
**Australasian Law Teachers Association - ALTA
2006 Refereed Conference Papers**



**Australasian Law Teachers Association – ALTA
Annual Conference**

61st Annual ALTA Conference

Victoria University, Melbourne, Victoria, Australia
4 – 7 July 2006

Legal Knowledge: Learning, Communicating and Doing

Published Conference Papers

This paper was presented at the 2006 ALTA Conference in the
'Dispute Resolution' Interest Group

**Australasian Law Teachers Association - ALTA
2006 Refereed Conference Papers**

The Australasian Law Teachers Association (ALTA) is a professional body which represents the interests of law teachers in Australia, New Zealand, Papua New Guinea and the Pacific Islands.

Its overall focus is to promote excellence in legal academic teaching and research with particular emphasis on supporting early career academics, throughout Australasia, in the areas of:

- (a) Legal research and scholarship;
- (b) Curriculum refinements and pedagogical improvements in view of national and international developments, including law reform;
- (c) Government policies and practices that relate to legal education and research;
- (d) Professional development opportunities for legal academics;
- (e) Professional legal education and practices programs.

*Conference Papers published by the ALTA Secretariat
2006*

Edited by Professor Michael Adams, Professor David Barker AM and Ms Samantha McGolrick
Associate Editor Janet Fox

ALTA Secretariat
PO Box 222
Lindfield NSW 2070
AUSTRALIA
Tel: +61 (2) 9514 5414
Fax: +61 (2) 9514 5175
admin@alta.edu.au
www.alta.edu.au

PLEA NEGOTIATION AND DECISION SUPPORT

ANDREW VINCENT* & JOHN ZELEZNIKOW**

* Honorary Associate, Faculty of Humanities & Social Sciences, School of Historical and European Studies, La Trobe University, Australia.

** Professor, Faculty of Business & Law, School of Information Systems, Victoria University, Australia.

I INTRODUCTION

The purpose of this short paper is to discuss the potential for decision support systems to assist legal aid lawyers in the plea bargaining process. Victoria Legal Aid lawyers handle over 80 per cent of criminal law defences in Victoria and are interested in systems that will help in the plea negotiation process, very useful for training and providing support for novice lawyers. A system that is able to assist lawyers to perhaps better situate their clients in terms of possible sentence would be useful. A sentencing decision support system, with its ability to provide the reasoning behind a sentence, as well as a sentence range, will enable VLA lawyers to better negotiate with Office of Public Prosecution lawyers. The reasoning behind a particular sentence outcome can also act as an argument for the prosecution to accept one particular charge over another. This paper focuses upon the Lodder-Zeleznikow (L-Z) three-step model for an online negotiation environment¹ and how it might be adopted for the plea negotiation process especially as part of the Contest Mention system in the Victorian Magistrates' Courts. Before embarking on an examination of the L-Z three-step model of online negotiation, the nature of plea negotiation in Australia and the United States will be examined.

II PLEA NEGOTIATION

In Australia, the process of plea negotiation is widely practiced in all states but practitioners and academics alike prefer different terminology. The practice is variously known as charge negotiation² and plea negotiation³. An excellent definition of the plea negotiation has been provided by Mack and Anleu:

¹ Arno R. Lodder and John Zeleznikow, 'Developing an online dispute resolution environment: dialogue tools and negotiation systems in a three step model' (2005) 10 *Harvard Negotiation Law Review* 287.

² Nicholas Cowdery, 'Creative sentencing and plea bargaining: Does it happen and what are the results?' (Paper presented at the LAWASIA downunder, Gold Coast, 22 March 2005) 2.

³ Robert D. Seifman, and Arie Freiberg, 'Plea bargaining in Victoria: the role of counsel' (2001) 25 *Criminal Law Journal* 64, 64.

**Australasian Law Teachers Association - ALTA
2006 Refereed Conference Papers**

Plea negotiations are an informal semi-adversarial/semi-co-operative process which attempts in a situation of uncertainty, to identify the provable facts and the charge which most appropriately reflects the facts to the satisfaction of both prosecution and defense.⁴

One of the major differences between the American system of plea bargaining and that employed in Australia is that the prosecutor is only indirectly able to influence the minimum sentence that may be prescribed by a judge. In the United States, a plea bargain involves the defendant pleading guilty to one or more lesser charges than that the initial proposed, in return for concessions as to the type and length of sentence.⁵ The fact that in most American states there are minimum sentences for the most common crimes ensures that the prosecution is able to enter into a plea bargain where they usually have some control over the final sentence. Stuntz⁶ suggests that the success of the plea bargaining process depends on the prosecutor's ability to make credible threats of severe post-trial sentences.⁷ Credible threats concerning sentence severity are enhanced in jurisdictions that have mandatory and guideline grid sentencing regimes.⁸ In a recent article, Bibas⁹ has noted that some scholars treat plea bargaining as simply another case of bargaining in the shadow of a trial. Mnookin and Kornhauser¹⁰ first discussed the shadow of trial concept, they contended that legal rights of each party could be understood as bargaining chips that can affect settlement outcomes. Plea bargaining in the United States, even though it has had the support of the Supreme Court for over thirty years has been heavily criticised because of the

⁴ Kathy Mack and Sharyn Roach Anleu, 'Balancing principle and pragmatism: Guilty pleas' (1995) 4 *Journal of Judicial Administration* 232, 236.

⁵ Mike McConville, 'Plea bargaining: Ethics and politics' in Sean Doran and John D. Jackson (eds), *The Judicial Role in Criminal Proceedings* (2000) 67, 67. Plea bargaining is 'a process based on a culture of extortionate relationships which extract crude cost-benefit actuarialism from everyone involved'.

⁶ William J. Stuntz, 'Plea bargaining and criminal law's disappearing shadow' (2004) 117 *Harvard Law Review* 2548, 2560.

⁷ In *Blakely v Washington*, 542 US 296 (2004) 311: 'given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal' (Scalia, J).

⁸ Mandatory and guideline grid sentencing are methods of limiting judicial discretion in sentencing.

⁹ Stephanos Bibas, 'Plea bargaining outside the shadow of the trial' (2004) 117 *Harvard Law Review*, 2463.

¹⁰ Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the shadow of the law: The case of divorce' (1979) 88 *Yale Law Journal* 950.

power of the prosecutor to engage in selective utilisation of the bargaining process. Bibas gives a very detailed exposition of the factors that effect plea bargaining and how they impact on the fair allocation of punishment. He claims that trials in the United States already allocate punishment unfairly and that plea bargaining adds another layer of distortion.¹¹ Both Bibas and Stuntz have at the heart of their respective discussions the claim that the Mnookin-Kornhauser model is not really applicable to the plea bargaining process because of the great number of other influences on the actors/players in the plea bargaining show/game than occurs in negotiations about divorce.

In Australia prosecutors achieve so control over the final sentence by the selection of charges and the agreement to drop particular charges in exchange for a guilty plea to other charges. The absence of mandatory minimum sentences and grid guideline sentences means that prosecutors use other methods to achieve their ends. Overcharging plays a major part in this process. Mack and Anleu¹² indicate that it seems that the greatest overcharging occurs in the lower jurisdiction courts. In the higher courts, where prosecution is handled by offices of public prosecution and not the police, there is a tendency not to overcharge. Mack and Anleu suggest that their interviews have identified several reasons for this overcharging, but the most important one is that it gives the police a better bargaining position. The police propose high charges in order to end up with what they see as a 'correct' or reasonable set of charges for a particular set of facts.

The same arguments for the institutionalisation of plea bargaining that are used in the United States are used in Australia to defend the practice of plea negotiation. The strongest argument is that the bargaining process is able to move cases through the system at a more rapid rate than would otherwise occur. Indeed *Santobello v New York*¹³ it was stated:

¹¹ Bibas, above n 9, 2468.

¹² Kathy Mack and Sharon Roach Anleu, *Pleading Guilty: Issues and practices* (1995) 32, 76-77.

¹³ *Santobello v New York*, 404 US 257 (1971) 261.

**Australasian Law Teachers Association - ALTA
2006 Refereed Conference Papers**

[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining', is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

In Australia, until 1976, no judicial comment was made on the practice of plea negotiation. In *R v Bruce*¹⁴ no mention is made regarding the efficiency of the process, rather the decision emphasises that the judiciary should not be involved in private decision-making. In the case of *R v Marshall*¹⁵ the negotiation was conducted in open court. However concerns over the practice were not confined to private discussion. Further

[i]t is said that the processes result in many more pleas of guilty than would otherwise be the case and that it is absolutely necessary to the expeditious clearing of the lists that as many pleas of guilty as possible be obtained ... [t]o allow this principle to yield to an expedient for clearing the lists is to clear the lists at too great a price.¹⁶

Efficiency looms as the most important factor in maintaining a plea bargaining system. However it is not the most important aspect in individual cases. Generally efficiency is the overriding reason for the prosecution to enter into a plea bargain. If a small percentage of defendants exercised their rights to trial, the criminal justice system would not be able to cope with massive amount of extra burden this would entail.¹⁷ The numbers of juries and judges alone would be very large. In the United States the number of cases in the Federal jurisdiction disposed of by way of guilty

¹⁴ [1975] HCA (Unreported, Barwick, CJ, Gibbs, Stephen, Mason, Jacobs, JJ, 19 December 1975).

¹⁵ (1981) VR 725.

¹⁶ Ibid 735.

¹⁷ William Hodge, Rodney Harrison and Graeme Colgan, 'Plea Bargaining' (1981) 7 *Commonwealth Law Journal* 1112, 1118. Defendants would need to be released if they could organise a massive exercise of their Sixth Amendment rights to a 'speedy' public trial before an impartial jury. If only another ten per cent claimed this right the judicial system would be brought to a halt. It surely must be the case that after twenty-five years the percentage of defendants moving from plea to trial would be much lower to bring the US system crashing down.

plea in 2000 was 93.7 per cent.¹⁸ The number of felony convictions in state courts for 2000 was 924 700 of which approximately 95 per cent were disposed of by guilty pleas.¹⁹

The high percentage of case disposed of by guilty pleas is not seen in Victoria. In 2003/2004 the percentage of cases disposed of by guilty pleas was 70.3 per cent.²⁰ The main reason for the 25 per cent difference is most probably attributable to the determinate sentencing regimes that are prevalent in most United States jurisdictions and the fact that defendants often spend a long time on remand awaiting final disposition of their cases. The resultant plea bargain is often for a sentence of time served.²¹

III THE CONTEST MENTION SYSTEM IN THE VICTORIAN MAGISTRATES' COURTS

The Victorian Magistrates' Court deals with over 95 per cent of all criminal offences that are resolved in Victorian courts.²² Of the 130 890 matters finalised in 2003-04, 9 082 were finalised via the Contest Mention.²³ The diagram below represents where the Contest Mention fits in to the criminal justice case processing by the Victorian Magistrates' Court.

¹⁸ The Federal jurisdiction in the United States accounts for only a small percentage of convicted felons incarcerated in prisons.

¹⁹ See especially Bureau of Justice Statistics, *Source Book of Criminal Justice Statistics* (2003) <<http://www.albany.edu/sourcebook/>> at 29 March 2007) tables 5.17 and 5.46. See also Bibas, above n 9, 2466: indicates that it is impossible to know the percentage of guilty pleas that resulted from plea bargaining.

²⁰ The figure relates to indictable offences which are approximately equivalent to felony offences in the United States. Victorian Office of Public Prosecutions, *Annual Report 2003-2004* (2004), 21, app A: Table 'Case outcomes as a percentage of total case disposals'. There seem to be no published figures for the number of cases disposed of by guilty plea in the Victorian Magistrates' Court.

²¹ Bibas, above n 9, 2468: indicates that the vast majority of criminal cases are small ones, in which defendants face only modest amounts of jail time. If a defendant is denied or cannot make bail, the length of pretrial detention may approach or even dwarf the likely sentence after trial. Thus, detained defendants strike bargains for time served instead of awaiting their day in court. Plea bargaining, then, often happens in the shadow not of trial but of bail decisions.

²² The figure of 95 per cent is derived from the Victorian Magistrates' Courts, *Sentencing Statistics: 1996/1997-2001/2002* (2003) 1. A brief examination of both the Victorian Magistrates' Courts, *Sentencing Statistics: 1996/1997-2001/2002* (2003) and the Victorian Higher Courts, *Sentencing Statistics: 1997/1998-2001/2002* (2003) leads to a figure of around 97 per cent of all defendants who had charges decided without resort to either bench or jury trial.

²³ Magistrates' Court of Victoria, *2003-04 Annual Report* (2004) 15.

**Australasian Law Teachers Association - ALTA
2006 Refereed Conference Papers**

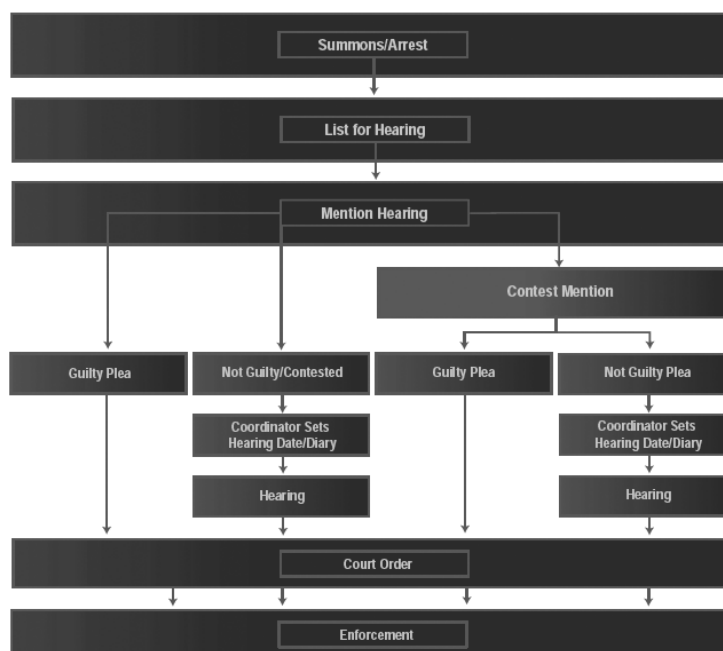


Figure 1: Criminal case processing of Victorian Magistrates' Court (Magistrates' Court of Victoria, 2003-04 Annual Report (2004), 15).

In 1993, as a result of the severe impact of late guilty pleas,²⁴ the Contest Mention system was introduced in the Broadmeadows Magistrates' Court. It was initially a pilot program with the specific aims:²⁵

1. To reduce the number of cases originally listed as pleas of not guilty that turned into guilty pleas at the court door.
2. To identify the plea (guilty or not guilty) at an early stage.
3. To reduce the number of adjournments.
4. To narrow the issues between the parties to areas of genuine dispute thereby reducing wasted preparation time by both the prosecution and the defense.
5. To reduce the instances of witnesses' time being unnecessarily wasted.
6. To generally assist in 'case flow management' techniques.

²⁴ Identified in part in the Pegasus Task Force Report, *Reducing Delays in Criminal Cases* (1992).

²⁵ A more detailed discussion of the implementation of the Contest Mention system is available in Serge Straijt, *The 'Contest Mention System' in the Magistrates' Court* (Unpublished Report, 1995). *Some of its effect and impact on the administration of criminal justice.*

The Contest Mention system is a set of procedural guidelines for assisting the prosecution and defence lawyers in identifying guilty pleas. Attempting to identify guilty pleas involves negotiation and, as indicated by Cowdrey,²⁶ ‘principled negotiation’.²⁷ This involves the separation of the people from the problem this will be discussed a little later. One of the main features of the Contest Mention system is the process of sentence indication.²⁸ The magistrate can give an indication as to a possible sentence if the accused continued with a plea of guilty at the Contest Mention. It is only conducted in appropriate circumstances. The Contest Mention guidelines state that the procedure should only be undertaken when the magistrate is aware of all the relevant factors.

There has been a much academic literature about judicial involvement in plea negotiation in Australia, especially relating to sentence indication schemes. Most recently, Freiberg and Willis have outlined the procedures for sentence indication schemes to assist the higher (County and Supreme) courts.²⁹ Freiberg and Willis further indicate that sentence indication is a form of plea bargaining. They distinguish two main forms of plea negotiation:

1. Discussions between the prosecution and defense to negotiate the exchange of guilty pleas to some charges for the withdrawal of other more serious charges. This is what Bishop labels prosecutorial plea bargaining.³⁰ He indicates that the accused may in fact receive a double benefit in being convicted of a lesser crime and also receiving a discount for pleading guilty.

²⁶ Cowdrey, above n 2.

²⁷ See especially, Roger Fisher and William Ury, *Getting to YES: Negotiating Agreement Without Giving In* (1981) 17, 17-39.

²⁸ Magistrates’ Court Practice Note – *Guidelines for Contest Mention* (1994), Sect 3.

²⁹ Arie Freiberg and John Willis, ‘Sentence indication’ (2003) 27 *Criminal Law Journal* 246, 248.

³⁰ John Bishop, *Criminal Procedure* (2nd ed, 1998) 486.

2. Discussions between counsel and the trial judge in relation to the likely sentence to be imposed after a guilty plea. Bishop calls this type of bargaining, judicial plea bargaining.³¹

Bishop³² identifies a third type of plea bargaining that he defines as implicit plea bargaining. This identifies an often unspoken agreement between the court and the accused that a plea of guilty will attract a discount in the sentence imposed upon the defendant. The first type of plea negotiation listed above is in effect what occurs prior to the commencement of the Contest Mention.

IV BENEFITS OF DECISION SUPPORT SYSTEMS

Before discussing the benefits of decision support with particular reference to plea bargaining, it is necessary to briefly discuss some of the major benefits of decision support in the legal domain. Zeleznikow has suggested four main benefits of decision support system to the legal domain:³³

1. Consistency: By replicating the manner in which decisions are made, decision support systems are encouraging consistency in legal decision-making.
2. Transparency: By demonstrating how legal decisions are made, legal decisions support systems are leading to a better community understanding of legal domains. This has the desired effect of decreasing the level of public criticism of judicial decision making.
3. Efficiency: One of the major benefits of decision support systems is to make organisations more efficient.

³¹ Ibid 479-86. Bishop further suggests that judicial plea bargaining is not widely practiced in Victoria. He was not discussing the sentence indication in the Magistrates' Courts, but rather a practice in the higher courts of requesting a trial judge to give an opinion as to a likely sentence. Freiberg and Willis, above n 29, 249-50: indicate that it is the practice of requesting a private opinion as to a possible sentence. It should be stressed that the sentence indication scheme in the Contest Mention process is performed in an open court.

³² Bishop, above n 30, 471-79.

³³ John Zeleznikow, 'Using web-based legal decision support systems to improve access to justice' (2002) 11 *Information and Communications Technology Law* 15, 17.

4. Enhanced support of dispute resolution: Users of legal decision support systems are aware of the likely outcome of litigation and thus are encouraged to avoid the costs and the emotional stress of legal proceedings.

Criticisms of plea negotiation have centred around several key issues, namely: transparency, inducements and coercion, and incorrect outcomes.³⁴ Mack and Anleu³⁵ have identified faults in the process, the significant points include:

1. The transparency of the process: in general, plea bargaining occurs outside the court system.
2. Guilty pleas may be induced by the unwarranted benefits of those burdens caused by the decision to go to trial. The quantum of sentence discount that is associated with the plea of guilty is an added pressure to engage in plea bargaining.
3. Incorrect outcomes in terms of both the determination of guilt and the subsequent sentence imposed.

These three main areas of concern as noted above are all present in the Contest Mention system. Even though the Contest Mention is conducted in front of the magistrate, before sitting begins for the day, there is considerable negotiation between defence lawyers and police prosecutors as to the charges which will proceed based on pleas of guilty. As mentioned earlier, if the accused decides to plead guilty to the charges filed, the charges are dealt with at the time of the Contest Mention hearing. The facts of the case are presented orally to the magistrate by the prosecutor by way of a written summary of the offence, which has been agreed to by the defence lawyer. The facts of the case presented in the prosecution summary are the key negotiable elements. In a guilty plea all of the facts must be admitted to. The defence lawyer is primarily interested in having the prosecutor playing down the aggravating factors, whilst emphasising the mitigating factors. The defence, when their client has pleaded

³⁴ Recently these have been detailed in a long discussion by Bibas, above n 9.

³⁵ Kathy Mack and Sharyn Roach Anleu, 'Guilty pleas: Discussions and agreements' (1996) 6 *Journal of Judicial Administration* 8, 9.

guilty, emphasise the mitigating factors in the plea in mitigation. If charges are withdrawn, the summary is usually adjusted to represent this fact. The defence does not want to be admitting to facts that might be seen as aggravating by the magistrate. There is no transparency in this process, as the magistrates is presented with only an altered copy of the summary and it is this summary alone that is preserved on the record.³⁶ There is no record of this process or any reasons to support the extremely discretionary actions of the prosecution.

For the accused, the burdens of going to trial are caused by the probability of conviction by a jury and the consequent threat of a usually higher sentence based on the higher number and severity of the charges filed by the prosecution and the lack of a sentence discount for an early guilty plea. In the case of an impasse in the Contest Mention the magistrate can offer an opinion as to the relative strengths and weaknesses of both the prosecution and defence cases.³⁷ This opinion is not derived from formal evidence or even a reading of the summary, but rather from information provided by the prosecution and defence counsel.³⁸ This ability of the magistrate to offer an opinion as to the strength of the defence case may help to mitigate against the structural inequalities with respect to the negotiation positions. The magistrate is further able to provide an indication as to the likely sentence if the matter is resolved by a guilty plea. The sentence discount given by the magistrate should be stated as being the same benefit as if the accused plead guilty at the earliest opportunity.³⁹

The number of charges laid by the prosecution has a direct bearing on the outcome of a plea negotiation. The same is true of the Contest Mention. It is still possible for the prosecution to lay charges for which it has only minimal supporting evidence, in order

³⁶ In the United States a landmark ruling by the Supreme Court, *Blakely v Washington*, (2004) 542 US 296 has made illegal the use of any and every fact which increases a defendant's effective maximum sentence that has not been either admitted to by the defendant or determined by a jury beyond a reasonable doubt.

³⁷ Magistrates' Court, above n 28, s 1.3. Section 1.4 suggests that if the prosecution case is weak or unlikely to reach the required standard of proof, the prosecution should be reminded that costs may follow a dismissal.

³⁸ Straijt, above n 25, 15-16.

³⁹ *Sentencing Act 1991* (Vic) s. 5(2)(e). Section 2.2 of the Magistrates' Court – *Guidelines for Contest Mention*: indicates that the discount can be increased or reduced according to the strength of the prosecution evidence. A greater discount is given when the prosecution does not have a strong case.

to coerce a guilty plea. The ability of the magistrate to evaluate the relative strength of both the prosecution and defence cases may counter balance the prosecution's over charging strategy.

Decision support systems can help to facilitate the delivery of a transparent, consistent and efficient Contest Mention system. Transparency improvements centre around the provision of a database of previous plea negotiations at Contest Mentions. Bibas⁴⁰ suggests that a database of past sentencing information could help non-repeat players to understand the going rates for various crimes. He further suggests that just as stock prices are listed on stock exchanges, plea bargaining markets could use a database of 'prices'. A database of past plea bargaining agreements would give lawyers greater access to information that many repeat players already know. The fact that prosecutors have full discretionary power to remove charges and substitute others has caused much concern.⁴¹ A method of tracking the details and reasons for prosecutorial decisions can be easily maintained and provided to other participants in the plea negotiation process. As will be discussed later, for any negotiation to be effectively and efficiently conducted the more detailed the available information, the more likely it is that there will be an informed decision to compromise.

The development of an online plea negotiation environment will enable the defence (obviously with client involvement) and prosecution to negotiate more efficiently. Asynchronous negotiation can enable defence lawyers to see a greater number of clients at their offices and establish at least some parameters in terms of what conditions the accused might accept from the prosecution in return for entering a guilty plea. This information could then be made known to the prosecutor and some negotiation should occur. The efficiency gains would stem from the ability of defence lawyers to counsel a potentially larger number of clients than would otherwise occur and initiate bargaining with prosecutors on their clients' behalf. Decision support

⁴⁰ Bibas, above n 9, 2532.

⁴¹ It should be kept in mind that even in jurisdictions with determinate sentencing regimes, the sentencing judge is simply the last person who can exercise discretion. The discretionary chain begins with law enforcements officials, extends to prosecutors and then to sentencing judges. Appeal court judges are the penultimate step in the chain. The final repository of discretionary power is that vested in parole officials and parole boards.

systems offer an added efficiency, as defence and prosecution need not be physically adjacent in order to commence negotiations. The system would be able to track the course of negotiations and enable greater procedural transparency.

Consistency in plea bargaining is not necessarily confined to consistency of outcome. While the outcome is a vital part of the process, especially for the accused, procedural consistency is also of crucial importance. It is laudable to strive for consistent outcomes across the board but not at the expense of procedural fairness. It does not serve the plea negotiation system well if all the outcomes are the same for similar crimes and the process taken in each case is completely different. The Contest Mention system goes some way to maintaining a consistency of approach and indeed this is enshrined in the preamble to the Contest Mention guidelines, ‘... it is hoped that general acceptance of the guidelines will result in consistency of approach...’⁴² Consistency can be improved by using decision support systems to formalise guidelines for a given system. It is important to realise that we are not attempting to implement a rule-based system as this area of legal practice is one characterised by broad discretion.⁴³ Plea negotiation is already an efficient method for disposing of cases in the criminal justice system. The Contest Mention system aims to bring the positions of the prosecution and defence closer together, so that the accused can plead guilty and receive an acceptable sentence.

The ability for the accused to be able to negotiate effectively is important to the proper functioning of the plea negotiation process. Zacharias⁴⁴ suggests that plea bargaining is an integral part of the criminal justice system and that society is better off when the prosecutor knows what can be achieved through the process. He further indicates that self-reflection about the prosecutor’s goals helps to prevent arbitrary and corrupt behaviour. Negotiation in the criminal justice system is not simply a matter of achieving a high conviction rate or higher than average sentences for

⁴² Magistrates’ Court, above n 28, preamble.

⁴³ See Andrew Stranieri, John Yearwood and Tundie Meikle, ‘The dependency of discretion and consistency on knowledge representation’ (2000) 14 *International Review of Law, Computers and Technology* 325. See also John Zeleznikow, ‘Building decision support systems in discretionary legal domains’ (2000) 14 *International Review of Law, Computers and Technology* 341.

⁴⁴ Fred C. Zacharias, ‘Justice in plea bargaining’ (1998) 39 *William and Mary Law Review* 1121.

criminals. There needs to be some notion of justice. Negotiation involves ordering priorities and this can be a difficult problem for defence lawyers with heavy caseloads. Decision support systems offer a way of ordering and weighing up various, often competing interests. Susskind⁴⁵ suggests that intelligent checklists are important in reviewing compliance with legal regulations. For the domain of plea negotiation, intelligent checklists (as part of a larger support system) provide an excellent method for the prosecution to ensure that any plea bargain that might be entered into meets all the necessary legal requirements and follows detailed prosecutorial guidelines.⁴⁶ This results in lawyers having more accurate information and thus providing effective representation.

A defendant who receives poor legal representation in regards to plea bargaining may find that an unfair deal is recommended as acceptable whereas it might otherwise have been rejected. In the United States, poor defendants often hire defence counsel who charges a flat rate, this usually increases the incentive to conduct a plea bargain.⁴⁷ Enhanced negotiation support can be provided by decision support systems. As will be discussed in the next section, decision support systems can provide an unbiased appraisal of an accused criminal's situation. This can be performed by the provision of a BATNA⁴⁸ especially with respect to a possible sentence at the final disposition of the case. Effective negotiation support can be brought about by organising and prioritising the most important aspects for an appropriate outcome. Considerations such as not receiving a conviction or keeping a fine as low as possible, can be ordered and prioritised. Rhode suggests that 'Court-appointed lawyers' preparation is often minimal, sometimes taking less time than the average American

⁴⁵ Richard Susskind, *Transforming the Law: Essays on technology, justice and the legal marketplace* (2000).

⁴⁶ See the Federal prosecutorial guidelines available at <<http://www.cdpp.gov.au/Prosecutions/Policy/>> at 29 March 2007; See also, the Victorian prosecutorial guidelines available at <<http://www.opp.vic.gov.au/CA256F7000755DC3/page/Prosecutorial+Guidelines?OpenDocument&1=20-Prosecutorial+Guidelines~&2=~&3=~>> at 29 March 2007.

⁴⁷ Deborah Rhode, *Access to Justice* (2004) 129.

⁴⁸ Introduced by Fisher and Ury, above n 27, 97-106, a BATNA is a *Best Alternative To a Negotiated Agreement*. They suggest that a BATNA, 'is the only standard which can protect you both from accepting terms that are too unfavourable and from rejecting terms it would be in your interest to accept'.

spends showering before work'.⁴⁹ As part of the overall push to improve access to justice, decision support system can help to achieve that goal. In the United States, less than one percent of lawyers are in legal aid practice. More and more defendants are pushed to *pro se* defence strategies and this is increasingly becoming the norm in Australia, especially in lower courts.

V TOWARD AN ONLINE PLEA BARGAINING ENVIRONMENT

As indicated throughout this paper we are investigating the feasibility of constructing a plea negotiation support environment for Contest Mentions in the Victorian Magistrates' Court and more broadly plea negotiations in other jurisdictions. The current system is intended to be used by VLA lawyers to support plea negotiations and possibly to train inexperienced advocates. The system consists of two major parts. The first part is a sentencing decision support system which provides information as to possible range of sentences and also the probability of attaining the recommended sentence. The second part is an environment for plea negotiation. The first and integral part of the overall system advises on possible sentence so as to properly apprise defendants of all the possible negotiation outcomes. The effects of suggested charge changes can be assessed using the sentencing information system part of the overall system.⁵⁰

Before embarking on an exploration of the negotiation process involved in the Contest Mention it is necessary to first highlight the key elements of the L-Z negotiation environment. The key points of the framework are:⁵¹

1. Accurate provision of advice about a BATNA.

⁴⁹ Rhode, above n 47, 4.

⁵⁰ See, Jean Hall, Domenico Calabro, Tania Sourdin, Andrew Stranieri and John Zeleznikow, 'Supporting discretionary decision making with information technology: a case study in the criminal sentencing jurisdiction' (2004) 2 *University of Ottawa Law and Technology Journal* 1. See also, Andrew Vincent and John Zeleznikow, 'Toulmin-based computational modelling of judicial discretion in sentencing' in David Hitchcock and Daniel Farr (eds), *The Uses of Argument: Proceedings of a conference at McMaster University* (2005) 464.

⁵¹ Lodder and Zeleznikow, above n 1, 301. The key elements are presented in much greater detail than in the following discussion.

2. Developing a process that enables direct communication and negotiation between the parties which supports interest based communication.
3. Developing a process that provides negotiation support through the use of compensation and trade-off strategies.

A The BATNA

The use of a sentencing decision support system is only one method for providing a defendant with a BATNA, lawyers could equally provide such advice. The plea bargaining environment is not wholly reliant on an information system to provide a BATNA. The sentencing decision support system could provide advice concerning possible sentences, but could also give information about how these sentences might be combined, either cumulatively or consecutively in the case of multiple charges. It must be remembered though, that the sentence is not being negotiated, it is a plea of guilty to a particular charge or set of charges that needs to be decided. In a recent discussion of plea negotiation in Australia, the New South Wales Director of Public Prosecutions, Nicholas Cowdrey has suggested that the plea negotiation process 'is aimed at the entry of a plea of guilty to a charge that adequately addresses the essential criminality of the conduct of the accused and that gives adequate scope for sentencing'.⁵² He further suggests that the process is one of principled negotiation and it cannot proceed without informed agreement.⁵³ A method of BATNA provision is the first step in providing support for this process.

BATNA advice in plea negotiation, at present, is not provided by specific electronic tools. Zeleznikow and Stranieri have developed a system to provide BATNA advice in the Family Law domain. The Split-Up system⁵⁴ is hybrid rule-based/neural network system that assists in calculation of property distribution after divorce in Australia.

⁵² Cowdrey, above n 2, 2.

⁵³ See, Tania Sourdin, *Alternative Dispute Resolution* (2nd ed, 2005) 8, where it is suggested that by distilling down Fisher and Ury (above n 27), the fundamental elements to achieving a successful negotiation are: (1) People: separate the people from the problem; (2) Interests: focus on interests, not positions; (3). Options: generate a variety of possibilities before deciding what to do; and (4) Criteria: insist that the result be based on some objective standard.

⁵⁴ See, Andrew Stranieri, John Zeleznikow, Mark Gawler and Bryn Lewis, 'A hybrid rule-neural approach for the automation of legal reasoning in the discretionary domain of family law in Australia' (1999) 7 *Artificial Intelligence and Law* 153.

Once an offer is made it must be measured against the BATNA. The step of reality testing is very important in the process of alternative dispute resolution (ADR). Sourdin⁵⁵ indicates that in the final stage of the negotiation process, reality testing provides an excellent method of ensuring that parties are fully aware of the agreement they are about to reach. The plea negotiation process is a form of shuttle bargaining, an offer followed by a counter offer. The defence lawyer evaluates the quality/benefit of the offer and either accepts or rejects the offer and makes a new offer. This is the case in the Contest Mention system as it operates in Victorian Magistrates' Courts. Unless the defence lawyer is experienced the types of negotiations that occur before the beginning of the Contest Mention can be very problematic and difficult. A less experienced lawyer might relay/accept a plea that might not be the best achievable outcome in the situation even though it may have been perfectly adequate for another defendant in a different case.

B Communication

There are various methods of electronic communication available for parties to conduct negotiations. E-mails, SMS messaging, telephone, 'snail' mail can all be used for effective communication. For example, Square Trade⁵⁶ is one of the largest suppliers of online dispute resolution and utilises e-mail exchange via a mediator to resolve issues.

When the two parties in the Contest Mention, the prosecution and defence, negotiate in the Magistrates' Court there is a presumption that anything divulged in open court should be 'without prejudice' and unless agreed by both parties should not be mentioned at a contested hearing.⁵⁷ Section 5.3 of Contest Mention system guidelines however suggest that '[a]ny disclosure or admission made in open court at the Contest Mention should be admissible at a subsequent contested hearing'. There is a statutory requirement for the prosecution to provide a full summary to the charges to the

⁵⁵ Sourdin, above n 53, 68-70.

⁵⁶ See <<http://www.squaretrade.com/cnt/jsp/index.jsp>> at 29 March 2007: for more information on the range of services offered by Square Trade.

⁵⁷ Straijt, above n 25, 10-14.

defence. Fox⁵⁸ indicates that a defendant is entitled to a copy of the charge-sheet and further particulars of the charge. This can include not only the legal nature of the charge, but also the matters alleged as the foundation of the charge.

The method of negotiation discussed in the L-Z model needs to be adjusted to reflect the differences in the process of resolving plea negotiations. The fact that the defence need not make any disclosures but the prosecution must divulge all the facts, as they are relevant to the charges, must be taken into account in our revised model. The argument tool used in the L-Z model is utilised to make explicit how the statements of the parties support their arguments. The tool makes the parties enter statements in a sequence that reflects the evidence cited for supporting each party's goals.

C Negotiation

The method that is utilised in the L-Z model to support compromises and trade-offs revolves around the creation of lists of issues.⁵⁹ In the case of the Contest Mention, the concerns of the prosecutor and the defence may well be overlapping in some respects, but can also be quite different in others. There are two matters that might be of little concern to the defendant but of a much greater concern to the prosecutor, the impact on the victim⁶⁰ and restitution.

Most of the other issues in dispute will revolve around the facts of the crime. As indicated earlier, these will usually be aggravating factors, those that make the sentence more severe. The accused may well plead guilty to a crime but not admit to certain facts. The perceived strength of the prosecutor's evidence will be the major inhibitor to a plea bargain being struck. The L-Z framework includes a phase where compromise and trade-offs are utilised to assist in the resolution of disputes.⁶¹ The

⁵⁸ Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (12th ed, 2005) 175.

⁵⁹ Lodder, above n 1, 328-33.

⁶⁰ The victim, if not directly involved in the proceedings, is often represented by a written victim impact statement. See Magistrates' Court, above n 28, Sect 6: deals with the views and role of the victim in the proceedings.

⁶¹ Lodder and Zeleznikow, above n 1, 325-33.

trade off part of the L-Z model is based on the Family_Winner system.⁶² The system asks individuals for their positions and importantly their reasons for taking their positions. The system uses a point allocation procedure to distribute items or issues to the participants who values the item or issue more. The system provides possible suitable allocation of items or issues but is dependant on human interlocutors to accept and finalise an agreement.

The Contest Mention system does not at first glance lend itself to the process of creating lists of issues. One of the greatest problems to overcome in this process is the case of multiple charges. Combining charges is one of the methods that the prosecutor may use to ensure that a plea of guilty is obtained for a particular desired charge. The various charges that might be levelled for a particular set of facts will vary if the defendant does not admit to the veracity of some of the facts.

One of the key elements in the authors' on going research is to establish what is negotiable in the plea negotiation and how the information can be represented and negotiated using the L-Z model.

VI CONCLUSION

In this paper we have considered how a plea bargaining decision support system can help support the advocacy provided by Victoria Legal Aid. Such systems are particularly useful for training novices. The first step in the plea bargaining process is determining relevant sentences. With this goal in mind, we have developed an appropriate decision support system, which we discussed in detail. We are currently using the sentencing decision support system together with the L-Z three step online dispute resolution environment to build our plea bargaining decision support system. Although not discussed at any great length, it may be possible that *pro se* defendants could utilise the system to assist in their defence.

⁶² Family_Winner provides negotiation decision support in the domain of Australian Family Law. See, John Zeleznikow and Emilia Bellucci, 'Family_Winner: integrating game theory and heuristics to provide negotiation support' in Danièle Bourcier (ed), *Legal Knowledge and Information Systems. JURIX 2003: The Sixteenth Annual Conference* (2003) 21.

**Australasian Law Teachers Association - ALTA
2006 Refereed Conference Papers**

The L-Z framework is a useful method for the construction of a negotiation support environment for the plea negotiation process. While still in its infancy we feel it has great potential for providing greater access to justice and making the plea negotiation process more transparent and efficient, both in Australia and overseas.