandate to work in partnership with the B.C. court system throughout the Province to provide legal educational programmes, both within the B.C. education system and otherwise. Their programmes are aimed at providing British Columbians with a greater understanding of the structure and operation of the justice system in general, and the court system in

particular.

4.1.3 In Vancouver the Commission visited the offices of the LCES where it met with Mr Rick Craig, the Executive Director, and Ms Evelyn Neaman, the Project Director. They explained to us the energetic and imaginative steps taken by the LCES to teach the schoolchildren of B.C. , who come from many diverse cultural backgrounds, how the courts in their Province are structured ; how they function ; and where and how a citizen should seek legal advice and relief.

4.1.4 Such education is a first essential step in making Access to Justice a reality in any community. In the opinion of the Commission South Africa, with its large population of underprivileged and ill-educated children and adults, would in this regard do well to follow B.C.'s outstanding example.

4.2 A MEETING WITH THE HON MR JUSTICE JOHN C. BOUCK OF THE SUPREME COURT OF BRITISH COLUMBIA :

4.2.1 Judge Bouck, who is based in Victoria, B.C. provided us with some interesting viewpoints. From what the Commission saw and heard in Vancouver the Commission gained the impression that in the matter of case management Canada lags considerably behind Australia.

4.2.2 In March 1994 the Judges of the Supreme Court of B.C. approved the design of a pilot project for an Individual Calendar System of Case Management [ICS]. In April 1995 Judge Bouck submitted to the Chief Justice an Overview Paper [" the paper "] to describe how the ICS pilot project would function if put into operation. Judge Bouck was good enough to present us with a copy of the paper.

4.2.3 It is useful here to quote extracts from Section 3 of the introductory chapter of the paper. We do so because this portion of the paper reveals not only how antiquated the B.C. system is but also its striking similarity to South Africa's outmoded treatment of defended trial actions.

4.2.4 Here follow extracts from Section 3 in PART I of the paper :-

" *a) Introduction - B.C. Rules Modelled on the English Rules of 1883*

Today, the court operates under a Master Calender System of case management (the MCS). It meshes with the underlying theme of the 1883 English Rules of Civil Procedure. The English 1883 rules gave litigants the right to control the pace of litigation…

(b) *Lack of Judicial Control Over Case Flow*

British Columbia MCS judges have little if any say in accelerating the pace of litigation. Cases may languish untried for many years in the MCS. The MCS has no way of tracking them…

No one judge is responsible for the management of an action in over 95% of MCS civil cases. The action proceeds through the system from the date of its commencement until it is tried or settled according to the whims and desires of the parties…

Parties may apply for a trial date at their leisure. They may reserve as much court time as they believe is necessary to present their case…Counsel may argue orally as long as they want on pre-trial motions and at the end of a trial. Valuable court time gets eaten up inefficiently.

(c) *Lack of Trial Judge Knowledge About the Case Prior to Trial*

Usually the MCS trial Judge will know little or nothing about the action before the trial begins. Pleadings filed one year before at the time of the application for trial are often out of date. At the commencement of the trial, counsel seldom provide a written trial brief setting out the essential facts in dispute, a statement of the issues, a summary of the law that applies and the nature of the remedy sought. Oral openings usually are incomplete and perfunctory. Educating the Judge about the issues and the law is saved for unlimited oral argument at the end of the trial…

(d) *Time for an MCS Action to Get a Trial Date*

The MCS measures its success in getting a case to trial by calculating the time between the application for trial and the date that the trial commences. That is now one year. But that time period yields a misleading figure for two reasons. First, before one of the parties applied for a trial date, the case may have languished in the system for 4 or 5 years. Thus, the MCS only disposed of the action some 5 to 6 years after it began.

Second, when the trial date arrives, the MCS may still 'bump' it for another 6 months to a year if there are no judges available…

(e) *Assignment of Judges to Try MCS Cases*

There are a limited number of MCS judges assigned to try civil cases. There are more actions applying for a trial date than there are judges available to hear them…

Overbooking of trials exists for two reasons. First, to make sure that all available judges are sitting in a courtroom every day the court house is open. Second, to try and squeeze onto the trial list the maximum number of trials because of the backlog of cases waiting to get on for trial.

(f) *Conclusion*

The MCS worked reasonably well in B.C. up to the mid 1970's. It then began falling behind in its ability to hear and decide civil matters in a timely fashion. Short of adding about 10 more judges and continuing to do so in the future, it is doubtful the existing rules and the MCS will ever pass the test of customer satisfaction…"

4.3 CERTAIN RECOMMENDATIONS IN REGARD TO CASE MANAGEMENT IN THE TASK FORCE REPORT OF THE CANADIAN BAR ASSOCIATION :

4.3.1 Early in 1995 the Canadian Bar Association [CBA] created the System of Civil Justice Task Force to inquire on a national basis into the state of the civil

justice system. The CBA appreciated that while the Canadian civil justice system had much to commend it, there existed a need to render it :-

> *" more efficient, accessible, accountable, fair and able to deliver timely results in a cost-efficient manner."*

The Report of the Task Force [August 1996] makes proposals aimed at the solution of problems which are shared, in varying degrees, in the civil justice system across Canada. It should be noted, however, that the Report does not represent policy of the CBA.

4.3.2 Chapter Four of the Task Force Report is devoted to a discussion of "A Multiple-Option Civil Justice System". It sets forth, ***inter alia*** the following recommendations :-

4.3.3 Recommendation 2 : [at page 34]

> *" The Task Force recommends that each jurisdiction through its rules of procedure impose on all litigants a positive, early and continuing obligation to canvass settlement possibilities and to consider opportunities available to them to participate in non-binding dispute resolution processes."*

4.3.4 Recommendation 4: [at page 36]

" The Task Force recommends that every court have a caseflow management system to provide for early court intervention in the definition of issues and for the supervision of the progress of cases."

4.3.5 Recommendation 5 : [at page 36]

" The Task Force recommends that, while the design of a caseflow management system should be at the discretion of each court, at a minimum systems should provide for

(a) early court intervention by designated and trained individuals in all cases ;
(b) the establishment, monitoring and enforcement of timelines ;
(c) the screening of cases for appropriate use of non-binding dispute

resolution processes ; and

(d) reliable and realistic fixed trial dates."

4.3.6 Recommendation 7 : [at page 37]

" The Task Force recommends that every jurisdiction provide for case management in all cases where there is a need for judicial supervision or intervention on an ongoing basis."

4.3.7 Recommendation 8 : [at page 38]

" The Task Force recommends that every jurisdiction provide a multi-track system for the resolution of civil disputes."

4.4 A MEETING WITH THE HON MR JUSTICE DUNCAN SHAW OF THE SUPREME COURT OF BRITISH COLUMBIA :

4.4.1 A leading protagonist of caseflow management in British Columbia is Mr Justice Duncan Shaw. He informed us that the Chief Justice of British Columbia had requested him to prepare a report on the whole subject.

4.4.2 The Commission had the benefit of a very useful discussion with Judge Shaw in his chambers in Vancouver. We are also much indebted to Judge Shaw for prompt arrangements made by him during our meeting which enabled the Commission during its subsequent and brief stay in Denver, Colorado, to consult with three outstanding figures in the field of Case Management : Dr Barry Mahoney ; Mr Harry Solomon ; and Mrs Maureen Solomon. Our meeting with them is discussed in Chapter Five of this Report.

4.5 A MEETING IN VICTORIA B.C. WITH AN EXECUTIVE OFFICER IN THE MINISTRY OF THE ATTORNEY GENERAL

4.5.1 The Commission spent a profitable afternoon in Victoria with Mr Jerry McHale who is a senior executive officer in the Ministry of the Attorney General. One of the topics discussed at some length was the use of mediation in the protection of children in need of care.

4.5.2 In British Columbia the Family and Child Service Act defines in what circumstances an abused or neglected child is " in need of protection " ; and it prescribes the procedures which may culminate in a court order " bringing a child into care ". Child protection proceedings easily become polarised and charged with strong emotions. Mr McHale explained that in such proceedings the investigating social worker tended to think in terms of "building up a case" against the child's family. The Ministry had therefore decided to explore the possibility that an alternate process might afford adequate protection to the child without generating the tension which is inevitable when the State is obliged to prove in court that a parent has failed to care properly for a child.

4.5.3 To this end a pilot project had been started in 1992. It seeks through mediation to reach an agreement respecting the future care and treatment of the child in question when the Ministry and the parents are in conflict. Two criteria for referral to mediation are that the child must not be in immediate danger, and that participation of the family must be voluntary. Involved in the mediation are the parents and their counsel (if they wish representation), an older child, and the social worker. The mediator is a neutral professional trained and experienced in mediation. Mediation changes the nature of the interaction between the family and the State from an authoritarian intervention to a negotiation. It is important to realise, however, that while the range of issues to be mediated is broad, the existence or non-existence of neglect, as a purely factual issue, cannot be mediated.

4.5.4 Though research information is still limited, results so far have been encouraging. Most cases mediated resulted in agreement. More than 85% of the families participating preferred mediation to meeting the social worker alone. Amongst single mothers the figure was 100%. 78% of the families felt the solution worked out was fair ; and that they " had a real say in working out the agreement ".

(B) OTTAWA, ONTARIO

4.6 A MEETING AT THE OFFICES OF THE COMMISSIONER FOR FEDERAL JUDICIAL AFFAIRS

4.6.1 Two members of the Commission accompanied by the Secretariat paid a visit to the Office of the Commissioner for Federal Judicial Affairs at 110 O'Connor, Ottawa. There we were cordially received by Mr André Gareau, Director General, Policy and Corporate Services ; Mr William J. Rankin, who is the Executive Director of the Federal Court Reports ; and Madame Anne Roland, who is the Registrar of the Supreme Court of Canada.

4.6.2 The Federal Judicial Appointments process, which has been in place since 1988, was explained to us. It applies to the appointment of Judges of the Superior Courts of every province, as well as to the Supreme Courts of the Yukon and Northwest Territories ; the Federal Court of Canada ; and the Tax Court of Canada. Qualified lawyers and persons holding judicial office who wish to be considered for appointment as a judge of one of these courts must apply to the Commissioner for Federal Judicial Affairs. The Commissioner maintains records of those interested in appointment and ensures that the candidates are assessed by the appropriate provincial or territorial advisory committee.

4.6.3 With reference to Chapter 7 of Hogg's " Constitutional Law of Canada " Mr Rankin explained to us the implications of the Constitution's judicature sections, and the respective spheres of the provincial and the federal courts. Madame Roland gave us some interesting glimpses into the day-to-day functioning of the Supreme Court of Canada. In that court a system of coloured lights is used to signal to counsel that the time allowed for his or her oral argument is fast running out.

4.6.4 An impressive feature of the Commissioner's Office is the wealth of statistical data collected and maintained by it in regard to every conceivable facet of the functioning of the Canadian justice system. In this connection we record our thanks to Mr Gareau for the trouble taken by him in subsequently forwarding to the Commission a large parcel containing not only an overview of National

Justice Statistics but in addition a set of financial estimates involving both the Federal Court and the Canadian Tax Court.

(C) TORONTO, ONTARIO

4.7 THE COMMISSION'S VISIT TO THE COMMERCIAL COURT OF THE ONTARIO COURT OF JUSTICE (GENERAL DIVISION)

4.7.1 In SECTION B of PART THREE of the Third and Final Report [at pages 92-96 in Chapter Six] a description of the above Court has already been given. For present purposes it is necessary to focus particularly on the ADR/Mediation initiatives displayed by the Court.

4.7.2 In the above connection it is useful to quote a number of extracts from an article written by the Hon Mr Justice James Farley in the December 1993 issue of " The Advocates Society Journal " under the title : "The Commercial List - Practical Comments, Including Advice on the ADR/Mediation initiative".

4.7.3 In the course of the article the learned author says, ***inter alia*** [at page 7] :-

> *" Many of the matters brought for hearing on this list demand a business solution rather than a strictly legal one. If the matter is addressed early enough there will still be the commercial premium which will be able to be shared in some degree by the parties. If left too long, not only will the business start to disintegrate, but the legal costs will mount. As time passes, these sunken costs will come to be regarded as an investment asset rather than a liability. With this in mind the Practice Direction endorses the use of alterative dispute resolution…"*
>
> *" Various elements of ADR are now available through the Commercial List. First (and most simplistically) are the request form and case timetable, which promote discussion between counsel and encourage a co-operative attitude. Next, there is the institution of the 9.30 judge ; not a week goes by without a settlement arising from a visit by both sides to review mechanics leading to a general discussion as to how the matter may be resolved overall. Third, there is the aspect of the various types of case management available on the list, resulting in a single*

judge becoming thoroughly familiar with an ongoing case ; this judge will either independently sense when a settlement case conference might be held or be prompted by one party to call one. Fourth, when one considers the general spectrum of ADR available, there is mediation, both interest based and/or rights based. With the assistance of co-operative counsel, the judges who have received mediation training have engaged in over a dozen 'formal' mediations in the first six months of this year, almost always with success."

" The obvious benefit of an ADR solution to the parties is a less costly and better-tailored resolution of the parties' dispute than might otherwise be obtained at trial. The benefit both to the court system and to society of using judges to do the ADR work is the cost/benefit ratio of spending, for example, one day doing a mediation with a 70% chance of success versus allowing that trial to go to trial with a 50% certainty basis and an estimated trial time of two or three weeks."

CHAPTER FIVE

THE COMMISSION'S INVESTIGATIONS AND OBSERVATIONS IN THE UNITED STATES OF AMERICA

(A) DENVER, COLORADO

ACKNOWLEDGEMENTS :

For the advance arrangements which enabled us to meet the Chief Justice and other members of the bench of the Supreme Court of Colorado and the State Court Administrator the Commission records its warm thanks to Daniel L. Ritchie, Chancellor of the University of Denver ; and to Stephen A. Edmonds of the Office of the Chancellor. The Commission further expresses its appreciation to Steven V. Berson, the Colorado State Court Administrator for arranging for us to meet with the Chief Judge of the Second Judicial Circuit and the City Attorney. The Commission rounded off its visit to Denver with a visit to Wellington E. Webb, the Mayor of the City and County of Denver. The Commission wishes to thank the Mayor for the hospitality shown by him to us.

5.1 A VISIT TO THE SUPREME COURT OF COLORADO :

5.1.1 At the State Judicial Building in Colorado the Commission was cordially received by Chief Justice Anthony F. Vollack and a number of his Brethren. The Supreme Court, which is the State's court of last resort, consists of seven Justices. Chief Justice Vollack gave us an overview of Colorado's judicial hierarchy. Below the Supreme Court there are the following courts : the Court of Appeals (16 judges) ; the District Courts (115 judges) ; and the County Courts (116 judges).

As a division of its District Court Colorado has seven Water Courts - one in each of its major river basins. Apart from the State Courts mentioned above there are the Federal Courts dealing with federal laws such as bankruptcy ; and matters involving the U S Constitution.

5.1.2 Chief Justice Vollack also gave us a detailed and interesting explanation of the method of appointment of State judges in Colorado. A constitutional amendment in 1966 provides that State judges be appointed instead of being elected on a political ticket. Tenure of judicial office is as follows. A Supreme Court Justice serves a ten-year term ; a Court of Appeals Judge an eight-year term ; a District judge a six-year term ; and a county judge a four-year term. These terms are, however, renewable.

5.1.3 Mention has already been made [see paragraph 4.1 in Chapter Four] of what British Columbia does to teach its schoolchildren how that Province's courts function. In this respect Colorado is no less enterprising. Chief Justice Vollack explained to us that active steps are taken to educate schoolchildren in regard to the State's court system by arranging on a regular basis for a court to conduct its proceedings in a school hall. The proceedings are observed by the pupils ; and at the adjournment thereof the pupils are invited to take part in a panel discussion on what they have seen and heard. The Commission recommends that the South African High Court should follow this praiseworthy example.

5.1.4 The Commission wishes to thank Chief Justice Vollack for his kindness in receiving the Commission and for thereafter placing at our disposal his conference room as the venue for our later meeting with Dr Barry Mahoney and Mr Harvey and Mrs Maureen Solomon.

5.2 A MEETING WITH THREE DISTINGUISHED COURT MANAGEMENT EXPERTS :

5.2.1 THE JUSTICE MANAGEMENT INSTITUTE :

The Justice Management Institute [JMI] is based in Denver. It is a non-profit organisation engaged in education, research and technical assistance in relation to the functioning of courts. JMI is currently involved in seven national projects all focused on trial court operations.

5.2.2 DR BARRY MAHONEY :

Dr Barry Mahoney is the President of JMI and the person responsible for its overall management and the development of its programmes and projects. He

is a graduate of Dartmouth College and the Harvard Law School. He holds a Ph.D in political science from Columbia University.

Dr Mahoney has extensive litigation experience. From 1962-67 he was an Assistant Attorney General for the State of New York. After four years of private practice in New York City, he served for two years as First Assistant Counsel for the New York State Division of the Criminal Justice Services. During the period 1978-1983 Dr Mahoney was for four years the Director of the London Office of the Vera Institute of Justice. For five years he was with the Institute of Court Management of the National Center for State Courts, where he led national-scope research on, ***inter alia***, court delay. He is Chairman of the ABA Judicial Administration Division Lawyers' Conference Committee on the Future of the Courts.

Pursuant to a project sponsored by the National Institute of Justice and the Bureau of Justice Assistance Dr Mahoney and eight other experts in this field in 1988 published a report entitled "Changing Times in Trial Courts" [the CTTC Report] , a copy of which he presented to the Commission. The CTTC Report reflects the findings of a three-year study of case-processing times in 18 general jurisdiction trial courts in urban areas spread over the United States.

5.2.3 HARVEY E. SOLOMON :

Mr Solomon is a Senior Consultant and a Member of the Board of Directors of the JMI. A graduate of Columbia College and Harvard Law School he also holds an LL.M from the Georgetown School of Law. He is a member of the Colorado Bar and an Adjunct Professor in the University of Denver College of Law. Before 1974 he served as a trial attorney with the Civil Aeronautics Board. Later he was the first Director of Court Studies of the Institute for Court Management [ICM] of which he was the executive Director from 1974 to 1978. Following upon ICM's merger with the National Center for State Courts [NCSC] he was from 1984 to 1995 the Vice President of ICM/NCSC. The author of articles on judicial administration and court management he has received awards for outstanding service in the field of judicial administration.

5.2.4 MAUREEN SOLOMON :

Mrs Maureen Solomon is a graduate of the University of California at Los

Angeles (B.A. Psychology) and of the University of Southern California (M.A. Public Administration). She is also a Graduate Fellow of the ICM. Mrs Solomon joined the newly-formed ICM in 1970. In 1972 she started her own court management consulting business. Since then she has been a consultant to courts in the USA, Canada, Australia and New Zealand in the fields of delay reduction, differential case management and case management information systems. She is also the authoress of articles and monographs on these topics. Maureen Solomon's 1973 monograph "Caseflow Management in the Trial Court", commissioned and published by the ABA, is considered the seminal work on the subject. Updated and republished by the ABA under the title "Caseflow Management in the Trial Court Now and for the Future" [the CMTC monograph] it is a standard work on the subject.

In 1990 she was awarded the NCSC's Distinguished Service Award for her outstanding contribution to the improvement of court administration nationally ; and in 1992 she received the Award of Merit of the National Association for Court Management.

5.2.5 The conference which the Commission was privileged to have with Dr Mahoney, Harvey E. Solomon and Maureen Solomon was particularly instructive. We are indebted to these three experts not only for being prepared to meet with and advise us at short notice, but also for the wealth of contemporary writings on case management and methods of delay reduction with which they generously provided us.

5.2.6 In South Africa both Judges and the practising professions often claim that the slow pace of civil trial work in our courts can be speeded up simply by the appointment of more judges to the High Court. One of the first things impressed upon us by our hosts, however, was that research in America had demonstrated that the appointment of additional judges by itself was not a cure for court delays. Until the mid-seventies it was commonly claimed (and accepted) in the USA that the chief cause of court delay was lack of court-based resources (eg. not enough judges ; too few courtrooms). Research by the National Center for State Courts [NCSC] had cast doubt on this proposition. The results of research were that courts with markedly different paces of litigation did not differ noticeably in their resources. In the CTTC Report Mahoney and his co-researchers put the matter thus (at page 53) :-

" Although inadequate judicial resources in relation to workload is

commonly asserted to be a primary cause of court delay, recent empirical research has challenged the validity of this assertion. The Justice Delayed study [1] found no relationship between the pace of litigation and either annual filings per judge or cases pending per judge."

5.2.7 In August 1994 Maureen Solomon made a presentation to the Canadian Bar Association on the origins of caseflow management in the United States ; and its progress and destination. Her opening words to the CBA are worth quoting here :-

" Near the conclusion of his poem 'The Road Not Taken', Robert Frost observes : 'I chose the [road] less traveled by'. In the United States growing public criticism of litigation cost and delay, lawyer dissatisfaction with delay and unpredictable court procedures, and a pattern of diminishing resources to support court operation have propelled our courts onto a course 'less traveled' which has proven to be the most effective route to timely disposition. The road is called Court Supervision of Case Progress and the road marker says : 'The court must take control of the progress of each case at filing and supervise the case until disposition.'

As recently as the early 1970's this road was not only less traveled, but judges, court managers and lawyers who ventured into court supervision of case progress were lonely pioneers encountering roadblocks and detours on the way to defining a new paradigm for case management. However, twenty years later caseflow management is a well-traveled thoroughfare, the preferred route to timely and economical justice in civil, criminal, family and juvenile cases. In fact it has become a super highway with alternative lanes for cases of differing complexity. Perhaps most amazing, highway maintenance has become a joint undertaking of the court and the bar, all dedicated to preservation and enhancement of the new paradigm of case management."

5.2.8 Although many techniques to counter court delay have been devised, our hosts explained to us that at the heart of the process lay active case management. In

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[1] **Thomas W. Church *et al*, "Justice Delayed : The Pace of Litigation in Urban Trial Courts, NCSC (1978).**

the past the accepted pattern of litigation was that cases were the domain of the parties and their lawyers ; and that the court had no right to intervene in the process unless and until requested to do so. A key component in caseflow management, however, is early and active court involvement in case progress. The basic concept of case management is that the court rather than the practitioners should control the pace of litigation. The psychological absolute underlying case management is that the court's surrender of control over litigation invariably leads to procedural inactivity.

5.2.9 It will be recalled that in his oral submissions to the Commission [see paragraph 1.3.10 in Chapter 1] Friedman JP pointed out that in the High Court our system of civil trial litigation is able to function at all only because 90% of trial cases are settled at or just before trial. One of the pithy maxims which Maureen Solomon uses in her teaching on reduction of court delays, involves the following question :-

> *" If only a small percentage of cases will require trial, why does it take so long to achieve the non-trial disposition of the remaining cases ?"*

5.2.10 After the stage of entry of appearance to defend, the further progress of a trial case is divisible into various identifiable phases by critical events which may be made subject to time deadlines. The recipe for successful case management involves striking a fine balance in determining deadlines. In the CMTC Monograph the matter is described (at page 4) in the following words :-

> *" Caseflow management must establish time intervals long enough to allow adequate preparation but short enough to encourage that preparation. It is an observable fact that tasks tend to be completed near the deadline for completion. A court can take this phenomenon into account and assure attorney preparation by creating realistic time frames in the caseflow process."*

5.2.11 Our hosts particularly emphasised the necessity that in case management attention should be directed to the progress through the court system of ALL cases and not merely the few which would ultimately proceed to trial. What is essential is the prompt disposal of the 90% or more which are resolved without being tried to a conclusion in a court of law.

5.2.12 In the concluding chapter of the CMTC Monograph (at page 54) the essential

elements common to successful case management are summarised thus :-

> *" A common definition of caseflow management has evolved. While those who study the subject have adopted differing terminology to depict the critical elements, all agree that these elements include :*
> *continuous court supervision of cases from filing through termination,*
> *adoption of time goals against which to compare system performance,*
> *establishment of deadlines for completion of specific case events,*
> *monitoring each case to assure that scheduled events are concluded on time, response by the court to failures to comply with deadlines,*
> *and creation of credible trial calenders [trial dates]."*

5.2.13 Having regard to South Africa's limited resources we were interested to learn from our hosts that while highly developed information systems are very useful, they do not appear to be essential to successful case management. In this regard the CTTC Report (at pp 199-200) says :-

> *" The types of management information systems used in the successful courts vary widely. Some are automated and are highly sophisticated in the type of management reports they produce at regular intervals. Others are entirely manual, and can provide only some of the data that a court manager would ideally want in order to monitor the pace of litigation. In all of these courts, however, some type of management information is collected - and used - by the leadership of the court - to monitor case proceedings times and identify problems before they become crises."*

5.2.14 Among the various factors which the CTTC Report identifies as being crucial to ensuring the proper functioning of case management, it seemed to us that in considering the feasibility of case management in the High Court of South Africa, the following three have particular significance :-

" *1. Leadership [at p. 198]*

> *…When we asked practitioners in these [successful] courts about reasons for effectiveness in minimizing or reducing delay, one of the most frequent responses was a reference to the leadership ability of the Chief Judge. The specific qualities mentioned in this context cover a wide range, but it is clear that most of the*

successful courts have had the benefit of leadership by a chief judge with vision, persistence, personality and political skills necessary to develop broad support for court policies and programs aimed at reducing delay…

Leadership…is not exclusively the province of the chief judge. Within a trial court the trial court administrator or clerk has a key role. More than anyone else, the administrator or clerk must convey the goals of a program to members of the court staff, obtain their input, allay their concerns, and organize the resources necessary to implement the program on a day-to-day basis…"

" *6.* *Judicial Responsibility and Commitment [at p. 202]*

Previous research on delay reduction programs has emphasized the importance of shared concerns, on the part of the judges of a court, about the problems of delay. In the words of one study, The most important element in starting and achieving a delay reduction program is a shared recognition in the court of the need to change the pace of litigation and a resolve to achieve that change. If one or only a few judges are committed to reducing the overall time to disposition, the chances of a program being successful are reduced significantly. [2] *"*

" *8.* *Education and Training [at p. 203]*

If courts are to manage their caseloads successfully, both the judges and the court staff need to know why and how to do it. Since the whole notion of caseflow management is of relatively recent vintage, this is not an area in which there is a great deal of knowledge and experience in most courts. Training is essential to familiarize judge, staff members and members of the bar with purposes and fundamental concepts of caseflow management and with the specific details and techniques essential to effective case management."

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[2] **Larry L. Sipes *et al*, "Managing to Reduce Delay" NCSC (1980).**

5.2.15 Our hosts also emphasised the importance of proper consultation with the practising profession. While final responsibility for effective caseflow management rests with the court itself, those practising in the court should be active participants in the development of the system. Under the heading "Consultation with the Bar" the CMTC Monograph says [at page 10] :-

> *" Teamwork as a component of commitment extends to the court's relationship with the organized bar and with other justice agencies. The impetus for change can originate in a variety of places. Increasingly, pressure for improved caseflow management arises in the organized bar. Court reform committees now exist in the majority of bar associations and regularly bring proposals for change to the courts. Failure of courts to recognise the interest of the bar or to involve lawyers in the planning process can have serious consequences."*

5.2.16 Our hosts left us under no illusion that the process of conversion to a caseflow management system is not an easy one ; and that it requires a fundamental psychological adjustment on the part of all role players. The difficulties are mentioned at page 47 of the CMTC Monograph :-

> *" Conversion to a caseflow management system in which the court accepts responsibility for controlling the pace of litigation requires a major philosophical and resource commitment. It may be such a significant departure from past practice that it is, at least temporarily, traumatic for judges, administrators, lawyers and personnel in other justice agencies. The process may involve confrontation between the court and prosecutor in a prosecutor-controlled criminal case processing system and require changes in the work habits of the trial bar and judges. Sustained effort will be needed to change long held lawyer perceptions about the court's intentions to manage case progress."*

5.2.17 Before leaving our discussions with the three experts in Denver, attention should be called to an important court functionary in American courts unknown to the South African system. This is the Court Manager. Our hosts impressed upon us the crucial role played in the smooth functioning of American courts by the Court Manager. He is appointed to his post essentially on the strength of his managerial skills and he requires no specialised legal knowledge or experience ; in fact he will often be a non-lawyer. It was emphasised that also

in the successful implementation of a caseflow system the abilities and commitment of the Court Manager are indispensable.

(B) MINNEAPOLIS , MINNESOTA

ACKNOWLEDGMENTS :

The Commission gratefully acknowledges the assistance given to it during its brief visit to Minneapolis by each of the undermentioned -

(1) Judge Douglas K. Amdahl of Rider, Bennett, Egan & Arundel, 2000 Metropolitan Centre, Minneapolis.

Judge Amdahl is a former Chief Justice of the Supreme Court of Minnesota who during his judicial career was a pioneer in fostering the use of mediation as a dispute resolution technique. We are indebted to Judge Amdahl for introducing us to Ms Tracey Sheehan of the Mediation Center for Dispute Resolution in Minneapolis ; and for his hospitality in entertaining us to lunch.

(2) Ms Tracey Sheehan of the Mediation Centre for Dispute Resolution.

Ms Sheehan, who is an experienced arbitrator and mediator, organised for our benefit a presentation at the Center described in paragraph 5.3 below.

(3) The various contributors to the presentation described in paragraph 5.3 below.

(4) The following Judges of the Fourth Judicial Circuit in Hennepin County : Chief Judge Howard ; Judge Diane S. Eagon ; Judge Mary Davidson.

5.3 A PRESENTATION AT THE MEDIATION CENTER FOR DISPUTE RESOLUTION :

5.3.1 Through the good offices of Tracey Sheehan the Commission was able to spend several hours at the Mediation Center for Dispute Resolution [the MC] at 670 Grain Exchange Building North, Minneapolis, where it was given the benefit of a highly professional and intensive presentation by various executive members of the MC.

5.3.2 The MC was founded in 1981 by the Hennepin County Bar Association, and

it has shown remarkable growth and activity since. It plays a leadership role in promoting mediation and other forms of ADR ; and in the integration of ADR into civil litigation in the State of Minnesota. It is the premier training organisation for mediators and negotiators in Minnesota, and it provides training also for judges, court administrators and attorneys. It functions as an advice and information centre for ADR. It provides a full range of ADR services, with a special commitment to the underprivileged, and it undertakes important research into the use and development of ADR. In recent years one of its research projects has involved the adaptation of mediation for selected communities. This focused on exploring conflict resolution within the African-American, Hmong and Cambodian communities within the metropolitan area of the Twin Cities. It has also conducted a research project regarding the use of ADR in the workplace ; and one for assessing the provision of family mediation services in Minnesota.

5.3.3 After an introduction by Tracey Sheehan the Commission was addressed at the presentation successively by each of the following three executive members of the MC : Nancy Welsh (Executive Director) ; Aimee Gourlay, JD (Director of Training and Family ADR Services) ; and Jenelle Soderquist, LL.M (Director of Training and Business ADR Services). Present also was a Practitioner Panel consisting of the following three attorneys : James Brehl, Royce Lawson ; and Mark McCrea. The proceedings were punctuated with many questions by members of the Commission and responses thereto by the respective contributors. We found the presentation stimulating and instructive.

5.3.4 During the presentation there were explored with us the scope and practical implications of Rule 114 of the Minnesota General Rules of Practice. This Rule deals with the applicability to civil cases of court-affiliated ADR processes. Rule 114.04 prescribes that after the filing of an action the parties shall promptly confer regarding case management issues, including the selection and timing of the ADR process.

5.3.5 Rule 114.02 lists and defines the following nine separate court-affiliated ADR processes : (1) Arbitration ; (2) Consensual Special Magistrate ; (3) Early Neutral Evaluation (ENE) ; (4) Mediation ; (5) Mediation-Arbitration (Med-arb) ; (6) Mini-Trial ; (7) Moderated Settlement Conference ; (8) Neutral Fact Finding ; and (9) Summary Jury Trial.

In addition to the in-depth discussion on mediation the Commission found

particularly interesting what was said about the process of ENE ; Med-arb ; the Mini-Trial and Neutral Fact Finding.

5.3.6 Early Neutral Evaluation (ENE) :

In this forum the attorneys present the core of the dispute to a third-party neutral in the presence of the parties, after the case is filed but before discovery is conducted. The neutral then gives a candid assessment of the strengths and weaknesses of the case. At this juncture settlement may result. If not, the neutral helps to narrow the dispute and suggests guidelines for managing discovery.

5.3.7 Mediation-Arbitration (Med-arb) :

This is a hybrid of the two processes in which initially the parties mediate their dispute. Should an impasse be reached they proceed to arbitrate on the deadlocked issues.

5.3.8 Mini-Trial :

Counsel for the parties make an abbreviated “best-case” presentation before a panel which usually consists of a high-level decision-maker, with full settlement authority for either side and a neutral third-party adviser. At the conclusion of this presentation (often limited to a day or two) the decision-makers meet in an attempt to settle the dispute. If no settlement results the adviser may act as a mediator ; or deliver a non-binding opinion as to the probable result should actual litigation ensue. Armed with the advisory opinion the parties enter into further confidential settlement negotiation. While a mini-trial is a more formal process than mediation it still allows the parties themselves to determine the outcome.

5.3.9 Neutral Fact Finding :

This can be useful in the resolution of complex matters involving scientific, business or economic issues. Either the parties or the court selects a neutral expert who investigates the issues and then submits a non-binding report or testifies in court. If the process is voluntary the parties can decide whether or not they will accept the expert’s finding as binding. The use of a neutral expert

as the fact-finder often conduces to a speedy and fair settlement while eliminating the inevitable posturing involved in litigation.

5.3.10 In terms of Rule 114.12 all neutrals providing mediation, med-arb or mini-trial services have to undergo a minimum of 30 hours of classroom training, with an emphasis on "experiential" learning. The training course is a comprehensive one.

5.3.11 The contributions at the presentation concentrated more particularly on mediation. One of the aspects addressed was Divorce Mediation. At the MC divorce mediation sessions are conducted by two mediators, one female and one male. The mediator is a professional who has completed 40 hours of training in conflict resolution. He or she is often an attorney or a psychologist. Fees for mediation services are determined by the individual gross income of each party. If an agreement is reached a written memorandum is prepared, whose contents the parties are encouraged to discuss with their respective attorneys.

5.3.12 From the ensuing discussions it appeared that the main advantages to be derived from agreement through divorce mediation were :-

(1) that the parties were more likely to be satisfied with the terms of the divorce ;
(2) that the parties were more likely to comply with the terms of the divorce ; and
(3) that post-divorce relationships and dealings between the parties were more likely to be free from rancour - particularly where there were minor children of the marriage.

(C) CHICAGO, ILLINOIS

ACKNOWLEDGMENTS :

(1) Mr George M. Burditt of the firm Burditt & Radzius, Chartered, 333 West Wacker Drive, Suite 2000, Chicago, Illinois, is a former Chairman of the Chicago Bar Association. He is nationally known and respected as an outstanding attorney and as an energetic and deeply public-spirited individual. The Commission is indebted to Mr Burditt for his tireless efforts on our behalf, both before and during our visit to Chicago. Not only did he organise a strenuous fact-finding programme for each day of our stay, but on every evening he lavished much hospitality upon us either at his Lakeshore home or at the Mid-Day Club.

(2) In earlier parts of this Report a number of our fact-finding activities in Chicago have already been related [see para 1.4.6 in Part Two in regard to our visit to the Domestic Relations Division of the Circuit Court of Cook County ; paras 8.12 & 8.13 in Section A to Part Three in regard to our visit to the firm of Pattishall, McAuliffe, Newbury, Hilliard and Geraldson, L.L.P. ; and paras 6.7.1 to 6.7.4 in Section B to Part Three in regard to our visit to the U S Bankruptcy Court for the Northern District of Illinois]. All these visits were carefully planned and arranged by Mr Burditt.

(3) Mr Burditt was likewise responsible for the further fact-finding activities undertaken by the Commission detailed in paragraphs 5.4 and 5.5 below. To Mr George M. Burditt (and to his wife, Mrs Barbara Burditt) whose painstaking efforts and hospitality made our stay in Chicago as pleasant as it was instructive, this Commission gives it warmest thanks.

(4) Of the many people in Chicago from whom the Commission received assistance a special word of thanks is due to Mr Edward V. Notz P C, Suite 2600, 333 West Wacker Drive. A specialist in Domestic Relations Law and practice Mr Notz is a past Chairman of the Chicago Bar Association's Matrimonial Law Committee. He was a fund of information to the Commission ; and he accompanied us on our visit to the Domestic Relations Division of the Circuit Court of Cook County. After our departure from Chicago Mr Notz had sent to the Commission's offices in Pretoria (i) an entire file containing the comprehensive Training Guide for CASA/GAL [Court Appointed Special Advocates and Guardians ad Litem] ; (ii) an informative videotape entitled

"Dynamics of Abuse and Neglect Within the Family".

(5) Last but not least the Commission records its thanks to the Hon Timothy Evans, Presiding Judge of the Domestic Relations Division of the Circuit Court of Cook County ; and to the following members of his court : the Hon Mitchell Leikin ; the Hon Aubrey F. Kaplan ; and the Hon Bruce W. Lester. On our visit to their court in the Richard Daley Center all the judges mentioned above explained to us the jurisdiction and the day-to-day functioning of the Domestic Relations Division. In addition the Presiding Judge generously donated to us a copy of his entire file containing Illinois Family Law Statutes, Domestic Relations Legal Forms, and Practice Directions governing his court.

5.4 A PRESENTATION TO THE COMMISSION BY FOUR EXPERTS ON THE USE OF ADR IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS :

5.4.1 In the Conference Room of Burditt & Radzius the Commission participated in a presentation on ADR in the Circuit Court of Cook County over which Professor Katheryn M. Dutenhaver presided quietly but very competently. She is an Associate Professor of Law in De Paul University College of Law. She is also the Executive Director of the Resolution Center in DePaul University.

5.4.2 After introductory remarks by Professor Dutenhaver, who is a very articulate speaker, contributions to the symposium were made successively by the following speakers, each of whom answered a good many questions from members of the Commission :-

5.4.2.1 Mr M. David Royko, Psy. D., who is the Clinical Director of the Department of Marriage and Family Counselling for the Circuit Court of Cook County ;

5.4.2.2 Mr Gary Schwartz, Deputy Administrator of the Mandatory Arbitration Program of the Circuit Court of Cook County ;

5.4.2.3 Professor Thomas D. Cavanagh, Assistant Professor of Business, North Central College, where he is also the Director of the Dispute Resolution Center.

5.4.3 The Department of Marriage and Family Counselling [MFCS] of which Mr Royko is the Clinical Director falls under the Chief Judge of the Domestic Relations Division. Mr Royko explained to us that MFCA mediates for

divorcing or separating parents who are in conflict over custody of or access to their children. Clients are seen only pursuant to a court order. MFCS employs 20 full-time mediators with professional backgrounds such as social workers, psychologists and attorneys. It handles some 24 000 cases annually. The mission of MFCS is to enable warring parents to fashion their own parenting plans without recourse to the court. MFCS does not make recommendations to the court regarding custody or access.

5.4.4 Mr Royko said that much of the mediation which MFCS undertakes involves emergency intervention where acute family conflict demands urgent attention. In this connection he described a technique called "shuttle mediation" which is employed when the relationship between parents has become explosive. The parties are seated in entirely separate rooms in order to avoid eye-to-eye confrontations ; and the mediation is conducted by the mediator moving to and fro between the parties. One of the pressing challenges faced by MFCS is to help parents to abandon the mind set characteristic of the adversarial system ; and to enable them to direct their focus away from their own distress and towards the needs of their children.

5.4.5 Mr Schwartz told us that the Illinois Mandatory Arbitration program was the nation's largest court-annexed arbitration scheme. It had been designed by the state judiciary to accelerate caseflow and to reduce court backlogs. In cases where the plaintiff's claim does not exceed $15 000, and in which arbitration is not deemed inappropriate, the case is referred to compulsory arbitration before a panel of three arbitrators. Arbitrators are drawn from the 5000-strong Illinois Bar. They are paid $100 per half day. When the arbitrators award is placed before a judge he pronounces judgment in terms of the award, unless either party objects, in which case the matter proceeds to trial. This mandatory process appeared to us to be somewhat draconian, but Schwartz pointed out that it had helped very substantially to reduce an immense backlog of cases.

5.4.6 Professor Cavanagh gave us an interesting overview of mediation in Cook County. There was evidence to suggest that clients were urging Illinois counsel to resort to mediation as an expeditious and cost-effective alternative to litigation. Attorneys could select mediators from former federal and state court judges, from fellow attorneys, or from the ranks of professional mediators with social science backgrounds.

5.4.7 Cavanagh said that all seven law schools in Illinois offered courses in ADR.

However, differing in this respect from other states, mediators in Illinois were neither licensed nor certified ; nor were they bound by mandatory rules of practice or codes of professional conduct. A survey undertaken to measure the use or avoidance of mediation by Cook County attorneys had revealed that their level of recourse to mediation was low ; and that the best trained attorneys were not the most frequent users of mediation.

5.4.8 Professor Dutenhaver expressed the view that ADR is in truth not an alternative but rather an auxiliary tool in the attorney's forensic equipment. She listed as the primary methods of ADR being encouraged by various federal and state courts in accordance with the Civil Judicial Reform Act of 1990 as being : (a) Judicial Settlement Conference ; (b) Early Neutral Evaluation ; (c) Mediation ; (d) Mini-trial ; (e) Summary Jury Trial ; and (f) Arbitration.

5.5 THE SCREENING OF A MATRIMONIAL MEDIATION SESSION :

5.5.1 Shortly before our departure from Chicago we were privileged to witness the screening of a videotape made in Canada of a live mediation session in which the parties were a middle-aged couple with two young children. The father had left the matrimonial home and was having an extra-marital affair. The dispute concerned what rights of interim access, if any, the father should have pending the divorce. The screening which took place in the conference room of Burditt & Radzius was arranged by Professor Dutenhaver ; and the progress of the mediation was illuminated by the explanatory comments made by her from time to time.

5.5.2 At the beginning of the mediation the stance adopted by each parent (neither of whom could even look at the other) was completely uncompromising. The husband's attitude was that as one of two parents he was entitled to see the children for half the time. The mother's initial attitude was that the father had completely forfeited any right of access ***pendente lite***. The mediator handled the session with great skill. Whenever either party sought to rake up the past sins of the other party (which each regularly did) the mediator invited them rather to concentrate their attention on the future and the interests of the children. Within 30 minutes their respective attitudes had undergone a dramatic change sufficient to sustain a compromise agreement. The videotape was striking proof of the efficacy of mediation when conducted by a talented mediator.

(D) NEW YORK, NY

5.6 TECHNOLOGY AND JUSTICE AT THE MIDTOWN COMMUNITY COURT

5.6.1 In New York the Commission spent a morning at the Midtown Community Court at 314 West 54th Street. The purpose of the visit was to observe how a court uses the latest computer technology to handle a heavy caseload in an efficient manner.

5.6.2 Begun in October 1993 the Midtown Community Court [MCC] brings persons charged with low-level crimes to justice in the very neighbourhood in which the offences are committed. This results in greater efficiency, visibility and accountability. The MCC mobilises local residents, business and social services agencies to collaborate with the criminal justice system by developing and supervising community service projects ; and by providing drug treatment, health care, education and other services to the accused. Minor offences like prostitution, shoplifting and vandalism undermine urban life. They diminish the quality of life for pedestrians, motorists, tourists, shopkeepers, residents and others who live or work in the area. Insufficient gaol space and the impracticability of suitable alternative sentences mean that the sanctions available to the courts in these cases are limited.

5.6.3 The MCC has developed individualised sanctions designed to restore the costs of the crime to the victim and the community, and to help divert offenders from further clashes with the criminal justice system. Whenever appropriate convicted persons are sentenced to a combination of community service, education and treatment.

5.6.4 To ensure that community service, drug treatment, and other sanctions stand the best chance of success, the MCC has assembled the following core resources :-

(1) an assessment team, operating between arrest and arraignment, to determine whether an accused has a substance abuse problem, a place to sleep, a history of mental illness, etc. ;

(2) a resource coordinating team to match accused persons with drug

treatment, community service and other sanctions ; space for counselling sessions, group meetings, and community service projects so that sanctions can take place immediately and, in some instances, on site, reducing the "no-show" and "drop-out" rates that have undermined such programmes in the past ;

(3) court-based case managers, to monitor and assist mandatory and voluntary participants in long-term substance abuse treatment ;

(4) a Community Advisory Board to identify, review, and evaluate community service projects, keep the court abreast of quality-of-life conditions in the community and suggest ways the court can address these conditions ;

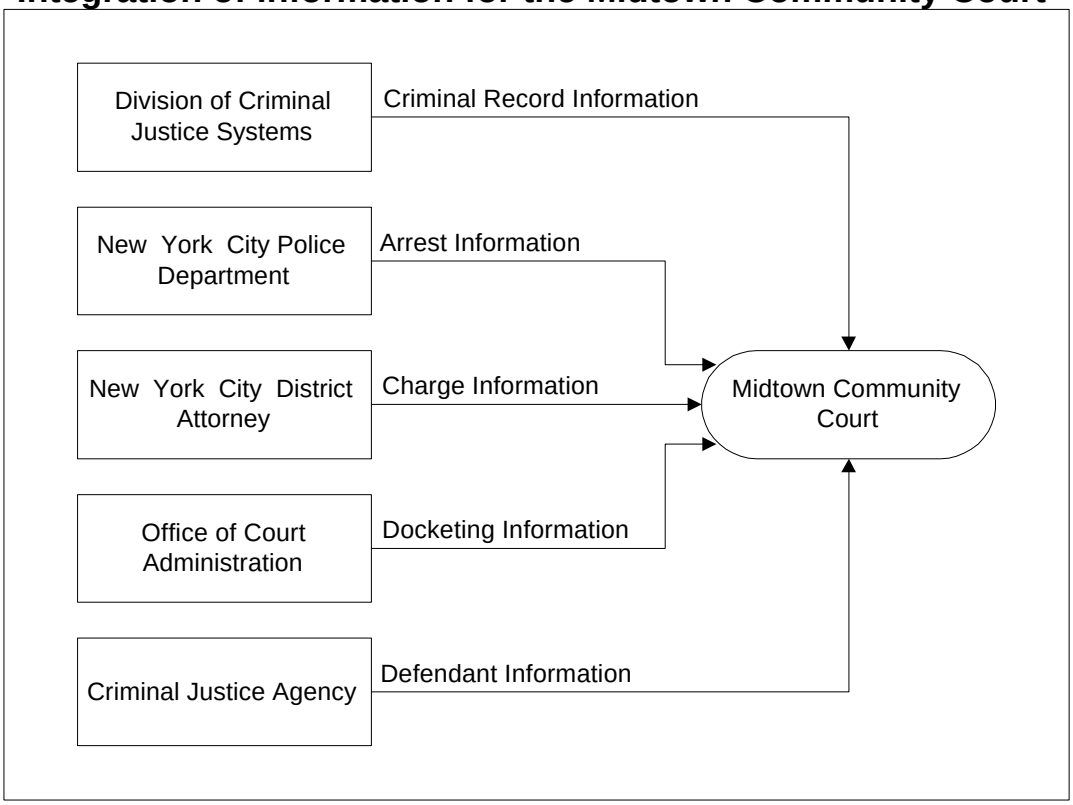
(5) an evaluation team to assess the court's impact on case processing, recidivism, the quality of life in the community, and public confidence in the criminal justice system, and to suggest adjustments to the experiment as it proceeds.

5.6.5.1 The MCC uses the latest technology to assist the presiding judge and the court personnel in the performance of their duties. Once fed into the system information is thereafter accessible to anybody concerned with the offender's case. Computer monitors installed in the courtroom give the judge, the accused's attorney and the case workers instant access to an accused's criminal record ; the regularity or otherwise of his attendance at a drug-rehabilitation clinic ; and any other information which might influence the court's handling of the case.

5.6.5.2 With the aid of "pen-based" computers and custom-designed software an accused is assessed during a comprehensive interview. The assessment is designed to extract information to assist the judge in considering an application for bail or in deciding whether a non-custodial sanction might be appropriate.

5.6.5.3 In order to gain a complete dossier on the accused the MCC relies on various sources in the criminal justice system. Reproduced from a document entitled "Technology and Justice at the Midtown Community Court", the illustration following depicts the MCC's integration of information.

Integration of information for the Midtown Community Court



5.6.6 Restoring the Costs of Crime: Community Service Sentences

Community service punishments at the community court have been designed to benefit the Midtown community. They require varying degrees of supervision and skills and range from one day to two weeks. Community court staff have developed an assessment scale for all offenders sentenced to community service. Offenders with a history of arrests or without a stable address are assigned to the highest level of supervision. Offenders with no criminal history are assigned to the lowest level. Thirteen groups supervise community service projects. In the first year, over 3,300 participants completed community service, producing over $170 000 worth of labour. Projects include :-

(1) Sweeping streets, cleaning lampposts, and removing graffiti, under the supervision of the Times Square Business Improvement District's sanitation crews.

(2) Cleaning bus lots at the Port Authority Bus Terminal, greening the surrounding area, or sweeping the corridors.

(3) Maintaining street trees.
(4) Sorting redeemable cans at the WE CAN redemption center.
(5) Painting affordable housing units managed by the Clinton Housing Development Corporation.
(6) Cleaning and painting subway stations under the supervision of the Transit Authority.

5.6.7 The MCC aims to improve justice in the following five respects :-

(1) Justice will be swift.
(2) Justice will be visible.
(3) Police enforcement efforts for low-level offences will be encouraged.
(4) The MCC will marshall the energy of local residents and businesses.
(5) The MCC will understand that communities are also victims.

CHAPTER 6

THE COMMISSION'S INVESTIGATIONS AND OBSERVATIONS IN SCOTLAND AND ENGLAND

(A) EDINBURGH , SCOTLAND

ACKNOWLEDGMENTS :

(1) The Commission wishes to thank the then Lord President of the Court of Session, The Right Hon The Lord Hope of Craighead [now Lord of Appeal in Ordinary] who in March 1996 was good enough to send to the Commission's offices a copy of the Report of the Hon Lord W.D. Cullen [the Cullen Report] on the Business of the Outer House of the Court of Session. In a covering letter Lord Hope invited the Commission to have a meeting with him in the course of the Commission's overseas fact-finding mission.

(2) The Commission expresses its appreciation to The Hon Lord W.L.K. Cowie of Parliament House, Edinburgh, for advising the Commission generally in regard to what it should examine in Scotland ; for arranging for the Commission to visit the Children's Panel Training Unit ; and for conducting the Chairman over the Sheriff Court in Edinburgh.

(3) The Commission wishes to thank The Hon Lord W.I.S Allanbridge who arranged for the Commission to attend the installation of Lord Rodger of Earlsferry who succeeded Lord Hope as the head of Scotland's judiciary.

(4) The Commission wishes to thank Ms Jean Raeburn MBE M Sc. She received the Commission at the Children's Panel Training Unit and there described to us, with visual aids, the functioning of the Children's Hearing system which operates in Scotland. To Ms Raeburn the Commission expresses its appreciation also for the useful literature on the system which she subsequently sent on to the Commission's offices.

6.1 A MEETING WITH THE RETIRING LORD PRESIDENT

On the eve of his departure from Edinburgh for London to assume his new office as a Lord of Appeal in Ordinary in the House of Lords, the Commission paid a courtesy visit to Lord Hope and had the benefit of a brief but instructive discussion with him. He had served Scotland for seven years as Lord President and Lord Justice-General. Lord Hope gave us an interesting overview of Scotland's criminal and civil justice system. He permitted television cameras in a court for the first time ; and his term of office also saw the elevation to the Bench of the first woman : Lady Cosgrove.

6.2 THE CHILDREN'S HEARING SYSTEM :

6.2.1 Initiated by the Social Work (Scotland) Act 1968, the Children's Hearing System [CHS] represents a radical and interesting innovation unique to Scotland. It depends on the freely given time of the citizens who make up the Children's Panel. During April 1971 these hearings took over from the ordinary courts most of the responsibility for dealing with children under the age of sixteen years who are criminal offenders or who are in need of protection or care. Children under sixteen are only considered for prosecution in court where serious offences such as murder or dangerous assault are in question.

6.2.2 The grounds on which a child may be brought before a Children's Hearing [CH] include the case of a child who is beyond parental control ; who is exposed to moral danger ; who is suffering serious impairment to health through lack of parental care ; who is playing truant from school ; or who has committed an offence.

6.2.3 The Reporter is the responsible official to whom referrals are made in respect of children who appear to need compulsory care measures. Referrals come chiefly from the police, but other agencies such as a social work (or indeed any member of the public) may refer a child to the Reporter.

6.2.4 The CH is a lay tribunal composed of 3 members of either sex. It can consider cases only where the child and its parents accept the grounds for referral stated by the Reporter. The Chairman of a CH may appoint a person known as a Safeguarder to protect the child's interest if he considers that there might be a conflict of interest between the child and its parents.

6.2.5 The hearing usually takes place in the area of the child's home. The proceedings are informal. Normally the child must attend. The attendance of both parents is legally compulsory. The CH's task is to decide on measures of care which are in the best interests of the child. It receives a report on the child and its social background from the Social Work Department and from the child's school. Medical, psychological or psychiatric reports may also be requested. It discusses the situation fully with the parents, the child, and (if they are present) the social worker and the teacher.

6.2.6 If the CH thinks that compulsory measures of care are appropriate, it imposes a supervision requirement which may be reviewed when the child turns eighteen. In most cases the child will continue to live at home, but will be under the supervision of a social worker. The child or its parents may appeal to the Sheriff against the decision of a CH, but this has to be done within 21 days. Once an appeal is lodged it must be heard within 28 days.

6.2.7 Panel members come from a wide range of backgrounds and experience, ranging in age between 20 and 60 years. The qualities required of a panel member are a knowledge and understanding of children ; an ability to communicate with children and their parents about their problems ; and the skills necessary to make decisions. There is a rigorous selection process by Children's Panel Advisory Committees in each region. These nominate suitable persons to the Secretary of State for Scotland for appointment by him. Training is given to both new and serving panel members. In Scotland there are about 1800 panel members. Panel members must be able to handle conflict and distress. They must also be able to deal with their own reactions ranging from sympathy to embarrassment and sometimes revulsion. In the end they must be able to make and explain reasoned decisions ; though these may be difficult and painful. Their important work is entirely voluntary, but they are entitled to claim in respect of travel and subsistence, and, if necessary, for loss of earnings. In the opinion of the Commission South Africa has much to learn from Scotland's Children's Hearing System.

6.3 THE CULLEN REPORT : THE TERMS OF REFERENCE

6.3.1 In May 1995 Lord Cullen was appointed by the Lord President of the Court of Session to conduct an inquiry with the following "remit" [Terms of Reference] :-

6.3.2 *" To review the manner in which business in the Outer House is administered, conducted and allocated with a view to making recommendations as to improvement ; and in particular to consider what measures should be taken (whether by changes in the rules of procedure, the practice of pleading, the appointment and organisation of court staff, the administrative arrangements or otherwise) to -*

- *simplify and expedite the progress and disposal of cases initiated by summons and by petition ;*
- *achieve a greater degree of judicial control and management of cases ;*
- *minimise the late settlement of cases and the adverse effect of late settlement ; and*
- *ensure that cases are allocated among Judges, and judicial time is used, to best advantage."*

6.4 THE CULLEN REPORT : A SUMMARY OF THE MAIN CONCLUSIONS

The main respects in which Lord Cullen concluded [see para 2.8 at pages 6-7 of the Cullen Report] that changes should be made were the following :-

" *(i) the introduction of a system under which pleadings initially are in an abbreviated form but may be expanded if the court decides that this is appropriate ;*

(ii) the earlier and wider disclosure of evidence ;

(iii) the introduction of case management hearings and selective pre-proof reviews ; and

(iv) the organisation of business to avoid delays in the starting and progress of proofs and jury trials.

*These changes and in particular the first three are intended, **inter alia**, to facilitate earlier settlement as well as to cut down undue delay and unnecessary*

expense. While they are dealt with in this report in separate chapters they should be considered together as part of a single reform."

6.5 THE CULLEN REPORT : A SALUTARY CAVEAT

6.5.1 In paragraph 2.9 [at page 7 of the Cullen Report] the learned author states that in arriving at his recommendations he has taken into account what he has learnt about courts in other countries ; and that he has also taken note of the proposal made by The Rt Hon The Lord Woolf in his interim report on Access to Justice in England and Wales which was published in June 1995.

6.5.2 Having made the above acknowledgments the Cullen Report proceeds to make the following cautionary observations :-

" However, I have at all time required to remind myself that the systems and solutions favoured in other jurisdictions reflect the conditions under which courts in those jurisdictions have to operate. These conditions include the nature and scale of the courts' workload, the procedures and practices which are well established in those courts and the 'culture' which prevails among practitioners and the judiciary. I have to decide what to recommend as appropriate for the Outer House of the Court of Session…"

(B) LONDON , ENGLAND

ACKNOWLEDGEMENTS :

The Commission gives its grateful thanks to the undermentioned persons :-

(1) The Rt Hon The Lord Steyn for advice concerning the Royal Courts of Justice which enabled the Commission to use its brief stay in London to very good advantage.

(2) The Master of the Rolls. The Chairman and the Hon R.N. Leon had the benefit of a meeting with Lord Woolf and The Right Hon Lord Justice Waller, who was previously the Judge in charge of the Commercial List. At this meeting the main thrust of the Woolf Report was discussed ; and Lord Woolf was good enough to present the Commission with several copies of his Final Report [London : HMSO, 1996] which had just been published.

(3) The Vice-Chancellor, Sir Richard Rashleigh Folliot Scott. The Vice-Chancellor is supervising the implementation of the proposals in the Woolf Report. The Chairman and the Hon R.N. Leon had the advantage of a useful informal discussion with the Vice-Chancellor.

(4) The Rt Hon Lord Justice Ward. Sir Alan Hylton Ward, a Lord Justice of Appeal, was formerly a Judge of the Family Division. The Commission is deeply indebted to Ward LJ :

(a) for his elucidation of the different levels of Family Jurisdiction and how cases progress through the various levels ;

(b) for arranging for the Chairman and the Hon R.N. Leon to observe proceedings at the Principal Registry of the Family Division at Somerset House ;

(c) for providing the Commission with Children (Allocation of Proceedings) Order 1991 ; together with a wealth of other documentary material relevant to the Commission's investigation into the feasibility of a family court of comprehensive jurisdiction ;

(d) for his generous hospitality towards the Commission during its stay in London ;

(5) Norman Grove and Gerald Angel of the Principal Registry for their kind assistance to the Commission during its visit to the Registry.

(6) A.A. Kelsall, Assistant Official Receiver, and Graham Hickling, Principal Examiner, of the Insolvency Service, with whom the Chairman and the Hon R.N. Leon had the benefit of a lengthy interview at 21 Bloomsbury Street.

(7) The Hon Mr Justice Anthony David Colman. Colman J of the Queen's Bench Division is the Judge in charge of the Commercial List. He is the co-author of "Practice and Procedure of the Commercial Court" 4th ed. 1995 by Lloyds of London Press Ltd. The Chairman of the Commission had the benefit of an instructive meeting with Colman J, during which various aspects of the day-to-day functioning of the Commercial Court were discussed.

6.6 THE WOOLF REPORT : BACKGROUND

6.6.1 In March 1994 the Lord Chancellor appointed Lord Woolf to review the rules of civil procedure in England and Wales with a view to improving access to justice, reducing the cost of litigation and removing unnecessary complexity. In June 1995 his Interim Report appeared [Access to Justice, Interim Report (Lord Chancellor's Department)] ; and the appearance of Access to Justice, Final Report [London : HMSO, 1996] coincided with the Commission's visit to London. In what follows reference will be made to the Interim Report as "IR" ; and to the Final Report as "FR".

6.6.2 Together the IR and FR make elaborate proposals for civil reform on an immense scale. Writing in the Modern Law Review of November 1996 (vol 59 NO 6) A.A.S. Zuckerman[3] summarises the genesis of the reform and its magnitude in the following words (at p 773) :-

> *" Lord Woolf carried out his task with the assistance of a team consisting of some of the best brains in the Lord Chancellor's Department, and in consultation with working parties on which all branches of the judiciary and the legal profession were represented. He also commissioned some important research. Before the publication of each report, the ideas of*

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3 ***"Lord Woolf's Access to Justice : Plus ca change"***

reform were aired in public debates. As a result, the two reports and their annexes consist of the most far-reaching review of civil procedure to have been conducted in living memory. Their recommendations offer bold and imaginative devices aimed at reducing the complexity of litigation."

6.7 THE WOOLF REPORT : EXTRACTS THEREFROM SET FORTH IN VOLUME II OF THIS REPORT

THE OVERVIEW :

SECTION I of the FR contains an **Overview** which runs to twelve pages. The Overview is a very convenient synopsis of both the IR and the FR ; it is reproduced in Appendix "AA" at pages 197 to 208 in VOLUME II of this Report.

6.8 THE WOOLF REPORT : THE FIRST STAGE OF THE INQUIRY

6.8.1 Paragraph 2 of the **Overview** lists the problems pinpointed in the IR, and paragraph 3 summarises the blueprint for basic reform proposed in the IR. These two paragraphs in the Overview are quoted in paragraphs 6.8.2 and 6.8.3 below.

6.8.2 In paragraph 2 of the **Overview** the following is said :-

" The defects I identified in our present system were that it is too expensive in that the costs often exceeded the value of the claim ; too slow in bringing cases to a conclusion and too unequal : there is a lack

of equality between the powerful wealthy litigant and the under-resourced litigant. It is too uncertain : the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown ; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no-one with clear overall responsibility for the administration of civil justice ; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court."

6.8.3 In paragraph 3 of the **Overview** the following is said :-

" The interim report set out a blueprint for reform based on a system where the courts with the assistance of litigants would be responsible for the management of cases. I recommended that the courts should have the final responsibility for determining what procedures were suitable for each case ; setting realistic timetables ; and ensuring that the procedures and timetables were complied with. Defended cases would be allocated to one of three tracks :

(a) an expanded small claims jurisdiction with a financial limit of £3,000 ;

(b) a new fast track for straightforward cases up to £10,000, with strictly limited procedures, fixed timetables (20-30 weeks to trial) and fixed costs ; and

(c) a new multi-track for cases above £10,000, providing individual hands-on management by judicial teams for the heaviest cases ; and standard or tailor-made directions where these are appropriate."

6.9 THE WOOLF REPORT : THE SECOND STAGE OF THE INQUIRY

In paragraph 6 of the **Overview** the following is said :-

" All the work I have carried out in the second stage of the Inquiry has confirmed the conclusions I reached in the interim report about the defects in

the present system. This report [the FR] *therefore builds on the contents and recommendations of the interim report by :*

(a) providing greater detail as to the principal recommendations in the interim report ;

(b) identifying the problems in those areas which have received special attention during the second stage of the Inquiry and the solutions I am recommending to meet those problems ;

(c) describing the new rules ; and

(d) making clear any change in my approach since the interim report."

6.10 THE WOOLF REPORT : IMPLEMENTATION OF THE REFORMS

Paragraphs 14 and 15 of the **Overview** read as follows :-

" In January 1996 the Lord Chancellor appointed the Vice Chancellor, Sir Richard Scott, to take on the duties envisaged for a Head of Civil Justice. This appointment is in itself a very important step. Sir Richard will be able to take charge of implementing many of the other recommendations. He will be able to provide the hands-on leadership which it has lacked in the past. He will be able to have an input into the selection of judges to be responsible for the handling of civil work at trial centres. He will be in a position to oversee the implementation of the other recommendations.

The Court Service, in consultation with the judiciary, has started to put into place the supporting structure which will be needed to introduce the new system of case management by the courts. This includes identifying the appropriate number and location of trial centres on each Circuit, and setting up a new arrangement for a partnership between the judiciary and administrative staff. The Judicial Studies Board is preparing for an intensive programme of training for judges involved in case management, based on a survey which the Board wishes to conduct to identify the special interests and needs of judges."

CHAPTER 7

RECENT SOUTH AFRICAN INITIATIVES IN REGARD TO CASE MANAGEMENT : THE NEW RULE 37A FOR THE CAPE PROVINCIAL DIVISION APPLICABLE FROM 1 DECEMBER 1997

7.1 A SEMINAR ON CASE MANAGEMENT HELD IN JOHANNESBURG DURING JANUARY 1997 :

7.1.1 On 24 January 1997 the General Council of the SA Bar held a seminar on case management in Johannesburg. Reference has already been made [see paragraph 2.5.2 in Chapter 2] to the fact that the main speaker at the seminar was the Hon Mr Justice D.A. Ipp.

7.1.2 Another speaker at the seminar was the Hon Mr Justice G. Friedman, Judge President of the Cape of Good Hope Provincial Division. His address has been reported in the May 1997 issue of "Consultus" at pages 40-41. Having detailed all the factors which in his opinion rendered necessary the introduction of case management to this country, Friedman JP remarked :-

> *" In my view it would be quite wrong for South Africa to lag behind those other jurisdictions which have taken positive steps to remedy the problems* [delays in getting cases to trial with the concomitant increase in cost] *by introducing a system of case management."*

7.1.3 Friedman JP traced the events which had led up to a recent reformulation of Rule 37A in the Cape Provincial Division ; and to indicate what was sought to be achieved by the proposed new Rule 37A :-

> *" In the Cape Provincial Division we realised that the Uniform Rule 37 which was introduced following upon the Van Winsen Report in 1965 was not achieving its objective. And so in 1993 we prevailed upon the Rules Board to allow us to implement an experimental rule 37A for a two-year period from 1/12/93 to 30/11/95. This period was subsequently extended.*

Rule 37A was drawn up after full consultation between the Bench, Bar and the attorneys' profession.

This was the first real attempt at the introduction of a system of case management, involving the intervention of the judiciary at an early stage of litigation with a view to attempting to ensure that litigation proceeded with a minimum of delay. Although Rule 37A involves a very rudimentary system of case management, it nevertheless has, to a certain extent, been successful and has led to quite a number of cases being settled at a much earlier stage than would otherwise have been the case.

Having operated under this system for some three years, we came to the conclusion that the time had arrived for the introduction of a more sophisticated case management system. We have now redrafted Rule 37A completely and we are in the process of negotiation with all the various branches of the profession in our division with a view to reaching consensus on the terms of a new Rule.

What we are seeking to achieve is a system in which there will be judicial intervention at various stages but particularly shortly before the trial.

Timetables will be fixed which will have to be adhered to, subject to stringent sanctions. Parties who co-operate will be given an early trial date. Those who do not will be taken out of the system so as not to impede the progress of the others. In order to avoid parties being caught by surprise at the trial, the draft provides for the exchange of witnesses' summaries."

7.1.4 In the course of his address to the seminar Mr Justice Friedman said that in introducing case management to this country the following five points required emphasis :

7.1.4.1 " Firstly : I think that we must acknowledge that *what might suit one division may well not be suitable for another division*…Each division must in my view, work out for itself a system which is suited to its own requirements."

7.1.4.2 " Secondly : Whatever system of case management is introduced will require

a change in the mind-set of both the judiciary and the profession. The judiciary can no longer play the role of the neutral umpire in a game played by the litigants.

The judiciary, for its part, will have to accept responsibility for implementing the system and the profession, for its part, will have to accept that although it will continue to operate on an adversarial basis, its approach will have to be modified so as to accommodate the new system. All role players need to acknowledge that without case management, the system is going to collapse."

7.1.4.3 " Thirdly : Any system of case management that is introduced must be *properly resourced*. It will therefore be necessary for up-to-date information technology to be made available and for the requisite support staff to be properly trained."

7.1.4.4 " Fourthly : I do not think that the *magistrates courts* should be overlooked. Their civil jurisdiction has now been increased to R100 000. The importance of the cases which they can now hear is manifest. Yet there is effectively no form of case management in the magistrates courts.

Section 54 of the Magistrates Court Act provides that a magistrate may at any stage of the proceedings ***mero motu***, or at the request of one of the parties, direct the parties or their representatives to appear before him in chambers for a conference to consider a number of matters aimed at the most expeditious disposal of the matter. This is, for all practical purposes, a dead letter as it is never used. And even if it were to be used, it is far too simplistic to be effective."

7.1.4.5 " Fifthly : any system of case management should be *introduced experimentally* to start with, i.e. for a period of two to three years, in order to determine how it can be improved…"

7.2 A BRIEF GENERAL SURVEY OF THE NEW RULE 37A :

7.2.1 In due course consensus was achieved in the CPD as to what the new Rule 37A should provide. Thereafter, and by Government Notice No R1352 of 10 October 1997 [GN 1352] the Rules Board for Courts Law [the Rules Board] under sec 6 of the Rules Board for Courts of Law Act, No 107 of 1985, and with the approval of the Minister of Justice, substituted for Rule 37A

of the Rules a new Rule 37A [the new Rule].

7.2.2.1 A copy of GN 1352 containing the new Rule is to be found in Appendix "AB" at pages 209 to 222 in VOLUME II of this Report.

7.2.2.2 The provisions of the new Rule :-

> *" shall apply to every civil action the entry date of which is on or after 1 December 1997 and which was commenced by process issued out of the seat of the Cape of Good Hope Provincial Division of the High Court of South Africa for hearing in the High Court sitting at Cape Town."*

7.2.2.3 The new Rule is a lengthy and detailed one. Only its main features are summarised in paragraphs 7.2.3 to 7.2.14 below.

7.2.3 The event which sets in motion the timetable of the new Rule is the **ENTRY DATE**, which is the date upon which the requisite particulars are entered in the register for trial in terms of Rule 34(1).

7.2.4 Not later than 2 months after the entry date all parties shall attend the **PROGRESS CONFERENCE**, the purpose of which is an in-depth review of the case, and agreement as to how issues may be speedily and efficiently resolved.

7.2.5 At the **PROGRESS CONFERENCE** there shall be an obligation on the parties, ***inter alia*** :

(a) to consider whether the pleadings are in a final form ;
(b) to define the matters in issue and to consider whether they can be settled by agreement or be limited ;
(c) to consider whether any of the disputed issues are susceptible of resolution by reference to ADR or by a separate hearing under Rule 33(4) ;
(d) to consider what is necessary to complete preparation for trial, including discovery and inspection of documents ;
(e) to determine whether any party wishes to adduce expert evidence, and, if so, whether the appointment of a mutually acceptable single expert (or a panel of experts) is appropriate ;

(f) to agree on the date by which witness summaries are to be exchanged ;

(g) to agree on the **COMPLIANCE DATE**, the date by which all directions ordered pursuant to the agreements reached at the **PROGRESS CONFERENCE** shall be completed ; being a date not later than 8 months after the **ENTRY DATE**.

7.2.6 THE MINUTE

(a) Not later than 3 months after the **ENTRY DATE** a **MINUTE** signed by the parties or their attorneys shall be filed. The **MINUTE** will briefly list (in the form of a consent to order) the terms of the agreements reached at the **PROGRESS CONFERENCE** ; and those matters upon which there was no agreement and in respect of which a party wishes the court to make an order.

(b) As soon as is practicable after the filing of the **MINUTE** the registrar shall place the court file before a judge in chambers.

(c) If the judge is satisfied with the **MINUTE** he shall make directions pursuant to the agreements recorded in the **MINUTE**, at the same time fixing a **COMPLIANCE DATE** which is to be not later than 8 months after the **ENTRY DATE**.

7.2.7 THE DIRECTIONS HEARING

If the judge is not satisfied with the **MINUTE** he may order a **DIRECTIONS HEARING** to be held. All parties shall attend the **DIRECTIONS HEARING** at which the judge may give directions and may make orders as to costs.

7.2.8 NOTICE OF DEFAULT AND THE DEFAULT HEARING

(a) If a party is in default of any provision of the Rule or of a Direction by the court, the other party shall deliver a **NOTICE OF DEFAULT** ; and if the default is not purged within 7 days the registrar shall give notice of a **DEFAULT HEARING** to be attended by the parties.

(b) A **DEFAULT HEARING** is presided over by a judge who may give

directions and may make an order as to costs. He may extend the **COMPLIANCE DATE** on good cause shown ; but only for the shortest possible time. The orders the judge may make include the following : (i) directions to enable the matter to proceed to an early **FINAL CONFERENCE** ; (ii) loss of priority ; (iii) transfer of the proceedings to the **NOT READY LIST** ; (iv) dismissal of the proceedings or part thereof ; (v) where a party other than the plaintiff is in default, striking out of any defence or pleading.

7.2.9 COMPLIANCE CERTIFICATE

By not later than 10 days after the **COMPLIANCE DATE** the plaintiff (if all directions and orders have been complied with) shall file a **COMPLIANCE CERTIFICATE**.

(a) If a **COMPLIANCE CERTIFICATE** is not timeously filed the registrar shall set the matter down for a **DEFAULT HEARING** to be attended by the parties.

(b) A judge presides over the **DEFAULT HEARING** who will give directions which will enable the matter to proceed to an early **FINAL CONFERENCE**. Should it appear, however, that the plaintiff has been remiss in complying with directions, the judge may transfer the matter to the **NOT READY LIST**.

7.2.10 THE FINAL CONFERENCE

(a) Upon the filing of a duly completed **COMPLIANCE CERTIFICATE** the registrar allocates a trial date and sets the matter down for a **FINAL CONFERENCE** to be attended by the parties and presided over by a judge.

(b) Where he considers it appropriate the judge may cancel the **FINAL CONFERENCE** and permit the parties to proceed to trial.

(c) If the parties are not fully prepared for the **FINAL CONFERENCE** the judge will transfer the matter to the **NOT READY LIST**.

(d) At the **FINAL CONFERENCE** the judge will explore the possibilities of settlement, or of limiting the issues, or of curtailing the trial.

7.2.11 THE NOT READY LIST

(a) The **NOT READY LIST** ensures that cases not ready to proceed to trial are placed under review and that at the same time they do not retard the progress to trial of properly prepared cases.

(b) Where a case has been on the **NOT READY LIST** for 3 months the registrar will notify the plaintiff that unless application is made within 30 days to remove the case from the **NOT READY LIST** the parties are to attend a **DEFAULT HEARING**.

(c) At the **DEFAULT HEARING** the court will make orders, including costs orders, to assist the parties in bringing the matter to trial as soon as possible.

(d) A case which has remained on the **NOT READY LIST** for more than 12 months will be referred by the registrar to the **JUDGE PRESIDENT**, who may make such orders as he/she considers necessary, including orders for costs and for dismissal of the action.

7.2.12 SUMMARIES OF EVIDENCE

(a) Except in matrimonial actions parties will be required to exchange summaries of (non-expert) witnesses intended to be called.

(b) The summary of each witness will summarise the substance of his/her evidence and be verified by the signature of the witness.

(c) Save with the court's consent no evidence for which a witness summary has not been delivered shall be adduced.

7.2.13 POSTBOXES

At the registry of the High Court every attorney will have his/her own postbox. Notices by the registrar to an attorney will be placed in the latter's postbox. Regular collection of the postbox will be the attorney's responsibility.

7.2.14 SPECIAL OR INDIVIDUAL CASE MANAGEMENT

Whenever a party is of the view that because of its complexity, or for any other reason, an action requires special or individual case management, such party shall on notice to all other parties, apply to the JUDGE PRESIDENT for appropriate directions.

CHAPTER 8

HIGH COURT CIVIL PROCEEDINGS BEFORE A CIRCUIT COURT

8.1 CIRCUIT LOCAL DIVISIONS :

Sec 7 of the Supreme Court Act, No 59 of 1959 [the Supreme Court Act] contains the following provisions :-

> " *(1) The judge president of a provincial division may by notice in the Gazette divide the area of that division into circuit districts, and may from time to time by like notice alter the boundaries of any such district.*
>
> *(2) In each such district there shall be held at least twice in every year and at such times and places as may be determined by the judge president concerned, a court which shall be presided over by a judge of the division in which that district is situated.*
>
> *(3) Any such court shall be known as the circuit local division for the district in question and shall for all purposes be deemed to be a local division."*

8.2 THE APPOINTMENT OF REGISTRARS AND ASSISTANT REGISTRARS :

8.2.1 In terms of sec 34(1)(a) of the Supreme Court Act :-

> *" The Minister may, subject to the laws governing the public service, appoint for the Supreme Court registrars, assistant registrars and other officers whenever they may be required for the administration of justice or the execution of the powers and authorities of the said court."*

8.2.2 Sec 34(7) of the Supreme Court Act provides that the Minister may delegate to an officer in the Department of Justice any of the powers vested in him by sec 34.

8.3 THE RULES GOVERNING THE ISSUE OF PROCESS IN AND THE

CONDUCT OF CIVIL PROCEEDINGS BEFORE A CIRCUIT COURT :

8.3.1 In terms of Circuit Court Rule 2(1) the rules of court, including the uniform rules, and practice in force in relation to civil proceedings before a provincial or local division, insofar as may be appropriate and practicable, shall apply, ***mutatis mutandis***, to all civil proceedings before any circuit court.

8.3.2 Circuit Rule 2(3) [which does not apply to the East London circuit local division] provides that in any civil proceedings before a circuit court the pleadings may be signed by an attorney or advocate alone or, if no attorney or advocate is acting, by the litigant concerned in person.

8.3.3 Circuit Court Rule 3 provides as follows :-

> " *(1) Any summons calling upon any person to appear as a defendant in any civil proceedings before a circuit court or a subpoena calling upon any person to appear as a witness in such proceedings may at any time, whether or not the date for the holding of such court has been appointed, be issued by the registrar or by the clerk of the magistrate's court for the district in which the defendant resides or in which the cause of action arose. If the summons or subpoena is issued before the said date has been appointed, the person issuing the summons or subpoena shall as soon as possible notify the defendant or witness, as the case may be, of the date and place appointed for the holding of such court.*
>
> *(2) The clerk of the judge who conducts the circuit court shall act as registrar of such court and in the absence of the registrar the clerk of the magistrate's court of the magisterial district where the circuit is held, shall act as registrar of such circuit court.*

8.4 THE GREAT BULK OF LEGAL WORK CURRENTLY DONE IN CIRCUIT

LOCAL DIVISIONS IN SOUTH AFRICA IS CRIMINAL WORK :

8.4.1 In the following three divisions of the High Court no civil work is done in circuit local divisions : the Transvaal Provincial Division ; the Natal Provincial Division and the Orange Free State Provincial Division.

8.4.2 In the Northern Cape Division the judge who conducts a criminal circuit also hears unopposed divorce actions ; and the Judge President entertains requests for civil trials to be heard at venues other than Kimberley.

8.4.3 In the Eastern Cape Division :-

8.4.3.1 (1) the judge who conducts a criminal circuit also hears unopposed divorce actions ;

(2) the East London circuit local division [see paragraph 8.5 in VOLUME I of the **First Interim Report**] sits for the greater part of the year and does both criminal and civil work.

8.4.4 In the Cape of Good Hope Provincial Division :-

(1) the judge who conducts a criminal circuit also hears unopposed divorce actions ;

(2) a civil circuit [the Southern Cape Circuit] sits regularly twice a year in the town of George ;

(3) if there is a civil action in any other circuit division which it is expedient to hear locally (as, for example, when both the parties and their witnesses live within the circuit division) the Judge President arranges ***ad hoc*** for a judge to hear the action there [see paragraph 1.3.17].

8.5 THE SOUTHERN CAPE LOCAL DIVISION :

8.5.1 Apart from the East London circuit local division (which does both criminal and civil work) the only regular civil circuit court in the country is the Southern Cape circuit local division.

8.5.2 The judge who conducts the Southern Cape Circuit sits at the town of George. By road the journey from George takes some six hours. Having investigated the matter the Commission has found that the Southern Cape Circuit works smoothly and efficiently ; and that it provides improved access to justice in the High Court in cases in which the litigants and all (or many) of the witnesses concerned in the action reside at or near George.

8.5.3 In the light of the finding indicated in paragraph 8.5.2 above it is necessary to describe, with some degree or particularity, how in practice the Southern Cape Circuit works. In this connection the Commission wishes to thank the Judge President of the CPD for his kind assistance in the investigation ; and to record its appreciation of two memoranda describing the operation of civil circuits in the CPD, respectively drawn up by the Hon Mr Justice S. Selikowitz and Mr H.J. Heyman, the Registrar of the CPD.

8.5.4 In terms of Circuit Rule 2 process is issued at the circuit town in question by the Clerk of the Magistrate's Court.

8.5.5 When the Judge President fixes the date of a forthcoming civil circuit he issues an invitation to the attorneys at the circuit town to enrol cases which are ripe for hearing at the circuit. The invitation stipulates that in respect of cases which are to be set down :-

(a) a completed questionnaire as required by Rule 37A must be filed by not later than one month before the date of the Rule 37A conference [the conference] ; and
(b) practitioners will have to attend the conference, which will be held approximately six weeks before the circuit date.

8.5.6 Particulars of local trial actions ripe for hearing are given by the local attorneys concerned to the Chairman of the Attorneys Association at the circuit town. The Chairman draws up a list of these cases and transmits the list to the Judge President in Cape Town.

8.5.7 Upon receipt of the list the Judge President fixes (a) trial dates for the cases and (b) the date of the conference at the circuit town. The Judge President also designates a judge [the conference judge] to preside at the conference. Ideally the conference judge should also be the judge who later presides at the actual civil circuit.

8.5.8 A week before the conference the court files and completed questionnaires are brought from the circuit centre to Cape Town and delivered to the secretary of the conference judge. Whenever a secretary is appointed to a CPD judge, and with a view to civil circuit proceedings, the registrar of the CPD in terms of sec 34 of the Supreme Court Act secures the appointment of such secretary as an acting assistant-registrar of the High Court.

8.5.9 The secretary to the conference judge prepares a case roll for the conference which together with the case files, she places before the conference judge for his perusal.

8.5.10 The conference is held approximately six weeks before the start of the civil circuit. Together with the case files and the conference case roll the conference judge, his secretary and the operator of the recording machine travel from Cape Town to the circuit town for the conference. At the conference the parties are heard. The conference judge ensures that the cases will be ready for hearing at the forthcoming circuit ; and he issues directions to facilitate the hearings. At the conclusion of the conference the case files provisionally remain at the magistrate's court in case further documents have to be inserted therein.

8.5.11 The Judge President designates the civil circuit judge. The case files are brought from the circuit town to Cape Town and delivered to the secretary of the circuit court judge. The secretary prepares a circuit case roll.

8.5.12 Together with the court files and the circuit case roll the circuit judge and his entourage proceed to the circuit town and the civil circuit proper begins.

8.5.13 On the first day of the circuit the roll is called. Having received reports as to the state of preparedness of each case the circuit judge announces a roll. In order to accommodate the convenience of witnesses from outside the circuit town the roll is a flexible one. Cases in which local witnesses are to testify are put on stand-by, as they may have to begin on notice of a few hours. On occasion a case will stand down to allow an out-of-town witness in another case to testify.

8.5.14 At the conclusion of the civil circuit case files in part-heard cases remain with the clerk of magistrate's court. All other case files are brought to Cape Town and are duly filed in the registry of the High Court.

CHAPTER 9

THE BROAD GUIDE-LINES ADOPTED BY THE COMMISSION IN REGARD TO THE ISSUES RAISED IN PART FOUR OF THE THIRD AND FINAL REPORT

9.1 THE NECESSITY FOR THE INTRODUCTION OF CASE MANAGEMENT AND THE EMPLOYMENT OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES :

9.1.2 In the submissions made to the Commission there was widespread support for the introduction of case management to South Africa.

9.1.3 That there is a pressing need for reform of the way in which defended actions in South Africa are dealt with in the High Court admits of no doubt. Our system is too slow and too expensive. The system is too slow because the pace of litigation is dictated by the parties and their legal representatives. The system is too expensive because delays in the litigation inflate the costs of litigation. Of the excessive legal costs in England Lord Woolf remarks in his **Interim Report** [see paragraph 12 in Chapter 3] :-

> *" There is no doubt that the expense of litigation is one of the most fundamental problems confronting the civil justice system. Sir Thomas Bingham, the Master of the Rolls, has described it as 'a cancer eating at the heart of the administration of justice'. The problem of cost is fuelled by the excessively combative environment in which so much litigation is now conducted."*

The civil justice system in the South African High Courts is afflicted with the same scourge. The method by which the pace of litigation in South Africa is governed is essentially Victorian in character and totally outmoded.

9.1.4 It is also beyond question that in many parts of the modern world delay in litigation has been effectively reduced by the adoption of some or other form of case management. The basic concept of case management is that the court itself, and not the parties or their lawyers, controls the pace of litigation

through direct involvement in the litigation process ; and the key components of case management are unremitting court supervision from the time an action becomes opposed until judgment ; the determination of deadlines for compliance of the various pre-trial stages ; monitoring to ensure compliance with deadlines ; and strict insistence by the court on compliance with deadlines.

9.1.5 The Commission agrees entirely with the view expressed by Friedman JP at the Johannesburg seminar on case management on 24 January 1997 [see paragraph 7.1.2 above] , that it would be quite wrong for South Africa to lag behind those jurisdictions which have adopted case management systems. Indeed, South Africa simply cannot afford to do so.

9.1.6 In the submissions to the Commission frequent reference is made to what is said in the Woolf Report. While many of the recommendations made by Lord Woolf will stimulate healthy debate as to how South Africa might improve its own civil justice system, the Commission considers, for the following two reasons, that the Woolf Report cannot serve as a blueprint for the type of case management which South Africa needs. First, the Woolf Report involves reform on a vast scale which will require resources quite beyond the reach of South Africa. In the second place, the success or failure of the reforms contemplated in the Woolf Report will be known only after it has been implemented. Such implementation, as Lord Woolf himself recognises, is yet a long way off. In paragraph 32 of his **Interim Report** Lord Woolf says :-

> *" I realise that full development and implementation of all the proposals in this chapter* [Chapter 13 : The role of Information Technology] *will constitute a challenging programme for the court system and the legal profession in the coming years. Accordingly, it is important to be realistic about expectations. The introduction of the system necessary to support a case flow management and Court administration will be a very major technical undertaking and will take several years to specify, design, develop and deliver…"*

The same view of the matter was expressed to us by the Vice-Chancellor in the course of our discussions with him.

9.1.7 In his address to the seminar on case management [see paragraph 7.1.4.2 above] Friedman JP remarked that whatever system of case management were to be introduced here would "require a change in mind-set of both the judiciary

and the profession". The Commission fully appreciates and acknowledges that the task of educating and training both the Judges and the practitioners to think in the radically different fashion which case management demands, will be a formidable one.

9.1.8 The legal profession is an inward-looking one with a strongly developed herd instinct. It has always displayed an ingrained aversion to change. This has scuttled more than one attempt at civil justice reform in England. In this connection Zuckerman, ***op. cit.*** at page 780, refers to a letter which was published in "The Times" of 28 June 1995. Zuckerman remarks :-

> *" But perhaps the most telling commentary on this century's history of law reform is to be found in a letter written last year by Sir Frederick Lawton. He points out that the Woolf proposals follow the pattern of two earlier reform attempts :*
>
> > *' The first was introduced in 1936. It was intended to apply to the smaller High Court claims. On the issue of a writ, the case was allocated to a named judge who gave all the directions for trial and himself tried it. Neither judges nor lawyers liked this procedure, and by 1939 it had fallen into disuse. The second attempt at reform was in 1950, following recommendations in the Evershed report. There were to be what were called 'robust summons' for directions. Early in the litigation the parties were to disclose all the material relevant to the issues. The court would then give the appropriate directions for trial. Within about two years the robust summons had become a memory.*
> >
> > *Both reforms had been rendered naught largely by the legal profession's dislike of, and resistance, to change…Effecting a change of attitude in the lawyers is likely to be more difficult than changing the rules of court.' "*

9.1.9 Since one of the main objectives of case management is to promote the earliest possible settlement of those cases which are susceptible of settlement, it follows that ADR is to be seen as the essential handmaiden of case management. ADR's advantages are fully recognised in the tribunal which Lord Wilberforce described as "the jewel in the Crown of the English Judicial System" - London's Commercial Court. In " The Practice and Procedure of the

Commercial Court " the learned authors observe [at page 20] :-

> *" The Commercial Judges are anxious to encourage the settlement of commercial disputes, particularly those which would be unduly costly or cumbersome to litigate before the Court. To this end, the parties to such disputes are encouraged to investigate the possibility of utilizing Alternative Dispute Resolution (A.D.R.) techniques such as conciliation and mediation, as a means of achieving settlement. The Registry maintains a list of individuals and organisations which offer A.D.R. services. The Commercial Judges do not act as mediators or conciliators or otherwise provide A.D.R. functions, but in appropriate cases they may well on the hearing of the summons for directions encourage the parties further to consider A.D.R. as an alternative to a trial. There have now been introduced into the Pre-Trial Check-List questions which are intended to direct the attention of the legal advisers of litigants to A.D.R. as a means of avoiding a trial."*

9.1.10 Of the various ADR methods explored by the Commission in the course of its fact-finding mission the Commission considers that, having due regard to the culture of litigation which prevails in South Africa, the process of mediation is best adapted for integration into a South African model of case management.

9.1.11 In his oral submissions to the Commission [see paragraph 1.3.11 above] Friedman JP identified as a local problem the dearth of mediation facilities in South Africa. The Commission takes a rather less gloomy view of the situation. The Commission is of the firm opinion that this country has many well-trained and experienced mediators [see paragraph 2.6.3 above for the encouraging report made to the Commission at Macquarie University by Mr Michael Noone]. What is necessary is that suitable mediators should be recruited for a court-annexed mediation service.

9.1.12 In Wellington [see paragraph 3.4.2 above] two mediation specialists explained to the Commission that until recently in New Zealand mediation had been used chiefly in industrial, employment and family disputes ; but that there was a growing tendency towards the employment of mediation in civil and commercial disputes. In the Commission's view a similar evolutionary process is likely in South Africa.

9.1.13 The Commission agrees with the view expressed by Mr Attorney C.H. Cohen

of Johannesburg in his oral submissions to the Commission [see paragraph 1.14.2 above] that the key to the use by the legal profession of mediation as a means of dispute resolution lies in education. In this respect South African courts would do well to take a leaf from the book of the Australian Federal Court. That Court [see paragraph 2.7.3 above] not only trains its own mediators ; its registrars and its Judges attend courses in mediation at Harvard. It will be further remembered [see paragraph 6.9.16.2 in SECTION B of PART THREE of this Report] that many Commercial List Judges in the Ontario Court of Justice have attended ADR courses at Harvard and elsewhere.

9.1.14 It will be recalled that the second basic case management model described in the Ipp article [see paragraph 1.3.6 above] was one :-

> *" …where control is exercised by requiring the parties to report to the court (often in the form of a master or registrar) at a few, fixed, strategically determined, intervals or occurrences (sometimes called 'milestones') where the management of the case is part of routine and structured control by the court over all or most of the cases in its registry."*

9.1.15 In the course of his oral submissions to the Commission [see paragraph 1.3.7 above] Friedman JP considered that the second basic model would far better suit the needs of our country than the first basic model. The Commission agrees with this view of the matter. The second basic model is exemplified by the system of caseflow management employed in the District Court of Western Australia [DC of WA] described in paragraph 2.4 above. The Commission was impressed with what it saw of the system adopted by the DC of WA. The Commission considers that the type of case management to be introduced in South Africa should be modelled largely on that used by the DC of WA.

9.1.16 The Commission agrees with the suggestion made by Friedman JP at the case management seminar [see paragraph 7.1.4.5 above] that :-

> *"…any system of case management should be introduced experimentally to start with, i.e. for a period of two to three years, in order to determine how it can be improved…"*

9.1.17 Accepting that it is necessary to test the waters by launching in one or more divisions of the High Court a **CASE MANAGEMENT PILOT PROJECT**

[CM pilot project] the critical question then becomes : What court control and supervision measures should be incorporated into the CM pilot project ?

9.1.18 The promulgation by the Rules Board of the new Rule 37A (albeit that its application will be limited to the CPD) is warmly to be welcomed as the first tentative step in South Africa's arduous journey towards an effective system of case management in whose benefits, so it is to be hoped, every division of the High Court in this country will ultimately share.

9.1.19 It is clear that the new Rule embodies many features which may usefully be incorporated in a CM pilot project. In the opinion of the Commission, however, it is no less clear that in several fundamental respects the new Rule does not go nearly far enough to provide a sufficient foundation for an effective CM pilot project.

9.1.20 The Commission holds the firm view that the debilitating delays which have long crippled our system of High Court civil litigation can be rooted out only by the firm application of stringent measures. Those measures will require the courts to exercise over the pace of litigation and the conduct of the parties a control which is more rigid and a supervision which is far tighter than those for which the new Rule provides. Accordingly in paragraphs 9.1.21 to 9.1.31 below the Commission discusses both what it sees as some of the essential components of a feasible CM pilot project, and what it identifies as shortcomings in the new Rule.

9.1.21 In the first place, so the Commission firmly believes, it is imperative that the launch of a CM pilot project by preceded by the appointment to the court personnel of the High Court concerned of an official to be designated **THE CASE MANAGEMENT CONTROLLER** [CM controller]. This official will be charged with overall responsibility for administering and monitoring the CM pilot project ; and at the same time he or she will have an important function to perform at the **PROGRESS CONFERENCE** for which the new Rule provides.

9.1.22 The CM controller will be appointed from the ranks of the practising professions. He or she will be an advocate or an attorney, experienced in High Court civil litigation, who has practised for a period of at least ten years. The CM controller will not be a member of the Public Service ; and he or she must be paid an adequate and market-related salary.

9.1.23 It goes without saying that in order to ensure its proper functioning, and the monitoring thereof, the CM pilot project will be equipped with a **COMPUTER SYSTEM TOGETHER WITH THE APPROPRIATE SOFTWARE**.

9.1.24 The **PROGRESS CONFERENCE** for which sub-rules (4) and (5) of the new Rule provides is one which is attended by the parties only. The progress to be made at this conference therefore depends upon the unaided initiative of the parties. In the view of the Commission this is a fundamental defect. The participation of the parties in such a conference unshepherded by someone able to provide a measure of coercion is a classic example of the court's surrender of its control over litigation. The inevitable result of such surrender, as is well known, is procedural inertia and stagnation. In the view of the Commission it is essential that the CM controller should preside at the Progress Conference ; and that he or she should play an active and interventionist role in prodding the parties towards a definition of the issues and a serious contemplation of the prospects of settling some or all of them.

9.1.25 Sub-rule (5) of the new Rule requires that at the PROGRESS CONFERENCE :-

> *" The parties shall agree upon the date by which witness summaries and further witness summaries are to be exchanged and whether they are to be filed at court and, if so, whether or not such summaries are to be sealed or not."*

9.1.26 One of the overriding objectives of case management is to make each party put his cards on the table at the earliest opportunity. To leave it to the parties to decide when witness summaries will be exchanged is subversive of this objective. Parties will be inclined to delay such exchange for as long as possible.

9.1.27 In the opinion of the Commission parties must be obliged to exchange witness summaries and to file them with the Court BEFORE they attend the PROGRESS CONFERENCE ; and the witness summaries (unsealed) should be before the CM controller when he presides over the Progress Conference.

9.1.28 Sub-rule (4)(d) of the new Rule states that the purpose of the Progress Conference :-

" shall be to conduct an in-depth review of the case and to reach agreement on how the issues can be resolved as efficiently, economically and speedily as possible."

In the opinion of the Commission these laudable objectives will be capable of proper attainment only if witness summaries have been exchanged beforehand and if the CM controller is aware of their contents.

9.1.29 The Commission further takes the view that proceedings at the PROGRESS CONFERENCE would be expedited if before the plaintiff's attorney is allowed to make an entry in the register for trial he is required to produce to the registrar a certificate signed by him [see paragraph 2.5.5 above in which the 1991 changes to the case management in the Supreme Court of Western Australia are described] to the following effect :-

(1) that he holds signed witness statements from all his client's witnesses ;
(2) that a written advice on evidence has been received and acted upon ;
(3) that no amendments to the pleadings are necessary.

9.1.30 The new Rule 37A provides that an application for special or individual case management shall be made on notice to all other parties to the Judge President. The Commission considers that when presiding over the Progress Conference the CM controller should be empowered to make such a direction at the Progress Conference whether or not any party makes application therefor.

9.1.31 As pointed out by Friedman JP in his oral submissions to the Commission [see paragraph 1.3.10 above] , although the bulk of defended actions are settled, the settlements generally come far too late. There is a simple psychological explanation for this vacillation. As every experienced trial lawyer very well knows, the prospects of settlement increase geometrically as a case approaches the trial date. Hence the frequent settlements at the very door of the court. The Commission thinks that it is essential to provide that when the Judge makes directions pursuant to the agreements reflected in the Minute, he should be empowered to order, in an appropriate case, that the matter be referred to mediation by a mediator whose name appears upon a list of mediators approved by the Judge President.

9.2 A CIRCUIT SYSTEM FOR THE ADJUDICATION OF CIVIL CASES :

9.2.1 Paragraph (1)(c)(ii) of the Terms of Reference enjoins the Commission to inquire and report upon the need for improved access to justice for civil litigants in the High Court :-

> *" by the establishment of a Circuit Court system for the adjudication of civil cases."*

9.2.2 As has been shown in Chapter 8 of this Report by reference to the relevant provisions of the Supreme Court Act and the Circuit Court Rules, there already exists a system for the adjudication of High Court civil cases on circuit.

9.2.3 It is also clear from the survey of circuit court work done in the various divisions that while in some divisions unopposed divorces are heard during criminal circuits, civil circuits are employed only in the Cape of Good Hope Provincial Division.

9.2.4 In practical terms, therefore, the issue raised by paragraph (1)(c)(ii) of our Terms of Reference comes to this : Will access to justice for civil litigants in the High Court be improved by running civil circuits in any of the divisions other than the CPD ?

9.2.5 The Provinces of Gauteng, the Free State and KwaZulu-Natal :

The Commission is satisfied that in these three provinces no need for civil circuits exists at the present time.

9.2.6 The Eastern Cape Province :

9.2.6.1 Within the Eastern Cape there are at present available to civil litigants the following High Courts : Grahamstown (the seat of the Eastern Cape Division) ; Port Elizabeth (the seat of the South-Eastern Cape Local Division) ; East London (a circuit local division which sits on a continuous basis) ; Bisho (the seat of the Ciskei High Court) ; and Umtata (the seat of the Transkei High Court).

9.2.6.2 The Commission is satisfied that for the present no need exists for civil circuit courts in any part of the Eastern Cape Province.

9.2.6.3 Depending on the nature of the rationalisation of the High Courts within the Eastern Cape Province which may follow upon the recommendations of the Commission's **First Interim Report**, it is possible that a need for civil circuit courts in a particular part or parts of the Eastern Cape may then arise.

9.2.7 The Northern Cape Province :

9.2.7.1 Although the Northern Cape is territorially the largest of the nine provinces it has the smallest population ; and little High Court civil work is generated in its country districts.

9.2.7.2 The Hon Mr Justice J.J. Kriek, the Judge President of the Northern Cape Division, proposes to amend the Rules of his division to provide for the following :-

> *" There shall be a Circuit Division for the hearing of civil matters to be called 'The Orange River Civil Circuit Division', which shall sit in Upington for such period in every term as may be determined by the Judge President."*
>
> and :
>
> *" The Judge President may, **mero motu**, or at the request of a party, establish such other permanent or **ad hoc** circuits for the hearing of civil matters, at such venues in this Division as may appear to him to be necessary or convenient."*

9.2.7.3 Kriek JP has recently written to the Commission as follows :-

> *" It is known amongst the legal fraternity that despite the absence of relevant provision in the Rules, I will entertain requests that civil trials be conducted at venues other than Kimberley. To date I have been approached only once. The matter of 'Mier Congregational Kerk vs Evangeliese Gemeenskap van Kongrasionistiese Kerke van Suid-Afrika en andere' is an opposed application which has been referred for the hearing of oral evidence, and has been set down for two weeks. There will be a comparatively large number of witnesses from a very poor community about 300 kilometres south of Upington (and therefore about 700 kilometres from Kimberley), and at the request of the parties I*

directed that the matter be heard at Upington."

9.2.7.4 The Commission is satisfied that the amendment of the rules proposed by Kriek JP will cater adequately for the needs of rural civil litigants in the Northern Cape ; and that no civil circuits in addition thereto will be necessary.

9.2.8 <u>The three provinces of Mpumalanga, the Northern Province and North West</u> :

9.2.8.1 These three provinces [the adjoining provinces] border on Gauteng. Save for (a) the magisterial district of Vryburg in North West ; (b) the area of jurisdiction of the Bophuthatswana High Court in North West ; and (c) the area of jurisdiction of the Venda High Court in the Northern Province, the territories of the adjoining provinces fall under the area of jurisdiction of the Transvaal Provincial Division. However, Mmabatho (the seat of the Bophuthatswana High Court) lies in an inaccessible position in the far west of North West next to the Botswana border ; and Thohoyandou (the seat of the Venda High Court) is in the remote north-eastern corner of the Northern Province close to South Africa's borders with Zimbabwe to the north and Mocambique to the east.

9.2.8.2 If in future effect is given to the recommendations in Chapter 10 of the Commission's **First Interim Report** then, in due course, each of the three adjoining provinces will have its own High Court seat or seats ; either as an independent provincial division or as a local division of a High Court in Gauteng.

9.2.8.3 Until effect is given to the Commission's recommendations in regard to the adjoining provinces, and depending upon the volume of the High Court civil work generated in them, it may well by that access to justice for civil litigants in one or more of the adjoining provinces would be enhanced by regular visits from a civil circuit court.

9.2.8.4 No really satisfactory and reliable evidence was placed before the Commission as to the volume of High Court civil work generated in towns such as Nelspruit, Middelburg, Pietersburg, Potchefstroom, Klerksdorp and Rustenburg. The Commission considers, however, that the need for civil circuits in such towns could be adequately gauged from time to time by liaison between the relevant Judge President in Gauteng and the Attorneys Association in each town.

9.2.8.5 Should the running of civil circuit courts in the adjoining provinces prove necessary the Commission considers that the practice (very successfully adopted on the Southern Cape Circuit [see paragraph 8.5 above]) of a pre-trial conference held in the circuit town six weeks in advance of the actual circuit, would contribute greatly to the economical and effective use of scarce judicial manpower.

9.3 THE COMMERCIAL COURT

One of the Commission's tasks [see paragraph (1)(c)(i) of the Terms of Reference] is to consider whether access to justice for civil litigants in the High Court could be improved by the creation of "a specialist Court such as the Commercial Court functioning in Johannesburg".

9.3.1 Leaving aside for a moment the much-debated question whether submission to the jurisdiction of the Johannesburg Commercial Court should require the consent of the defendant, the following may be said at once. Despite a solitary voice in the oral submissions to the Commission [see paragraph 1.7.1 above] pressing the claims of Durban, the Commission is quite satisfied that, save for Johannesburg, no other High Court elsewhere in the country qualifies for consideration as the venue for a Commercial Court.

9.3.2 In the course of his oral submissions to the Commission Mr M.J.D. Wallis, SC, urged upon us that the notion of a statutory Commercial Court in South Africa was not workable. The arguments marshalled by him [see paragraphs 1.1.2 to 1.1.16 above] in support of this submission were weighty.

9.3.3 One of his contentions raises an important matter of principle. He questioned the propriety of according a commercial case preferential treatment to the prejudice of no less deserving cases. Pointing out that a business was better able to withstand court delay than a quadriplegic, Mr Wallis [at paragraph 1.1.15] remarked :-

> *" I would like to see the breadwinner who has lost a limb being able to get into Court because the case is properly and firmly managed from an early stage…"*

9.3.4 To much the same affect was the criticism voiced by Friedman JP [see

paragraph 1.3.16 above] on behalf of Judges and practitioners in the Cape :-

> *"…there is no reason why a commercial case should receive preference over a case of personal injuries where the person is desperately awaiting an outcome so that he can carry on with his life after he has been injured. So unless one can devise a system whereby Commercial Courts are not given preference timewise over cases in which the community is involved on a personal level, it would be unfair."*

9.3.5 The Commission considers that the argument is difficult to refute. In paragraph 2 of the **Overview** [see paragraph 6.8.2 above] one of the defects in the English civil justice system identified by Lord Woolf was :-

> *" there is lack of equality between the powerful wealthy litigant and the under-resourced litigant."*

To give a commercial case the benefit of case management and a speedy passage through the litigation process while denying the same to an indigent plaintiff in a personal injury damages case would simply widen the unfortunate gap to which Lord Woolf refers.

9.3.6 The Commission is firmly of the opinion that to the extent that case management is introduced at all it should be applied uniformly to all defended actions in the High Court ; and that special or individual case management should depend upon the particular circumstances of each case and not merely on the categorisation of a case as a "commercial case".

9.3.7 The Hon Mr Justice H.C.J. Flemming, Deputy Judge President of the Witwatersrand Local Division, submitted to the Commission [see paragraph 1.9.3 above] that the Johannesburg Commercial Court had been tried and found wanting. Having regard, however, to the totality of the submissions by interested parties bearing on the issue, the Commission is satisfied that the advantages of the Johannesburg Commercial Court far outweigh its disadvantages.

9.3.8 The cogent argument for giving the Commercial Court a proper opportunity for proving its worth was well put [see paragraph 1.8.11 above] by Eloff JP :-

> *" Now theoretically any judge should be equipped to deal with a*

commercial matter but it goes much quicker if you do not have to explain to a judge what a charter-party or a bill of lading or demurrage is, or if he can interpret a balance sheet, or if he is familiar with business practices in certain matters. It greatly assists and the duration of the trial is cut down very substantially."

9.3.9 The Commission is of the opinion that the limited use in fact made of the Johannesburg Commercial Court in the past is to be ascribed primarily to the fact that **both** parties have to apply for the action to be designated a commercial action. The Commission considers that the defendant's submission to its jurisdiction should be made compulsory by statute.

9.4 WITNESS STATEMENTS AND SUMMARIES OF EVIDENCE

In the course of his oral submissions [see paragraph 1.8.14] Eloff JP told the Commission that the initial requirement in the Commercial Court that witness statements be exchanged had proved unpopular ; and had induced senior counsel to steer their clients away from the Commercial Court.

9.4.1 The problems to which the rule requiring the exchange of witness statements has given rise in England were graphically described to us [see paragraphs 1.1.17 to 1.1.21] by Mr Wallis, SC. The sorry tale is summarised thus by Lord Woolf in paragraph 9 of Chapter 3 of his **Interim Report** :-

" Witness statements, a sensible innovation aimed at a 'cards on the table' approach, have in a very short time begun to follow the same route as pleadings with the draftsman's skill often used to obscure the original words of the witness."

9.4.2 It is to be noticed that in the recommendations in Lord Woolf's **Final Report** [paragraphs 95 and 96 at page 231] the exchange of witness statements is confined to the multi-track ; on the fast track :-

" witness summaries should be exchanged instead of witness statements."

9.4.3 In the opinion of the Commission the sensible solution is the one adopted in the new Rule 37A [see paragraph 7.2.12 above] , namely, to require the

exchange of **summaries of evidence**. The Commission considers that this should be a firm requirement in **all** defended actions, including cases in the Johannesburg Commercial Court.

9.5 THE FEASIBILITY OF A DEPARTMENT FOR COURTS IN SOUTH AFRICA :

9.5.1 In Chapter 3 of this Report [see paragraph 3.3 above] the Commission has explained briefly why the Department for Courts was established in New Zealand ; and how it functions.

9.5.2 The New Zealand Courts Services Review Committee [see paragraph 3.3.5 above] identified defective support for the judiciary as one of the main areas crying out for improvement. In South Africa defective support for the judiciary (both in the superior and lower courts) is a depressing reality. By way of a single example we quote here an extract from the oral submissions made to the Commission [see paragraphs (4), (5) and (6) at pages 184/5 in VOLUME IV of the **First Interim Report**] in which the Hon Mr Justice J.F. Myburgh of the Witwatersrand Local Division describes the insalubrious conditions under which Judges in the Johannesburg High Court have to work :-

> *" The Department of Public Works is responsible for our building…built in the late 1970's it has never been maintained ; it has never been repainted or re-wallpapered, it was left in the condition from the late 1970's until today when now, in this year* [1996] *they have started re-painting at our request some of the dirtier aspects of our court ; no proper maintenance. The toilets which the public use do not function properly…We have doors on our floors which not only do not lock, they do not have door handles on them, the doors just swing open and shut. In other words there is no physical security to judges' chambers whatsoever. Any member of the public can walk through a door, it is entirely up to him.*
>
> *In regard to the Department of Justice which of course administers the Registrar's office, we have an inefficient Registrar's office…*
>
> *CHAIRMAN :…last year we were told that of the ten Registrars, nine were - in the words of the Senior Registrar, taken off the street without any prior experience.*

MYBURGH J : Yes, he will also tell you that there are no formal facilities for the training of his staff ; so when he gets an inexperienced person, there is no basis on which he gets sent away for a month to be trained, the training takes place while they have to run that busy office, in-house with over 100 people involved.

9.5.3 The chief concern of the Department of Justice should be the administration of justice. The administration of the courts and the provision of adequate support services for the judiciary are highly specialised functions. The courts are administered by the Department of Justice in an unbusinesslike and unsatisfactory fashion. The complaints of Myburgh J related to the High Court. However, the deplorable state of the country's lower courts has already been mentioned in paragraph 6.2.7 at pages 66 to 68 of VOLUME I of the Commission's **First Interim Report**.

9.5.4 In the Commission's opinion the court system in South Africa would function more efficiently and productively if South Africa had its own Department for Courts. The Commission considers that a small committee (say a senior Judge President, two senior puisne Judges, a senior Magistrate, a senior member of the Department of Justice and a chartered accountant) should spend some weeks in New Zealand examining the Department for Courts and conferring with its managers.

9.6 ACCESS TO JUSTICE REQUIRES BASIC UNDERSTANDING OF THE JUSTICE SYSTEM AND THE FUNCTIONING OF ITS COURTS :

9.6.1 Earlier in this Report attention has been called to important initiatives undertaken in countries like Canada and the USA aimed at informing the community in general and schoolchildren in particular in regard to the structure of their justice system and the functioning of its courts [see paragraph 4.1 above for British Columbia ; and paragraph 5.1.3 above for Denver, Colorado].

9.6.2 It is important for at least two fundamental reasons that citizens who themselves have no professional link with the courts should receive some basic education in regard to them. First, ignorance concerning the justice system and its courts must necessarily inhibit access to justice - more particularly access by those deprived sections of the community who need it most. Second, maintenance

of public confidence in the courts cannot be inspired or maintained unless the public understands how the justice system works.

9.6.3 In the opinion of the Commission it is essential that the Department of Justice should embark upon an educational programme designed to inform the citizens of this country - with due regard to the multi-lingual composition of our population - how our courts function ; and where and how legal advice may be obtained at little or no cost.

CHAPTER 10

THE COMMISSION'S FINDINGS AND RECOMMENDATIONS IN REGARD TO IMPROVED ACCESS TO JUSTICE

10.1 CASE MANAGEMENT AND COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION

10.1.1 FINDINGS :

10.1.2 The progress of defended actions through the High Court in South Africa is too sluggish and too expensive because of unnecessary delays. The delays supervene because the court supinely allows the parties to dictate the pace of litigation.

10.1.3 The High Court manages to keep head above water only because 90% of all defended actions are settled. The bulk of these settlements, however, are reached either at or very shortly before the trial. Heavy legal costs for the parties and congestion for the court registry are the consequences of the tardy settlement of cases which, by timely recourse to ADR, could and should have been settled much earlier.

10.1.4 Radical reform is essential to improve this grave situation. Case management and court-annexed ADR are urgently required for the High Court in South Africa. Case management involves control of the pace and manner of litigation by the court and not the parties.

10.1.5 Case management involves early court intervention in the definition of issues and a monitored supervision of defended cases from entry date to judgment. It also entails early and sustained encouragement to the parties to explore the possibility of settlement.

10.1.6 The case management model best suited to South Africa's specific needs and limited resources is the basic model involving a routine court control which requires the parties to report to the court at a number of strategically fixed intervals or events [" milestones "]. The intervals must be just long enough to allow proper preparation by the parties for the next event ; and just short

enough to require prompt action by the parties. Once deadlines are set there must be strict compliance with them.

10.1.7 The form of court-annexed ADR best suited to South Africa's specific needs and limited resources is mediation. Judges and those members of the court's personnel involved in case management should attend training courses in mediation. The Judges themselves, however, should not participate in mediation sessions.

10.1.8 Successful implementation of case management requires, on the part both of the judiciary and of the practitioners, a fundamental readjustment of the traditional but outmoded approach to litigation. It demands a joint and dedicated undertaking by the Bench and the practising professions.

10.1.9 The new Rule 37A [see GN R1352 published on 10 October 1997], which applies only to the Cape of Good Hope Provincial Division [CPD], is to be welcomed as the first step in this country towards case management. Subject to what is said in paragraphs 10.1.10, 10.1.11 and 10.1.12 below its provisions should be made applicable also to such other divisions of the High Court as may appear (upon consultation between the Chairman of the RULES BOARD and the Judge President or Judges President concerned) to be ready and willing to be governed thereby.

10.1.10 While the new Rule 37A embodies many basic techniques useful to case management, its provisions do not go nearly far enough to sustain the operation of an effective case management system in the High Court.

10.1.11 Essential to the successful implementation of case management in the High Court is the appointment to the court personnel of a **CASE MANAGEMENT CONTROLLER** [CM controller], who will have overall responsibility for the administration and monitoring of case management ; and who will also preside at the **PROGRESS CONFERENCE** to which reference is made in sub-rule (4) of the new Rule 37A.

10.1.12 It is likewise essential to the success of case management that the parties should be obliged to exchange **WITNESS SUMMARIES** (and to file them with the court) BEFORE the Progress Conference is held ; and that the Judge who makes directions pursuant to the **MINUTE** prescribed by sub-rules (6) and (7) of the New Rule 37A must have the power to refer the matter to court-annexed

mediation.

10.1.13 Case management should be introduced to South Africa experimentally by means of a monitored **CASE MANAGEMENT PILOT PROJECT** [CM pilot project].

10.1.14 Inasmuch as the new Rule 37A already has application to the CPD that division is the obvious choice for the venue of the CM pilot project.

10.2 <u>THE COMMISSION UNANIMOUSLY MAKES THE FOLLOWING RECOMMENDATIONS IN REGARD TO CASE MANAGEMENT AND COURT-ANNEXED ADR</u>

10.2.1 As soon as is reasonably possible a CASE MANAGEMENT PILOT PROJECT [CM pilot project] should be launched in the CAPE OF GOOD HOPE PROVINCIAL DIVISION [CPD].

10.2.2 The launching of the CM pilot project should be preceded :-

(a) by the installation of a COMPUTER SYSTEM TOGETHER WITH THE APPROPRIATE SOFTWARE in the court building of the CPD ;

(b) by the appointment to the court personnel of the CPD (at a market-related salary) of a CASE MANAGEMENT CONTROLLER [CM controller], who shall be an advocate or attorney experienced in High Court civil litigation who has practised for at least ten years.

(c) by the compilation by the JUDGE PRESIDENT of the CPD of a list of suitably qualified and experienced mediators within the metropolitan area of Cape Town who are prepared to preside at mediation sessions held as part of a court-annexed mediation service.

10.2.3 The CM controller will be in charge of administration and monitoring of the CM pilot project ; and he or she will also preside at the **PROGRESS CONFERENCE**.

10.2.4 The parties will be obliged to exchange **WITNESS SUMMARIES**, and to file them with the court, **BEFORE** the Progress Conference is held. The witness summaries filed with the court will be unsealed and open to the scrutiny of the

CM controller.

10.2.5 The Judge who makes directions pursuant to the **MINUTE** prescribed by sub-rules (6) and (7) of the new Rule 37A should be empowered to refer the matter to court-annexed mediation by a mediator whose name appears on the list described in paragraph 10.2.2 (c) above.

10.2.6 The provisions of the new Rule 37A (modified in the respects indicated in paragraphs 10.1.11 and 10.1.12 above) should be made applicable to a division of the High Court other than the CPD if it appears (after due consultation between the Judge President of such division and the Chairman of the RULES BOARD) that such division is ready and willing to be governed thereby.

10.3 A CIRCUIT SYSTEM FOR THE ADJUDICATION OF CIVIL CASES

10.3.1 FINDINGS :

10.3.2 In the Western Cape Province regular civil circuits are held. They function efficiently and in the circuit towns visited access to justice for civil litigants living in or near the circuit towns is enhanced.

10.3.3 No civil circuits are at present needed in the provinces of Gauteng, the Free State and KwaZulu-Natal.

10.3.4 No civil circuits are needed at present in the Eastern Cape Province. However, depending upon what rationalisation of the High Courts within the province may be implemented in future, a need for civil circuits in parts of the Eastern Cape Province may yet arise.

10.3.5 No civil circuits are needed in the Northern Cape Province additional to the civil circuits about to be established by the Judge President of the Northern Cape Division.

10.3.6 Unless and until effect is given to the recommendations of the Commission's **First Interim Report** in regard to the new provinces of Mpumalanga, the Northern Province and North West [the adjoining provinces], it may well be that access to justice for civil litigants in the larger towns of the adjoining provinces would be enhanced if they were to receive regular visits from a civil

circuit court.

10.3.7 The volume of High Court civil work generated in any of the larger towns in the adjoining provinces which are likely circuit centres is uncertain.

10.3.8 Whether or not the volume of civil High Court work in the larger towns in the adjoining provinces is sufficient to warrant the holding of a civil circuit court can be established through liaison between the relevant Judge President in Gauteng and the Attorneys Associations in the towns concerned.

10.4 <u>THE COMMISSION UNANIMOUSLY MAKES THE FOLLOWING RECOMMENDATIONS IN REGARD TO CIRCUIT COURTS FOR THE ADJUDICATION OF CIVIL CASES</u> :

10.4.1 Until effect is given to the recommendations of the Commission's **First Interim Report** in regard to the adjoining provinces, the relevant Judge President in Gauteng should consult with the Attorneys Associations in the larger towns (such as Nelspruit, Middelburg, Pietersburg, Potchefstroom, Klerksdorp and Rustenburg) in order to determine whether or not a need for a civil circuit in any such town exists.

10.4.2 Should a civil circuit in any of the larger towns in the adjoining provinces prove to be necessary, the procedure of a pre-trial conference held in the circuit town six weeks in advance of the actual circuit should be adopted.

10.5 <u>THE COMMERCIAL COURT</u> :

10.5.1 <u>FINDINGS</u> :

10.5.2 Save for the High Court in Johannesburg the establishment at this stage of a Commercial Court elsewhere in South Africa is unnecessary.

10.5.3 In Johannesburg there is a need for a special forum within the High Court for the resolution of complex commercial disputes.

10.5.4 In order that the Johannesburg Commercial Court should function properly the designation of a case as a commercial action should not require the approval or

consent of both parties.

10.5.5 There is no warrant for giving a commercial action any special treatment in the form of individual case management in preference to a non-commercial action whose speedy disposition, objectively viewed, is a matter of urgency for either or both parties.

10.6 <u>THE COMMISSION UNANIMOUSLY MAKES THE FOLLOWING RECOMMENDATIONS IN REGARD TO THE JOHANNESBURG COMMERCIAL COURT</u> :

10.6.1 The Commercial Court in Johannesburg should continue.

10.6.2 The Supreme Court Act should be amended to give authority to the Judge President in charge of the WLD to designate an action as a commercial action upon the application of any party to such action.

10.6.3 While the exchange of witness statements in the Commercial Court should be a matter for consent between the parties, the exchange of **WITNESS SUMMARIES** should be **mandatory** in all cases before the Commercial Court.

10.7 <u>THE CREATION OF A DEPARTMENT FOR COURTS IN SOUTH AFRICA</u> :

10.7.1 <u>FINDINGS</u> :

10.7.2 In South Africa the administration of the courts and the provision of support services for the judiciary by the Department of Justice are unsatisfactory.

10.7.3 The court system in South Africa would function more efficiently and productively if South Africa had its own Department for Courts.

10.8 <u>THE COMMISSION UNANIMOUSLY MAKES THE FOLLOWING RECOMMENDATIONS IN REGARD TO A DEPARTMENT FOR COURTS FOR SOUTH AFRICA</u> :

10.8.1 The feasibility of establishing a South African Department for Courts should be considered as a matter of urgency.

10.8.2 As a first step a small committee composed of a few senior Judges, a senior Magistrate, a senior official in the Department of Justice and a chartered accountant, should undertake in New Zealand an in-depth study of the New Zealand Department for Courts. Thereafter it should report its findings and recommendations to the President.

10.9 <u>IMPROVED ACCESS TO JUSTICE BY MEANS OF AN INFORMATION SERVICE TO EDUCATE THE PUBLIC</u>

10.9.1 <u>THE COMMISSION UNANIMOUSLY MAKES THE FOLLOWING RECOMMENDATIONS</u> :

10.9.2 A systematic legal information programme should be devised by the Department of Justice, and then be implemented nation-wide with due regard to the multi-lingual composition of our population.

10.9.3 The aim of the programme should be to inform members of the South African public how the various courts in our hierarchy of courts function ; and from what agencies in the community a citizen is able to obtain basic legal advice as to his or her legal rights.

10.9.4 Such information should be disseminated by means of the Internet and by means of attractive brochures published by the Department of Justice. The brochures should be couched in simple and clear language and in bold print. The brochures should be freely available to members of the public at every magistrate's court in the country ; and bulk deliveries of them should be made to all secondary schools throughout the land.

10.10 FAST-TRACK CRIMINAL COURTS :

10.10.1 Although its Terms of Reference relate to **civil** litigation in the High Court, the Commission is minded, in the public interest, to make the recommendation set forth in paragraph 10.10.2 below.

10.10.2 **THE COMMISSION UNANIMOUSLY RECOMMENDS** that in order to speed up the movement of criminal trials through our courts there be introduced, in both our superior and lower criminal trial courts, a FAST-TRACK CRIMINAL COURT such as has been established in the District Court of Western Australia, and whose essential features are described in paragraph 2.3 of this Report.

PART V

THE EXTENSION OF THE ORIGINAL CIVIL JURISDICTION OF THE DIVISIONS OF THE HIGH COURT

1.1 Paragraph (1)(d) of the Terms of Reference [hereinafter simply called **"para. (1)(d)"**] requires the Commission to inquire into :-

> **" the desirability of extending the original civil jurisdiction of each provincial and local division of the Supreme Court by empowering it to entertain all causes, wherever arising, in those matters in which the defendant is an *incola* of South Africa as a whole."**

1.2 Although the same common law applies throughout South Africa it is trite that upon the establishment of the Union of South Africa the separate judicial systems of the four colonies were largely preserved despite their formal unification in the Supreme Court of South Africa [now the High Court].

1.3 Sec 19 of the Supreme Court Act, No 59 of 1959 [the SC Act] deals with the persons over whom and the matters in relation to which provincial and local divisions of the Supreme Court have jurisdiction. Relevant for present purposes are the following introductory words of sec 19(1)(a) of the SC Act :-

> " A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising…within its area of jurisdiction and all other matters of which it may according to law take cognizance…"

1.4 In various juxtapositions the words ***'causes arising'*** in sec 19(1) of the SC Act are to be found in all the statutes establishing the colonial predecessors of the various provincial and local divisions in South Africa.

1.5 In a long line of cases the words ***'causes arising'*** have been judicially interpreted as

signifying not 'causes of actions arising' but 'legal proceedings duly arising', that is to say, *proceedings in which the court has jurisdiction under the common law*.
See : *Bisonboard Ltd v K. Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 486B-G.

1.6 In *Ewing McDonald & Co Ltd v M & M Products Co* 1991(1) SA 252, the Appellate Division (at 257F-H) put the matter thus :-

> " Since a Court under the common law would have had jurisdiction over persons domiciled within its area of jurisdiction (who would include, although not confined to persons 'residing or being in'), 'persons residing or being in' and 'causes arising' are not antithetical concepts ; the former is merely an elaboration of the latter. (Cf *Steytler NO v Fitzgerald* 1911 AD 295 at 315.) The phrase 'persons residing or being in' harks back to the rule of Roman law : *actor sequitur forum rei*. According to that rule an *incola* who wished to pursue a peregrinus was obliged to travel to the latter's forum to do so but, by the same token, was only liable to be sued in his own (Cf *Sciacero & Co v Central South African Railways* 1910 TS 119 at 121.)"

1.7 Neither at the time of Union nor thereafter were any separate functions assigned to the Supreme Court of South Africa as a distinct and independent tribunal in its own right. It was not invested with any original jurisdiction ; and nothing was done to make all the residents in South Africa subject to its jurisdiction. Under the SC Act the area in respect whereof a defendant is an *incola* or a *peregrinus* is the area of the division to which the court in which the action is instituted belongs. To that extent our judicial structure has a federal aspect.

1.8 The creation in South Africa of a single over-arching High Court to whose civil jurisdiction any defendant, resident anywhere in the Republic, would be amenable, can no doubt be achieved by appropriate (and very detailed) legislation. It is obvious, however, that such a situation is entirely incompatible with the current jurisdictional regime governed by the SC Act, in which original jurisdiction of separate divisions is exercised within particular geographical areas according to common law rules.

1.9 The incongruity mentioned in paragraph 1.8 above was pointed out by the Appellate

Division in *Estate Agents Board v Lek* 1979(3) SA 1048 (A). With reference to the provisions of the SC Act, and the effect of sec 26 thereof, the following was stated at 1062E-G :-

> "…I think that the inference is irresistible that the Legislature did not, by enacting 25, 26 and 28(1), intend to endow a Division with jurisdiction in any proceedings merely because its process commencing the proceedings or its judgment or order therein could be served and executed, as hitherto, on a South African *incola* outside its area of jurisdiction. **For that would have meant that each and every Division was to have original jurisdiction over all causes, wherever arising, provided only that the defendant or respondent was a South African *incola* ; that would have been quite contrary to the fundamental concept of the territorial jurisdiction of the Divisions entrenched in the SC Act of 1959. It would also have been quite contrary to the well-established pre-existing legal position expounded above…" *[Emphasis supplied]***

1.10 The original object of the Roman law rule *actor sequitur forum rei*, which was taken over by Roman Dutch law, was to ensure that judgments should be given where they could be enforced. Later it was appreciated that the rule afforded important protection to defendants. It was perceived that it would be unreasonable for the plaintiff to compel the defendant to appear in the court selected by the plaintiff ; defendants are in a weaker position than plaintiffs and, as a matter of policy they should be favoured by the law. See : Huber , *Heedendaegse Rechtsgeleertheyt* (1768) 4.22.1 ; Forsyth, *Private International Law*, 3rd ed (1996) p. 150.

1.11 Very few interested parties made submissions to the Commission in respect of **para. (1)(d)**. In the course of his oral representations [see paragraph 17 at pages 22 to 23 of VOLUME III of this Report) Mr Attorney M.T. Steyn, the Vice-President of the Cape Law Society, said that his Society would be in favour of the extension of jurisdiction mooted in **para. (1)(d)**. On the other hand in a written response on behalf of the Cape Judges, Fagan AJP wrote to the Commission that such an extension of jurisdiction :-

> "…could result in a defendant or respondent being unduly prejudiced by having his or her case heard in some other province with the attendant costs and other inconvenience. This proposal is accordingly not supported."

1.12 The enlargement of original jurisdiction described in **para. (1)(d)** would displace the rule *actor sequitur forum rei*. Where that rule has no application a defendant is exposed to the risk of harassment by a plaintiff. The larger the geographical area involved the greater will be the extent of the potential oppression. South Africa is a vast country. For example, by road the journey from Cape Town to Pretoria takes some fifteen hours. Many other seats of the High Court are situated very far apart.

1.13 In the opinion of the Commission the benefit which such an extension of jurisdiction would confer on plaintiffs is far outweighed by the potential of crippling prejudice to which it would expose defendants. The unanimous view of the Commission is that considerations of common sense, fairness and convenience all militate strongly against such an expansion of jurisdiction.

1.14 **The Commission unanimously recommends that the original civil jurisdiction of each provincial and local division of the High Court should NOT be extended by empowering it to entertain all causes, wherever arising, in those matters in which the defendant is an incola of South Africa as a whole.**

1.15 The Commission wishes to endorse, however, the third recommendation set forth in the Report of the SOUTH AFRICAN LAW COMMISSION (*Project 87, November 1994*), which is in the following terms :-

> *" The Commission* [the SA Law Commission] *recommends that in the light of the new constitutional dispensation and the establishment of nine provinces the whole question of the civil jurisdiction of the courts should be included as a separate and urgent project in the* [SA Law] *Commission's programme of work."*