

# THE DECLINE OF THE TRIAL IN AUSTRALIA

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## Abstract

*Over the last decade some jurisdictions in the United States have experienced a downturn in the number of trials being run - a trend the American Bar Association has called the 'vanishing trial phenomenon'. Between 1962 and 2002 the proportion of civil disposals by trial in the US District Courts has fallen from 11.5% to 1.8%. While the evidence in the US shows that trials are not vanishing rather they are in decline, can the same be said in Australia? This paper examines the decline of the trial in Australia using the New South Wales District Court as the judicial landscape for discussion.*

## Introduction

In 2003 the American Bar Association Section of Litigation (ABASoL) requested 15 eminent legal academics to gather information on whether trials were at risk of vanishing from the American judicial landscape. Data was gathered relating to the number of trials conducted in US District Courts in ten year intervals between 1962 and 2002. It was found, among other things, that between 1962 and 2002 the number of civil dispositions in the US District Courts had increased by a factor of five<sup>2</sup> and over the same period of time filings per million of population rose from 294 to 957.<sup>3</sup> However, the proportion of those dispositions by trial over the same period of time had fallen from 11.5% to 1.8%.<sup>4</sup>

Since the findings of the ABASoL in 2003 some dispute resolution advocates have suggested that dispute resolution is solely or at least the major contributing factor to the vanishing trial. Others believe that there are a number of contributing factors that may include the rise of dispute resolution in the private and public sectors. A third group believe that trials were never the predominant method of resolving disputes between parties and therefore, they did not mourn something that never was. Some of the original academics seconded by the ABASoL took the view that trials are not vanishing rather, they are merely in decline.

This paper will present data from the New South Wales (NSW) District Court (the Court) that establishes that similar to the US District Court, trials in the Court are declining. Secondly, it will discuss some of the reasons that may go to explain why the use of trials is in decline. The author will set out to establish that trials are not vanishing rather they are in decline and similarly that civil disputes are not vanishing from society rather they are being diverted to specialist tribunals.

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<sup>2</sup> Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 *Journal of Empirical Legal Studies* 459, 461.

<sup>3</sup> Ibid 489.

<sup>4</sup> Ibid 461.

Data for this paper was gathered from the Court's Annual Reviews available to the public from the Court's web site. State wide data was not recorded in any great detail in the Annual Reviews examined. Therefore, the author has mainly collected data from the Sydney Registry, the largest of the Court's registries which in 2009 accounted for 68% of all new cases, 71% of all disposals and 68% of pending cases.<sup>5</sup>

### **Civil trials in the NSW District Court**

The first set of data represented diagrammatically in Figure 1, shows the number of civil filings in the Sydney Registry of the Court and state-wide.<sup>6</sup> The pattern for new filings or new cases in the Sydney Registry is similar to that state wide. Even accounting for the legislatively induced and data reporting anomalies listed above, it would seem that over the last two decades, new filings are decreasing. In 1990 new filings in NSW amounted to 22,860 compared with 5,297 in 2009. In other words, in 2009, new cases commencing in the Court number less than a quarter of those two decades ago. Notwithstanding the effect of civil litigation reform by the NSW Government, the last two years has seen new filings drop to their lowest levels in 20 years.

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<sup>5</sup> New South Wales Attorney-General's Department, *District Court of New South Wales Annual Review 2009*, 14 -15.

<sup>6</sup> Data variance may be attributable to the following reasons. First, up to 30 August 1995, new cases consisted of new Praecipes for Trial, arbitrations, re-trials and restoration of cases transferred from other jurisdictions. However, after 1 September 1995 the Court counted new cases from the time of filing the initiating process. Secondly, the large number of new cases recorded in 1990 can be explained by the introduction of the *Motor Accidents Act 1988* (NSW) which required claimants in respect of transport accidents that occurred between 1 July 1987 and 30 June 1989 to commence proceedings prior to 30 June 1990. Thirdly, the reduction in the number of filings recorded in 1992 can be explained by the increase in the jurisdictional limit of the Local Court to \$40,000 which took effect from 1 November 1991. Fourthly, the increase in the number of filings in the Sydney Registry in 1994 may be explained by the jurisdictional increase in the Court to \$250,000, effective from 1 July 1993. Fifthly, the increase in filings in 1997 can be explained by the jurisdictional increase in the Court to \$750,000 effective from 18 July 1997. Sixthly, the increase in 1998 can be explained due to Part 12 Rule 4C of the *District Court Rules 1973* (NSW) taking effect that provided that any action commenced prior to 1 January 1996 was deemed to be dismissed if the Praecipe for Trial was not filed before 1 January 1998. Seventhly, the increase in new filings in 2001 can be explained by an influx of new cases as a result of changes in relation to work related accidents and medical negligence claims. Finally, the reduction in new filings in 2003 can be explained by legislative changes affecting civil litigation of personal injury claims which saw a significant drop in new cases in the second half of that year after the amendments became effective.

Figure 1: Civil filings in the Sydney registry of the NSW District Court and state-wide, 1990-2009.

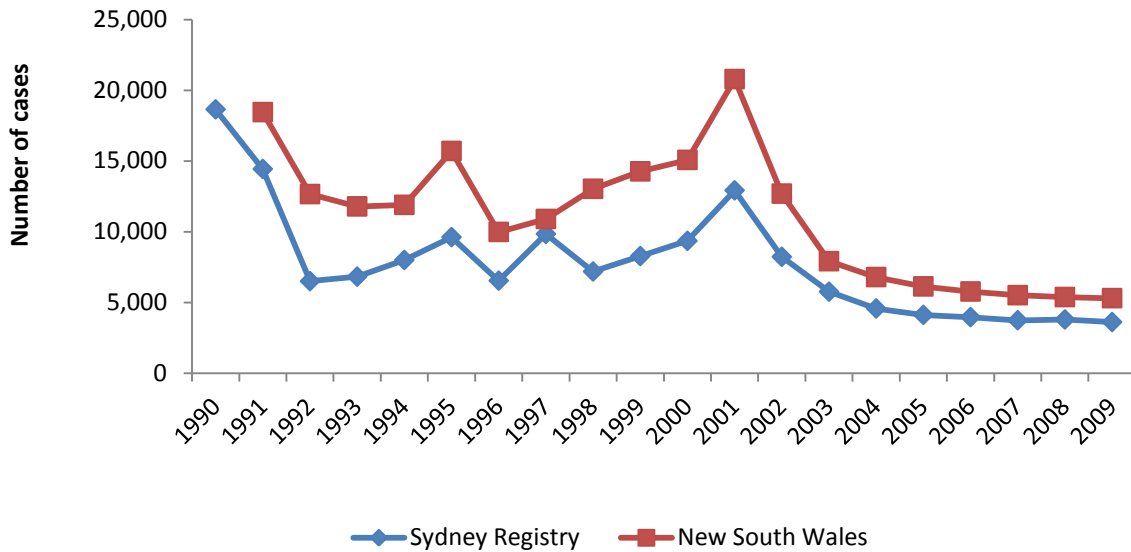
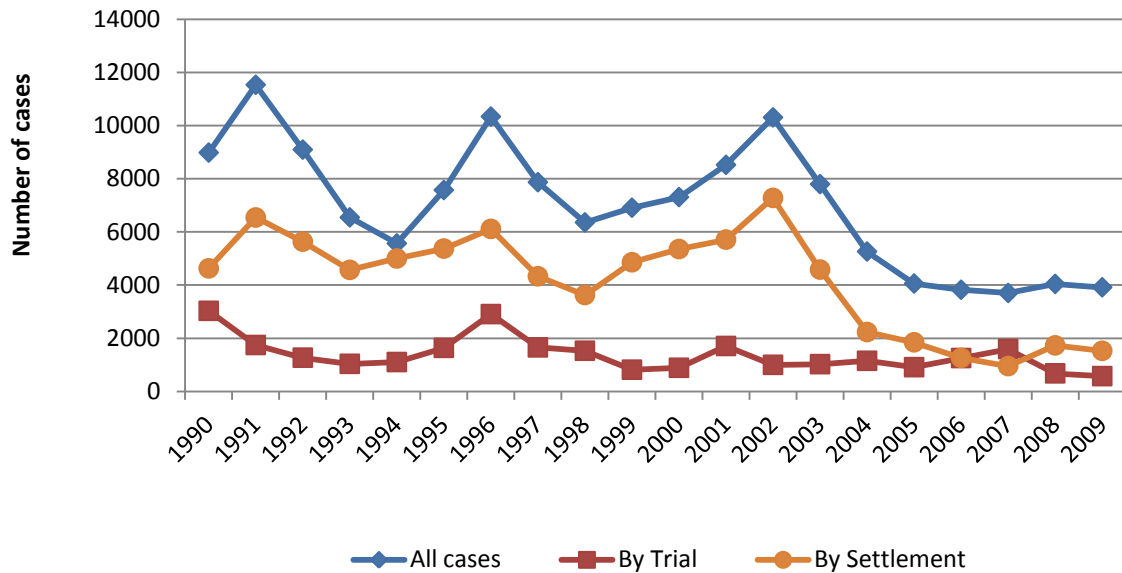


Figure 2 shows the Court’s disposal rates and manner in which cases are disposed of. There are noticeable peaks and troughs some of which correlate with new filings entering the Court. For example, the peak of cases disposed of in 1996 coincides with the up-turn in new filings in 1995 that in turn coincides with the civil jurisdictional limit increase of 1994. The 1996 peak in disposals also coincided with the introduction of the Court’s Civil Case Management System pursuant to the Chief Judge’s Strategic Plan introduced of December 1995 which applied to all actions commenced after 31 December 1995. The system sought to ensure that as many cases as possible were disposed of within 12 months from commencement and set quotas for the disposal of new filings. Further, it forced cases commenced prior to 1996 to file praecipes for trial before 1 January 1998 or face dismissal.

Figure 2: Civil cases disposed of in the Sydney registry of the NSW District Court by trial and settlement, 1990-2009.



The number of cases disposed of by trial tends to follow the overall disposal rates of the Court. Disposal by trial rates drop from a peak in 1990 of 3,028 or 34% of all disposals to 570 or 15% of all disposals in 2009. Given these figures it seems that one could state that there has been a significant reduction in the number of trials run by the Court over a 20 year period from 34% in 1990 to 15% in 2009. However, it is more accurate to observe that the true percentage of disposals by trial in the Court has reached a plateau of approximately 15% over the last 20 years. Therefore, the Court's data shows that there is no conclusive evidence that trials in the Court are vanishing. However, the data could support the proposition that trials in the Court are in decline and that may be due to the decrease in filings more than the unpopularity of trials.

### The reasons that trials are in decline

There are numerous reasons for the decline of the trial in the US District Court and in the NSW District Court. The American literature lists more reasons than those discussed below which are restricted to those that resonate with Australian judicial landscape.

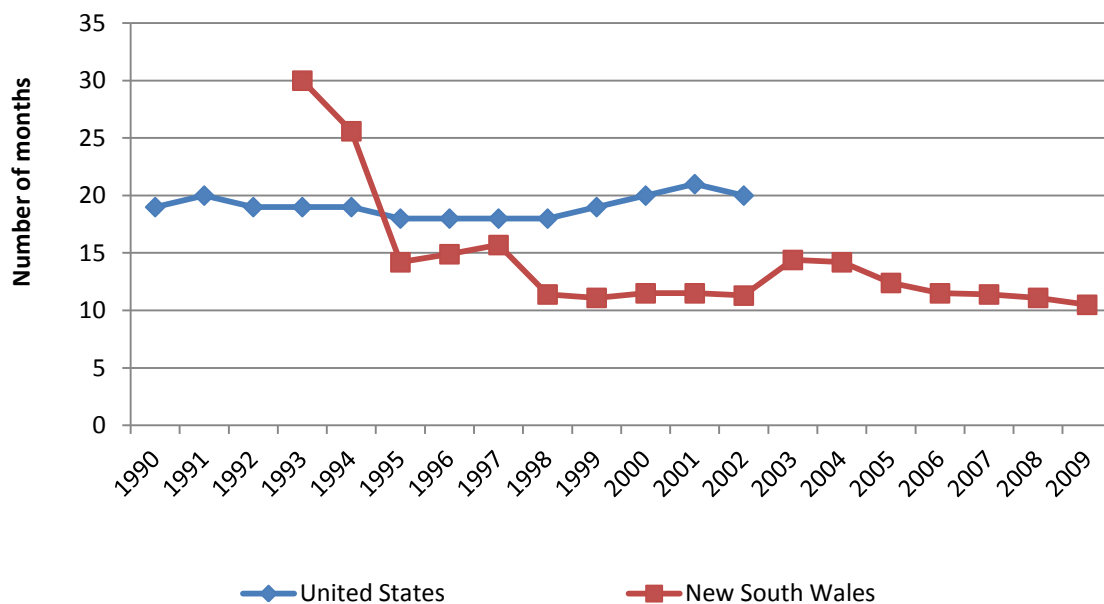
The complexity of the judicial system acts as a counter-incentive to participation in trials.<sup>7</sup> Litigants who lack the funds or ability to attract legal aid are reticent to appear for themselves because they may not have the ability to act as their own advocate and understand the plethora of complex rules and procedures that govern a trial. The flow on effect of this is that many potential litigants must find processes other than adjudication to respond to conflict. In the US, this polarisation of litigant choice is leading to the

<sup>7</sup> See, United Kingdom Department of Constitutional Affairs, *Access to Justice* (1996), section III, chapter 12.

‘privatization of disputing processes, whether located in or out of courts’.<sup>8</sup> If the complexity of court rules and procedures forces people away from trials and into other private methods of adjudication or dispute resolution then the resulting outcome is a move away from the trial as the only method to resolve conflict. In NSW it is apparent that potential cases are being referred away from the Court as well as the fact that referral of matters to mediation are on the rise largely through court annexed and industry code requirements – factors that will be discussed below.

The delay in getting cases to trial may also act as a disincentive for litigants. In the United States there is evidence that filings are continuing in an upward trend which in turn places pressure on the court system to deal with more cases.<sup>9</sup> Figure 3 compares the time taken from filing to disposition by trial in the US District Court with the median delay between commencement of cases and disposition by any means in the NSW District Court between 1990 and 2002.<sup>10</sup> The data shows that the time taken to get cases to trial in the US has been in a state of plateau for the last 15 years with the average time being 20 months. However, in NSW the Court takes approximately 11-14 months to get a case to trial – a situation that has been in plateau since 1998. It is likely that this time period probably would not act as a significant disincentive for litigants to proceed to trial.

Figure 3: Median time (in months) from filing to disposition by trial in the United States District Court and median time (in months) from filing to disposition by any means in the NSW District Court, 1990-2009.



<sup>8</sup> Judith Resnik, ‘Migrating, Morphing, and Vanishing : The Empirical and Normative Puzzles of Declining Trial Rates in Courts’ (2004) 1 *Journal of Empirical Legal Studies* 783, 785-786 (emphasis in original).

<sup>9</sup> Marc Galanter, ‘Law Abounding: Legislation Around the North Atlantic’ (1992) 55 *Modern Law Review* 1, 3.

<sup>10</sup> Prior to 1 September 1995, the NSW District Court measured disposal times from the time the praecipe for trial was filed whereas after 1 September 1995, it measured disposal times from the commencement to finalisation of proceedings.

Mass settlement or class action claims have continued to gain popularity since their inception and are now a regular feature in many tort cases in the US federal jurisdiction. In 1962 torts cases accounted for 55% of all trials and 81% of all jury trials in the US however, by 2002 tort cases had dropped to 23% of all trials and 26% of jury trials.<sup>11</sup>

In Australia representative proceedings (class actions) have only been possible since 1992 when the parliament passed Part IVA of the *Federal Court of Australia Act 1976* (Cth). Between 1992 and 2009 only 241 class actions were filed in the Federal Court of Australia with filings in any of those years representing less than 1% of all filings.<sup>12</sup> In these cases the average number of litigants has been 3.65 or under 900 applicants in total with the average duration of cases being 23 months.<sup>13</sup> Of the representative proceedings commenced in Australia, 218 were resolved with: 85 or 38.9% of those cases settled; 46 or 21.1% dismissed; 39 or 17.8% discontinued by the applicants; 26 or 11.9% discontinued as Part IVA proceedings; and, 16 or 7.3% judgments favorable to the applicant or class.<sup>14</sup>

While there may be a correlation between the numbers of class actions commenced in the US that contributes to the decline of trials, the Australian data shows that class actions are not commenced in numbers that would indicate they contribute greatly to any reduction in the number of trials.

Case management systems are a recent factor that may contribute to a decline in trials. In the US some judges are simply anti-trial and see themselves as case-resolvers who ‘have a way of exacting a toll on those who want to hold out for a jury trial’.<sup>15</sup> The epithet that ‘a bad settlement is almost always better than a good trial’ is a truism expounded by one US judge who stated, ‘There is an overriding public interest in favor of settlement’, with another judge stating, ‘trials are evidence of lawyers’ failure’.<sup>16</sup> In the US, this sort of judging is called ‘managerial judging’ and the legislatures in America have given judges more discretion to make continuous procedural, evidentiary and management decisions concerning the progress of cases through to trial. The same trend has occurred in Australia with changes brought about by economic rationalism and institutional pressures focussing on judges’ performance based on their control over case disposals. In both the US and Australia, legislatures, judges and administrators of the courts have ‘embraced the notion that judges [are] problem solvers and case managers as well as adjudicators’.<sup>17</sup>

The introduction of the Civil Case Management System in 1996 and subsequent passing

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<sup>11</sup> Galanter, above n 2, 466.

<sup>12</sup> Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes*, Monash University [2, <<http://www.buseco.monash.edu.au/blt/staff/december-report.pdf>> at 1 September 2011.]

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Patricia Lee Refo, ‘Opening Statement: The Vanishing Trial’, (2004) 30(2) *Litigation on Line* 1, [3, American Bar Association, <[http://www.americanbar.org/content/dam/aba/publishing/litigation\\_journal/04winter\\_openingstatement.au](http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.au) thecheckdam.pdf.> at 1 September 2011].

<sup>16</sup> Resnik, above n 8, 812 (citations omitted).

<sup>17</sup> Galanter, above n 2, 520 (citations omitted).

of Part 6 of the *Civil Procedure Act 2005* (NSW) places judges in the position of having to play a more pro-active role in case management than ever before. In this sense managerial judging is experienced throughout the Court and delivers disposal rates consistent with legislative demands.

In recent years, the US has experienced a proliferation of adjudicatory bodies that complement the court system. This has led to disputes migrating to other places. It is apparent that in the last two decades of the 20th century, the prospect of adjudication became feasible for potential litigants as ‘different political conceptions of people, governments, and markets became dominant’.<sup>18</sup> The concept of adjudication grew to the point where alternative methods of adjudication had to emerge because of the inherent difficulties in having trials as the only form of adjudication. Therefore, it is argued that trials have been moved to other places such as tribunals, commissions and private adjudicators within and outside the courts - ‘Under this approach, courts - not trials - are atrophying.’<sup>19</sup> Therefore, in the US, ‘the claims and contests are there but they are in different forums’.<sup>20</sup>

The experience in NSW is similar to that in the US where there has been the creation of numerous tribunals and commissions since the 1980’s that divert disputes and relieve the courts of the compulsion to conduct trials. In NSW there are 14 specialist tribunals and commissions that determine disputes allowing disputants to avoid the court system. Of those, the Administrative Decisions Tribunal (ADT) and the Consumer, Trade and Tenancy Tribunal (CTTT) established in 1998 and 2002 respectively are the two specialist tribunals that mostly deal with disputes that were once the domain of the Court.

Figure 4 compares the number of new filings in the Court with those of the ADT and CTTT. It can be seen that as new filings in the Court began to rise between 1997 and 2001, the government established the CTTT and the ADT. The creation of these tribunals has coincided with a reduction in the number of new filings in the Court between 2002 and 2009. It is apparent that the establishment of these tribunals and others have contributed to the decline in new filings and therefore trials in the Court.

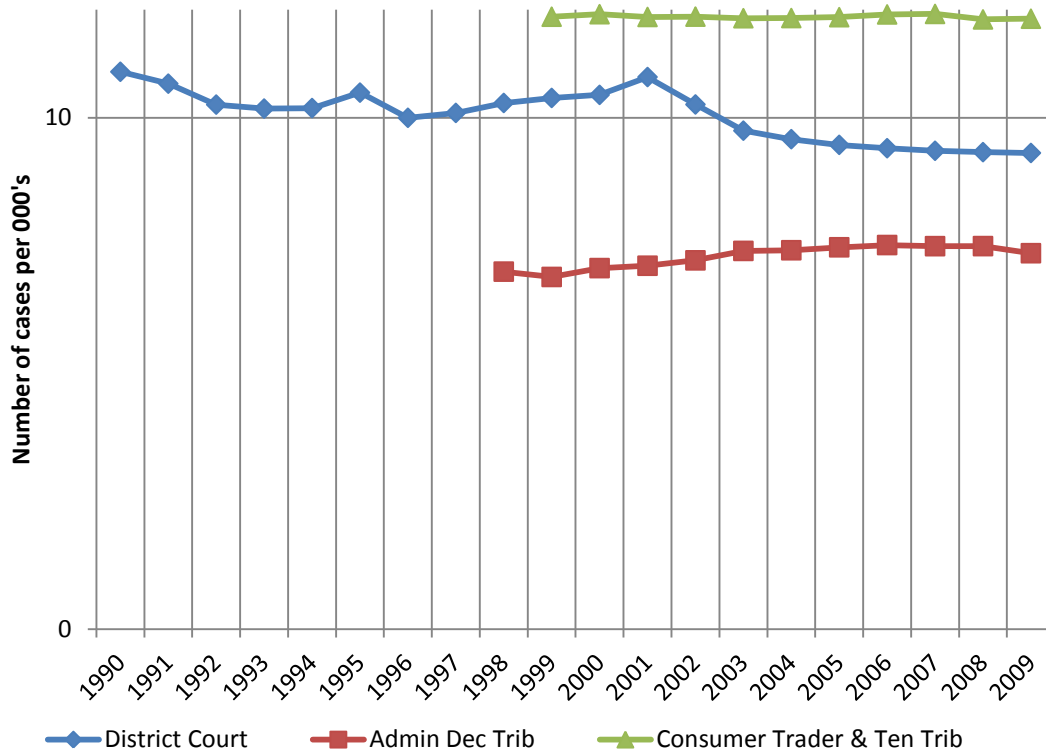
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<sup>18</sup> Resnik, above n 8, 786.

<sup>19</sup> Resnik, above n 8, 790 (emphasis in original).

<sup>20</sup> Galanter, above n 2, 517.

Figure 4: Number of new filings in the NSW District Court and selected NSW tribunals and commissions, 1990-2009.



Another possible factor that could contribute to the decline of the trial is the rise in the popularity of dispute resolution in civil cases. In the last two decades the courts in Australia have embraced dispute resolution as an element of their case management systems. Legislative reforms empowering courts to order, primarily mediation, without the parties’ consent exists in each state and territory of Australia and in the Federal Court, Family Court and Federal Magistrates Court. In the US, ‘ADR is the “new” civil procedure as techniques-such as mediation, arbitration, and settlement conferences, which were once termed “extrajudicial”- have become regular features of civil court processes’.<sup>21</sup>

While there was initial enthusiasm for the idea that dispute resolution was the major contributing factor to the decline of the trial in the US, zeal for this concept has been replaced with caution, partly as a result of the RAND Corporation’s *Institute for Civil Justice Report* of 1996 (the report) which looked into the dispute resolution programs of US District Courts and found that there was no evidence that dispute resolution affected dispositions, costs of litigation or views of fairness or satisfaction among lawyers. The report audited the Chicago Centre for Analysis of Alternative Dispute Resolution Systems which had conducted sixty-two studies of mediation in more than 100 different court-annexed programs. It concluded, ‘in most of these studies, mediation was found to

<sup>21</sup> Resnik, above n 8, 820 (citations omitted).



have no effect on the incidence of trial.’<sup>22</sup> Further, it has been acknowledged ‘that the decline in trials is very general, across the board, and is not confined to sectors or localities where ADR has flourished.’<sup>23</sup>

In Australia there is little data available regarding the impact of public or private dispute resolution on the number of trials. The only publically available figures on the disposal rate of the Court by mediation is that in 2008 and 2009, 66 cases or 1.6% and 67 cases or 1.7% of all disposals respectively were by mediation.<sup>24</sup> Of the matters referred to court-annexed mediation approximately 50% were settled.<sup>25</sup> In those same years some 343 and 458 cases respectively were referred to private mediation where the rates of disposals and withdrawals in the Court are unknown. Given the lack of data is difficult to draw any firm conclusions other than dispute resolution as part of the Court’s case management system may be a contributing factor for a reduction in trials but it is only part of a larger set of reasons for their decline.

The cost of proceeding to trial may be a contributing factor in explaining the decline of trials - ‘we as trial lawyers bear some responsibility because we have made the process of getting to trial too expensive and, relatedly, the trials themselves too long’.<sup>26</sup> In the US and Australia going to trial has become more costly as litigation has become more technical, complex, and expensive. The more technical and complex cases become the more specialised the legal profession has become in an effort to deal with that technicality and complexity. Further, there are increasing numbers of corporate litigants in the courts, largely because they are the only entities that can afford to be running litigation who regard legal action as part of their business operations that is budgeted for and subjected to cost controls. ‘One part of such control is alternative sourcing - diverting what might have been in the courts into alternative forums.’<sup>27</sup>

When litigants develop their strategy about proceeding to trial, their perception of the costs involved greatly affect their ultimate decision. Their perception may be based on false information but nevertheless, it is their perception that will determine their decision of whether to proceed to trial. In this respect the costs of litigation are often the most critical determinant of whether or not people will have access to the courts. The costs ‘will not only determine the price of access to justice but will often have an important impact on the conduct and outcome of litigation’.<sup>28</sup>

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<sup>22</sup> Thomas J Stipanowich, ‘ADR and the Vanishing Trial: The growth and Impact of Alternative Dispute Resolution’ (2004) 1 *Journal of Empirical Legal Studies* 843, 861.

<sup>23</sup> Galanter, above n 2, 517.

<sup>24</sup> Department of Attorney General and Justice (NSW), *District Court of New South Wales Annual Review 2008*, 18; Department of Attorney General and Justice (NSW), *District Court of New South Wales Annual Review 2009*, 16 and Department of Attorney General and Justice (NSW), *District Court of New South Wales Annual Review 2009*, 16.

<sup>25</sup> Ibid.

<sup>26</sup> Refo, above n 15, 3.

<sup>27</sup> Galanter, above n 2, 517.

<sup>28</sup> Peter Cashman, ‘The Cost of Access to Courts’ (Paper presented at the Confidence in the Courts Conference, National Museum of Australia, Canberra, 9-11 February 2007, [3, Law Reform Commission of Victoria, <<http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Newsroom/Speeches/>> at

Litigants - particularly corporate litigants – are concerned about the perceived uncertainty and unpredictability of jury trials.<sup>29</sup> The complexity and increasing numbers of precedents, based on the multitude of factual permutations and combinations, is moving litigation to bimodal outcomes where mean and median judgments differ substantially which in turn complicates trial-or-settlement calculations.<sup>30</sup> In many civil cases the range of damages can be very large - for example, general, special, nominal, aggravated and exemplary damages have a broad range despite legislative reforms. ‘These two factors push litigants’ calculations about possible outcomes in opposite directions. The bimodality bias of much of the substantive law creates a very substantial all-or-nothing risk’.<sup>31</sup> This heightened level of bimodality in civil case outcomes is reflected in the advice most lawyers’ tender to their clients about adjudication and is a relevant and common factor between the US and Australia that contributes to a decline in the use of trials.

### Conclusion

There is scepticism among some American commentators as to the existence of the vanishing trial phenomenon. Even the chief investigator for the inquiry conducted by the ABASoL has taken the view that ‘trials are not exactly an endangered species – at least for now. But their presence has diminished’.<sup>32</sup> Opinion is consistent that in the US, trials will never disappear from the judicial landscape – indeed they cannot disappear from the judicial landscape for fear of what might replace them – rather, trials have been displaced from the role assigned to them. Given that the trial was not the most common way of resolving disputes, what is being experienced is a rise in other forms of adjudication and dispute resolution that litigants prefer to the trial.

In the US and Australia the law is experiencing a reallocation of cases to other forms of adjudication. The core values of the trial have not been rejected rather the demand for specialist and more efficient adjudication has led to a reduction in the use of the trial. Therefore, perhaps the real issue is how to adapt trials so that they are sustainable and serve society. Perhaps limiting the fact finding and taking a narrower view of what is and is not relevant is the way of the future. Perhaps simplifying the rules of evidence and allowing more access to what is currently a formalistic and user-unfriendly environment is the step forward required to ensure a sustainable future for the trial. Perhaps the decline of the trial would not have occurred if more had been done to accommodate the needs of its users and not its players. Perhaps the judicial system needs to consider the ‘conceptual possibility that courts could be reinvented as institutions of settlement but nonetheless be required to enable forms of public access and participation.’<sup>33</sup>

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1 September 2011].

<sup>29</sup> Refo, above n 15, 4.

<sup>30</sup> Ibid.

<sup>31</sup> Stephen C Yeazell, ‘Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial’ (2004) 1 *Journal of Empirical Legal Studies* 943, 952-953.

<sup>32</sup> Galanter, above n 2, 523.

<sup>33</sup> Resnik, above n 8, 832.

It is not such a radical concept that civil courts could become agents for settlement rather than only being a mechanism for dispensing adversarial justice. To a certain degree courts around Australia are already fulfilling that role through their case management procedures and legislative directives to dispose of cases in a just, quick and cheap manner. However, another option is a radical change where judicial adjudication is all but gone or remodelled in a way that is more accessible to litigants. This model sees judges offering adjudicative and non-adjudicative processes that are tailor-made to the litigants and the subject matter of their dispute, of which one option is an expurgated trial forum that creates precedent but not heartache and financial ruin. In this new judicial world a pro-active legal profession will drive change that provides a better way of resolving disputes than we presently have.

Regardless of the future, users of the current system are speaking with their feet. In the US, filings may be increasing however litigants and the courts themselves are utilising the trial less because it has little to offer its users and they are very expensive to conduct. Litigant preferences to utilise or avoid trial or other methods of dispute resolution may be dependent on their level of concern over any of the factors discussed in this paper. Vanishing or diminishing trials are probably in part due to changing litigant perceptions of the judicial system - 'the pattern of vanishing trials over time is also consistent with changes over time in the preferences of litigants as well as changes in the law that affect the rights of litigants to trial'.<sup>34</sup> A combination of litigant perceptions of the value of trials in concert with the encouragement or otherwise by the court to opt out of trials are the determinative factors in the declining use of the trial.

In NSW the decline of the trial may not be as sharp as the US, but there is a good chance it will follow the US in years to come and the same questions about the future of the trial will face the judiciary, legal profession, community and the government.

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<sup>34</sup> Shari Seidman Diamond and Jessica Bina, 'Puzzles about Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals' (2004) 1 *Journal of Empirical Legal Studies* 637, 654.