CIVIL JUSTICE RESEARCH CENTRE
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AN IMPLEMENTATION EVALUATION OF DIFFERENTIAL CASE MANAGEMENT

Tania Matruglio
and Joanne Baker

SEPTEMBER 1995

AN IMPLEMENTATION EVALUATION OF DIFFERENTIAL CASE MANAGEMENT:

A report on the DCM Program in the Common Law Division of the Supreme Court of New South Wales

Tania Matruglio and Joanne Baker

September 1995

CIVIL JUSTICE RESEARCH CENTRE

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ISBN 0 909136 49 1

September 1995

Published by the Law Foundation of New South Wales on behalf of the Civil Justice Research Centre.

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Foreword

This research was conducted to examine the implementation of a program of Differential Case Management (DCM) in the Common Law Division of the Supreme Court of New South Wales. Public and professional concern about the level of delay within the Division prompted the Court to convene a committee to implement strategies to reduce delay. DCM is the third strategy implemented by the committee, and with it has come a considerably different approach to the conduct of litigation.

Any new program inspires people to ask: What are the program goals? and Did it achieve them? In between the answers to these questions lie a large number of other questions which are not usually asked: Has the program been implemented as intended? What changes have been made to the program? What changes need to be made to the program? What is program success contingent upon? the list goes on. Without an understanding of the process which occurred between the implementation of a program and evaluating its impact, it is not possible to understand impact results. In short, it will not be possible to determine why program goals were or were not achieved.

This report provides an implementation evaluation of the DCM program after its first year of operation. It helps to answer the questions which fall between What are the program goals? and Did it achieve them? It looks at the development of the DCM program, describes the program design and provides an examination of the program in operation. In addition to providing information about program implementation, this report considers one further aspect which is often overlooked: What are the implications of the program for the process and outcome of litigation?

This study is the first step in conducting a true evaluation of the DCM program, and will play an important role in the Court's administration of the program. However, the study will also be of great value to administrators in other jurisdictions in planning delay reduction strategies.

Gillian McAllister
Executive Director
Civil Justice Research Centre

Executive Summary

Background and Research Objectives

This research examines the development and implementation of a program of Differential Case Management (DCM) which became operational in the Common Law Division of the Supreme Court of New South Wales on 31 January 1994. The research had three main objectives:

- **To document the background of the DCM program.**

  Of particular interest were program origins, history and development, including the goals and objectives of the program designers. Such information was considered fundamental to understanding the context of the DCM program.

- **To describe the characteristics of the program design and the program in operation.**

  This information makes it possible to determine whether the program has been implemented as intended, what problems have been encountered, and what mid-course changes and modifications have been made.

- **To ascertain and report the views of key informants who have some knowledge or experience of the introduction of DCM.**

  Information was sought on the views of key informants about DCM. In particular, how the program has impacted upon their work, their perception of how well the program has been implemented, what changes they have observed and any suggestions they had with regard to program modification.

Methodology

Four data sources provided the information for this report:

- records from institutions;
- Supreme Court case files;
- observation of court processes; and
- key informant interviews.

The CJRC reviewed documentation held about the DCM program by the Supreme Court, the Law Society of New South Wales, the New South Wales Bar Association and the then Department of Courts Administration (DOCA). This information enabled the CJRC to document program origins and design.

A review of 1280 Supreme Court case files (all those included in the DCM program during its first year of operation) enabled the collection of information about case characteristics and case processing. The observation of procedures specific to the DCM program enabled the CJRC to ascertain how the Court was administering the program, how well it was understood by legal practitioners, and the extent to which they were cooperating with it. The information from all of these sources was used in the development of an interview schedule. The series of interviews included judicial officers, court administrators, court clerks, individual solicitors and barristers, and representatives from DOCA and from the Insurance Council of Australia.

Main Research Findings

In an atmosphere of government and public concern about increasing court delay, the Supreme Court convened the Common Law Delay Reduction Committee in September 1988. Since its inception, the committee has implemented progressively more intensive programs of case management aimed at reducing delay. DCM represents the third delay reduction program implemented by the Committee.

Program Development, Modification and Debate

The ultimate responsibility for the features and design of the DCM program lies with the Supreme Court. The Court sought input on the DCM program from the legal profession once a draft of the Practice Note which introduced the program (Practice Note 81) was completed. In response to concerns raised by the profession, the Court incorporated a number of changes into the DCM Practice Note. However, after the distribution of two drafts, lengthy discussion and a number of program modifications, neither the Court nor the profession was completely satisfied with the final version of the Practice Note.

As this implies, there was considerable debate surrounding the introduction of the program into the Common Law Division. Spokespersons for the legal profession expressed opposition to the introduction of the program on the grounds that such intensive court management of cases was inappropriate and unnecessary given changes which had already occurred in the Division. They also argued that DCM would place additional burdens on solicitors and would increase litigants' costs.

Key informant interviews were conducted at the end of the first year of program operation. These provided an opportunity to see whether the concerns originally expressed by the Law Society and the Bar Association, and their opposition to the

program, was reflected by the current views of individual practitioners. Most of the practitioners were broadly supportive of DCM, several saying that they had changed their views on it over time. Several stated that they had in fact been opposed to the introduction of the program, but that their views had "mellowed over time". This change was the result of a combination of the program not having produced many of the problems which had been anticipated, and to their experiencing, first hand, benefits which DCM offers for clients who have cases which require fast court attention.

The Goals and Key Features of the DCM Program

The three main goals of the DCM program were identified as being to:

- achieve earlier settlement of cases;
- increase efficient usage of court resources; and
- reduce the time from case commencement to disposition.

Four key features were incorporated into the DCM program to enable the program goals to be met. These were:

- early court intervention;
- differential treatment of cases;
- use of time goals and timetables; and
- control of adjournments.

The program was designed so that court intervention would occur at an early stage in all cases. To achieve this, the program requires that the parties provide detailed information about the case in the form of *DCM Documents* at an early stage in the proceedings. Cases are placed in the *Not Ready List* until the DCM Documents are filed.

The program was also designed to differentiate between cases according to their "complexity and need for pre-trial activity". To achieve this, the Court introduced a system of three case management tracks: the *Individual Track*, the *Special Track* and the *Standard Track*. Each track differs in terms of their time frames and the level of case management provided.

A fixed time goal of 18 months was set for the overall disposition of cases. This period commences with the filing of DCM documents. To enable this time goal to be met, the Court has established time standards for critical events in the litigation process.

The DCM program targets civil cases commenced in or transferred to the Common Law Division between 31 January 1994 and 1 January 1996.

Was the Program Implemented as Intended?

An examination of the program's operation during the first year allowed us to determine the extent to which the program was implemented as intended. The results indicated that the DCM program did reach the cases it targeted, but that some features of the program design were implemented more fully than others.

It was found that in the first year early court intervention was not implemented entirely as intended. The Court had intervened relatively quickly once parties filed the relevant documentation. However, parties generally had not filed the DCM Documents at commencement of the case as intended, and one half of the cases remained in the Not Ready List at the end of the first year. Therefore, the Court had not yet commenced active intervention in most cases.

Differential treatment of cases was thought to have been implemented as intended. The Court had succeeded in providing tailored and need specific directions and timetables to cases in the Individual and Special Tracks. Uniform directions were issued to cases in the Standard Track. As a result some cases received more intensive management than others.

The time goals and timetables were also considered to have been implemented as intended in the first year. In general, in those cases that had progressed out of the Not Ready List, the Court succeeded in setting timetables that met the time standards specified in the Practice Note and the 18 month time goal. However, often the timetables set resulted in cases progressing through well within the 18 month goal. This was causing some parties to have difficulties in meeting their timetables.

The Court did not control adjournments as fully as intended during the first year of the program. Twenty-seven percent of the Status Conferences held were adjourned to a further Status Conference and 25% were adjourned for other purposes. Forty-six percent of the Final Conferences held were adjourned.

The Future Success of the Program

Opinions were sought from key informants on the future of the DCM program. There was general consensus that the program would continue, as it represented a trend which was occurring on an international scale. It was suggested that in January 1996 the program will undergo some modification based on the experience gained in the first two years of operation.

Five key elements required for the success of the DCM program came out of the interviews:

- adequate judicial resources;
- continued judicial support of the program;
- maintenance of program momentum;
- solicitor compliance; and
- application of sanctions.

Implications of the Findings

Simply implementing the program according to the Practice Note does not guarantee program success. The first year of operation is, in a sense, a trial run. It is during this period that the effectiveness, or otherwise, of program design becomes apparent. The findings have implications for the future success of the DCM program in achieving its goals.

While the DCM program incorporated features acknowledged as being central to a successful program of case management and delay reduction, the way in which the Court has applied some features may hinder their effectiveness.

Firstly, it was suggested that the inclusion of transfer cases, while intended by the Court may, to some extent, defeat the purpose of DCM. The aim of the program is early court intervention in order to determine the pre-trial requirements of a case. It must be asked whether the application of DCM to "old" cases will achieve the goals of the program. Further, it needs to be acknowledged that such cases may not necessarily be the best ones upon which to "test" the DCM program.

The second issue is whether DCM, with its current design, is achieving early court intervention. The 12 month period which solicitors have to file DCM Documents, the number of cases which are, at present, in the Not Ready List, and the unsatisfactory quality of information in some DCM Documents seems to suggest that it is not.

The third issue is that the number of adjournments which have occurred during the first year runs counter to both the Court's "strict policy on adjournments" and to its goal of efficient use of judicial resources. This has implications for program success.

Finally, it needs to be asked whether DCM is managing cases differentially, based on their "complexity and need for pre-trial activity". With the inclusion of the Standard Track the answer to this is: not entirely. Solicitors may opt for this track, regardless of case "complexity and need for pre-trial activity" if they wish. Without court supervision of track allocation for all cases, it can never be sure that the aims of the program are being achieved.

People continue to have mixed opinions about the implications of DCM for the costs of litigation, both monetary and other. This research provides no firm answers on this point. It is not yet possible to determine whether DCM will, as some have suggested, affect access to justice in the Supreme Court due to an increase in the cost of litigating within it. Another issue which needs to be considered following the implementation of a delay reduction program is whether faster justice is necessarily better justice. Some of those interviewed expressed concern that DCM may be promoting early settlement at the expense of fair settlement, and early case preparation at the expense of good case preparation.

Research Conclusions and the Need for Future Research

The implementation evaluation has provided information about program development and DCM's first year of operation. The study found there was considerable opposition to the program during its development, which continued through to its implementation in January 1994. However, during the interviews held with key informants one year into the operation of the program, it was found there was not as much dissension between the attitudes of the informants within the Court and those of the legal profession as may have been expected given the debate which surrounded the introduction of the program. Generally, the opinions of the profession appeared to have undergone some change during the first year of program operation. This appeared to be the result of the program not producing as many problems as had been anticipated, and of practitioners experiencing, first hand, benefits of DCM.

The report points to certain design features which may require some modification. It documents various features key informants saw as being fundamental to program success, and some possible implications for the legal profession and the justice system. The report concludes that the DCM program was designed with attention to features which have been found elsewhere to be fundamental to successful case management and delay reduction. However, the program has not, in all aspects, been implemented entirely as intended by the Court. This fact has important implications for the future success of the program in achieving it goals.

This analysis of the implementation of DCM has identified key questions that can only be answered with a rigorous impact evaluation. While this research describes the development of DCM and discusses whether it has been implemented as intended, it raises several important questions about the potential impact of the program on the process of litigation, litigation outcomes and the issue of quality of justice. Building on the results of this analysis of the first year's implementation problems, research should be conducted to assess whether the program is successful in achieving its goals of reducing the overall time to disposition, achieving earlier settlements and increasing the efficient use of judicial resources. An assessment also needs to be made of whether the anticipated benefits and problems do in fact occur, and what effect DCM will have on perceptions of justice.

Acknowledgments

This research would not have been possible without the support and cooperation of a number of people who contributed their time and knowledge. In particular, we thank the people who gave most generously of their time to talk with us about DCM, and John Schwartzkoff, of Keys Young, who provided expertise and support during the conduct of the interviews.

Thanks to the Supreme Court, the Law Society, the Bar Association and the Department of Courts Administration for allowing us access to documentation held on DCM. Many thanks to the staff of the Supreme Court for the enormous effort they put in during the data collection phases of the project. In particular, thanks to Mr Warwick Soden, former CEO. To Justice Badgery-Parker, Prothonotary Whalan and Registrar Harrison for allowing us to observe DCM court processes, and to Janine Taggart, Information Systems Manager, for her provision of case lists and training to use the COURTNET computer system. Thanks also to Lena Ruggero who shared her office with us during the weeks of data collection!

Thanks goes to a number of people who were involved in the review of the draft report: Registrar Joanne Harrison, Mr David Beling (Registry Manager), Mr Cliff Hoeben (QC). Special thanks to Ms Pat Ebener (RAND Institute for Civil Justice) whose review and comments on the draft served as true inspiration.

Thank you to Elizabeth Brack and Deborah Worthington, both of the CJRC, for their help during the data collection.

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1

Introduction

1.1 Background

In 1988 the Supreme Court of New South Wales began to address the issues of case management and delay. Before this time, the Court had been described as having no effective statistical information on the state of the lists, or the age of the caseload. It was also considered not to have recognised any need to set time standards, nor was there anyone responsible for monitoring the lists or the avoidance of delays.[1]

In the face of widespread public and professional concern expressed over delay within the Common Law Division,[2] the Court established the Common Law Delay Reduction Committee in 1988. At the time the Committee was convened, the number of pending cases in the Division was 10,900 and the average time to reach disposition was forecast at 10-12 years.[3] The Committee embarked on a series of initiatives designed to reduce the backlog in the lists and to combat court delay. As a part of these initiatives, on 31 January 1994, a program of Differential Case Management (DCM) became operational in the Common Law Division.

DCM is a system of case differentiation and individualised case management. In this type of management system, case differentiation is based on the resource and management needs of the individual case rather than on the type of case alone. The essence of DCM is that greater efficiency can be achieved through the reorganisation of the case-flow system to recognise explicitly that the speed and method of case disposition should depend on the actual resource and management requirements of a case, rather than on the order in which cases have been filed.[4] Thus, DCM challenges the traditional "first in first served" approach to case processing. It also challenges the traditional wisdom of employing a single set of uniform rules and procedures based on case age.

Case management is not a new concept. As early as 1941 proponents of judicial involvement in case management wrote:

> *Necessarily, pretrial procedure envisages the invocation of initiative on the part of the judge. It transforms him from his traditional role of moderator passing on questions presented by counsel, to that of an active director of litigation. [It makes it] possible to dispose of the contest properly with the least possible waste*

of time and expense. By exercising his authority to the fullest extent in this direction the pretrial judge not only advances the cause of the administration of justice, but also enhances the respect for the courts on the part of the public.[5]

The past two decades have seen significant effort being invested in devising enhancements to case management to achieve goals of justice and efficiency.[6] A common theme has emerged as the key to these goals: early and continuous supervision of case flow. In 1976, the American Bar Association first wrote about a general principle of case management and delay reduction:

From the commencement of litigation to its resolution, whether by trial or settlement, any elapse of time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once achieved, maintaining a current docket.[7]

1.2 Experience with Delay Reduction Approaches

Research which has been conducted in the United States by the National Centre for State Courts (NCSC) has provided empirical evidence demonstrating that different approaches taken by courts to case management do affect the pace of litigation.[8] Through a comparison of 18 state courts in the United States, it was possible to determine the factors associated with fast (or slow) case processing. In short, the NCSC found that the courts which took the longest time from commencement to disposition "exercised virtually no control over the pace of litigation and have little or no knowledge about the relative complexity of different cases prior to the point of trial readiness".[9]

The characteristic which dominated the courts in which cases experienced the longest duration was the use of a certificate of readiness procedure (or the like) to bring the case to the attention of the court. They all used a "first in first served" approach to litigation. This "laissez-faire" approach to litigation was characteristic of the Supreme Court of New South Wales prior to the introduction of DCM.

From its research, the NCSC found the following factors, among others, to be related to the pace of litigation:

- the stage of court intervention;
- a strict adjournment policy;
- the assurance of firm hearing dates;
- the establishment of information systems; and
- the attitude and expectations of legal representatives.

From a body of research on delay reduction, there is now considered to be broad agreement that goals of timeliness and fairness are most likely achieved when the court actively supervises the progress of each case from an early stage to disposition. This has resulted in reconsideration of traditional case management philosophy and practice.[10]

The focus of attention on the need for courts to implement strategies to combat delay, and its concomitant costs, is world-wide. What the Supreme Court of New South Wales intended to achieve, and the way it set about achieving it, is by no means unique. Variations of civil differential case management programs are now in place in a number of jurisdictions in the United States, Britain, and in the following Australian Courts: the Federal Court of Australia, the Family Court of Australia, the Supreme Courts of South and Western Australia, the New South Wales Land and Environment Court as well as in the Commercial and Building Lists of the New South Wales Supreme Court.

1.3 Description of the Research

The DCM program which has been implemented in the Common Law Division of the Supreme Court is overseen by a monitoring committee which comprises representatives from the Supreme Court, the New South Wales Bar Association, the Law Society of New South Wales, the Department of Courts Administration[11], the Insurance Council and the Civil Justice Research Centre (CJRC). The program is operating under a "sunset clause" which comes into effect on 1 January 1996. The Court considered that a two year period of operation was adequate for the purpose of conducting a review of the impact of the program.

In order to determine whether the program of DCM was achieving its goals of justice and efficiency, the Supreme Court approached the CJRC to conduct an evaluation of the program.

An evaluation of a program with regard to its intended goals has, however, two requirements. First, it is necessary to determine whether the program has been implemented as it was intended; second, sufficient time must have elapsed for enough cases to be resolved using the system to make a review appropriate.

The CJRC therefore proposed that the review of the DCM program should involve two stages. The first would be to conduct an implementation evaluation of the DCM program, and the second, to conduct an impact evaluation. An *implementation evaluation* is "concerned with the extent to which a particular policy or program is implemented according to its stated guidelines", while an *impact evaluation* "is concerned with examining the extent to which a policy causes a change in the intended direction".[12] To undertake both stages of research is important in policy research.[13]

1.3.1 Why Conduct an Implementation Evaluation?

The reasons for conducting an implementation evaluation are threefold. The first is to provide an account of the program in operation. It is only through a description of how the program was intended to operate and how it is operating that program designers can determine whether the program has run according to plan. It is also an important method through which to identify changes which have occurred in the operation of the program, and changes which still need to be addressed.

The second reason is for the purpose of institutional accountability. There has been increased institutional interest in developing better methods of establishing program accountability, and integrating research is an approach which can achieve this. As stated in a paper by a Judge and the Chief Executive Officer of the Supreme Court of New South Wales, and presented at an Annual AIJA Conference on Delay Reduction:

> *The adoption of a more pro-active role, and the introduction, or attempted introduction, of new measures, inevitably attracts accountability of the Court for its performance since it increases the expectations of the community and of executive government.*[14]

The third reason is that an implementation evaluation serves as a necessary precursor to an impact evaluation. This has been highlighted by Kerr et al.,[15] who stated that the failure to measure the degree of program implementation can distort evaluation results. While an impact evaluation may indicate whether a program has been successful, it will not indicate why. This is because a program may appear effective, or ineffective, when in fact the intended program never happened. Further, it is only by measuring the extent to which a program is implemented that evaluators can determine whether the program was fairly tested. Thus, measures of the degree of program implementation help in the interpretation of impact results.[16]

This report provides the results of stage one, the implementation evaluation of the DCM program. It documents the program's history, origins and development; the debate surrounding the introduction of the program; a description of the program in operation; the effect it has had on the Court and the users of the Court and how those who have been affected by DCM have responded to its introduction. Thus, this report examines how the DCM program was put into practice, rather than the extent to which the goals of the program have been achieved.

1.4 Research Objectives

In conducting this research the CJRC had three main objectives.

- To document the background of the DCM program.

  Of particular interest were program origins and history, including the objectives of the program designers. Such information was considered fundamental to understanding the context of the DCM program.

- To describe the characteristics of the program goals, program design and the program in operation.

  This information will make it possible to determine whether the program has been implemented as intended, what problems have been encountered, and what mid-course changes and modifications have been made.

- To ascertain and report the views of key informants who have some knowledge or experience of the introduction of DCM.

  Information was sought on the views of key informants about DCM, including how the program has impacted upon their work, their perception of how well the program has been implemented, what changes they have observed and any suggestions they had with regard to program modification.

1.5 Research Methods and Data Sources

The CJRC reviewed the first year of program operation. This period was considered to have been long enough for the program to become fully operational and for participants to have gained enough experience with its operation to be able to make informed comments and suggestions about its design, operation and its effect on their work to date. It was not however considered too far into the program so that it missed the important "start-up" phase. In conducting the evaluation one year into the program, the CJRC was able to obtain information about initial developments and changes which, if an evaluation had been left longer, may not have been available. The information presented in this report was compiled from four sources: records from institutions, case files held by the Court, observations of court procedures, and interviews with key informants.

Records from Institutions

Data collection began in early October 1994 with the review of documentation held about the DCM program by the Supreme Court, the New South Wales Law Society, the Bar Association of New South Wales and the Department of Courts Administration. This phase of the data collection was completed by the end of November 1994.

The information from the documentation held by these institutions enabled the CJRC to trace the development of the program from its initial stages of design through to its implementation. Included in the documents was information about program design, the debate surrounding the design, and modifications which were subsequently made. The records which provided such information included staff reports, correspondence, internal memoranda, records and reports of committees and drafts of the program, its reviews and modifications. The documents of the Court covered the period of delay reduction efforts dating back to 1988.

The CJRC sought to obtain documents from all key stakeholders, including both the proponents and opponents of DCM. However, the CJRC was limited by what documentation was made available for review.

Collection of Information from Court Records

The CJRC requested from the Supreme Court a list of all cases commenced in, or transferred to, the Common Law Division between 31 January and 31 December 1994. Using a standard data coding sheet[17] information was collected on 1280 cases, all those provided on the list.

Both the COURTNET[18] computer system and the Supreme Court case files were used to abstract information about the origin of cases in DCM, the management tracks cases were allocated to, the number of court appearances per case, and the stage at which the cases were at the time of coding. Case characteristics recorded included the date of commencement and the nature of the claim. Case processing information recorded included the dates of filings, how the DCM process was commenced and the date of court appearances.

A pilot collection was conducted for a period of two weeks during December 1994. Following this, the data coding sheet was revised, and the main data collection period was conducted during December 1994 and January 1995.

Observation of Court Procedures

Researchers observed court procedures specific to the DCM program. A total of 92 observations were made from October to December 1994. Sixty of these procedures were Status Conferences, 27 were Final Conferences and five were Default Conferences.[19] The observations were made when the program had been in operation for at least 9 months. This period was considered long enough to allow the program to have stabilised.

The observations of court processes enabled the CJRC to see first hand how the Court was administering the program, how well the legal practitioners understood the program and the extent to which they were cooperating with the Court.

Interviews

The fourth source of information was from interviews with DCM stakeholders. Included were judicial officers, court administrators and court clerks, individual solicitors and barristers, and representatives from the Department of Courts Administration and from the Insurance Council of Australia. Information from all of the sources mentioned above was used in the development of an interview schedule.[20] The interviews were semi-structured and the schedule of questions was distributed to the participants in advance of the interview. Each interview took between 30 and 60 minutes. The questions on the schedule were intended as a guide only. Additional information provided by informants was also recorded.

In total, letters were sent to 27 people requesting their participation, and a further three were initially contacted by telephone. Twenty-two interviews were conducted. The remaining eight people were not interviewed due to the following reasons. One of the court clerks nominated was not available during the time frame allocated to the conduct of the interviews. Three solicitors, two self insurers, a judicial officer and a representative from the Public Interest Advocacy Centre (PIAC) indicated that they had not had any first hand experience with the DCM program to date and on this basis, did not believe they could comment on the program.

Informants were selected with the need for a thorough representation of stakeholders in mind. Included from the Supreme Court were six judicial officers, the Chief Executive Officer (CEO), the Registry Manager and two registry clerks. These informants were nominated for inclusion by the CEO on the basis of their knowledge of and experience with DCM. An officer from the Department of Courts Administration's Legal and Legislative Services Branch was nominated by the Director General. Seven solicitors were selected from a list provided by the Court which contained names of frequent Common Law Division litigators. Four of these were classified as "plaintiff solicitors" and three as "defendant solicitors". Three barristers were selected from a list of nominations provided by a representative of the Bar who sits on the DCM Monitoring Committee. Two of these classified themselves as being predominantly counsel for the defendant, and one as counsel for the plaintiff. A representative of the Insurance Council of Australia was selected from a list provided to the CJRC by the representative of this organisation who also sits on the DCM Monitoring Committee.

It is important to note that the CJRC did not select key informants at random. While we attempted to obtain the views of a broad cross-section of people, the view-points expressed may not necessarily represent all possible view-points about the DCM program.

1.6 Organisation of this Report

Section 2 provides a description of program foundation, development and debate. It begins with a summary of the motivation for the program, and the Supreme Court's delay reduction strategies since 1988. Following this is a description of program development and modification, and the debate which surrounded the introduction of DCM.

Section 3 documents the goals and the key features of the DCM program designed for the Supreme Court Common Law Division. Included is a description of how the DCM program differs from the systems which preceded it.

Section 4 describes the first year of the program's operation. The aim of the section is to determine whether the program has in fact been implemented as intended by the Court. It addresses the following questions: Did the program reach the cases that it targeted? Were the key features – early intervention, differential treatment of cases, the time goals and timetables, and control of adjournments – implemented as intended? And last, was the program administered as intended?

Section 5 provides an account of the views of key informants, one year later, on the debate which surrounded the introduction of DCM. It also provides the perceptions of key informants with regard to the advantages and disadvantages of the DCM program, and their opinions of what it will take for the program to achieve its goals. The section also discusses the key informants' perceived implications of the DCM program for the legal profession and the justice system.

Section 6 discusses the implications of the research findings, and highlights some remaining research questions. Finally, Section 7 provides a summary of the research, and the CJRC's research conclusions.

1 The Hon. Mr Justice JRT Wood, 1991, "Case Management in the Common Law Division of the Supreme Court of New South Wales", *Journal of Judicial Administration*, 1, pp. 71–87.

2 Soden, W, 1988, "An Evaluation of the Extent of Backlog and Delay within the Common Law Division of the Supreme Court of New South Wales", paper presented at the Supreme Court's *Delay Reduction Project Seminar*, 17 September, unpublished.

3 The Hon. Mr Justice AM Gleeson, AC, Chief Justice of the Supreme Court, correspondence to all metropolitan solicitors, dated 20 December 1993.

4 Bakke H, & Soloman, M, 1989, "Case Differentiation: An Approach to Individualised Case Management", *Judicature*, Vol. 73, No.1, pp. 17–21.

5 Pretrial Procedure Abridged Report of the Comm. in Pretrial Procedure to the Judicial Conference of the District of Colombia, 4 Fed. R. Serv. 1015 (1941) cited in Peckham, RF, 1985, "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution", *Rutgers Law Review*, Vol.37, pp. 253–277.

6 Bakke, H, & Soloman, M, 1989, see note 4, and Van Dadelszen, M, 1994, "High Court Case Management Pilots – Some History, Some Philosophy and Some Features", *Law Talk*, 423,27, pp. 26–30.

7 American Bar Association, 1976, *Standards Relating to Trial Courts*, Chicago.

8 Mahoney, B, Aikman, AB, Casey, PE, Flango, VE, Gallas, G, Henderson, TA, Ito, J, Steelman, DC, & Weller, S,1988, *Changing Times in Trial Courts*, National Centre for State Courts, Williamsburg.

9 Mahoney, B, et al., p. 75, see note 8.

10 Mahoney, B, et.al., see note 8.

11 On coming to government following the state election on 25 March 1995, the Premier of New South Wales, the Hon. Bob Carr MP, announced that the Department of Courts Administration (DOCA) would be amalgamated with the Attorney General's Department. Thus, functions exercised by DOCA at the time the research was conducted are now the responsibility of the Attorney General's Department.

12 Nachmias, D, 1979, *Public Policy Evaluation: Approaches and Methods*, St. Martin's, New York, p. 5.

13 Palumbo, D, & Sharp, E, 1980, "Process Versus Impact Evaluation of Community Corrections", in *The Practice of Policy Evaluation*, D. Nachmias (ed), St Martin's Press, New York, pp. 288–304.

14 The Hon. Mr Justice JRT Wood, & Soden, W, 1991, "The Supreme Court of New South Wales", paper presented at the AIJA conference, *Case Management and Delay Reduction in the Higher Courts*, 6–7 December, p. 49.

15 Kerr, DM, Kent, L, & Lam, T, 1985, "Measuring Program Implementation with a Classroom Observation Instrument: The Interactive Teaching Map", *Evaluation Review*, Vol. 19, No. 4, August, pp. 461–482.

16 Scheirer, MA, & Rezmovic, EL, 1984, Measuring the Degree of Program Implementation: A Methodological Review, *Evaluation Studies Review Annual*, Vol. 19, pp. 382–416.

17 Appendix 1 provides a copy of the data coding sheet.

18 COURTNET is the computer system set up in 1989 by the Department of the Attorney General. The system was developed for administrative purposes.

19 See Section 3 for a description of these procedures.

20 Appendix 2 provides a copy of the interview schedule.

2

Program Foundation, Development and Debate

This section provides an account of program foundation, development and debate. It begins with a summary of the motivation for the program, and the Supreme Court's delay reduction strategies since 1988. Following this is a description of program development and modification, and the debate which surrounded the introduction of DCM.

The information for this section was drawn from the records of the Supreme Court, the Law Society, the Bar Association and the Department of Courts Administration. It is supplemented by information provided during interviews with key informants.

2.1 Program Foundation: The History of Delay Reduction Strategies in the Common Law Division

2.1.1 Program Motivation

In recent years, the courts have come under mounting public scrutiny and adverse comment. The main focus of criticism has been the delay involved in bringing matters to trial, the cost of litigation, the length of some trial processes and the general cost to the community of the administration of the law.[21] In response to such concerns, the courts commenced programs aimed at reducing the time and cost involved in litigation. As a Supreme Court judge has stated:

> *A combination of the mounting public disquiet concerning the efficiency of the litigation process and a waning confidence in it, coupled with steadily increasing budgetary pressures upon the courts themselves, have combined to both catalyse and accelerate what is now a national movement towards the positive case flow management approaches presently being developed within most courts.*[22]

During the same period, the New South Wales Government was taking stock of the situation within the courts, and was trying to find ways to reduce delay and make the system run more efficiently. In May 1989, Coopers and Lybrand completed a review of the New South Wales court system. This review was conducted in

accordance with the instructions of the then Premier, Treasurer and Minister for Ethnic Affairs, The Hon. NF Greiner MP and Attorney General, The Hon. JRA Dowd, MP. The review was conducted "in the light of increasing public concern about delays and inefficiencies in the court system in New South Wales".[23]

The goal of the Government was to prompt the courts of New South Wales to impose rules and procedures on themselves and on legal practitioners to ameliorate the twin problems of cost and delay. The report prepared for the Government recognised the attempts of the Supreme Court to date to combat court delay, and stated that there was a need for all courts to take a leading role in better regulating the manner in which matters are prepared and come before the courts. One of the recommendations made from the review was that:

> *... the developments in case flow management by the Supreme Court Common Law Division... be continued and extended, to encompass all the seven principles of caseflow management outlined in this report... In this respect, we consider that it is essential for the courts to develop appropriate time standards for the disposition of cases.*[24]

The seven principles of case flow management outlined in the report were:

- judicial commitment and leadership;
- court consultation with the Bar;
- court supervision of case progress;
- standards and goals;
- a monitoring and information system;
- scheduling for credible trial dates; and
- court control of adjournments.

The Supreme Court, through DCM, adopted the seven principles of case flow management, and introduced a system of case differentiation based on case complexity and need for pre-trial activity.

2.1.2 Development of Delay Reduction Strategies

The recognition by the Supreme Court of the need to reduce the amount of time taken for cases to be resolved in the Common Law Division dates back to September 1988, when, in the face of increasing delay, the Court established the Common Law Delay Reduction Committee. The Committee was chaired by Justice Wood, and representatives from the Supreme Court, the Law Society, the Bar Association, the Department of the Attorney General and the Government Insurance Office (GIO) served as members.

The task of the Committee was to develop ways the, then out of control, backlog of cases in the Common Law Division could be reduced. Since its inception, three progressively more intensive programs of case management, designed to expedite civil case disposition, have been instituted.

Practice Note 59: No Case Management

The first major change introduced by the Committee came with the introduction of Practice Note 59 (issued on 28 February 1990). This Practice Note aimed to establish a system whereby the Court would exercise some influence over the rate and state of preparation of cases through the introduction of Callovers and Issues and Listing Conferences.[25] The purpose of these strategies was to ensure that cases listed for hearing would be prepared for hearing and that all possibility of settlement would have been explored prior to the allocation of a hearing date by the Court. However, despite the "concentrated efforts" of the Court to require sufficient preparation for the Callovers and conferences, it was found that an "unacceptably high proportion of cases remained unprepared".[26]

The Court decided that Practice Note 59 was not achieving its intent. In the words of the CEO "there were problems with the system, particularly, problems concerning the rate of case preparation by practitioners".[27] In particular, the Court was concerned that there was "insufficient preparation of cases for Callovers and for Issues and Listing Conferences". The problem with Practice Note 59 was considered to be that the pace of litigation remained predominantly within the hands of the practitioners. To overcome this, on 8 August 1991, the Court introduced a system of case management by way of directions hearings under Practice Note 68. This Practice Note was intended to shift the control of the rate of case preparation from the legal practitioners to the Court.[28]

Practice Note 68: Active Case Management

Practice Note 68, referred to by the Court as Active Case Management (ACM), introduced a system of case management by a registrar from the first Directions Hearing until the conclusion of the Issues and Listing Conference. When a plaintiff failed to comply with directions, the registrar could strike the case out of the list or refer it to the List Judge. Case management conducted by the registrar was to include:

- identification and referral of long cases to a separate list for case management;
- referral of appropriate cases to arbitration;
- provision of directions to cases at a Directions Hearing on issues such as the exchange of reports, furnishing of particulars and preparation of and calculation of economic loss components;

- referral of cases, where necessary, to the Duty Judge or Master for determination;
- appointment of dates for further Directions Hearings as may be required; and
- placing cases in a list if they failed to proceed promptly to a hearing. A case put in this "Dormant Cases List" could be restored by filing an affidavit of readiness to proceed.

A number of changes occurred in the Common Law Division during the time of Practice Note 68. In 1992 and 1993 two "Special Sittings" programs were conducted. The Special Sittings were intended to reduce the number of cases in the backlog by culling the oldest cases from the General List. Also, on 1 July 1993, the jurisdictional limit of the District Court was increased from $100,000 to $250,000. This was also intended to decrease the caseload of the Common Law Division.

While the Court considered ACM to have been successful in reducing the backlog of cases in the Division, and thereby reducing case delay, it had "observed problems in its operation and some intrinsic disadvantages".[29] Again, the Court faced the problem that the pace of litigation was predominantly in the hands of practitioners. This realisation resulted in a decision to refine Practice Note 68, and DCM is considered to be this refinement. Introduced by Practice Note 81, DCM became applicable to all cases filed in the Common Law Division on and after 31 January 1994. As far as the Court is concerned, DCM "... is a refinement of case management principles that have been operating in the Supreme Court for a number of years and thus has been designed to overcome perceived shortcomings with earlier attempts at case management".[30] A full description of the DCM program is provided in Section 3.

2.2 Program Development: The Evolution and Modification of DCM

2.2.1 Program Evolution

The DCM program underwent a considerably long period of development. The principles of DCM have their origin in the Common Law Delay Reduction Committee report submitted in September 1988. In the report Justice Wood identified a need to differentiate cases according to management needs and to treat them differently on that basis.[31]

In February 1992, judicial and administrative officers from the Supreme Court attended a national conference convened by the National Centre for Court Administration and sponsored by the Australian Institute for Judicial Administration (AIJA). At the conference, court staff were directed to design a delay reduction program. Their draft scheme laid the foundation of the DCM program as it stands today.

Over the following six months, the draft DCM proposal was refined by key court personnel who, in September 1992, presented it as an alternative at the Common Law Division Delay Reduction Conference. The proposal was well received at the conference, and a report was produced detailing recommendations for procedures for DCM in all civil and criminal matters in the Common Law Division. The recommendations set a time goal for the overall time from case commencement to disposition, together with time limited procedures designed to achieve the ultimate time goal. The goal for civil cases was to take no longer than 18 months from commencement to disposition. The DCM proposal outlined at the September conference in 1992 is similar in concept to that set out in Practice Note 81, although the detail now differs considerably from that originally proposed.

The Court introduced the concept of DCM and its intended mode of operation to representatives of the legal profession at a meeting of the Common Law Delay Reduction Committee on 14 October 1992. The intended date of program commencement was 1 July 1993, coinciding with the increased jurisdictional limit of the District Court. In March 1993 a conference[32] provided the Court with a forum in which to introduce DCM to the legal profession more generally.

The first formalised draft version of the operation of DCM was completed in April 1993. In June 1993, the Supreme Court issued the draft (Practice Note A93) to the Bar Association and the Law Society. Each organisation considered the draft which was then discussed in detail at a meeting of the Common Law Delay Reduction Committee held on 7 June 1993.

Following expressions of concern about program features by the representatives of the Law Society and the Bar Association who sit on the Committee, the draft Practice Note underwent two revisions before the final form was reached. These occurred in July and October 1993. Table 2.1 provides a chronology of the main events which took place during the development of the DCM program.

The ultimate responsibility for the design of the DCM program lies with the Supreme Court. Input was sought from the Law Society and the Bar Association only after a draft version of the Practice Note was completed. Therefore, the role played by the profession during program development can be described as being reactive rather than interactive.

The level of input the Court sought from the legal profession during program development was a topic raised during the interviews. Key court informants acknowledged that input from the legal profession during program development was limited to providing comment on the program design. This was however considered to be appropriate, as input from the profession prior to this stage would, it was argued, have been of limited value. This was because the program was designed to meet the needs of the Court first and foremost.

Table 2.1. Chronology of major events in the development of the DCM program

Date	Event
September 1988	Report of the Common Law Delay Reduction Committee introduces the concept of differential management of cases
February 1992	Staff of the Court design a delay reduction program which forms the foundation of the DCM program
September 1992	DCM proposal presented at the Supreme Court's Common Law Division Delay Reduction Conference
October 1992	The concept and intended operation of DCM introduced to the legal profession through representatives on the Common Law Delay Reduction Committee
March 1993	The concept and intended operation of DCM introduced to the legal profession at a conference
April 1993	First formalised draft of the DCM Practice Note is completed and distributed to the Law Society and the Bar Association
July 1993	DCM draft Practice Note is amended to incorporate concerns raised by the Law Society and the Bar Association
October 1993	DCM draft undergoes further revision to incorporate concerns of the Law Society and the Bar Association

There were conflicting views about the level of consultation from the practitioners themselves. Most believed that consultation between the Court and the profession had been adequate. This opinion was based on the fact that various committees were given the opportunity to review and comment on the draft Practice Notes. These practitioners also considered the consultation process to have been "fair", as the Court had considered modifications suggested by the profession and had incorporated some of these into the final form of the DCM Practice Note.

In contrast to this, some practitioners considered that the level of input from the profession was "limited". They argued that although the Court had consulted with various committees about the draft Practice Notes, there had been no discussion about whether DCM should be introduced nor about the elements which the program should contain. As one solicitor stated, while DCM may "suit the purposes of the Court it does not suit those of the people who use it".

2.2.2 Program Modification

As noted above, the DCM Practice Note underwent two revisions prior to its final form. The revised versions of the draft incorporated recommendations for change made by the legal profession. This section outlines the major changes which were made to the program. A full description of the program is provided in Section 3.

The commencement of DCM

The Court intended DCM to apply to cases from commencement, by requiring solicitors to provide detailed case information at the time of filing. Solicitors were opposed to this because "it is often not known at the early stages whether a matter will result in litigation and therefore, it is not desirable to have to prepare all the necessary information for filing with the Statement of Claim". Also because "it is not possible to tell at an early stage whether injuries are serious enough for the matter to be commenced in the Supreme Court. Thus, if court requirements differed for the two [jurisdictions] a solicitor would not know what material to collect and how to prepare".[33]

In response, the Court removed from the draft Practice Note the requirement which would prevent the filing of a Statement of Claim until documentation necessary for DCM had been prepared. Included in its place was provision for a 12 month period within which solicitors had to prepare and file documentation required for DCM.

Case management

The Court intended to individually manage all cases eligible for inclusion in the DCM program, and it was a requirement in the draft Practice Note that all cases appear before the Court to receive tailored directions. The Law Society argued that not all cases require individual case management, and suggested that the Court introduce a means by which "run of the mill" cases could receive uniform directions, without having to appear before the Court. A reduction in the number of court appearances, it was argued, would also reduce litigation costs. The Court complied with this request, and made an allowance in the Practice Note for solicitors to decide whether their cases required individual case management or could receive uniform directions.

The date of program commencement

In October 1992, the first time DCM was introduced to the profession, the practicality of commencing the program on 1 July 1993 was questioned. Although no documentation was available pertaining to the issue of timing, by the time the initial draft proposal was discussed on 7 June 1993, the Court had postponed the commencement of the program until October 1993. At the June meeting, the Law Society again expressed concern about the intended date of implementation, suggesting that commencement be further postponed to "... ensure that as many practitioners as possible could receive information and education about the new system". In response, the Court postponed the introduction of the program to January 1994.

2.3 Program Debate

Any change to a traditional system of operation is likely to meet with some opposition from the major stakeholders. The introduction of DCM represented, to most, a significant change in the manner of processing litigation. As Noble has stated: "Judges, law professors and lawyers, in particular, are wary about the effect of these approaches on the rule of law, due process and adjudicative justice. Court administrators, by contrast, see these reforms as firmly rooted in justice."[34]

Considerable debate surrounded the introduction of the DCM program, much of which began during the revision period of the draft Practice Notes. The Law Society and the Bar Association, despite changes which were incorporated into the Practice Note, were opposed to the detail of it and resolved to oppose its introduction. In contrast to this, the program was met with approval by members of the insurance industry. This section draws on information from institutional records and from the interviews to describe the debate. It begins by providing an account of the arguments for DCM.

2.3.1 Arguments for DCM: The Court and the Insurers

The Court had three main arguments in favour of a program of DCM. The primary argument was that DCM would reduce the time and concomitant cost of litigation. It was believed that this could only be achieved through a change in "local legal culture".[35] The Court adopted the philosophy that it was only through court control over case processing that expeditious case processing could be achieved, and through DCM the Court sought to remove the control over the pace of litigation from the practitioners. As stated by a representative from the Supreme Court: "Most decisions are made by low level managers and relatively inexperienced practitioners, who continue to play the game according to an ethos which is dated and inappropriate to the present environment of limited resources in the Court".[36]

Informants from the Court also highlighted the potential cost saving DCM would have for the Court. This, it was believed, would result from there being a reduction in the number of appearances per case and in the number of cases requiring hearing, and through those which do go to a hearing being better prepared and requiring less court time.

The second argument for DCM was that not all cases coming before the Court are the same. Therefore, they should be treated differentially, and according to individual case needs. Over 90% of cases in the Common Law Division settle on an out-of-court basis. In view of this, it must be asked why all cases are processed as though they will go to trial, and on a simple "first come first served" basis. Thus, it was argued that the speed and method of case disposition should depend on the actual resource needs and management requirements of the case, rather than on the order in which the cases have been filed.

The third argument for DCM was that it would standardise procedures and bring with it a greater predictability to litigation. Thus, DCM would reduce the uncertainty which surrounded the process of litigation under previous systems.

The Insurers

On 15 February 1994, the General Manager of the Motor Accidents Authority (MAA) corresponded with its licensed insurers asking for their views on the likely impact of DCM, and some indication of the likely costs and savings involved in the implementation of the program. The CJRC was privy to the responses of 14 of the insurers.

All insurers were in favour of the introduction of DCM. The adage "time is money" was used by one to describe the potential effect of DCM on the cost of litigation, and this belief was echoed by all others. The belief was that early settlement would result in cost savings for both parties through savings in administration costs, legal fees and interest payments.

A number of insurers sought the advice of their solicitors before responding to the request made by the MAA. The insurers indicated that the solicitors were best able to assess the potential impact of DCM as they were the "hands on" users of the system. All of these solicitors were supportive of DCM, seeing potential cost savings through early settlement. A number did however indicate that the cost for cases operating under uniform directions could increase due to the requirement to provide written statements of oral evidence on which the parties intend to rely at hearing. This additional cost however would not be incurred if cases settled before this became a requirement.

One insurer indicated another area in which defendant cost savings might be had. It was suggested that there is a connection between case duration and case outcome, indicating that the longer a case goes for, the greater is the amount awarded. Thus if DCM promotes earlier settlement then insurers may expect savings due to earlier (and lower) awards. This issue is addressed from the perspective of the legal practitioners in Section 5.

2.3.2 Arguments Against DCM: The Legal Profession

As noted above, the Law Society and the Bar Association were opposed to the introduction of DCM. In direct contrast to the arguments the Court and the insurers used for DCM, the legal profession argued that:

- DCM was inappropriate;
- DCM was not necessary;
- DCM would place additional burdens on solicitors; and
- DCM would increase litigants' costs.

DCM was inappropriate

From the time the DCM program was introduced to the Common Law Delay Reduction Committee, the representatives of the Law Society and the Bar Association queried its philosophy. First, in contrast to the belief of the Court, they believed there was no need to change the legal culture. It has been shown that traditionally case management, and through this the pace of litigation, was in the hands of the practitioners.[37] It was argued that the Court was not in the best position to determine the requirements of a case and to set the appropriate timetable. Instead, litigants and their legal representatives are the best judges of the speed at which a case should progress as only they have the knowledge which is necessary to determine the most suitable pace.

Second, the profession was unconvinced that such close case management by the Court could reduce delay. The real issue, they argued, was the need to increase the number of judges to hear civil cases in the Common Law Division. DCM therefore was considered as a "second best" system.

DCM was not necessary

The profession also queried the necessity of introducing a new system of case management. It was argued that the DCM proposal was formulated without taking into consideration the recent developments which had occurred in the Common Law Division. Therefore, the introduction of DCM was redundant.[38]

The first development was the introduction of the WorkCover legislation (1987) and the Motor Accidents Act (1989), both of which included the legislative stipulation of thresholds and caps in relation to damages as well as self imposed time limits for the commencement of proceedings.[39] The Motor Accidents Act, it was suggested further, already had a focus on the quick resolution of claims. Second, attention was drawn to the Special Sittings programs the Court had conducted, which had "substantially reduced the backlog in the division".[40] Although not stated explicitly, the presumption was that a reduction in the backlog would enable the Court to deal with new filings more expeditiously. Third, it was noted that, with the increased jurisdictional limit of the District Court, the Supreme Court would have a diminishing role in damages matters at any rate.[41]

DCM would place additional burdens on solicitors

The profession claimed that DCM introduced a system which was unnecessarily complex and that the complexity would be counter-productive to efficient litigation.[42] It was argued that the complex nature of DCM would reduce the ability of senior solicitors to delegate work, which would, in turn, reduce the number of matters which firms could take on.

This burden was considered to be of particular detriment to small, suburban and country practices, due to solicitors in these practices having fewer resources with

which to conduct litigation. Although DCM applies only to the Sydney registry, it was argued that there are a considerable number of cases commenced in the Sydney registry by country solicitors, and a considerable number which are transferred to Sydney for various reasons.[43] It was argued generally that DCM would introduce procedural burdens which the larger city firms would have systems in place to handle, while smaller firms would not.[44]

Another concern raised was that small firms may in fact be excluded from Supreme Court matters as a result of the introduction of DCM. It was argued that it may be too difficult for them to meet the deadlines and increased demands which such a system of case management would introduce.

DCM would increase the cost of litigation

The main platform used by representatives of the legal profession to oppose the introduction of DCM was that it would increase the cost of litigation. The issue of costs was also one of the first issues raised in opposition to the program at the Common Law Delay Reduction Committee meeting in September 1993.

The suggestion that costs would increase was based on three assumptions. The first was that professional costs would increase due to additional documentation and procedural requirements. Second, it was believed that the emphasis of the program on early case preparation would result in solicitors having to back-track over work at a later date. This would increase not only solicitor costs, but also those for counsel, experts and reports. Third, it was argued that the inability of senior practitioners to delegate (described above) would increase costs. The costs associated with the first and last of these assumptions were considered to be particularly relevant to suburban and country solicitors, who have further to travel to attend the Court.[45]

The issue of increased costs was believed to have ramifications for access to justice. It was argued that access to the Supreme Court would be limited, particularly in personal injuries matters. One example given was cases in which the plaintiffs had little money and would previously have been able to rely on their solicitor to carry them until judgement. It was argued that the costs under DCM would be so extensive that solicitors would not be able to provide this service, which would then prohibit the plaintiff from litigation except by way of litigation lending (a very expensive form of finance).[46]

In late October 1993 the Law Society recommended that a working party be established to study the provisions of the Practice Note and its implications before it was implemented. The Law Society also questioned whether a Practice Note was a suitable vehicle to introduce reforms of such a wide ranging nature. In December 1993, the Society commissioned a firm of legal costs consultants to compare the costs of conducting three typical common law actions in accordance with Practice Note 68 and the DCM procedure.[47] The results of that report suggested that the

costs for both plaintiffs and defendants under DCM would be "significantly increased". In response, the Court commissioned its own costs analysis.[48] The results of these two analyses were diametrically opposed.

The Law Society, in particular, launched a fairly vigorous campaign against the introduction of the program. Letters were sent to all regional law societies explaining the potential negative effects the program could have. It also published the results of its commissioned costs analysis in a Law Society Caveat in early 1994.

2.3.3 Why was the Profession Opposed to DCM?

Given the opposition to the introduction of DCM from the legal profession, it is of interest to consider why this may have been the case. There are three points worthy of consideration:

- professional opposition to court management;
- the process used to inform practitioners about DCM; and
- professional involvement during program development.

Professional opposition to court management

The first point is the profession's general opposition to court control and management of the process of litigation. As far back as 1991 it was noted that "...the Court has not had the full support of individual practitioners, and that one of the greatest hurdles is to convince practitioners of the benefits to them of delay reduction and of case management".[49] Thus, opposition to a court initiative which sought to remove the control over the pace of litigation from the hands of practitioners was, perhaps, to be expected.

The process used to inform practitioners about DCM

The second point is whether the Court provided practitioners with adequate information and education about the program. This could have a bearing on professional understanding of program aims and method of operation. It is also relevant as it was one reason given by the Law Society for the need to delay the introduction of the program. As part of the interview program, practitioners were asked whether they believed the education offered by the Court about DCM was adequate. This question received a mixed response.

Some practitioners indicated that the Court had provided enough information through seminars. Others stated that given that the Practice Note was so detailed, it reduced the need for an extensive education process. In contrast to this, some practitioners indicated a belief that the education process was inadequate. One of the main issues raised concerning this was that the Court failed to provide

precedents for solicitors to use as a basis for preparing the documentation required for DCM. As one barrister indicated, such information is vital if the Court is going to receive the type and extent of information it requires from solicitors for DCM to operate optimally.

During the interviews, a court officer indicated a belief that the profession would have been better served by a more extensive education process. This was due to there being a "considerable number" of legal professionals who did not fully understand the concept or operation of DCM. However, it was said a more extensive education program was simply not possible at the time due to resource and funding issues.

Professional involvement during program development

The third consideration is that the legal profession may not have been sufficiently consulted during the development of the DCM program. Perhaps the opposition of the Law Society and the Bar Association can be explained using the words of Solomon, who is regarded as one of the "key American architects of case management".

> *Changes to a case flow management system will undoubtedly meet resistance from the organised bar unless representatives have participated in planning. Participation does not mean simply offering the opportunity to comment on new rules that the court has adopted or inviting the bar to send one representative to serve on a planning committee. A better model is involvement of a substantial number of lawyers along with the judge and administrators on task forces responsible for developing monitoring and evaluating case flow reform.*[50]

2.4 Summary

While the DCM program is considered to be an initiative of the Supreme Court, it is given support by the Department of the Attorney General. The interviews revealed that the level of Government support for DCM has remained strong. A major benefit of the program, from the view point of the Government, was considered to be that it "represents that the judges are taking a greater role in the administration of the Court". The success of such a program is considered to have enormous benefits for not only the Court and its users, but for the Government as well.

In response to concerns raised by the profession, the Court incorporated a number of changes into the DCM Practice Note. This issue was raised during the key informant interviews. It was found that both the Court and the profession believed that they had made compromises on the final version, and neither was entirely

satisfied with it. While the profession considered that the Court had addressed "many of the anomalies which had been identified",[51] they remained opposed to the detail of the Practice Note and resolved to oppose its introduction. The Court, on the other hand, viewed the changes as constituting a "watering down"[52] of the original DCM proposal. The result of this was considered to be a less effective scheme than the one which had been intended for introduction.

Considerable debate surrounded the introduction of the DCM program. The Court argued that DCM would bring with it advantages for the speed, cost and predictability of litigation, as well as for the appropriate management of cases. A number of insurers were also found to have been in favour of the introduction of the program. In contrast to this, the representatives of the legal profession argued that DCM was inappropriate, unnecessary, would create burdens for solicitors and would increase the cost of litigation. The various issues raised in the early debate about DCM can ultimately be addressed only in an impact evaluation.

This section has provided the background and development of the DCM program implemented in the Common Law Division of the Supreme Court. The following section will describe the goals of the program, and key features of its design.

21 The Hon. Justice LT Olsen, 1993, "Civil Caseflow Management in the Supreme Court of South Australia – Some Winds of Change", *Journal of Judicial Administration*, 3, pp. 3–26.

22 The Hon. Justice LT Olsen, p. 5, see note 21.

23 Coopers & Lybrand, WD Scott, 1989, *Report on a Review of the New South Wales Court System*, May, unpublished.

24 Coopers & Lybrand, WD Scott, p. 91, see note 23.

25 A Callover is held to determine whether a case is suitable for trial or arbitration. An Issues and Listing Conference (ILC) is held to discuss settlement or to set a case down for trial if ready.

26 The Hon. Mr Justice JRT Wood & Soden, W, see note 14.

27 The Hon. Mr Justice JRT Wood & Soden, W, see note 14.

28 Soden, W, 1992, "The Supreme Court of New South Wales", paper presented at AIJA conference *Case Management and Delay Reduction in the Higher Courts*, 29–30 November, p. 201.

29 Soden, W, 1994, *Differential Case Management Seminar*, held for the Young Lawyers Association, 29 March, p. 4.

30 Court administrator, CJRC interviews.

31 The Hon. Mr Justice JRT Wood, 1988, "Report of the Committee on the Supreme Court Delay Reduction and Caseflow Management Program", paper presented at the *Supreme Court of New South Wales Delay Reduction Project Seminar*, 17 September, unpublished.

32 Soden, W, 1993, "Case Management in the Common Law Division of the Supreme Court – New Procedures", *A State Legal Conference '93: Your Solution to Continuing Legal Education*, Sheraton Wentworth Hotel, 25 March.

33 Information from Court records, dated March 1992.

34 Noble, RA, 1992, "Access to Civil Justice: Administrative Reflections from New Jersey", *Rutgers Law Review*, 45, p. 51.

35 Legal culture has been described as being the informal norms, expectations and behaviours of practitioners, and the relationship between the judiciary and the legal profession. See Mahoney, B, et.al., note 8.

36 The Hon Mr Justice JRT Wood, & Soden, W, see note 14, p. 50.

37 Worthington, D, 1991, *The Pace of Litigation in New South Wales*, Civil Justice Research Centre, Sydney.

38 Information from Supreme Court records.

39 Information from Law Society records.

40 Information from Supreme Court records.

41 Information from Law Society records.

42 Information from Supreme Court records.

43 The Law Society of New South Wales, 1994, "Differential Case Management", *Caveat, A Law Society Bulletin*, No. 193, 6 January.

44 Information from Supreme Court records.

45 The Law Society of New South Wales, see note 43.

46 Information from Bar Association records.

47 Pattison Hardman, 1993, Report commissioned by the Law Society, unpublished.

48 Mahlab, 1993, *(DCM) Legal Costs Analysis Differential Case Management*, commissioned by the Supreme Court, unpublished.

49 The Hon. Mr Justice JRT Wood & Soden, W, see note 14.

50 Miles, J, 1994, "Unnecessary Tinkering in the Production Line – or Should Case Control Remain with Litigants?", *Law Talk*, 423, 27, p. 31.

51 Information from Supreme Court records.

52 Information from Supreme Court records.

3

A Description of the Supreme Court's DCM Program

This section describes the DCM program designed by the Supreme Court of New South Wales. First, it provides details of the Common Law Division in which the program has been implemented and the key features of the programs that were in place prior to the introduction of DCM (Practice Notes 59 and 68). The DCM program is then examined in detail including the time period covered by the program, the cases targeted, the key features and the administrative arrangements associated with the program.

3.1 The Common Law Division

The Common Law Division is comprised of the Chief Judge at Common Law and 19 other judges. Generally, however, these judges deal with criminal trial work as a priority.[53] There are two masters in the Division, who assist with the disposition of cases. The registrars of the Court also have a limited jurisdiction to assist the judges and the masters with the disposition of cases and have been taking an increasing role in case management. The registry staff of the Court provide administrative support to the Division. This includes processing documents filed by parties, maintaining records of proceedings and listing and case management operations.

Civil cases in the Common Law Division include claims for personal injury that arise out of motor vehicle and industrial accidents, out of professional negligence, or against occupiers of property. They also include claims for other events such as possession of land, breaches of contract, professional negligence (non personal injury) and fraud. Generally, civil cases are commenced by either Statement of Claim or Summons.

3.2 Key Features of Previous Programs

While the previous programs operating under Practice Notes 59 and 68 were described earlier, the key features of these programs are described here in more

detail to facilitate comparison with the DCM program. The previous programs were characterised by the uniform treatment given to all cases. Court intervention did not occur until a late stage in the litigation process. No time goals for the disposition of cases or the timing of events were in place. Figure 3.1 compares the caseflow process of Practice Notes 59 and 68.

Figure 3.1. Caseflow under Practice Notes 59 and 68

Statement of Claim	→	Notice to Set Down	→	Callover	→	Issues and Listing Conference	→	Hearing
Statement of Claim	→	Notice to Set Down	→	Directions Hearing	→	Issues and Listing Conference	→	Hearing

In both programs, court intervention did not commence until the plaintiff filed the Notice to Set Down for Trial that certified that the case was ready to proceed. No time limit was set for the filing of the document. Once the Notice to Set Down was filed, cases were placed in the General List. The Court dealt with cases in this List on a "first in first served" basis and held a Callover (Practice Note 59) or Directions Hearing (Practice Note 68). Often this was not held until several years after the filing of the Notice to Set Down.[54] No firm policy on adjournments existed and often cases had many Callovers, Directions Hearings or Issues and Listing Conferences (ILCs). Registrars were responsible for conducting the Callovers, Directions Hearings and ILCs. Judges usually did not become involved until the hearing.

Hearing dates were allocated at the ILC where possible. However, often the Court could not accurately estimate the availability of its judicial resources at this stage. As a result, in 1993, the Holding List was introduced. A case is placed in the Holding List at the ILC if ready for hearing. A Call-up is then held about one month before the likely hearing to allocate a hearing date.

Immediately prior to the introduction of DCM the pending caseload of the Common Law Division was 4334.[55] Practice Note 68 still applies to these cases and hence this program is running concurrently with the DCM program.

3.3 The DCM Program

The DCM program was introduced by Practice Note 81 (supplied in Appendix 3). It modified the existing case management procedures set out under Practice Note 68. In effect it constitutes a more systematic and formalised process of case management and involves greater monitoring of case progress. The program is a comprehensive system made up of a collection of procedures.

The court procedures in DCM have been adapted and streamlined from the previous systems. The *Status Conference* was introduced to replace numerous Directions Hearings. The *Final Conference* replaces the Issues and Listing Conference.

The review of the Supreme Court records made it possible to identify the main goals and key features of the DCM program. These are outlined below.

3.3.1 The Time Period Covered by the Program

Practice Note 81 covers the time period from 31 January 1994 to 1 January 1996. If not renewed the program will terminate due to a sunset provision in the Practice Note.[56]

3.4 The Cases Targeted by the Program

Practice Note 81 applies to civil cases *commenced* in the Common Law Division or *transferred* to the Division between 31 January 1994 and 1 January 1996, or to any other cases that the Court directs it apply to. It does not apply to defamation cases, cases in the Construction List or cases to be heard outside Sydney.[57]

The Practice Note differentiates between *ordinary*, *default* and *other* types of proceedings. *Ordinary* proceedings involve a claim for an unquantified amount of damages.[58] They usually include claims for personal injury, professional negligence, fraud or breach of contract (Section 3.1).

Default proceedings involve a claim for a specific sum of money or for possession of land. Ordinarily these cases are undefended and are dealt with by default judgement.[59] Minimal court involvement is required. However, if the case is defended, then the DCM case management procedures apply.[60]

Other types of proceedings include those transferred to DCM and those commenced by summons. Summons cases are usually listed before the Court in an Applications List. DCM case management procedures will not normally apply to summons cases.

3.5 The Goals of the DCM Program

The DCM program incorporates goals that are common to all courts and systems: to ensure equal access to court services, to contain the cost of litigation and to ensure that cases are resolved justly and efficiently. In addition the DCM program has three main goals:

- to achieve earlier settlement of cases;
- to increase efficient usage of court resources; and
- to reduce the time from case commencement to disposition.

3.6 Key Features of the DCM Program

Four key features of the DCM program were designed to achieve the goals described above. These were:

- early court intervention;
- differential treatment of cases;
- use of time goals and timetables; and
- control of adjournments.

3.6.1 Early Court Intervention

In contrast to the previous programs, DCM was designed so court intervention would occur at an early stage in all cases. To achieve early intervention, the Court requires that the parties provide detailed information about the case, in the form of *DCM Documents*, at an early stage.

The DCM Documents should include the following information:

- a summary of the case, including a concise *narrative of the facts*;
- disclosure of any relevant investigation reports, other claims and prior injuries;
- any possible additional parties;
- a statement about whether interrogatories are necessary; and
- justification for why the case is being brought in the Supreme Court.

The Court intended that in *ordinary* proceedings the plaintiff's DCM Documents would be filed at the commencement of the case. However, it allowed a period of 12 months in which the documents could be filed.[61] Defendants are required to file the DCM Documents once notified of a Status Conference (described below).[62]

Cases are placed in the *Not Ready List* until the DCM Documents are filed. The Court is able to monitor the cases in the Not Ready List and issues a reminder notice to the plaintiff's solicitor after six months.

If the plaintiff does not file the DCM Documents after 12 months, the case is called up before the List Judge. The Judge will "make orders and give directions appropriate to achieving the just, efficient and cheap disposal of the proceedings, including, where necessary, an order dismissing them."[63]

Once the DCM Documents have been filed the Court holds a *Status Conference*, normally after 65 sitting days (approximately 13 weeks).[64] The purpose of the Status Conference is to conduct an in-depth review of the case to identify the real issues and give directions to resolve the cases as quickly and efficiently as possible.[65] The judicial officer also encourages the parties to turn their minds to settlement and methods of Alternative Dispute Resolution (ADR). Alternatively, the plaintiff may elect the *Standard Track*. In this case the Court does not hold a Status Conference, but rather issues a set of uniform directions to the parties.

Court intervention commences at an earlier stage in *other* types of proceedings, as it is not dependent on the filing of DCM Documents. For *default* proceedings the DCM case management procedures only apply to defended cases. The Court holds a Status Conference normally ten sitting days after a defence or cross claim has been filed. For *transfer* cases the Court holds a Status Conference normally ten sitting days after the case transfers in. *Summons* cases are usually listed before the Court in an Applications List. A Status Conference is appointed after 14 days only if necessary. In these other types of proceedings the Court directs the parties to file the DCM Documents at the Status Conference.[66]

Early court intervention is designed to ensure that cases cannot linger dormant in the system indefinitely. It also means that more information should be exchanged up front, through the DCM Documents. As a result the Court and the parties should be more aware of the real issues of the case at an earlier stage. Case preparation should therefore be more focussed and efficient and settlement more likely. The Court can encourage the parties to turn their minds to settlement and the use of ADR procedures at an early stage.

Through commencing intervention at an early stage the Court hopes to achieve its program goals of reducing the time to disposition and producing early settlements.

3.6.2 Differential Treatment of Cases

Under the previous systems, the Court treated all cases alike. A key feature of the DCM program is that it differentiates between various types of cases according to their "complexity and need for pre-trial activity".[67]

In order to do this the Court has designed a system of case management tracks that differ in terms of their time frames and the level of case management provided. Three case management tracks were designed – the *Individual Track*, the *Special Track* and the *Standard Track*.

The Individual Track

The Individual Track was designed so that cases could receive individualised management. At the Status Conference the Court, in consultation with the parties, decides on the steps and time needed to prepare the case. The steps and time will vary case by case. In this way case management is tailored to the specific needs of the case. The Court anticipated that most cases on the Individual Track would only require one Status Conference and one Final Conference.[68]

The Special Track

The Special Track was designed for cases that require more intensive management, such as those that involve unusual complexity or urgency. For example, cases where the plaintiff has a short life expectancy, class actions and test cases where a decision on liability in one case will assist the early settlement of other proceedings. As with the Individual Track, the steps and the time allowed for case preparation are tailored to the needs of the case. Cases on the Special Track, however, may be judge-managed and allocated to a trial judge at the Status Conference. Several Status Conferences may be required and the judge may adjourn the Status Conference from time to time to monitor case progress and give further directions as the case develops.[69] A Final Conference is held if necessary or the judge may place the case straight in the Holding List once satisfied that it is ready for trial.

The Standard Track

The Standard Track was designed for cases where the parties wish to opt out of individualised case management. The plaintiff must elect for this track at the time of filing the DCM Documents. Little management is provided by the Court to cases in this track. No Status Conference is held and instead the Court issues the parties with a set of uniform directions and a fixed time for case preparation. The Court does not actively intervene until the Final Conference.

In general, the case management track is decided by the Court and/or the parties. The plaintiff, upon filing the DCM Documents, has the option of electing the Standard Track or a Status Conference. At the Status Conference the Court, on the basis of the information provided in the DCM Documents and in consultation with the parties, decides on the appropriate case management track – either the Individual or Special Track.

The Court only allows cases to change tracks where defaults or difficulties have arisen which mean that the time frames specified in the track cannot be met.[70] As a result cases cannot transfer from the Special Track to the Individual Track.

The case management tracks were designed to allow cases to receive only the degree of management necessary. Tailoring directions according to the nature of cases should enable cases to be prepared efficiently, so only those steps that are truly necessary are completed. The tracks should also allow the Court to deal with cases on the basis of their readiness, rather than their order of filing. Cases that require less time for preparation can be dealt with first.

Through the use of the case management tracks the Court aims to achieve its program goal of efficient usage of court resources. More resources can be put into those cases that require them, and less into those that do not.

3.6.3 The Use of Time Goals and Timetables

Under previous systems no time goals for the disposition of cases existed. With the introduction of DCM, the Court has fixed a time goal of 18 months for the overall disposition of cases. This covers the period from the filing of the DCM Documents to disposition. To enable the time goal to be met, the Court has established time standards for the critical events in the litigation process.

Firm time limits for case preparation have been set in the *Individual* and *Standard* case management tracks. The Court fixes an appropriate time in the *Special Track* according to the needs of the case.[71] In the *Individual* and *Special Tracks*, the Court, in consultation with the parties, develops a timetable for case preparation. Cases on the *Standard Track* are issued with a uniform timetable. The Court gives directions for each step required and sets a date for the completion of each direction. A *Compliance Date* is set for the completion of all directions. This must meet the time standard set out for the track. The plaintiff is required to file a *Certificate of Compliance* on or before the Compliance Date to certify that the parties have complied with all directions.

The Court intended that the time limits set for case preparation would be firm, so while the parties may alter the individual directions by consent, they cannot alter the Compliance Date. This can only be altered by an application to the Court.[72]

Time standards are also set for the occurrence of key events in the DCM process – the Status Conference and Final Conference. The *Status Conference* is held 65 sitting days (approximately 13 weeks) after the DCM Documents are filed in ordinary proceedings or ten sitting days (approximately two weeks) after the defence or

cross claim is filed in default proceedings (see Section 3.7.1). The *Final Conference* is held 15 sitting days (approximately three weeks) after the Certificate of Compliance is filed.

The time standards set in the *Individual* and *Standard Tracks* are outlined in Table 3.1.

In the *Individual Track*, the timetable set for case preparation at the Status Conference should be no longer than 210 sitting days (approximately 42 weeks). In the *Standard Track* the uniform timetable is issued when the DCM Documents are filed and the track is elected. The timetable issued should be 275 sitting days in length (approximately 55 weeks).

The overall time standard from the filing of *DCM Documents* to the *Compliance Date* for the Standard Track is the same as that in the Individual Track (275 days). The difference, however, is that while cases on the Individual Track may proceed along the track in less than the specified time, cases on the Standard Track cannot. The solicitor is required to explain this fact to the plaintiff.

Table 3.1. The time standards in the case management tracks

	Individual Track	Standard Track
Status Conference to Compliance Date	210 sitting days (~ 42 weeks)	–
Filing of DCM Documents to Compliance Date	275 sitting days (~ 55 weeks)	275 sitting days (~ 55 weeks)
Filing of DCM Documents to Final Conference	290 sitting days (~ 58 weeks)	290 sitting days (~ 58 weeks)

Under the previous systems there was no mechanism for ensuring that parties complied with any directions given by the Court. The time goals and timetables introduced by DCM allow the Court to take a more rigorous approach to the monitoring of case progress and compliance with directions. Automatic reminder notices are sent to the parties prior to the Compliance Date. If the plaintiff does not file the Certificate of Compliance by the Compliance Date a *Default Conference* is held. The Default Conference is conducted by the List Judge 15 sitting days (approximately three weeks) after the Certificate of Compliance was due. The aim of the conference is to put the case back on track and to ensure that it can be finalised within the designated time frame. The judge will consider the conduct of the parties and the solicitors and make orders, which may include loss of priority, dismissal of the proceedings or costs orders if necessary.[73]

Through the setting of time goals and timetables for case preparation the Court aims to achieve its program goal of reducing the time to disposition.

3.6.4 Control of Adjournments

Under previous systems no firm policy on adjournments existed as cases frequently had many Callovers, Directions Hearings or ILCs. The DCM program incorporates a firm policy of minimisation of procedures and control of adjournments.[74]

The *Status Conference* was supposed to replace numerous Directions Hearings. It was envisaged in the program design that most cases would require no more than one Status Conference.[75] Only those cases on the Special Track that required close supervision were expected to require more Status Conferences. However, the Court recognised that the Status Conference may need to be adjourned in some circumstances to allow the parties time to comply with directions, additional parties to be joined or interlocutory applications to be dealt with.[76]

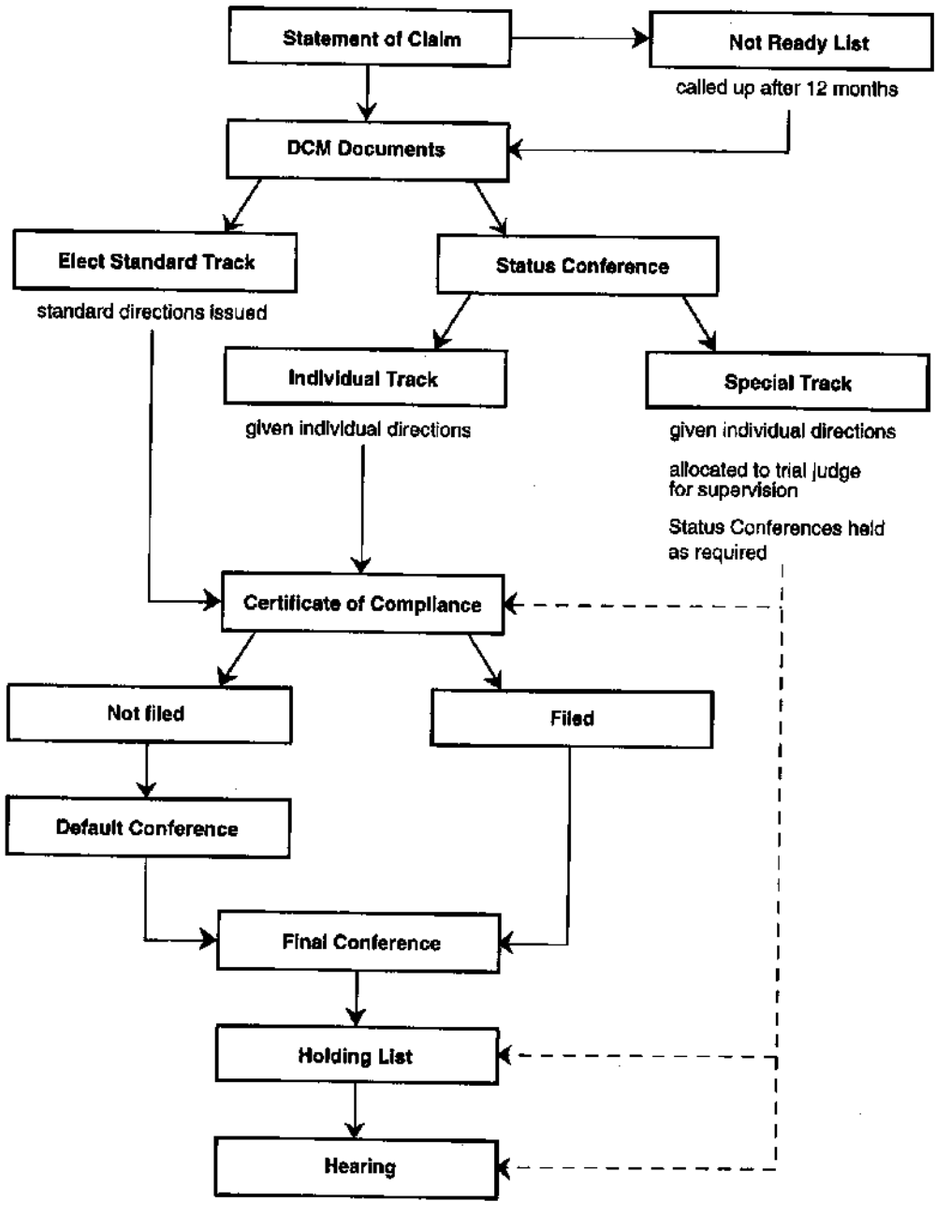
The *Final Conference* was intended to replace the ILC, the main purpose of which was to explore all possibility of settlement and ADR. In the program design it was expected that cases would require only one Final Conference as adequate time is given to prepare cases. The Final Conference was only to be adjourned in exceptional circumstances.[77]

DCM incorporates the *Holding List* system used in the previous system (refer to Section 3.2). Cases are placed in the Holding List at the Final Conference only if they are ready for hearing. Cases fixed for hearing are only adjourned if "special circumstances have arisen which could not have been foreseen".[78]

The use of timetables and case monitoring should mean that cases are adequately prepared at each stage and adjournments can be minimised. Through minimising procedures and adjournments the Court aims to achieve its program goals of using its judicial resources more efficiently and reducing the time to disposition.

The four features just described form the key features of the DCM program. In effect the DCM process is intended to create a timely and predictable path for litigation. The parties will know at an early stage what steps need to be completed, the date they need to be completed by and they can be guaranteed of a hearing within 18 months. Figure 3.2 illustrates the basic caseflow process for *ordinary* proceedings under DCM. The process for *other* types of proceedings – default, transfer and summons proceedings – is essentially the same. The only difference is the way in which the Status Conference is appointed.

Figure 3.2. Caseflow under DCM for ordinary proceedings



3.7 The Administration of the DCM Program

This section discusses the administration of the DCM program – the staff who were to be involved, the facilities required and the arrangements for overseeing the program.

3.7.1 Staff Involvement

The workload created by the introduction of the DCM program was to be distributed among the existing structure and staff of the Court. No new positions were to be created and several judges, including the List Judge, and registrars were to be responsible for the case management procedures. Their role was essentially similar to that of previous programs (see Section 3.2). However, the judges were to have a more formalised role. They were to conduct the Status Conferences, at least initially, the Default Conferences and the Callovers for cases that had been in the Not Ready List for over 12 months. The judges were also to be responsible for managing the Special Track cases. Some of these judicial officers studied the principles and application of caseflow management at the Centre for Court Policy and Administration at the University of Wollongong through the AIJA.[79] They were also provided with training on the DCM computer system.

Several of the Court registry staff were to be responsible for the administrative element of the program. In particular they were to be responsible for maintaining the computer system associated with DCM, coordinating the issue of reminder notices to the parties, listing operations and handling inquiries from the profession about the program. In addition, they were to have a new role to provide support in the court room to the judicial officers conducting the conferences.

The counter staff within the registry were to be responsible for processing the documents filed by the parties, as they were in previous systems. However, they were required to check the documents thoroughly and ensure that they were entered into the computer correctly so that court appearances could be triggered appropriately.[80]

3.7.2 Overseeing the Program

In early January 1994, the Supreme Court established a working party to "monitor the operations of DCM, and to make suggestions for its future". Membership of the committee consisted of judges and other staff of the Supreme Court, individual solicitors and barristers and representatives from the Insurance Council of Australia, the Department of Courts Administration and the CJRC. The committee was to meet quarterly to discuss program statistics, problems in the program and methods for resolving those problems.

3.7.3 The Facilities Required by the Program

The main facility required by the introduction of DCM was the computer system. The Court's existing computer system, COURTNET, was extended in order for the DCM program to be implemented effectively and to allow it to run more efficiently. As no personnel were added, the computer system modification was the only direct Court cost incurred to implement DCM.

The COURTNET system maintained a record of all cases filed in the Court and a record of proceedings for each case. It was modified to enable additional case information to be recorded, including track assignment, Compliance Dates and the outcomes of conferences. The new time standards outlined in the program design were incorporated into the system to ensure that the timetables set for case preparation did not exceed the specified times. This also enabled the computer to trigger the court appearances on the appropriate dates. For example, the computer triggers a Status Conference in ordinary proceedings 65 sitting days after the DCM Documents have been filed.

The computer system was also modified so that it could generate notices for the parties on the appropriate dates. These include notification of court appearances, reminders of approaching compliance dates and reminders to parties in the Not Ready List.

Computer terminals were installed in one court room to enable judicial officers and support staff to have immediate access to information on case status. A set of orders and directions was built into the system for use at conferences and for the uniform directions for the Standard Track. The directions and timetables given are recorded on the system and parties receive a print-out of their timetable at the conference.

The computer system was designed to be inflexible to ensure that DCM was implemented in accordance with the Practice Note. The program specifications were drawn up in line with program design to ensure time standards were enforced and case management procedures were followed correctly. The system constitutes a significant part of the way in which the Court monitors individual case progress. It also allows the Court to monitor and produce regular statistics about its caseload.

53 Supreme Court of New South Wales, 1993, *Annual Review.*

54 Soden, W, 1993, *Differential Case Management Seminar,* 14 December.

55 Supreme Court of New South Wales, see note 53.

56 Practice Note 81, Clause 6.

57 Practice Note 81, Clauses 3 & 4.

58 The Court specifies that claims for damages should not be quantified as the Court will assess the value of damages in monetary terms.

59 Bishop (1990) defines a default judgement as a "judgement obtained against a defendant who has failed to respond to the originating process issued by the plaintiff".

60 Practice Note 81, Clause 12.1.

61 Practice Note 81, Clause 10.1.

62 Practice Note 81, Clause 11.3.

63 Practice Note 81, Clause 23.2.

64 Sitting days are the "working days" of the Court. They exclude weekends, public holidays and Court vacations. In this report the approximate number of actual weeks is provided for the readers' reference.

65 Practice Note 81, Part 5.

66 Practice Note 81, Clause 4.1.

67 Practice Note 81, Clause 1.5.

68 The Hon, Mr Justice JRT Wood, 1993, *The Supreme Court of New South Wales, Differential Case Management – Common Law,* unpublished.

69 The Hon. Mr Justice JRT Wood, 1993, see note 68.

70 Practice Note 81, Clause 16.2; and Supreme Court of New South Wales, 1994, *Differential Case Management Information Guide.*

71 Practice Note 81, Part 5.

72 Soden, W, 1993, see note 54.

73 Practice Note 81, Clauses 19 & 19.2.

74 CJRC interviews.

75 The Hon. Mr Justice JRT Wood, 1993, see note 68; and Soden, W, 1993, see note 54.

76 Practice Note 81, Clause 15.3; and Soden, W, 1993, see note 54.

77 Practice Note 81, Clause 20.1.

78 Practice Note 81, Clause 28.

79 Soden, W, 1993, see note 54.

80 CJRC interviews.

4

DCM: The Program in Operation

The last section described the features of the DCM program designed by the Supreme Court of New South Wales. This section examines the operation of the program in its first year and considers whether the program was implemented as intended. The following questions are addressed:

- Did the program reach the cases that it targeted?
- Was early intervention implemented as intended?
- Was differential treatment of cases implemented as intended?
- Were the time goals and timetables implemented as intended?
- Was the control of adjournments implemented as intended?
- Was the program administered as intended?

The findings from the file based survey, observations of court procedures, informal discussions with court staff and key informant interviews are drawn upon to address these questions. However, it must be borne in mind that the findings reported in this section reflect only the first year of the program. The full impact of the program can only be evaluated when enough cases have passed through the system.

4.1 Did the Program Reach the Cases that it Targeted?

4.1.1 Overview

To address whether the DCM program reached the cases that it targeted we consider the characteristics of the cases in the DCM program in its first year.

We found that:

- The DCM case management procedures applied to 1280 cases which represents 29% of the total civil cases filed in the Common Law Division in 1994.

- The DCM caseload consisted of civil cases commenced in the Common Law Division, including ordinary, defended default and summons proceedings and civil cases transferred to the Division on or after 31 January 1994.
- The bulk of the DCM caseload were ordinary proceedings and involved claims for personal injuries.

Thus the findings indicated that the DCM program did reach the cases that it targeted in its first year. However, we also found that:

- The total number of cases commenced in the Common Law Division in 1994 had decreased substantially from previous years. As a result DCM may have a greater chance of succeeding than its predecessors.
- Many of the cases that transferred to the DCM program were quite old when they transferred. These cases, by definition, could never receive early court intervention under DCM and therefore may not be appropriate for its procedures.

Full details of these findings are now provided.

4.1.2 The Main Findings

The DCM caseload

In total, 4468 cases were commenced in or transferred to the Common Law Division in 1994.[81] The results of the file based survey indicated that the DCM case management procedures had applied to 1280 of these cases, which represents 29% of the total civil cases in the Division. The remainder of the cases in the Division consisted of undefended default and summons cases to which the DCM case management procedures did not apply (48%), and cases that were not targeted by the DCM program including defamation cases, cases in the Construction List and cases to be heard outside Sydney (23%).

The total number of cases commenced in the Common Law Division had decreased substantially from previous years. The average number of cases commenced per year in the period 1990–1993 was 7597.[82] The 4468 cases commenced in 1994 represents a decrease of 41% from that average.

The decrease in the number of filings was addressed in the interviews. Many key informants felt the decrease in the size of the caseload was not a direct result of the introduction of DCM, but was most likely due to the increase in the jurisdiction of the District Court or perhaps general recessionary factors. Although it was also suggested that some of the profession may have been deterred from filing in the Supreme Court by DCM.

The decrease in the number of filings has significant implications for the DCM program. DCM may have a greater chance of being successful than previous

programs as it has fewer cases to deal with. The size of the caseload has been "traditionally cited as the primary factor influencing the incidence of delay in litigation".[83] Thus to evaluate the impact of DCM it will be important to determine the effect DCM has on delay separately from the effects of the reduced caseload.

What types of cases were in the DCM program?

The types of cases in the DCM program in the first year are outlined in Table 4.1. The majority of the cases were *commenced* under DCM (89%). A large proportion of these were ordinary proceedings. A small proportion of cases were *transferred* to DCM (11%).

Table 4.1. The types of cases in the DCM program

Type of case	n	%
Commenced under DCM		
Ordinary proceedings	967	76
Default proceedings	157	12
Summons proceedings	16	1
Total	1140	89
Transferred to DCM	140	11
Total	**1280**	**100**

The transfer cases

As the table shows, 140 cases transferred to DCM. Of these, nearly half (47%) transferred from other courts. A further 21% of the cases transferred from other Divisions of the Supreme Court, mostly from the Commercial Division. Almost one third (32%) of the cases transferred to DCM had previously commenced in the Common Law Division, mostly in previous case management systems, but also in country registries of the Supreme Court.

The majority of the cases that transferred from other courts were from the District Court, while the remainder transferred from the Family Court of Australia and Supreme Courts in other states of Australia under Cross Vesting legislation.

The commencement dates of the cases transferred to DCM ranged from 1978 to 1994. Many of these were quite old when they transferred. Only 19% had commenced in 1994 and 24% had commenced in 1993. Fifty-seven percent had commenced in 1992 or earlier. One judicial officer indicated that some of these cases were ready or almost ready for trial when they transferred.

These transfer cases, being quite old, by definition, cannot receive early intervention like that called for by DCM, nor can they reach settlement at an early stage. These cases, therefore, may not be appropriate for the procedures of DCM. Serious consideration should be given to whether DCM should continue to apply to transfer cases. Indeed the Court began to limit the number of cases that could transfer to DCM towards the end of the first year, although this was more due to the number of cases in the program increasing, rather than to the nature of these cases.

What types of claims were involved?

Table 4.2 shows the types of claims involved in the DCM cases. Approximately two thirds of the cases involved claims for personal injuries. A substantial proportion of these arose out of motor vehicle accidents. The remaining third involved claims for other events such as possession of land, professional negligence, money claims, breach of contract and mixed claims.[84]

Table 4.2. Claim types in DCM cases

Claim type	n	%
Personal injury		
Industrial	198	15
Motor vehicle	346	27
Professional negligence	126	10
Occupier liability	81	6
Other*	110	9
Total	861	67
Other		
Possession	117	9
Professional negligence	50	4
Money claims	49	4
Breach of contract	119	9
Mixed (unliquidated/liquidated)	21	2
Other**	63	5
Total	419	33
Total	**1280**	**100**

* Includes compensation to relatives and other personal injuries.
** Includes fraud, declarations and other types of claims.

While 67% of the total DCM caseload involved claims for personal injury, most of these had *commenced* under DCM rather than *transferred* in. In fact the bulk of the DCM caseload consisted of personal injury cases that had *commenced* under DCM. They formed 61% of the total caseload.

The *transfer* cases had a slightly different mix to those commenced under DCM. While personal injury cases formed 69% of the cases *commenced* under DCM, they formed only 57% of those *transferred* in.

This section has shown that the DCM program did reach the cases that it targeted. The next sections will address whether the key features of the program have been implemented as intended.

4.2 Was Early Intervention Implemented as Intended?

4.2.1 Overview

To address whether early intervention was implemented as intended we consider the progress of the cases in DCM at the completion of the first 12 months of the program. This focuses on the timing of the Status Conferences, the cases in the Not Ready List, the filing of the DCM Documents and settlement and ADR. We also consider whether the Court made any changes to its early intervention strategies and any further possible modifications.

We found that:

- Where the plaintiff promptly filed the DCM Documents, or the defendant filed a defence in default proceedings, the Court intervened relatively quickly and held a Status Conference.[85]
- The Court's computer system enabled automatic reminders to be sent to plaintiffs in the Not Ready List who had not filed their DCM Documents. In addition the computer system maintained a record of the length of time cases had been in the Not Ready List so that they did not remain on the List for longer than 12 months before being called up.

These are significant moves towards early intervention. However, we also found that:

- On the whole, plaintiffs did not file the DCM Documents at commencement as the Court intended. About one half of the cases in the DCM program were in the Not Ready List at the time the case files were reviewed.[86] A considerable proportion of these had been in the List for nine months or more and thus almost a year had elapsed without active court intervention because DCM Documents had not been filed.

In fact, of the cases commenced in the first three months of the program, active court intervention had not commenced in just under half.

- Where the parties had filed the DCM Documents, key informants suggested that the information provided was not always adequate. As a result the Court and the parties were not as aware of the issues and the cases were not as prepared as the Court intended, and there was less chance of early settlement. Indeed few settlements had occurred in the first year of the program.

Thus we found that early intervention was not implemented entirely as intended. Full details of these findings are now provided.

4.2.2 The Main Findings

The progress of cases at the completion of the first 12 months of the program (January 1995) is outlined in Table 4.3. Most cases were in the early stages of the DCM process. One half of the DCM caseload was in the Not Ready List and 15% of the cases were awaiting a Status Conference and allocation to a track. Approximately one quarter of the cases were in a case management track. Only a small proportion of cases in the program (8%) had been finalised.

Table 4.3. The progress of cases in DCM

Case status as at January 1995	n	%
In the Not Ready List	634	50
Awaiting Status Conference/track allocation	197	15
In a case management track	328	26
Finalised	105	8
Other*	16	1
Total	**1280**	**100**

* Includes cases placed in the Holding List never having been placed in a track, "stayed" proceedings, "inactive" proceedings, and cases not allocated to a track with no conferences pending.

The fact that most cases were in the Not Ready List or awaiting a Status Conference indicates that in most cases the Court had not commenced active intervention. The only action the Court had taken in such cases was to send an automatic reminder notice to the plaintiff's solicitor to file the DCM Documents and maintain a record of the length of time cases had been in the Not Ready List, or appoint a Status Conference.

Status Conferences

In cases where the Court *had* commenced active intervention, that is in those that had had a Status Conference, this had taken place relatively quickly. The survey indicated that in *ordinary* proceedings where the plaintiff had applied for a Status Conference, the conference was held, on average, 96 days (14 weeks) after the DCM Documents were filed.[87] In *default* proceedings the Status Conference was held, on average, 23 days (three weeks) after the defendant filed a defence or cross claim.[88]

The Not Ready List

As Table 4.3 shows there were 634 cases or 50% of the DCM caseload in the Not Ready List at the completion of the first 12 months of the program. Further analysis revealed that in the majority of these cases the plaintiff had not filed the DCM Documents. However, in a small proportion of cases (6%) the Court had actually commenced intervention, having held at least one Status Conference, but had returned the cases to the Not Ready List as they were not ready to proceed. This practice, while not widespread, has significant implications for whether the 18 month time goal for disposition will be met as cases could potentially remain in the List for a further 12 months.

Three quarters of the cases in the Not Ready List were personal injury cases *commenced* under DCM. These cases were over represented in the Not Ready List as there were only 61% of these cases in the total DCM caseload (refer to Section 4.1.2). The remainder of the Not Ready List consisted of 22% non personal injury cases *commenced* under DCM, and 3% *transfer* cases. A substantial proportion of the cases in the List involved claims for motor vehicle accidents (27%).

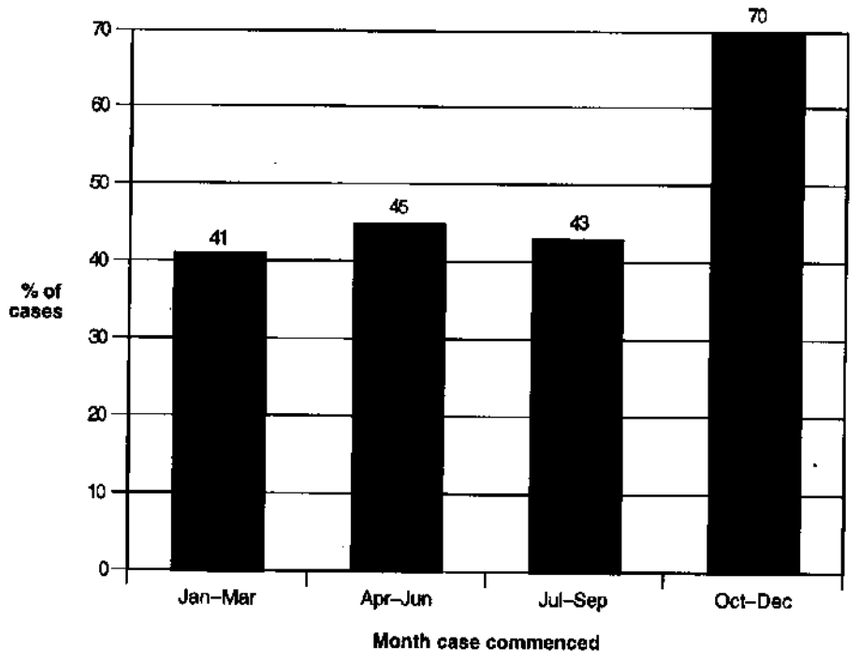
At the time of the study no cases had been in the Not Ready List for over 12 months because the program had only been in operation for a year. However, the average length of time that cases had spent in the List was 136 days (4.5 months). One third of the cases had been in the List for six months or more. Fourteen percent had been in the List for nine months or more.

Figure 4.1 shows the proportion of cases still in the Not Ready List by the months that cases were commenced in. Not surprisingly, 70% of the cases commenced in the last three months of 1994 (October – December) were still in the Not Ready

List. However, almost one half (41%) of the cases commenced in the first three months of 1994 (January – March) remained in the Not Ready List, as the parties had not filed the DCM Documents. Similarly, 45% of the cases commenced in the period April – June remained in the Not Ready List at the end of the first year.[89]

Therefore, because of the additional time spent in the Not Ready List, in many cases the time to disposition will be increased by several months at least over what was originally intended in the program design. This will be particularly so in personal injury cases which form the bulk of the List.

Figure 4.1. The proportion of cases in the Not Ready List by month commenced



The large number of cases in the Not Ready List was an issue addressed in the interviews. It brought a mixed response from key informants. Some court officers felt the cases were cause for concern. It was suggested that a backlog of cases was building up and the Court may not have adequate resources to handle these cases, either through the 12 month Callovers or through Status Conferences if the parties begin to file the DCM Documents. Other court officers, however, believed the cases did not constitute a problem as solicitors who chose to have their cases in the List were delaying only themselves.

The reasons for so many cases remaining in the Not Ready List are as yet unknown. Some key informants suggested the cases were a product of inefficient solicitors, or those not coping well with the new system. The most common reason suggested was the need for injury stabilisation, particularly in motor accident claims that were filed to meet statutory limitation periods, but were not yet ready to proceed. Indeed, it was shown that most cases in the Not Ready List were personal injury cases and many of these involved motor accident claims. However, the need for injury stabilisation as an explanation for delay remains an issue of contention.

The DCM Documents

In most of the 967 *ordinary* proceedings commenced in the first year of the program (see Table 4.1) the plaintiffs had not filed the DCM Documents, as indicated by the large number of cases in the Not Ready List. The survey indicated that in only 34% of the cases had the plaintiffs done so. Further, in most cases the plaintiff had not filed the DCM Documents at *commencement* as the Court had intended. In total, only 11% of plaintiffs had filed the documents at commencement of the case. On average, the plaintiffs filed the DCM Documents 64 days (2.1 months) after commencement, although some plaintiffs had taken up to 11 months. Similarly, only 9% of the defendants had filed the documents after the first year.

In the *other* types of proceedings – the default, transfer and summons cases – it was intended that the Court would give directions for the filing of DCM Documents at the Status Conference. Most of these cases had had a Status Conference, as they do not have the opportunity to go into the Not Ready List at commencement. Of the 313 other types of cases, only 27% of plaintiffs and 17% of defendants had filed their DCM Documents. Since the inception of DCM, the Court has taken the attitude that DCM Documents are not necessarily required for default, transfer and summons cases.

In addition to the small number of cases in which the DCM Documents were filed, it was suggested by some key informants and members of the DCM Monitoring Committee that adequate information was not always being provided in the DCM Documents. The view expressed was that while some DCM Documents were of a high standard and gave detailed information about the case, in others the description of the narrative of facts was inadequate. Often it was vague and only repeated the information provided in the Statement of Claim.

Some key informants felt that the inadequacies in the DCM Documents arose as a result of the uncertainty that still surrounds the program. Some practitioners are still getting used to the system and are not quite sure what is expected of them. Other key informants expressed the view that practitioners were beginning to take short cuts and "were not cooperating with the spirit of the program".

The small number of DCM Documents filed and the inadequacy in the information provided means that most cases are not as prepared as early as the Court intended. The result, as one practitioner described it, is that "it puts the whole process back – the issues are not well known, the preparation of the case is not as good as it could be and there is less chance of settlement". Track assignment is also made more difficult.

Some of the practitioners, on the other hand, questioned the value of some requirements of the DCM Documents. One practitioner believed that the narrative of facts was not useful in its unsigned format as the plaintiff could change the facts of their story at a later stage. Another questioned the usefulness of having the plaintiff's solicitor file a statement of evidence, potential indemnities and having to provide information about cross-claimants. These, it was argued, should be a requirement of the defendant solicitor.

Settlement and ADR

Part of the reason for introducing early court intervention was to encourage the parties to turn their minds to the possibility of settlement and ADR procedures at an early stage. Ultimately, early court intervention aimed to achieve the early settlement of cases and reduce the time to disposition.

Table 4.3 showed that only 105 cases or 8% of the DCM caseload had been finalised. The small proportion of cases that had been finalised, and in particular the lack of settlements, was highlighted by some of the key informants as an issue of concern. Many within the Court were "disappointed" by the lack of settlements, particularly as early settlement was a goal of the DCM program.

Of the cases that had finalised only 16% had settled. This represents 1% of the total DCM caseload. The method of finalisation for the remainder of cases included: discontinued (17%), Court Order (10%), verdict (7%), struck out/dismissed (7%), arbitration (2%) and transferred out of DCM (41%). The latter transferred to a country circuit, another Division of the Supreme Court or another court.

The lack of settlements may reflect the fact that active court intervention has not occurred in many cases. However, various other factors could have also contributed. Some of the key informants expressed the view that the lack of settlements were a result of the cases not being as prepared at each stage as they should be. In some cases this was due to inadequacies in the DCM Documents. A judicial officer suggested that often the parties felt that it was too early at the Status Conference to talk about settlement. However, some practitioners believed that it did not matter how the Court intervened, parties would still wait until the day of the hearing to settle cases.

In addition to the lack of settlements, the figures presented above show that few cases had been finalised by ADR: only 2% of the cases finalised were finalised by

arbitration. The survey indicated that in the first year only 12 cases had been referred to ADR procedures. Of these, ten were referred to arbitration and two to Early Neutral Evaluation. The reasons for the small number of cases referred to ADR procedures may be similar to those described above for the lack of settlements.

This section has shown that early court intervention has not been implemented entirely as intended. In many cases the Court did not commence intervention as early as intended. As a result the Court may have difficulty in achieving its program goals of producing early settlements and reducing the time to disposition. Previous research by the NCSC has suggested that the point at which the Court becomes involved in monitoring the progress of litigation and in scheduling future events is strongly related to case processing times (refer to Section 1.2).[90] However, these findings reflect only the first year, and the program may modify itself as practitioners adjust to the new system.

4.2.3 Possible Modifications for Early Intervention

Given the large number of cases in the Not Ready List, serious consideration should be given to whether the Court should intervene at an earlier stage. Indeed some of the key informants suggested this.

A number of court officers felt the Court should introduce the requirement that DCM Documents be filed at the time the case is *commenced*. This view contrasts sharply with that expressed by solicitors which was discussed previously in Section 2.2.2. Other key informants suggested that the time allowed for the filing of DCM Documents should at least be reduced, so that cases are called up before the Court before 12 months has elapsed. The Court would then have the opportunity to assess whether cases had valid reasons for being in the List (such as the need for injury stabilisation), or whether cases were simply "languishing" as the solicitor had chosen not to begin case preparation.

In addition, it was suggested that the Court should be stricter with the filing of DCM Documents. A court officer suggested that in all cases both parties should be required to file the DCM Documents before attending the Status Conference. One practitioner suggested that the Court should exert more control over the quality of the documentation at the time of filing. This would ensure that documentation was of adequate quality before the case reached the Status Conference.

Key informants also suggested that the Court should place greater emphasis on ADR and incorporate it into the program at an earlier stage and in a more formalised way. One judicial officer suggested, for example, that the Court could generate automatic notices to encourage the parties to consider ADR.

4.3 Was Differential Treatment of Cases Implemented as Intended?

4.3.1 Overview

To address whether differential treatment of cases was implemented as intended we examine the quarter of the DCM caseload that was in a case management track after the first year. We examine the usage of the case management tracks, the stages of track allocation, the basis for track allocation and the level of management provided in each track. We also consider whether any changes were made to the differential treatment strategies in the first year and any possible modifications.

We found that:

- In the first year of the program the Court did not treat all cases alike, some cases received more intensive management than others.
- Track allocation was generally occurring at an early stage in the process.
- Cases on the Special Track were being judge managed and, on average, had had more Status Conferences than cases on the other tracks. Cases in the Standard Track, on the other hand, were receiving little intervention, and were being provided with uniform directions. Most cases were on the Individual Track and received individualised management, tailored to the nature of the case.
- In the Individual and Special Tracks the directions, the time allowed for case preparation and the court events varied case by case. Cases that were routine, ready to proceed or urgent could proceed through quickly.

Thus, differential treatment of cases had been implemented as intended in the first year of the program. However, we also found that:

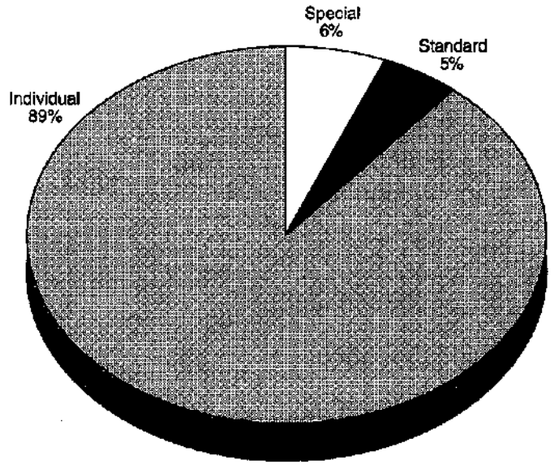
- After the first year of the program only 5% of cases had elected the Standard Track. While the usage of this track may change as more cases begin to progress through the system, it could be questioned whether the existence of this track was justified.
- It is too early to tell whether track allocation was appropriate and according to "complexity and need for pre-trial activity". The Court did not specify any objective criteria for track allocation.

Full details of the cases in the case management tracks are now provided.

4.3.2 The Main Findings

Table 4.3 showed that 328 cases or one quarter of the DCM caseload were in a case management track after the first year of the program. The vast majority of cases, 89% (291 cases), were allocated to the Individual Track. Six percent were allocated to the Special Track (21 cases) and 5% had elected the Standard Track (16 cases). This is illustrated in Figure 4.2.

Figure 4.2. The proportion of cases in each case management track



Some of the court officers interviewed expressed surprise that the profession was not using the *Standard Track* more. This track was included at the request of the profession to enable them to opt out of individualised management (refer to Section 2.2.2). The practitioners interviewed tended to feel that the Court was discouraging use of the Standard Track by making it a slower track and requiring that clients be informed of this. The use of the tracks may change in the future, however, as more cases start to progress through the system.

Of the 328 cases in the case management tracks, only one third were personal injury cases that had *commenced* in DCM. This contrasts with the total DCM caseload where 61% were personal injury cases *commenced* in DCM (refer to Section 4.1.2). Most of the cases in the tracks were other types of cases *commenced* in DCM (37%)

and *transfer* cases (30%). So it can be seen that the personal injury cases, which form the bulk of the DCM caseload, were not really flowing through the system yet. The more unusual cases were progressing through. Thus, the way in which DCM operates may change as more personal injury cases start to progress through the system.

At what stage were cases allocated to tracks?

Most cases were allocated to a case management track at an early stage as the DCM program intended. Table 4.4 shows that in 80% of cases track allocation occurred at the first Status Conference. Ten percent were allocated to a track at a later stage – at an adjourned Status Conference.

Table 4.4. The stages at which cases were allocated to tracks

Stage	Allocated to track n	%
Plaintiff elected Standard Track at time of filing DCM Documents	16	5
At the first Status Conference	261	80
At an adjourned Status Conference	34	10
Other*	17	5
Total	**328**	**100**

* Includes at the application to transfer to DCM or in the judge's chambers prior to the first Status Conference.

In addition, there was a small proportion of cases that had not been allocated to a track. Of the 197 cases *awaiting a Status Conference and track allocation* (Table 4.3), 10% had previously had a Status Conference but had not been allocated to a case management track at the time of the study.

Thus it was not always possible for the Court and the parties to determine a suitable track at the first Status Conference. A judicial officer suggested that there may have been too many uncertainties in the case or certain steps such as the filing of DCM Documents needed to be completed first. This practice has implications for whether the time goals will be met, as the computer system does not start to track time until a case is allocated to a case management track.

Further, a small proportion of cases were never allocated to a track. They were placed straight into the Holding List for allocation of a hearing date (see Table 4.3) as they may have been ready for trial or unusually urgent.

What was the basis for track allocation?

Track allocation was decided by the Court and/or the parties as intended. In all cases on the *Standard Track* the plaintiff had elected for the track. Cases on the *Individual* and *Special Tracks* were allocated by the Court usually in consultation with the parties and on the basis of the information provided in the DCM Documents. One judicial officer suggested that generally track allocation was based on the urgency of the case, the seriousness of the injury, or whether the case was a test case. Thus, it would appear that track allocation in the Individual and Special Tracks was being made according to the needs of the case.

However, after the first year it was too early to tell whether cases were assigned to tracks according to their "complexity and need for pre-trial activity". The Court provided no objective criteria for track allocation. In addition, too few cases had passed through the system to determine whether they had met the management requirements of the tracks. Further, the parties can elect the *Standard Track* without court consultation and it is possible that the Court would have assigned these cases differently. It will be important to examine whether cases on the Standard Track meet the requirements for this track when enough cases have progressed through the system.

However, the fact that very few cases had changed tracks in the first year tends to suggest that cases are being appropriately assigned. The survey indicated that only four cases had changed tracks, all had changed from the Individual to the Special Track. Too many track changes may also undermine the success of the system.

Was the appropriate level of management being provided on each track?

The level of management provided by the Court appeared to vary according to the track. Observations of court procedures revealed that for cases allocated to the *Individual Track* the Court and the parties discussed the case at the Status Conference and decided upon the steps necessary and the time needed to prepare the case. The steps and the time allowed varied case by case. In this way the management was individualised and tailored to the needs of the case. In some cases the Status Conference needed to be adjourned. The number of Status Conferences held for cases on the Individual Track ranged from zero to five, with the average being 1.3.

Observations revealed that for cases allocated to the *Special Track* the steps and the time needed were also developed in consultation with the parties and were tailored to the needs of the case. Cases were allocated to either a trial judge or the List Judge

for case management. Several Status Conferences had been held in most cases. The number of Status Conferences held for cases on the Special Track ranged from zero to five, with the average being 2.8. This would suggest that cases on the Special Track were, on average, receiving more intensive management than cases on the Individual Track.

It was evident that the Court was providing little management to cases on the *Standard Track*. All cases had received the set of standard directions and a fixed time frame in which to complete the directions. A Status Conference had been held in only one case. This resulted from a listing error.

In this section we have seen that in the first year differential treatment of cases has been in general, implemented as intended. This will assist the Court to reach its program goal of using its judicial resources effectively. However, it remains to be seen whether cases were assigned to tracks appropriately.

4.3.3 Possible Modifications for Differential Treatment of Cases

Given the limited use of the Standard Track in the first year, it could be questioned whether the existence of the track was justified. The use of this track may change, however, as more cases begin to pass through the system.

Some of the court officers interviewed suggested that the Standard Track could be removed. This would mean that all cases would receive individualised management. Alternatively, as some solicitors suggested, the Court could encourage more cases to use the Standard Track. The need to attend the Status Conference is then eliminated, which would ease the workload for both practitioners and the Court.

Another suggestion made by a court officer was that a separate list for *possession cases* could be developed to increase efficiency. It was considered that these cases are simply "delaying the inevitable" and could be dealt with separately which would "free up" the lists for other cases in the system.

4.4 Were the Time Goals and Timetables Implemented as Intended?

4.4.1 Overview

To address whether the time goals and timetables were implemented as intended in the first year we consider the cases in which timetables have been set for case preparation. These cases form 20% of the DCM caseload. We examine whether the timetables set met the time standards specified in the program design and whether

the parties were able to meet the timetables. We also examine whether the key events were occurring on time. Finally, we consider whether the Court made any changes to this feature in the first year and possible future modifications.

We found that:

- Firm time limits were set at an early stage in most cases.
- In general the time standards were being met. The key events – the Status and Final Conferences – were generally held in the times specified. The timetables set in each track for case preparation met the time standards set. The Court's computer system contributed significantly to ensuring that the time standards were met.
- After the first year it was projected that the majority of cases would meet the overall time goal for disposition of 18 months, based on the length of the timetables set. In fact it was projected that on average cases would progress through in 13 months, well within the time goal.
- The Court was monitoring the parties' compliance with the timetables. A Default Conference was held if the plaintiff did not file the Certificate of Compliance on time to ensure that the case would be finalised within the designated time frame.

Thus, in the first year, the time goals and timetables had been largely implemented as intended. However, we also found that:

- In a substantial proportion of cases in case management tracks, no timetables had been set.
- The short timetables set were creating difficulties for both the parties and the Court. In some cases the parties had trouble meeting the Compliance Date. For the Court, cases were coming up for hearing more quickly than the Court could provide the resources to deal with them.
- In addition it was shown in previous sections that certain practices of the Court, although not widespread, may have significant implications for whether time goals are met. These included returning cases to the Not Ready List once court intervention had commenced and not allocating cases to tracks at the first Status Conference.

Full details of the timetables set, the timing of key events and the rate of compliance are now provided.

4.4.2 The Main Findings

At what stage were timetables set?

The Court had set a Compliance Date in a total of 254 cases at the end of the first year of the program.[91] Most timetables were set at an early stage as was intended. Table 4.5 shows that in most cases (68%) the Compliance Date had been set at the first Status Conference. However, there was a considerable proportion of cases in which the Compliance Date had been set at a later stage – at an adjourned Status Conference (21%).

Table 4.5. The stages at which Compliance Dates were set

Stage	Compliance Date set n	%
Upon election of the Standard Track	15	6
At the first Status Conference	173	68
At an adjourned Status Conference	53	21
Other*	13	5
Total	**254**	**100**

* Includes at the application to transfer to DCM or in the judge's chambers prior to the first Status Conference.

In addition, there were relatively large numbers of cases in which the Court had not set a Compliance Date. No Compliance Date was set in 27% of the cases in the *Individual Track* and in 48% of the cases in the *Special Track*. However, the program design did not always require that a Compliance Date be set in the Special Track.

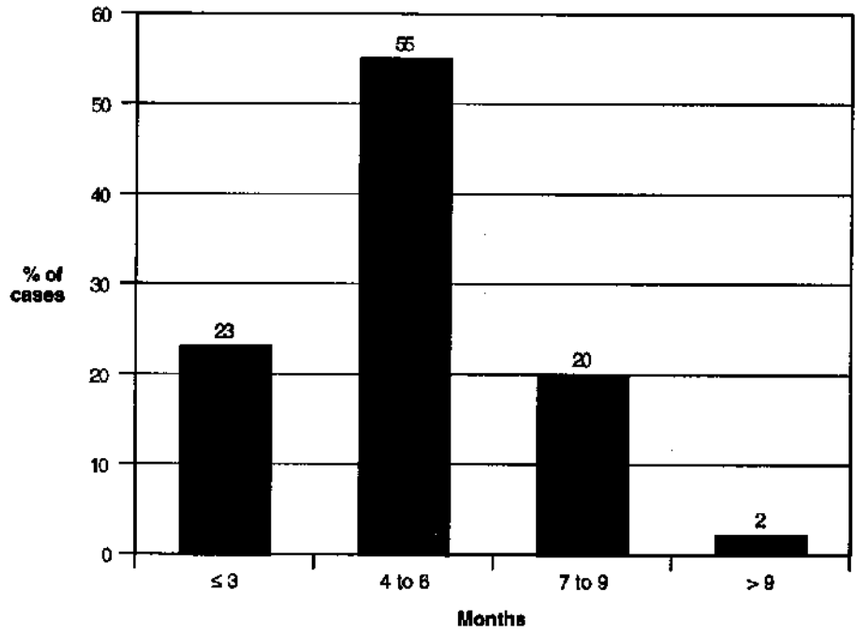
Thus, it was not always possible for the Court to work out a timetable for case preparation at the first Status Conference. According to a judicial officer, often there were too many uncertainties in some cases to do this.

What was the length of the timetables set?

The survey indicated that the length of the timetables set varied according to the track, and in the Individual and Special Tracks varied widely between cases. In general, the timetables set were in accordance with the standards specified in the Practice Note, as the computer system ensured that this occurred. Often the timetables set were well within the time standards. Overall, the average length of the timetable set was 171 days (5.6 months or 24 weeks).[92]

The timetables the Court set for cases in the *Individual Track* ranged in length from seven to 315 days (10.4 months or 45 weeks).[93] The average length of the timetable was 137 days (4.5 months or 20 weeks).[94] This is well within the 210 sitting days (approximately 42 weeks) specified in the Practice Note (see Table 3.1). Figure 4.3 shows that there was a high proportion of cases proceeding through quite quickly, with a timetable of six months or less (78%).

Figure 4.3. The length of timetables set in the Individual Track



Timetables set for cases in the *Special Track* ranged in duration from 84 days (2.8 months or 12 weeks) to 505 days (16.6 months or 72 weeks). Thus, some cases were progressing through quite quickly. However, the average length of the timetables set was 448 days (14.7 months or 64 weeks).[95] So, on average, cases were progressing more slowly than the time standard specified in the Individual Track.

Little variation was evident in the length of the timetables set for the 16 cases on the *Standard Track*. The duration of the timetables ranged from 430 days (14.1 months or 61 weeks) to 453 days (14.9 months or 65 weeks).[96] The average was 438 days (14.4 months or 63 weeks). So, on average, cases were meeting the time standards set in the Practice Note and they were progressing through more slowly than cases on the Individual Track, as intended.[97]

The timing of key events

In general the key events – the Status and Final Conferences – were also occurring in accordance with the time standards specified.[98] The Court's computer system ensured that the conference dates were allocated in the times specified.

Section 4.2.2 showed that for *ordinary* proceedings, the Status Conference was held, on average, 96 days (14 weeks) after the DCM Documents were filed.[99] For *default* proceedings the Status Conference was held, on average, 23 days (three weeks) after the defence was filed.[100]

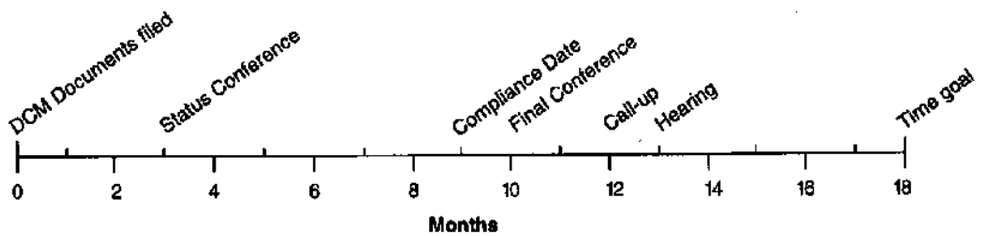
The Final Conference was held, on average, 28 days (four weeks) after the plaintiff had filed the Certificate of Compliance.[101]

Projected time to disposition

After the first year of the program, the projected time to disposition in *ordinary* cases, from the time of filing of the DCM Documents, was approximately 13 months. This is well within the 18 month goal. The projected time was calculated using the average times as a guideline: 14 weeks (three months) from the filing of the DCM Documents to the Status Conference, six months for the timetable and an approximate time of four months to the hearing.[102] Figure 4.4 illustrates this. Other types of cases should proceed through more quickly than this, as they do not have to wait three months for a Status Conference.

However, it is important to note that the projection was based on only those cases that had filed the DCM documents and on the timetables that were set in the first year. The time frames may change as more cases begin to pass through the system.

Figure 4.4. The timing of events under DCM for ordinary proceedings



The Compliance Dates

After the first year of the program it was too early to tell how effective the Compliance Dates were as most cases had not reached the Compliance Date. Only 31% of the 254 cases in which a Compliance Date had been set had reached the Compliance Date.[103] However of these cases, a substantial proportion (31%) had not met the Compliance Date. These cases had all proceeded along the Individual Track.

As intended, a *Default Conference* was held before the List Judge when the parties did not meet the Compliance Date. This was held on average 26 days (four weeks) after the Certificate of Compliance was due.[104] The main focus of the Default Conferences appeared to be to get the cases back on track, and to establish what steps still needed to be completed to get the case ready. In general, new directions were given and a new Compliance Date set. The Default Conference constitutes a significant way in which the Court ensures that time goals are met.

One of the main reasons suggested to explain the difficulties parties had in meeting the Compliance Dates was the short timetables being set. It was suggested by one court officer that often the solicitors and the Court had been too ambitious in setting time frames. Problems, unforeseeable at the Status Conference, had then arisen which meant that the timetable could not be met.

In some cases the Compliance Date had been changed. The survey indicated that the date had been changed in 13% of the 254 cases in which the Compliance Date had been set. As with track changes, too many Compliance Date changes may also undermine the success of the program. However the number of changes also suggests that some parties may be coming back before the Court when problems do arise.

Solicitors interviewed also raised some potential problems in meeting timetables. The first was that solicitors are often dependent upon other sources to provide them with relevant case information (for example, doctors and the police). If these sources delay in responding to requests for information, solicitors may not be able to comply with the timetables set. The second problem raised was that as solicitors' caseloads increase in DCM, they may find it difficult to meet the multiple case deadlines that the program will impose.

The shorter than expected timetables set during the first year of the program's operation were also found to have caused some problems for the Court. A court officer believed that the fast progress of cases had resulted in too many cases being placed in the *Holding List*. This meant that cases were coming up for hearing more quickly than the Court could provide the resources to deal with them. However, this will be a greater problem when more cases begin to progress through the system.

This section has shown that the time goals and timetables were implemented according to plan in the first year for those cases that had progressed out of the Not Ready List. This should assist the Court in meeting the program goal of reducing the time to disposition. However, the short timetables being set were creating difficulties for some parties as they could not meet their timetables. As a result some are having to appear before the Court an additional time at a Default Conference. This may have implications for the costs of litigation and has the potential to increase the time to disposition. Towards the end of the first year the Court began to set longer timetables allowing more time for each step. This is to allow for any difficulties that may develop in the case.

4.4.3 Possible Modifications for Time Goals and Timetables

Given the difficulties being created by the short timetables being set, one court officer suggested that the Court should impose a *minimum* time standard for case disposition, in addition to the 18 month maximum currently imposed. It was suggested that this minimum could be set at 12 months. It was noted, however, that this minimum could not apply to the cases on the Special Track as they may need to proceed through far more expeditiously.

Another court officer suggested that *Default Conferences* should be eliminated from the program. Instead a Final Conference should be held in cases where solicitors have not filed the Certificate of Compliance on time. At that conference, the case could be placed in the Holding List if ready, or if necessary, it could be referred to a judge. The elimination of the Default Conference may reduce the number of times a case appears before the Court. This would create savings in terms of judicial resources and legal costs.

4.5 Was the Control of Adjournments Implemented as Intended?

4.5.1 Overview

To address whether the control of adjournments was implemented as intended we consider the number of adjournments of Status and Final Conferences.

We found that:

- Twenty-seven percent of the Status Conferences had been adjourned to a further Status Conference and a further 25% had been adjourned for other purposes.
- Almost half (46%) of the Final Conferences had been adjourned.

Thus in the first year the Court did not implement a firm policy on adjournments as fully as it intended.

More detail on the adjournments and the reasons for them follow.

4.5.2 The Main Findings

Status Conferences

Observations and the results of the file based survey indicated that there had been a substantial proportion of adjournments of Status Conferences. The Supreme Court statistics show that at the end of the first year 885 Status Conferences had been held and 235 of these, or 27%, had been adjourned to a further Status Conference.[105] A further 225 Status Conferences (25%) were adjourned for other purposes, mostly for a return of subpoena date. Of particular concern was the number of adjournments for cases on the Individual Track. It was intended that most cases on the Individual Track would only require one Status Conference. However, the survey indicated that 29% of cases on the Individual Track had had more than one Status Conference in the first year. This did not include any pending Status Conferences. In fact some cases had had as many as five conferences as Section 4.3.2 showed.

Comments from the key informants suggested that the number of Status Conferences adjourned was perhaps not unintended by the Court, as it was recognised that certain steps or some issues may need to be dealt with prior to the setting of the timetable.

A wide range of reasons were given for the adjournments by key informants. Some of the judicial officers and other court officers suggested that often issues needed to be dealt with first, such as disputed interlocutory processes, or applications for summary judgement needed to be referred to another judicial officer for determination, additional parties needed to be joined or cross claims made. In other cases the Status Conference had to be adjourned as the parties had not received notification of the conferences and did not attend.

Key informants also expressed the views that the adjournments were more due to cases not being as prepared as the Court had intended, and the fact that both the judicial officers and the profession were still getting used to the system.

However, some court officers and practitioners felt that perhaps the Court had been "lenient in the early nurturing stages of the program" and could have exercised more control.

Final Conferences

The number of Final Conferences adjourned, on the other hand, was not intended by the Court. Of the 50 Final Conferences held in the first year 23, or 46%, had been adjourned to a further Final Conference.[106]

The key informants suggested that some final conferences had to be adjourned for reasons similar to those applying to the Status Conferences. That is, parties did not attend conferences as they did not receive notification, judicial officers and practitioners were still getting used to the system, and the Court had been lenient.

The most common reason given for the adjournments was that there were problems with the timetables set which meant parties were not in a position to discuss settlement. As a result the Final Conferences were, in effect, treated as Status Conferences. In some instances, steps had been left off the timetable set at the Status Conference and new directions had to be given for these steps.

However, most key informants felt the problems arose from the short timetables that were being set. Previously it was suggested that some parties had difficulties meeting their timetables and so did not file the Certificate of Compliance on time (Section 4.4.2). It also became apparent that in other cases the parties had difficulties meeting their timetables but had chosen to file the Certificate of Compliance even though all directions had not been completed. As one practitioner described it: "Problems do not emerge until the Final Conference as the Final Conference represents the first opportunity to let the Court know if things are going wrong. There is no formal mechanism built into the system to allow practitioners to interrupt the timetable, except by way of a Notice of Motion." On the other hand, a court officer suggested that perhaps practitioners were "falling into old habits and just filing the certificate to get on the queue".

Thus the Court has not implemented the control of adjournments as well as intended. Through limiting adjournments and minimising procedures the Court aimed to achieve its program goals of reducing the time to disposition and effective use of judicial resources. The number of adjournments that are occurring may make these goals difficult to meet. NCSC research has indicated that the pace of litigation is affected by the practices of the Court and the practitioners in relation to the granting of adjournments.[107] The adjournments also mean that the number of court appearances required by the parties is increasing which may have implications for the costs of the litigation.

Some key informants, however, suggested that the Court began to exercise more control over adjournments towards the end of the first year. This may also modify itself in the future as more cases begin to flow through the system and practitioners and court staff adjust to the new system. Judicial officers are also encouraging parties to approach the Court if any problems emerge after the timetable has been set.

4.6 Was the Program Administered as Intended?

4.6.1 The Staff Involved

As intended, only a small number of judicial officers and registry staff were responsible for program operation during the first year.

Key informants felt that the Court had kept fairly tight control over the DCM program through having a small core of staff involved in the delivery of the program. Although there was some variation in the approaches taken by the judicial officers, it was argued that the staff involved are familiar with the philosophy of the program and can ensure that it is delivered in a consistent way. The view was also expressed that they work well together to resolve any issues.

Initially the program was judge driven, with the List Judge conducting all Status Conferences. However, after six months the responsibility of conducting Status Conferences was handed over to the registrars. Three registrars became involved in conducting the Status and Final Conferences. By the end of the first year one registrar was handling most of the Status and Final Conferences.

Many of the practitioners interviewed expressed some reservations about the handing over of responsibility to the registrars. They argued that judges have more authority than registrars, and therefore have more impact when presiding over a conference to direct parties and to focus attention on the real issues of a case. It was also suggested that with greater judicial authority comes a greater ability to impose sanctions on solicitors who fail to comply.

The court officers and a few of the practitioners, however, argued that the level of judicial officer presiding over a conference should be irrelevant to its "success" as individuals apply court procedures differently. Some suggested that it was in fact beneficial to have the registrars handling the Status Conferences as then the same judicial officer could handle the case right through to the *Final Conference*, which would lead to greater consistency of rule application.

The interviews also provided the opportunity to consider the effect that the introduction of DCM had on the workload of court staff.

Judicial officers

After the first year, DCM was not considered to have had a major affect on the workload of judicial officers, generally. It was suggested that their workload had been "reorganised" rather than expanded. However, it was also noted that the workload had not increased as only a relatively small number of cases had begun to progress through the system. In the longer term DCM is expected to have a beneficial effect on judicial workload as it is intended to reduce the number of times the parties must appear before the Court and remove the lack of case preparation which takes up judicial time and causes the judges frustration.

Registry staff

DCM, on the other hand, was considered to have increased the workload for registry staff as these staff were attending to DCM duties in addition to their normal duties. The attendance at court conferences had particularly added to the workload. It was also believed that the workload for counter staff within the registry had increased due to the increased number of documents that are being filed under the program. This appears to be exacerbated by the fact that little training in DCM was provided to those staff.

4.6.2 The DCM Computer System

Observations and comments from the interviews suggested that the computer system had run well in the first year and had contributed enormously to the operation of DCM.

There was general recognition among key informants that there is a need for the Court to increase computerisation to increase efficiency. One solicitor felt there was no reason why the Court "should not catch up", and that increasing computerisation should ultimately reduce costs for the Court as it streamlines procedures. One judicial officer suggested that the Supreme Court still has a long way to go in the development of its computer system, indicating that other legal institutions have more advanced systems in place.

Practitioners also saw the use of computers in the court room as increasing the efficiency of litigation. They were particularly impressed with having printed directions handed to them "on the spot". This initiative was considered to "save inconsistencies and misunderstandings". Others noted that the issuing of printed directions serves as an "easy guide to litigation", thus making it easier for infrequent litigators and small firms.

However, despite the advantages of having such a management system, there were a few issues raised by some court officers regarding the operation of the computer system. They felt the system had been too inflexible and had governed judicial officers to a certain extent.

Several changes were made to the computer system in the first year. More directions were added to the set initially built into the system, as the need arose and to suit the styles of the judicial officers. The Court will continue to modify the system to enable it to run more efficiently. Key informants also suggested that the system should be enhanced to allow the Court to make better projections about its caseload and resource needs.

In sum, this section has examined the first year of operation of the program to address whether the program has been implemented as intended. The conclusion is that generally the program was implemented as intended, although some

features of the program were implemented more fully than others. The next section will supplement this analysis by examining the key informants' views one year into the program.

81 Supreme Court of New South Wales, 1994, *Annual Review*.

82 Based on figures provided in the Supreme Court, *Annual Review*, 1994.

83 Goerdt, J, 1991, Explaining the Pace of Civil Litigation: The Latest Evidence from 37 Large Urban Trial Courts, *Justice System Journal*, 14(3) and 15(1), p. 301.

84 Mixed claims involve claims for a specific sum of money and an unquantified amount of damages. They are dealt with as ordinary proceedings.

85 Where the plaintiff elected the Standard Track the Court promptly issued a set of uniform directions.

86 A few cases had filed DCM Documents but were later returned to the Not Ready List.

87 This was based on the 146 cases in which the plaintiff's DCM Documents triggered the Status Conference and the Status Conference had been held. In several cases the parties had applied for expedition and the Status Conference was held earlier. These cases are not included in this analysis.

88 Based on 131 cases in which a defence or cross claim had triggered the Status Conference and the Status Conference had been held.

89 Cases that were returned to the Not Ready List after a Status Conference were excluded from this analysis.

90 Mahoney, B, et al, 1988, see note 8.

91 Note that this includes some cases that had finalised and were no longer in a case management track.

92 Based on 238 of the 328 cases on the case management tracks in which a Compliance Date had been set. Timetable lengths were calculated from the date of track allocation to the Compliance Date.

93 In two cases the timetable appeared to exceed the 42 week time standard set, however once the Court vacation period was taken into account the timetables were found to have met the standard.

94 Based on 211 of the 291 cases on the Individual Track in which a compliance date had been set.

95 Based on the 11 cases on the Special Track in which a Compliance Date had been set.

96 Timetable lengths were calculated from the time the Standard Track was elected to the Compliance Date.

97 The Practice Note specified the Standard Track timetable as 275 sitting days (approximately 55 weeks). However, the survey was measured in actual days, making comparison difficult. Once the Court vacation periods were taken into account, cases were in general found to be meeting the time standards.

98 The Practice Note specified that the Status Conference should be held 65 sitting days (approximately 13 weeks) after the DCM Documents were filed, or ten sitting days (approximately two weeks) after the defence was filed, and the Final Conference should be held 15 sitting days (approximately three weeks) after the Certificate of Compliance was filed. However, the survey was measured in actual days, making comparison difficult.

99 This was based on the 146 cases in which the plaintiff's DCM Documents triggered the Status Conference and the Status Conference had been held. In several cases the parties had applied for expedition and the Status Conference was held earlier. These cases are not included in this analysis.

100 Based on 131 cases in which a defence or cross claim had triggered the Status Conference and the Status Conference had been held.

101 This was based on 39 cases in which the Certificate of Compliance had triggered the Final Conference and the Final Conference had been held, and the relevant information was available.

102 At the time of the study cases had an approximate wait of four months from the Final Conference to the hearing.

103 Note that six cases were finalised before they had reached the Compliance Date.

104 Based on 16 cases in which the non-filing of the Certificate of Compliance had triggered the Default Conference and the Default Conference had been held.

105 Supreme Court of New South Wales, 1994, *Differential Case Management Report.*

106 Supreme Court of New South Wales, 1994, see note 105.

107 Mahoney, B, et al, 1988, see note 8.

5

Program Success, Future and Implications

This section provides an account of the key informants' views on the debate which surrounded the introduction of DCM, and their views about program success and future. It supplements the quantitative analysis of Section 4 by providing perceptions of key informants about the advantages and disadvantages of the DCM program and their perceptions of what it will take for the program to achieve its goals. It also discusses the implications they believed the DCM program has for the legal profession and the justice system.

5.1 Views on the Debate About DCM One Year Later

Section 2 provided an account of the opposition the Law Society and the Bar Association had to the introduction of DCM. The issues discussed in Section 2.3 were raised during the interviews, providing the opportunity to ascertain how closely the opinions of individual practitioners reflected the official view of their representative organisations.

5.1.1 Is DCM Appropriate?

In general, the solicitors and barristers who were interviewed believed that DCM was an appropriate means through which to deal with cases coming before the Court. Most viewed court management of cases as inevitable, and that the introduction of DCM was a response to a need to increase control over case processing. One practitioner stated that the involvement of the Court had increased enormously over the past 20 years, and this increased involvement was generally positive. The practitioners who were of this view agreed that DCM does not represent something entirely new. Instead, it represents a refinement of previous management programs which had been put in place by the Court. There was recognition that in the past the Court had adopted a "laissez faire" approach to litigation, but that in the interest of efficiency, such a system was no longer appropriate.

A number of participants commented on the increased role of the judiciary in the administration and management of cases under DCM. This broadening of judicial

duties was viewed as judges fulfilling their responsibility to all cases, not just to the small percentage of cases which end up before a judge at a hearing. Thus, DCM was considered by some to more equally distribute "justice" among cases coming before the Court.

A judicial officer believed that greater cooperation had emerged between the parties, and between the parties and the presiding judicial officer during court appearances. Better communication and co-operation between the parties' legal representatives was also heralded as an argument for DCM by its proponents. It was suggested that this has been the result of the parties coming "face to face" earlier in the proceedings than occurred in previous systems, and that far more can be achieved face-to-face than through written correspondence.

There were however some practitioners who considered the degree of case management applied by the Court under DCM as being not only inappropriate, but excessive. The basis for this opinion was that the pace of litigation should remain firmly in the hands of practitioners, as it is they who know what is best for the case. Another was that DCM was too complicated, and was therefore unsuitable for personal injury claims, most of which are "run of the mill" at any rate.

5.1.2 Is There a Need for DCM?

The necessity of introducing DCM on the basis of "recent developments"[108] which had occurred in the Common Law Division was generally not questioned by the practitioners who were interviewed. The need to introduce a new program of case management was however questioned by others on the basis that Practice Note 68 could have been made to work had the Court been willing to impose sanctions on practitioners who failed to comply. One practitioner predicted that the fate of Practice Note 81 will be the same as that of Practice Note 68, because the Court will again fail to impose sanctions on non-complying solicitors.

5.1.3 Does DCM Impose Additional Burdens on Solicitors?

There was a mixed response from practitioners regarding whether DCM imposed additional burdens on solicitors. All city based practitioners did however suggest that DCM would create greater burdens for suburban based practitioners; only one of the two suburban solicitors interviewed agreed.

Most of the solicitors stated that DCM had not changed their workload, but that it had changed their work practices, with tasks being attended to earlier rather than later as was the case under Practice Note 68. One practitioner considered this to be a positive result of the program, as it will serve to standardise the work practices of practitioners.

A few solicitors took the view that DCM has brought with it a more complex system of litigation. This has affected their ability to delegate work as they would have done under previous systems. It has also resulted in them spending more time per case due to the increased number of documents required by DCM.

In contrast to the early concern of the Law Society that DCM would decrease the number of cases a firm would be able to take on, one solicitor indicated that quite the reverse had occurred. DCM had not increased the amount of work he was conducting on a case-by-case basis, but it had increased his workload simply by virtue of the number of cases which he was now able to attend to due to the speed with which DCM had been dealing with cases.

Therefore, with regard to the issue of solicitor burden, it appears that most practitioners interviewed had not been unduly affected by DCM to date. It remains to be seen however if solicitor burden is related, as has been suggested, to the number of cases a solicitor has running under DCM at one time.

5.1.4 Will DCM Affect the Costs of Litigation?

During the debate surrounding program introduction, it was argued that DCM would increase the costs of litigation due to additional documentation requirements, the need for early case preparation and through senior practitioners being unable to delegate work. We saw above that some practitioners have indicated that their workload has increased as the result of increased documentation requirements and an inability to delegate work. These effects would indeed affect the costs of litigation.

Nevertheless, a mixed response was received from practitioners with regard to the issue of costs. Their response was necessarily related to their views on solicitor burden. A number of practitioners did believe that DCM would increase costs on the basis that it required more documentation and more court appearances. The early preparation requirement was also implicated as a source of additional costs. It was stated that under Practice Note 68 the bulk of work was completed at the end of a case, sometimes not until a case had been set down for trial. Thus, if a case settled relatively early, the costs incurred would be relatively small. Under DCM, however, with an emphasis on early case preparation, all the "heavy" work is completed at an early stage of the case. This early completion of work is necessarily attended by increased *early* costs.

This point was indeed recognised by one court officer. It was noted that a costs increase could result for cases which would, under Practice Note 68, have settled prior to any court intervention. That is, prior to the Notice to Set Down for Trial being filed. However, it was also noted that this occurred only rarely, and that the Court cannot allow such cases to "slip through the net" due to the possibility that they may find that court intervention is required further down the track.

Some practitioners were however of the opinion that DCM would in fact reduce the costs of litigation. Their belief was based on the same foundation as the Court's. That is, that DCM was designed to promote early settlement and reduce adjournments. Each of these, they argued, would result in cost savings.

A third view expressed by practitioners was that DCM would have little or no effect on the costs of litigation. The basis of this argument was that proper case preparation requires a certain amount of work to be done before settlement can even be considered. Thus, while under DCM solicitors may be completing work earlier than they would usually attend to it, the same amount of work is actually being done. It was suggested by one practitioner that those who are finding that they are doing more work under DCM may in fact be simply preparing their cases more thoroughly than they had previously done. This aspect was considered to be an advantage of the program – that DCM may in fact serve to make solicitors "come up to speed".

5.1.5 Summary

The interviews provided the opportunity to revisit the concerns raised by the Law Society and the Bar Association before the introduction of the program. It was found that the majority of the legal professionals interviewed one year into the program were in favour of court management, seeing it as the means through which to achieve efficiency of litigation. Most of the practitioners were broadly supportive of DCM, several saying that they had changed their views on it over time. There were mixed impressions about the burden that DCM placed on solicitors, and the debate about the impact on costs still continues. In addition, the key informant interviews identified several other areas of concern to stakeholders. These are provided in Section 5.2.

5.2 Views About Key Features of DCM

In addition to the four general issues discussed above, one year following implementation key informants were able to provide an opinion on the operation of key program features. The issues which follow were raised spontaneously, and therefore may represent issues of most salience to the key informants.

5.2.1 Early Disclosure of Information

DCM requires parties to disclose issues about the case to each other, early in the proceedings, in the form of DCM Documents.[109] Another issue about which there was conflicting views was this early disclosure requirement. Most court informants

and practitioners were of the view that early disclosure would be an advantage as it would eliminate "trial by ambush", which was considered to exacerbate delay. As one practitioner stated, early disclosure "ensures that the merits of the case are focussed upon during the early stages, before getting into preparation for trial". This was considered to be particularly important in complex cases. It was also believed that early disclosure will serve to facilitate early settlement. If issues are considered at an early stage, the case can be prepared in a structured manner and not in "a last minute panic".

In contrast to this, there were a few practitioners who believed that early disclosure constituted "giving the game away" which would only serve to "benefit the other side". This opinion was based on the belief that early disclosure will facilitate, particularly for the plaintiff, the manufacture of evidence in rebuttal. Another objection to early disclosure was that written or read evidence is unsuitable for determining the credibility of witnesses.

More generally, early disclosure was viewed as having the potential to encourage parties to overstate their case in an attempt to induce settlement. It was also considered to have the potential to encourage cases to go to hearing rather than settle at an earlier stage in the proceedings. This opinion was based on the belief that if the parties have fully prepared their case, then there is no reason to settle. DCM, it was argued, would result in cases becoming "trial ready" much earlier, which could serve to motivate the parties to go to hearing.

The concerns raised by the practitioners with regard to the issue of early disclosure are by no means new. All were in fact the topic of a paper written in 1994.[110] In this paper, Beck presents both sides of the information disclosure debate. The conclusion he reaches is that there are undoubtedly some disadvantages to "early disclosure of a party's hand". However, he considers these disadvantages to be outweighed by the advantages. Further, he states that the prejudices which are brought by early disclosure are frequently overstated. He goes on to say that the advantages of early disclosure are great, with the argument being that it contributes to a more satisfactory system of dispute resolution, which is not so dependent upon arbitrary withholding or emergence of certain information.

5.2.2 Differential Treatment of Cases

The cornerstone of DCM, that is, treating cases differentially, was viewed by most participants as being one of the greatest advantages of the program. It was this which allows cases to be given directions tailored to specific case needs, thereby either eliminating unnecessary work, or ensuring that all necessary work is completed. A number of solicitors noted that DCM allowed urgent cases to come up for hearing much more quickly than would have been probable under the previous system. Two practitioners cited specific cases they were conducting in which this had occurred.

5.2.3 Time Goals and Timetables

A number of issues were raised pertaining to the time goals and timetables imposed by DCM. These features were classified as having both advantages and disadvantages.

Major advantages were predicted for plaintiffs under DCM. In addition to the obvious advantages if DCM is successful in reducing delay and costs, it was seen as having the potential to encourage rehabilitation. As one judge stated, DCM, with its emphasis on early resolution, will enable litigants to "get their lives back to normal as quickly as possible". This was contrasted with the "old" systems which were considered to be "counter productive to rehabilitation", and as "encouraging malingering" simply by virtue of the duration of litigation. If successful in achieving these advantages for plaintiffs, it was suggested that the ultimate result would be a more positive public perception of the legal process.

A number of informants, both court staff and practitioners alike, indicated that the main advantage of DCM goes to the practitioners. Under the system, those who are prepared to work hard can get their cases listed for hearing quickly. Generally, a major advantage of DCM is that it rewards those who want to work. Further, it was argued that the time goals of DCM make litigation more predictable and controllable – for both the practitioners and the Court. This feature allows all to make better use of time and resources, making scheduling of workloads possible.

A major potential disadvantage was that the time goals imposed could serve to compromise the quality of justice delivered. This view was expressed by a number of practitioners. It was seen earlier that a number of practitioners suggested that the time frames imposed by DCM may serve to work against adequate case preparation. There were two reasons for this belief. First, injury stabilisation may not have occurred. Second, early case preparation may result in case issues being missed due to it being too early to have established all of the issues which are relevant to the case.

Another issue which was considered to affect the quality of justice for the plaintiff, particularly by plaintiff solicitors, was the push for early case settlement. The disadvantage of early settlement was that it may result in a reduction of the amount of compensation a plaintiff receives. For example, it was stated by one plaintiff solicitor that defendants do not make realistic offers of settlement until a case has "reached the door of the court". Therefore, it was argued that a case which settles at an early stage of the proceedings may suffer a reduction in the amount of compensation the plaintiff would have received if the case was allowed to proceed to hearing. This argument would seem to have some basis. In Section 2.5 an insurer was noted as having stated that if DCM is successful in achieving early settlement, insurers may benefit from savings as there seems to be a "connection" between case duration and case outcome.

5.3 Prospects for the Future of DCM

Comment was sought on the key informants' perceptions of the future of the DCM program, and what the requirements of its success would be. There was a general consensus among those interviewed that the program would continue in the Common Law Division, despite the January 1996 "sunset clause" under which it is operating. The program was considered to represent a trend in litigation which is occurring on an international scale. As one solicitor stated "we are dealing with a more educated clientele, people who are more aware of their rights and the result is increasing litigation. The Court is getting busier and it needs to streamline its procedures to cope with it". Key court informants indicated that in January 1996, the program will be likely to undergo some modification based on experience gained during the first two years of operation.

Outlined below are five elements the key informants saw as being essential to the ultimate success of the DCM program:

- adequate judicial resources;
- continued judicial support of the program;
- maintenance of program momentum;
- solicitor compliance; and the
- application of sanctions.

5.3.1 Adequate Judicial Resources

The provision of adequate judicial resources to meet the 18 month time goal of DCM was viewed by all key informants as being essential to the success of the program. Failure to do so, it was believed, would have at least two effects. The first was that practitioners would begin to file DCM Documents upon commencement to "get into the queue", regardless of the state of case readiness to proceed. This would result in cases being adjourned when they come before the Court, which wastes time and costs, not to mention Court resources. It was also believed that there would be a fall in the rate of settlements, as the stimulus to settle due to "trial date certainty" would be lost. In short, without adequate judicial resources the time frames established by DCM will not be able to be maintained, and litigation will once again become unpredictable and uncontrollable.

The likelihood of this occurring was considered, particularly by practitioners, as being high. Inadequate judicial resources for civil cases in the Common Law Division was described as a longstanding problem, and was seen as exacerbating the problems which occurred with previous programs. Civil cases are not allocated a specific number of judges to hear cases; instead, they receive in number what the criminal jurisdiction does not require (see Section 3.1).

5.3.2 Continued Judicial Support

Strong judicial leadership and support were highlighted as being fundamental to program success. To date, DCM has received this but it was predicted that if it does not continue, the program will lose its impetus and fail. It was noted by a judicial officer that this has indeed occurred with other Supreme Court programs. While the level of judicial support was high, programs have succeeded in achieving their aims. However, should they lose the key judge, and with them goes enthusiasm for the program, programs have fallen apart. It was stated that "programs have come and gone in the past depending on the backing they received from the judiciary".

5.3.3 Maintenance of Program Momentum

Another issue raised was the possibility of the program losing its impact as practitioners become more familiar with it. Essentially, the program would "run out of steam" over time. This was recognised by a judicial officer as being a potential problem, and one which could be countered by implementing minor changes in the program. He stated that "there is always the need for changes, as something new tends to keep things moving along".

5.3.4 Solicitor Compliance

A related issue is that of solicitor compliance. The ultimate success of DCM was recognised by both court informants and practitioners as resting with the willingness of practitioners to comply, not only with the letter of DCM, but with its "spirit" as well. In short, DCM cannot succeed simply by virtue of the rules it imposes. As one judicial officer stated, "program success depends on early and careful preparation of documentation" and that if the "old approach of loose or open documentation is used, DCM will be of no benefit". The statement by a practitioner that "it takes both sides to want to settle" also highlights where some of the onus for program success lies. If both parties choose not to prepare early documentation and discuss settlement early in the process, the goals of DCM cannot be achieved.

5.3.5 Application of Sanctions

The issue of solicitor compliance is particularly important to monitor because some believed that a certain amount of program success will depend on the willingness of the judiciary to impose sanctions on practitioners who fail to comply with the rules imposed by DCM. The imposition of sanctions was seen as not only having the potential to ensure solicitor compliance, but as a means of avoiding the loss of program impetus, as it would be too risky for solicitors not to put in

continued effort. One practitioner stated that if the Court fails to impose sanctions on solicitors who do not comply with the rules of DCM, it will be the "downfall" of the program.

The issue of imposing sanctions on practitioners was raised during the interviews. It was noted that there is some reluctance to impose cost rules on solicitors or to strike unready cases out of lists as it is the litigant who ultimately pays the costs, in both monetary terms and time. It was also suggested that judicial officers who are not fully committed to a program may be more likely to allow practitioners to "flout the system".

5.4 Implications for the Legal Profession and the Justice System

Comment was sought on any incidental effects the informants perceived DCM to have had. Two main issues emerged:

- the effect of DCM on work quality; and
- DCM and the emergence of a "two-tiered" justice system.

The issue of increased work quality under DCM was frequently raised during the interviews. This was seen as having two possible origins. The first was that DCM requires solicitors to work harder. It was stated by a solicitor that under DCM, less competent solicitors are being made to "come up to speed" to meet program requirements. It was further noted that DCM helps practitioners to achieve this through the provision of written directions which serve as "checkpoints against which they can run their case". As one judge stated, "the aim of the Court is to put solicitors on track, not to remove cases and punish solicitors". Under DCM, another judge stated "good" practitioners are no longer held up by "bad" ones.

Another view was that standards for work quality would be raised through DCM forcing the "less competent solicitors out of the market for Supreme Court cases". Thus, specialisation of litigation will emerge as a result of the introduction of the program. The practitioners who were of this view considered it a positive side effect of the program. They believed that increased specialisation would coincide with an increase in work quality, and the more thorough handling of cases.

It was suggested that the introduction of DCM has, in one sense, created a "two-tiered" justice system. While DCM cases may be forging ahead at a quick rate, this is occurring at the expense of cases not in the program. It was pointed out by one practitioner that when the program first began, it was possible to transfer old cases into it. However, due to an increase in the DCM workload, the Court is accepting fewer transfers. This was considered to disadvantage cases which have been in the system for a long period of time. As one practitioner stated, "if the Court

implements a program, then it should have the resources available to handle the old cases as well". This problem was anticipated by the Court, but it was argued that it was not feasible for the Court to wait for the backlog to dissipate before implementing DCM, as in the mean time, the backlog would have been increasing. It is important to note that this effect of DCM is one which will continue only as long as there are cases under the old system awaiting hearing.

5.5 Summary

From the interviews, it became apparent that there was not as much disagreement between the opinions and attitudes of the court staff and the legal practitioners as might have been expected given the strong opposition the program received from the Law Society and the Bar Association prior to its introduction (see Section 2). There appeared to be an acceptance by the practitioners of the need for the Court to establish mechanisms which provide greater management of case processing, and recognition of the benefits of time standards and time goals which the DCM program has introduced.

Generally however, the opinion of the profession in relation to DCM appears to have changed since its introduction. A number stated that they were opposed to the introduction of the program, but that they had, as one practitioner put it, "mellowed over time". This was the result of a combination of the program not having produced many of the problems which had been anticipated prior to its implementation, and due to practitioners experiencing, first hand, benefits that DCM can bring to clients who have cases which require fast attention. It was also noted that the feedback that the Law Society had been receiving from the legal profession generally had, to date, been positive. It would appear that the initial furore which surrounded the introduction of the DCM program has to a large degree subsided, and practitioners are simply "getting on with it" and responding to the program as they would any other.

The interviews also provided the opportunity to establish what the users of the system saw as being fundamental to program success, as well as implications DCM has for the legal profession and the justice system. Both of these issues will be central to any review the Court undertakes of the DCM program.

108 See Section 2 for a discussion of this issue.

109 See Section 3 for a description of the type of information DCM Documents should contain.

110 Beck, A, 1994, "Developments in Litigation", *Law Talk*, 423, pp. 20–23.

6

Implications for the Program's Future and Remaining Research Questions

The main aims of this research were to document the development of the DCM program, and to determine whether it had been implemented as intended by the Supreme Court. The study found that there was considerable opposition to the program during its development, which continued through to its implementation in January 1994. A fairly vigorous campaign was waged against the program by the Law Society and the Bar Association, whose main concerns were the implication the program had for the work of solicitors and the cost of litigation.

During the interviews with key informants held one year into the operation of the program, it was found there was not as much dissension between the opinions and attitudes of the court informants and the practitioners as was expected given the initial opposition to the program. Instead, it was found that the profession had undergone a shift in opinion over the past year. The initial opposition expressed by most practitioners was replaced, at least at this stage, with support. It was stated that the program had not created the host of problems which had been anticipated and had provided considerable benefits to some of their clients.

The interviews provided some preliminary information on the concerns initially raised by the profession. Some solicitors suggested that DCM had increased their work burden, others did not. However it remains to be seen, given the newness of the program, whether an increased burden will be experienced by some only while they are getting used to the system. On the other hand, it could be that those who have not experienced increased burden are not yet putting in the amount of work which is required by the program, or that they may once their caseload operating under DCM increases. It was also predicted that DCM would force some practitioners out of taking their cases to the Supreme Court. However, it is still too soon to determine whether this will occur.

With regard to the issue of costs, it may be found that DCM does achieve its goals, but at some monetary and other costs to litigants. It remains to be seen whether DCM will affect access to justice in the Supreme Court as some have suggested it may do. Some suggested that DCM may tend to promote early settlement at the expense of a fair settlement, and early case preparation at the expense of good case preparation. Other issues are also relevant here. It is important to consider how faster disposition may affect litigation outcomes, and litigant and solicitor perceptions of fairness and satisfaction.

The analysis of how closely the program implementation followed program design also highlighted implications for program modification. The following provides a synthesis of the results presented in Section 4.

The first question considered was whether DCM has reached the cases that it targeted. In Section 4 it was shown that it had. However, in the first year, 11% of DCM cases were transferred to the program. Most of these commenced litigation some years ago, and this group comprised a slightly different case mix than those which have been commenced under DCM. Despite the fact that the Court built a provision for transfer cases into the program, the following questions arise. What is the benefit of applying DCM, with its emphasis on early intervention, to old cases? Does this constitute efficient use of judicial resources? Are these the best cases upon which to "test" the DCM program? Many of these cases are moving through the DCM system at a faster rate than cases which commenced under the program. This is because they were ready, or almost ready, for hearing at the time of transfer. It is important to consider that it is these cases upon which the Court is essentially trialing the program, and upon which program precedents are being set. The system, and the needs of the cases within it, may change as more of the cases for which DCM was designed begin to move through the system.

The second question is whether DCM is achieving early court intervention. The number of cases in the Not Ready List after the first year suggests that DCM is not achieving early intervention for all cases. DCM was introduced with the aim of removing the control over the pace of litigation from practitioners. While they have done this to a certain extent by having a time limit within which DCM Documents have to be filed, the period of 12 months which has been allowed appears to be compromising the aims of the program. The Court did not anticipate that most solicitors would take advantage of the 12 month period before complying with the DCM documentation requirement. A considerable number of cases commenced at the outset of the program remained in the Not Ready List 9–12 months later. Again, a longer time frame is required to evaluate this program feature. Further, it still remains to be seen what action the Court will take when cases not filing within this period are called up. The Practice Note has not specified what should occur at this stage, although it is fundamental to program success. The large number of cases in the Not Ready List has implications for whether the goals of early settlement and a reduction in the time to disposition will be achieved. Another important issue is to establish why so many cases are remaining in the Not Ready List for extended periods.

The DCM Documents themselves have caused concern. They are intended to provide information which will facilitate track assignment and aid early settlement. It was suggested that in some cases, the information provided on the documents was not adequate enough to accomplish this. It was suggested that the Court should

provide solicitors with a precedent upon which to rely while preparing the documents, and should undertake early vetting of the documents, perhaps at the time of filing, to ensure the standard is adequate. Problems have also been encountered with solicitors filing a Certificate of Compliance but not having complied with all directions. This and the adequacy of DCM Documents have implications for adjournments and efficient use of judicial resources. This also highlights, as some have said, that there may be a need for the Court to impose sanctions on solicitors who choose not to conduct litigation in accordance with the program.

This point brings us to the program goal of increasing the efficient use of judicial resources. The number of adjournments which have occurred to date suggests that this goal may also be under compromise. It is important to consider why this might be occurring. A number of possibilities exist. First, the Law Society predicted that 65 sitting days from the filing of DCM Documents to the Status Conference did not allow practitioners enough time to prepare.[111] Second, it may be, as has been suggested, that practitioners and court staff require some time to get used to the new system. Third, it is possible that practitioners are conducting litigation as they were under the previous system, with little regard to the program rules.

If DCM fails to implement early intervention, it cannot ultimately achieve the goal of reducing time to disposition. Nevertheless, it was found that, to date, the time frames specified by the program are being met among the relatively small number of cases that have proceeded through various stages. However, the small number of cases operating in the system during its first year was noted, and some doubt exists as to whether the availability of judicial resources will be adequate to achieve its goals when larger numbers of cases require judicial attention.

Finally, the question which needs to be asked is whether differential management of cases, on the basis of case complexity and the need for pre-trial management, is occurring. With the Standard Track operating in its current form, the answer to this is not entirely. Solicitors can opt for the Standard Track regardless of case complexity and need for pre-trial management, should they choose to do so. While the Standard Track could be maintained for the "run of the mill cases", without Court supervision of track allocation for all cases it can never be sure that the aims of DCM are being achieved.

This analysis of the implementation of DCM has identified key questions that can only be answered with a rigorous impact evaluation. While this research describes the development of DCM and discusses whether it has been implemented as intended, it raises several important questions about the potential impact of the program on the process of litigation, litigation outcomes and the issue of quality of justice. Building on the results of this analysis of the first year's implementation

problems, research should be conducted to assess whether the program is successful in achieving its goals of reducing the overall time to disposition, achieving earlier settlements and increasing the efficient use of judicial resources. An assessment also needs to be made of whether the anticipated benefits and problems do in fact occur, and what effect DCM will have on perceptions of justice.

111 Law Society documentation.

7

Summary and Conclusion

7.1 Summary

Background and Research Objectives

This research examined the development and implementation of a program of Differential Case Management (DCM) which became operational in the Common Law Division of the Supreme Court of New South Wales on 31 January 1994. The research had three main objectives:

- To document the background of the DCM program.
- To describe the characteristics of the program design and the program in operation.
- To ascertain and report the views of key informants who have some knowledge or experience of the introduction of DCM.

Main Research Findings

In an atmosphere of government and public concern about increasing court delay, the Supreme Court convened the Common Law Delay Reduction Committee in September 1988. Since its inception, the committee has implemented progressively more intensive programs of case management aimed at reducing delay. DCM represents the third delay reduction program implemented by the committee.

Program Development, Modification and Debate

The ultimate responsibility for the features and design of the DCM program lies with the Supreme Court. The Court sought input on the DCM program from the legal profession once a draft of the Practice Note which introduced the program (Practice Note 81) was completed. In response to concerns raised by the profession, the Court incorporated a number of changes into the DCM Practice Note. It was found, however, that after the distribution of two drafts, lengthy discussion and a number of program modifications, neither the Court nor the profession was completely satisfied with the final version of the Practice Note.

As this implies, there was considerable debate surrounding the introduction of the program into the Common Law Division. Spokespersons for the legal profession expressed opposition to the introduction of the program on the grounds that such intensive court management of cases was inappropriate and unnecessary given changes which had already occurred in the Division. They also argued that DCM would place additional burdens on solicitors and would increase litigants' costs.

Key informant interviews were conducted at the end of the first year of program operation. These provided an opportunity to see whether the concerns originally expressed by the Law Society and the Bar Association, and their opposition to the program, was reflected by the current views of individual practitioners. Most of the practitioners were supportive of DCM. However, the opinions held by a number of individual practitioners about the program were found to have changed since the introduction of the program. Several stated that they had themselves been opposed to the introduction of the program, but that their views had "mellowed over time". This was the result of a combination of the program not having produced many of the problems which had been anticipated, and to their experiencing, first hand, benefits which DCM offers for clients who have cases which require fast court attention. Most of the arguments used by the Law Society and the Bar Association to oppose the introduction of DCM contrast directly with the arguments used by the Court to support its introduction.

Was the Program Implemented as Intended?

An examination of the program's operation during the first year allowed us to determine the extent to which the program was implemented as intended. The results indicated that the DCM program did indeed reach the cases that it targeted but that some features of the program design were implemented more fully than others.

It was found that early court intervention was not implemented entirely as intended. The Court had intervened relatively quickly once parties filed the relevant documentation. However, on the whole, parties did not file the DCM Documents at commencement of the case as intended and one half of the cases remained in the Not Ready List at the end of the first year. Therefore the Court had not yet commenced active intervention in most cases.

Differential treatment of cases was thought to have been implemented as intended. The Court had succeeded in providing tailored and need specific directions and timetables to cases in the Individual and Special Tracks. As a result some cases received more intensive management than others.

The time goals and timetables were also considered to have been implemented as intended. In general the Court succeeded in setting timetables to meet the time standards specified in the Practice Note and the 18 month time goal. However often the timetables set were well within the time standards specified, and as a result some parties were having difficulties in meeting their timetables.

The Court did not control adjournments as fully as intended during the first year of the program. Twenty-seven percent of the Status Conferences were adjourned to a further Status Conference and 25% were adjourned for other purposes. Forty-six percent of the Final Conferences were adjourned.

The Future Success of the Program

Opinions were sought from key informants on the future of the DCM program. There was general consensus that the program would continue, as it represented a trend which was occurring on an international scale. It was suggested that in January 1996, the program will undergo some modification based on the experience gained in the first two years of operation.

Five key elements required for the success of the DCM program came out of the interviews:

- adequate judicial resources;
- continued judicial support of the program;
- maintenance of program impetus;
- solicitor compliance; and
- application of sanctions.

7.2 Conclusion

At the request of the Supreme Court of New South Wales the CJRC evaluated the first year of the implementation of a program of Differential Case Management in its Common Law Division. This report reviewed the development and design of the program and presents the CJRC's observations about the implementation of the program.

The research has highlighted the complexities of controlling case processing and delay reduction. The CJRC's conclusions are that the case management procedures introduced by DCM have incorporated features which are fundamental to both successful case management and delay reduction. It has found, however, that the program has not, in all aspects, been implemented entirely as intended by the Court. This fact has important implications for the future success of the program in achieving its goals of promoting early settlement, increasing efficient use of court resources and reducing the amount of time between case commencement and disposition.

It is important to note however that this evaluation is of the first year of program operation. It is anticipated that the program will undergo changes as more cases come into the system and as DCM becomes more internalised within both the court system and the practices of legal professionals.

In sum, this implementation analysis has answered questions about how the program of DCM was implemented in the Common Law Division of the Supreme Court of New South Wales, and has considered the implications of program introduction. It has also highlighted areas of the program where modifications may be required if the program is to achieve its goals. However the questions of greatest significance can not be answered until a sufficient number of cases have been finalised under DCM to enable an impact analysis to be conducted. Only at that point will it be possible to consider whether DCM has achieved its goals and what impact it has had on the process and cost of litigation.

APPENDIX 1

Data Coding Sheet

ID: ☐☐☐ Coder: ☐☐ Date: ☐☐☐☐☐☐ Checked: ☐ Entered: ☐

Information source: 1 = computer 2 = court file ☐ Current track: ☐

DCM IMPLEMENTATION STUDY CODING SHEET

FILE INFORMATION DAY NO. ☐☐☐

1	File/court number		S☐☐☐☐☐☐ of 19☐☐
2	Statement of Claim	(dd-mm-yy)	☐☐☐☐☐☐ N/A ☐
3	Claim type	Use code	☐☐ other:_____
4	Summons	(dd-mm-yy)	☐☐☐☐☐☐ N/A ☐
5	Defence filed	(dd-mm-yy)	☐☐☐☐☐☐ N/A ☐
6	Cross-claim filed	(dd-mm-yy)	☐☐☐☐☐☐ N/A ☐
7	Number of plaintiffs		☐
8	Number of defendants		☐
9	Number of cross-claimants		☐
10	Number of cross-defendants		☐
11	Was the case transferred into DCM?	1=yes 2=no	☐
12	If yes, where was it transferred from?	Use code	☐☐ other:_____
13	Who requested the transfer?	Use code	☐ other:_____
14	Date of transfer	(dd-mm-yy)	☐☐☐☐☐☐
15	Date of filing in previous forum	(dd-mm-yy)	☐☐☐☐☐☐

DCM DOCUMENTS - PLAINTIFF

16	Have the documents been filed?	1=yes 2=no	☐
17	Date of filing	(dd-mm-yy)	☐☐☐☐☐☐
18	Were DCM documents dispensed?	1=yes 2=no	☐
19	Date they were dispensed with	(dd-mm-yy)	☐☐☐☐☐☐
20	At what stage were they dispensed with?	Use code	☐

DCM DOCUMENTS - DEFENDANT

21	Have the documents been filed?	1=yes 2=no	☐
22	Date of filing	(dd-mm-yy)	☐☐☐☐☐☐
23	Were DCM documents dispensed?	1=yes 2=no	☐
24	Date they were dispensed with	(dd-mm-yy)	☐☐☐☐☐☐
25	At what stage were they dispensed with?	Use code	☐

DCM DOCUMENTS - OTHER PARTIES

26	Party	Use code	☐
27	Have the documents been filed?	1 = yes 2 = no	☐
28	Date of filing	(dd-mm-yy)	☐☐☐☐☐☐
29	Party	Use code	☐
30	Have the documents been filed?	1 = yes 2 = no	☐
31	Date of filing	(dd-mm-yy)	☐☐☐☐☐☐
32	Party	Use code	☐
33	Have the documents been filed?	1 = yes 2 = no	☐
34	Date of filing?	(dd-mm-yy)	☐☐☐☐☐☐
35	Party	Use code	☐
36	Have the documents been filed?	1 = yes 2 = no	☐
37	Date of filing?	(dd-mm-yy)	☐☐☐☐☐☐

CASE MANAGEMENT DETAILS

38	What stage is the case at?	Use code	☐☐ other:_____
39	Is the case in a track?	1 = yes 2 = no	☐
40	Which track?	Use code	☐
41	When was the case placed in this track?	(dd-mm-yy)	☐☐☐☐☐☐
42	What stage was this?		☐ other:_____
43	Give details of any changes in tracks (include Not Ready List)		_____
44	Certificate of Compliance Date	(dd-mm-yy)	☐☐☐☐☐☐ N/A ☐
45	Has this date been complied with?	Use code	☐
46	Date of filing		☐☐☐☐☐☐
47	Notice to Set Down for Trial filed		☐☐☐☐☐☐ N/A ☐
48	Statement of Particulars filed		☐☐☐☐☐☐ N/A ☐
49	Was the case referred to ADR at any stage?	1 = yes 2 = no	☐
50	Date of referral	(dd-mm-yy)	☐☐☐☐☐☐
51	Stage of referral	Use code	☐☐

DCM COURT APPEARANCES

Court Appearance 1

Date: ☐☐☐☐☐☐ Type: ☐☐ Other: _____

Judicial Officer: ☐☐ Other: _____

Directions _____

Court Appearance 2

Date: ☐☐☐☐☐☐ Type: ☐☐ Other: _____

Judicial Officer: ☐☐ Other: _____

Directions _____

Court Appearance 3

Date: ☐☐☐☐☐☐ Type: ☐☐ Other: _____

Judicial Officer: ☐☐ Other: _____

Directions _____

Court Appearance 4

Date: ☐☐☐☐☐☐ Type: ☐☐ Other: _____

Judicial Officer: ☐☐ Other: _____

Directions _____

DCM COURT APPEARANCES (continued)

Court Appearance 5

Date: ☐☐☐☐☐☐ Type: ☐☐ Other: _____

Judicial Officer: ☐☐ Other: _____

Directions _____

Court Appearance 6

Date: ☐☐☐☐☐☐ Type: ☐☐ Other: _____

Judicial Officer: ☐☐ Other: _____

Directions _____

Court Appearance 7

Date: ☐☐☐☐☐☐ Type: ☐☐ Other: _____

Judicial Officer: ☐☐ Other: _____

Directions _____

COMMENTS

APPENDIX 2
Interview Schedule

DIFFERENTIAL CASE MANAGEMENT - INTERVIEW GUIDE

1 (a) What would you say were the main factors that led to the introduction of Differential Case Management?

(b) How were the DCM procedures developed? Who contributed to that process, and in what ways? How does DCM differ from the previous case management system?

2 What would you say were the specific objectives of introducing DCM?

3 Has the program or the approach changed in any ways since DCM was first introduced? If so, in what ways, and why?

4 Would you say that DCM has been consistently implemented in accordance with:

(a) the general principles of differential case management, for example, individualised management of cases, early and ongoing court management etc.?

(b) the rules set out in practice note 81?

5 Do you have any comment on the time standards and time goals specified under DCM?

6 (a) How, if at all, has the introduction of DCM affected your own work or workload, or the way you go about your work? Do you have any changes to suggest which would improve/simplify things from your own viewpoint?

(b) Has the introduction of DCM created more work or required additional resources within the Court?

7 What is your general attitude to the increasing computerisation in the Courts system? Do you have any comment on the way the Court is using computers to manage cases under DCM? What is your view on the use of computers in court 11D?

8 Who are the main groups affected by DCM? How would you say these different groups have responded to it over the past year?

9 From your perspective, what are the most positive aspects or benefits of the system?

10 From your perspective, what are the most negative aspects or disadvantages of the system?

11 (a) Do you foresee any changes likely to be made in the way that DCM operates in the future?

(b) Are there any other changes to the system that you would suggest?

12 (a) How successful would you say DCM has been, so far, in meeting the objectives we discussed earlier? Is there anything which we have not so far mentioned and which you think would help better achieve those objectives?

(b) Are you aware of any other effects or implications that the introduction of DCM has had - that is, incidental or unintended effects?

(c) How do you see the future of DCM?

13 Do you have any other comment on DCM or the way it has operated to date?

APPENDIX 3
Practice Note 81

The Chief Justice

New South Wales

Supreme Court of New South Wales
Common Law Division

Practice Note No 81
Differential Case Management, Sydney

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Supreme Court of New South Wales
Practice Note No 81
Differential Case Management, Sydney

Part 1
Introduction

1 New system of case management

The Common Law Division intends to give effect to a new system for Case Flow Management. The system is to be known as "Differential Case Management" or "DCM". The judges of the Common Law Division proposed to give effect to this system under their powers of pre-trial management of cases, in particular their powers under s76A of the Supreme Court Act.

This Practice Note is to inform the legal profession and the public how the Supreme Court will exercise its powers under the Supreme Court Act and the Rules to implement DCM. The Practice Note does not confer these powers, it merely explains how they will be exercised.

DCM is a refinement of the Active Case Management System covered by Practice Note No 68.

2 What is Differential Case Management?

DCM is a system of individualised case management. It is designed to ensure equal access to court services so that cases are resolved justly and efficiently.

DCM is a program for managing all cases, not just those that will go to trial. It is designed to promote the early settlement of cases. Cases that should have been resolved at an early stage often settle at the door of the court or part way through a hearing. This involves an unacceptable waste of scarce resources and increases the cost of litigation.

For cases that cannot be settled, DCM is designed to reduce the time of the hearing, by narrowing the issues for trial.

3 Proceedings covered by DCM

From 31 January 1994 DCM applies to the following proceedings in the Common Law Division:

- those commenced on or after 31 January 1994;
- those transferred from another court or from another Division on or after 31 January 1994;
- any others the Court directs it applies to.

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4 Proceedings not covered by DCM

DCM does not apply to the following:

- proceedings commenced by statement of claim that name a place other than Sydney as the place of trial;
- proceedings for defamation;
- proceedings in the Construction list.

5 How does DCM work?

DCM modifies the existing case management procedures (set out in Practice Note No 68) by differentiating between various types of cases according to their complexity and the need for pre-trial activity. In this way, some cases receive more intensive management than others. As the essence of DCM is that each case is given only the necessary degree of management, the Court seeks to place each case on an appropriate management track. These tracks are the Individual Track and the Special Track. How the Court selects the appropriate track is described later in this Note. Most cases will not require numerous direction hearings, but cases which should respond to more intensive management will receive closer supervision.

Plaintiffs who do not wish to take advantage of the benefits of Individual Case Management have the option of proceeding along the Standard Case Management Track.

6 Monitoring and reviewing the DCM system

This Practice Note applies to all cases commenced before 1 January 1996. This "sunset clause" provides a date for appropriate review of the DCM system. A working party made up of representatives of the Court and the legal profession will monitor DCM during its operation.

Part 2
General

7 Interpretation

In this Practice Note:

(a) **default proceedings** refers to proceedings commenced by statement of claim which contain only a claim or claims for one or more of the following:

- a liquidated demand;
- possession of land;
- an order for interest under section 94 of the Supreme Court Act 1970.

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(b) **ordinary proceedings** refers to proceedings which are commenced by statement of claim that are not default proceedings;

(c) a party's **DCM documents** has the meaning given to it in Appendix A.

8 Commencing proceedings

8.1 Normally proceedings should be commenced by statement of claim. However, DCM also covers proceedings commenced by summons.

8.2 The originating process and pleadings should be as brief and precise as the nature of the case allows.

9 Service of documents

For DCM to be as effective as possible, parties are expected to serve other parties with all relevant documents and information. In particular:

(a) where a party files:

- that party's DCM documents; or
- an application for a Status Conference;

that party should serve it or them on all other parties as soon as possible;

(b) a party whose action causes the court to appoint a Status Conference should serve notice of the appointment on all parties. Where that party is not a plaintiff, the court will also give notice of appointment to other parties;

(c) where a party files an election to proceed on the Standard Case Management Track and receives from the registry the uniform directions, that party should serve a copy of the election and of the directions on all other parties as soon as possible.

Part 3

Ordinary proceedings

10 DCM documents

10.1 A plaintiff should file DCM documents at the same time as filing the originating process; but subject to the discretion of the court, may do so at any time afterwards.

10.2 Proceedings are placed in the Not Ready List until:

(a) the plaintiff's DCM documents are filed; or
(b) another party takes steps to bring the matter before the Court.

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10.3 Where a document or information is not available, the non-complying party should file with that party's DCM documents a statement of the reasons for failure to comply.

11 Appointment of Status Conference

11.1 Unless a Status Conference has already been appointed, a plaintiff should file with the DCM documents either:

(a) an application for a Status Conference in the form of Appendix B; or

(b) an election to proceed on the Standard Case Management track in the form of Appendix C. This should only be done if an affidavit of service of the statement of claim on, or an appearance by, a defendant has been filed.

11.2 Where a plaintiff's DCM documents are filed without an application for a Status Conference or an election, the Court appoints a Status Conference.

11.3 Where the Court appoints a Status Conference, each party should serve their DCM documents within 20 sitting days of being served with the notice of Status Conference, on all other parties.

11.4 A Status Conference in ordinary proceedings normally takes place 65 sitting days after the filing of plaintiff's documents.

11.5 Any party who has filed DCM documents may apply for a Status Conference, but may not do so after the expiration of 135 sitting days from the filing of the election. This restriction is imposed to avoid the use of an application for a Status Conference to delay proceedings for tactical reasons.

11.6 The Court may appoint a Status Conference at any time.

Part 4

Proceedings other than ordinary proceedings

12 Default proceedings and proceedings transferred from another court

12.1 The Court appoints a Status Conference where:

(a) a defence or cross-claim is filed in default proceedings and a Status Conference has not been appointed previously; or

(b) proceedings are transferred from another court.

12.2 The Status Conference takes place at the earliest possible date, which is normally 10 sitting days' time.

12.3 Where an order is made setting aside a judgment in default proceedings, the Court appoints a Status Conference, which will normally take place 65 sitting days after the order is made.

12.4 The Court places the default proceedings in the Inactive List when:

(a) 60 sitting days have elapsed since the commencement of default proceedings;

(b) no defence or cross-claim has been filed in the proceedings; and

(c) the proceedings have not been disposed of.

12.5 In an urgent case, a party may ask the Court to appoint an earlier date for a Status Conference.

13 Status Conference for proceedings commenced by summons

If a Status Conference is necessary for proceedings commenced by summons, it takes place not less than 14 days after the first occasion on which the proceedings come before the Court.

14 DCM documents

14.1 In proceedings other than ordinary proceedings, the Court gives directions for filing DCM documents the first occasion the proceedings come before the Court for a Status Conference.

14.2 Where a document or information is not available, the non-complying party should file with that party's DCM documents a statement of the reasons for failure to comply.

Part 5
Status Conference and track selection

All parties attend a Status Conference to conduct an in-depth review of the case. The orders and directions made at a Status Conference are designed to resolve the case as quickly as possible. The tasks at a Status Conference include:

- defining the matters in issue, including liability, by examining DCM documents;
- directing the parties to the possibility of settlement, including ascertaining prospects for, and giving directions to promote settlement;
- considering whether Alternative Dispute Resolution is suitable, and if so, giving appropriate directions;
- establishing whether any party requires a trial by jury, and if so, for what reasons;

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- allocating proceedings to the appropriate case management track;
- giving directions to ensure that all interlocutory steps are completed as early as possible;
- giving directions designed to ensure that within 210 sitting days (or on the Special Track, within the time the court fixes) proceedings will be adequately prepared for the Final Conference.

15 Conduct of Status Conference

15.1 A judge, a master, or a registrar conducts a Status Conference.

15.2. At a Status Conference, the Court may give directions or make orders to parties to file documents or any further information necessary for track selection.

15.3 The Court may adjourn a Status Conference to give parties time to comply with directions or orders.

15.4 If a party other than the plaintiff has applied for a Status Conference and is in default, the Court may:

(a) allow the proceedings to remain on the Standard Case Management Track; or

(b) return the proceedings to the Not Ready List.

16 Track selection at a Status Conference

16.1 At a Status Conference, based on the information provided by both parties, the judge or registrar allocates proceedings to either the:

- ***Individual Case Management Track***: under which proceedings are managed according to directions appropriate to the specific case, as the Court determines; or
- ***Special Case Management Track:*** for proceedings of intrinsic complexity or unusual urgency that warrant management in a particularly fast and cost-effective way.

16.2 Where defaults or difficulties have arisen, the Court may transfer proceedings to another track.

16.3 Where proceedings are allocated to the Individual Case Management Track, the Court:

(a) makes orders and gives directions so that in the shortest possible time, and within 210 sitting days after the date of commencement of the Status Conference, the matter is ready for a Final Conference;

(b) directs the plaintiff to file and serve a Certificate of Compliance in the form of Appendix D by a certain date.

16.4 Where proceedings are allocated to the Special Case Management Track, the Court where practicable nominates the trial judge and adjourns the Status Conference to be resumed before that judge.

16.5 Where proceedings are allocated to the Special Case Management Track, the Court may:

(a) make orders and give directions to lead to the earliest possible identification of issues, and the prompt and effective preparation of the case;

(b) adjourn the Status Conference until the Court is satisfied the proceedings are ready to be assigned a hearing date;

(c) direct the plaintiff to file and serve a Certificate of Compliance in the form of Appendix D by a certain date; or

(d) include the proceedings in the Holding List, or refer them to the listing clerk to appoint a special fixture, if the Court is satisfied that the proceedings are ready to be assigned a hearing date.

17 Selection of the Standard Case Management Track

17.1 Proceedings are placed on the Standard Case Management Track only if the plaintiff elects to do so when filing his or her DCM documents.

17.2 When a plaintiff files an election to proceed on the Standard Case Management Track, the Court issues a notice that contains the uniform directions, and assigns to each a date for compliance. The plaintiff serves this notice on all parties.

17.3 The uniform directions include a direction that the plaintiff file and serve a Certificate of Compliance in the form of Appendix D on or before the day which is 275 sitting days after filing the election.

Part 6

Final and Default Conferences

After filing a Certificate of Compliance, all parties attend a Final Conference to see if the case can be disposed of, or to set the case down for trial. If a Certificate of Compliance is not filed on time, a Default Conference is held to try to achieve compliance.

18 Appointment of Final Conference

18.1 When a party files a Certificate of Compliance, the Court appoints a Final Conference.

18.2 When proceedings are allocated to the Individual or Special Case Management Tracks, a Final Conference will take place 15 sitting days after filing a

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Certificate of Compliance, and no later than 225 sitting days after the Status Conference.

18.3 When proceedings are allocated to the Standard Case Management track, a Final Conference will not take place until 291 sitting days after the filing of the election.

19 Default Conference

The main purpose of a Default Conference is to bring a case to a Final Conference as early as possible, within the original time frame. If at the Default Conference the proceedings are found to be ready for hearing, the conference will go ahead as a Final Conference. If the proceedings cannot be made ready for hearing in accordance with the track to which they have been allocated and the directions given, other orders may be made, including:

- dismissal of the proceedings;
- loss of priority.

19.1 If a Certificate of Compliance is not filed as directed, the proceedings will be listed for a Default Conference before the List Judge. The Default Conference will take place 15 sitting days after the date the Certificate of Compliance should have been filed.

19.2 At a Default Conference, the conduct of the parties and their solicitors concerning the preparation of the proceedings is examined and appropriate orders made, which may include costs orders.

20 Conduct of Final Conference

20.1 Because adequate time is given to prepare cases, Final Conferences will only be adjourned in exceptional circumstances.

20.2 Parties should attend a Final Conference in person.

20.3 At a Final Conference, the Court explores prospects of settlement or of disposal of proceedings by Alternative Dispute Resolution, if available. The Final Conference is an appropriate time to make offers of compromise under Part 22 of the Rules.

20.4 If settlement negotiations are unsuccessful, both parties should sign a comprehensive and detailed statement of the real matters in dispute.

20.5 If it appears at a Final Conference that proceedings are not capable of being settled, the Court:

- considers the state of preparation;
- confirms compliance with directions and sets short time limits for compliance with any directions not yet complied with;

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- identifies and attempts to narrow the issues;
- secures and records admissions;
- gives directions for final preparation, including steps to shorten the trial.

21 Setting proceedings down for trial

21.1 The Court exercises its power under Part 33 Rule 8 to set the matter down for trial, if at the Final Conference the Court is satisfied that the proceedings:

- are ready for hearing; or
- will be ready by time of callup by compliance with directions given.

21.2 If the Court believes the proceedings are not ready for hearing only because of the defendant's default, the Court considers whether the defence should be struck out and the proceedings be fixed:

- for hearing undefended; or
- on the issue of damages only;

and will make appropriate orders.

21.3 Lack of preparation that can be remedied before the likely hearing date will not be allowed to delay or halt proceedings.

21.4 If the Court determines that proceedings should be set down for trial, the Court may:

(a) include the proceedings in the Holding List;
(b) include the proceedings in the Long Matters List; or
(c) refer the proceedings to the list clerk to appoint a special fixture.

Part 7

Not Ready List

The Not Ready List is designed to ensure cases commenced in the Court are under a constant process of review, with the aim of disposing of them as soon as possible.

22 Notice of proceedings being in the Not Ready List

22.1 (a) Where a case has been in the Not Ready List for 6 months, the Court sends the plaintiff's solicitor a dated notice for the plaintiff stating that the case has been placed in the Not Ready List, and the consequences of this.

(b) The plaintiff's solicitor should give this notice to the plaintiff within 20 sitting days of the date on the notice, and file an affidavit stating that this notice has been given to the plaintiff.

(c) If an affidavit is not filed within 20 sitting days of the date on the notice, the Court sends a similar notice to the plaintiff.

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22.2 Proceedings remain in the Not Ready List until:

(a) the plaintiff's DCM documents are filed;

(b) any other party files their DCM documents and an application for a Status Conference; or

(c) the Court otherwise orders.

22.3 The Court will not appoint a Status Conference or take any other step to bring the proceedings to a hearing as long as they remain in the Not Ready List.

23 Callover

23.1 When proceedings have remained in the Not Ready List for over 12 months, they will be included in a callover conducted by the List Judge. Notice of the callover is given to all solicitors on the record, and to the plaintiff. The notice specifies the date, purpose, and possible consequences of the callover.

23.2 At the callover, the List Judge makes orders and gives directions appropriate to achieving the just, efficient, and cheap disposal of the proceedings including, where necessary, an order dismissing them.

23.3 If proceedings in the Not Ready List are dismissed, the Court sends to the plaintiff and the plaintiff's solicitor a notice stating that proceedings have been dismissed, and the consequences of this.

Part 8

Inactive List - default proceedings

The Inactive List allows the Court to monitor its potential case load by reviewing outstanding default proceedings; and to ensure inadvertent delays do not arise.

24 Notice of proceedings being in the Inactive List

24.1 (a) When proceedings are placed in the Inactive List (see Clause 12.4), the Court sends to the plaintiff's solicitor a dated notice for the plaintiff stating that the case has been placed in the Inactive List and the consequences of this.

(b) The plaintiff's solicitor should give this notice to the plaintiff within 20 sitting days of the date on the notice, and file an affidavit stating that this notice has been given to the plaintiff.

(c) The Court sends a similar notice to the plaintiff if this affidavit is not filed within 20 sitting days of the date on the notice.

24.2 While proceedings remain in the Inactive List:

(a) the Court will not appoint a Status Conference or take any other step to bring the proceedings to a hearing while they remain in the Inactive List; and

(b) the party who filed the statement of claim should not file a document or take any other step in the proceedings (other than the making of a motion on notice) without paying the prescribed fee.

25 Removal of proceedings from the Inactive List

25.1 Proceedings are removed from the Inactive List when a document is filed or another step is taken in the proceedings. However, the proceedings will be returned to the Inactive List unless;

- a Status Conference is appointed; or
- proceedings are wholly disposed of within 60 sitting days.

25.2 When proceedings are in the Inactive List, if no affidavit of service of the statement of claim has been filed within 2 years after the commencement of proceedings, the Court may give each party notice that the proceedings will be dismissed unless, within a given time:

- an affidavit of service of the statement of claim is filed;
- a defence or cross-claim is filed; or
- on motion, a party satisfies the court that the proceedings should not be dismissed.

Part 9

Motions

To keep cases within acceptable time limits, and to ensure timetables are maintained, motions should be served as early as possible.

26 Notices of motion

26.1 A notice of motion should be filed and served within 5 sitting days before the date fixed for the motion.

26.2 A notice of motion filed between the appointment and conclusion of a Status Conference is returnable at the Status Conference, unless the Court otherwise orders.

26.3 If proceedings have been allocated to a track, a notice of motion should bear a note at the foot of the page stating:

- the track; and
- if a Certificate of Compliance must be filed by a certain date, that requirement and date.

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26.4 If a Certificate of Compliance must be filed in proceedings by a certain date, a party shall not without leave of the Court, move the Court for any order in the proceedings after that date.

Part 10

Default or adjournment

To minimise costs and unnecessary appearances, and to use Court time efficiently, the onus is on parties to take the initiative to try to minimise default or the need for adjournment.

27 Minimising delay and default

Parties should ensure that proceedings are not unduly delayed by defaults or delays by:

(a) giving notice to a party they know to be delaying or in default, that unless the default is rectified within a specified brief period, the party will apply to the Court for an appropriate order; and

(b) making an application for that order if the delay or default is not rectified.

28 Adjournment

To use court time efficiently, proceedings fixed for trial will not normally be adjourned unless special circumstances have arisen which could not have been foreseen. An application for adjournment requires supporting affidavits.

29 Attendance at proceedings

29.1 At proceedings resulting from a party's default (including a Default Conference) or an application for adjournment, then the following should attend the Court personally:

- the party in default or making the application; or
- if the party is a company, the officer responsible for the case.

29.2 If the party or the responsible officer is unable to attend, that person should swear an affidavit setting out the reasons for being unable to attend and, where applicable, why the adjournment is required.

Chief Justice
20 December 1993

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Appendix A

DCM documents are filed in order to provide the court with information which will assist:

- in assigning each case to the most appropriate case management track;
- in deciding what directions need to be given; and
- in directing what time should elapse before the Certificate of Compliance is filed.

DCM documents are not pleadings. A statement about the expected need for discovery or interrogatories does not preclude a later application in accordance with the rules for such interlocutory steps.

1 Plaintiff's DCM documents

The plaintiff's DCM documents are the following:

1.1 A list of the DCM documents.

1.2 A concise narrative of the facts the plaintiff intends to prove on the issue of liability.

1.3 A description (name, place of residence, place of business, and occupation) of any person from whom the plaintiff believes that the defendant may be entitled to contribution or indemnity if the plaintiff obtains judgment against the defendant. The plaintiff must include this document even if he or she currently does not intend to join this person as an additional defendant.

1.4 Where the plaintiff's claim arises out of an event that has been the subject of proceedings such as a prosecution, a coronial inquest, or an inquiry - a statement giving:

- the title of the proceedings;
- the date and place of the proceedings; and
- the name of the judicial officer who conducted the proceedings.

1.5 Where the plaintiff's claim is for damages for personal injuries:

(a) a copy of any police report concerning the event out of which the claim arises;

(b) a copy of any relevant report concerning the accident or injury prepared by an officer of:

- the Department of Industrial Relations, Employment, Training and Further Education;
- the Department of Mineral Resources;
- the Workcover Authority of New South Wales;

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(c) a statement about any other proceedings the plaintiff has brought in any court, for damages for personal injuries which may be relevant to the assessment of damages in these proceedings. The statement must mention these proceedings even if they are not related to the event out of which these proceedings arise, and must include:

- the parties to the other proceedings;
- the court in which the other proceedings are on foot or were determined; and
- the file number of the other proceedings.

1.6 Full particulars of any other accident or injury the plaintiff has suffered which is not the subject of a claim in these proceedings and which may be relevant to the assessment of damages.

1.7 Where the plaintiff is represented by a solicitor, a statement by the solicitor setting out the solicitor's opinion about:

- whether it is likely that discovery of documents will be needed;
- whether it is likely that interrogatories will be needed, and if so, why; and
- any special feature of the plaintiff's claim that might affect the complexity or length of the trial.

1.8 A statement of why:

- the judgment is likely to exceed $150,000; or
- the action is otherwise appropriate to be brought in the Supreme Court (for example: that it is a test case, a matter of public interest, a claim for professional negligence or otherwise affecting the personal reputation of one or other of the parties).

2 Defendant's DCM documents

The defendant's DCM documents are the following:

2.1 A list of the DCM documents.

2.2 A concise narrative of the facts the defendant intends to prove on the issue of liability, including contributory negligence.

2.3 A description (name, place of residence, place of business, and occupation) of any person from whom the defendant believes that the defendant may be entitled to contribution or indemnity if the plaintiff gains judgment against the defendant. The defendant must include this document even if he or she currently does not intend to join this person as an additional defendant.

2.4 Where the defendant is represented by a solicitor, a statement by the solicitor setting out the solicitor's opinion about:

- whether it is likely that discovery of documents will be needed;
- whether it is likely that interrogatories will be needed, and if so, why; and

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- any special feature of the plaintiff's claim that might affect the complexity or length of the trial.

2.5 Where the statement of claim includes a claim against the defendant for damages for personal injuries:

(a) a copy of any claim form or written report of the injury or accident the defendant or its insurer has received from the plaintiff;

(b) where the defendant or its insurer has interviewed the plaintiff, and one of the purposes of that interview was to prepare for potential or existing litigation, a copy of any statement made by the plaintiff in that interview relating to liability or contributory negligence in relation to the claim.

2.6 Any documents referred to in clause 1.5 (a) and (b) in the possession of the defendant that have not already been served on the parties.

2.7 Any information of the type referred to in clause 1.4 that the defendant knows.

3 Cross-claimant's DCM documents

The cross-claimant's DCM documents are the following:

3.1 A list of the DCM documents.

3.2 A concise narrative of the facts the cross-claimant intends to prove on the issue of the cross-defendant's liability.

3.3 A description (name, place of residence, place of business, and occupation) of any person from whom the cross-claimant believes that the cross-defendant may be entitled to contribution or indemnity if the cross-claimant gains judgment against the cross-defendant. The cross-claimant must include this document even if he or she currently does not intend to join this person as an additional cross-defendant.

3.4 Where the cross-claimant is represented by a solicitor, a statement by the solicitor setting out the solicitor's opinion about:

- whether it is likely that discovery of documents will be needed;
- whether it is likely that interrogatories will be needed, and if so, why; and
- any special feature of the plaintiff's claim that might affect the complexity or length of the trial.

3.5 Any documents referred to in clause 1.5 (a) and (b) in the possession of the cross-claimant that have not already been served on the parties.

3.6 Any information of the type referred to in clause 1.4 that the cross-claimant knows.

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4 Cross-defendant's DCM documents

The cross-defendant's DCM documents are the following:

4.1 A list of the DCM documents.

4.2 A concise narrative of the facts the cross-defendant intends to prove on the issue of liability, including contributory negligence.

4.3 A description (name, place of residence, place of business, and occupation) of any person from whom the cross-defendant believes that the cross-defendant may be entitled to contribution or indemnity if the cross-claimant gains judgment against the cross-defendant. The cross-defendant must include this document even if he or she currently does not intend to join this person.

4.4 Where the cross-defendant is represented by a solicitor, a statement by the solicitor setting out the solicitor's opinion about:

- whether it is likely that discovery of documents will be needed;
- whether it is likely that interrogatories will be needed, and if so, why; and
- any special feature of the plaintiff's claim that might affect the complexity or length of the trial.

4.5 Where the statement of cross-claim includes a claim against the cross-defendant for damages for personal injuries:

(a) a copy of any claim form or written report of the injury or accident the cross-defendant or its insurer has received from the cross-claimant;

(b) where the cross-defendant or its insurer has interviewed the plaintiff or cross-claimant, and one of the purposes of that interview was to prepare for potential or existing litigation, a copy of any statement made by the plaintiff or cross-claimant in that interview relating to liability or contributory negligence in relation to the claim.

4.6 Any documents referred to in clause 1.5 (a) and (b) in the possession of the cross-defendant that have not already been served on the parties.

4.7 Any information of the type referred to in clause 1.4 that the cross-defendant knows.

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Appendix B

Appendix B
Application for Status Conference

The plaintiff (or other party) applies for the appointment of a Status Conference.

Signature of applicant's solicitor

Filed

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Appendix C

Appendix C
Election for Standard Case Management Track

I elect to proceed on the Standard Case Management Track and consent to the standard directions being given

Signature of plaintiff

I have explained to the plaintiff the difference between proceedings conducted on the Standard Case Management Track and proceedings conducted on the Individual Case Management Track.

In particular, I have brought to the attention of the plaintiff the fact that proceedings allocated to the Individual Case Management Track may in general be expected to obtain a hearing date earlier than proceedings allocated to the Standard Case Management Track.

Signature of plaintiff's solicitor

Filed

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Appendix D

Appendix D
Certificate of Compliance

I certify that:

(a) the plaintiff has complied with all directions to be carried out by the plaintiff; and

(b) (state whether each other party has complied with all directions to be carried out by that party).

Signature of plaintiff's solicitor

Filed

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