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Practical approach could slash litigation costs

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It demonstrates the need for a practicable mechanism for resolving commercial disputes quickly and efficiently

In July last year, Ronald Sackville delivered judgement in the Seven Network case, about which the judge used the expression "extraordinarily wasteful". It was suggested that the case cost about $200 million. The matter was contested over 120 hearing days and judgement ran for 1120 pages.

Last week, a judgement was delivered by Neville Owen in Perth concerning the consequences of the Bell Group's liquidation , which occurred 17 years ago. The case ran for 404 days and the judgement was 2643 pages long. It may be reasonably assumed that the costs were considerably in excess of the $200 million expended in the case before Sackville.

In April, Rodney Madgwick, recently retired from the Federal Court, suggested in this newspaper that the adversarial system be bypassed in favour of a more investigatory system for small disputes.

I agree with that view but suggest that the need to do so is more urgent in massive litigation - exemplified by the two cases I have mentioned.

In the United States, special masters are sometimes appointed to report on quite complex matters involved in litigation.

For example, an order has been made setting up a science panel to provide an objective view on the multibillion-dollar question whether certain breast implants were physically harmful to their users.

As a Federal Court judge, I once made an order, on application made to me, that an expert report to the court on what were in substance the issues in the trial. The report cost about 1

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per cent of the estimated cost of the litigation, which was brought to a sudden end.

Rather puzzlingly, despite the extraordinary success of the technique in that case, lawyers were reluctant to apply for similar orders.

The Takeovers Panel hears more takeover matters than would ever be decided by the courts and it demonstrates the need for a practicable mechanism for resolving commercial disputes quickly and efficiently. The tendency towards mediation, sometimes seen as a sort of half-baked adjudication is, again, a very reasonable response to the costs and delay involved in conventional litigation.

Lawyers tend to disparage fundamental changes, and no government has ever made a root-and-branch inquiry into the litigation system. Such reforms as are made just nibble at the edges.
The European inquisitorial system, as exemplified by the performance of the German civil courts, seems to work pretty well. As a first step, our courts might, whether the parties want it, appoint a person in complex cases to report on the issues, after gathering information by any method thought convenient by the reporter. The report might take weeks to complete and could be quite expensive. But the Bell decision, for example, was not completed until 13 years after it was initiated.

The report would become the basis of the subsequent litigation and would be evidence in the case. Parties wishing to challenge its conclusions could call evidence to do so but the times limited for such evidence would be quite strict.

It may well be that the practice of requiring a report by an investigator to precede conventional litigation, and setting strict limits on the length of the case, might lead to less than perfect results. But it would provide a practical, instead of a demonstrably impractical, method of deciding complex disputes.

It would no doubt be excessively cynical to assume that any attorney-general bold enough to consider this proposal would merely act on the advice of those who are thoroughly indoctrinated with the present unsatisfactory methods.

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