BY PETER CASHMAN,
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Reform of the *federal civil justice sysem:* some lessons from North America?

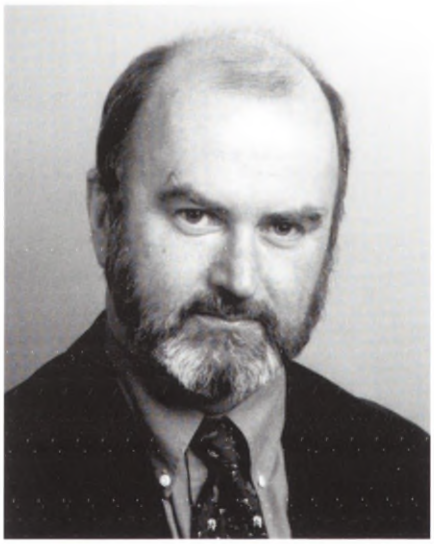
In November 1995 the then Commonwealth Attorney-General, Michael Lavarch requested the Australian Law Reform Commission (ALRC) to inquire into various aspects of the present adversarial system of conducting civil proceedings, administrative review and family law matters before courts and tribunals exercising federal jurisdiction and to propose reforms.

Among other things, the ALRC was required to consider the means of gathering, testing and examining evidence. The Commission was required to produce its final report by 30 September 1995.

In September 1997 the ALRC requested further time to complete its inquiries and to produce a report. The present Commonwealth Attorney-General, Darryl Williams QC, extended the time for carrying out the reference and amended the reference by excluding certain matters. He also required the Commission to focus its attention on the causes of excessive cost and delay. The ALRC was required to issue a discussion paper by 31 August 1998 and a final report by 30 April 1999.

In August 1999 the ALRC issued a discussion paper (DP62) entitled "Review of the Federal Civil Judicial System".

Notwithstanding the breadth of its investigations and consultations, the



Commission's discussion paper is, with great respect, disappointing.

The discussion paper quotes an observation made by Justice Kirby:

"A lawyer from Dickens' time, walking out of Bleak House into a modern Australian court on an ordinary day, would see relatively few changes. The same wigs and robes. The same elevated Bench and sitting times. Very similar basic procedures of calling evidence and presenting argument. Longer judgments: but still the same structure of facts, law and conclusion." (at page 33)

There have, to be fair, been a number of changes. Wigs have gone but the other trappings, including robes, remain. Of more importance is the retention of traditional means for the gathering and presentation of evidence at trial. The proposals incorporated in the ALRC discussion paper are limited in scope and lacking in vision.

In its discussion paper the ALRC fails to consider, let alone propose, some important innovations which have been developed in the North American context and which, it is submitted, provide an effective, inexpensive and expeditious method of ascertaining the truth well in advance of the conduct of the trial.

I am referring to the use of depositions which are the customary method adopted in civil litigation before United States courts, at both state and federal levels, for pre-trial investigation of both factual and expert evidence. Why is it that both our law reformers and our courts have been slow to recognise the obvious advantages of the deposition procedure?

In part, this may reflect a limited understanding of the way in which depositions are used in North American courts.

What are Depositions?

Depositions are a means for conducting an oral examination of any person who may have knowledge of relevant facts or who may be able to provide information which will assist in the discovery of relevant facts. Any party to civil litigation may serve a deposition notice on the person whose evidence it

is proposed to take. The deposition is normally taken at a mutually convenient time and place. It does not require judicial presence or involvement. There is no need for an examiner or person to supervise the conduct of the deposition. Depositions are frequently conducted in the offices of the lawyers acting for the parties. A person, usually a court reporter, is required to make an official record (by transcript and/or video tape and sound recording). The answers are required to be given on oath and the court reporter or shorthand writer usually administers the oath at the commencement of the deposition.

Through this procedure parties have an informal and extremely efficient means of obtaining information and ascertaining relevant facts well in advance of the conduct of the trial. The deponent who is the subject of the deposition is required to answer the questions under oath. When privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself subject to a claim of privilege. Private conferences between deponents and lawyers for the parties in the course of the interrogation are improper except for the purpose of determining whether a privilege should be asserted.

In advance of the date of the proposed deposition the person to be deposed is often served with a subpoena requiring the production of relevant documents prior to the scheduled deposition. Arrangements are usually made to permit inspection of the documents before the interrogation commences. In the course of the deposition various documents may be identified and marked and these become exhibits to the transcript of the deposition.

The deposition procedure is often used to require production, for questioning, of the person or persons with the requisite knowledge or expertise in relation to the matters which are the proposed subject of the deposition. Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about which such person has limited or little knowledge he or she may submit to the noticing party, in advance of the date of the proposed deposition, an affidavit identifying the person within the corporation or government entity believed to have the requisite knowledge. Although the noticing party may still proceed with the deposition, it is usually the case that the person with the requisite knowledge is deposed.

Not infrequently, depositions are taken, or participated in, by video conference thus avoiding the necessity for lawyers or the deponent to travel to the same location.

What are the purposes of Depositions?

The obvious purposes of the deposition procedure are:

(a) to obtain relevant information from knowledgeable persons;

(b) to perpetuate the testimony of a witness who may be unavailable at trial; and

(c) to commit an adverse witness to their testimony at an early stage in the proceedings (see the *Manual for Complex Litigation*, 3rd Ed., published by the Federal Judicial Center, 1995).

In addition, the deposition procedure provides a means by which a party may obtain, directly from the person with requisite knowledge, material information well in advance of the conduct of the trial and such information may be obtained from persons who the other party does not intend to call as a witness at the hearing. The deposition procedure also provides a means for the parties to get together and confer which will often facilitate settlement, particularly when relevant facts surface during the deposition process.

Although there has been some criticism of deposition procedures because of the time and cost involved, the court will often make orders designed to avoid unnecessary depositions, place limits on the number or length of depositions and ensure that the process is conducted fairly and efficiently. In the United States context, the Federal Court has power to limit depositions [see Federal Rules of Civil Procedure, Rules 30(a)(2)(A); 31(a)(2)A; 26(b)(2); 30(d)(2)]. In the United States the Federal Judicial Centre has published model deposition guidelines (see pages 463-468, *Manual for Complex Litigation*, 3rd Edition).

"If we are seriously interested in the truth in civil litigation then the deposition procedure has much to recommend it and should be introduced into Australian courts."

In its discussion paper the ALRC fails to refer to the deposition procedure, despite the fact that at consultations with legal practitioners various proposals were made to the effect that Australian courts should introduce a similar procedure.

The failure to refer to depositions is all the more curious in light of the fact that the ALRC report refers to ongoing concern about problems with the existing processes for obtaining expert evidence and the increasing concern about the "partisan" role of many expert witnesses. Although the ALRC discussion paper refers to various other methods for obtaining evidence, including court appointed experts, panels of experts, and the use of assessors and referees, it is submitted that a deposition procedure is a much more effective, expeditious and less costly method of getting to the facts early on, including in respect of expert evidence.

In the United States context, once a person is nominated as an expert to be called by a party that person is able to be deposed by the other side well in advance of the trial. Thus their evidence may be clarified and, more importantly, tested before waiting for the formal conduct of the trial proceedings. This has obvious advantages except for persons who are seeking to hide the truth. ▶

Insofar as the deposition procedure may result in the disclosure of adverse information at an early stage of the proceedings it is difficult to conceive of an argument as to why this may be undesirable. From a plaintiff lawyer's perspective, it should provide an effective means for exposing the weaknesses in the defendant's case at an early stage, without waiting until the actual conduct of the trial. More importantly, it permits information to be obtained from persons who the defendant may not wish to call because of the fact that they have requisite knowledge or information which may be adverse to the interests of the defendant in the proceedings. Of course, the procedure cuts both ways. However, plaintiffs' lawyers acting for meritorious clients have little to fear.

If we are seriously interested in the truth in civil litigation then the deposition procedure has much to recommend it and should be introduced into Australian courts. The Federal Court may already have the power to order North American style depositions, including under Order 10 of the Federal Court Rules and/or powers conferred by the *Federal Court Act*. Those who are concerned at the radical nature of this proposal may need to be reminded that recently amended existing court rules provide relatively radical civil procedures including (a) powers for the appointment of court experts and provision for cross-examination of such persons prior to trial or before an examiner (Order 34, Federal Court Rules) and (b) provisions for expert witnesses to question each other and to comment on each others evidence at trial (s.34A(e)-(i), Federal Court Rules).

The need for deposition procedures in the Federal Court is all the more pressing in view of recently introduced limitations on discovery.

letters

To: the editor@apla.com.au
From: rebecca.sorgiovanni@...
Subject: Sydney Conference

I refer to the conference held in Sydney from 21 to 23 October 1999.

This was my first conference and I must say that on the whole I was very impressed with the standard of the venue and the quality of the information provided, however, on speaking with some of my colleagues who have attended previous conferences, I understand that numbers this year were down on previous years and in particular, down on last year's attendance at the conference held in Queensland on Hamilton Island.

While the Sydney Convention Centre was certainly well appointed, perhaps there is a message for organisers in the attendance which suggests that a popular holiday destination is likely to draw larger crowds simply because of the dual nature of the trip which of course encourages lawyers to bring their families for a brief holiday.

In addition, although there were social events organised for members to attend throughout the conference, the very nature of a large city means that there are so many competing sources of entertainment (and possible family to visit) that it is less likely that people will attend the social events than if the conference were held in a relatively secluded holiday destination.

It was lucky that I arrived early to register as I had some difficulty finding the registration desk, partly because there were not many signs. It was immediately apparent to me where the radiologist's convention was but it was only through sheer luck and the intervention of two security guards that I found the APLA conference.

Perhaps next year, an area could be designated for delegates to congregate during the registration period to meet each other and enjoy refreshments. I noticed this year that most delegates tended to collect their conference papers and scuttle off to a coffee shop and waste time separately for the two hours instead of meeting with their colleagues and deriving benefit from the exchange of ideas in an informal atmosphere prior to the official conference opening.

Having said all that, the conference was fantastic and I am really looking forward to next year.

Reply to sender

I was pleased to receive the positive feedback on the Sydney conference venue and program quality. Indeed, any feedback can only assist in structuring a better program each year.

The numbers this year were in fact higher than in previous years, although the venue rooms were so large they could have accommodated many more.

This was the first year APLA held it's annual conference in a capital city and it was therefore something of an experiment.

Next year the conference will return to Queensland - the Marriott Gold Coast - and for 2001 a venue on the Queensland sunshine coast will be selected.

Suggestions from APLA members on speakers and topics would be much appreciated.

BILL MADDEN, Conference Chair