



Victorian
Law Reform
Commission



CIVIL JUSTICE REVIEW Report

Published by the Victorian Law Reform Commission

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Reference Team

Mary Polis (Team Leader)
Ross Abbs (from 5 February 2007 to 15 June 2007)
Samantha Burchell (until 2 November 2007)
Emma Cashen (from 9 July 2007)
Claire Downey (until 31 December 2006)
Prue Elletson (from 12 November 2007)
Christiana McCudden (from 5 February 2006 to 3 May 2007)
Jacinta Morphett (from 30 October 2006 to 24 February 2008)



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CIVIL JUSTICE REVIEW

Report 14

Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001 Australia
DX 144 Melbourne, Vic

Level 10, 10–16 Queen Street
Melbourne Victoria 3000 Australia

Telephone +61 3 8619 8619
Facsimile +61 3 8619 8600
TTY 1300 666 557
1300 666 555 (within Victoria)
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

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Preface

This report concerning reform of the civil justice system is the product of 18 months work by a committed team of people led by the commissioner in charge of the reference, Dr Peter Cashman, who brought his many years experience as a litigator, teacher, author and law reformer to the undertaking.

In May 2004 the Attorney-General, Rob Hulls, issued a *Justice Statement* outlining directions for reform of Victoria's justice system. Reform of the rules of civil procedure in order to streamline litigation processes, reduce costs and court delays, and achieve greater uniformity between different courts is one of the *Justice Statement's* objectives.

In September 2006 the Attorney-General asked the commission to provide broad ranging advice about civil justice reform in the first stage of what may turn out to be a multi-stage reference. The Terms of Reference given to the commission ask us to identify, among other things, 'the key factors that influence the operation of the civil justice system, including those factors that influence the timeliness, cost and complexity of litigation'. Dr Cashman embraced the rather daunting task of identifying these key factors, as well as dealing with the many other challenges associated with an activity of the magnitude of civil justice reform, with vigour.

The commission was originally asked to submit its final report of the first stage of the reference to the Attorney-General in September 2007. However, due to extensive consultation with stakeholders on a wide range of reform proposals, the Attorney-General extended this deadline until March 2008 at my request.

Our aim has been to prepare a report that provides both a comprehensive analysis of the Victorian civil justice system and contains a number of recommendations that are designed to reduce the time taken to resolve disputes, reduce costs and simplify the process of civil litigation.

The commission received strong support from the judiciary and the practising profession throughout the reference. As well as thanking all of the jurisdictional heads for their assistance, I wish to acknowledge the encouragement we have received from the Chief Justice of the Supreme Court of Victoria, the Hon. Marilyn Warren AC, whose court has been a major focus of this review. The courts, members of the legal profession, community groups and others with an interest in the civil justice system generously devoted a considerable amount of time and effort to the preparation of submissions and to participating in individual consultations.

My fellow commissioners who comprised the Division with responsibility for this reference—Dr Peter Cashman, Judge Felicity Hampel, Justice David Harper, Professor Sam Ricketson, and Judge Iain Ross—gave generously of their time and expertise to read and comment upon significant amounts of material. Their capacity to work as a team when developing and refining ideas greatly enhanced the quality of the numerous reform proposals in this report.

A number of people contributed to the research undertaken for this reference and to the preparation of the final report. Mary Polis led a team of legal researchers that included Ross Abbs, Samantha Burchell, Emma Cashen, Claire Downey, Prue Elletson, Christiana McCudden and Jacinta Morphett. Research assistance was also provided by interns Kate Kennedy and Sarah Zeleznikow. Emma Cashen also played a key role in the final editing and production of the report. Miriam Cullen and Sarah Zeleznikow have worked tirelessly on the report's referencing. In her role as the person responsible for production of the report, Clare Chandler has demonstrated flair, skill and diplomacy. Throughout the reference the Commission's CEO, Padma Raman, has offered experienced guidance and support.

My final debt of gratitude is due to Dr Peter Cashman whose vision and energy lie at the centre of this report.



Neil Rees

Chairperson

Victorian Law Reform Commission

Terms of Reference

Chairperson

Professor Neil Rees

Commissioner

Peter Cashman (from September 2006 to December 2007)

Part-time Commissioners

Paris Aristotle AM
The Honourable Justice David Harper
Her Honour Judge Felicity Hampel
Professor Sam Ricketson
His Honour Judge Iain Ross

Chief Executive Officer

Padma Raman

Operations Manager

Kathy Karlevski

Policy and Research Team Leaders

Angela Langan
Siobhan McCann
Mary Polis (on secondment)

Manager – Community Law Reform

Michelle Burrell

Policy and Research Officers

Emma Cashen
Lara Rabiee
Tanaya Roy
Priya SaratChandran
Rupert Watters

Executive Research Assistant

Claire Gallagher

Research Assistant

Miriam Cullen

Communications Manager

Sally Finlay

Communications Officer

Clare Chandler

Librarian

Julie Bransden

Project Officer

Simone Marrocco

Administrative Officers

Vicki Christou
Jessica Reynolds

1. To identify the overall objectives and principles of the civil justice system that should guide and inform the rules of civil procedure; having regard to the aims of the *Attorney-General's Justice Statement: New directions for the Victorian Justice System 2004-2014*, and in particular:
 - the modernisation, simplification and harmonisation of the rules of civil procedure within and across jurisdictions;
 - the reduction of the cost of litigation;
 - the promotion of the principles of fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability.
2. To identify the key factors that influence the operation of the civil justice system, including those factors that influence the timeliness, cost and complexity of litigation;
3. To consult with the courts, the legal profession, business, government and other stakeholders on the current performance of the civil justice system as well as the overall objectives and principles of the civil justice system and potential options for reform;
4. The review should consider the operation of the rules of civil procedure in the Supreme Court, the County Court and the Magistrates' Court;
5. The review should have regard to recent reviews of civil procedure in other jurisdictions, both within Australia and internationally;
6. The review should also have regard to the impact of current policy initiatives on the operation of the civil justice system including the proposed increase in the jurisdiction of the County Court and investments in information technology such as an Integrated Courts Management System;
7. In presenting its report, the Commission should identify areas of the civil justice system and rules of civil procedure that might form the basis of a later and more detailed review. Such areas may include, but are not limited to, the rules and practices relating to:
 - pre-commencement options;
 - pleadings;
 - discovery;
 - summary judgment;
 - expert witnesses;
 - class actions;
 - abuse of process;
 - alternative methods of dispute resolution, including alternative dispute resolution undertaken by judicial officers; and
 - judicial role in case management and listing practices, including docketing systems.
8. The Commission should also identify the process by which the courts, the legal profession and other stakeholders may be fully involved in any further detailed review of the rules of procedure;
9. The Victorian Law Reform Commission should report in 12 months from the date of the commencement of the review.

Executive Summary

Overview of report

This report is the final product of the first stage of the commission's civil justice inquiry.

The terms of reference required the commission to undertake a number of tasks including identification of the goals of the civil justice system and the principles that should guide the rules of civil procedure. The commission was also asked to identify the key factors that influence the operation of the civil justice system, including matters affecting the timeliness, cost and complexity of litigation.

An analysis of this magnitude required extensive research and consultation with interested parties, most particularly the judiciary and the legal profession.

At the outset, the commission identified a number of specific areas for detailed investigation. The commission selected 12 'priority' areas where it has made a number of recommendations for reform.

The 12 'priority' areas selected for detailed investigation were:

- means by which persons in dispute communicate and exchange information prior to the formal commencement of legal proceedings
- standards of conduct of participants in civil litigation
- the resolution of litigation other than by judicial adjudication at trial
- mechanisms for ascertaining facts and getting to the truth before trial
- control over the conduct of pre-trial and trial procedures
- the role of experts
- group or class action procedures
- financing of litigation
- special needs of self-represented litigants and those with language difficulties
- particular problems arising out of unmeritorious or vexatious claims
- rationalisation and reduction of costs
- ongoing processes of review and reform.

Goals of the civil justice system

These priority areas were examined in the light of the goals of the civil justice system identified by the commission. Goals have been categorised as those that are 'desirable' and those that are 'fundamental'. Desirable goals are aspirations for the civil justice system. Fundamental goals are essential prerequisites to the proper administration of justice.

Desirable goals of the civil justice system include:

- accessibility
- affordability
- equality of arms
- proportionality
- timeliness
- getting to the truth
- consistency and predictability.

Fundamental goals of the civil justice system include:

- fairness
- openness
- transparency
- proper application of the substantive law
- independence
- impartiality
- accountability.

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These fundamental goals are derived from principles that are embedded within the law. Sources of those principles include the common law, statutes which govern the operation of the courts, the Victorian Constitution, Chapter III of the Australian Constitution and the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

These important safeguards are designed to protect the interests of the parties and to promote the integrity of the administration of justice. However, they come at a price to the parties and to the broader community because adherence to these requirements adds to the cost, duration and complexity of proceedings.

The tension between the competing demands of maintaining pursuit of justice safeguards and of achieving the effective, expeditious and inexpensive resolution of civil disputes has been eased in Victoria by the creation of a multi-tiered civil justice system. The Victorian Civil and Administrative Tribunal (VCAT) provides a low cost, efficient, expeditious and simplified forum for the resolution of a large number of civil disputes. The Magistrates' Court sits between the formality and complexity of the higher courts and the informal and less 'legalistic' VCAT. The County and Supreme Courts continue to administer justice in accordance with legal and procedural requirements which inevitably give rise to complexity, cost and delay. However, within each tier, most disputes are resolved by means other than formal adjudication following a trial. At all levels there has been increased use of alternative dispute resolution mechanisms.

Factors influencing the civil justice system

After examining the existing jurisdiction, workload and organisation of the civil courts in Victoria in Chapter 1, we also examine the many factors that influence the manner in which the civil justice system operates. Those matters include the factual and legal complexity of much litigation and, in particular, the procedural and evidentiary rules which govern the manner in which litigation is conducted. In addition, matters such as the tension between judicial case management and party control of litigation, as well as the adversarial 'culture' that permeates the civil justice system, are significant variables that merit attention.

These and many other matters that have an impact of the incidence, duration, cost and complexity of litigation are addressed in the report. The fact that many of these factors may not be amenable to immediate influence by changes to the law or procedural rules is one of the great challenges associated with civil justice reform.

Assessing the performance of the civil justice system

Chapter 1 concludes by examining means by which the performance of the civil justice system may be assessed.

To date, criticisms of the civil justice system, particularly in the higher courts, have focused on the problems of delay, inefficiency and excessive or disproportionate legal costs. Problems are easy to identify. Solutions are far more elusive. Moreover, there is relatively little empirical data with which to assess the overall magnitude of the problems, the causal explanations for the problems, or the impact of reforms.

Review and reform are ongoing iterative processes. Adequate empirical data and appropriate measures of performance and feedback from key participants in the process, including regular users of the court system, are necessary if reform is to be effective. One of the commission's key recommendations is that a Civil Justice Council be established to facilitate ongoing review and reform, with the involvement of key stakeholders in this process.

Specific recommendations for reform

In order to formulate reform proposals the commission engaged in extensive consultation with various stakeholder groups, it researched civil justice reforms in other jurisdictions, and it reviewed the submissions received in response to a Consultation Paper and to the draft reform proposals incorporated in two exposure drafts.

The background to, and the reasons for, the many reform proposals advanced by the commission are dealt with at length in Chapters 2 to 12. The commission's major recommendations are:

To facilitate the quick and inexpensive resolution of disputes, without the necessity to commence litigation, through the introduction, and future expansion, of **pre-action requirements** for communication and exchange of information

To improve the **standards of conduct** of participants in civil litigation through:

- the introduction of new statutory standards to govern the conduct of key participants in civil proceedings so as to accelerate the disclosure of information between parties, encourage greater cooperation, limit the issues in dispute, increase the prospect of alternative dispute resolution and improve standards of conduct in connection with both civil proceedings and ancillary ADR processes
- new requirements for parties and lawyers to certify or verify that allegations made in pleadings have merit
- an overriding provision to the effect that relevant legislation and procedural rules are to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute

To increase **alternative dispute resolution** through:

- greater use of an increased array of options for ADR
- more effective use of industry dispute resolution schemes
- additional provisions for mandatory referral to ADR

To facilitate more proactive **judicial management** of litigation, including through:

- a general statutory provision giving a clear judicial power/discretion to make appropriate orders and impose reasonable limits, restrictions or conditions in respect of the conduct of any aspect of a proceeding
- an extension of the docket system
- more clearly delineated and specific judicial powers to actively manage and impose limits on pre-trial processes and hearings
- an express power permitting judges to call witnesses
- greater use of telephone directions hearings and technology
- the use of case conferences and listing conferences as an alternative to directions hearings
- earlier and more determinate trial dates
- reform of procedures for the earlier determination of disputes, including by summary disposal of unmeritorious claims and defences
- greater control over interlocutory disputes
- enhanced measures to deter or curtail unnecessary litigation

To enable the parties to get to the truth earlier and easier through new mechanisms designed to facilitate earlier and more cost effective methods of **disclosure**, including through:

- pre-trial oral examinations
- the introduction of a statutory provision to enable confidential (non-privileged) information to be obtained prior to trial
- narrowing the range of documents required to be produced on discovery to those that are directly relevant to issues in dispute
- requiring parties to try and reach agreement on discovery issues before seeking orders from the court
- expedited inspection of certain categories of readily identifiable documents
- provision for the appointment of special masters to assist in resolving discovery issues
- additional express power to limit or restrict discovery
- new requirements for the disclosure of the identity of litigation funders and insurers exercising influence or control over the conduct of proceedings
- provision for the disclosure of lists of documents containing 'objective' information where such lists may otherwise be privileged
- a power to create document repositories for use in multi-party litigation
- additional sanctions for discovery abuse
- additional express power to make orders limiting chargeable or recoverable costs in connection with discovery

To enhance judicial control over expert witnesses and **expert evidence**, including through:

- reforms based on the recently introduced NSW provisions
- requiring parties to seek directions before calling expert evidence
- the introduction of a purposes clause to assist judicial control over expert evidence
- restricting expert evidence to that which is reasonably necessary
- avoiding unnecessary costs in connection with experts
- enabling a single expert to be appointed in appropriate circumstances
- declaring the duties of expert witnesses

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- judicial discretion to direct expert witnesses to confer, to try and reach agreement and to prepare a joint report specifying matters agreed and not agreed and the reasons for disagreement
- judicial discretion to give directions as to the manner in which expert evidence is to be given, including by concurrent evidence
- court appointed experts
- disclosure of the basis upon which experts are being remunerated

To improve remedies in **class actions** by:

- clarifying that there is no legal 'requirement' that all class members have individual claims against all defendants, provided that all class members have a legal claim against one defendant
- clarifying that class action proceedings can be brought on behalf of some of those with the same, similar or related claims even if the class comprises only those who have consented to the conduct of proceedings on their behalf
- conferring on the Supreme Court discretion to order *cy-près* type remedies where there has been a proven breach of the law resulting in a pecuniary advantage that is capable of reasonably accurate assessment but where it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered loss

To provide greater assistance for **self-represented litigants**, including through:

- continuation and extension of self litigant co-ordinator programs in each of the courts
- further consideration of a court based pro bono referral scheme
- the appointment of special masters
- providing courts with adequate resources to develop information and material for self-represented litigants
- the development, by the professional bodies, of guidelines for lawyers in dealing with self-represented litigants
- the development, by courts, of self-represented litigant management plans

To obtain additional funding for **interpreter services** in civil proceedings

To curtail **unmeritorious claims and defences and vexatious litigation** by:

- broadening the categories of persons who have standing to bring an application for a vexatious proceedings order
- introducing a more liberal test specifying the circumstances where a court may make orders prohibiting or restricting a person from instituting civil proceedings
- providing for orders to be made against those acting in concert with vexatious litigants and against corporate entities or incorporated associations affiliated with them
- permitting the court to have regard to various types of 'proceedings', including interlocutory proceedings and appeals
- providing for a broader range of orders to be made by courts
- providing for a register to be kept of persons declared to be vexatious litigants
- conferring on other courts and tribunals power to make a vexatious proceedings order in respect of litigants before those courts or tribunals
- the introduction of an automatic stay of pending proceedings once an application for a vexatious proceedings order is made
- permitting affidavit evidence in support of an application to be on the basis of 'information and belief' with cross examination only with leave of the court
- providing that any proceeding commenced in breach of a vexatious proceedings order is a nullity
- provision for determinations to be made by the court on the papers, unless the court orders otherwise
- provision for waiver of court fees and other charges in applications for a vexatious proceedings order

To facilitate greater **access to justice** through the establishment of a new funding body (the Justice Fund) to provide:

- financial assistance to parties with meritorious civil claims
- indemnity in respect of any adverse costs order
- indemnity in respect of any order for security for costs

The Justice Fund would seek to become self funding through:

- statutory entitlement to a percentage share of the proceeds of litigation, including class actions (subject to approval of the court)
- recovery of costs from parties against whom the funded party obtains an order for costs
- receipt of funds by order of the court where cy-pres remedies are awarded
- entering into joint venture arrangements with commercial litigation funding bodies

To rationalise and reduce the **costs of litigation** by various means including:

- the establishment of a Costs Council
- conferring on courts express power to require parties to disclose to each other and to the court estimates of costs and actual costs incurred
- the further development of fixed or capped costs in particular areas of litigation
- simplifying the present bases for taxation of costs
- the introduction of a presumptive rule that interlocutory costs orders should not be taxed prior to the conclusion of the case unless the court orders otherwise
- allowing party-party costs to be recovered based on all costs reasonably incurred and of reasonable amount
- the greater use by courts of other methods of determining the amount of recoverable party-party costs so as to avoid the delays and costs associated with the present method of taxation of costs
- the revision and updating of court scales of costs
- the introduction of a common scale of costs across courts
- the introduction of a prohibition on law firms profiting from disbursements, except in the case of clients of reasonably substantial means who agree to pay
- the introduction of an express provision allowing courts to make orders protecting public interest litigants from adverse costs in appropriate cases
- reconsideration of the current absolute legislative prohibition of percentage contingent fees, provided that any proposed (regulated) percentage fee arrangements are subject to adequate safeguards to protect clients and to prevent abuse
- further consideration of whether proportionate and other types of fees should be recoverable in class action proceedings, subject to court approval
- review of court fees by the proposed Costs Council, including in connection with whether higher 'user pays' fees should be introduced for commercial litigants and whether there should be easier and simpler methods for reducing or waiving fees for litigants of limited means
- further review of the rules relating to offers of compromise and costs consequences by the proposed Costs Council

To facilitate **ongoing civil justice review and reform** by:

- legislative provision for the constitution and operation of each court's rules committee
- joint meeting of rules committees when considering rules and procedures applicable in more than one jurisdiction
- broadening the power to make rules so as to further the proposed overriding purpose
- further review of the legislation and rules of procedure in each of the three courts to achieve greater harmonisation, a simplified structure and more use of plain English
- clarification, consolidation and reorganisation of practice notes and directions
- the establishment of a new body, the Civil Justice Council (comprising members from a broad range of participants in the civil justice system), with ongoing statutory responsibility for review and reform of the civil justice system

Executive Summary

Additional reform proposals

In addition to the reforms proposed by the commission in respect of those matters addressed in stage one of the civil justice inquiry, the report sets out a number of **additional reform proposals** advocated by those with whom we consulted. These reform proposals encompass:

- rules about pleadings
- non-party participation in civil proceedings
- enforcement of judgments and orders
- appeals from interlocutory decisions
- rules and procedures relating to civil appeals
- the jurisdiction of VCAT
- the law relating to tax deductability of legal costs (a Commonwealth matter)
- awarding of interest on amounts recovered in legal proceedings
- economic aspects of the civil justice system
- court governance

Some of these matters may be appropriate for consideration by the commission during the second stage of the inquiry, or by the proposed Civil Justice Council. Alternatively, a number of these reform proposals could be implemented by the Government or the courts without the need for further investigation.

Recommendations

Chapter 2: Facilitating The Early Resolution of Disputes Without Litigation

1. Pre-action protocols should be introduced for the purpose of setting out codes of 'sensible conduct' which persons in dispute are expected to follow when there is the prospect of litigation.
2. The objectives of the protocols would be:
 - to specify the nature of the information required to be disclosed to enable the persons in dispute to consider an appropriate settlement
 - to provide model precedent letters and forms
 - to provide a time frame for the exchange of information and settlement proposals
 - to require parties in dispute to endeavour to resolve the dispute without proceeding to litigation
 - to limit the issues in dispute if litigation is unavoidable so as to reduce costs and delay.
3. Although information and documentation about the merits and quantum of the claim and defence would be available for use in any subsequent litigation, offers of settlement made at the pre-action stage would be on a 'without prejudice' basis but would be able to be disclosed, following the resolution of the dispute after the commencement of proceedings, and would be taken into account by the court in determining costs.
4. The general standards of pre-action conduct expected of persons in a dispute would be incorporated in statutory guidelines. Each person in a dispute and the legal representative of such person would be required to bring to the attention of each other or potential party to the dispute the general standards of pre-action conduct and any specific pre-action protocols applicable to the type of dispute in question (where such other person is not aware of such protocols).
5. The statutory guidelines should provide that, where a civil dispute is likely to result in litigation, prior to the commencement of any legal proceedings the parties to the dispute shall take reasonable steps, having regard to their situation and the nature of the dispute, to resolve the matter by agreement without the necessity for litigation or to clarify and narrow the issues in dispute in the event that legal proceedings are commenced. Such reasonable steps will normally be expected to include the following:
 - (a) *The claimant shall write to the other party setting out in detail the nature of the claim and what is requested of the other party to resolve the claim, and specifying a reasonable time period for the other person to respond.*
 - (b) *The letter from the person with the claim should:*
 - (i) *give sufficient details to enable the recipient to consider and investigate the claim without extensive further information*
 - (ii) *enclose a copy of the essential documents in the possession of the claimant which the claimant relies upon*
 - (iii) *state whether court proceedings will be issued if a full response is not received within a specified reasonable period*
 - (iv) *identify and ask for a copy of any essential documents, not in the claimant's possession, which the claimant wishes to see and which are reasonably likely to be in the possession of the recipient*
 - (v) *state (if this is so) that the claimant is willing to undertake a mediation or another method of alternative dispute resolution if the claim is not resolved*
 - (vi) *draw attention to the courts' powers to impose sanctions for failure to comply with the pre-action protocol requirements in the event that the matter proceeds to court.*
 - (c) *The person receiving the written notification of the claim shall acknowledge receipt of the claim promptly (normally within 21 days of receiving it), specify a reasonable time within which a response will be provided and indicate what additional information, if any, is reasonably required from the claimant to enable the claim to be considered.*
 - (d) *The person receiving the written notification of the claim, or that person's agent, shall respond to the claim within a reasonable time and provide a detailed written response specifying whether the claim is accepted and if not the detailed grounds on which the claim is rejected.*
 - (e) *The full written response to the claim should, as appropriate:*
 - (i) *indicate whether the claim is accepted and if so the steps to be taken to resolve the matter*
 - (ii) *if the claim is not accepted in full, give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions are accepted and which are disputed and the reasons why they are disputed*

Recommendations

- (iii) enclose a copy of documents requested by the claimant or explain why they are not enclosed*
 - (iv) identify and ask for a copy of any further essential documents, not in the respondent's possession, which the respondent wishes to see*
 - (v) state whether the respondent is prepared to make an offer to resolve the matter and if so the terms of such offer*
 - (vi) state whether the respondent is prepared to enter into mediation or other form of dispute resolution.*
 - (f) In the event that the claim is not resolved or withdrawn, the parties should conduct genuine and reasonable negotiations with a view to resolving the claim economically and without court proceedings.*
 - (g) Where a person in dispute makes an offer of compromise before any legal proceedings are commenced the court may, after the determination of the court proceedings, take that into consideration on the question of costs in any proceedings.*
6. Specific pre-action protocols applicable to particular types of dispute should be developed by the proposed Civil Justice Council (see further recommendations below) in conjunction with representatives of stakeholder groups in each relevant area (eg, commercial disputes, building disputes, medical negligence, general personal injury, etc.).
 7. Where a specific pre-action protocol is developed for a particular type of dispute it would be referred to the Rules Committee for approval and implementation by way of a practice note in each of the Magistrates' Court, the County Court and the Supreme Court, with such modifications as may be appropriate in each of the three jurisdictions.
 8. Except in (defined) exceptional circumstances, compliance with the requirements of the practice notes would be an expected condition precedent to the commencement of proceedings in each of the three courts. The obligation to comply with the requirements of applicable practice notes would be statutory. A person seeking to formally commence a legal proceeding should be required to certify whether the pre-action protocol requirements have been complied with, and where they have not to set out the reasons for such non compliance.
 9. Because it would not be practicable for court registry staff to determine whether there had been compliance with the pre-action protocol requirements or to evaluate the adequacy of the reasons for noncompliance, the court would not have power to decline to allow proceedings to be commenced because of noncompliance. However, where the pre-action protocol requirements have not been complied with the court could, in appropriate cases, order a stay of proceedings pending compliance with such requirements.
 10. The 'exceptional' circumstances where compliance with any pre-action protocol requirements would not be mandatory would include situations where:
 - a limitation period may be about to expire and a cause of action would be statute barred if legal proceedings are not commenced immediately
 - an important test case or public interest issue requires judicial determination
 - there is a significant risk that a party to a dispute will suffer prejudice if legal proceedings are not commenced, in circumstances where advance notification of proceedings may result in conduct such as the dissipation of assets or destruction of evidence
 - there is a reasonable basis for a person in dispute to conclude that the dispute is intractable
 - the legal proceeding does not arise out of a dispute
 - the parties have agreed to dispense with compliance with the requirements of the protocol.
 11. Unreasonable failure to comply with an applicable protocol or the general standards of pre-action conduct should be taken into account by the court, for example in determining costs, in making orders about the procedural obligations of parties to litigation, and in the awarding of interest on damages. Unless the court orders otherwise, a person in dispute who unreasonably fails to comply with the pre-action requirements:
 - would not be entitled to recover any costs at the conclusion of litigation, even if the person is successful
 - would be ordered to pay the costs of the other party on an indemnity basis if unsuccessful.
 12. The operation of the protocols and general standard of pre-action conduct should be monitored by the Civil Justice Council, in consultation with representatives of relevant stakeholder groups, and modified as necessary in the light of practical experience.
 13. There should be an entitlement to recover costs for work done in compliance with the pre-action protocol requirements in cases which proceed to litigation. Specific pre-action protocols should attempt to specify the amount of costs recoverable, on

a party-party basis, for carrying out the work covered by the protocols. As with the current Transport Accident Commission (TAC) protocols in Victoria, such costs should be either fixed (with allowance for inflation) or calculated in a determinate manner (eg, like the fixed costs payable in certain types of simple cases in England and Wales, where costs are calculated on a fixed base amount plus an additional percentage of the amount claimed). Consideration should be given to whether specific pre-action protocols should include a procedure for mandatory pre-trial offers which would be taken into account by the court when determining costs at the conclusion of any legal proceeding.

14. Where the parties to a dispute have agreed to settle the dispute before starting proceedings but have not agreed on who is to pay the costs of and incidental to the dispute or the amount to be paid, and there is no pre-action protocol which provides for such costs, any party to the dispute may apply to the court for an order:
 - (i) for the costs of and incidental to the dispute to be taxed or assessed, or
 - (ii) awarding costs to or against any party to the dispute, or
 - (iii) awarding costs against a person who is not a party to the dispute, if the court is satisfied that it is in the interests of justice to do so.
15. Where, taking into account the nature of the dispute and the likely means of the parties, the costs of and incidental to the dispute are relatively modest, there should be a presumption that each party to the dispute will bear its own costs. The court should have power to determine the application on the basis of written submissions from the parties, without a hearing and without having to give reasons, or refer the matter to mediation or other form of alternative dispute resolution.

Chapter 3: Improving The Standards of Conduct of Participants in Civil Litigation

16. New provisions should be enacted in respect of (a) standards of conduct in civil proceedings (b) verification of the allegations made in pleadings and (c) the overriding purpose of relevant statutory provisions and procedural rules.
 - 16.1 New provisions should be enacted to prescribe standards of conduct in civil proceedings, and to facilitate cooperation between the participants in a civil proceeding, candour and early disclosure of relevant information, and early resolution of the dispute - including by agreement of the parties or through alternative dispute resolution processes at minimal cost to the parties. There should be sanctions and penalties for non-compliance with these overriding obligations. Such sanctions should only come into force 12 months after the obligations take effect and any application should require leave of the court.
 - 16.2 There should be new requirements for parties and lawyers to certify or verify that allegations in pleadings have merit.
 - 16.3 There should be an overriding provision to the effect that relevant legislation and procedural rules are to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.

Such provisions should be along the lines of the following draft:

Section /Rule A: overriding obligation

- (1) *These provisions apply to the conduct or defence of any aspect of a civil proceeding, including any interlocutory proceeding, and any appeal from any order or judgment in a proceeding ('a civil proceeding') where such civil proceeding is in the Magistrates' Court, the County Court, the Supreme Court or the Court of Appeal (a 'Victorian court'), and to any alternative dispute resolution process undertaken in relation to any civil proceeding pending in a Victorian court.*
- (2) *These provisions apply to:*
 - (a) *any person who is a party to a civil proceeding*
 - (b) *any legal practitioner or other representative acting on behalf of a party to a civil proceeding*
 - (c) *any law practice acting on behalf of a party to a civil proceeding*
 - (d) *any person providing any financial or other assistance to any party to a civil proceeding, including an insurer or a provider of funding or financial support, insofar as such person exercises any direct or indirect control or influence over the conduct of any party in a civil proceeding ('the participants').*
- (3) *These provisions:*
 - (a) *do not apply to witnesses as to fact*
 - (b) *(other than subsections 4(b), (c), (f)) apply to expert witnesses.*

Recommendations

- (4) *Each of the persons to whom this part applies has a paramount duty to the court to further the administration of justice. Without limiting the generality of this obligation, in all aspects of the proceeding (including any ancillary processes such as negotiation and mediation), each of the participants:*
- (a) *shall at all times act honestly*
 - (b) *shall not make any claim or respond to any claim in the proceeding, or assist in the making of any claim or response to any claim in the proceeding, where a reasonable person would believe that the claim or response to claim is frivolous, vexatious, for a collateral purpose or does not have merit*
 - (c) *shall not take any step in the proceeding in connection with a claim or response to a claim, or assist in the taking of any step or response to any step, unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding*
 - (d) *has a duty to cooperate with the parties and the court in connection with the conduct of a civil proceeding*
 - (e) *has a duty not to engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive, or knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive*
 - (f) *shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes*
 - (g) *where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute*
 - (h) *shall use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute*
 - (i) *shall use reasonable endeavours to act promptly and to minimise delay*
 - (j) *has a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.*
- (5) *Subsections 4(b) and (c) do not apply to preliminary steps, preliminary legal work or preliminary financial or other assistance for the purpose of a proper and reasonable consideration of whether a claim, proceeding or defence of a claim or proceeding or a step in a proceeding has merit.*
- (6) *The obligations imposed by this part shall override any legal, ethical, contractual or other obligation which the person may have insofar as they are inconsistent with such obligations. The obligations in this part apply to any legal practitioner engaged on behalf of a client in connection with a civil proceeding, despite any obligation that the legal practitioner or law practice may have to act in accordance with the instructions or wishes of a client.*

Penalty Provisions

- (7) *Provisions for penalties for breach of the overriding obligations will come into effect 12 months after the obligations take effect. Such penalties will only apply to breaches arising after that date. The delay in implementation of the penalty provisions shall not prevent the court from exercising any power it already has, including in relation to costs.*
- (8) *Where the court is satisfied that, on the balance of probabilities, a person to whom this part applies has failed to act in accordance with the obligations imposed by this part the court may, of its own motion or on the application of any party or person with a sufficient interest, in addition to any other order that the court has power to make, make such order as the court considers in the interests of justice, including:*
- (a) *an order that the person pay some or all of the legal or other costs or expenses of any person arising out of the failure to act in accordance with the obligations imposed by this section*
 - (b) *an order that the person compensate any person for any financial or other loss which was materially contributed to by the failure to act in accordance with the obligations imposed by this section, including an order for penalty interest in respect of any delay in the payment of any amount claimed*

in a civil proceeding or an order that there be no interest, or reduced interest, where there has been a failure on the part of any participant involved in the bringing of the claim

- (c) *an order that the person take such steps in a civil proceeding as may be reasonably necessary to remedy any problem arising out of the failure to act in accordance with the obligations imposed by this section*
 - (d) *an order that the person not be permitted to take specified steps in a civil proceeding*
 - (e) *such order as the court considers to be in the interest of any person who has been prejudiced by the failure to act in accordance with the obligations imposed by this section*
 - (f) *an order that the person pay into the Justice Fund such amount as the court considers reasonable having regard to the time spent by the court as a result of:*
 - (i) *the failure to act in accordance with the obligations imposed by this section, or*
 - (ii) *any civil claim or civil proceeding arising out of the failure to act in accordance with the obligations imposed by this section, including an application for an order under this section.*
- (9) *Any application under section 8 by a party or person with sufficient interest may only be made with leave of the court.*
- (10) *An application under section 8 shall be made in the court in which the proceeding is being heard or was heard and, where practicable and without limiting the discretion of the court to decide how and by whom such application should be determined, such application may be dealt with initially by the judicial officer who is most familiar with the proceeding which gave rise to the application.*
- (11) *An application under section 8 shall be made not later than 28 days from the date of final determination of the proceeding. Where an order in respect of costs is made after the date of judgment or final determination of the proceeding the date of the making of the last of any such order shall be the date of final determination of the proceeding for the purposes of this section.*

Certification Provisions

- (12) *Each party to a proceeding is required:*
- (a) *to personally certify that they have read and understood the overriding obligations. Such certification must be filed when the party files its first document in the proceeding*
 - (b) *when filing any pleading (including any amendment of the pleading), to certify on the pleading, or verify on affidavit or by statutory declaration, that:*
 - (i) *as to any allegations of fact in the pleading, the deponent believes that the allegations have merit*
 - (ii) *as to any allegations of fact that the pleading denies, the deponent believes that the allegations do not have merit*
 - (iii) *as to any allegations of fact that the pleading does not admit, after reasonable inquiry the deponent does not know whether or not the allegations have merit.*
- (13) *A determination of whether any allegation of fact has merit shall, in the case of a party, be based on a reasonable belief as to the truth of the allegation.*
- (14) *Legal practitioners are required, when filing any statement of claim or other originating process, defence or further pleading on behalf of a party, to certify on the document that:*
- (a) *each allegation in the document has merit*
 - (b) *each denial in the document has merit*
 - (c) *each nonadmission in the document arises out of an inability to determine the merit of the allegation.*
- (15) *A determination as to whether an allegation has merit shall, in the case of a legal practitioner, be based on the available factual material and evidence and a reasonable view of the law.*

Overriding Purpose and the Duties of the Court

- (16) *The overriding purpose of this Act and the rules of court, in their application to civil proceedings, is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute by (i) the just determination of the proceeding by the court or (ii) the agreement of the parties or (iii) an alternative dispute resolution process agreed to by the parties or ordered by the court.*

Recommendations

- (17). *The court must seek to give effect to the overriding purpose when it interprets or exercises any of its powers, whether derived from procedural rules or as part of its inherent, implied or statutory jurisdiction.*
- (18). *Parties to a civil proceeding are subject to the overriding obligations in section 4 and are under a duty to the court to assist the court to further the overriding purpose.*
- (19). *Legal practitioners or any other representatives acting on behalf of a party are subject to the overriding obligations contained in section 4 and are under a duty to the court to assist the court to further the overriding purpose and shall not by their conduct cause their clients to be put in breach of section 5 or the overriding obligations contained in section 4.*
- (20). *The court may take into account any failure to comply with sections 18 or 19 in exercising any power, including its discretion with respect to costs.*
- (21). *To further the overriding purpose, the court in making any order or giving any direction in a civil proceeding—*
- (a) *shall have regard to the following objects:*
 - (i) *the just determination of the proceeding*
 - (ii) *the public interest in the early settlement of disputes by agreement between the parties*
 - (iii) *the efficient disposal of the business of the court*
 - (iv) *the efficient use of available judicial and administrative resources*
 - (v) *the timely disposal of the proceeding*
 - (vi) *dealing with the case in ways which are proportionate to:*
 - *the amount of money involved*
 - *the importance and complexity of the issues*
 - *the financial position of each party.*
 - (b) *may, in addition to any other matter, have regard to the following considerations to the extent that the court thinks relevant:*
 - (i) *the extent to which the parties have complied with any pre-action procedural obligations or protocol applicable to the dispute*
 - (ii) *the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute*
 - (iii) *the degree of expedition with which the respective parties have approached the proceeding, including the degree to which they have been timely in their interlocutory steps*
 - (iv) *the degree to which any lack of expedition in approaching the proceeding has arisen from circumstances beyond the control of the respective parties*
 - (v) *the degree to which there has been compliance with the overriding obligations contained in sections 4, 18 and 19*
 - (vi) *the degree of injustice that may be suffered by any party as a consequence of any order or direction under consideration and*
 - (c) *should, in addition to any other matter, have regard to the objective of minimising any delay between the commencement of the civil proceeding and its listing for trial beyond that reasonably required for such interlocutory steps as are necessary for the fair and just determination of the real issues in dispute and the preparation of the case for trial.*

Chapter 4: Improving Alternative Dispute Resolution

17. A wider range of ADR options should be available to the courts, including:
- early neutral evaluation
 - case appraisal
 - mini trial/case presentation
 - the appointment of special masters
 - court-annexed arbitration

- greater use of special referees to assist the court in the determination of issues or proceedings
- conciliation
- conferencing and
- hybrid ADR processes.

Some of these options will be more appropriate in the higher courts; for example, special masters and court annexed arbitration.

18. More effective use should be made of industry dispute resolution schemes. If proceedings have commenced, the dispute should not be able to be referred to an industry scheme, unless the parties agree to stay the proceedings. This would appear to be the present position under most if not all industry dispute resolution schemes.
19. While the use of collaborative law in Victoria has largely been confined to family law matters, it is a process that could be applied to all kinds of civil disputes. Collaborative law could be used in wills disputes, property disputes and other types of disputes, particularly where the parties have a relationship that they wish to continue.
20. Court conducted mediation is to be encouraged but in view of limited court and judicial resources it might be preferable for courts to deal mainly with cases where private mediation is unsuitable or unavailable, such as where:
 - one of the parties is in financial hardship and/or self-represented
 - the parties are unable to agree on a choice of mediator
 - there has already been an unsuccessful external mediation
 - the case is of public interest or is highly complex and could benefit from a mediator with court authority.
21. If a judge has conducted a mediation that fails to resolve the matter there should be a presumption against that judge presiding over the hearing of the matter. However, if the parties consent, the judge should be able to hear the matter.
22. There should be educational programs and training for the judiciary and legal profession about court-conducted mediation.

Binding and Non-Binding ADR

23. The courts should have power to order non-binding ADR, with or without the parties' consent.
24. In appropriate circumstances, it may be desirable for a person who would otherwise conduct an ADR process to be appointed as a special referee. The reference might be limited to particular questions of fact or law. The special referee could seek to resolve, albeit on a provisional basis, all or part of the dispute, using such processes as are (a) determined by the court, or (b) agreed between the parties. This could include procedures analogous to arbitration even in the absence of consent of the parties. The court should have the power to control the procedures governing the reference.

The special referee would make a provisional determination, in the form of a report to the court, if a settlement agreement is not reached between the parties. The court would retain responsibility for determining the outcome of the case (in the absence of a resolution agreed to by the parties) without being required to conduct an evidentiary hearing before the court on all issues in dispute. The parties would retain the right to argue before the court against adoption of the referee's findings. Existing appeal rights from the final orders of the court would be retained.

Resources

25. The courts should be adequately resourced to appoint or designate persons with responsibility to recommend suitable forms of ADR and to assist parties in arranging ADR providers and facilities. There should also be a panel of suitably qualified and experienced dispute resolution practitioners available to undertake ADR processes.

Empirical data

26. There is a lack of empirical data on the effectiveness of court-ordered mediation in Victoria, including the cost effectiveness. There is a need for more research on the effectiveness, including the cost effectiveness, of mediation/ADR in Victoria. The Department of Justice's Civil Law Policy Unit is undertaking a review of the effectiveness, including the cost effectiveness, of mediation in the higher courts. A review of the Magistrates' Court mediation program would also be useful. The Civil Justice Council should be responsible for the ongoing review of ADR processes in all three courts.
27. Reports should be required to be submitted by the parties to the court at the conclusion of any ADR process. Such reports should also provide an assessment of the person conducting the ADR process.

Education

28. There should be more education of lawyers, judicial officers and court officers about the different types of ADR and in what circumstances different ADR processes will be appropriate. The Judicial College of Victoria and the Legal Services Commissioner could provide education programs regarding the ADR processes.

Recommendations

Chapter 5: Case Management

Judicial power

29. There should be a general statutory provision to clearly provide for judicial power/discretion to make appropriate orders and impose reasonable limits, restrictions or conditions in respect of the conduct of any aspect of the proceeding as the court considers necessary or appropriate in the interests of the administration of justice, and in the public interest, having regard to the overriding purpose. Such provision should make it clear that the overriding purpose is to prevail, to the extent of any inconsistency, over principles of procedural fairness derived from the common law.

The proposed statutory provision is intended to be of general application and specifically applicable to various proposals including case management, expert evidence, discovery, ADR, self-represented litigants, etc.

Rule making power

30. The commission suggests that the courts should consider utilising the full extent of their rule making powers to implement the reforms recommended by the commission and to encourage cultural change. There may be a need to amend the rule making powers of the courts so as to make it clear that the courts have clear and express power to make such rules as may be necessary or appropriate (a) to further the overriding purpose and (b) to implement, by way of rules, a number of the reform recommendations of the commission and in particular many of those relating to: (a) pre-action protocols (b) case management, (c) alternative dispute resolution, (d) pre-trial oral examinations, (e) self represented and vexatious litigants, (f) disclosure and discovery, (g) expert evidence, and (h) costs. However, a number of the commission's recommendations may need to be implemented by statute, particularly those that propose changes in the substantive law rather than changes in practice and procedure.

The rule making power is discussed further in Chapter 12.

Active judicial case management

31. There should be more clearly delineated and specific powers to actively case manage. A rule or provision defining what is 'active case management' could be drafted as follows:

Active case management includes:

- (a) *encouraging the parties to co-operate with each other in the conduct of proceedings;*
 - (b) *identifying the issues at an early stage;*
 - (c) *deciding promptly which issues need full investigation and a hearing and accordingly disposing summarily of the others;*
 - (d) *deciding the order in which the issues are to be resolved;*
 - (e) *encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
 - (f) *helping the parties to settle the whole or part of the case;*
 - (g) *fixing timetables or otherwise controlling the progress of the case;*
 - (h) *considering whether the likely benefits of taking a particular step justify the cost of taking it;*
 - (i) *dealing with as many aspects of the case as it can on the same occasion;*
 - (j) *dealing with the case without the parties needing to attend court;*
 - (k) *making use of technology;*
 - (l) *giving directions to ensure that the hearing of a case proceeds quickly and efficiently;*
 - (m) *limiting the time for the hearing or other part of a case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness.*
32. The courts should have an express power to call witnesses in civil proceedings without the parties' consent. This power could be used when there is no other reasonably practicable alternative means of achieving justice between the parties. A draft provision is as follows:

The court may, at the request of a party or of its own initiative order a person to appear to give evidence as a witness in a proceeding if the court is of the view that (a) such evidence is necessary or desirable in relation to a matter in dispute and (b) there is no reasonably practicable alternative means of determining such matter in dispute.

The imposition of limits on the conduct of the proceeding, trial time, interlocutory hearings and submissions

33. There should be more clearly delineated and specific powers to impose limits on trial time, length of oral submissions and length of written submissions etc. Set out below is a draft provision that specifies the types of directions or orders the court could make as to the conduct of a hearing:

Section/Rule X: 'Directions as to conduct of hearing'

- (1) *The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.*
 - (2) *The court may, by order, give directions as to the order in which questions of fact are to be tried.*
 - (3) *The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.*
 - (4) *Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:*
 - (a) *limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,*
 - (b) *not allowing cross-examination of a particular witness,*
 - (c) *limiting the number of witnesses (including expert witnesses) that a party may call,*
 - (d) *limiting the number of documents that a party may tender in evidence,*
 - (e) *limiting the time that may be taken in making any oral submissions,*
 - (f) *that all or any part of any submissions be in writing,*
 - (g) *limiting the length of written submissions,*
 - (h) *limiting the time that may be taken by a party in presenting his or her case,*
 - (i) *limiting the time that may be taken by the hearing,*
 - (j) *with respect to the place, time and mode of trial,*
 - (k) *with respect to the giving of evidence at the hearing including whether evidence of witnesses in chief shall be given orally or by affidavit, or both,*
 - (l) *with respect to costs, including the proportions in which the parties are to bear any costs,*
 - (m) *with respect to the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing,*
 - (n) *with respect to the taking of evidence and receipt of submissions by video link, or audio link, or electronic communication, or such other means as the court considers appropriate,*
 - (o) *that evidence of a particular fact or facts be given at the hearing:*
 - I by statement on oath upon information and belief,*
 - II by production of documents or entries in books,*
 - III by copies of documents or entries; or*
 - IV otherwise as the court directs,*
 - (p) *that an agreed bundle of documents be prepared by the parties,*
 - (q) *that evidence in relation to a particular matter not be presented by a party, or*
 - (r) *that evidence of a particular kind not be presented by a party.*
 - (5) *At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party and/or the court a memorandum stating:*
 - (a) *the estimated length of the trial, and the estimated costs and disbursements, and*
 - (b) *the estimated costs that the party would have to pay to any other party if they were unsuccessful at trial.*
34. There should be more clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures. Set out below is a draft provision that specifies the types of directions orders the court could make including as to pre-trial procedures.

Recommendations

Section/Rule Y: 'Directions as to practice and procedure generally'

- (1) *The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.*
- (2) *The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.*
- (3) *Without prejudice to the generality of subsection (1) the Court may give such directions or make such orders as it considers appropriate with respect to:*
 - (a) *discovery and inspection of documents, including the filing of lists of documents; either generally or with respect to specific matters;*
 - (b) *interrogatories;*
 - (c) *inspections of real or personal property;*
 - (d) *admissions of fact or admissibility of documents;*
 - (e) *the filing of pleadings and the standing of affidavits as pleadings;*
 - (f) *the defining of the issues by pleadings or otherwise; including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions;*
 - (g) *the provision of any essential particulars;*
 - (h) *the joinder of parties;*
 - (i) *the mode and sufficiency of service;*
 - (j) *amendments;*
 - (k) *counterclaims;*
 - (l) *the filing of affidavits;*
 - (m) *the provision of evidence in support of any application;*
 - (n) *a timetable for any matters to be dealt with, including a timetable for the conduct of any hearing;*
 - (o) *the filing of written submissions;*
 - (p) *costs;*
 - (q) *the use of assisted dispute resolution (including mediation) to assist in the conduct and resolution of all or part of the proceeding;*
 - (r) *the attendance of parties and/or legal practitioners before a Registrar/Master for a conference with a view to satisfying the Registrar/Master that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in preparation for and at the trial;*
 - (s) *the attendance of parties and/or legal practitioners at a case management conference with a Judge or Registrar/Master to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial, at which conference the Judge or Registrar/Master may give further directions;*
 - (t) *the taking of specified steps in relation to the proceedings;*
 - (u) *the time within which specified steps in the proceedings must be completed;*
 - (v) *the conduct of proceedings.*
- (4) *If a party to whom such a direction has been given or against whom an order is made under subsection (1) or (2) fails to comply with the direction or order, the court may, by order, do any one or more of the following:*
 - (a) *dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,*
 - (b) *strike out or limit any claim made by a plaintiff,*
 - (c) *strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly,*
 - (d) *strike out or amend any document filed by the party, either in whole or in part,*

- (e) *strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,*
 - (f) *direct the party to pay the whole or part of the costs of another party,*
 - (g) *make such other order or give such other direction as it considers appropriate.*
- (5) *Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given or order made by the court.*
- (6) *The Court may revoke or vary any direction or order made under subsection (1) or (3).*

Methods to enhance party compliance with procedural requirements and directions

35. The proposed Section Y(4), above, expressly permits the court to impose costs and other sanctions for failure to comply with court directions or orders.

Expansion of Individual Docket Systems

36. The Commission considers that there is merit in giving further consideration to the extension of the individual docket system in the Supreme and County Courts.
- The courts should retain a consultant or consultants to examine the feasibility of implementing a docket system in the County and Supreme Courts. If the individual docket system is extended, the courts should determine the method of implementation.
- Any changes should be monitored or evaluated by the Chief Justice in the Supreme Court, the Chief Judge in the County Court and the proposed Civil Justice Council.

Greater use of telephone directions hearings and technology

37. The County Court could consider adopting the Supreme Court's approach to e-litigation. The Magistrates' Court may wish to consider adopting the Supreme Court's approach to e-litigation in more complex cases, including where there is a substantial portion of the discoverable material in electronic form.
38. There could be more use of telephone directions hearings to save the parties the time and the cost involved of legal practitioners attending a directions hearing. Email directions hearings and internet online messaging systems should also be considered, subject to appropriate security arrangements.

The use of case conferences and listing conferences as an alternative to directions hearings

39. Case management conferences could be used as an alternative to directions hearings.

Earlier and more determinate trial dates

40. Further consideration should be given to means by which trial dates could be set earlier than at present. Once a trial date is set, the courts should ensure that there are sufficient judicial resources available to hear the trial.

Reform of procedures for the earlier determination of disputes, including the summary disposal of unmeritorious claims and defences

41. The test for summary judgment in Victoria should be changed to provide that summary judgment can be obtained if the other party has 'no real prospect of success.'
42. There should be in the rules of court a statement of an explicit case management objective that the Court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.
43. There should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding appears desirable.
44. There should be a restatement and simplification of the rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants and the rules should be based on the same test. The Magistrates' Court rule should be extended to permit a defendant to apply for summary dismissal of the proceeding.
45. The limitations on categories of cases that are excluded from the procedure in the Supreme Court and the Magistrates' Court should be removed.
46. The court should retain a residual discretion to allow a matter to proceed to trial even if the applicable test is satisfied.

Recommendations

Methods for controlling interlocutory disputes

47. There should be additional measures to reduce the interlocutory steps in proceedings. This may be facilitated by:
- requiring parties to confer and encouraging parties seek to reach agreement on an issue before making an interlocutory application;
 - more determinate costs consequences for unnecessary as well as unsuccessful applications;
 - requiring certification of the merits of applications.

The Civil Justice Council could develop guidelines and education programs on appropriate ways of dealing with interlocutory disputes.

Power to make decisions without giving reasons

48. The Commission has considered whether, in certain circumstances, the courts should have the power to make decisions without giving reasons, unless the parties request reasons. A requirement that the court give reasons for decisions slows down the process and causes delay. Juries are not required to give reasons for their decisions. If the parties request reasons, a request should be made within a reasonable time.

The Commission is not presently persuaded that any general dispensation of the requirement to give reasons for decisions, particularly final decisions determining the rights of parties, is in the interests of the administration of justice, although it would no doubt expedite determinations. However, there are no doubt many situations where parties could be encouraged to consent to dispensing with reasons, particularly in relation to interlocutory orders and judgments. Also, there is a strong case for allowing short form reasons in some circumstances, such as interlocutory matters including leave to appeal applications.

This matter requires further detailed consideration and should be a matter for review by the proposed Civil Justice Council.

Making decisions on the papers

49. At present, in a number of instances, decisions may be made ‘on the papers’ without the necessity for oral argument. Giving decisions on the papers could reduce costs and delay.

The Commission believes that making decisions on the papers in appropriate cases should be encouraged as a means of reducing costs and delay. However, consideration should be given as to whether there should be a requirement for consent of the parties or criteria for the circumstances in which an oral hearing may be dispensed with. These matters should be examined by the proposed Civil Justice Council.

Chapter 6: Getting To The Truth Earlier and Easier

Pre-Trial Oral Examinations

50. A new pre-trial procedure should be introduced to enable parties to a civil proceeding to examine on oath or affirmation any person who has information relevant to the matters in dispute in the proceeding.

Objects of the procedure

51. The provisions relating to pre-trial examinations should incorporate an objects clause that states their primary purpose is not preparation for trial, but rather:
- to facilitate the pre-trial disclosure of relevant information
 - to assist the parties to obtain a better understanding of, and therefore to limit, the real issues in dispute
 - to facilitate settlement
 - to restrict or eliminate the need to call or test particular evidence if the matter proceeds to hearing.
52. The provisions should make it clear that requiring a person to submit to a pre-trial examination should be regarded as a step of last resort, to be taken only when less formal, cooperative means of obtaining information from relevant persons have failed. The requirement that the parties seek to exchange information in a non-adversarial manner prior to initiating a pre-trial examination should be expressed in a manner conformable with the overriding obligation.

Nature of the examination procedure

53. The parties should be entitled, with leave of the court, to examine any person on oath or affirmation. There should be a presumption in favour of granting such leave, subject to the exercise of judicial control to limit costs, prevent abuse and ensure appropriate safeguards are implemented. The court would have overriding power to limit the use of pre-trial examinations in a particular case.

54. The procedure should be available, with leave of the court, at any stage of the proceeding before the commencement of the trial, including in circumstances where the matter has been referred to an ADR process.

Details of the examination procedure

55. The application for leave to conduct an examination, together with a notice of examination, should be served on the person to be examined and all other parties to the litigation. The notice should contain details of:

- the time, place and expected duration of the pre-trial examination; where practicable, the examination should be held at a time and a place convenient to the person to be examined
- the reasonable travel and out-of-pocket expenses to which the person to be examined is entitled (to be borne, at least initially, by the litigant initiating the examination)
- the expected subject matter of the examination, in general terms
- all documents that the examinee will be required to produce at the examination
- where the person to be examined is a corporation, the proposed framework for agreeing on the individual(s) to be examined, and notice of the duty of such individual(s) to inform themselves as to relevant matters prior to their examination (see below, recommendation 59)
- the legal rights of the person to be examined, including the right to appear at the hearing of the application for leave, the right to be legally represented at the examination, the right to object to answer questions if they are misleading, offensive, repetitive or call for the disclosure of information which is privileged and
- the legal obligations of the person to be examined, including those arising under the overriding obligation if the person is a person to whom such obligations are applicable.

56. The court should be empowered to give such directions as it thinks appropriate as to the conduct of pre-trial examinations in a particular case at any time, either of its own motion or on application of one of the parties or an examinee. Such directions could include:

- limiting the number of examinations able to be initiated by a party
- limiting the duration of an examination, or examinations
- precluding the examination of a named person
- precluding a particular litigant from participating in a specific examination
- restricting the subject matter of a particular examination
- setting the time or place at which particular examinations must take place
- an order that specified persons be examined concurrently.

57. The court may appoint an independent legal practitioner to be present at the examination, to administer the oath and to control the conduct of the examination.

58. A litigant should be precluded from examining a natural person more than once, unless leave of the court is given or the examinee consents.

59. Where the person to be examined is a corporation, the examining party and the corporation must endeavour to reach agreement as to the person or persons most appropriate to be examined on the matters specified in the notice. Where agreement cannot be reached, the court should appoint a person or persons to be examined on the corporation's behalf. A person being examined on behalf of a corporation should be under an obligation to inform him or herself as to the matters specified in the notice prior to the examination (subject to any division of responsibilities between examinees, as agreed or directed by the court).

60. Unless the parties otherwise agree, the litigant who initiates an examination should be responsible for making appropriate arrangements with respect to:

- a suitable venue for the examination
- the time and date of the examination
- the travel and out-of-pocket expenses of the examinee
- ensuring that the examination is recorded, and that a record of the examination is served on all parties in an appropriate form. Normally, it would be expected that a video recording, with sound, would be made of the examination.

Recommendations

61. The provisions should require all participants in a pre-trial examination, including the parties, their legal representatives and the examinee, to endeavour, in good faith, to:
- minimise the amount of time required for the examination
 - act in a collaborative manner, and minimise adversarial conduct
 - avoid needless formalities
 - avoid repetition and other oppressive behaviour
 - confine the examination to matters that are relevant to the issue in dispute.

These requirements should be expressed in terms conformable with the overriding obligation.

62. The parties should be permitted to waive or modify any requirement in relation to pre-trial examinations by express agreement.
63. All parties to the action should be permitted to be present and/or represented at the examination, and to ask questions of the examinee.
64. Examinees should be required to answer all questions put to them while under examination, consistent with the overriding obligation. However, examinees should be protected against the disclosure or future use of self-incriminating information revealed in response to a question. Examinees should be permitted to refuse to answer questions which would otherwise result in the disclosure of information that is protected by legal professional privilege.
65. Examinations should be informal and the rules of evidence should not apply. There would, therefore, be no relevant distinction between examination and cross-examination. Examinees should be permitted to refresh their memory for the purpose of the examination. Objections to particular questions asked during the course of an examination should be noted on the record for determination by the court in the event that the answer is sought to be introduced into evidence. No objection should be permitted as to the form of questions, except where a question is misleading or offensive.
66. The court should consider whether it can facilitate the provision of urgent telephone directions as to the conduct of an examination on request. This could be done either through the judge presiding over the proceeding (if one has been allocated) or through any other officer of the court, such as a registrar or master, empowered to give directions. If this is impracticable, provision should be made for the adjournment of examinations for the purposes of obtaining directions. This may give rise to an order for costs.
67. Sanctions in respect of obstructive, repetitive, unreasonable or oppressive examination conduct should be able to be imposed on all participants in the examination process, including the parties, their legal representatives and the examinee. Sanctions should include costs orders, and such other orders as the court considers appropriate.
68. Interrogatories should not be permitted to be served on a person who has been the subject of an examination by a litigant who initiated or participated in that examination, unless the court gives leave.

Examinations prior to the commencement of legal proceedings

69. Prospective litigants should be permitted to conduct examinations prior to commencing proceedings, but only with leave of the court.

Use of information obtained at examination

70. Information obtained through a pre-trial examination should be able to be used at trial in four circumstances:
- to impeach the testimony of a witness who has provided evidence at trial that is inconsistent with information he or she provided under examination (that is, as evidence of a prior inconsistent statement)
 - where the examinee has died, or become unfit to give evidence, or where it is impracticable to secure his or her presence at trial
 - where all parties to the litigation consent
 - where the court gives leave.
71. Where information comprising part of the transcript of an examination is admitted on the application of one of the parties, any other party can seek to have admitted any other part of the transcript.

Costs

72. The reasonable costs incurred in preparation for and conduct of examinations, subject to the discretion of the court, should be recoverable as costs of the proceeding. However, there should be a presumption that each litigant is limited to recovering the costs of engaging one legal practitioner per examination. The Costs Council should seek to develop a scale of fixed costs for the conduct of examinations.
73. Examinees should be entitled to recovery of their travel and out-of-pocket expenses, for example, loss of earnings, directly related to their attendance at the examination loss of earnings.

Application

74. The provisions in respect of examinations should, at least initially, be applicable only to proceedings in the Supreme and County Courts.

Role of the Civil Justice Council

75. The proposed Civil Justice Council should, in conjunction with the courts, the Law Institute and the Bar Council:
- develop a general code of conduct in respect of examination conduct
 - develop codes of practice to govern the use of pre-trial examinations in particular litigation contexts
 - oversee the establishment of education and training programs to assist practitioners to develop good examination practices
 - review the provisions relating to pre-trial examinations with a view to assessing their effectiveness and costs consequences, and considering possible changes to the existing scheme. The council should also consider and make recommendations about whether pre-trial examinations should be permissible in matters within the jurisdiction of the Magistrates' Court and, if so, whether any modifications to the general scheme are required in relation to such matters.
76. There should be a statutory provision making it clear that relevant information may be provided in connection with litigation, prior to trial, notwithstanding any confidentiality constraint that might otherwise prevent the disclosure or use of such information. A draft provision is as follows:
- (1) *Subject to (2) and (5), a person in possession of information which is or may be relevant to an issue which has arisen or may arise in a civil proceeding pending in a court in Victoria may disclose such information*
 - (a) *to a court in Victoria in which such proceeding is pending or*
 - (b) *to a legal practitioner acting for a party in such proceeding, despite any express or implied confidentiality obligation that may otherwise prohibit such disclosure.*
 - (2) *Disclosure of information that may otherwise be prohibited from disclosure because of any express or implied confidentiality obligation is permissible under this section only where the disclosure is made:*
 - (a) *solely for the purpose of the proper preparation and conduct of the civil proceeding pending in a court in Victoria ('the purpose')*
 - (b) *in circumstances where the legal practitioner to whom such disclosure is made agrees to receive such information solely for the purpose.*
 - (3) *Where disclosure is made in accordance with the requirements of (2), neither the person who disclosed the information nor the legal practitioner to whom such information was disclosed shall be liable for such disclosure at law or in equity in any proceeding for damages or other relief.*
 - (4) *This section does not limit the operation of any other law permitting disclosure of information for the purpose of legal proceedings in a court in Victoria.*
 - (5) *This section does not apply in respect of any non disclosure obligation arising under any statute which makes it an offence to disclose information.*
77. For the purpose of facilitating disclosure it is proposed that there be a new statutory provision entitling a party to apply to the court for the purpose of issuing a notice, similar to a subpoena, to be served on the person with relevant information prior to trial. The notice would specify the nature of the information sought to be obtained and the proposed time and place for conferring with such person, ex parte, to ascertain relevant information. In the event that the person served with the notice (or some other person claiming to have an interest) does not object to the proposed conference it may proceed at a time and place agreed between the legal practitioner seeking the information and the person on whom the notice is served.

Recommendations

78. In the event that the person on whom the notice is served (or some other person claiming to have an interest) objects to the proposed conference (other than an objection as to the proposed date or location) the legal practitioner seeking to obtain information shall: (a) serve a copy of the notice on each of the other parties to the proceedings and (b) apply to the court for leave to proceed with the proposed conference. At the hearing of the application for leave (i) each of the parties to the proceedings, (ii) the person on whom the notice was served, and (iii) any other person who the court considers has a sufficient interest, may appear. The court may refuse the application for leave or grant leave on such terms and conditions as the court considers appropriate. A draft provision is as follows:

Obtaining Information and Documents

- (1) *If a party to a proceeding believes on reasonable grounds that a person:*
- (a) *has information or documents relevant to the proceeding; or*
 - (b) *is capable of giving evidence that is relevant to the proceeding;*
- the party may, by written notice issued by the [Registry of the] Court and given to the person, require the person:*
- (i) *to give the information to the party at the time and place specified in the notice; or*
 - (ii) *to produce the documents to the party within the time, and in the manner, specified in the notice; or*
 - (iii) *to attend before the party at the time and place specified in the notice, and answer questions relevant to the proceeding.*³⁴³
- (2) *Party includes the legal representative of a party.*
- (3) *At the request of a party the [Registry of the] Court shall issue a notice unless there are reasonable grounds for the belief that the notice is frivolous, vexatious or otherwise an abuse of the court's process.*
- (4) *If (a) the person who is given the notice notifies the party issuing the notice that he or she objects to giving the information or producing the documents or attending to answer questions, or (b) the party issuing the notice becomes aware that some other person claiming to have an interest objects to the disclosure of information or the production of documents, then the party shall, if the party intends to proceed to seek the information or documents, (a) provide a copy of the notice to each of the other parties to the proceeding and (b) apply to the court for leave to proceed with the steps proposed in the notice or an order that the person given the notice attend a pre-trial oral examination.*
- (5) *In determining an application for leave under (4) the court may (a) refuse leave, or (b) make such orders as the court considers appropriate, on such conditions as the court considers reasonable, to require the person to give information, produce documents or attend to answer questions.*

79. A person on whom a notice is served shall be entitled to receive from the party seeking the information payment in respect of (a) any loss of income and (b) reasonable travel, accommodation and other out-of-pocket expenses. Subject to the discretion of the court, such amounts shall be costs in the cause.

Discovery of documents

80. The test for determining whether a document must be discovered should be narrowed. Discovery should be limited to 'documents directly relevant to any issue in dispute'.
81. Discovery should continue to be available as of right subject to any directions of the court.
82. Parties should be required to seek to reach agreement on discovery issues and to narrow any issues in a discovery dispute before making an interlocutory application.
83. In order to reduce costs and delays arising out of discovery of documents the court should have the discretion to order (on such terms including as to confidentiality or restricted access, as the court considers appropriate) a party to provide any other party (or an appropriately qualified independent person nominated by the other party and approved by the court) with access to **all** documents in the first party's possession, custody or control that fall within a general category or general description (regardless of whether some such documents are not relevant to the issues in dispute in the proceedings or do not fall within the description of documents that may be the subject of an order for discovery) where:
- (a) the documents are able to be identified by general description or fall within a category of documents where such category or description is approved by the court
 - (b) the documents are able to be identified and located without an unreasonable burden or unreasonable cost to the first party;

- (c) the costs to the first party of differentiating documents within such general category or description which are (i) relevant or (ii) irrelevant to the issues in dispute between the parties are in the opinion of the court excessive or disproportionate;
- (d) access to irrelevant documents is not likely to give rise to any substantial prejudice to the first party which is not able to be prevented by way of court order or agreement between the parties
- (e) access is to facilitate the identification of documents for the purpose of obtaining discovery of such identified documents in the proceedings.

Where an order is made for access for inspection pursuant to this provision, the other party shall not be permitted to copy, reproduce, make a record of, photograph or otherwise use, either in connection with the proceedings or in any other way, documents or information examined as a result of such inspection except to the extent that would allow the other party to describe or identify an examined document for the purpose of obtaining discovery of such identified document in the proceedings.

There is a need to make provision for any disclosure under this provision to be without prejudice to an entitlement to subsequently claim privilege over any information that has been inspected and is claimed to be privileged. In other words, disclosure pursuant to this provision does not give rise to waiver of privilege. The proposed protection against waiver of privilege should also extend to any document obtained as a result of a chain of inquiry arising out of the interim disclosure of documents.

The proposed Civil Justice Council should monitor the use and effectiveness of interim inspection orders.

84. The rules of court should be amended to provide that in appropriate cases the court may appoint a special master to manage discovery. A special master should be a judicial officer (of a lower tier than a judge) or a senior legal practitioner who will actively case manage the discovery aspect of a proceeding. The special master may make directions, give rulings and determine applications.

The costs of any externally appointed special master should be at the discretion of the court and, on an interim basis, may be ordered to be costs in the cause.

85. The court should have broad and express discretion in respect of disclosure. A draft provision is as follows:

The court may make any order in relation to disclosure it considers necessary or appropriate, including to

- (a) *relieve a party from the obligation to provide discovery*
- (b) *limit the obligation of discovery to:*
 - (i) *classes of documents as specified by the court*
 - (ii) *documents relevant to one or more specified matter(s) in dispute*
- (c) *order that discovery occur in separate stages*
- (d) *require discovery of specified classes of documents prior to the close of pleadings*
- (e) *relieve a party from the obligation to provide discovery of*
 - (i) *documents that have been filed in the action*
 - (ii) *communications between the parties' lawyers or notes of such communications*
 - (iii) *correspondence between a party and the party's lawyer or notes of oral communications between a party and the party's lawyer;*
 - (iv) *opinions of counsel*
 - (v) *copies of documents that have been disclosed or are not required to be disclosed.*
- (f) *expand a party's obligation to provide discovery*
- (g) *modify or regulate discovery of documents in some other way*
- (h) *order that a list of documents be indexed or arranged in a particular way*
- (i) *require discovery to be provided by a certain time*
- (j) *relieve a party of the obligation to provide an affidavit verifying a list of documents*
- (k) *make orders as to which parties are to be given documents by any specified party*
- (l) *require the party discovering documents to:*

Recommendations

- (i) *provide facilities (including copying and computerised facilities) for the inspection and copying of the documents*
 - (ii) *make available a person who is able to explain the way the documents are arranged and help locate and identify particular documents or classes of documents*
 - (m) *make any other direction that the court considers appropriate.*
- 86. Parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or assisted party in the course of the proceeding. The court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate.
- 87. The court should be given discretion to require the disclosure of all lists and indexes (including drafts) of documents in a party's possession, custody or control, even if such lists and indexes may be privileged, but only to the extent that those lists and indexes contain 'objective' information about the documents encompassed by the lists, including information such as date, subject matter, author, recipient, etc.
- 88. There should be legislative powers for courts to order the creation of document repositories to be used by parties in multi-party litigation.
- 89. The court should have broad and express discretion to deal with discovery default. A draft provision is as follows:

Where the court finds that there has been (a) a failure to comply with discovery obligations or orders of the court in relation to discovery or (b) conduct intended to delay, frustrate or avoid discovery of discoverable documents ('discovery default'), the court may make such orders or directions as it considers appropriate, including:

 - (a) *for the purpose of proceedings for contempt of court*
 - (b) *orders for costs, including indemnity cost orders against any party or lawyer who is responsible for, who aids and abets any discovery default*
 - (c) *in respect of compensation for financial or other loss arising out of the discovery default*
 - (d) *for adjournment of the proceedings with costs of that adjournment to be borne by the person responsible for the need to adjourn the proceedings*
 - (e) *to revoke or suspend the right to initiate or continue an examination for discovery*
 - (f) *for the purpose of preventing a party from taking steps in the proceeding*
 - (g) *in respect of any adverse inference arising from the discovery default*
 - (h) *in respect of facts taken as established for the purposes of litigation*
 - (i) *for the purpose of compelling any person to give evidence, including by way of affidavit, in connection with the discovery default*
 - (j) *for the purpose of prohibiting or limiting the use of documents in evidence*
 - (k) *for the purpose of dismissing any part of the claim or defence of a party responsible for the discovery default*
 - (l) *in respect of disciplinary action against any lawyer who is responsible for, who aids and abets any discovery default.*

Unless the court orders otherwise, any party may cross-examine or seek leave to conduct an oral examination of the deponent of an affidavit of documents prepared by or on behalf of any other party if there is a reasonable basis for the belief that the other party may be misinterpreting its discovery obligations or failing to disclose discoverable documents.
- 90. In order to reduce the costs of discovery, the court should have discretion to make orders limiting the costs able to be (a) charged by a law practice to a client or (b) recovered by a party from another party, to costs which represent the actual cost to the law practice of carrying out such work as may be necessary in relation to discovery (with a reasonable allowance for overheads but excluding a mark up or profit component being added to such actual costs) or otherwise as the court sees fit.
- 91. Provision should be made for limitation on the disclosure of copies of documents.
- 92. A short plain English explanation of disclosure obligations should be prepared by the Legal Services Commissioner (or other appropriate entity). This should be provided to the parties and circulated to employees or agents who are asked to assist in the discovery process.

Chapter 7: Changing The Role of Experts

93. Victoria should adopt reforms based on the recently introduced NSW expert evidence provisions. This would enhance the court's control over the provision of expert evidence. The court's powers would be discretionary. Reforms based on the NSW provisions should: (a) be subject to certain specific modifications; (b) exclude those provisions where there is already a substantially equivalent provision in Victoria; and (c) be subject to retaining certain specific Victorian provisions.

The provisions should apply in the Supreme, County and Magistrates' Courts. In particular the following provisions should be implemented:

- 93.1 A purposes clause, to ensure the court has control over the giving of expert evidence, to restrict expert evidence to that which is reasonably required, to avoid unnecessary costs associated with retaining experts, to enable a single expert to be engaged by the parties or appointed by the court and to declare the duty of an expert witness. A draft provision is as follows:

The main purposes of this order are as follows:

- (a) *to ensure that the court has control over the giving of expert evidence*
- (b) *to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings*
- (c) *to avoid unnecessary costs associated with parties to proceedings retaining different experts*
- (d) *if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court*
- (e) *if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings*
- (f) *to declare the duty of an expert witness in relation to the court and the parties to proceedings.*

- 93.2 A requirement that the parties seek directions before calling expert witnesses, as follows:

- (1) *Any party:*
 - (a) *intending to adduce expert evidence at trial*

or

 - (b) *to whom it becomes apparent that he or she, or any other party, may adduce expert evidence at trial, must promptly seek directions from the court in that regard.*
- (2) *Directions under this rule may be sought at any directions hearing or case management conference or, if no such hearing or conference has been fixed or is imminent, by notice of motion or pursuant to liberty to restore.*
- (3) *Unless the court otherwise orders, expert evidence may not be adduced at trial:*
 - (a) *unless directions have been sought in accordance with this rule*
 - (b) *if any such directions have been given by the court, otherwise than in accordance with those directions.*

In NSW this rule (r 31.19) does not apply to proceedings involving a professional negligence claim. This exclusion may not be appropriate in Victoria.

- 93.3 A broad and express discretion to give directions in relation to the use of expert evidence, in the following terms:

- (1) *Without limiting its other powers to give directions, the court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings.*
- (2) *Directions under this rule may include any direction:*
 - (a) *as to the time for service of experts' reports*
 - (b) *that expert evidence may not be adduced on a specified issue*
 - (c) *that expert evidence may not be adduced on a specified issue except by leave of the court*
 - (d) *that expert evidence may be adduced on specified issues only*
 - (e) *limiting the number of expert witnesses who may be called to give evidence on a specified issue*
 - (f) *providing for the engagement and instruction of a parties' single expert in relation to a specified issue*
 - (g) *providing for the appointment and instruction of a court-appointed expert in relation to a specified issue*

Recommendations

- (h) requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue*
 - (i) that may assist experts in the exercise of their functions*
 - (j) that experts who have prepared more than one expert report in relation to any proceedings are to prepare a single report that reflects their evidence in chief.*
- 93.4 A broad and express discretion to direct expert witnesses to confer, to endeavour to reach agreement on any matters in issue, to prepare a joint report specifying matters agreed and matters not agreed and reasons for any disagreement. A draft provision is as follows:
 - (1) *The court may direct expert witnesses:*
 - (a) to confer, either generally or in relation to specified matters*
 - (b) to endeavour to reach agreement on any matters in issue*
 - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement*
 - (d) to base any joint report on specified facts or assumptions of fact, and may do so at any time, whether before or after the expert witnesses have furnished their experts' reports.*
 - (2) *The court may direct that a conference be held:*
 - (a) with or without the attendance of the parties affected or their legal representatives*
or
 - (b) with or without the attendance of the parties affected or their legal representatives, at the option of the parties*
or
 - (c) with or without the attendance of a facilitator (that is, a person who is independent of the parties and who may or may not be an expert in relation to the matters in issue).*
 - (3) *An expert witness so directed may apply to the court for further directions to assist in the performance of such expert functions.*
 - (4) *Any such application must be made in writing to the court, specifying the matter on which directions are sought.*
 - (5) *An expert witness who makes such an application must send a copy of the request to the other expert witnesses and to the parties affected.*
 - (6) *Unless the parties affected agree, the content of the conference between the expert witnesses must not be referred to at any hearing.*
 - (7) *If a direction to confer is given under rule (1)(a) before the expert witnesses have furnished their reports, the court may give directions as to:*
 - (a) the issues to be dealt with in a joint report by the expert witnesses*
 - (b) the facts, and assumptions of fact, on which the report is to be based, including a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert witnesses.*
 - (8) *This rule applies if expert witnesses prepare a joint report as referred to in rule (1)(c).*
 - (9) *The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.*
 - (10) *The joint report may be tendered at the trial as evidence of any matters agreed.*
 - (11) *In relation to any matters not agreed, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.*
 - (12) *Except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report.*
- 93.5 A broad and express discretion to make directions for the manner in which expert evidence is to be given, including to facilitate concurrent expert evidence (hot-tubbing). A draft provision is as follows:

In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same issue or similar issues, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

- (a) *a direction that, at trial:*
 - (i) *the expert witnesses give evidence after all factual evidence relevant to the issue or issues concerned, or such evidence as may be specified by the court, has been adduced*
 - or
 - (ii) *the expert witnesses give evidence at any stage of the trial, whether before or after the plaintiff's case has closed*
 - or
 - (iii) *each party intending to call one or more expert witnesses close that party's case in relation to the issue or issues concerned, subject only to adducing evidence of the expert witnesses later in the trial*
- (b) *a direction that after all factual evidence relevant to the issue, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:*
 - (i) *whether the expert witness adheres to any opinion earlier given*
 - or
 - (ii) *whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given*
- (c) *a direction that the expert witnesses:*
 - (i) *be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h))*
 - (ii) *when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence*
- (d) *a direction that expert witnesses give an oral exposition of their opinion, or opinions, on the issue or issues concerned*
- (e) *a direction that expert witnesses give their opinion about the opinion or opinions given by other expert witnesses*
- (f) *a direction that expert witnesses be cross-examined in a particular manner or sequence*
- (g) *a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:*
 - (i) *by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another*
 - or
 - (ii) *by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete*
- (h) *a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witnesses who are concurrently giving evidence*
- (i) *such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.*

93.6 A discretion to direct the parties to engage a single joint expert, and to make directions for the preparation of the expert's report and the cross-examination of the expert. A draft provision is as follows:

- (1) *Selection and engagement*
 - (a) *If an issue for an expert arises in any proceedings, the court may, at any stage of the proceedings, order that an expert be engaged jointly by the parties affected.*
 - (b) *A parties' single expert is to be selected by agreement between the parties affected or, failing agreement, by direction of the court.*
 - (c) *A person may not be engaged as a parties' single expert unless he or she consents to the engagement.*

Recommendations

- (d) *Any party affected who knows that a person is under consideration for engagement as a parties' single expert:*
 - (i) *must not, prior to the engagement, communicate with the person to obtain an opinion as to the issue or issues concerned, and*
 - (ii) *must notify the other parties affected of the substance of any previous communications for that purpose.*
- (2) *Instructions to parties' single expert*
 - (a) *The parties affected must endeavour to agree on written instructions to be provided to the parties' single expert concerning the issues arising for the expert's opinion and the facts, and assumptions of fact, on which the report is to be based.*
 - (b) *If the parties affected cannot so agree, they must seek directions from the court.*
- (3) *Parties' single expert may apply to court for directions*
 - (a) *The parties' single expert may apply to the court for directions to assist in the performance of the expert's functions in any respect.*
 - (b) *Any such application must be made in writing to the court, specifying the matter on which directions are sought.*
 - (c) *A parties' single expert who makes such an application must send a copy of the request to the parties affected.*
- (4) *Parties' single expert's report to be sent to parties*
 - (a) *The parties' single expert must send a signed copy of his or her report to each of the parties affected.*
 - (b) *Each copy must be sent on the same day and must be endorsed with the date on which it is sent.*
- (5) *Parties may seek clarification of report*
 - (a) *Within 14 days after the parties' single expert's report is sent to the parties affected, and before the report is tendered in evidence, a party affected may, by notice in writing sent to the expert, seek clarification of any aspect of the report.*
 - (b) *Unless the court orders otherwise, a party affected may send no more than one such notice.*
 - (c) *Unless the court orders otherwise, the notice must be in the form of questions, no more than ten in number.*
 - (d) *The party sending the notice must, on the same day as it is sent to the parties' single expert, send a copy of it to each of the other parties affected.*
 - (e) *Each notice sent under this rule must be endorsed with the date on which it is sent.*
 - (f) *Within 28 days after the notice is sent, the parties' single expert must send a signed copy of his or her response to the notice to each of the parties affected.*
- (6) *Tendering of reports and answers to questions*
 - (a) *Unless the court orders otherwise, the parties' single expert's report may be tendered in evidence by any of the parties affected.*
 - (b) *Unless the court orders otherwise, any or all of the parties' single expert's answers in response to a request for clarification may be tendered in evidence by any of the parties affected.*
- (7) *Cross-examination of parties' single expert*

Any party affected may cross-examine a parties' single expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected.
- (8) *Prohibition of other expert evidence*

Except by leave of the court, a party to proceedings may not adduce evidence of any other expert on any issue arising in proceedings if a parties' single expert has been engaged under this Division in relation to that issue.

(9) *Remuneration of parties' single expert*

- (a) *The remuneration of a parties' single expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by direction of the court.*
- (b) *Subject to sub-rule (c), the parties affected are jointly and severally liable for the remuneration of a parties' single expert.*
- (c) *The court may direct when and by whom a parties' single expert is to be paid.*
- (d) *Sub-rules (b) and (c) do not affect the powers of the court as to costs.*

93.7 The court should have a broad and express discretion to appoint experts. A draft provision is as follows:

(1) *Selection and appointment*

- (a) *If an issue for an expert arises in any proceedings the court may, at any stage of the proceedings:*
 - (i) *appoint an expert to inquire into and report on the issue*
 - (ii) *authorise the expert to inquire into and report on any facts relevant to the inquiry*
 - (iii) *direct the expert to make a further or supplemental report or inquiry and report*
 - (iv) *give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert or give directions on the giving of such instructions.*
- (b) *The court may appoint as a court-appointed expert a person selected by the parties affected, a person selected by the court or a person selected in a manner directed by the court.*
- (c) *A person must not be appointed as a court-appointed expert unless he or she consents to the appointment.*
- (d) *Any party affected who knows that a person is under consideration for appointment as a court-appointed expert:*
 - (i) *must not, prior to the appointment, communicate with the person to obtain an opinion as to the issue or issues concerned*
 - (ii) *must notify the court as to the substance of any previous communications for that purpose.*

(2) *Instructions to court-appointed expert*

The court may give directions as to:

- (a) *the issues to be dealt with in a report by a court-appointed expert*
- (b) *the facts, and assumptions of fact, on which the report is to be based, including a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert.*

(3) *Court-appointed expert may apply to court for directions*

- (a) *A court-appointed expert may apply to the court for directions to assist in the performance of the expert's functions in any respect.*
- (b) *Any such application must be made in writing to the court, specifying the matter on which directions are sought.*
- (b) *A court-appointed expert who makes such an application must send a copy of the request to the parties affected.*

(4) *Court-appointed expert's report to be sent to registrar*

- (a) *The court-appointed expert must send his or her report to the registrar, and a copy of the report to each party affected.*
- (b) *Subject to the expert having complied with the code of conduct and unless the court orders otherwise, a report that has been received by the registrar is taken to be in evidence in any hearing concerning a matter to which it relates.*
- (c) *A court-appointed expert who, after sending a report to the registrar, changes his or her opinion on a material matter must immediately provide the registrar with a supplementary report to that effect.*

Recommendations

(5) *Parties may seek clarification of court-appointed expert's report*

Any party affected may apply to the court for leave to seek clarification of any aspect of the court-appointed expert's report.

(6) *Cross-examination of court-appointed expert*

Any party affected may cross-examine a court-appointed expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected.

(7) *Prohibition of other expert evidence*

Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any issue arising in proceedings if a court-appointed expert has been appointed under this Division in relation to that issue.

(8) *Remuneration of court-appointed expert*

(a) *The remuneration of a court-appointed expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by direction of the court.*

(b) *Subject to sub-rule (c), the parties affected are jointly and severally liable for the remuneration of a court-appointed witness.*

(c) *The court may direct when and by whom a court-appointed expert is to be paid.*

(d) *Sub-rules (b) and (c) do not affect the powers of the court as to costs.*

94. There should be a more extensive code of conduct for expert witnesses, including a duty to:

- (1) comply with the applicable overriding obligations
- (2) comply with a direction of the court
- (3) work cooperatively with other expert witnesses.

95. Expert witnesses should not be immune from sanctions applicable to other participants in the civil justice system, including costs orders in appropriate cases. However, there should not be specific sanctions directed solely at expert witnesses.

96. Expert witnesses shall, at the time of service of their reports or at any other time ordered by the court, disclose: (a) the basis on which they are being remunerated for services as an expert witness, including whether any payment is contingent on the outcome of the proceedings; (b) the details of any hourly, daily or other rate; and (c) the total amount of fees incurred to date.

97. It should be made clear that privilege in respect of any communication with an expert or any document arising in connection with the engagement of the expert (including drafts of reports, letters of instruction etc) is waived as soon as it is confirmed that the expert will be called to give evidence in court. Privilege in respect of communications with experts retained but not proposed to be called to give evidence would not be affected.

98. The requirement that the defendant serve on the plaintiff any medical report prepared as a result of an examination of the plaintiff, regardless of whether the defendant intends to use it in court, should be retained.

Chapter 8: Improving Remedies in Class Actions

99. There should be no legal 'requirement' that all class members have legal claims against all defendants in class action proceedings, but all class members must have a legal claim against at least one defendant.

100. There should be no legal impediment to a class action proceeding being brought on behalf of a smaller group of individuals or entities than the total number of persons who may have the same, similar or related claims, even if the class comprises only those who have consented to the conduct of proceedings on their behalf.

101. The Supreme Court should have discretion to order cy-pres type remedies where (a) there has been a proven contravention of the law, (b) a financial or other pecuniary advantage has accrued to the person contravening the law as a result of such contravention, (c) the loss suffered by others, or the pecuniary gain obtained by the person contravening the law, is capable of reasonably accurate assessment and (d) it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered a loss.

102. The power to order cy-près type remedies should include a power to order payment of some or all of the amount available for cy-près distribution into the Justice Fund.

103. The court's power to order cy-près type remedies should not be limited to distribution of money only for the benefit of persons who are class members or who fall within the general characteristics of class members.

104. The court's general discretion as to how any cy-près relief should be implemented should not be limited to any proposal or agreement of the parties to the class action proceeding.
105. Unless the court orders otherwise, the parties should be required to give court-approved notice to the public that the power to order cy-près type remedies may be exercised. Where appropriate, this should include notice to particular entities that the court or the parties consider may be appropriate recipients of funds available for cy-près distribution.
106. Subject to leave of the court, persons other than the parties to the class action proceeding may be permitted to appear and make submissions in connection with any hearing at which cy-près orders are to be considered by the court.
107. There should be no general right of appeal against the exercise of the court's discretion as to the nature of the cy-près relief ordered but there should be a limited right of appeal, based on *House v The King* type principles.

Chapter 9: Helping Litigants with Problems and Hindering Problem Litigants

108. The Self-represented Litigants Co-ordinator program in the Supreme Court of Victoria should be resourced and funded on an ongoing basis and the scope of the existing program should be extended. For instance, additional positions should be resourced and funded in the County Court and the Magistrates' Court (initially in the Melbourne registries, with a view to extending services to suburban and regional registries).
109. The proposed Civil Justice Council, in conjunction with the courts and VCAT, should investigate the possibility of implementation of a court-based pro bono referral scheme (along the lines of the Order 80 scheme in the Federal Court) in each of those courts.
110. In appropriate cases, the Supreme and County Courts should have the option of appointing a special master in matters where one or more of the parties are self-represented. A special master should be a judicial officer of a lower tier than a judge, or a senior legal practitioner, who will case manage proceedings in proactive manner in order to facilitate the appropriate disposition of the proceeding. The costs of any externally appointed special master should be at the discretion of the court and, on an interim basis, may be ordered to be costs in the cause.
111. Courts at all levels should be properly resourced to develop information and material for self-represented litigants and to enhance the delivery of resources of this kind, where possible, through technological solutions. Such resources should be considered an integral part of the services provided to court users.
In particular, an audio-visual aid should be produced (possibly by or with the assistance of the Victoria Law Foundation) to explain in broad terms the processes of civil litigation. This resource could be made available on the courts' websites, as well as in court registries.
112. Existing training programs for judicial officers addressing the needs of, and the challenges posed, by self-represented litigants should be resourced to allow for the extension and further development of such programs to a greater number of judicial officers in Victoria each year. Where it is not already the case, programs should be extended to masters and court registrars. Such programs should be considered an integral part of ongoing training and education for judicial officers.
113. To the extent that it is not already the case, courts of all levels should provide training for all court staff who come into contact with members of the public, including registry staff and judges' associates, about the needs of and challenges posed by self-represented litigants. In particular, training is required for court staff to develop strategies to help them:
 - work with self-represented litigants
 - avert and manage difficult situations
 - provide accurate information about services and resources and, in particular, to distinguish between information and advice.
114. The Law Institute and the Victorian Bar should develop professional guidelines to assist solicitors and barristers in dealing with self-represented litigants to whom they are opposed. Guidelines could address issues such as protocols for communication, record keeping, conduct during negotiations and personal security issues.
115. Programs should be put in place in all courts and properly resourced to provide:
 - reliable data about the numbers of self-represented litigants and their levels of participation in the court system
 - analysis of data to assess the impact of self-represented litigants on the court system
 - qualitative research to assess the effectiveness of measures adopted to assist self-represented litigants and manage matters in the court system where at least one party is unrepresented.
116. Where appropriate, data collection should be a by-product of the Integrated Courts Management System or other existing systems. Analysis of the data and qualitative research should be undertaken or commissioned by the proposed Civil Justice Council.

Recommendations

117. Courts at all levels should develop self-represented litigant management plans. Such plans should be considered an integral part of overall planning by the courts so that measures put in place to meet the challenges of self-represented litigants are well targeted and outcomes can be measured against identified aims and objectives.

Interpreting fund

118. A fund should be established ('the interpreting fund') which may be drawn on to fund interpreters in civil proceedings in Victorian courts in appropriate cases (as provided for below).

Payment from the interpreting fund

119. Victorian courts should be given the discretion to recommend that it is in the interests of justice for payment to be made from the interpreting fund for interpreting services in civil proceedings for litigants who require it. In exercising the discretion the court should be able to take into account:

- (a) the means of the litigant
- (b) any other matter that the court considers appropriate.

Costs of interpreter

120. Insofar as the existing rules do not so provide, there should be, subject to judicial discretion in relation to costs, provision for an order that such services should be the subject of a party-party costs order and any funds recovered should be reimbursed to the interpreting fund.

Definition of interpreter

121. The legislation should provide a definition of interpreter along the following lines: *'interpreter' means an interpreter accredited with the National Accreditation Authority for Translators and Interpreters Limited.*

Telephone interpreting service

122. The Department of Justice should provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis through a Victorian pro bono referral scheme.

Development of policies

123. All Victorian courts should develop detailed policies about the provision of interpreters and such policies should be made publicly available.

Research

124. Empirical research should be undertaken to ascertain the ambit of the problem of 'vexatious' litigants, not limited to those who may be subject to an order under existing provisions. Research identifying the impact of vexatious litigants on the courts would be useful, as well as research considering the impact or effectiveness of the making of orders declaring a person to be vexatious.

Standing

125. The categories of persons who should have standing to bring an application should be broadened:

- 125.1 The Victorian Government Solicitor should be included, in addition to the Attorney-General, as a public officer with standing to bring an application.
- 125.2 The commission is not of the view that it is necessary or desirable to provide that the court of its own initiative may bring an application (as provided in the Queensland Act). Rather the court should be empowered to refer a matter to the prothonotary or registrar for action.
- 125.3 The categories of parties who have standing to make an application should be widened to include not only the Attorney-General and the Victorian Government Solicitor but also:
 - the Prothonotary of the Supreme Court or the Principal Registrar of the County Court; or,with the leave of the court,
 - a person against whom another person has instituted or conducted vexatious proceedings, or
 - a person who has a sufficient interest in the matter.

Adoption of legislative reforms in other states

126. The following reforms (which are largely in place in the Queensland Act and the WA Act) should be introduced:
- 126.1 The requisite test should be liberalised to reflect the test contained in the Queensland Act, namely, where a person has 'frequently' instituted or conducted vexatious proceedings in Australia the court may make orders prohibiting or limiting the right of a person to take or continue legal action.
 - 126.2 The court should be empowered to make an order prohibiting and limiting the right of a person acting in concert with a vexatious litigant to take or continue a legal action. Legislation should also prevent a vexatious litigant from acting in concert with, or directing, another person to bring legal proceedings that are the subject of the order against the vexatious litigant. Such provisions appear in the Queensland Act.
 - 126.3 A statutory definition of 'vexatious proceedings' should be introduced along the lines of the definition in the Queensland Act and the WA Act.
 - 126.4 The court should be empowered to have regard to 'proceedings' broadly defined, including interlocutory and appellate proceedings (as in the definition in the Queensland Act and the WA Act) as well as proceedings in any Australian court or tribunal (as in the Queensland Act).
 - 126.5 A provision should be introduced that sets out the types of orders that the court may make, including orders staying existing proceedings and prohibiting the institution of proceedings and 'any other order the court considers appropriate' (as in the Queensland Act). The last of these options envisages orders restraining certain conduct or orders awarding costs.
 - 126.6 A provision should be introduced that specifically allows the court to extend its orders to corporate entities or incorporated associations affiliated with the litigant the subject of the order.
 - 126.7 In addition to the gazetting of any order, a provision should be introduced that requires the Prothonotary of the Supreme Court to enter any order in a register at the court. This register should be able to be searched through the Supreme Court's website so as to determine if a particular party is a vexatious litigant. Unlike under the Queensland Act, it is not proposed that the prothonotary have broad discretion to publish the details of any order. Rather it is proposed that the legislation require the prothonotary to notify the heads of all jurisdictions in Victoria and the principal registrars in all jurisdictions in Victoria of any order made.

Vexatious proceedings in other courts and tribunals

127. Each of the courts and tribunals in Victoria (other than the Supreme Court) should have express power to make a vexatious proceedings order limited to proceedings within the jurisdiction of that court or tribunal. The Supreme Court should retain the power to make orders in respect of any court or tribunal in Victoria.

Automatic stay

128. Once an application for a vexatious proceedings order is made, there should be an automatic stay in relation to pending proceedings and a prohibition on the commencement of further proceedings pending the hearing unless the court orders otherwise.

Evidence

129. Evidence in support of the application should be on affidavit and may be provided on the basis of 'information and belief'. Cross-examination on affidavit evidence should only be allowed with leave of the court.

Declaring proceedings a nullity

130. If, despite the making of a vexatious proceedings order, proceedings are commenced by the person the subject of the order, such proceedings should be a nullity.

Determination on the papers

131. To circumvent the problem of vexatious litigants absorbing court time by making repeated applications for leave to commence proceedings, legislation should provide that, unless the court otherwise orders, such applications should be determined on the papers without the need for a formal oral hearing.

Discretion to waive court fees

132. The prothonotary or registrar should have the discretion to waive court fees and photocopying and other charges otherwise payable by the applicant in proceedings for orders in relation to a vexatious litigant.

Recommendations

Chapter 10: A New Funding Mechanism

133. A new funding body (the 'Justice Fund') should be established to (a) provide financial assistance to parties with meritorious civil claims, (b) provide indemnity for any adverse costs order or order for security for costs made against the party assisted by the fund.
134. For administrative convenience, and to minimise establishment costs, the fund should be established, at least initially, as an adjunct to an existing organisation. One possible body is Victoria Legal Aid.
135. The fund should be structured to minimise potential liability for income tax or capital gains tax on any amount received by the fund.
136. The fund should seek to become self funding through (a) entering into funding agreements with assisted parties whereby the fund would be entitled to a share of the amount recovered by the successful assisted party; (b) having statutory authority in class action proceedings under Part 4A of the *Supreme Court Act 1986 (Vic)* to either (i) enter into agreement with an assisted representative party whereby the fund would be entitled to a share of the total amount recovered by the class under any settlement or judgment, subject to approval of the court, or (ii) to make application to the court for approval to receive a share of the total amount recovered by the class under any settlement or judgment; (c) recovering, from other parties to the proceedings, costs incurred in providing assistance to the assisted party where the assisted party is successful and obtains an order for costs; (d) receiving funds by order of the Court in cases where *cy-près* type remedies are available and (e) entering into joint venture litigation funding arrangements with commercial litigation funding bodies.
137. Where the fund provides assistance the lawyers acting for the assisted party should normally be required to conduct the proceedings without remuneration or reimbursement of expenses until the conclusion of the proceedings. Where the proceedings are successful they should normally be remunerated by costs recovered from the unsuccessful party and/or out of any monies recovered in the proceedings, without the fund having to pay the costs incurred in the proceedings. Where the assisted party is unsuccessful the fund should meet the costs of the funded party as set out in the funding agreement or varied thereafter by agreement between the fund and the law firm conducting the case of the assisted party.
138. During its first five years of operation (or such lesser period as the trustees of the fund may determine in light of the financial position of the fund), the liability of the fund for any order for costs or security for costs made against the funded party should be limited, by statute, to the value of the costs incurred by the assisted party which the fund is required to pay to the lawyers acting for the assisted party under the funding agreement. During such period the fund would have a discretion to pay some or all of the shortfall between the amount ordered by way of adverse costs or security for costs against the assisted party and the amount of such costs for which the fund is liable.
139. At any stage of the proceedings the fund or the assisted party could apply to the court for an order limiting the amount of costs that the assisted party may be ordered to pay to any other party if the funded party is unsuccessful in the proceedings.
140. The operation of the fund should be subject to audit and monitored by the Civil Justice Council.

Chapter 11: Reducing The Cost of Litigation

Ongoing costs review and reform

141. A specialist Costs Council should be established, as a division of the Civil Justice Council. The Costs Council, in consultation with stakeholder groups, would: (a) review the impact of the commission's implemented recommendations about costs; (b) investigate the additional matters in relation to costs referred to in the commission's report, including those matters raised in submissions; (c) carry out or commission further research in relation to costs; and (d) consider such other reforms in relation to costs as the council considers appropriate.

Costs disclosure

142. The court should have an express power to require parties to disclose to each other and the court estimates of costs and actual costs incurred.
143. In exercising the proposed power to order disclosure of costs incurred and estimates of costs likely to be incurred, there should be limits on the type of information required to be disclosed to protect information that may have confidential strategic or forensic significance or which might otherwise be privileged (other than information concerning the quantum, break up or method of calculation of legal fees and expenses).

Fixed or capped costs

144. Although fixed or capped costs are a good idea in principle, there are practical problems in their implementation. These should be developed for particular areas of litigation after consultation and with the agreement of stakeholders (under the auspices of the Costs Council/Civil Justice Council).

Taxation of costs

145. The present multiple bases for taxation of costs should be simplified.
146. There should be a presumptive rule that interlocutory costs orders should not be taxed prior to the final determination of the case unless the court orders otherwise.

Solicitor–client costs and party–party costs

147. The present gap between party–party and solicitor–client costs is unreasonable in a number of cases. The recoverable costs on a party–party basis should usually be ‘all costs reasonably incurred and of a reasonable amount’, unless the court, in the exercise of its discretion, makes an order on some other basis.
148. Other methods for ordering recovery of legal costs of a successful party should be utilised (more often), including ordering costs as a specified percentage of the actual (reasonable) solicitor–client costs, with a view to avoiding the costs and delays associated with the present process of taxation of costs.

Scales of costs

149. The court scales of costs need to be revised and/or updated.
150. There should be a common scale of costs across courts. The question of whether there should be proportionate differentials, between courts, in terms of recoverable party–party costs should be considered by the Costs Council.
151. In the event that there is a common scale for recoverable party–party costs applicable across the three courts, in addition to considering whether there should be ‘standard’ percentage reductions in the amount of costs recoverable depending on which court the proceeding is in, the Costs Council should consider whether the principle that the recoverable costs should be ‘reasonable’ is sufficiently flexible to accommodate variations between courts (in the event that such variations are considered desirable) without the need for prescribed variations.

Cost of disbursements

152. There should be a prohibition on law firms profiting from disbursements, including photocopying, except in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit. When a client recovers costs, only the reasonable actual costs of the disbursements (excluding any profit element) should be recoverable from the losing party.

A draft provision is as follows:

- (1) *Unless the client or another person providing indemnity or financial support for the client is (a) of reasonably substantial means and (b) agrees to pay in excess of the prescribed rate for disbursements, a law practice shall not charge a client any amount for disbursements in excess of the prescribed rate.*
- (2) *In making any order for costs against a party or other person who is not a party the court shall not allow recovery of any amount for disbursements in excess of the prescribed rate.*
- (3) *Law practice includes any related person or entity, including a service company.*
- (4) *Prescribed rate means the approximate actual cost of the disbursement without any allowance for mark-up by the law practice or profit by the law practice. The actual cost may include a reasonable allowance for law practice office overheads. (For example: the ‘actual cost’ of internal photocopying would include (i) the cost of the paper, (ii) charges payable to an unrelated lessor or owner of any photocopying equipment used in making the copies and (iii) other costs associated with the purchase, lease or use of photocopying equipment in the possession of the law practice. The cost of the labour involved in the copying and collating would be included as part of the allowance for law practice office overheads. The ‘actual cost’ of copying done externally would be the charges made by an unrelated commercial photocopying company plus a reasonable allowance for law practice office overheads, including the labour involved in collating, despatching and collecting the documents.)*
- (5) *To avoid complicated computations, the law practice may make a reasonable estimate of the approximate actual cost of the disbursement or charge at a rate approximate to the rate charged by unrelated commercial suppliers of services (eg, photocopying).*
- (6) *The prescribed rate for disbursements may be set by the Costs Council.*

Recommendations

Public interest litigation costs

153. There should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.

Percentage fees

154. The current absolute legislative prohibition of percentage contingent fees should be reconsidered, provided that any proposed (regulated) percentage fee arrangements are subject to adequate safeguards to protect consumers and to prevent abuse.
155. The determination of whether regulated percentage fees should be introduced, with appropriate safeguards, should be made by the Costs Council after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar Council. The Costs Council could also consider whether there are particular types of legal work where percentage fees should not be permitted.
156. The Costs Council should also reconsider whether percentage fees could be introduced by way of a 'scale of costs' within the meaning of the Legal Profession Act 2004.
157. The Cost Council should consider what safeguards and protections, if any, would be appropriate in the event that proportionate fees were to be permitted.

Proportionate and other fees in class action proceedings

158. The Costs Council, after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar should also consider whether proportionate and other types of fees, including fees based on the work actually done with a multiplier (similar to the 'lodestar' method applied by Canadian and US courts) should be recoverable in class action proceedings. However, fees in class action proceedings should be subject to court approval where they will ultimately be paid or reimbursed by class members who have not individually consented to the fee arrangements.

Court fees

159. Court fees should be reviewed by the Costs Council. There is a need for greater standardisation and simplification of court fees. There are strong arguments in favour of higher 'user pays' fees for commercial litigants and easier and simpler methods for reducing or waiving fees for those who cannot afford them.

Offers of compromise and costs

160. The rules relating to offers of compromise and costs consequences should be reviewed by the Costs Council.

Justice Fund

161. The (proposed) Justice Fund should provide assistance, including indemnity in respect of adverse costs, in cases other than class actions, after it has become self-funding.
162. In cases where funding is provided by the Justice Fund during its first five years of operation the liability of the fund in respect of adverse costs should be limited to an amount equivalent to the amount of funding provided to the assisted party. The assisted party would remain personally liable to meet any shortfall between the amount of an adverse costs order and the maximum liability of the fund. However, during this period the fund should have a discretion to pay any shortfall if it is in a financial position to do so. Also, the fund should have standing to apply to the court for an order limiting the potential liability of the funded party for adverse costs.

Research on costs

163. There is a need for more data and research on costs. One means by which this might be achieved is by empowering the court to require parties to disclose costs data at the conclusion of the matter or at any other stage of the proceeding.

Chapter 12: Facilitating Ongoing Civil Justice Review and Reform

Rule-making process and powers

164. The courts' governing legislation should make provision for the constitution and operation of each court's rules committee. The chair of each rules committee (or the chair's nominee) could be made an ex-officio member of each other committee entitled to attend the other committees' meetings. This would provide for increased communication between the three jurisdictions.

165. The rules committees should meet jointly when considering rules and procedures which apply in more than one jurisdiction. This may involve a joint meeting of two or three rules committees.

166. The power to make rules should be broadened and exercised so as to further the courts' overriding purpose. A draft amendment to section 25 of the *Supreme Court Act 1986* is as follows:

(1) *The Judges of the Court [...] may make Rules of Court for or with respect to the following:*

...

(f) *Any matter relating to—*

(i) *the practice and procedure of the Court; or*

(ii) *the powers, authorities, duties and functions of the officers of the Court;*

(iii) *the powers, authorities, duties and functions of the Court in imposing limits, restrictions or conditions on any party in respect of any aspect of the conduct of proceedings; or*

(iv) *the management of cases; or*

(v) *the referral (with or without the consent of the parties) to any form of alternative dispute resolution; or*

(vi) *the means by which the Overriding Purpose may be furthered.*

Equivalent amendments to the County Court Act and the Magistrates' Court Act would also be required.

Court rules

167. The legislation and rules of civil procedure in all three courts should be reviewed to:

- achieve greater harmonisation between courts, including standardisation of the terminology used to describe procedural steps, and standardisation of court forms. In particular there should be one form for commencing proceedings and one for making interlocutory applications
- simplify the structure and ordering of the rules
- make greater use of plain English.

168. Each court should clarify the circumstances in which practice notes and directions are made, and consolidate and organise the content and publication of existing practice notes and directions.

Ongoing reform

169. A new body, called the Civil Justice Council, with ongoing statutory responsibility for review and reform of the civil justice system, should be established. Its purpose would be to investigate ways to make the civil justice system more just, efficient, and cost effective.

170. The Civil Justice Council would have the following functions:

- to monitor the operation of the civil justice system generally
- to identify areas in need of reform
- to conduct or commission research
- to bring together various stakeholder groups with a view to reaching agreement on reform proposals, including through the use of mediation and other methods
- to recommend reforms, including amendments to statutory provisions and rules governing the civil justice system
- to facilitate education programs about developments in the civil justice system.

171. The Civil Justice Council should also assist in the implementation of the reforms proposed by the Victorian Law Reform Commission and monitor the impact of such reforms, which may include:

- developing specific pre-action protocols for each relevant area (for example, commercial disputes, building disputes, medical negligence, general personal injury, etc)
- monitoring the operation of the protocols and general standard of pre-action conduct so that any modifications considered necessary in the light of practical experience can be implemented
- overseeing and developing further the operation of pre-trial examinations, including:
 - developing a general code of conduct in respect of examination conduct

Recommendations

- developing codes of practice to govern the use of pre-trial examinations in particular litigation contexts
 - overseeing the establishment of education and training programs to assist practitioners and other interested parties to develop good examination practices
 - reviewing the provisions relating to pre-trial examinations with a view to assessing their effectiveness and costs consequences, and considering possible changes to the existing scheme. The Council should also consider and make recommendation on the question of whether pre-trial examinations should be permissible in matters within the jurisdiction of the Magistrates' Court, and if so, whether any modifications to the general scheme are required in relation to such matters;
 - constituting a specialist Costs Council to oversee and monitor issues to do with legal costs
- reviewing ADR processes in all three courts
 - scrutinising the operation of the Justice Fund
 - assisting in a review of the rules of civil procedure.
172. The Civil Justice Council should comprise members from a broad range of participants in the civil justice system and stakeholder groups, including:
- members of the judiciary
 - members of the legal profession
 - public servants concerned with the administration of the courts
 - persons with experience in and knowledge of consumer affairs
 - persons with experience and expertise relevant to particular types of litigation (for example representatives from the business community, insurance industry, consumer organisations, and the community legal sector).
173. The chair and members of the Civil Justice Council should be appointed by the Attorney-General after calling for nominations from the courts and relevant stakeholder groups.
174. Members of the Civil Justice Council would be appointed for their expertise and experience, and not necessarily as representatives of the entities or organisations for which they work.
175. Members of the Civil Justice Council would serve in an honorary capacity but would be reimbursed for expenses etc. There would be a secretariat comprising a chief executive officer and support staff.
176. The Civil Justice Council should be able to co-opt people to form committees to focus on specific areas under review.
177. The Civil Justice Council should be entitled to an allocation of funds from the Justice Fund to assist it to carry out its functions.

Chapter 1
**Overview of the Civil
Justice System**



Overview of the Civil Justice System



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The discovery and vindication and establishment of the truth are main purposes certainly of the existence of Courts of Justice [but] these objects ... cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is open to them ... Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.¹

1. INTRODUCTION: ABOUT THIS REFERENCE AND REPORT

1.1 JUSTICE STATEMENT

In May 2004 the Attorney-General, Rob Hulls, issued a Justice Statement outlining directions for reform of Victoria's justice system. The commission's civil justice review is part of this reform program. One of the Justice Statement's objectives is the reform of civil rules of procedure to streamline litigation processes, reduce costs and court delays and achieve greater uniformity between different courts.

The Justice Statement identified the need for:

- modernisation, simplification and harmonisation of the rules of civil procedure within and across the jurisdictions of the Supreme Court, the County Court and the Magistrates' Court
- reduction in the cost of litigation
- promotion of the principles of 'fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability in the civil justice system'.²

It was envisaged that this would involve improving the civil justice system for the benefit of those who may customarily or occasionally use it and for those who administer it. This would also encompass reforms to facilitate greater access for people with civil claims with merit, the introduction of more procedural and economic disincentives to the pursuit of claims or defences without merit, and an improvement in alternative dispute resolution mechanisms.

The Justice Statement identified potential areas of change, including:

- reform of the processes for commencing litigation
- reform of pleadings and other procedures to require parties to provide greater disclosure, at an early stage, of information relevant to the merit of the claim and the defence of the claim
- reform of the procedures for discovery of documents
- relaxation of the restrictive rules on summary judgments to facilitate early resolution of claims or defences which have no substantial or realistic prospect of success
- reforms designed to ensure that witnesses, and particularly expert witnesses, have a primary and overriding duty to the court and the administration of justice rather than to either of the parties
- reforms which accelerate disclosure of information and evidence relevant to the claim or defence
- reforms which seek to identify the key issues in dispute between the parties and to facilitate early resolution of these issues without the need for protracted and expensive litigation
- reforms which seek to ensure that those in dispute and their legal representatives approach the dispute with a commitment to resolving it as quickly and as fairly as possible.

In September 2004 the Victorian heads of jurisdiction in their Courts Strategic Directions Statement also recommended a review of the cost of justice to litigants and a review of procedural rules with the aim of simplifying and, where appropriate, harmonising court processes and court rules.³

1.2 TERMS OF REFERENCE

The Attorney-General asked the commission to examine, report and make recommendations on the civil justice system in Victoria in accordance with the following terms of reference:

1. To identify the overall objectives and principles of the civil justice system that should guide and inform the rules of civil procedure, having regard to the aims of the Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004–2014, and in particular:

- the modernisation, simplification and harmonisation of the rules of civil procedure within and across jurisdictions
- the reduction of the cost of litigation
- the promotion of the principles of fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability.

2. To identify the key factors that influence the operation of the civil justice system, including those factors that influence the timeliness, cost and complexity of litigation.

3. To consult with the courts, the legal profession, business, government and other stakeholders on the current performance of the civil justice system as well as the overall objectives and principles of the civil justice system and potential options for reform.

4. The review should consider the operation of the rules of civil procedure in the Supreme Court, the County Court and the Magistrates' Court.

5. The review should have regard to recent reviews of civil procedure in other jurisdictions, both within Australia and internationally.

6. The review should also have regard to the impact of current policy initiatives on the operation of the civil justice system including the proposed increase in the jurisdiction of the County Court and investments in information technology such as the Integrated Courts Management System.

7. In presenting its report, the commission should identify areas of the civil justice system and rules of civil procedure that might form the basis of a later and more detailed review. Such areas may include, but are not limited to, the rules and practices relating to:

- pre-commencement options
- pleadings
- discovery
- summary judgment
- expert witnesses
- class actions
- abuse of process
- alternative methods of dispute resolution, including alternative dispute resolution undertaken by judicial officers
- judicial role in case management and listing practices, including docketing systems.

8. The commission should also identify the process by which the courts, the legal profession and other stakeholders may be fully involved in any further detailed review of the rules of procedure.

9. The Victorian Law Reform Commission should report in 12 months from the date of the commencement of the review.

These terms of reference comprise stage one of the civil justice review.

The scope of the review is very broad. However, the reference is limited in that the commission is not required to examine areas of substantive law (such as compensation schemes and limitations periods) which determine the legal rights of parties in dispute and which have an important impact on the operation of the civil justice system. Moreover, as the inquiry was required to focus on the operation of the Supreme, County and Magistrates' Courts, the operation of Victoria's tribunals and other dispute

- 1 *Pearse v Pearse* (1846) 63 ER 950, 957 (Knight Bruce VC).
- 2 Attorney-General's Justice Statement, *New Directions for the Victorian Justice System 2004–2014* (2004) 35.
- 3 Courts Consultative Council, *Courts Strategic Directions Project* (2004) 99 (Recommendation 11), 100 (Recommendation 12).

Overview of the Civil Justice System



resolution mechanisms (including industry ombudsman schemes) are not within its scope. Some of the discussion and recommendations do, however, touch on these bodies. Also, some of the reform proposals in this report propose changes to substantive (as distinct from 'procedural') laws.

Although the commission's report on stage one of the civil justice review was initially required to be submitted to the Attorney-General in September 2007, in late 2007 this deadline was extended to March 2008 to allow for additional consultation.

1.3 REVIEW PROCESSES

Dr Peter Cashman, barrister and Associate Professor at the University of Sydney law school was appointed as the commissioner in charge of the civil justice review in September 2006 for 12 months. In late 2007 this term was extended to December 2007.

A division of the commission was established for the review pursuant to section 13 of the *Victorian Law Reform Commission Act 2000*. The division comprised Dr Cashman; Justice David Harper of the Supreme Court; Judge Felicity Hampel of the County Court; Professor Sam Ricketson, barrister and professor of law; Judge Iain Ross of the County Court; and Professor Neil Rees, Chairperson of the commission, following his appointment to the commission in June 2007.

The commission's research and policy officers involved in the review were Ross Abbs (from 5 February 2007 to 15 June 2007), Samantha Burchell (until 25 October 2007), Emma Cashen (from 9 July 2007), Claire Downey (until 31 December 2006), Prue Elletson (from 12 November 2007), Christiana McCudden (from 5 February 2006 to 3 May 2007), Jacinta Morphet and Mary Polis, team leader. Additional research assistance was provided by law students Kate Kennedy (from 25 June 2007 to 20 July 2007) and Sarah Zeleznikow (from 25 June 2007 to 20 July 2007, and from 26 November 2007) and by research assistant Miriam Cullen (from January 2008). Clare Chandler was responsible for layout and production of the report. Ongoing assistance was provided by the commission's CEO Padma Raman.

1.3.1 Consultation Paper

In October 2006 the commission distributed a Consultation Paper seeking submissions to identify key areas requiring reform and potential solutions. A total of 61 submissions were received in response to the Consultation Paper. A list of persons or organisations making submissions appears in Appendix 2. Submissions received are referred to throughout this report.

1.3.2 Stage One priority areas

The commission identified 10 priority areas for particular attention in stage one of the civil justice inquiry. These 10 priority areas encompass:

- the stage before the commencement of legal proceedings, with particular reference to procedures facilitating disclosure of relevant information and communication between parties in dispute and the resolution of disputes without the necessity to commence legal proceedings
- the standards of conduct of parties in dispute, legal representatives of litigants and persons providing financial support to litigants
- processes and procedures for disclosure of relevant information and obtaining information from potential witnesses after the commencement of litigation but prior to trial, including discovery of documents
- mechanisms for the 'alternative' resolution of disputes or the summary disposal of claims or defences without the necessity for trial
- problems experienced or caused by self-represented litigants
- means of enhancing case management
- the role of expert witnesses and methods of addressing the cost and potential bias of expert evidence
- the costs of litigation, means by which such costs may be reduced and mechanisms for financing litigation
- access to justice to remedy mass wrongs, including through class action procedures in the Supreme Court
- mechanisms for ongoing review, research and reform of procedural rules and the civil justice system generally.

1.3.3 First Exposure Draft

On 28 June 2007 the commission released an exposure draft setting out a first round of draft reform proposals for public and professional comment. The draft proposals in that exposure draft covered:

- standards of conduct of participants in civil litigation
- disclosure of information and cooperation before civil proceedings are commenced
- getting to the truth before trial through pre-trial oral examinations
- alternative dispute resolution
- expert evidence
- class actions and public interest remedies
- litigation funding
- costs.

The commission received 32 submissions in response to these initial draft reform proposals. A list of the persons making submissions is in Appendix 2. Selected aspects of submissions are summarised and referred to throughout this report.

1.3.4 Second Exposure Draft

On 6 September 2007 the commission released a further exposure draft setting out additional draft reform proposals for public and professional comment. These proposals covered the following areas:

- case management
- self-represented litigants
- vexatious litigants
- interpreters
- discovery
- costs
- confidentiality constraints on conferring with potential witnesses
- ongoing review and civil justice reform.

The commission received 19 submissions in response to the second exposure draft. A list of the persons making these submissions is in Appendix 2. Selected aspects of a number of the submissions are summarised or referred to throughout this report.

1.3.5 Consultations

In addition to considering written submissions, the commission has consulted with many individuals involved in and affected by the civil justice system during stage one of the civil justice inquiry. This has included representatives of various stakeholder groups, including judicial officers, the legal profession, the insurance industry, the business community, consumer organisations and members of the community. A list of those consulted appears in Appendix 1.

1.3.6 Interstate and international reforms

The commission has also examined recently introduced reforms and proposals for reform in other jurisdictions in Australia and in other countries, including Lord Woolf's *Access to Justice* report and the reforms arising from it in the UK. In October 2006 Dr Cashman travelled to London and conferred with judicial officers, members of the legal profession and consumer organisation representatives to obtain information on the impact of the Woolf civil procedure reforms. Members and staff of the commission participated in a workshop on disclosure and discovery reform organised by the Australasian Institute of Judicial Administration in August 2007.

1.3.7 Conferences and seminars

During stage one of the civil justice review Dr Cashman and members of the civil justice research team attended conferences throughout Australia and presented papers addressing various aspects of civil justice reform. A list of events attended is included in Appendix 3.



1.3.8 Other law reform bodies

The commission has also liaised with agencies in Victoria and elsewhere currently conducting their own reviews of aspects of the civil justice system. This included the Civil Justice Council in the UK, the Attorney General's Working Party on civil procedure in New South Wales chaired by Justice Hamilton of the NSW Supreme Court, and the Civil Justice Reform Project being carried out in Ontario, Canada, by the Hon. Coulter Osbourne, former Associate Chief Justice of Ontario.

1.3.9 Empirical research

In view of the limited time the commission had to complete stage one of the civil justice inquiry, there was limited scope for carrying out in-depth empirical research. There has been some analysis of the available statistical data on the operation of the Victorian courts and this is discussed in various parts of the report. At the request of the commission, one large law firm agreed to include questions prepared by the commission about costs and fees in a survey of clients carried out by independent consultants. The results are discussed in Chapter 11. Selected law firms were also asked to provide data on the costs of conducting proceedings, with particular reference to the total amount of costs incurred on a solicitor–client basis, the amount of costs recovered from the other side on a party–party basis and the proportionate relationship between costs and the amount in dispute. The results from this survey are also discussed in Chapter 11. Associate Professor Vince Morabito of Monash University is carrying out an empirical study of class action litigation, and at the request of the commission agreed to focus on Victorian class action proceedings and issues of interest to the commission to provide information during stage one of the inquiry. These results are discussed in Chapter 8.

1.4 REPORT OVERVIEW

This report deals primarily with the 10 priority areas referred to above, which were the focal points of stage one of the inquiry. However, during the course of stage one, the commission identified other areas where civil justice reform is required. Also, many of the submissions received by the commission call for reform in a multitude of areas outside of the commission's priority areas. In this report we have endeavoured to identify other areas where there is a case for reform.

This is an interim report in the sense that it reflects the work carried out by the commission in stage one of what is a longer-term inquiry into the civil justice system in Victoria. The law reform proposals and recommendations in this report need to be considered in light of the fact that the commission is recommending the establishment of an ongoing body, the Civil Justice Council. The role of the proposed Civil Justice Council would be to: facilitate the implementation of civil justice reforms, monitor the impact of these and other reforms, propose further reforms, commission research, and bring together representatives of stakeholder groups to reach agreement on reform initiatives and civil justice policy issues.

The remaining part of this chapter provides an overview of the civil justice system in Victoria, with particular reference to key factors that influence the operation of the system and criteria by which the performance of the civil justice system may be evaluated.

- Chapter 2 examines how the early resolution of disputes may be facilitated without litigation, with particular reference to pre-action protocols.
- Chapter 3 focuses on how the standards of conduct of participants in civil litigation may be improved.
- Chapter 4 addresses means of improving alternative methods for the resolution of disputes which result in litigation in Victorian courts.
- Chapter 5 deals with methods of improving judicial management of disputes.
- Chapter 6 is concerned with disclosure of relevant information and earlier and easier mechanisms for 'getting to the truth' before and after the start of civil proceedings in Victorian courts.
- Chapter 7 looks at the role of experts and expert evidence and how greater judicial control may be exercised, with a view to changing the 'adversarial' role of experts.
- Chapter 8 reviews problems with complex litigation, class actions and public interest litigation and outlines a number of solutions, including improved remedies for mass wrongs.

- Chapter 9 analyses how greater assistance may be provided to self-represented litigants and people with language difficulties, together with mechanisms for the early disposition and control of unmeritorious claims and difficult or ‘vexatious’ litigants.
- Chapter 10 examines how access to justice may be improved, including by the establishment of a new ‘self-funding’ body and additional assistance to litigants.
- Chapter 11 focuses on how the cost of litigation may be reduced and economic factors affecting the conduct and cost of civil litigation.
- Chapter 12 deals with processes and procedures for making civil justice rules, the evaluation of the civil justice system, and monitoring and implementation of further reforms. This also includes a consideration of future directions of civil justice reform.

The appendices contain detailed information that supplements the discussion in this report. This includes information on submissions received and consultations conducted.

The accompanying table provides an overview and summary of the commission’s reform proposals. The left hand side of the table sets out the normal sequence of events in civil litigation. The right hand side of the table refers to the reforms proposed by the commission.

2. VICTORIAN COURTS’ AND TRIBUNALS’ JURISDICTION

2.1 SUPREME COURT JURISDICTION⁴

The Supreme Court of Victoria was created in 1852, succeeding the Supreme Court of NSW following the states’ separation in 1851. It is the superior court of record in Victoria, having unlimited jurisdiction. It is, in essence, a common law court applying both the common law and the doctrines of equity as modified by statute. Its jurisdiction was historically defined by reference to the jurisdiction of the various superior courts at Westminster,⁵ which amalgamated into the Supreme Court of Judicature after the *Judicature Act 1873* (UK). Its current constituting statute⁶ simply describes the Supreme Court as having unlimited jurisdiction ‘in all cases whatsoever’.

As the superior court of record for Victoria, it exercises a supervisory jurisdiction over inferior courts and tribunals. It can therefore hear appeals from these inferior bodies, but also has jurisdiction to issue orders in the nature of the historic prerogative writs, *certiorari*, *mandamus*, prohibition and *quo warranto*. The court has exclusive jurisdiction to issue writs of habeas corpus as well as exclusive jurisdiction under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) to make declarations of incompatibility of statutes with the Charter.

The court maintains a role in the admission and supervision of legal practitioners under the *Legal Profession Act 2004* and through the exercise of its inherent powers. It is also the Court of Disputed Returns for state electoral purposes.

Subject to the provisions of the Commonwealth and various state cross-vesting Acts, it has all of the jurisdiction of the Federal Court, the Family Court and the Supreme Court of each other state and territory.

The court is also vested with federal jurisdiction pursuant to section 77(iii) of the *Australian Constitution*.⁷

Finally, the court has jurisdiction conferred by federal legislation in criminal matters, matters arising under the *Corporations Act 2001* (Cth) and some intellectual property matters.

2.1.1 Volume of business

In 2005–06 there were 6504 civil proceedings commenced in the Supreme Court of Victoria (excluding probate matters) and 167 appeals initiated in the Court of Appeal.⁸

2.1.2 Complexity of matters

As the Supreme Court has noted in its submission, there is no definitive measure of the complexity of cases. However, the court believes there has been an increase in the complexity of cases heard in recent years due to several factors, including the growth of legislation creating new areas of law and replacing or adding an additional layer of regulation to areas previously covered by the common law.

4 The following section has been adapted from but incorporates much of the material in submission CP 58 (Supreme Court of Victoria).

5 These superior courts included Chancery, Queen’s Bench, Common Pleas, Exchequer, Admiralty, Probate, and Divorce and Matrimonial Causes.

6 *Constitution Act 1975* s 85.

7 See, eg, *Judiciary Act 1903* (Cth).

8 Supreme Court of Victoria, *Annual Report* (2005–06) 8, 10.



Other factors include legislative changes that have increased procedural complexity, such as the apportionment of liability regimes (which have led to increased numbers of parties in a single proceeding). Also, in recent years statutory class action provisions have been adopted in Victoria⁹ and these proceedings require careful management and adjudication. The court also believes that broader social and economic changes have impacted on the complexity of litigation. For example, there has been an increase in cases with choice of law issues due to greater cross-border communication. Although the increased jurisdiction of lower courts has reduced the volume of cases in several areas, many remaining cases have been extremely complex.

Several flow-on effects may arise from this increased complexity, including:

- restricting access to justice due to higher costs and difficulty in securing representation
- increasing the costs of litigation where it is pursued
- greater burdens being placed on the court through increases in interlocutory applications, the time needed for case management, hearing time for trials and time in writing judgments.

2.1.3 Civil Procedure Rules

Section 25 of the *Supreme Court Act 1986* empowers the judges of the court to make rules with respect to:

- (a) any matter dealt with in any Rules of Court in force on 1 January 1987;
- (b) the prescription of the proceedings or class of proceedings which may be dealt with by the Court constituted by a Master;
- (c) appeals by way of rehearing or otherwise to the Trial Division of the Court constituted by a Judge from the Trial Division constituted by a Master or from a Master of the County Court;
- (ca) applications and appeals to and proceedings in the Court of Appeal;
- (d) the payment of money into and out of court and the investment of that money including, without limiting the generality of the foregoing provisions of this paragraph, rules—
 - (i) providing for the establishment and management of Common Funds; and
 - (ii) regulating the practice and procedure of the Senior Master in relation to the investment of money; and
 - (iii) generally prescribing anything necessary to be prescribed for the proper management and operation of Common Funds;
- (e) the reference of any question arising in a proceeding to a special referee or officer of the Court for decision or opinion;
- (ea) the reference of any proceeding or of any part of a proceeding to mediation or arbitration;
- (eb) requirements for the purposes of Part IIA of the Evidence Act 1958 for or with respect to—
 - (i) the form of audio visual or audio link;
 - (ii) the equipment, or class of equipment, used to establish the link;
 - (iii) the layout of cameras;
 - (iv) the standard, or speed, of transmission;
 - (v) the quality of communication;
 - (vi) any other matter relating to the link;
- (ec) applications to the Court under Division 2 or 3 of Part IIA of the Evidence Act 1958;
- (f) Any matter relating to—
 - (i) the practice and procedure of the Court; or
 - (ii) the powers, authorities, duties and functions of the officers of the Court;
- (g) Any matter relating to the enforcement of judgments of the Court, whether arising under the common law or under any jurisdiction conferred by or under any Act or enactment.

The court is also empowered to make rules under section 50 of the *Interpretation of Legislation Act 1984*, which provides:

Where an Act or subordinate instrument confers any jurisdiction on a court or other tribunal or extends or varies the jurisdiction of a court or other tribunal, the authority having for the time being power to make rules or orders regulating the practice and procedure of that court or tribunal may, unless the contrary intention appears, make such rules or orders (including rules or orders with respect to costs) as appear to the authority to be necessary for regulating the practice and procedure of that court or tribunal in the exercise of the jurisdiction so conferred, extended or varied.

The Supreme Court Act allows judges to make rules where they are agreed on by a majority of the judges of the court at a meeting held for that purpose.¹⁰ In practice, this is effected at the regular Council of Judges meetings. Any rules made are subject to disallowance by the parliament.¹¹

The Council of Judges delegates the task of investigating the need for new or amended rules, and the drafting of rules, to the Rules Committee. The committee presents its recommendations to the Council of Judges. The Rules Committee is currently chaired by Justice Ashley of the Court of Appeal and comprises other judges of the court, a master, a nominee of each of the Bar Council, the Law Institute and the Council of Judges, and Mr Neil Williams QC. Parliamentary Counsel acts as secretary to the committee.

In addition to their duties to act in response to new legislation, the committee receives suggestions for new rules or amendments from within the court, from the profession and others. Through the Council of Chief Justices, the committee also participates in the National Harmonisation of Rules Committee, which provides a forum for the development of uniform or harmonised rules on common issues across superior courts.

This rule-making power is integral to the court's ability to control its own procedure. The composition of the Rules Committee allows those who most often use the rules, and who understand them best, to assess how they could be made more effective or just. The system allows amendment of rules without recourse to parliamentary or departmental processes.

The Supreme Court Rules are divided into chapters. Chapter I, the *Supreme Court (General Civil Procedure) Rules 2005*, contains the rules applicable to civil proceedings generally. More specialised rules are found in:

- Chapter II, the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998*
- Chapter III, the *Supreme Court (Administration and Probate) Rules 1994*
- Chapter V, the *Supreme Court (Corporations) Rules 2003*
- Chapter VII, the *Supreme Court (Admiralty) Rules 2000*
- Chapter VIII, the *Supreme Court (Intellectual Property) Rules 2006*.

The Supreme Court supports efforts to harmonise rules between courts, both within Victoria and across Australia. Such harmonisation brings benefits such as consistency of application across jurisdictions, shared jurisprudence and, accordingly, a more efficient system for practitioners and their clients. However, the commission is in agreement with the court's view that the differences in the type, volume and complexity of cases brought in Victorian courts mean that strict uniformity of rules and procedure is not appropriate.

2.1.4 Practice notes and statements

The court also issues Practice Notes, Practice Statements and Notices to Practitioners. These provide detailed and specialised information on specialist lists of the court, procedures for certain types of applications and new court initiatives. For instance, a recent Practice Note provides *Guidelines for the Use of Technology in any Civil Litigation Matter* (No 1 of 2007). These documents are available on the Supreme Court website.

2.1.5 Case management

The court has introduced reforms to assist the just and efficient disposition of cases in accordance with its longstanding commitment to case management. A number of different models of case management are applied to proceedings.

9 Statutory class actions are provided for by *Supreme Court Act 1986* pt 4A, and the Supreme Court has exclusive jurisdiction over these. Associate Professor Morabito, in a speech to a class actions conference in Melbourne in December 2005, estimated there had been 22 class actions commenced in the period since the introduction of the statutory class action procedure in January 2000. See Peter Cashman, *Class Action Law and Practice* (2007) 466.

10 *Supreme Court Act 1986* s 26.

11 *Supreme Court Act 1986* s 27.



2.1.6 Divisions

Civil cases are issued in either the Commercial and Equity Division or the Common Law Division of the Court. Trial Division judges are allocated to these divisions for differing periods of time to assist in the listing and allocation of cases and to utilise the particular expertise of judges. This system is flexibly applied to allow the maximum number of cases to be heard.

Matters in the Commercial and Equity Division include those arising out of commercial transactions, cases concerning wills and probate, deceased estates, trust matters, and commercial arbitration matters.

Matters in the Common Law Division include claims in tort and judicial review proceedings, including statutory appeals from inferior courts and tribunals. Some matters of a civil nature related to criminal matters are also heard in this division, including applications under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

2.1.7 Civil management list

Before trial, most cases are subject to management by masters in the Civil Management List. Masters set timetables for the necessary interlocutory steps and hear most interlocutory applications, including summary judgment and strike-out applications, discovery applications and applications arising out of noncompliance with previous orders. The vast majority of proceedings are referred to mediation following discovery, if not earlier.

Once all necessary interlocutory steps have been completed and mediation has been concluded, the proceeding is referred to the Listing Master. After having received a report from the parties,¹² the Listing Master will fix a date for trial. When the proceeding is ready to be heard it enters the General Civil List. In 2005–06, 525 matters entered the General Civil List and 465 matters were finalised. At 30 June 2006, 558 matters were pending.

The Listing Master also manages the Long Cases List, which comprises cases expected to exceed 12 sitting days at trial. On 30 June 2006, there were 79 cases in the Long Cases List.

The court takes steps to ensure urgent matters are given an expedited hearing. These matters are also frequently referred by the master to pre-trial conferences conducted by the Prothonotary or Senior Deputy Prothonotary to encourage settlement or the narrowing of issues before trial.

Deputy Premier and Attorney-General Rob Hulls has recently announced that masters will be renamed 'associate judges' and will play a larger role in mediating disputes. New legislation is to be introduced to facilitate this change. The legislation follows recommendations made by Crown Counsel, Dr John Lynch, following a review of the Office of Master.

2.1.8 Practice Court

One judge is allocated to the Practice Court each fortnight. The judge in the Practice Court hears applications which are not able to be heard by masters. Although applications in specialist list proceedings are usually heard by the judge managing the case, they may be heard in the Practice Court if they are urgent and the list judge is unable to hear them.

Matters which are heard by the judge sitting in the Practice Court include:

- injunction applications
- appeals from masters (which are conducted as hearings *de novo*)
- administration and probate applications
- applications for leave to bring proceedings by litigants declared vexatious
- applications for bail (where no Criminal Division judge is available)
- warrant applications (where no Criminal Division judge is available).

The judge sitting in the Practice Court may also hear urgent applications out of hours.

2.1.9 Specialist lists

At the election of practitioners or the direction of the court, some matters are entered into specialist lists, which are managed by judges or a combination of judges and masters. These lists include the Corporations list, the Commercial list, the Building Cases list, the Admiralty list, the Intellectual Property list, the Victorian Taxation Appeals list, the Major Torts list, and the Valuation, Compensation and Planning list.

2.1.10 Court of Appeal

The civil work of the Court of Appeal comprises:

- determining applications for leave to appeal (leave is required in a range of circumstances, including appeals from certain interlocutory decisions)
- determining other applications, such as applications for extensions of time, stays and security for costs
- appeals from the Trial Division of the Supreme Court
- appeals from the County Court
- appeals on questions of law from judicial members of the Victorian Civil and Administrative Tribunal.¹³

In 2005–06, 187 civil appeals were finalised.

As described in its Practice Statement No 1 of 2006, the Court of Appeal has recently introduced a pilot program of ‘front end management’ of civil appeals. The program is run by two masters who have commenced directions hearings in civil appeals with the goals of:

- identifying the scope and nature of the appeal at an early stage so it can be appropriately managed
- encouraging mediation and earlier settlement of appeals
- increasing flexibility and reducing delay in listing.

2.1.11 Regional sittings

In 2005–06, 127 proceedings were issued in regional registries in Ballarat, Bendigo, Geelong, Hamilton, Horsham, Mildura, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga. Both the Court of Appeal and the Trial Division sit in regional courts when necessary.

2.2 COUNTY COURT CIVIL JURISDICTION

As of 1 January 2007, there is no longer any monetary limit in respect of civil matters within the jurisdiction of the County Court in proceedings commenced after that date.¹⁴ ‘Any judge of the court may exercise at any time and place all the jurisdiction vested in the court’.¹⁵

For proceedings commenced before 1 January 2007 (a) the court has an unlimited jurisdiction in personal injury matters¹⁶ and (b) in nonpersonal injury civil matters, the court has a jurisdiction up to \$200 000.¹⁷ In proceedings commenced before 1 January 2007, where the parties consent, the court may have jurisdiction in excess of \$200 000 in nonpersonal injury cases.¹⁸ The court has original jurisdiction in WorkCover matters, with the Magistrates’ Court having a limited concurrent jurisdiction in that area. Civil trials may be heard by a judge alone, or by a judge and jury of six.¹⁹

Most cases are heard in Melbourne. However, judges hear both criminal and civil cases in the following country locations: Bairnsdale, Ballarat, Bendigo, Geelong, Hamilton, Horsham, Mildura, Morwell, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga. According to the court’s annual report, about 20 per cent of the court’s judges sit on circuit at any one time throughout the year.²⁰

2.2.1 County Court Rules

The *County Court Rules of Procedure in Civil Proceedings 1999*²¹ constitute Chapter I of the Rules of the County Court.²² The rules are made under section 78 of the *County Court Act 1958*²³ and all other powers.²⁴

The rules apply to ‘every civil proceeding commenced in the court’. However, the rules ‘do not apply to a civil proceeding to which Chapter II of the Rules of the County Court applies except as that chapter provides’.²⁵

The *County Court Rules of Procedure in Civil Proceedings 1999* share a large number of common provisions with the *Supreme Court (General Civil Procedure) Rules 2005*, which allows for a common jurisprudence in relation to the applications of the rules. The rules maintain a common numbering system to assist practitioners practising across jurisdictions.

12 Parties are required to provide the Listing Master with a report under Practice Note 4 of 2006. See the Supreme Court of Victoria, *Practice Note 4 of 2006: Listing of Civil Matters in 2007* (2006) [6] <www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb944c07befaf7d/PracticeNote-No4-2006_CivilListing2007.pdf> at 04 February 2008.

13 Submission CP 58 (Supreme Court of Victoria).

14 See the *Courts Legislation (Jurisdiction) Act 2006* s 3.

15 *County Court Act 1958* s 3B.

16 *County Court Act 1958* s 37. For a history of the civil jurisdiction of the County Court see <www.countycourt.vic.gov.au>.

17 County Court of Victoria, *Annual Report* (2005–6) 10.

18 *Ibid* 10.

19 *County Court Act 1958* ss 65, 67.

20 County Court (2005–6) above n 17, 19.

21 Version incorporating amendments as at 1 January 2007.

22 *County Court Rules of Procedure in Civil Proceedings 1999* r 1.01.

23 Version incorporating amendments as at 1 July 2007. Section 78 of the *County Court Act 1958* encompasses the Court’s power to make rules of practice.

24 *County Court Rules of Procedure in Civil Proceedings 1999* r 1.03.

25 *County Court Rules of Procedure in Civil Proceedings 1999* r 1.05.

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There are areas of difference, some of which reflect the differences in jurisdiction. For example, the County Court Rules do not include Order 56 because the County Court does not have that review jurisdiction. Others reflect the case management processes of each court, such as Order 34A of the *County Court Rules of Procedure in Civil Proceedings 1999*.

2.3 MAGISTRATES' COURT JURISDICTION²⁶

The Magistrates' Court of Victoria is currently undertaking a review of its rules with a view to harmonising its civil procedure with the Supreme Court Rules, to the extent that it is considered appropriate.

The civil jurisdiction of the Magistrates' Court encompasses claims for damages, debt or other monetary demands and for equitable relief.²⁷ The Magistrates' Court can decide most disputes over money or property up to the value of \$100 000.²⁸ This includes damages for personal injury. In relation to arbitrations for a small claim, the Magistrates' Court can determine disputes over money or property up to the value of \$10 000.²⁹ In some cases the court can deal with claims of unlimited value.³⁰

Cases in the Civil Jurisdiction fall into three broad categories: general, WorkCover and industrial.

2.3.1 General civil jurisdiction

The general jurisdiction is extremely broad and includes claims for debts, damages for breach of contract or damage to property or for injury (eg, motor car collisions), some neighbourhood matters (eg, fences disputes) and most other matters.

2.3.2 WorkCover jurisdiction

The WorkCover jurisdiction includes claims for compensation for workplace injuries either under the *Workers Compensation Act 1958* or the *Accident Compensation Act 1985*.

2.3.3 Industrial jurisdiction

The industrial jurisdiction is known as the Industrial Division of the Magistrates' Court. It includes claims under the *Long Service Leave Act 1992*, under which the court has unlimited and exclusive jurisdiction. The Industrial Division also has jurisdiction where an employee is owed money under any Act. Some matters arising under the *Occupational Health and Safety Act 1985* can be brought in this division.

2.3.4 Civil jurisdiction increase

The 2005–06 year represents the first full year since the commencement of the increased jurisdictional limits in the general civil jurisdiction on 1 January 2005. The changes were brought about by the *Magistrates' Court (Increased Civil Jurisdiction) Act 2004*, which increased the jurisdictional limit of the court from \$40 000 to \$100 000³¹ and, in relation to arbitrations for a small claim, from \$5000 to \$10 000.³² This had a significant impact on the number of arbitrations finalised.

2.3.5 Impact of jurisdictional increase³³

Following the announcement of the proposed jurisdictional increase, an analysis of the likely effect on the court led to the following projections:

- (a) the number of additional proceedings owing to the jurisdictional increase to \$100 000: 1871
- (b) the number of those additional proceedings which would be undefended and would be determined in chambers as opposed to open court: 236
- (c) the number of defended proceedings which would be resolved following alternative dispute resolution processes and prior to listing for trial: 490
- (d) the number of proceedings listed for trial and requiring a hearing and determination by a judicial officer: 148
- (e) the average time required to hear and determine the proceedings in (d) above: four days.

During the 2005–06 year, the number of proceedings in category (a) exceeded expectations. However, the number of proceedings in category (b) also exceeded expectations. Accordingly, the number of proceedings in category (d) was roughly in accordance with expectations and the average duration of the hearing [was] also within expectations.³⁴

2.3.6 Jurisdictional changes and resources

The court noted that '[t]he jurisdictional increase was made without any commitment to appoint additional magistrates, registrars or administrative staff'.³⁵ According to the court, the change was managed by a number of means, referred to below.

As set out in the 2004–05 Magistrates' Court Annual Report, significant changes were made to the *Magistrates' Court Civil Procedure Rules 1999*. Several of the changes focused on 'increasing the level of disclosure in pleadings and simplifying the process of arbitration by removing many interlocutory steps'.³⁶

Registrars and deputy registrars were given the power to conduct assessments of costs; this had previously been undertaken by a magistrate. This was sometimes a time-consuming exercise and was 'expected to worsen with the jurisdictional increase', so the change 'enabled magistrates to devote more time to the hearing of proceedings'.³⁷

Steps were also taken to improve mediation in the court by forming arrangements with the legal profession and other organisations to provide such services when mediations are ordered by the court. Following the introduction of the amendment to section 108 of the *Magistrates' Court Act 1989*, the use of mediation has increased because the court is now able to refer proceedings to mediation without the consent of parties. The amendment also introduced rules of court dealing specifically with mediation.³⁸

The office of judicial registrar was introduced through the *Magistrates' Court (Judicial Registrars and Court Rules) Act 2005*.³⁹ The judicial registrars are empowered to hear and determine arbitrations for small claims where the amount claimed is less than \$5000, and this has released magistrates to hear other proceedings. Additionally, 'both the judicial registrars have mediation training and have undertaken mediation of more significant proceedings'.⁴⁰

Although the proportion of proceedings involving claims over \$40 000 is relatively small, many of these cases are defended. Consequently, these cases result in more resources being devoted to alternative dispute resolution (ADR) processes and trials. The vast majority of proceedings issued in the court are for amounts of \$10 000 or less, but most of these proceedings are undefended and so can be disposed of simply with limited impact on resources.⁴¹

2.3.7 Pre-hearing conferences and mediation

The Magistrates' Court offers two main forms of ADR: pre-hearing conferences and mediation. The former are largely conducted by registrars and deputy registrars of the court, who combine mediation and conciliation skills in an attempt to resolve the issues in dispute. If the dispute cannot be resolved, the pre-hearing conference may nonetheless be useful in clarifying the issues in dispute for trial and allowing parties to apply for interlocutory orders to assist them in preparing for trial. Registrars and deputy registrars have enhanced powers through amendments to the civil procedure rules by the *Magistrates' Court Civil Procedure (Amendment No 11) Rules 2004*.⁴²

Mediations are conducted by registrars, barristers, solicitors and others. External mediators are regulated by rules of court, which include the requirement that barristers and solicitors who act as mediators have undertaken a course resulting in accreditation as a mediator.

2.3.8 Pre-hearing conference process

The pre-hearing conference has two objectives. The first is to identify the matters in dispute between the parties, with the objective of encouraging the parties to reach a settlement that is acceptable to them. The second goal is to ensure that the case is managed in accordance with the overriding objective.⁴³

Cases are selected for either pre-hearing conference or mediation after an assessment of the court file.⁴⁴

Despite the increase in civil jurisdiction in 1997 and in 2005,⁴⁵ 'the rate of finalisation of completed cases at pre-hearing conference has risen' according to the court's Annual Report.⁴⁶ The court believes this is 'largely due to the expertise of the registrars and acceptance by the legal community that the

26 This has been adapted from the Magistrates' Court website, <www.magistratescourt.vic.gov.au> at 16 October 2007.

27 *Magistrates' Court Act 1989* s 100.

28 See *Money Claims and Other Disputes* (2007) <www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Money+Claims+%26+Other+Disputes+%28Civil%29?OpenDocument&1=30-Money+Claims+%26+Other+Disputes+%28Civil%29-&2=-&3=-> at 21 December 2007.

29 *Magistrates' Court Act 1989* s 102.

30 Certain Acts confer unlimited monetary jurisdiction on the court: see, eg, *Magistrates' Court Act 1989* s 100(1) (c), which empowers the court to hear any claim with the consent of parties, regardless of jurisdictional limit.

31 *Magistrates' Court (Increased Civil Jurisdiction) Act 2004* s 3.

32 *Magistrates' Court (Increased Civil Jurisdiction) Act 2004* s 4.

33 The following summary has been adapted from the Magistrates' Court of Victoria, *Annual Report* (2005–6).

34 *Ibid* 25.

35 *Ibid* 26.

36 *Ibid*.

37 *Ibid*.

38 *Ibid*.

39 See especially *Magistrates' Court (Judicial Registrars and Court Rules) Act 2005* s 4.

40 Magistrates' Court (2005–6) above n 33, 26.

41 *Ibid*.

42 *Ibid* 27.

43 *Ibid*. In relation to the overriding objective, see O 1 Pt 5 of the *Magistrates' Court Civil Procedure Rules 1999*.

44 Magistrates' Court (2005–6) above n 33, 27.

45 *Ibid*. The increased jurisdiction may also have resulted in an increase in the complexity of cases. According to the report, the length of pre-hearing conferences varied from 20 minutes to seven hours. The average length of pre-hearing conferences was said to be 45–60 minutes.

46 Magistrates' Court (2005–6) above n 33, 27.

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pre-hearing conference is an appropriate form of early dispute resolution'.⁴⁷ In Melbourne, where the majority of conferences are convened, the finalisation rate reportedly rose from 64 per cent in 1996 to nearly 73.8 per cent in 2006.⁴⁸

The amendment to the rules about attendance at pre-hearing conferences in April 2005 places conferences on the same footing as the new mediation process: all 'relevant and interested parties' are required to attend.⁴⁹ Attendance can be made by telephone 'where personal attendance would cause unreasonable expense or inconvenience'.⁵⁰ A significant increase in the demand for telephone conferences has placed additional strain on limited accommodation resources and generated time and list management difficulties.⁵¹

2.3.9 Mediation processes

Mediation is an 'alternative to pre-hearing conference and operates alongside pre-hearing conferences as a process for early resolution of disputes'.⁵² Registrars select cases appropriate for mediation in all divisions of the court other than the Industrial Division and WorkCover List.⁵³

Matters in the target range⁵⁴ are ordinarily referred to mediation. However, exceptions are made where the defence to a claim fails to clearly disclose the nature of the dispute or appears to demonstrate a simple defence. Exceptions are also made where a party is not a Victorian resident or is not legally represented.⁵⁵

Parties are given notice that they may raise with the registrar any matter for consideration in relation to the prospective mediation within 21 days.⁵⁶ After this time, the dispute is listed for administrative mention.⁵⁷ At the mention 'the dispute is referred to mediation or, occasionally, to pre-hearing conference or directly to [a final] hearing. Attendance at the mention, when necessary, may be made by telephone. The registrar may make interlocutory and directions orders that are consented to by the parties'.⁵⁸

Generally, 60 days is allowed for completion of the mediation. Where registrars are unavailable during the time frame, barristers and solicitors are more likely to conduct mediations.⁵⁹

In the 12 months from July 2005 to June 2006, the finalisation rate of mediations averaged 69.4%. In the period since January 2006 the finalisation rate was 72%.⁶⁰ The waiting period for a three hour mediation (up to seven hours) conducted by a registrar in Melbourne was eight weeks.⁶¹ A mediation pilot was introduced in the Industrial Division of the court, which has produced good results.⁶² The new judicial registrars have gradually assumed responsibility for mediation in this jurisdiction, which has reduced the pressure due to lack of availability in the general list.⁶³

In 2005, 'the WorkCover List magistrates began referring claims for recovery of money under section 138 of the *Accident Compensation Act 1985* to pre-hearing conferences or mediation by a registrar'.⁶⁴

The Magistrates' Court has been innovative in procedures for mediation of disputes before the commencement of proceedings. On 21 December 2004 the Chief Magistrate issued a Practice Direction dealing with pre-issue mediation.⁶⁵ A further Practice Direction⁶⁶ on 21 September 2007 extended the mediation pilot program at the court at Broadmeadows to include pre-issue mediation. From 1 October 2007 parties to any civil dispute within the jurisdiction of the Magistrates' Court may request a mediation through the Dispute Settlement Centre of Victoria.⁶⁷

2.3.10 Assessment of costs

Another measure to ease the burden of increased jurisdiction involved giving power to registrars and deputy registrars to assess the costs of parties. This task, previously undertaken by magistrates,⁶⁸ had been relatively simple before the jurisdictional increase, but it was expected to become more complex and therefore involve more time, given the increased complexity of proceedings that could be brought.⁶⁹

Under an administrative arrangement, registrars of the County Court currently undertake assessment of bills of costs.⁷⁰ During the 2005–06 year, '30 bills of costs were filed in the County Court relating to proceedings in the Magistrates' Court. Eighteen of those were resolved without the need for an assessment. Twelve required an assessment and involved a total of 27 hours. At the end of the year there were 17 bills awaiting assessment'.⁷¹

The assessment of costs is the subject of a review undertaken by the Crown Counsel. This is discussed in Chapter 11 of this report, which deals with costs.

2.4 VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL JURISDICTION

One important development in Victoria in recent years has been the substantial increase in the jurisdiction and volume of civil matters dealt with by tribunals.⁷² The Victorian Civil and Administrative Tribunal (VCAT) has extensive jurisdiction under a multitude of pieces of legislation.

The 'use of tribunals involves a trade-off between the merits of speed, inexpensiveness, flexibility and expertise which they (at their best) can offer, on the one hand, and, on the other, the need for disputes ... to be determined by an independent judiciary, in the most complete manner and strictly in accordance with the law'.⁷³

Many of the 'court substitute' tribunals which have proliferated in recent times 'have been given similarly worded statutory powers which direct them to act according to equity, good conscience, and the substantial merits of the case and which permit them to dispense with the rules of evidence'.⁷⁴

The contrast between the way in which civil courts traditionally operate and the manner in which modern tribunals function is summarised in the following comment by former VCAT President, Justice Stuart Morris:

*First, the method of bringing cases before the Tribunal is relatively simple; complex pleadings are unnecessary. Second, the tribunal engages a substantial registry staff to assist parties and to perform work which would ordinarily be done by solicitors in courts of law. Third, hearings are conducted in an ordered manner, but with as little formality and technicality as is practicable. Fourth, the tribunal is empowered to inform itself on any matter as it sees fit and this power is used to promote the fair conduct of a case as well as to achieve a just outcome according to law. For example, tribunal members often ask questions or raise issues in order to overcome an inability of a party to articulate its true case.*⁷⁵

Although the operation of VCAT is outside the terms of reference of stage one of the civil justice inquiry, they are relevant to the jurisdiction of the civil courts in Victoria for a number of reasons. First, appeals may be brought from decisions of VCAT to the civil courts. Second, there are some disputes where some of the matters in issue are within the exclusive jurisdiction of VCAT while other aspects of the same dispute are within the jurisdiction of other Victorian courts. This creates obvious difficulties, which are referred to below.

47 Ibid.

48 Ibid. That is to say, 'only 26.2% of defended disputes were listed for hearing after a conference before the court constituted by a registrar'.

49 Ibid.

50 Ibid.

51 Ibid.

52 Ibid.

53 Ibid.

54 Ibid 28. Matters in the 'target range' are claims for \$30 000 or more.

55 Ibid. These sorts of cases might be referred to pre-hearing conference.

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 Ibid.

65 See Magistrates' Court of Victoria, *Practice Direction No 13 of 2004: Pre-issue Mediation* (2004) <[www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Chief_Magistrates_Directions/\\$file/pd1304.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Chief_Magistrates_Directions/$file/pd1304.pdf)> at 7 February 2008.

66 See Magistrates' Court of Victoria, *Practice Direction No 7 of 2007: Pre-issue Mediation* (2007) <[www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Chief_Magistrates_Directions_2/\\$file/pd707.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Chief_Magistrates_Directions_2/$file/pd707.pdf)> at 7 February 2008.

67 Pre-action procedures are considered in detail in Chapter 2.

68 Magistrates' Court (2005–6) above n 33, 28.

69 Ibid.

70 Ibid.

71 Ibid.

72 Victorian Civil and Administrative Tribunal, *Annual Report* (2005–6) 3. According to the report, VCAT resolved almost 90 000 cases in the financial year 2005–06.

73 See Greg Taylor, *The Constitution of Victoria* (2006), 409–10, referring to Robin Creyke, 'Tribunals, Divergence and Loss' (2001) 29 *Federal Law Review* 404, 405, and Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 *Modern Law Review* 393, 396.

74 Neil Rees, 'Procedure and Evidence in "Court Substitute" Tribunals' (2006) 28 *Australian Bar Review* 41.

75 *Re Ogawa and University of Melbourne* [2005] VCAT 197, [21] cited in Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 55; and Tania Sourdin, *Dispute Resolution Processes for Credit Consumers* (2007) 34.

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VCAT began operating on 1 July 1998. Its stated purpose is to deliver ‘a modern, accessible, informal, efficient and cost effective tribunal justice service to all Victorians, while making quality decisions’.⁷⁶ Justice Morris recently commented that VCAT

*has now emerged as the principal jurisdiction for the resolution of mainstream civil disputes in Victoria. VCAT touches the lives of more Victorian civil litigants, more often, than any other jurisdiction.*⁷⁷

2.4.1 Volume of work

In 2005–06 VCAT finalised approximately 89 000 applications on a total allocation of approximately \$27 million.⁷⁸ During the same year, a similar number of applications were lodged with VCAT.⁷⁹ Of the applications lodged, approximately 66 000 were residential tenancies matters (mainly relating to possession orders or forfeiture or payment of bond money), approximately 9000 were guardianship matters, nearly 7000 were general civil matters, approximately 3500 were planning and environment matters and approximately 800 were domestic building matters.⁸⁰

2.4.2 Jurisdiction

VCAT does not possess any inherent jurisdiction. It has two types of jurisdiction: original jurisdiction and review jurisdiction.⁸¹ The original jurisdiction is defined to be the jurisdiction ‘other than its review jurisdiction’⁸² and is conferred on VCAT by or under an enabling enactment.⁸³ It allows VCAT to make a range of first instance decisions. The review jurisdiction is ‘conferred on the Tribunal by or under an enabling enactment to review a decision made by a decision-maker’.⁸⁴

In some matters it has exclusive jurisdiction; in others, jurisdiction is shared with the Supreme Court or other courts.

The exclusive civil jurisdictions of VCAT are principally in residential tenancies, retail tenancies, domestic building, transport accident injuries, credit (mainly repossession) and drainage. It also appears that VCAT has exclusive jurisdiction in relation to judicial review of decisions of planning authorities under the *Planning and Environment Act 1987*.⁸⁵ Where VCAT has exclusive jurisdiction, it has unlimited jurisdiction. This is particularly relevant in the domestic building area, where the quantum and complexity of the dispute can be significant.

The non-exclusive jurisdictions of VCAT include land valuation, judicial review of decisions by responsible authorities (as opposed to planning authorities) under the *Planning and Environment Act 1987*, state taxation matters (stamp duty or land tax) and civil claims.

2.4.3 Divisions

VCAT comprises three divisions—civil, human rights and administrative. Each division has a number of lists specialising in particular types of cases.⁸⁶

The civil and human rights divisions are primarily responsible for the exercise of VCAT’s original jurisdiction.

The Civil Division deals with disputes involving:

- fair trading (consumer) matters
- credit
- domestic building
- legal practice matters
- residential tenancies
- retail tenancies.⁸⁷

The Human Rights Division deals with matters concerning:

- guardianship and administration
- discrimination
- racial vilification.⁸⁸

The Administrative Division exercises VCAT's review jurisdiction. It deals with disputes about:

- land valuation
- licences to carry on business, such as travel agencies and motor traders
- planning and environment
- state taxation
- other administrative decisions such as Transport Accident Commission decisions and freedom of information issues.⁸⁹

VCAT also reviews decisions made by statutory professional bodies such as the Medical Practice Board of Victoria.⁹⁰

2.4.4 Appropriate forum

Difficulties may arise in circumstances where there are multiple claims arising out of particular factual circumstances. It is obviously undesirable in such circumstances for the claims to be brought in different forums. However, such instances can occur.

Where it is in the interests of justice for a proceeding before VCAT to be referred to a court, the legislation enables VCAT to make an order striking out a proceeding, or part of a proceeding, in VCAT's original jurisdiction if it considers that the subject matter of the proceeding would be more appropriately dealt with by a body other than itself.⁹¹ If VCAT makes an order under this section, it may refer the matter to that other body.⁹²

However, this process cannot be used if the matter is one over which VCAT has exclusive jurisdiction. Where there are related proceedings in a court, this gives rise to the multiple proceedings issue.⁹³

2.4.5 Appeals

Pursuant to section 148 of the *Victorian Civil and Administrative Tribunals Act 1998*:

1. *A party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding—*
 - a. *to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others; or*
 - b. *to the Trial Division of the Supreme Court in any other case—**if the Court of Appeal or the Trial Division, as the case requires, gives leave to appeal.*
2. *An application for leave to appeal must be made—*
 - a. *no later than 28 days after the day of the order of the Tribunal; and*
 - b. *in accordance with the rules of the Supreme Court.*
3. *If leave is granted, the appeal must be instituted—*
 - a. *no later than 14 days after the day on which leave is granted; and*
 - b. *in accordance with the rules of the Supreme Court.*
4. *If the Tribunal gives oral reasons for making an order and a party then requests it to give written reasons under section 117, the day on which the written reasons are given to the party is deemed to be the day of the order for the purposes of subsection (2).*
5. *The Court of Appeal or the Trial Division, as the case requires, may at any time extend or abridge any time limit fixed by or under this section.*
6. *A party that institutes an appeal must notify the principal registrar.*
7. *The Court of Appeal or the Trial Division, as the case requires, may make any of the following orders on an appeal—*
 - a. *an order affirming, varying or setting aside the order of the Tribunal;*
 - b. *an order that the Tribunal could have made in the proceeding;*
 - c. *an order remitting the proceeding to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the court;*
 - d. *any other order the court thinks appropriate.*

76 VCAT (2005–6) above n 72, 1.

77 Stuart Morris, 'Civil Litigation: VCAT and the Courts' (address delivered at a seminar held by the Law Institute of Victoria as part of its Advanced Civil Litigation Seminar Series 2004, Melbourne, 15 April 2004) 1.

78 VCAT (2005–6) above n 72, 3.

79 Ibid.

80 Ibid 4.

81 *Victorian Civil and Administrative Tribunal Act 1998* s 40.

82 *Victorian Civil and Administrative Tribunal Act 1998* s 41.

83 *Victorian Civil and Administrative Tribunal Act 1998* s 44.

84 *Victorian Civil and Administrative Tribunal Act 1998* s 42(1).

85 *Victorian Civil and Administrative Tribunal Act 1998* s 39, and Schedule 1, Part 16.

86 VCAT (2005–6) above n 72, 44.

87 Ibid 2.

88 Ibid.

89 Ibid.

90 Ibid.

91 *Victorian Civil and Administrative Tribunal Act 1998* s 77.

92 *Victorian Civil and Administrative Tribunal Act 1998* s 77(3).

93 This issue arose in *Premier Building & Consulting Pty Ltd v Spotless Group Ltd* [2004] VCAT 1364 (27 May 2004) (Morris J). See Stuart Morris, 'VCAT Practices and Procedures: Recent Developments' (speech delivered to mark the launch of *Pizer's Annotated VCAT Act* (2nd ed), 20 July 2004, Melbourne).

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8. *If the court makes an order under subsection (7)(c), it must give directions as to whether or not the Tribunal is to be constituted for the rehearing by the same members who made the original order.*
9. *A party to a proceeding under a credit enactment that involves a claim not exceeding \$3000 cannot apply for leave to appeal under this section unless that party agrees to indemnify the reasonable legal costs of the other parties in the proceeding.*

2.4.6 Rules Committee

The Victorian *Civil and Administrative Tribunal Act 1998* provides for the establishment of a Rules Committee.⁹⁴

The Rules Committee may, at a meeting, make rules regulating VCAT 'practice and procedure, including any rules required or permitted to be made by [the legislation] or necessary to be made to give effect to [the legislation]'.⁹⁵ The legislation goes on to provide that '[w]ithout limiting the matters in respect of which rules may be made, rules may be made for any matter referred to in schedule 2'⁹⁶ to the Act. 'The power to make rules is subject to the rules being disallowed by the parliament.'⁹⁷

The Rules Committee is empowered to issue practice notes relating to VCAT practice and procedure. It 'must give a copy of each practice note to the minister as soon as practicable after the note is issued'.⁹⁸

The functions of the Rules Committee are to 'develop rules of practice and procedure and VCAT practice notes ...; to direct the education of VCAT members in relation to those rules of practice and procedure and practice notes; [and to carry out] any other functions conferred on it by the President'.⁹⁹

The members of the Rules Committee are 'the President; each Vice-President; a full-time [VCAT] member who is not a judicial member or legal practitioner, nominated by the minister after consultation with the President; an [Australian] legal practitioner nominated by the minister after consultation with the Legal Services Board [and] two persons nominated by the minister'.¹⁰⁰

2.5 THE JURISDICTION OF VICTORIA'S CIVIL COURTS AND TRIBUNALS

In the course of stage one of the present civil justice review, the commission has not sought to examine whether there is a need to modify the jurisdictions of the various courts and tribunals. However, in the course of the inquiry the commission has become aware of various reform proposals and suggestions. These include proposals for an increase in the civil jurisdiction of the Magistrates' Court, following from the conferral of expanded jurisdiction on the County Court, and for the further rationalisation of the distribution of both civil and criminal business between the various state courts and tribunals and within such bodies. This issue is further discussed in Chapter 12.

2.6 THE VOLUME OF CIVIL LITIGATION IN VICTORIA'S COURTS

The most recent publicly available information on the volume of civil litigation in civil courts in Victoria is that published by the Productivity Commission.¹⁰¹ Excluding probate matters in the Supreme Court and Coroners' Court matters, in the financial year 2006-07 there were 196 400 civil court 'lodgements'.¹⁰² This Victorian data includes the Supreme, County and Magistrates' Courts and also the Federal Court.¹⁰³

In the same period, 167 200 civil matters were finalised in the Victorian courts.¹⁰⁴

The issue of delay and the rate at which cases are determined are discussed below.

According to data supplied to the commission in a submission from the Victorian Bar, the volume of civil litigation in Australia has been growing at approximately 2.4 per cent a year since 2001. This was said to be in line with the expansion of the economy, with real GDP growth of 3.3% a year for the same period. However, according to the Victorian Bar, the national market of civil litigation has been changing, with NSW capturing a disproportionate share of the growth compared to Victoria. The Bar expressed concern at the migration of civil work from Victoria to NSW in the Supreme and Federal Courts. According to the Bar, this 'shift' cannot be explained by different economic growth rates or the location of company headquarters. Interviews with general counsel with corporations, major solicitors' firms and barristers suggested that there are four major reasons for this shift of work:

- the superior performance of the Federal and Supreme Courts in NSW
- differences in legislative schemes between Victoria and NSW¹⁰⁵
- transfer of tax matters to the Federal Court
- familiarity and established networks to manage litigation.

Although the 'competitive' position of Victorian courts, compared with those in other jurisdictions, is not a matter which the commission considers as falling within the terms of reference of stage one of the present inquiry, it is relevant that many of the areas where the Bar advocated reform (for the purpose of making Victoria a more attractive venue for commercial and other litigants) are encompassed by the recommendations in the present report.

Apart from the volume of cases filed in Victorian courts it would be of interest to ascertain whether there has been any substantial decline in the number of cases which have proceeded to trial over recent years, such as the apparent major decline in cases tried in US federal courts in recent decades. According to research carried out by the American Bar Association, US federal courts tried fewer cases in 2002 than they did in 1962, despite a fivefold increase in the number of civil cases instituted and more than double the number of criminal proceedings.¹⁰⁶

Justice Hayne has made the following observations concerning the apparent decline in the number of cases tried:

*I do not know whether similar statistics have been gathered in Australia. But I have the clear impression that over the last 15 or 20 years, perhaps longer, the number of civil cases tried to judgment in Australia's State and Territory Courts, and in the Federal Court of Australia, either has diminished, or at least has not kept up with the number of judicial officers in those courts or the increase in the size of the population. My impression is that this is so no matter whether the comparison is made between raw numbers or only between the proportions of cases that are tried to judgment. And my further impression is that statutory modifications to rights to claim damages for accident-related injuries do not provide a complete explanation for these changes. We need to know whether these impressions are right and, if they are, why this has happened.*¹⁰⁷

As Justice Hayne proceeded to note, the inquiry into whether this decline, if it exists, is due to the increase in managerial judging and the greater use of ADR should not stop at that point. It is necessary to examine whether such reasons reveal any causes of popular dissatisfaction with the administration of justice to which we should be giving attention.

These matters are clearly in need of further investigation but fall outside the terms of reference of the first stage of the present inquiry. They may be taken up by the proposed Civil Justice Council, if it is established, or by the commission in the course of the ongoing inquiry.

3. FACTORS INFLUENCING THE CIVIL JUSTICE SYSTEM

A variety of factors influence the operation of the civil justice system and, jointly and severally, have an impact on cost, delay and complexity. Identification of these factors highlights the problematic nature of civil justice reform. Such factors include:

- the inherent complexity of the factual matters in issue in many cases
- the variety and complexity of substantive laws governing claims and defences
- general procedural rules regulating the conduct of civil proceedings
- specific procedural mechanisms for disclosure of documentary and other evidence in the possession of the parties
- particular procedural avenues for obtaining relevant information in the possession of third parties
- the rules of evidence generally and the procedures and practices for expert evidence in particular
- common law, statutory and human rights provisions concerned with procedural fairness
- the availability and utility of procedures for the aggregation and resolution of large numbers of individual claims through statutory class action or representative action procedures

- 94 *Victorian Civil and Administrative Tribunal Act 1998* s 150.
- 95 *Victorian Civil and Administrative Tribunal Act 1998* s 157(1).
- 96 *Victorian Civil and Administrative Tribunal Act 1998* s 157(2).
- 97 *Victorian Civil and Administrative Tribunal Act 1998* s 157(3).
- 98 *Victorian Civil and Administrative Tribunal Act 1998* s 158.
- 99 *Victorian Civil and Administrative Tribunal Act 1998* s 151.
- 100 *Victorian Civil and Administrative Tribunal Act 1998* s 152(1); see also ss 155 and 156 on meeting procedure and the validity of decisions.
- 101 Australian Government Productivity Commission, *Report on Government Services 2008* (2008) Chapter 7 and Appendices <www.pc.gov.au/gsp/reports/rogs/2008> at 7 February 2008.
- 102 *Ibid* [7.17].
- 103 *Ibid*. The Magistrates' Court civil data also include a proportion of lodgments from VCAT.
- 104 *Ibid* [7.19], Table 7.6. The Supreme Court data exclude finalisation of uncontested probate matters.
- 105 The examples cited are (1) the 2003 amendments to the unfair practices provisions of the *Fair Trading Act 1999*, which were said to be prompting corporations to choose the law of NSW for consumer contracts, and (2) the contention that some leading commercial firms are advising clients to use the law of NSW to govern all major domestic construction contracts because of their belief that proportionate liability has a restrictive operation. Submission CP 62 (Victorian Bar).
- 106 These statistics are referred to by Justice Kenneth Hayne, 'The Vanishing Trial' (paper presented at the Supreme and Federal Court Judges Conference, 23 January 2008) 2.
- 107 *Ibid* 3–4.

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- the motivation and conduct of the parties in dispute
- the motivation and behaviour of lawyers acting for the parties in dispute
- ethical rules governing the conduct of lawyers in civil litigation
- the regulations, commercial practices and market forces which determine how legal fees are calculated
- the financial means of the parties
- the availability of external means of funding litigation through legal aid, commercial litigation funding and insurance arrangements
- the costs indemnity rule and legal and discretionary factors which determine how much of the winning party's actual legal costs are recovered from the losing party
- the availability to businesses of tax deductions for legal fees and expenses incurred in litigation
- the total judicial and other court resources available to deal with civil cases and the extent to which those judicial resources are diverted to deal with criminal proceedings
- the manner in which judicial and court resources are deployed and systemically managed
- the way in which individual judicial officers manage civil cases
- the general statutory, inherent and procedural powers conferred on judicial officers for the management and conduct of civil proceedings
- the specific laws and procedures providing for the 'summary' disposal of unmeritorious claims and defences
- the idiosyncratic demands placed on the court system and other parties by 'difficult' or 'vexatious' unrepresented litigants
- available mechanisms for the 'alternative' resolution of civil disputes by means other than a final trial on the merits
- the impact of computer technology, including on (a) the volume and distribution of electronic documents, and (b) the mechanisms available to the court and the parties for the management of civil litigation generally and electronic documents in particular
- appeal rights in respect of both interlocutory and final orders
- diffuse cultural factors which impact on the attitude and forensic conduct of parties in dispute and their lawyers
- human rights obligations
- constitutional considerations
- the attractiveness of other jurisdictions for the litigation of disputes, and the availability of means of resolving disputes other than litigation.

Most of these factors are discussed further below and in other parts of this report. The list is not intended to be exhaustive. The law reform proposals and recommendations in this report touch on many of these areas.

In view of the time frame and limited terms of reference for stage one of the civil justice inquiry, a decision was made to focus on a restricted number of priority areas. The reforms proposed by the commission are not intended to provide a comprehensive solution to all of the identified problems. In any event, many of the factors identified above are not susceptible to influence or change by legislative or procedural reform.

A further complicating factor in considering civil justice reform is that the three courts which fall within the terms of reference of the review deal with an enormously diverse range of matters. There are variations not only in terms of subject matter and the economic dimensions of the disputes, but also in terms of their perceived private and public importance. For example, a small liquidated debt claim in the Magistrates' Court is radically different from a large class action in the Supreme Court, not only in terms of legal and factual complexity, but also in relation to those affected other than the named parties to the proceedings.

To be effective, reforms need to be tailored to the specific problems arising out of particular types of dispute or the particular characteristics of the parties to the dispute. Also, in order to evaluate the impact of reforms and to assess their intended and unintended consequences, there is need for ongoing monitoring and the implementation of further reforms. One of the key recommendations in the current report is that a new permanent body, the Civil Justice Council, should be set up to facilitate these tasks.

Apart from the proposals and recommendations of the commission itself, the present report identifies numerous other proposals for reform made by various individuals and organisations in the course of submissions to and consultations with the commission. These are outlined in Chapter 12. This provides a provisional agenda for both the commission, during the second stage of the civil justice review, and the proposed Civil Justice Council. Alternatively, many of these reform proposals could be implemented by the Victorian Government forthwith.

3.1 THE LEGAL AND FACTUAL COMPLEXITY OF LITIGATION

The number and complexity of the factual and legal matters required to be determined in any individual matter will have an important bearing on the time, cost and resources required for its resolution. As Justice Hayne has observed:

*The amount of time and effort that must be expended is directly related to the number and type of issues that are in play. The more issues there are in a case, the longer its resolution will take. The more uncertainty there is about the content or application of the legal principles that are relevant to the dispute, the less predictable is its outcome. If the outcome is not predictable, it will often be harder to settle the dispute and its trial will be protracted.*¹⁰⁸

One of the factors having an impact on the operation of the civil justice system is the apparent increase in the legal and factual complexity of many civil cases and the disproportionate impact on judicial resources of what has been described as ‘mega litigation’.¹⁰⁹ In the aftermath of the recent *C7* litigation in the Federal Court, Justice Sackville identified a number of factors relevant to the incidence, complexity, duration and cost of civil litigation.¹¹⁰ Such factors include:

- the increasing size, influence and range of commercial activities of large corporations
- the inherent legal and factual complexity of many disputes
- the retreat from the certainties of the law of contract and of commercial law in general in favour of a search for ‘individualised justice’¹¹¹
- the undermining of objectively ascertained contractual intent by the expansion of ameliorative doctrines developed by the courts or incorporated in legislation
- the increasing flexibility of principles developed and applied by the courts and the consequential broadening of admissible evidence and increase in the duration and costs of litigation
- the increasing relevance of the subjective intention or motives of parties
- the extensive use of expert evidence
- the proliferation of courts’ discretionary powers
- the ‘remedial smorgasbord’¹¹² found in some legislation¹¹³
- procedural innovations in the form of class actions and relaxation of the law of standing¹¹⁴
- the increasing mantra of access to justice
- the burden of discovery and the exponential increase in electronically stored and transmitted information
- the use of legal proceedings to pursue commercial objectives not directly related to the relief sought in the proceedings
- the use of the courts as part of a broader corporate strategy also fought out in the media, in the political arena and before regulators.

¹⁰⁸ Ibid 6.

¹⁰⁹ Defined by Sackville J as ‘civil litigation, usually involving multiple and separately represented parties, that consumes many months of court time and generates vast quantities of documentation in paper or electronic form’: *Seven Network Ltd v News Ltd* (‘C7’) [2007] FCA 1062 [2]; see also Richard L. Marcus, ‘Reassessing the Magnetic Pull of Megacases on Procedure’ (2001) 51 *De Paul Law Review* 457; John D Cooke, ‘Judicial Method and Technique in Anti-Trust Litigation: The European Courts’ (2005) 12 *Competition and Consumer Law Journal* 1.

¹¹⁰ Justice Ronald Sackville, ‘Mega-litigation: Towards a New Approach’ (Paper presented at the Annual Conference of the Supreme Court of NSW, Central Coast, NSW, 17–19 August 2007).

¹¹¹ See A M [Murray] Gleeson, ‘Individualised Justice—The Holy Grail’ (1995) 69 *Australian Law Journal* 421.

¹¹² *Akron Securities Ltd v Illife* (1997) NSWLR 353, 364 (Mason P).

¹¹³ See, eg, *Trade Practices Act 1974* (Cth) s 87.

¹¹⁴ See, eg, *Trade Practices Act 1974* (Cth) s 80.

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Many of these factors are relevant to civil cases other than those which may meet the description of ‘mega-litigation’. However, as Justice Sackville noted, mega-litigation itself is an ‘increasing phenomenon’.¹¹⁵ Each such case places considerable demands on the civil justice system. The effective management of such cases, and other civil litigation, is not always able to be achieved by the mere exercise of judicial powers or by the conferral of additional powers.

Constraints on the exercise of such powers arise out of a variety of factors. As Justice Sackville observed, these include legal and constitutional constraints, the degree of cooperation of the parties and the ‘information deficit’ on the part of judicial officers compared with the legal representatives of the parties.¹¹⁶

3.2 PROCEDURAL RULES

The overall objectives of the civil justice system need to be considered with specific reference to the civil procedural rules in operation in the three courts which are the focus of the civil justice review.

3.2.1 Modernisation, simplification and harmonisation

Greater harmonisation of existing procedural rules is presently being achieved through various means, including:

- the adoption of common procedural rules in the County and Supreme Courts
- the present adaptation of the Magistrates’ Court Rules to bring them into greater harmony with the rules of the County and Supreme Courts
- the overlapping membership of the Rules Committees in each of the three courts
- the operation of the Courts Consultative Council
- the operation of the National Harmonisation of Rules Committee
- the work of the Standing Committee of Attorneys-General
- initiatives undertaken by the Australasian Institute of Judicial Administration.

Notwithstanding such important initiatives, the three courts dealing with an enormous diversity of civil matters could not be expected to have uniform rules. A liquidated debt proceeding in the Magistrates’ Court requires a different procedural framework than a class action in the Supreme Court.

However, there are many areas where greater uniformity and simplification are required and to this end a number of proposed further reforms are outlined in this report.

3.2.2 Procedural rules and ascertaining the truth

As a number of commentators have noted, at the foundation of civil procedure lies the objective of getting at the truth.¹¹⁷ Existing civil procedure rules encompass a variety of means of seeking to achieve this and provide a framework for the processing of cases towards adjudication at trial. Such rules include procedural mechanisms for:

- ascertaining factual information before proceedings are commenced (including to identify relevant potential defendants and to obtain information to assess the merits of legal claims)
- specifying the material facts said to found an action or defence and the legal causes of action or defences to be relied on at trial
- disclosing information and documents in the possession of parties and third parties relevant to the issues in dispute
- obtaining expert evidence
- disclosing evidence to be relied on at trial
- obtaining interlocutory orders from the court to assist in the conduct of the litigation
- summary disposal of unmeritorious claims or defences
- costs sanctions for noncompliance with procedural requirements or orders of the court
- regulation and control of the conduct of the parties at trial
- interlocutory and final appeals.

However, the existing procedural and legal framework for the conduct of civil litigation is flawed in a number of respects. A number of the proposals in this report are designed to overcome these deficiencies.

In his review of the civil justice system in England and Wales, Lord Woolf was critical of the fact that the same procedures were applicable to all cases 'regardless of financial weight, complexity or importance'.¹¹⁸

Although there are variations in procedures and practices between and within the civil courts in Victoria, historically, relatively uniform procedures and rules have been available for the conduct of most civil cases within each jurisdiction. In recent years there has been greater differentiation of the procedural regimes applicable to different types of cases through a combination of procedural and jurisdictional rules.

3.3 RESOURCE ALLOCATION AND DISTRIBUTION OF CIVIL AND CRIMINAL CASES

Funding is a critical factor affecting the operation of the civil justice system. The quantity of judicial and other resources available to deal with cases will be an important determinant of the capacity of the civil justice system to deal with the demands of litigants. The manner in which judicial and other resources are deployed to deal with the competing demands of criminal cases will also directly impact on the available resources to deal with civil cases. All three Victorian courts, and many judicial officers within each court, deal concurrently with both civil and criminal cases. In a number of other jurisdictions there have been moves to create separate specialist criminal and civil courts.

Apart from its impact on the level of judicial and other resources, funding will influence the quality of judicial and other court personnel. Levels of remuneration and other factors, such as judicial pensions, have a bearing on the calibre of candidates for judicial office and on the duration of their period in office. The remuneration entitlements of judicial officers are significantly less than what may be earned in private practice. However, noncontributory judicial pensions may have an influence in both attracting people to judicial office and accelerating their retirement.

In considering the level of public funding for the civil courts it is necessary to have regard to the fact that the courts generate income, including through court fees and other charges for services. According to the Productivity Commission, in the 2005-06 financial year recurrent expenditure on court administration for the civil courts in Victoria amounted to \$86.3 million.¹¹⁹ In the same period, income derived through the civil courts in Victoria, excluding fines, amounted to \$33.9 million.¹²⁰ In the 2006-07 financial year, the respective figures were \$86.5 million and \$34.6 million.¹²¹ In recent times there have been increasing calls for users of the court system to pay more for the services provided, including in commercial disputes between resourceful commercial entities.

115 Sackville (2007) above n 110, [2]; see also [5], referring to *Bell Group Ltd v Westpac Banking Corporation*, which occupied 404 hearing days in the Supreme Court of WA; *Australian Securities and Investments Commission v Rich*, which occupied 220 hearing days in the Supreme Court of NSW, without final oral submissions; *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1, which occupied 471 hearing days in the Supreme Court of SA; *Three Rivers District Council v The Governors and Company of the Bank of England* [2006] EWHC 816, discussed in Adrian Zuckerman, 'A Colossal Wreck: the BCCI-Three Rivers Litigation' (2006) 25 *Civil Justice Quarterly* 287.

116 *Ibid* [24]-[25], [28]-[29].

117 See, eg, Adrian Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999) 3, 5; Australian Law Reform Commission, *Evidence: Volume 1, Interim Report No 26* (1985) [54] quoting F C Maugham, 'Observations on the Law of Evidence with Special Reference to Documentary Evidence' (1939) 17 *Canadian Bar Review* 469; and *Jones v National Coal Board* [1957] 2 QB 55, 63 (Lord Denning); Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd ed, 2006) 7; M P Golding, 'On the Adversary System and Justice' in Bronaugh (ed), *Philosophical Law—Authority, Equality, Adjudication, Privacy* (1978) 98.

118 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) [4.8].

119 Includes data for the Supreme, County and Magistrates' Courts (including children's courts) and also the Federal Court. This figure also includes the data for the probate jurisdiction of the Supreme Court. The Magistrates' Court civil data include a proportion of expenditure from VCAT. Recurrent expenditure on court administration is said to encompass costs associated with the judiciary, court and probate registries, sheriff and bailiff's offices, court accommodation and other overheads. Components of expenditure include salary and non-salary expenditure, court administration agency and umbrella department expenditure and contract expenditure: see Productivity Commission, *Report on Government Services 2007* (2007) [6.12],[6.13] Table 6.1, <www.pc.gov.au/gsp/reports/rogs/2007> at 7 February 2008.

120 Income derived from probate matters in the Supreme Court has been included in this figure. Court administration income includes court fees, and revenue from library services, court reporting, sheriff and bailiff activities, mediation, rental and other sources (excluding fines). See *ibid*.

121 Productivity Commission (2008) above n 101, [7.12], Table 7.1. Financial information for the probate jurisdiction of the Supreme Court has been included in both expenditure and income figures.

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Although the level of judicial and other resources available to deal with civil cases, and the allocation of judicial and other resources between civil and criminal matters, are important factors influencing the civil justice system these matters are outside the scope of stage one of the present review.

However, the commission accepts that ‘access to justice’ is a qualified right. Governments cannot reasonably be expected to provide unlimited publicly funded resources for the adjudication of disputes, particularly private disputes that do not have significance beyond the interests of the individual parties. From a policy perspective, there is a need to balance the ‘government’s duty to use public funds responsibly’, including by making difficult decisions between competing priorities, and the obligation of parties in dispute to ‘bear some responsibility for resolving their differences’.¹²²

The following observations of Professor Zuckerman have met with judicial approval in the UK:¹²³

The right of access to court does not, however, entitle litigants to demand the best possible law enforcement process regardless of cost, any more than they are entitled to demand unlimited health support or boundless educational facilities. The only reasonable demand that members of the community can make with respect to any public service is that its funding should be commensurate with available public resources and with the importance of the benefits that it has to deliver. In addition, members of the community have a right to expect that, within available resources, the service should provide adequate benefits to the community.

The test of whether a given public service is adequate is fairly straight forward. A public service is adequate if it is effective, efficient and fair. A service is effective if it meets the reasonable expectations of the community, be they appropriate health service, a satisfactory education system or, indeed, adequate court assistance for the enforcement of rights. A service is efficient if its resources are used to maximise benefit output and are not unreasonably wasted on unproductive activities. A service is fair if the resources available to it are justly distributed between those entitled to the service, whether their needs are present or merely contingent.

The requirements of effectiveness, efficiency and fairness are easily translated to the provision of court dispute resolution. Court adjudication is effective if it determines claims with reasonable accuracy, within a reasonable time and with proportionate investment of litigant and public resources. Court adjudication is efficient if public and litigant resources are employed to maximise effectiveness and are not wasted unnecessarily. Lastly, court adjudication is fair if the system ensures that its resources and facilities are justly distributed between all litigants seeking court help and between present and future litigants.¹²⁴

It would appear to be generally accepted that the goals of the civil justice system cannot be pursued without some moderation, or pursued by unfair means or by exhausting every avenue of inquiry.¹²⁵ As Knight Bruce VC has noted: ‘Truth ... may be loved unwisely—may be pursued too keenly—may cost too much.’¹²⁶

3.4 PROACTIVE JUDICIAL CASE MANAGEMENT OR PARTY CONTROL OF LITIGATION

Whether judicial officers or parties and their lawyers exercise dominant control over the conduct of civil litigation will be an important determinant of how the civil justice system functions. Historically, party control has been paramount in most common law civil jurisdictions, including Victoria. More recently in various jurisdictions, including Victoria, judicial officers have become more proactive in the management and control of cases.

Many recent civil procedural reforms in Victoria and elsewhere arise out of what Lord Woolf has described as the need for ‘a fundamental transfer in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts’.¹²⁷

However, as Professor Scott has observed, judicial case management may not achieve its desired objectives unless certain underlying structural issues are addressed.¹²⁸

The fundamental elements of case management have been described as encompassing:

- judicial commitment and leadership
- court consultation with the legal profession

- court supervision of case progress
- the use of standards and goals
- a monitoring information system
- listing for credible dates
- strict control of adjournments.¹²⁹

Historically, many of these elements have been missing in Victoria's civil courts. At present the missing elements are being gradually implemented. Judicial commitment and leadership are well established at all levels. Consultation with the profession is continuing. Court supervision of case progress is increasing. Standards and goals are being considered if not implemented. Limited monitoring information systems have been introduced and a more sophisticated integrated system (Integrated Courts Management System, ICMS) is scheduled to be introduced in the Supreme Court in September 2008 and implemented in all courts and VCAT by July 2009.

Listing for (early) trial dates remains a problem for some categories of cases in the higher courts. Many judicial officers now appear to be exercising stricter control over adjournments. Although there have been some recent marked improvements many cases are still not disposed of within the time frames proposed by bodies such as the Productivity Commission.

However, as Scott has observed, in functional or organisational terms, courts cannot be readily compared with other organisations, where an input can be readily turned into an output by the application of controlled processes. This is because at various key points courts have no control, or only limited control, over critical variables. Courts have no control over 'inputs' arising out of the decisions of parties to commence cases. Courts have only limited control over any interlocutory 'cottage industry' which may develop. Courts have no control over whether many cases proceed to trial or are settled or discontinued, often on the date fixed for hearing when judicial and other resources have been deployed to hear the matter. Also, courts have, at best, only limited control over the length of trial. In addition to these factors identified by Scott, courts do not have any control over their jurisdiction or new legislation which may substantially affect the volume of civil litigation.

Although modern procedural rules seek to confer additional explicit powers on courts to manage cases and trials, including limiting discovery, witnesses and the time taken, there are legal and 'information' constraints on the exercise of such powers.

A number of these constraints were recently identified by Justice Sackville in the aftermath of the C7 'mega-litigation'.¹³⁰

- Notwithstanding recent important changes in the judicial role and in the manner in which cases are proactively managed, courts arguably still have insufficient effective control over mega-litigation [and other cases].
- Parties can be encouraged or compelled to attend mediation or other forms of ADR to resolve the dispute or narrow the issues. Limits can be placed on discovery and experts. Time limits can be imposed on hearings. However, as noted by Justice Sackville, the reality is that the exercise of these powers depends 'to a great extent on the co-operation of the parties'.
- There are legal constraints on courts, including those imposed by Chapter III of the Constitution. Judicial intervention may result in the trial miscarrying. For example, orders 'limiting the nature and scope of evidence ... could place the integrity of the trial at serious risk'.
- There are limits on the power to order summary judgment.
- The judge also, compared with the parties, suffers an 'information deficit'. This gives rise to the need for judicial caution before overriding the wishes of the parties in relation to the conduct of the case.¹³¹

Thus, as Justice Sackville noted, normally, a judge will err on the side of caution in allowing the parties to 'pursue their own course'.¹³²

In light of these difficulties Justice Sackville has raised the question of what can be done to achieve more effective judicial control of mega-litigation. Many of his observations are equally relevant to judicial management of civil litigation generally. As he noted:

122 New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report No 85 (2004) 10.

123 See, eg, Sir Anthony Clarke, 'The Importance of Civil Justice: Nationally and Internationally' (paper presented at the American Bar Association Conference, London, 3 October 2007) 5 (quoting Zuckerman).

124 Adrian Zuckerman, 'Civil Litigation: A Public Service for the Enforcement of Civil Rights' (2007) 26 *Civil Justice Quarterly* 1, [3].

125 Zuckerman (2006) above n 117, 5, quoting Knight Bruce VC in *Pearse v Pearse* (1846) 63 ER 950, 957.

126 *Pearse v Pearse* (1846) 63 ER 950, 957.

127 Woolf (1995) above n 118, Chapter 8 (Recommendations).

128 Ian Scott, 'Caseflow Management in the Trial Court' in Adrian Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure: Essays on 'Access to Justice'* (1995) 1.

129 Solomon and Somerlot, *Caseflow Management in the Trial Court: Now and for the Future*, study prepared for the American Bar Association, 7, referred to by Scott (1995) above n 128, 1, 7.

130 In the C7 litigation in the Federal Court (*Seven Network Ltd v News Ltd* [2007] FCA 1062), the parties were reported as having incurred legal costs of around \$200 million. There were 22 respondents. The trial lasted 120 hearing days, and the electronic database compiled for the case comprised almost 86 000 documents, amounting to almost 600 000 pages. Documentary material would have been far greater but for the document deletion policy of one of the parties. Apart from the trial there were pre-trial proceedings, including for discovery, and post-trial hearings, including in relation to costs. See Sackville (2007) above n 110.

131 *Ibid* 8–10.

132 *Ibid* 11. In the C7 litigation there was even vigorous opposition by one of the parties to the evidence of experts being given concurrently.

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- There is 'no easy solution'.
- The aspiration of 'just, quick and cheap resolution of the real issues' in dispute is easier to express than to achieve.
- Modern technology may help but it is 'wishful thinking' to assume that modern information technology will solve the problem.¹³³
- 'Vigorous' judicial management and control will help restrict the ambit of the litigation but will not prevent mega-litigation 'imposing an unreasonable burden on the judicial system'.
- The role of the judiciary needs to change further to adopt even 'more rigorous and interventionist pre-trial case management strategies' and greater control over the parties 'in the conduct of the trial itself'.
- Legal and constitutional restraints loom large. Apart from 'traditional constraints on the exercise of judicial power, especially by Chapter III courts', proactive judicial intervention may lead to disqualification on the grounds of reasonable apprehension of bias and pre-judgment.¹³⁴
- Courts need not only a 'greater panoply of case management tools',¹³⁵ but also 'a greater willingness to use them.'
- '[T]raditional adversary procedures, even within a case management system, must be modified'.
- 'Judges must be given explicit statutory powers [and protection] to curtail the scope, duration and expense of mega-litigation even over the express opposition of the parties.'
- A 'guiding principle should be the need to ensure that the ... costs of the litigation are proportionate to the relief sought and that an undue burden is not placed on the court or the judicial system'.¹³⁶

In Justice Sackville's view, the court should be able to exercise powers to:

- 'limit the number and length of expert reports'
- refuse permission for potential experts to give evidence where there are 'reasonable grounds to think that the probative value ... will be outweighed by the danger that the evidence might ... result in an undue waste of time'¹³⁷
- restrict the categories of discoverable documents and impose limits on the cost of discovery
- refer specific issues to arbitration¹³⁸
- impose time limits on the trial and the time available among the parties
- limit the time for lay evidence, including cross-examination
- impose page limits on written submissions and time limits on oral submissions
- provide a template for the parties to follow in making submissions
- provide summary reasons only in determining any contested interlocutory issue
- specify the time it is reasonable to expect the trial judge to devote to preparing a final judgment.¹³⁹

Mindful of current legal and other constraints, Justice Sackville suggested that in order for such powers to be effectively exercised there will need to be legislative reinforcement of such powers and some leeway allowed by appellate courts, particularly in respect of case management decisions that may at present be challenged on the grounds of prejudgment or apprehended bias.¹⁴⁰ As he observed:

Traditional practices and principles may require modification in the interests of efficiency and fairness to other litigants.

Such modifications could facilitate innovations that may startle some who are imbued with the virtues of the traditional adversary system, yet can be justified in the interests of achieving considerable savings in time and costs and improving the chances of litigation being effectively managed ... The departure from the traditional standards of procedural fairness can be justified not only by the advantages gained in the more efficient conduct of mega-litigation but by the safeguards inherent in the obligation ... to give reasons.¹⁴¹

As Justice Sackville expressly acknowledged, legislation to implement the proposed changes will present 'substantial conceptual and drafting difficulties'.¹⁴² However, in his opinion, legislators need to recognise that the 'traditional concept of procedural fairness should no longer govern the conduct of mega-litigation'.¹⁴³ As he noted, 'Too much is at stake for the integrity and effective functioning of the court systems to adhere uncritically to the traditional concept'.¹⁴⁴

Although he stressed that independence and impartiality 'must remain at the core of the exercise of judicial power', in Justice Sackville's view 'the content of these concepts must adapt to the new forensic reality'.¹⁴⁵

At present, many of the problems for the administration of justice generally, and judicial case management in particular, are not limited to those arising out of the relatively recent phenomenon of 'mega-litigation'. Many of the abovementioned observations have broader relevance.

However, as was the case in England and Wales prior to the introduction of the Woolf reforms, there are divisions of opinion in Victoria among judicial officers and members of the legal profession in relation to the desirability or feasibility of proactive judicial management of civil cases. Such divisions arise in part out of differences in perspective on policy, variations in approach to the question of whether more proactive judicial management is practicable (in the absence of additional resources) and differing conclusions drawn from the fact that the overwhelming majority of cases settle in any event.

There does, however, appear to be a considerable consensus on the desirability of proactive judicial encouragement of settlement, including through the use of alternative dispute resolution techniques. Moreover, most judges would probably disagree with the view that 'litigation was a game which litigants or their advisers were at liberty to play at their own pace and that the only duty of a judge was to decide a proportion of those few cases which survived to the last round'.¹⁴⁶

The implementation of effective proactive judicial management of cases does require more than a commitment to this objective. Professor Scott has identified 10 'concerns' which he contends need to be taken into consideration.¹⁴⁷ These may be summarised as follows:

- Because effective case management creates additional work for judges and court staff, extra 'judge power', administrative support and resources are required.
- A comprehensive and reliable management information system is critical to the effective implementation of case management. This also requires appropriate education and training for judicial officers, court administrators, court staff, members of the legal profession and major court users.
- Case management imposes discipline on the courts and the courts must have the capacity to respond to the demands for their services in accordance with the standards and goals of the case management system. One important element is a firm date for hearings.
- It is important to consult with and involve the legal profession in the implementation of any system and in particular in the setting of timescales, system norms and goals.
- Case management systems need to take account of local conditions and the resources of the court.
- Sophisticated case management systems require lawyers to do more work than they were required to do previously. This work is required to be done within shorter timeframes and the capacity to vary deadlines for the convenience of practitioners is restricted. Thus, successful delay reduction programs cost money and for this reason delay reductions do not always result in reductions in costs. Maintaining profitability for lawyers may require practices to be conducted more efficiently.
- Although sanctions for noncompliance are required, an over reliance on sanctions for enforcement is undesirable. However, sometimes more draconian sanctions than costs orders and additional court fees are required. It is also important to ensure that sanctions work without creating further work for the courts. Changes in practice also require a change in the 'culture'. Although Lord Woolf was of the view that a cooperative approach needs to replace adversarial attitudes and conduct, Professor Scott maintains that the role of lawyers in litigation is ambivalent and likely to remain so. In his view, there is evidence of a trend towards excessive combative behaviour of litigation lawyers which will not be quickly reversed. The additional pressures on lawyers of active case management may increase the level of conflict and increase the incidence of aggressive adversarial tactics.

133 As Sackville noted, 'making long trials more manageable, paradoxically enough, may actually have the effect of encouraging mega-litigation': *ibid* 13.

134 See, eg, *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411, see also, in relation to reasonable apprehension of bias: *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337; and *Smits v Roach* (2006) 227 CLR 423, referred to by Sackville (2007) above n 110, 15.

135 Including fast track procedures, such as the procedure recently introduced in the Federal Court.

136 Sackville (2007) above n 110, 12–17.

137 Contrast s 135 *Evidence Act 1995* (Cth).

138 Section 53A(1A) of the *Federal Court of Australia Act 1976* (Cth) provides that the Federal Court can refer matters to arbitration only with the consent of the parties. As Justice Sackville also notes, Chapter III issues may arise if federal courts are empowered to compel the parties to arbitrate. This issue is considered further in Chapters 4 and 5.

139 Sackville (2007) above n 110, 17–18.

140 *Ibid* 18.

141 *Ibid* 19.

142 *Ibid*.

143 *Ibid*.

144 *Ibid*.

145 *Ibid* 20.

146 As Scott notes, Templeton L J spoke disapprovingly of this view in *Towli v Fourth River Property Co: The Times*, 23 November 1976, referred to in Scott (1995) above n 128, 30 (fn 90).

147 *Ibid* 17–29.



- The implementation of effective case management systems has the effect of altering procedural processes, exposes the need for standardisation of rules and results in the substantial modification of pre-trial procedures. According to Scott, such systems are not benign: they threaten the integrity of procedural law. Thus, it is important to ensure procedure does not become a mere adjunct to case management. Procedural law should continue to ‘reflect the “process values”, “procedural rights” and “principles of natural justice” that form the fulcrum of justice’.¹⁴⁸
- The role of judges as proactive case managers should not be allowed to undermine their role as impartial adjudicators. Important discretionary decisions concerning the conduct of cases may be made without knowledge of all the relevant facts, in the absence of admissible evidence and without being required to give detailed reasons. Moreover, pre-trial involvement in the case may lead to the development of bias towards a party or lawyer or a reasonable apprehension of bias by the litigant or lawyer.
- The key to effective case management is judicial commitment and control. Effective court administration requires a partnership between the judiciary and the executive based on a mutual agreement to get the job done. However, judicial officers should remain in overall control, take their responsibilities seriously and discharge them properly.¹⁴⁹

Although these observations were directed at the Woolf reforms in England and Wales, they have broader relevance. Also of direct relevance to the Victorian civil justice system is Professor Scott’s observation that the link between disputes and processes for resolving them is not mechanical: it is dynamic.¹⁵⁰ As he also notes, the failure to understand this helps to explain why so many procedural reforms do not have the intended effect or have unexpected results.¹⁵¹

The recognition of this dynamic relationship between disputes and dispute resolution processes has led to a number of the recommendations in this report. Also, the fact that civil justice reform measures may often not achieve their intended effect, and may give rise to unintended and undesirable consequences, is one of the reasons why the commission has proposed that there should be an ongoing process of evaluation, review and reform through the establishment of the Civil Justice Council.

We presently appear to be experiencing a paradigm shift in the way civil litigation is conducted by the parties and managed by the courts. Historically, the principle of party control of civil litigation was paramount. Courts sought to exercise relatively little control over the manner in which parties conducted cases. More recently, the trend towards greater proactive judicial managerial control of litigation has gained pace.

However, the tension between proactive judicial case management and the procedural rights of the parties has to some extent been resolved in favour of the latter by appellate courts.¹⁵² In the absence of clear legislative authority, attempts by courts to give primacy to principles of case management may fall foul of paramount legal requirements for the just resolution of disputes.¹⁵³

Although at the level of abstract generality it is difficult to disagree with the propositions that the ‘ultimate aim of a court is the attainment of justice and [that] no principle of case management can be allowed to supplant that aim’,¹⁵⁴ in practice the complex and competing private and public interest considerations involved make any attempt at generalisation problematic. As one commentator has noted:

*Differing views as to whom the duty to do justice is owed and its content come to a head in the Australian context when looking at the weight given to case management in determining procedural questions.*¹⁵⁵

A new legal dimension to this problem has been added by the introduction of human rights legislation, which is discussed below.

Historically, party control has been paramount. The present trend towards more proactive judicial control of civil cases is constrained by a number of factors, including:

- uncertainty as to the ambit of judicial power generally and the extent of the rule making powers in particular
- decisions of appellate courts giving primacy to principles of ‘justice’ over practical case management

- the lack of sufficient judicial resources to manage the current volume of matters in the higher courts
- the demands of criminal caseloads which divert judicial officers from civil cases
- deficiencies in case management technology
- the absence of adequate data
- differences in viewpoint about the desirability of proactive judicial case management.

Notwithstanding such constraints, many of the recommendations in this report are designed to facilitate more proactive judicial management of litigation and dispute resolution processes.

3.5 ECONOMIC FACTORS, INCLUDING THE COST OF CONDUCTING LITIGATION

In the course of the present inquiry, the commission has sought to examine various economic incentives, and disincentives, to the efficient conduct of civil litigation and economic and other sanctions for litigants and lawyers who engage in inappropriate conduct.

A number of the commission's recommendations (eg, the proposed Justice Fund) are intended to remove some of the economic disincentives to the pursuit of meritorious claims.

Other recommendations, such as the proposed sanctions for noncompliance with the overriding obligations, seek to introduce new disincentives to the pursuit of unmeritorious claims or defences, and interlocutory applications and appeals which do not have merit. The application of such sanctions to conduct in the course of negotiations and ADR processes (such as mediation and arbitration) conducted ancillary to court proceedings seeks to ensure high(er) standards of conduct in all aspects of the dispute resolution process, both formal and informal.

3.5.1 Availability of public and private resources for funding

As many commentators have observed a judicial decision 'may be unjust not because it is incorrect, but because it comes too late [or at too high a price]'.¹⁵⁶ The temporal and economic dimensions of justice are of critical significance. In recognition of this, Victorian courts have endeavoured to deal with the twin evils of cost and delay in a variety of ways, including through the more proactive management of cases.

Notwithstanding such initiatives, the conduct of civil litigation in the higher courts remains excessively expensive and beyond the financial capacity of many people. This problem has been compounded by the curtailment of civil legal aid schemes by both the state and federal governments in recent years. This is discussed in Chapter 10.

To some extent this decline in publicly funded legal services has been mitigated by the increased willingness of private law firms to take on the conduct of civil litigation, and to advance the out-of-pocket expenses incurred, under speculative fee and retainer arrangements, by the development of pro bono programs and by the emergence of commercial litigation funders.

Commercial litigation funders have been prepared to meet the legal costs incurred in high value legal claims with substantial merit, and also to meet any orders for security for costs or adverse costs. Such assistance, however, comes at a price. Litigants are required to agree to pay to the commercial litigation funder a relatively substantial percentage of the amount recovered at the successful conclusion of the litigation.

In the absence of such sources of assistance, 'the vast majority of Australians simply cannot afford the legal representation they need to make utilisation of our complex legal system a practical possibility'.¹⁵⁷

To a large extent, access to the courts will be determined not by the substantive or procedural rights of the parties, or by the manner in which cases are managed by the courts, but by whether those seeking to enforce or defend their rights have adequate legal representation. Lawyers 'represent the portal through which access to justice is secured'.¹⁵⁸ Or, as has been suggested in the English context, 'access to funding ... is the complex key to the most difficult door to unlock in the search for justice'.¹⁵⁹

Where those without access to lawyers are able to obtain access to the courts as self-represented litigants, their position of disadvantage may to some extent be ameliorated by the trial judge's duty to ensure a fair trial.

148 *ibid* 25.

149 *ibid* 1.

150 *ibid* 29.

151 *ibid* 1.

152 See, eg, the High Court's decision in *The State of Queensland and Another v J L Holdings Pty Ltd* ('*J L Holdings*') (1997) 189 CLR 146. *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* [2007] FCA 1623 is also notable: Finkelstein J stated, in relation to *J L Holdings*, that the 'High Court ruled that case management, while a relevant consideration, does not trump justice to the parties. A close reading of *J L Holdings* shows that the High Court was confining its comments to the case where costs would provide full compensation to the opposite party. However, *J L Holdings* has been applied in many cases where a simple costs order will not do justice between the parties. In *Black & Decker* Finkelstein J commented on *J L Holdings* that: 'The case has, in my view, unfairly hamstrung courts. Almost every day a defaulting party seeks the court's indulgence to extend time, amend documents or obtain some other allowance (often not for the first, second or third time) and successfully relies on *J L Holdings* to obtain relief. It is time that this approach is revisited, especially where the case involves significant commercial litigation. One of the primary objectives of a commercial court is to bring the litigants' dispute on for trial as soon as can be reasonably and fairly done. If, in some instances, the preparation of the case is not perfect so be it. A case that is reasonably well prepared is just as likely to be decided correctly as a perfectly prepared case' ([3]-[4]).

153 See *J L Holdings Pty Ltd* (1997) 189 CLR 146, 154.

154 *J L Holdings Pty Ltd* (1996) 189 CLR 146, 154.

155 David Bamford, 'Litigation Reform 1980-2000: A Radical Challenge?' in Wilfred Prest and Sharyn Roach Anleu (eds), *Litigation: Past and Present* (2004) 146, 162.

156 Zuckerman (2006) above n 117, 5.

157 Wayne Martin, 'Opening Address' (Speech delivered at the National Legal Aid Best Practice Conference, Fremantle, 31 May 2007).

158 Gino E Dal Pont, 'Affordable Justice in 2006—Exploring New Initiatives for Courts, Tribunals, Litigants and the Legal Profession' (paper presented at the 24th Australian Institute of Judicial Administration Conference, Adelaide, 15-17 September 2006) 2.

159 Michael Napier, 'Access to Justice: Keeping the Doors open' (speech delivered at Gresham College, 20 June 2007).



However, as the submission by the Human Rights Law Resource Centre acknowledges, the Australian jurisprudence regarding legal aid emphasises that the right to a fair hearing does not impose an obligation on the state to provide free legal assistance in civil matters.¹⁶⁰ In the view of the centre, the obligation on the state to make the court system accessible to everyone may itself entail the provision of legal aid, and the complexity of some matters is such that legal aid may be required to ensure a fair hearing.¹⁶¹

Of course, substantial public funds are already deployed in the provision of courts, judicial officers, court personnel and mechanisms for the enforcement of judgments. Apart from the significant public costs incurred by the State of Victoria in providing state court facilities and judicial and other personnel, the federal government incurs significant 'cost' through the provision of federal courts and as a result of the substantial loss of revenue arising out of the tax deductibility of legal and other expenses by businesses involved in litigation.

3.5.2 'Loser pays' or costs indemnity rule

The 'costs follow the event' or 'loser pays' rule seeks to transfer the transaction costs of litigation incurred by the winning party to the losing party. This is fair in that it prevents the gain to the winner being eroded by the costs of litigation. It also serves to deter unmeritorious claims or defences and is a judicial tool for the management of the conduct of litigation.

However, it also gives rise to a number of problems. People of limited means may be deterred from pursuing meritorious claims because of the fear of an adverse costs order. Persons of substantial means may be unconcerned at the risk of adverse costs and may not be deterred from pursuing unmeritorious claims or defences. Also, although intended to 'indemnify' the winning party, the increasing disparity between the costs actually incurred in conducting civil litigation and the actual costs recovered from the losing party has a number of undesirable consequences. If the matter is pursued to conclusion the winning party will remain substantially out of pocket and in the case of damages claims the unrecovered legal costs will substantially erode the amount recovered. Moreover, many meritorious claims may not be pursued or may be settled for substantially less than the value of the claim because of the irrecoverable transaction costs likely to be incurred in litigating the case to a successful conclusion. To some extent the latter problem has been addressed by procedural rules and common law rules relating to the award of costs on a full indemnity basis, particularly where offers of compromise have been made and rejected.¹⁶²

In the present report a number of proposals are directed at current problems with the cost indemnity rule in its practical operation in Victorian courts. These recommendations relate to:

- the need to simplify the current bases for taxation of costs
- the costs and inconvenience arising out of the routine taxation and enforcement of interlocutory costs orders
- the principles governing the award of party-party costs
- the problematic disparity between costs incurred and costs recovered by successful litigants.

A number of other proposals seek to reduce the legal costs and out of pocket expenses incurred, or recoverable on a party-party basis, in relation to particular aspects of litigation or in respect of specific items (such as photocopying, etc). Various issues in relation to costs are discussed in detail in Chapter 11.

3.5.3 Professional and commercial practices of the legal profession

In a variety of ways, the professional and commercial practices of the legal profession will have an important influence on the incidence, speed and cost of civil litigation.

Competitive market forces and the financial terms on which lawyers are prepared to conduct cases will have an impact on the incidence of litigation. The availability of pro bono programs, speculative fee arrangements, success fees, civil legal aid, services provided by community legal centres and funding and costs indemnity provided by commercial litigation funders will all have an important bearing on the volume of civil claims. The use of advertising may also increase the number of legal proceedings.

Other aspects of the commercial and professional practices of the legal profession will have an important influence on the pace of litigation. The pervasive use of time costing provides an economic incentive to maximise legal resources and to prolong litigation. Excessive caseloads will directly impact the capacity of lawyers and law firms to conduct civil proceedings. Lord Woolf was concerned that delay was more advantageous to lawyers than to litigants because it allowed litigators 'to carry excessive caseloads in which the minimum possible action occurs over the maximum possible timescale'.¹⁶³ Excessive caseloads are not uncommon in some areas of legal practice in Victoria.

A number of academic commentators have pointed to the professional and business practices of the legal profession as being a major explanation for why the legal system has become 'simply too expensive, too inefficient and too sclerotic to provide a meaningful forum for dispute resolution in the commonplace social interactions that fall within the confines of tort, contract and property law'.¹⁶⁴

Canadian academic Professor Colleen Hanycz suggests that while various factors have contributed to the present state of affairs, 'certainly among the most central has been the way in which the economic self interest of members of the legal profession has served to incentivise the protraction and complication of litigation'.¹⁶⁵ In her opinion:

*While such self interest in other professions might quickly draw attention and censure, what blunts its impact in the field of law is the fact that it can appear to align the interests of the client in our traditional adversarial model. With the duty of 'zealous advocacy' forming a universal pillar of the legal profession, the barrister who leaves no stone unturned on her [or his] march towards adjudication might be said, with approval, to be meeting this duty, whatever the costs that this march might incur.*¹⁶⁶

She proceeds to express the view that a full scale litigation battle, along with interlocutory skirmishes along the way, may not actually favour the client's interests.

English civil procedure expert Professor Adrian Zuckerman also makes the observation that, 'these two economic factors, the natural desire to maximise reward and the systemic incentive, lead irresistibly to forensic practices designed to increase profits'.¹⁶⁷

However, it needs to be borne in mind that these 'economic factors' have several somewhat conflicting policy dimensions. In the absence of commercial incentives, private law firms and commercial litigation funders would not provide legal services to people with meritorious claims. This would result in a substantial denial of access to justice for many current litigants. Law firms currently providing legal assistance to impecunious clients on a conditional fee basis do so primarily because of the prospect of economic reward at the conclusion of the case if it is successful. This also has the effect of introducing a (desirable) economic incentive for the screening out of cases unlikely to succeed.

However, the desire to maximise profitability no doubt increases legal costs incurred by all parties to litigation, thus having a negative impact on proportionality (particularly in relatively low value claims). Moreover, the escalation of costs and delay has negative systemic consequences for current and potential litigants and for the administration of justice generally. The desire to delay and defeat claims which may have merit may be enhanced where substantial legal fees may be generated in the process and where such fees, although payable regardless of the ultimate outcome of the proceedings, may be deducted out of business income which is otherwise taxable.

As Colleen Hanycz has noted, whatever factors may have contributed to escalating costs and delays in civil litigation, 'jurists, policy-makers and scholars seem to have seized upon efficiency as the panacea'.¹⁶⁸

3.5.4 Unavailability of legal expense insurance

In many overseas jurisdictions the private insurance market provides insurance to cover legal expenses and/or the risk of adverse costs orders in civil litigation. For example, 'before the event' insurance arrangements are relatively common in some European countries, including Germany. 'After the event' insurance is relatively widely available in the United Kingdom to cover the risk of an adverse costs order. This insurance is able to be taken out 'after the event' in the sense that the person already has experienced the event giving rise to a legal claim at the time of taking out the policy. Where the legal claim has merit, the insurer assumes the risk of paying any adverse costs order (up to the limit of indemnity provided by the policy) if the claim is unsuccessful. The premium for such insurance is recoverable from the losing party at the successful conclusion of the case.

160 Or in criminal matters: see *Dietrich v R* (1992) 177 CLR 292.

161 Submission CP 36 (Human Rights Law Resource Centre).

162 See *Supreme Court (General Civil Procedure) Rules 2005* O 26.08(2); see also *Calderbank v Calderbank* [1975] 3 WLR 586 and the decision of the Queensland Court of Appeal in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd & Ors* [2006] QCA 414, and the decision of the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298; (2005) 13 VR 435 at [17]–[29] (Warren CJ, Maxwell P and Harper AJA); see also *Orrong Strategies Pty Ltd v Village Roadshow Limited (No 2)* [2007] VSC 205 (Habersberger J).

163 Woolf (1995) above n 118, [12], quoted by Scott (1995) above n 128, 11.

164 Samuel Issacharoff, 'Too Much Lawyering, Too Little Law' in Zuckerman and Cranston (1995) above n 128, 245–6, cited in Zuckerman, 'Lord Woolf's Access to Justice: Plus ça Change (1996) 59 *Modern Law Review* 773, 774, and also by Colleen Hanycz, 'More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform' 227 *Civil Justice Quarterly* 1 (2008) 98, 106.

165 Hanycz (2008) above n 164, 106.

166 *Ibid* 106–7.

167 Zuckerman (1996) above n 164, 776, quoted by Hanycz (2008) above n 164, 107.

168 Hanycz (2008) above n 164, 107.

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Despite various attempts to develop such insurance arrangements in Australia, there is at present no readily available before the event or after the event cover. Interestingly, one of the major Australian commercial litigation funders has recently obtained insurance cover, from an English insurer, to cover the adverse costs liability that the funder has incurred pursuant to litigation funding agreements.¹⁶⁹

3.5.5 Rise in commercial litigation funding

The availability, and judicial acceptance, of commercial litigation funding arrangements has had a significant effect on the civil litigation landscape in recent years. In return for an agreed percentage of the damages or compensation, payable in the event of success, various commercial entities have agreed to finance civil proceedings, assume the risk of paying any adverse costs order made against the assisted party (or the funder) and provide any security for costs ordered by the court.

However, there appears to still be a substantial unmet demand for financial assistance in civil proceedings which has been exacerbated by the curtailment of civil legal aid over recent years. In Chapter 10 we propose a new funding mechanism (the Justice Fund) to address this problem.

3.6 OBJECTIVES AND CONDUCT OF PARTIES

The resolve and resources of persons in dispute are important determinants of both the incidence of litigation and the manner in which cases are conducted. Many of the proposals in this report are directed specifically at the conduct of persons in dispute, both prior to and after the commencement of civil litigation.

The proposals in relation to pre-action protocols are designed to facilitate and accelerate communication and the exchange of information and to provide a relatively structured opportunity to resolve the dispute without the necessity for the litigation to be commenced. These proposals are discussed in Chapter 2.

The proposals in respect of overriding obligations seek to impose high standards of responsible conduct on litigants in connection with the conduct of proceedings, including interlocutory steps and appeals, and also ancillary alternative dispute resolution processes. These proposals are discussed in detail in Chapter 3.

The proposals in relation to self-represented persons seek to provide additional assistance to litigants with meritorious claims and to facilitate earlier and easier disposition of claims or defences which do not have merit or which are vexatious. These matters are dealt with in Chapter 9.

The proposals in relation to case management are designed to reduce party autonomy and facilitate more proactive judicial management and control of litigation. These proposals are discussed in Chapter 5. However, as Justice Hayne has recently observed, this may not be without its own problems:

There are times when we are focussing too much upon process, and too little upon those very practical ends to which the process must be directed. Paradoxically, this is a problem that emerges at its most acute in the over-managing of cases before trial. But it may also manifest itself in an equivalent paradox of under-management.¹⁷⁰

3.7 ADVERSARIAL 'CULTURE', PRACTICES AND PROCEDURES

The present civil justice system is largely adversarial, in the sense that it is 'party-oriented'.¹⁷¹ Historically, at least, this has meant that it is the parties who largely, if not exclusively, determine the issues in dispute, the witnesses to be called, the manner in which each side's case is presented and the manner in which the other party's case is subject to forensic challenge.

Many procedural reforms and changes in practices in most courts in recent years have incrementally transferred control or at least management of various aspects of the conduct of litigation from the parties to the court.

Many of the commission's recommendations in this report seek to further this trend. In particular, Chapter 5 deals with judicial management of disputes; Chapter 4 addresses various means of improving alternative resolution of disputes, including through more active judicial involvement; and Chapter 7 examines how greater judicial control over experts may be exercised.

In his review of the civil justice system in England and Wales, Lord Woolf concluded that an unacceptable situation had arisen out of 'unmanaged adversarial procedure'.¹⁷² In his view, active judicial management of cases was necessary in order to assist in achieving the stated objectives of

improved access to justice through the reduction of inequalities, cost, delay and complexity and to introduce greater certainty as to timescales and costs. The civil justice system in England and Wales was said to have a number of serious defects:

*It is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants.*¹⁷³

As the Australian Law Reform Commission (ALRC) has observed, the traditional adversary system may have a detrimental effect on the ethics and conduct of lawyers:

*Formally, duties to the administration of justice are paramount and take precedence over duties to the client. However, in practice, it is generally recognised that interests of the client are given greater weight by lawyers. Duties to the administration of justice may also be interpreted narrowly so that they do not restrict a lawyer's ability to present the best possible case for their client.*¹⁷⁴

In part the Woolf reforms were intended to encourage a spirit of cooperation between the parties and to avoid unnecessary combativeness, which led to unnecessary expense and delay.

A number of the recommendations in this report have a similar strategic policy objective.

There is, however, a need for caution before assuming that procedural changes will necessarily facilitate a change in forensic behaviour or a more general cultural transition. As Justice Hayne has recently noted:

Except in unusual cases, it will be in the interests of one side of a piece of litigation to obfuscate and delay. Usually only one side of the record will be anxious to isolate the determinative issue in the case and have that decided quickly. The other side will have powerful reasons to avoid that being done.

*In addition to whatever motives a party may have to obfuscate and delay, not all lawyers will find it expedient to reduce the number of directions hearings that are held. They are not unhappy if the case is over-managed. Each hearing will be a source of costs taken to account when budgeted costs to be charged are compared with bills actually rendered. And leaving aside any commercial motive that a lawyer may have to avoid reduction in the number and complexity of directions hearings, many lawyers will find it hard to focus upon the place that a particular directions hearing should have in the progress of the case towards trial.*¹⁷⁵

Apart from party control over the conduct of litigation, the traditional adversarial approach to fact finding in civil courts places the burden on the parties to investigate the facts, adduce evidence and call witnesses. By way of contrast, many other investigative and adjudicatory bodies play an important role in fact finding through the use of 'inquisitorial' powers, including the power to call witnesses.¹⁷⁶

3.8 ALTERNATIVE DISPUTE RESOLUTION

Historically, civil procedural rules were primarily, if not exclusively, concerned with the progression of cases towards adjudication at trial. The current procedural rules remain focused on preparation for trial rather than alternative means of dispute management and resolution. This is despite the fact that a final trial on the merits does not take place in the overwhelming majority of cases. This focus is, however, understandable, particularly given that the court cannot control which cases proceed to a hearing. Moreover, it is often the threat, imminence or cost of trial, and the risk of an adverse costs order, which induces settlement.

Although there is a growing recognition of the importance of dispute resolution by means other than trial, courts have traditionally been constrained from more actively promoting, facilitating, providing or requiring ADR services for a variety of reasons. These include:

- divergent views about the desirability of ADR rather than trial on the merits
- a lack of clearly defined judicial power to compulsorily refer parties to ADR where they have not consented

169 Release to Stock Exchange by IMF (Australia) Ltd, 7 June 2007. See Cashman (2007) above n 9, 188 note 299.

170 Hayne (2008) above n 106, 11.

171 G E P Brouwer, 'Inquisitorial and Adversary Procedures—A Comparative Analysis' (1981) 55 *Australian Law Journal* 207 at 236. See generally: Giuseppe Leroy Certoma, 'The Accusatory System v The Inquisitorial System: Procedural Truth v Fact' (1982) 56 *Australian Law Journal* 288; Wolfgang Ziedler, 'Evaluation of the Adversary System: A Comparison, Some Remarks on the Investigatory System of Procedure' (1981) 55 *Australian Law Journal* 390; David Ipp, 'Reforms to the Adversarial Process in Civil Litigation: Part I and Part II' (1995) 69 *Australian Law Journal* 790.

172 Woolf (1995) above n 118, 13.

173 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) [2].

174 ALRC, *Review of the Adversarial System of Civil Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (1997) [11.15].

175 Hayne (2008) above n 106, 13–14.

176 See, eg, Bedford and Creyke (2006) above n 75, 15.

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- the limited range of external ADR available and the limited number of independent personnel with the requisite expertise and experience
- the lack of judicial and other resources available to provide ADR options through the court system.

In Victoria in recent years there has been an increasing acceptance of the desirability of ADR within the civil justice system at all levels, from VCAT to the Court of Appeal.

Until relatively recently, the judicial role had been largely limited to pre-trial case management, the conduct of the trial and giving a decision. The pre-trial and trial processes largely assumed party control and party autonomy.¹⁷⁷

It is now increasingly accepted that it is also part of the courts' role to proactively manage disputes,¹⁷⁸ including through the proactive control of hearings, procedures and evidence and by facilitating ADR mechanisms.

Several issues remain controversial. As noted above, there are differing views about the desirability of compulsory referral to ADR processes. There is continuing debate about whether such ADR services should be provided by the courts themselves or by alternative service providers. There is also an important policy debate about whether compulsory referral to ADR should encompass mechanisms, such as arbitration, which may result in a binding determination of the dispute other than by consensual agreement between the parties. As noted in Chapter 4, these issues have important public interest, human rights and constitutional dimensions.

Many of the recommendations in this report are designed to facilitate greater use of alternative methods of dispute resolution both prior to the commencement of litigation and once proceedings have been commenced.

The use of ADR may be appropriate in extremely complicated or large disputes which would otherwise require a substantial or 'disproportionate' allocation of judicial resources to resolve them and where this would divert such resources from other matters in need of adjudication and resolution.

Although the commission's proposals seek to facilitate greater use of ADR, both by the parties and by the courts, it will remain a matter for the courts, in the exercise of their discretion, to determine the extent to which:

- certain types of dispute should be referred to other types of 'private' dispute resolution
- judicial resources should be directly engaged in forms of dispute resolution by means other than adjudication on the merits following a hearing.

These questions involve legal, policy and practical resource issues. The task of ADR is different from traditional conceptions of the judicial task, which is to adjudicate disputes. Although there is increasing acceptance that courts can and should play a greater role in proactively facilitating the resolution of disputes by means other than adjudication on the merits following a contested hearing, as noted above, there remain differences of viewpoint concerning the extent to which judges should themselves conduct such ADR processes. Even if in principle this is considered appropriate, there are practical and resource constraints.

If judicial officers are deployed to reduce the resources available to the adjudication of disputes which are unable to be resolved by ADR methodologies, the administration of justice and the proper functioning of the courts may be compromised. On the other hand, if more disputes are resolved through ADR processes, less judicial resources will be required as cases will not go to trial. Although judicial office obviously lends considerable authority to ADR processes, there is a limited number of judges and a substantially greater number of professional non-judicial or former judicial personnel available to handle cases referred to ADR.

Referral to external ADR has the effect of transferring the cost from the public purse to the private litigants. Notwithstanding the obvious advantage of this, there are those who contend that the interests of efficiency and expediency do not justify curtailing the rights of the parties to conduct the proceedings as they see fit.

If parties have the benefit of judicial adjudication of their dispute, or the use of judicial officers in ADR processes, it does not necessarily follow that this should always be at public expense. There is a strong case for requiring certain types of court users to pay the public costs incurred in the provision of court services.

3.9 HUMAN RIGHTS CONSIDERATIONS

Human rights considerations are of increasing relevance to the law governing the conduct of civil proceedings and to legal conceptions of what amounts to a fair trial or a just decision.¹⁷⁹

As Justice Bell of the Victorian Supreme Court has noted in a recent decision, ‘the numerous human rights specified in the ICCPR [*International Covenant on Civil and Political Rights*], including equality before the law and access to justice, form the basis of the human rights set out in Part 2 of the Charter.¹⁸⁰

In the case before him, arising out of a criminal trial of a self-represented litigant before a magistrate, the Charter had no application as it was not in force at the relevant time.¹⁸¹ Thus his Honour proceeded to consider the legal significance of the ICCPR. He noted:

Subject to certain limitations and to an evolving extent, the ICCPR, and those other instruments, may at least inform the interpretation of statutes (so as to be consistent with and not to abrogate international obligations), the exercise of relevant statutory and judicial powers and discretions, the application and operation of the rules of natural justice, the development of the common law and judicial understanding of the value placed by contemporary society on fundamental human rights.¹⁸²

Following a detailed review of relevant authorities Justice Bell held that ‘[e]very judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair’.¹⁸³ This was ‘inherent in the rule of law and the judicial process’.¹⁸⁴ Justice Bell also stated that ‘[t]he proper performance of the duty to ensure a fair trial would also ensure [that the rights specified in the ICCPR] are promoted and respected’.¹⁸⁵

In addition, after 1 January 2007 the provisions of Part 2 of the Victorian Charter are applicable to Victorian civil proceedings.¹⁸⁶ Section 24(1) provides that a party to a civil [or criminal] proceeding ‘has the right to have the ... proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing’.¹⁸⁷ Section 24(3) provides that ‘all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits’. The Charter also provides that ‘so far as it is possible to do so consistently with their purpose, all statutes must be interpreted in a way that is compatible with human rights’.¹⁸⁸ Moreover, ‘[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision’.¹⁸⁹ In any proceeding before a court or tribunal, a question of law relating to the application of the Charter or with respect to the interpretation of a statutory provision in accordance with the Charter may be referred to the Supreme Court in certain circumstances.¹⁹⁰ A declaration may be made that a statutory provision is inconsistent with a human right.¹⁹¹

177 David Weisbrot and Ian Davis, ‘Litigation and the Federal Civil Justice System’ in Prest and Anleu (2004) above n 155, 122, 162.

178 Attorney-General’s Department, Parliament of Australia, *Federal Civil Justice System Strategy Paper* (2003) 4.

179 See generally Joseph M Jacob, *Civil Justice in the Age of Human Rights* (2007).

180 *Tomasevic v Travaglini* (‘*Tomasevic*’) [2007] VSC 337 (13 September 2007) [69]. See also the more recent decision in *Ragg v Magistrates’ Court of Victoria* [2008] VSC 1 (Bell J).

181 *Tomasevic* [2007] VSC 337, [70].

182 *Tomasevic* [2007] VSC 337, [73], footnotes omitted. Bell J proceeded to endorse the remarks of Maxwell P in *Royal Women’s Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 38.

183 *Tomasevic* [2007] VSC 337, [139].

184 *Tomasevic* [2007] VSC 337, [139].

185 *Tomasevic* [2007] VSC 337, [139]; see also [155].

186 *Charter of Human Rights and Responsibilities Act 2006* s 2. In the UK the *Human Rights Act 1998* (UK) c 42 came into force on 2 October 2000. It incorporates into the domestic law of the UK provisions derived from treaty obligations under the *European Convention on Human Rights and Fundamental Freedoms* to which the UK has been a party since 1950.

187 This echoes other provisions on human rights. Article 14(1) of the *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) provides that everyone has the right to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law’. Article 6(1) of the *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) provides that ‘In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

188 *Charter of Human Rights and Responsibilities Act 2006* s 32(1).

189 *Charter of Human Rights and Responsibilities Act 2006* s 32(2).

190 *Charter of Human Rights and Responsibilities Act 2006* s 33.

191 *Charter of Human Rights and Responsibilities Act 2006* s 36.

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Such a declaration of inconsistency does not affect the validity, enforcement or operation of the statute in question or create any legal right or cause of action.¹⁹² However, a ministerial response is required.¹⁹³

The Charter also makes it unlawful for a public authority to ‘act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right’.¹⁹⁴ However, this provision does not apply ‘if, as a result of a [Commonwealth or state statutory provision] or otherwise under law, the public authority could not reasonably have acted differently or made a different decision’.¹⁹⁵ There are also other exceptions.

Acts or decisions of a public authority which are unlawful (otherwise than because of the Charter) may give rise to an application for relief or a remedy on a ground of unlawfulness because of the Charter.¹⁹⁶ However, there is no entitlement to be awarded any damages because of a breach of the Charter.¹⁹⁷

Apart from the direct operation of the Charter, Article 14.1 of the ICCPR provides that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’ Australia has ratified the ICCPR¹⁹⁸ and also the supplementary Optional Protocol,¹⁹⁹ which confers a right of persons affected to complain to the United Nations Human Rights Committee if Australian law does not comply with these human rights provisions.

In *Smits v Roach*²⁰⁰ the High Court considered the question of whether the failure of a NSW Supreme Court judge to make early disclosure of the fact that his brother was a partner of the law firm which was a party to the proceedings before him gave rise to apprehended bias and, if it did, whether there had been waiver of the right to object to the proceedings being determined by that judge. In his judgment Justice Kirby referred to the significance of Australia’s obligations under international law and noted that the essential features of the due administration of justice sought to be protected by the ICCPR are also part of Australia’s domestic law.²⁰¹

In the United Kingdom (UK), the introduction of the *Human Rights Act 1998* has had a significant impact on civil procedure and on the *Civil Procedure Rules*. This is notwithstanding the concern of Lord Woolf to ensure that human rights law did not unduly affect case management decisions.²⁰² However, as Jacob observed, ‘[m]odern civil justice is concerned with expediency and efficiency’.²⁰³ He further remarked that the ‘concern now is not the pursuit of absolute justice but of fairness and efficiency ... [which] reflects a dominance of real-life commercial interests over less definitive ideas of justice’.²⁰⁴ This may give rise to tension or conflict with fundamental human rights which seek to guarantee access to justice.

Some of the areas where there may be tension or conflict between procedural reform and human rights protections include:

- limitations on expert evidence
- limitations on publicly funded legal services
- excessive court fees and charges
- limitations on the calling of witnesses
- limitations on the time allowed for hearings or the cross-examination of witnesses
- limitations on proceedings in public
- compulsory referral to mediation or arbitration
- cases where hearings are not held within a reasonable time
- the nature of the assistance required to be given to self-represented litigants
- restrictions on the right to a final hearing, including through provisions for striking out claims or defences
- economic constraints on the right to a hearing, including security for costs
- paper-based versus oral processes and hearings
- applications for an adjournment
- disclosure obligations and discovery
- exclusion of evidence
- requirements relating to ‘proportionality’
- judicial appointment, tenure and bias
- the funding of the civil justice system.

As one English judge has noted:

*The tentacles of the Human Rights Act 1998 reach into some unexpected places. The Commercial Court, even when exercising its supervisory role as regards arbitration, is not immune.*²⁰⁵

The Human Rights Law Resource Centre submitted that the right to procedural fairness 'ensures litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party'.²⁰⁶ However, as noted in the context of European human rights jurisprudence, states 'enjoy a free choice of the means to be used in guaranteeing a litigant the right to a fair trial'.²⁰⁷ The right to a fair trial, such as that contained in Article 6.1 of the *European Convention on Human Rights*, is not absolute and 'may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate'.²⁰⁸

Similarly, the rights conferred by the Victorian Charter are qualified by the provisions of the Charter itself.

3.10 CONSTITUTIONAL CONSIDERATIONS

Constraints derived from Chapter III of the *Australian Constitution* may have an important bearing on the operation of Victorian courts, which are empowered to exercise federal jurisdiction, or on state legislation affecting such courts.

The constitutional principle established in *Kable*²⁰⁹:

forbids attempts of State Parliaments to impose on courts, notably Supreme Courts, functions that would oblige them to act in relation to a person "in a manner which is inconsistent with traditional judicial process". It prevents attempts to impose on such courts "proceedings [not] otherwise known to the law", that is, those not partaking "of the nature of legal proceedings". It proscribes parliamentary endeavours to "compromise the institutional impartiality" of a State Supreme Court. It forbids the conferral upon State courts of functions "repugnant to judicial process".¹

The issue of 'institutional integrity' has been further elucidated by members of the High Court:

Because Ch III requires that there be a body fitting the description "the Supreme Court of a State", it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. One operation of that limitation on State legislative power was identified in Kable. The legislation under consideration in Kable was found to be repugnant to, or incompatible with, "that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system". The legislation in Kable was held to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court of New South Wales because of the nature of the task the relevant legislature required the Court to perform. At the risk of undue abbreviation, and consequent inaccuracy, the task given to the Supreme Court was identified as a task where the Court acted as an instrument of the Executive. The consequence was that the Court, if required to perform the task, would not be an appropriate recipient of invested federal jurisdiction. But as recognised in Kable, Fardon v Attorney-General (Qld) and North Australian Aboriginal Legal Aid Service v Bradley, the relevant principle is one which hinges upon maintenance of the defining characteristics of a "court", or in cases concerning the Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.²¹¹

Apart from issues of independence and impartiality, courts, as Justice Kirby has recently observed, 'must act in particular ways. There may be innovations and differences between courts. However, there may be limits upon permissible departures from the basic character and methodologies of a court'.²¹² Adjudication is a key feature of the judicial function. Moreover, as Justice Kirby proceeded to note, the High Court has defined judicial power in the following terms:

- 192 *Charter of Human Rights and Responsibilities Act 2006* s 36(5).
- 193 *Charter of Human Rights and Responsibilities Act 2006* s 37.
- 194 *Charter of Human Rights and Responsibilities Act 2006* s 38(1).
- 195 *Charter of Human Rights and Responsibilities Act 2006* s 38(2).
- 196 *Charter of Human Rights and Responsibilities Act 2006* s 39(1).
- 197 *Charter of Human Rights and Responsibilities Act 2006* s 39(3).
- 198 Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980.
- 199 Effective as of 25 December 1991.
- 200 *Smits v Roach* (2006) 228 ALR 262.
- 201 *Smits v Roach* (2006) 228 ALR 262 at [103]–[105].
- 202 See *Daniels v Walker*, also known as *D (a child) v Walker* and *D v Walker* (Practice Note) [2000] 1 WLR 1382, Court of Appeal, 1387. The case arose out of concerns at the report prepared by a jointly appointed expert.
- 203 Jacob (2007) above n 179, 2.
- 204 *Ibid* 6.
- 205 *Mousaka v Golden Seagull Maritime* [2002] 1 WLR 395, 1 quoted in *ibid* 43.
- 206 Submission ED1 32 (Human Rights Law Resource Centre).
- 207 *Steel and Morris v UK*, 68416/01 [2005] ECHR 103, 60 (15 February 2005). This case discussed a state's criteria for eligibility for legal aid.
- 208 *Ashingdane v the United Kingdom*, judgment of 28 May 1985, Series A no. 93, 24–5, 57.
- 209 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.
- 210 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 626 [141] (footnotes omitted).
- 211 *Forge v Australian Securities and Investments Commission* ('Forge') (2006) 228 CLR 45, 115 per Gummow, Hayne and Crennan JJ (footnotes omitted) ; cited also by Kirby J in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* ('Gypsy Jokers') [2008] HCA 4, [102]
- 212 *Gypsy Jokers* [2008] HCA 4, [103], in dissent.

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*Judicial power involves application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them.*²¹³

Similarly, members of the High Court in *Forge* stressed the courts 'capacity to administer the common law system of adversarial trial'.²¹⁴

It may also not be permissible to restrict the constitutional right to appeal from judicial determinations.²¹⁵

The Victorian *Constitution Act 1975* does not give rise to similar impediments and does not provide an explicit right of access to the courts. The Victorian Parliament can confer judicial functions on non-judicial bodies, such as conferring the power to issue injunctions on VCAT.²¹⁶ Further, the Victorian Parliament can confer non-judicial functions on Victorian courts.²¹⁷ The scope is broad:

*The content of a State's legal system and the structure, organisation and jurisdiction of its courts are matters for each State ... nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts.*²¹⁸

In contrast, there is a strict separation of powers in federal courts. The separation of powers doctrine requires that courts constituted under Chapter III of the *Australian Constitution* can only exercise judicial power²¹⁹ and cannot exercise non-judicial power.

Kable limits the plenary legislative power of the states by providing that the 'State cannot legislate in a way that violates the principles that underlie Chapter III.'²²⁰ This means that the Victorian legislature cannot go so far as to vest jurisdiction and powers upon a state court vested with federal jurisdiction that are of such an extreme nature and quality as to render them incompatible with the exercise by the same court of the judicial power of the Commonwealth.²²¹

This limitation can be drawn widely. Justice McHugh expressed the view that:

*Neither Parliament, for example, can legislate in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice or to exercise legislative or executive power.*²²²

Justice Gaudron formulated the test as follows:

*There is nothing to prevent the Parliaments of the States from conferring powers on their courts which are wholly non-judicial, so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth.*²²³

It is clear that issues may arise under Chapter III of the Constitution not only where a state court is in fact exercising federal jurisdiction in a particular case, but also where the jurisdiction in question is state jurisdiction. As the High Court has noted:

*It is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal.*²²⁴ (emphasis added)

The court noted the impossibility of exhaustively defining the minimum characteristics of such an independent and impartial tribunal.

More recently, it has been stated that:

*As a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals.*²²⁵

Within the constraints of the principles referred to above, in general the Commonwealth must take state courts as it finds them.²²⁶

In *Fardon*, McHugh J noted:

*The structure of a State court may provide for certain matters to be determined by a person other than a judge—such as a master or registrar—who is not a component part of the court. If the Parliament of the Commonwealth invests that court with federal jurisdiction in respect of those matters, the investiture does not contravene Ch III of the Constitution, and that person may exercise the judicial power of the Commonwealth.*²²⁷

Moreover, in *Fardon* it was suggested that:

*State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation.*²²⁸

Traditionally, there has been a range of procedural protections for litigants before the court. These protections include an open and public inquiry, the requirements of natural justice, and the obligation to apply the law to the facts of the case.²²⁹

The rules of natural justice are common law principles. Generally they encompass:

- the right to be heard, that is, that a decision maker give to persons whose interests may be adversely affected by a decision an opportunity to present their case. When an order is to be made which will deprive persons of some right or interest or the legitimate expectation of a benefit, they are entitled to know the case sought to be made against them and to be given an opportunity to reply to it²³⁰
- the absence of actual or perceived bias on the part of the decision maker and
- the requirement that the decision be based on logically probative evidence.²³¹

There is, however, a variety of ways in which legislation has encroached on these and other traditional protections without violating constraints derived from Chapter III of the Constitution.

In the recent decision of the High Court in the *Gypsy Jokers Motorcycle Club* case, provisions of state legislation in Western Australia were found (by majority) to be valid, notwithstanding various legal challenges based on alleged violation of the court's institutional integrity, interference by the executive in the judicial process and the prohibition on disclosure of confidential information to the parties and to the public. As Justice Crennan observed in that case:

*Parliament can validly legislate to exclude or modify the rules of procedural fairness provided that there is 'sufficient indication' and 'they are excluded by plain words of necessary intendment'. Whether the obligation to accord procedural fairness is satisfied will always depend on all the circumstances.*²³²

Modification by state statutory provisions of the traditional requirements of procedural fairness do not necessarily violate the standards of independence and impartiality or other standards necessary to meet Chapter III constitutional requirements.

3.11 ATTRACTIVENESS OF COURTS IN OTHER JURISDICTIONS

An additional factor affecting the frequency with which court (or tribunal) proceedings are instituted in any one jurisdiction is the relative attractiveness of courts (or tribunals) in other jurisdictions. The introduction and the expansion of the jurisdictions of the Federal Court and, more recently, the Federal Magistrates Courts have had an important influence on the volume of civil litigation in Victorian state courts. Also, national and international businesses may often be able to choose between the courts in different Australian or international jurisdictions. Within Australia, potential litigants may have a preference for the courts in one particular jurisdiction over the courts in others.

The location of litigation in a particular jurisdiction has an impact not only on the local court system but on the local economy. In its most recent submission the Victorian Bar stressed the positive economic impact of the civil justice system on the Victorian economy and raised concerns that civil litigation, especially commercial work, is migrating to other jurisdictions, particularly NSW, and that Victoria is not attracting work from the large and growing Asian litigation market.²³³

The Bar contended that the full realisation of Victorian Chief Justice Marilyn Warren's vision of Victoria as 'a centre for excellence in litigation' is the best means of reversing the migration of work, improving justice and boosting Victoria's economy. In support of its position, the Bar's submission sets out:

- 213 *Bass v Permanent Trustee Co Ltd* [1999] 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (footnotes omitted). See also the judgment of Crennan J [175].
- 214 *Forge* (2006) 228 CLR 45 at 76 [64] (Gummow, Hayne and Crennan JJ); see also *Gypsy Jokers* [2008] HCA 4 at [162] (Crennan J).
- 215 See *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, 433 [55], 453 [127].
- 216 *Victorian Civil and Administrative Tribunal Act 1998* s 123.
- 217 *Kable v DPP (NSW)* (1996) 189 CLR 51. The Victorian Constitution gives plenary power to the legislature: *Victorian Constitution Act 1975* s 16.
- 218 *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575, 600 (McHugh J).
- 219 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
- 220 *Kable v DPP (NSW)* (1996) 189 CLR 51, 115 (McHugh J).
- 221 *Kable v DPP (NSW)* (1996) 138 ALR 577, 605, 608 (Toohey J), 612 (Gaudron J), 622 (McHugh J), 644 (Gummow J).
- 222 *Kable v DPP (NSW)* (1996) 189 CLR 51, 116 (McHugh J).
- 223 *Kable v DPP (NSW)* (1996) 189 CLR 51, 106 [(Gaudron J)].
- 224 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (Mc Hugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
- 225 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4, [39] (Gummow, Hayne, Heydon and Kiefel JJ).
- 226 *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association v Alexander* (1912) 15 CLR 308.
- 227 *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575, 599 (McHugh J).
- 228 *Fardon* (2004) 223 CLR 575, 601 (McHugh J).
- 229 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.
- 230 *Kioa v West* 159 CLR 550, 582 (Mason J).
- 231 Butterworths, *Halsbury's Laws of Australia*, (at 12 March 2008) 10 Administrative Law, 'IV Judicial Review', (B) Natural Justice or Procedural Fairness, (I) Procedural Fairness: Implication – (CTH) Administrative Decisions (Judicial Review) Act 1977 s 5(1)(a), (A) Introduction..
- 232 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4 at [182]. See also [191].
- 233 Submission CP 62 (Victorian Bar).

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- evidence to support its contention that Victoria is losing out to NSW in the growth of the national civil litigation market and that commercial litigation is rapidly migrating out of Victoria²³⁴
- the importance of a healthy civil justice system to maintaining justice and economic growth
- a framework for reform to realise the vision of Victoria as a ‘centre for excellence in litigation’ and
- a perspective on how the Victorian Government can support an integrated reform agenda.

Although the submission raises a variety of matters which are outside the terms of reference of stage one of the present inquiry, many of the reform proposals adverted to in the submission from the Bar are consistent with a number of reform recommendations in this report. In particular, the submission highlights the need for reforms in the areas of:

- effective case management
- ‘front-load’ issue definition and resolution
- proactive judicial management of core issues and processes at trial
- reform of discovery rules
- increased transparency in costs
- judicial training
- cultural changes in the attitudes and practices of the legal profession
- court statistics and information resources.

Key recommendations in this report are directed at each of these issues.

3.12 PUBLIC OPINION, SOCIAL EXPECTATIONS AND CONFIDENCE IN THE COURTS

Public opinion and social expectations will be important determinants of whether and how parties to civil disputes endeavour to resolve them.²³⁵

The extent to which the public or potential litigants have confidence in the courts will be an important determinant of whether civil proceedings are pursued and of the choice of forum or jurisdiction. In its recent submission, the Victorian Bar contended that various reforms are required for Victoria to become a ‘centre for litigation excellence’ so as to obtain a greater share of the ‘national market of civil litigation’ and to avoid the further ‘migration’ of cases to the Supreme and Federal Courts in NSW.²³⁶

Confidence in and choice of courts will inevitably be determined by factors other than the quality of the decision ultimately handed down, for a number of reasons.

First, and most obviously, the overwhelming majority of cases in all courts do not proceed to final judgment. Confidence in the courts will obviously be enhanced if courts proactively facilitate settlement, by whatever means. At present, in Victoria and in most other Australian jurisdictions, judicial officers and court personnel have developed a variety of mechanisms to achieve the resolution of disputes by means other than trial.

Second, for most litigants the process of litigation will not only have an important bearing on the outcome, but will also generate its own complications, stresses and costs for participants. While most courts are continuing to improve both procedures and processes, in the higher courts in most Australian jurisdictions there would be few who would conclude that there is nothing more to be done in terms of either the optimal use of existing powers and procedures or the allocation of additional resources.

Third, and perhaps most importantly, for most participants in the civil litigation process the perceived quality of the outcome will be tempered by the transaction costs involved. For some, justice is unaffordable, which leads to a lack of confidence in the courts. For others, justice comes at too high a price, thus also undermining confidence in the courts and the legal profession.

Fourth, notwithstanding the breadth of judicial powers, judicial officers and participants in the litigation process are to a large extent constrained by the legislative framework and the civil procedural rules governing the conduct of litigation. Deficiencies in this framework will undermine confidence in the courts.

It is clear there is scope for improvement in this legislative and procedural framework and this is an area where judicial officers, public servants and law reform bodies are all playing an important role. Also, the anticipated time likely to be taken from commencement to conclusion will be an important determinant of confidence in and choice of courts.

However, one of the important lessons from both the Woolf reforms and from other developments in Australia is that there is substantial scope for improving the procedures and processes for dispute resolution *before* the machinery of the court system is mobilised and with a view to avoiding the necessity for litigation. In this respect, the commission is of the view that pre-action protocols are likely to facilitate resolution of significant numbers of disputes which at present result in litigation.

As David Gladwell has noted:

Confucian thought holds that going to court is a failure: a failure by the parties in not having regulated their conduct better, a failure in not being able to resolve their differences themselves and in having to resort to a third party to adjudicate. Recourse to law is something shameful. 'In death avoid hell; in life avoid the courts.' Two and a half millennia later, we in the West have begun to see the sense of that approach.

A leading businessman recently said to the judge in charge of one High Court list: 'It's our intention to put you out of a job. The new emphasis on early settlement has made us realise how much money and time we have wasted in the past.'²³⁷

One of the objectives of a number of the civil procedural reforms proposed in this report is to improve the mechanisms for the early and inexpensive resolution of civil disputes both within and outside the conduct of litigation. In most instances this is likely to be in the interests of litigants, although not necessarily in the commercial interests of lawyers. However, lawyers have an important role to play as both users and providers of ADR processes. Moreover, the Victorian profession has enthusiastically supported ADR initiatives.

4. CIVIL JUSTICE GOALS AND OBJECTIVES

The objectives and principles underlying the civil justice system and a number of factors influencing its operation are examined in this chapter. Specific areas of civil procedure and reform proposals are dealt with in detail in the following chapters.

The objectives of the civil justice system have been defined by the Productivity Commission in the following terms:

The civil justice system sustains and fosters social stability and economic growth through a network of courts, tribunal and legal processes that:

- *resolve civil disputes and enforce a system of legal rights and obligations*
- *respect, restore and protect private and personal rights*
- *resolve and address the issues resulting from family conflicts and ensure that children's and spousal rights are respected and enforced*

By contrast with criminal justice, civil cases involve participants using the legal system as a matter of choice to settle disputes, and the types of parties and possible dispute resolution vary considerably.²³⁸

As the Productivity Commission notes, the justice system is broad and complex, and has many interrelated objectives. However, an 'overarching aim is to ensure that the community has access to a fair system of justice that protects the rights of individuals and organisations/legal entities and contributes to community safety'.²³⁹

The civil justice system comprises the institutional, legal, procedural and judicial framework for the resolution of civil disputes. The system is only functional because most disputes are resolved without litigation and most cases which result in the commencement of legal proceedings are resolved without the necessity for adjudication, by judge or jury, of the conflicting claims of the parties.

However, the civil justice system is more than just a facility for the resolution of individual disputes. As an arm of government the judiciary is vested with the important function of administering the law. This has consequences not just for individual litigants but also for society as a whole.

234 According to the Bar, Commercial and Corporations List matters in the Victorian Supreme Court have been rapidly declining and now only represent 15 per cent of the Victorian Supreme Court's overall caseload, compared with 26 per cent in 2004.

235 Héctor Fix-Fierro, *Courts, Justice and Efficiency: A Socio-legal Study of Economic Rationality in Adjudication* (2003) 5.

236 Submission CP 62 (Victorian Bar)

237 D Gladwell, 'Modern Litigation Culture: The First Six Months of the Civil Justice Reforms in England and Wales' (2000) 19 *Civil Justice Quarterly* 9.

238 Productivity Commission (2008) above n 101, Chapter 7 and Appendices.

239 *Ibid.*

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The fact that this mechanism exists serves to regulate behaviour and to enhance compliance with the law, quite apart from the role courts play in facilitating individual redress through enforcement of the law where transgressions have occurred. As Zuckerman has noted, '[i]n the absence of an effective enforcement system rights would be less likely to be respected'.²⁴⁰

Courts also play an important part in defining and developing the law, which in turn provides guidance for the community generally and for those involved in civil disputes in particular. Individuals, corporations and governments regulate their behaviour not only in accordance with legal norms but also in the knowledge that the court system is available to provide a remedy for unlawful conduct. Thus courts constantly 'stand between the government and the governed, the wealthy and the poor and the strong and the weak'.²⁴¹ This will often involve preventing or correcting abuse of power.²⁴² This role of the courts also encompasses preserving the integrity of institutions, including mechanisms of governance, and 'regulating the balance and separation of powers'.²⁴³

In a number of respects, and particularly in the context of class actions, the role of the courts is to provide remedies for those who have been adversely affected by the failure of regulation, at both a corporate and governmental level.²⁴⁴

However, courts are not merely concerned with remedial measures following breaches of the law. In many areas the courts play an important role, including through the use of injunctions, to prevent contraventions or continuing contraventions of the law.

The manner in which the civil justice system operates and the way in which judicial power is exercised has important implications, not only for litigants but also for public confidence in the administration of justice.

Courts are required not merely to adjudicate disputes but to do so in a manner which is 'just' and 'fair'. These fundamental requirements create tension with the goals of achieving the economical and expeditious resolution of civil proceedings. Achieving a just outcome means not only obtaining the correct result but also doing so 'within a reasonable time and by a proportionate use of court and party resources'.²⁴⁵

The objectives or goals of the civil justice system administered by courts in Victoria may be categorised into those that are *desirable* on the one hand, and on the other hand those that are *fundamental* requirements.

4.1 DESIRABLE GOALS OF THE CIVIL JUSTICE SYSTEM

It is highly desirable that the civil justice system be accessible and affordable; that there be 'equality of arms' between litigants; that the private and public resources required to resolve disputes be 'proportional' to the issues in question; that the process be concluded in a timely manner; that the correct result be obtained after the full facts are ascertained; and that the outcomes of similar cases be consistent and predictable.

4.1.1 Accessibility

It is clearly desirable that the civil justice system be accessible. Accessibility has a number of dimensions. Excessive cost, complexity or delay will undermine or prevent accessibility.

Accessibility will also depend on awareness of legal rights and of available procedural mechanisms for the enforcement of such rights.²⁴⁶ In many instances 'injustice results from nothing more complicated than lack of knowledge'.²⁴⁷

4.1.2 Affordability

If the civil justice system is prohibitively expensive then this will have adverse consequences not only for parties in dispute but also for the administration of justice generally. The cost of access to the civil justice system has a number of dimensions. These encompass the fees and charges imposed by the courts, the cost of engaging professional legal assistance, the cost of witnesses, ancillary out-of-pocket expenses and 'disbursements', the 'loser pays rule' and the disparity between the costs incurred by successful parties and the amount of such costs recovered from losing litigants.

4.1.3 Equality of arms

Treating litigants as equals is a basic goal of justice.²⁴⁸ Parties in the civil justice system should ideally be able to make optimum use of the law, lawyers and the court system with a view to the correct decision being obtained in light of the facts disclosed by the evidence. In reality, inequalities of wealth, power and resources potentially place certain litigants at a strategic advantage.²⁴⁹ To safeguard against abuse courts and procedures should seek to minimise the effects of resource inequalities on outcomes.²⁵⁰

4.1.4 Proportionality

It is increasingly accepted that the costs incurred by the parties and by the public in the provision of court resources should be 'proportional' to the matter in dispute. Relevant dimensions of the matter in dispute include the amount in issue or its importance. As one author has suggested, there is a widely-held belief that we must 'match the extensiveness of the procedure with the magnitude of the dispute'.²⁵¹ According to Lord Woolf's *Final Report*, 'the achievement of the right result needs to be balanced against the expenditure of time and money needed to achieve that result'.²⁵²

There are numerous dimensions to the civil justice debate about proportionality. Although disputes of relatively low value or importance should clearly not require disproportionate private or public resources for their resolution, there is a vexed policy issue as to whether high value civil disputes should be permitted to consume substantial publicly funded court resources, particularly where the parties in dispute are commercial leviathans involved in a commercial dispute with purely financial dimensions and where such parties can readily afford the costs of mediation, arbitration or other 'private' methods of resolving their dispute.

There is also an important question about whether the 'imposition' of 'proportionality' in certain contexts may favour certain litigants, including those with disproportionately greater resources.

In some cases a well-resourced or determined litigant may be prepared to incur costs which are disproportionate to the amount in dispute for a variety of commercial or forensic reasons. This may seek to deter the other party to the proceedings, or other persons with similar claims, from pursuing what may be meritorious claims. In damages proceedings, where a claimant succeeds in pursuing a claim, the fact that a substantial proportion of the costs may not be recoverable from the unsuccessful opponent will erode the damages recovered and leave a justified feeling of resentment at the transaction costs incurred in succeeding. Reforms in relation to proportionality may have a desirable impact by limiting or reducing the use of disproportionate resources by a party with an unmeritorious forensic position.

However, in many contexts, the desire to ensure that only a 'proportionate' amount of resources can be deployed in the conduct of the litigation may lead to constraints on discovery and the use of interlocutory procedures, which may disadvantage particular litigants and impair the quality of justice delivered.

Moreover, the concept of 'proportionality' is not as readily applicable to proceedings where the outcome is not quantifiable in economic terms, including cases which may have important 'public interest' dimensions. In such cases, whether the likely legal costs are 'proportionate' to the importance and complexity of the issues in dispute will inevitably involve value judgments and subjectivity.

However, as Colleen Hanycz notes:

*Assumptions underlying the principle of proportionality hold that high costs and delays in the litigation process discourage disputants from accessing the courts as a means to resolving disputes. By achieving proportionality, it is assumed that [in] the interests of justice, accurate outcomes are balanced with efficient cost-effectiveness, thereby enhancing meaningful access to justice.*²⁵³

Given the increasing primacy of the concept of proportionality in civil justice reform it seems somewhat inconsistent that Australian law continues to prohibit lawyers from entering into fee arrangements with clients whereby fees are calculated as a proportion of the amount in dispute.²⁵⁴ This is despite the fact that policy makers have seen fit to introduce various legislative reforms which cap recoverable legal costs, at least on a party-party basis, by reference to the amount recovered in the proceedings. However, in this as in most other areas of civil justice, there are competing policy considerations. Those relevant to the present prohibition on fees being calculated as a percentage of damages are discussed in Chapter 11.

240 Adrian Zuckerman, 'Court Adjudication of Civil Disputes: A Public Service That Needs to be Delivered with Proportionate Resources, Within a Reasonable Time and at a Reasonable Cost' (Paper presented at the 24th Australian Institute of Judicial Administration Annual Conference, Adelaide, 15–17 September 2006) 1.

241 Courts Consultative Council (2004) above n 3, [1.4.1], [1.2] quoting Sir Gerard Brennan, 'Courts Democracy and the Law' (1991) 65 *Australian Law Journal* 32, 40.

242 James J Spigelman, 'Measuring Court Performance' (Paper presented at the 24th Australian Institute of Judicial Administration Annual Conference, Adelaide, 15–17 September 2006) 19–20.

243 Weisbrot and Davis (2004) above n 177, 128. See also Spigelman (2006) above n 242, 13–14.

244 Deborah R Hensler, 'Private Litigation as (a Form of) Governance' (Paper presented at University of Melbourne Law School, August 2007) 6.

245 Zuckerman (2006) above n 240, 8.

246 Attorney-General's Department (2003) above n 178, 6.

247 Murray Gleeson, 'Opening Address' (Speech delivered at the National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006).

248 Zuckerman (1999) above n 117, 5.

249 Hazel Genn, 'Access to Just Settlements: The Case of Medical Negligence' in Zuckerman and Cranston (1995) above n 128, 394.

250 Ibid.

251 Robert M Goldschmid, *The Major Themes of Civil Justice Reform* (Discussion Paper prepared for the British Columbian Ministry of the Attorney General's Civil Justice Reform Working Group) (2006) 20.

252 Woolf (1996) above n 173, Ch 2 [17], [27].

253 Hanycz (2008) above n 164, 106.

254 Relevant issues, including the arguments for and against percentage conditional fees, are discussed in Chapter 10.



4.1.5 Timeliness

It is clearly desirable that civil cases proceed with a minimum of delay. However, nobody realistically expects instant justice. Reasonable delays are to be expected in a system which does not have infinite resources and where the factual and evidentiary material relevant to the resolution of many disputes is not readily available to all parties or to the court at the inception of the proceedings.

At present there do not appear to be any readily agreed or uniformly complied with time frames for the adjudication of civil disputes, at least in the higher courts in Victoria. There does, however, appear to be increasing acceptance of the view that the timely adjudication of disputes is 'as much part of the court's function as the obligation to decide disputes on their substantive merits'.²⁵⁵

Moreover, inordinate delay in handing down a decision after the conclusion of a case may result in a denial of procedural fairness, especially where a decision requires assessment of the credibility of witnesses.²⁵⁶

In some jurisdictions, a time limit for making decisions has been statutorily imposed on tribunals, but failure to comply with the time frame does not necessarily invalidate the decisions.²⁵⁷ However, even in the absence of statutory provisions protracted delay may result in judicial decisions being set aside.

The Productivity Commission has established 'national standards' for the timely processing of cases.²⁵⁸

In Magistrates' Courts:

- no more than 10 per cent of lodgements pending completion are to be more than 6 months old
- no lodgements pending completion are to be more than 12 months old.

In the Supreme and County Court and all appeals:

- no more than 10 per cent of lodgements pending completion are to be more than 12 months old
- no lodgements pending completion are to be more than 24 months old.

In the view of the Productivity Commission, performance relative to these timeliness standards indicates 'effective management' of caseloads and court 'accessibility'. However, as it acknowledges, the time taken to dispose of cases is not necessarily indicative of delay arising out of court administration. Some delays are caused by factors other than those related to the workload of the courts (eg, the unavailability of a witness). According to the Productivity Commission, the following factors may affect the timeliness of case processing in the civil courts:

- in contested cases a single case may involve several related applications or issues that require judgments and decisions of the court
- the conduct of parties may significantly affect delay, including through adjournments that are outside court control
- the court may employ case management or other dispute resolution processes, such as mediation, that are alternatives to formal adjudication
- an inactive case is regarded as closed or finalised one year after the last action on the case.²⁵⁹

There are of course a multitude of other complicating factors. The judicial and other court resources available to deal with civil cases will have a critical impact on delay.²⁶⁰ In courts with both civil and criminal caseloads the demands of criminal cases may substantially diminish the amount of judicial resources available to deal with civil matters. In Victoria in recent years this has been exacerbated by the demands of long and complex criminal trials arising out of police corruption, gangland killings, organised crime and terrorism cases. Moreover, complicated civil cases, including class actions and corporate 'mega-litigation', will consume a disproportionate share of judicial resources.

In many respects the control of civil litigation by the parties and the court is a managerial nightmare. There are many variables over which each participant has no control or no effective control.

Also, as the Productivity Commission acknowledges, 'diversion programs' for civil cases will have an important bearing on caseloads, disposition rates and delay. Civil cases may be referred to arbitration, mediation or to a referee. In such cases:

*Success at mediation (settlement of the case) or at arbitration (acceptance of the arbitrator's award) generally finalises cases earlier than if finalised by trial and judgment. Where the mediation or arbitration is unsuccessful, the delaying effect on finalisation is highly variable.*²⁶¹

Based on the most recent statistics published by the Productivity Commission, as at 30 June 2007 none of the civil courts in Victoria²⁶² met the benchmark standards for the timely disposition of cases referred to above. However, such standards were not met by most criminal and civil courts in almost all Australian jurisdictions.

4.1.6 Getting to the truth

To adjudicate civil disputes, and to facilitate settlement, it is desirable to ascertain the facts. This process is somewhat problematic in the civil courts. Current civil procedural rules and court processes place primary if not exclusive responsibility for this on the parties. Courts do not see it as their responsibility to investigate or ascertain the facts other than on the basis of evidence adduced by the parties.

There remain doubts about both the legal power and the desirability of judicial officers engaging in proactive fact finding, including by calling witnesses.²⁶³ In part this is because traditionally the adversarial system of civil justice requires the parties to find, call and question witnesses. This results in each party selecting those considered to be favourable to its case and excluding persons with relevant factual knowledge or expert opinions considered unfavourable to that party's case.

This problem is exacerbated by the fact that, with limited exceptions, there is little if any opportunity to test the other side's case, or to question witnesses favourable to the other side (other than with their consent), prior to the final trial. The problem is compounded by the fact that relatively few cases proceed to final trial.

Although procedural mechanisms exist for disclosure of the material facts, evidence and legal contentions, these often give rise to significant cost and delay.

To date, civil procedures and the attitude of the parties and their legal representatives has not been conducive to ensuring that all relevant forensic cards are placed on the table at the earliest practicable opportunity.

Insofar as the object of civil procedural rules is to facilitate fact finding and the ascertainment of truth, such rules have a number of serious deficiencies. These include:

- the absence of any requirement for communication or disclosure between parties in dispute prior to the formal commencement of court process
- the absence of any requirement to disclose relevant evidence in the possession of parties even at the date of commencement of civil litigation
- limited options for compulsory oral examination of potential witnesses, parties or third parties prior to the conduct of the final trial
- legal restraints on access to information in the possession of persons subject to confidentiality obligations arising out of express confidentiality agreements or employment arrangements
- the absence of provisions for interim expedited access to readily identifiable documents in the possession of parties, prior to the completion of formal, complex, time-consuming and expensive discovery procedures.

The reform proposals in this report address each of these problem areas.

4.1.7 Reaching the correct result

The judicial system seeks to reach the 'correct' result by ascertaining the facts, through admissible evidence, and applying the relevant law. The procedural mechanisms by which this is achieved may still be considered to be "'just" even if individual decisions arrived at by this process are sometimes erroneous'.²⁶⁴

Individual judicial fallibility is assumed by the existence of extensive mechanisms for appellate review. Additional judicial resources are deployed on each appeal in the expectation that an increase in the number of legal minds brought to bear on the case will improve the probability of a correct decision.

255 Zuckerman (2006) above n 117, 11; see also 16 including the reference to *O'Brien v Chief Constable of New South Wales Police* [2005] UKHL 26, [6], [25].

256 See, eg, the majority decision of the High Court in *NAIS v Minister for Immigration and Multicultural Affairs* (2005) 223 ALR 171 arising out of a decision by the Refugee Review Tribunal. The case involved judicial review of an administrative decision for jurisdictional error. See also the decision of the NSW Court of Appeal following the protracted delay in giving judgment in the litigation arising out of the 'Copper 7' IUD: *Moylan v Nutrasweet Co* [2000] NSWCA 337.

257 In some instances, a tribunal is required to act 'as quickly as practicable'. See, eg, *Administrative Decisions Tribunal Act 1997* (NSW) s 73(5)(a).

258 See Productivity Commission (2008) above n 101, 7.25, Chapter 7 and Appendices.

259 According to the Productivity Commission, Victorian Magistrates' Courts have not applied this deeming rule, which may result in an increased pending caseload with longer duration: *ibid* 7.27, Chapter 7 and Appendices.

260 The Productivity Commission report includes data on the number of judicial officers available in each jurisdiction to deal with cases. Data are also provided on the number of full time equivalent judicial officers per 100,000 people in each jurisdiction. See *ibid* 7.31 (tables 7.11 and 7.12), Chapter 7 and Appendices.

261 *Ibid* 7.28, Chapter 7 and Appendices.

262 The overall aggregate data, in a number of categories, include both Victorian state courts and Federal Court cases in Victoria.

263 This issue is discussed in detail in Chapter 5.

264 Zuckerman (1999) above n 117, 4.



Yet differences of judicial viewpoint are not uncommon at appellate level. In many instances there is no manifestly correct conclusion. Many matters involve questions of degree and judgment. Many judicial decisions involve the exercise of discretion. The applicable law may be unclear or undeveloped. The relevant facts may be far from clear cut. Civil decisions are based on probabilities, not certainties. The objective of achieving the 'correct' result is constrained by these realities.

Notwithstanding such constraints, there appears to be very little, if any, major concern about the quality of judicial decision making in Victorian courts or the competence of judicial officers. Similarly, there would appear to be no basis for concern about the independence and impartiality of the judiciary. However, it cannot be reasonably expected that judicial decisions are free from error. Every system has a 'percentage of error'.²⁶⁵

At present, the extensive rights of appeal from primary judicial decisions provide wide scope for appellate review and correction of errors. However, to permit 'successive appeals in the hope of producing an answer which accords with perfect justice is to kill the parties with kindness'.²⁶⁶ In other jurisdictions, appeals as of right have been curtailed by the introduction of leave requirements. There have also been increasing suggestions of a need for additional constraints on interlocutory appeals. A number of the proposals in this report seek to achieve a reduction in interlocutory applications. Chapter 12 discusses a number of issues in relation to interlocutory appeals.

In both the County Court and the Supreme Court in Victoria not all civil cases are determined by judges. Juries are still used in many cases. Decision making by juries is relatively instantaneous and usually final. Appeals from jury decisions are less likely to be pursued, or successful, compared with appeals from judicial decisions. In part this is because juries are not required to give reasons for their decisions and thus appellate scrutiny is constrained.

In its recent submission the Victorian Bar observed that clients who regularly use the civil justice system report that access to a pool of high quality judges is the single most important criterion in selecting a court and a determinative factor for the effective operation of case management systems. According to the Bar, developing and sustaining judicial excellence in the civil justice system is a fundamental pillar of any reform effort. In various parts of this report we recommend additional judicial training and improved systems and data to enhance judicial administration and performance evaluation.

In its submission the Bar also contended that, for the superior courts, a commitment to judicial excellence involves a number of initiatives focused on deepening and broadening the expertise and abilities of the courts to the maximum extent possible. The Bar suggested one approach could be to build a package of 'judicial excellence initiatives' around the themes of: comprehensive judicial training, creating a more transparent review of the performance of the judiciary and developing a clear strategy for 'judicial talent management'. The commission agrees with the thrust of the Bar's proposal but has not focused in detail on all of these matters in stage one of the inquiry. Some of these matters may be taken up in stage two of the inquiry, or by the Civil Justice Council if it is established.

4.1.8 Consistency and predictability

Inconsistency and unpredictability in the civil justice system are highly undesirable for a variety of obvious reasons. Conduct in the community generally, by individuals, entities and governments, is regulated according to perceptions of the applicable law and predictions about the likely outcome of litigation.²⁶⁷

4.2 FUNDAMENTAL REQUIREMENTS OF CIVIL JUSTICE

The abovementioned attributes of the civil justice system are *desirable* in the sense that they are goals which are sought to be achieved. A number of additional features of the civil court system are essential or *fundamental* requirements. The proven failure to satisfy any of these requirements is likely to lead to a judicial decision being set aside.²⁶⁸

These requirements are fairness, openness, transparency, the application of substantive law, including the laws of evidence, and the independence and impartiality of judicial officers.

4.2.1 Fairness

Fairness is a fundamental requirement of the civil justice system. Justice requires not only 'fair' results but also outcomes arrived at by fair procedures.²⁶⁹ As Justice Gaudron has observed (albeit in the context of the criminal trial): 'The requirement of fairness is not only independent, it is intrinsic and inherent.'²⁷⁰

The requirement of procedural fairness encompasses a variety of dimensions, each of which is separately addressed in this chapter.

Section 24 of the Charter provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a *fair and public hearing*.²⁷¹

According to the submission by the Human Rights Law Resource Centre:

The right to a fair hearing is an essential aspect of the judicial process and is indispensable for the protection of other human rights. In essence, the right to a fair hearing requires a party to be able to present his or her case and evidence to the court under conditions that do not place him or her at a substantial disadvantage when compared with the other party. The basic elements of the right to a fair hearing are:

- *equal access to, and equality before, the courts*
- *the right to legal advice and representation*
- *the right to procedural fairness*
- *the right to a hearing without undue delay*
- *the right to a competent, independent and impartial tribunal established by law*
- *the right to a public hearing; and*
- *the right to have the free assistance of an interpreter when necessary.*

4.2.2 Openness

It is a fundamental requirement of the administration of justice that it be carried out in the open.²⁷² The proposition that justice must not only be done, but must also be seen to be done, is critical not only from the perspective of the parties to the dispute but also for public confidence in the administration of justice. It is also of 'constitutional significance'.²⁷³

The common law principles underlying the importance of open justice and the limited circumstances which may justify a departure from it have been the subject of a number of cases, particularly in the criminal law context.²⁷⁴

In Victoria the Charter incorporates the right to a 'public hearing'. Judgments and decisions of a court or tribunal are to be made publicly available, 'unless the best interests of a child otherwise requires or a law other than [the] Charter otherwise permits'.²⁷⁵

As suggested, there are several recognised exceptions to this 'requirement'. There are many instances where oral or documentary evidence may be in camera or even allowed without one of the parties having access to the evidence. An example of the former is where legislative provisions permit courts to be closed when child victims of sexual assault give evidence (and this is consistent with the aforementioned

265 Zuckerman (2006) above n 117, 9, quoting a lecture by Lord Devlin in 1970, later cited in Woolf (1995) above n 118, 9.

266 *Piglovska v Piglovski* [1999] 1 WLR 1360, 1373 (Lord Hoffman), quoted by James J Spigelman, 'Access to Justice and Access to Lawyers' (Speech delivered at the 35th Australian Legal Convention, Sydney, 24 March 2007).

267 Alberta Law Reform Institute, *Class Actions* (2000) 9.

268 To some extent, this dichotomy between *desirable* objectives and *fundamental* requirements is artificial in the sense that in some instances substantial delay may result in a decision being set aside in the same way that a failure to ascertain or apply the relevant facts may lead to judgments being overturned on appeal.

269 James J Spigelman, 'Seen to be Done: The Principle of Open Justice', (Speech delivered at the 31st Australian Legal Convention, 9 October 1999, Canberra), (2000) 74 *Australian Law Journal* 290. According to Justice John Basten, 'the question of whether procedural fairness is a freestanding principle of the general law, or an implied statutory constraint on the exercise of administrative and judicial power, apparently remains unresolved': John Basten 'Limits on Procedural Fairness' (Paper delivered at the AIAL Administrative Law Forum, 30 June 2005, Canberra).

270 *Dietrich v R* (1992) 177 CLR 292 [3]. See also *Jago v District Court (NSW)* (1989) 168 CLR 23.

271 Section 24 *Charter of Human Rights and Responsibilities Act 2006*. See also Art 14 *International Covenant on Civil and Political Rights*. As Justice John Basten has noted, with reference to Art 14, these are concepts of indeterminate application and involve imprecise standards: John Basten 'Limits on Procedural Fairness' (Paper delivered at the AIAL Administrative Law Forum, 30 June 2005, Canberra) at 2.

272 See Wayne Martin, 'Access to Justice—The Media, the Courts and the Public Record' (Speech delivered at the Australian Press Council, Perth, 22 March 2007); Spigelman (2007) above n 266; Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (Speech delivered at the Media Law Resource Centre Conference, London, 20 September 2005); Spigelman (2000) above n 269; and Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29. See also: *Re Applications 2004* (2004) 9 VR 275 (Winneke P, Ormiston and Vincent JJ) concerning ss 18 and 19 *Supreme Court Act 1986*.

273 Spigelman (2005), above n 272. See also Taylor (2006) above n 73, 452 (referring to the decision of Gaudron J (in dissent) in *Re Nolan, ex parte Young* (1991) 172 CLR 460, 496) Taylor states that the decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 511 'raises the possibility that, in order to protect the appearance of institutional integrity ... basic procedural principles, such as the openness of courts to the public, may also be protected by the [principles enunciated in that case]'.²⁷⁴

274 See, eg, *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; *Lodhi v R* [2006] NSWCCA 101; *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84; *Witness v Marsden* (2000) 49 NSWLR 429.

275 *Charter of Rights and Responsibilities Act 2006* s 24(3).

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provision of the Charter). An example of the latter is where confidential evidence submitted by one of the parties in relation to the merits of the claims in class action proceedings is considered by the court in determining whether to approve proposed terms of settlement, without such information being available to the other parties.²⁷⁶ However, as Chief Justice Spigelman has noted:

*'The exceptions to the principle of open justice are few and strictly defined ... It is now well accepted that the courts will not add to the list of exceptions but, of course, Parliament can do so, subject to any Constitutional constraints.'*²⁷⁷

4.2.3 Transparency

Apart from the fact that civil proceedings are required to be held in public there is a requirement of 'transparency' in the sense that judicial decisions are made public and, unlike jury decisions, are required to specify reasons. If a judicial determination is not supported by legally adequate reasoning it may be overturned on appeal. This helps to ensure that decisions are based on sufficient legal and evidentiary grounds and is an important safeguard against capriciousness.

This safeguard comes at a cost to the parties and to the court system. The time required to prepare judgments usually means that there will be a delay between when the hearing concludes and when the decision is handed down. It also requires the judicial officer to spend considerable time preparing judgments which are reserved. This will often require time out of court to prepare written judgments. In some matters a decision, with *ex tempore* reasons, may be given at the conclusion of the hearing, particularly in less complex matters. However, this is the exception rather than the rule.

As Campbell notes, there are few statutes which expressly deal with the duty of judges to give reasons for their judgments.²⁷⁸ The nature of this duty has been largely articulated by appellate courts.²⁷⁹

4.2.4 Substantive law application

In the adjudication of disputes courts are required to apply the relevant law.

Unlike some statutory tribunals, which are not strictly bound to apply the laws of evidence or to comply with other technical procedural rules,²⁸⁰ courts are generally required to apply the laws of evidence, subject to any applicable statutory exclusions or exceptions.

4.2.5 Independence

In *Smits v Roach* Justice Kirby observed that:

*'Independence' connotes separation from other branches of government but also independence from the litigants, their interests and their representatives.*²⁸¹

A leading commentator, Professor Stephen Burbank, has defined judicial independence as follows:

*True judicial independence ... requires insulation from those forces, external and internal, that so constrain human judgment as to subvert the judicial process.*²⁸²

Institutional independence has been defined by Sir Guy Green in the following terms:

*Judicial independence [is] the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise control.*²⁸³

The Australasian Institute of Judicial Administration has noted the importance of judicial independence:

*Much has been written about judicial independence both in its institutional and individual aspects. Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. There are two aspects of this concept that are important for present purposes: Constitutional independence and independence in discharge of judicial duties.*²⁸⁴

Section 24 of the Charter provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, *independent* and *impartial* court or tribunal.

Chief Justice Martin notes that the distinction corresponds to another distinction which is often drawn between institutional independence (see definition above) and individual independence:

*Individual independence, or impartiality, is the absence of a personal interest in, or prejudice towards, the particular issues to be determined by the tribunal or court in a particular case.*²⁸⁵

Chief Justice Gleeson has argued that it is a collective responsibility of the judiciary to see that the community values judicial independence and, at the same time, to meet the legitimate expectations that judges, in appropriate ways, give an account of themselves.²⁸⁶

The issues of the administrative independence of courts from the public service and the organs of government and the issue of 'court governance' remain the subject of ongoing debate in Victoria and elsewhere.²⁸⁷ This issue is referred to in Chapter 12.

4.2.6 Impartiality

It is fundamental to the civil justice system that judicial officers in Australian courts uphold 'very high standards of manifest neutrality and impartiality'.²⁸⁸

Impartiality has been defined as 'a state of mind or attitude of the court or tribunal in relation to the issues and the parties in a particular case'.²⁸⁹ In *Smits v Roach* Kirby J noted that:

'Impartiality' is concerned with the judge's approach to the hearing and the determination of matters in dispute.

The requirement of impartiality arises out of Australian common law, the provisions of the Victorian Charter and the *International Covenant on Civil and Political Rights*²⁹⁰ and has been said to have a constitutional dimension. In *Ebner v Official Trustee in Bankruptcy*²⁹¹ Justice Gaudron said:

[In] my view, Ch III of the Constitution operates to guarantee impartiality and the appearance of impartiality throughout the Australian court system.

The Australasian Institute of Judicial Administration has made the following observations concerning impartiality:

*It is easy enough to state the broad indicia of impartiality in court—to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides. None of this, however, debars the judge from asking questions of witnesses or counsel which might even appear to be 'loaded' in order to gain a better understanding and eventual evaluation of the facts, or submissions on fact or law. The more difficult and often controversial area concerns the judge's extra-judicial activities, which may give rise to a challenge to impartiality by reason of apprehended bias; conflict of interest; or prejudgment of an issue.*²⁹²

276 However, this is usually done with the consent of the other parties. Query whether such evidence would be allowed if the other parties objected.

277 *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 [73]. For a review of relevant Australian and Canadian decisions focusing on criminal cases, see Sharon Rodrick, 'Open Justice and Suppressing Evidence of Police Methods: The Positions in Canada and Australia' (2007) 31 *Melbourne University Law Review* 171.

278 Enid Campbell, 'Reasons for Judgment: Some Consumer Perspectives' (2003) 77 *Australian Law Journal* 62. See also Michael Kirby, 'Reasons for Judgment: Always Permissible, Usually Desirable and Often Obligatory' (1994) 12 *Australian Bar Review* 121.

279 See, eg, *Moylan v The Nutrasweet Company* [2000] NSWCA 337.

280 See generally Neil Rees, 'Procedure and Evidence in "Court Substitute" Tribunals' (2006) 28 *Australian Bar Review* 41.

281 *Smits v Roach* (2006) 228 ALR 262, [104].

282 Stephen Burbank, 'Is it Time for a National Commission on Judicial Independence and Accountability?' (1990) 73 *Judicature* 176, 177–8.

283 Sir Guy Green, *The Rationale and Some Aspects of Judicial Independence* (1985) ALJ 135, 135.

284 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (AIIA, 2nd ed, 2007) <[www.aija.org.au/online/GuidetoJudicialConduct\(2ndEd\).pdf](http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf)> at 12 February 2008.

285 Chief Justice Murray Gleeson, 'Judicial Accountability' (paper presented at a conference on Courts in a Representative Democracy, Canberra, 13 November 1994) 16.

286 *Ibid.*

287 See, eg, Ian Scott, 'The Future of Judicial Administration' (Paper presented at the Seminar on Constitutional and Administrative Responsibility for the Administration of Justice: The Partnership of the Judiciary and the Executive, AIIA, 10–11 August 1985); Sir John Young, 'The Roles of the Judiciary and Executive in the Administration of the Courts' (Paper presented at the Inaugural Biannual Conference of the Higher Courts' Administrators, AIIA, 24–25 May 1990); R E McGarvie, 'Judicial Responsibility for the Operation of the Court System' (1989) 63 *Australian Law Journal* 79; Thomas W Church and Peter Sallmann, *Governing Australia's Courts* (1991) 1–14, 55–77; Justice Tim H Smith, 'Court Governance and the Executive Model' (Paper presented at the Judicial Conference of Australia, Canberra, 6 October 2006).

288 *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411 at 418 (Kirby P).

289 *Valente v The Queen* (1985) 24 DLR (4th) 161, 169 (Le Dain J – Supreme Court of Canada).

290 Art 14.1.

291 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [82]; see also *Smits v Roach* (2006) 228 ALR 262, [121] (Kirby J).

292 AIIA (2007) above n 284, 3.



4.2.7 Accountability

Chief Justice Doyle has identified the ways in which judges are accountable:

First of all, they sit in public and discharge their duties in public. They are open to complete scrutiny. Secondly, fair comment on what they do is protected, even if it is both inaccurate and defamatory. Thirdly, a judge must give reasons for decision. Fourthly, most decisions are subject to appeal. Fifthly, judges are accountable to the opinions of their peers, which is a particularly powerful form of scrutiny. Sixthly, the decisions of courts can be reversed by legislation, as long as it is not legislation aimed at a particular case. Finally, the judiciary is accountable for the public resources that it administers.²⁹³

To these may be added the fact that in exceptional circumstances judicial officers may be removed from office. Also, in some jurisdictions (eg NSW²⁹⁴) independent bodies have been established to investigate complaints against judicial officers. In Victoria, provision is made for removal of judicial officers in the *Constitution Act 1975*. Under the legislation, the Attorney-General may appoint an investigating committee if satisfied that there are reasonable grounds for the carrying out of an investigation into whether facts exist that could amount to proved misbehaviour or incapacity on the part of the holder of a judicial office such as to warrant the removal of that office holder from office.²⁹⁵

5. ASSESSING THE PERFORMANCE OF THE CIVIL JUSTICE SYSTEM

Criticisms of the civil justice system, particularly in the higher courts, almost invariably focus on the problems of delay, inefficiency and the excessive or disproportionate expense of legal costs to the litigants.

The problems with the civil justice system are easy to identify. Solutions are far more elusive. In Victoria, as noted below and elsewhere in this report, the courts themselves have been at the forefront of efforts to bring about improvements.

In considering proposed solutions to perceived problems with the civil justice system it is perhaps instructive to recall the words of H L Mencken: 'There is always a well-known solution to every human problem—neat, plausible, and wrong.'²⁹⁶

It is obvious that excessive or unreasonable delay, inefficiency and high costs will impair or prevent access to justice, which impacts significantly on the rights of actual or potential litigants and on the administration of justice more generally. The rule of law is fundamental to the operation of our democratic system. To be meaningful this requires that individuals, organisations and authorities, both public and private, should be bound by and entitled to the benefit of the law. The machinery for the enforcement of the law is critical to its efficacy. Courts are one of the principal methods for the determination, declaration, development and enforcement of legal rights. The procedural framework within which the civil justice system operates will have an important impact on questions of cost, delay, effectiveness and efficiency.

Although the commission is of the view that the reform proposals in this report will bring about marked improvements in the Victorian civil justice system, we also believe that review and reform are ongoing iterative processes. This requires adequate empirical data, appropriate measures of performance and feedback from key participants in the process, including regular users of the court system.

Thus, one of the commission's key recommendations is that a Civil Justice Council should be established to facilitate such ongoing review and reform. Importantly, one of the significant roles of this new body would be to endeavour to use alternative dispute resolution techniques (including negotiation and mediation) to facilitate the agreement of key stakeholders in relation to both the impact of reforms and the areas where further reforms are required. This will assist in resolving divergent policy positions and take into account the different interests of various participants in the civil justice system.

It is important to ensure that those responsible for civil justice policy continually, and critically, examine the relationship between 'efficiency' reforms and access to justice. As Colleen Hanycz has noted: 'To achieve just ends, legal processes must strike an appropriate balance between efficiency of inputs and accuracy of outputs.'²⁹⁷ She then observes that although recent civil justice reform agendas in Canada,

England and elsewhere are dominated by streamlined procedures intended to deliver speedier and less costly dispute resolution, there has been little information gathered to measure the other impacts of such reforms.

She proceeds to

*question whether our fascination with efficiency has blinded us to the erosion of what we think of as just outcomes. For it is only in maintaining due process that we are able to guarantee access to just results. If the justice we can guarantee becomes so diluted as to render it meaningless, we must ask whether accessing it remains important at all; or if, instead, true justice achieved through full and rigorous processes is something that resource constraints now prevent us from promising.*²⁹⁸

Based on an examination of the impact of reforms in respect of interim/advance costs orders in Canada,²⁹⁹ the author points to the potential dangers resulting from reducing procedural safeguards without considering substantive impacts.

Hanycz stresses the need for empirical research on the impact of the move away from the traditional adversarial model of civil litigation with its emphasis on party autonomy, party prosecution and the assumption that a full hearing will lead to a fair outcome. As she notes, although it would seem that efficiency reforms are facilitating greater access to the courts it is not clear that this has resulted in 'greater justice'.³⁰⁰

Although highlighting the need for better research to evaluate the impact of civil justice reforms, Hanycz notes that research which seeks to make a comparative assessment of the substantive outcomes of procedural changes presents formidable methodological problems:

*How can we know if the substantive results of one set of procedures are superior or inferior to the substantive results of a slightly modified set of procedures? Anyone attempting that discussion needs to share in an understanding of what we mean by superior and inferior results.*³⁰¹

As she notes, to date policy-makers and empirical scholars have focused on:

- whether participants prefer one procedural alternative over its predecessor
- whether litigants spend more or less time and money on litigation under the new model compared with the old model
- reported 'user satisfaction' of lawyers, litigants and judges.

However, such research does not address the actual 'quality' of the justice provided. Moreover, to date in Victoria there has been relatively little empirical research, either quantitative or qualitative, on the present operation of the civil justice system, let alone rigorous attempts to measure the impact of changes.

While 'efficiency' has become the guiding light of much civil procedural reform in Australia, as Hanycz notes, this has usually been narrowly defined in terms of faster and cheaper procedures. As she proceeds to note, the Woolf reforms and many other procedural reform initiatives are premised on the assumption that 'enhancing efficiency results in enhanced access to justice'.³⁰² In her view, it is this central but largely untested assumption that is most problematic:

*If we hope to reform our civil justice systems in ways that produce positive systemic change, then we must include assessment standards that are located externally rather than impoverishing our inquiry by limiting it to internal standards driven by economic utility and user satisfaction ... What value is more access if it is only to less justice?*³⁰³

Her observation that policy makers seem to have accepted a causal relationship between enhanced efficiency and enhanced justice would appear to be apposite in Australia. Although such an assumption is intuitively plausible, to date it has not been the subject of empirical investigation or proof. Although, as Hanycz suggests, efficiency is a rather one dimensional approach to solving the multi-layered and complex issues around meaningful access to justice, to date there has been relatively little Australian research on whether civil procedural reforms have even achieved their stated goals of improving efficiency.³⁰⁴

293 Chief Justice Doyle, 'Judicial Independence' (1997-1998) 16 *Australian Bar Review* 212, 219. See also Stephen Burbank, *Judicial Accountability to the Past, Present and Future: Precedent, Politics and Power* (2005) 28 *University of Arkansas Little Rock Law Review* 19.

294 *Judicial Officers Act 1986* (NSW) pt 6.

295 *Constitution Act 1975* s 87AAD.

296 H L Mencken, *Prejudices*, Second Series (1920).

297 Hanycz (2008) above n 164, 100.

298 *Ibid* 101.

299 See *British Columbia v Okanagan Indian Band* [2003] 3 SCR 371; *Little Sister's Book and Art Emporium v Canada (Commissioner of Customs and Revenue)* [2007] SCJ No 2; D Goulay 'Access to Excess: Interim Costs in Okanagan' (2005) 63 *University of Toronto Law Review* 111.

300 Hanycz (2008) above n 164, 98.

301 *Ibid* 101.

302 *Ibid* 103.

303 *Ibid* 104.

304 On the evaluation of efficiency generally, see Fix-Fierro (2003) above n 235.

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However, as noted by Zuckerman, the civil justice system gives rise to ‘inevitable tension’ between the desire to obtain ‘correct outcomes, the need for the expeditious resolution of cases, and the practical constraints of [public and private] resources’.³⁰⁵

The requirement of open justice and the procedural requirements of fairness often result in more time-consuming and expensive procedural processes than may be required if speed and efficiency were paramount considerations.

The civil justice system gives rise to an inherent ‘tension between the demands of managerial efficiency and [the requirements for the proper] administration of justice’.³⁰⁶

Apparent improvements in ‘efficiency’, including through the more expedited resolution of cases, at less cost through alternative dispute resolution processes, may not necessarily signify an improvement in the administration of ‘justice’. As Justice Hayne has recently noted:

If cases are settled because the prospect of trial is too horrid for parties to contemplate, settlement may mark the failure of the system, not its success. If cases are settling because they are managed to the point of parties’ exhaustion, the system has failed them. If cases are settling because one party is able so to prolong and complicate the litigation as to outlast a financially weaker party, the system fails. Settlement in those circumstances is a mark of failure not success. No less importantly, are there controversies which parties are choosing not to submit to resolution by the application of judicial power, and instead resolving by other methods, because they are dissatisfied with the ways in which the judicial system is administered during and before trial? If there is a significant number of cases in which parties are dissatisfied in the manner described, there truly is popular dissatisfaction with the administration of justice.’³⁰⁷

Such considerations need to be taken into account in considering the variety of approaches, and numerous quantitative and qualitative methodologies, which may be used in seeking to measure the performance of the civil justice system.

In its report the Productivity Commission seeks to measure the performance of the justice system ‘against the objectives of effectiveness (how well agencies meet the outcomes of access, appropriateness and/or quality), equity (how well agencies treat special needs groups) and efficiency (how well inputs are used to deliver a range of outputs)’.³⁰⁸

In recent years some concerns have been expressed, including by some judges, that attempts to measure the performance of courts are inherently problematic. On occasions it has been suggested that some such attempts may undermine the independence of the judiciary. On the latter issue, the observations of Chief Justice Martin are of relevance:

In my opinion, there is no tension whatever between judicial independence and increasing attention being directed to the measurement and appraisal of judicial performance and efficiency. However, that view is subject to the important proviso that that which is being measured and appraised must be something that matters, and in the judicial system it is quality not quantity that matters. But I can see no reason at all why the performance of judges, both individually and collectively, should not be measured and appraised in relation to things like the time taken to resolve cases, delay in delivery of reserved decisions, the efficiency of case management etc.’³⁰⁹

However, as others have noted, courts are not merely a publicly funded dispute resolution service for consumers. Civil courts ‘perform a core function of government: the administration of justice according to law’.³¹⁰ From this perspective it has been suggested that courts serve the people, rather than merely providing services to the people.³¹¹ The distinction is said to be ‘fundamental’ and not merely semantic.³¹²

The administration of justice serves important public purposes ‘beyond the resolution of individual disputes’.³¹³ This has important implications for both the way in which the civil justice system operates and the manner in which its performance is evaluated. Many of the important features of the system, at least in the higher courts—including the requirement to determine cases according to the admissible evidence, the requirement of openness, the requirement to give reasons and the requirements of due process and natural justice—all come at a significant price. Compliance with such requirements inevitably adds to the complexity, cost and duration of civil proceedings. The search for a

'just' outcome and the adherence to 'fair' procedural and substantive laws enhances the effectiveness of the civil justice system at the expense of efficiency. Civil justice reform inevitably involves an attempt to reconcile or shift the balance between these competing objectives.

Public confidence in the administration of justice is not necessarily enhanced by measures which seek to achieve 'perfect' justice if such measures inexorably lead to substantial increases in complexity, cost and delay. This will usually be unacceptable to both individual litigants and the public generally. However, the obligation to make legal decisions based on 'objective' legal standards, rather than 'subjective' perceptions of fairness³¹⁴ serves to enhance confidence in the civil justice system by both the parties and the public.

To some extent the tension between the competing demands on the civil justice system to achieve both effective and efficient processes for the resolution of civil disputes has been reconciled by the creation of a two- or three-tier system and by the development of flexible methods for the 'alternative' resolution of disputes within each tier.

At the 'lower' tier, VCAT was established to not only rationalise the pre-existing multitude of adjudicative and appeal bodies, but also to provide a low cost, efficient, simplified and expeditious forum for the resolution of a large number of civil disputes.

The Magistrates' Court remains something of a halfway house between the formality and complexity of the higher courts and the informal and less 'legalistic' VCAT.

Although the County and Supreme Courts continue to administer justice in accordance with legal and procedural requirements which inevitably result in an increase in complexity, cost and delay, they—along with the Magistrates' Court and VCAT—have continued to develop various means of seeking to resolve disputes without the necessity to proceed to final formal adjudication on the merits. The fact that such proceedings will often be complex, expensive and protracted, coupled with the potential risk of being ordered to pay substantial adverse costs, provides powerful incentives for the parties to settle. However, where there is an 'inequality of arms' between the parties the more powerful and resourceful will usually have a substantial forensic advantage.

In assessing the performance of the civil justice system, and the impact of procedural reforms, it is important to bear in mind that the focus should not be limited to quantitative measures of matters such as cost and delay or qualitative measures of outcome. Policy considerations may have an important bearing on preferences for different dispute resolution methodologies.

At present in Victoria the civil courts apply different methodologies for the resolution of disputes than VCAT does. Moreover, within each jurisdiction courts and tribunals each facilitate both formal adjudication on the merits, after a hearing, and informal methods of alternative dispute resolution. Important differences between a 'rights based' approach and an 'interests based' approach to the resolution of civil disputes³¹⁵ are not readily amenable to empirical evaluation. Moreover, the relative advantages and disadvantages of court adjudication, based on strict rule observance, and the more flexible approach adopted by tribunals, which seek to provide a determination based on the merits,³¹⁶ cannot be assessed solely on the basis of quantitative or qualitative dimensions of process or outcome variables. 'Justice' or 'fairness' are not concepts that are readily measurable.

The development, and implementation, of measures for assessing the performance of the civil justice system,³¹⁷ and the impact of reforms such as those proposed in this report, are matters which may be taken up by the Civil Justice Council, if it is established, and/or this commission in the second stage of the present civil justice inquiry.

6. VIEWS OF INDIVIDUALS AND ORGANISATIONS CONSULTED

In the Consultation Paper issued by the commission in October 2006 views were sought on whether particular aspects of the civil justice system were considered to be in need of reform. Respondents were also asked to identify what specific changes should be implemented. Selected aspects of the responses are summarised below.

A number of submissions addressed particular categories of persons or specific areas of the law.

Particular categories of persons considered to be presently at a disadvantage in the civil justice system include people who are homeless³¹⁸ and impoverished individual debtors.³¹⁹

- 305 Zuckerman (2006) above n 117, 16.
- 306 Murray Gleeson, 'The State of the Judicature' (Speech delivered at the 13th Commonwealth Law Conference, Melbourne, 17 April 2003).
- 307 Hayne (2008) above n 106, 6–7.
- 308 Productivity Commission (2008) above n 101, Chapters 5 and 7 and Appendices.
- 309 Chief Justice Wayne Martin, 'Judicial Appointments and Judicial Independence' (Paper presented at a Law Council of Australia Conference on Rule of Law: The Challenges of a Changing World, Brisbane, 31 August 2007) 19.
- 310 Spigelman (1999) above n 269.
- 311 James J Spigelman, 'Our Common Law Heritage' (Speech delivered at the 2004 Joint Study Institute of Law Librarians, Sydney, 21 February 2004).
- 312 Ibid; see also Courts Consultative Council, *Courts Strategic Directions Project* (2004) [1.4.1].
- 313 Murray Gleeson, 'The Future of Civil Justice—Adjudication or Dispute Resolution?' (Speech delivered at the Australasian Law Teachers Association Conference, Dunedin, 7 July 1998).
- 314 Attorney-General's Department (2003) above n 178, 3.
- 315 Goldschmid (2006) above n 251, 1 (see his discussion in footnote 1).
- 316 Zuckerman (2006) above n 240, 7.
- 317 The Law Commission of New Zealand considered a number of 'indicators of the performance of the court system' in the report: *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, Report 85 (March 2004) at 354–9.
- 318 Submission CP 29 (Public Interest Law Clearing House, Homeless Persons Legal Clinic).
- 319 Submission CP 43 (Consumer Action Law Centre).

Overview of the Civil Justice System



Particular areas of law where it was suggested there are current barriers to access to the civil justice system include: complaints and proceedings against police,³²⁰ the lack of access by Aboriginal people to the Equal Opportunity Commission, and consumer debt, where it was suggested that there is unwillingness on the part of some large organisations to use the conciliation process in good faith.

A number of submissions contended that in various areas there was a lack of ‘fairness’ or a power imbalance between parties in dispute³²¹ and that delays resulted in significant disadvantage.³²² The excessive cost of litigation was identified in numerous submissions as a major problem.³²³

Various solutions were proposed. The Law Institute suggested that more judicial officers should be appointed (including experienced solicitors) and that the ‘work pattern’ of judges should be reviewed. Numerous submissions pointed to the need for greater information and legal representation to facilitate access to the courts.³²⁴ According to one submission, the cost of pursuing and defending claims is high and without funding this is likely to be beyond the reach of most Australians.³²⁵ The need to keep legal costs proportionate to claim value and potential liability for adverse costs were also identified as major issues. Mandatory cost budgeting and cost capping were said to be required in order to facilitate access to justice.

Apart from the open ended question about the need for reform of the civil justice system, the Consultation Paper and subsequent Exposure Drafts sought views on a variety of specific matters. These issues are addressed in other chapters of this report. Matters which fall within the 10 priority areas selected for detailed review in the first stage of the inquiry are dealt with in Chapters 2 to 11. Chapter 12 incorporates other areas where, during the course of submissions and consultations, it was suggested that there is a need for reform. Some of these may be taken up during the second stage of the inquiry by the commission or may be considered by the Civil Justice Council, if it is established. Alternatively, some reforms could be implemented without the need for further review.

320 Submission CP 27 (Victorian Aboriginal Legal Service Co-operative Ltd.).

321 For example between large and well- resourced institutional creditors and impoverished individual debtors: submission CP 43 (Consumer Action Law Centre).

322 See, eg, submission CP 18 (Law Institute of Victoria).

323 See, eg, submission CP 18 (Law Institute of Victoria).

324 The issue of legal aid is dealt with in detail in Chapter 10.

325 Submission CP 13 (Vicki Waye).

Overview of the Civil Justice System

TRADITIONAL CIVIL LITIGATION

Circumstances giving rise to civil dispute Letter of demand
Funding arrangements to pursue proceedings or speculative fee arrangement
Commencement of proceedings
Pleadings
Procedure for summary disposal
Mediation
Case management Directions hearings

LAW REFORM PROPOSALS

<p>Pre-action Protocols to facilitate early communication, disclosure and settlement</p>
<p>▽ New 'self funding' litigation funding body: the Justice Fund; to finance litigation, provide security for costs and to meet adverse costs orders</p>
<p>▽ New standards governing the conduct of participants (parties, lawyers, experts and those who fund or assist parties) and requiring early disclosure of relevant documents: Overriding Obligations imposed on the participants, and applicable to all aspects of the proceedings including interlocutory steps, negotiations and ADR processes</p> <p>Additional broad ranging sanctions for non compliance with the Overriding Obligations</p> <p>New obligation on parties and lawyers to certify the merits of any claim or defence</p> <p>New principles governing the manner in which judicial officers control proceedings and apply procedural rules: Overriding Purpose imposed on the court</p> <p>New procedure for the oral examination, out of court, of persons with relevant information: Oral Examinations</p> <p>New provisions to deter or curtail unnecessary litigation, including a more liberal test for the summary disposal of unmeritorious claims and defences and a broader power for the court to reject irregular applications and originating processes</p> <p>New provisions to deal with 'vexatious' proceedings</p> <p>Additional assistance and support for self represented litigants with meritorious claims</p> <p>Provision for the appointment of Special Masters to have defined responsibilities in particular cases</p> <p>Additional interpreter services for litigants with language difficulties</p> <p>More clearly defined 'dispute management' powers for courts, including power to refer to various forms of ADR without consent of parties</p> <p>Additional ADR options for the parties and the court to utilise</p>
<p>▽ More clearly defined powers and options for proactive judicial 'case management', including the greater use of case conferences, telephone directions hearings and technology</p> <p>New power for the court to order disclosure of litigation funding and insurance arrangements</p> <p>Possible expansion of the 'docket system' for greater judicial control of proceedings</p> <p>New obligation on lawyers to endeavour to reach agreement on procedural matters before seeking orders of the court</p>

<p>Interlocutory costs orders</p> <p>Discovery of documents</p>	▽	<p>New provision to avoid the quantification and recovery of interlocutory costs orders in most cases</p> <p>Statutory modification of confidentiality constraints to allow information or evidence to be obtained from potential witnesses</p> <p>New provisions to enhance judicial control of discovery, including more explicit and broad discovery management powers and additional sanctions for discovery abuse</p> <p>New provisions to limit the costs incurred and the costs recoverable in respect of discovery</p> <p>Provision for disclosure of lists of documents, even if covered by privilege</p> <p>Additional interim procedure for expedited access to potentially relevant documents</p> <p>Provision for disclosure of litigation funding and insurance arrangements</p>
<p>Expert evidence</p>	▽	<p>New framework for judicial control of expert evidence</p>
<p>Trial</p>		<p>New powers to control conduct of trials</p> <p>Additional power for judicial officers to call witnesses</p>
<p>Class Actions</p>	▽	<p>Legislative clarification that class actions are permissible even if all class members do not have claims against all defendants and even if the class is limited to individuals who have consented to the conduct of proceedings on their behalf</p> <p>New judicial power to order cy pres remedies in class action proceedings</p>
<p>Legal Costs</p>	▽	<p>New costs provisions to reduce the costs of litigation and achieve greater determinacy and proportionality of costs</p>
<p>Recovery of party-party costs</p>	▽	<p>New provisions to limit costs and to reduce the costs and complexity of party-party cost recovery</p> <p>ADDITIONAL PROPOSALS</p> <p>Additional educational measures for the courts and the profession, including in relation to ADR</p> <p>Establishment of an ongoing body to evaluate the impact of reforms and the need for further reforms and to facilitate research: the Civil Justice Council</p> <p>Establishment of an ongoing body, to consider further reforms in the area of costs; the Costs Council</p> <p>Mechanisms for greater co-ordination of rule making through the existing rule making bodies</p>

Chapter 1

Overview of the Civil Justice System



Chapter 2
**Facilitating the Early
Resolution of Disputes
without Litigation**



Chapter 2



Facilitating the Early Resolution of Disputes without Litigation

1. Introduction and Summary
 - 1.1 Legal Challenge to Pre-action Protocols
 2. Traditional Pre-action Procedures
 - 2.1 Preservation and other orders
 - 2.2 Disclosure to identify a defendant or to determine merit
 3. 'New' Pre-action Requirements
 - 3.1 England and Wales
 - 3.1.1 Pre-action conduct not covered by an approved protocol
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 5. Impact of Pre-action Procedures
 6. Disclosure and Service of Documents when commencing proceedings
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 7. Submissions
 - 7.1 Support for Pre-action Protocols
 - 7.2 Opposition to Pre-action Protocols
 - 7.3 Other Issues Raised in Submissions
- Recommendations

Pre-action procedures 'are useful mechanisms for (a) reminding parties that they might avoid litigation and instead achieve a settlement, whether by simple negotiation or ADR, notably mediation, (b) sponsoring informed settlement by the exchange of information between disputants, (c) fostering a spirit of co-operation between adversaries so that the dispute can be narrowed or even resolved amicably, and (d) canalising preparation for litigation (if settlement is elusive).¹

1. INTRODUCTION AND SUMMARY

Customarily, formal court-based dispute resolution procedures start when legal proceedings begin between the parties in dispute. Usually, this is preceded by a letter of demand and response to the letter of demand. Until recently, such 'pre-action' communications were optional and unregulated.

The rules of most courts allow for various types of pre-action procedures, designed to facilitate the future conduct of litigation. These include procedures to identify the appropriate party to sue, to decide whether there is a cause of action and to prevent the prospective defendant from disposing of or removing assets or property from the jurisdiction where this would have the effect of frustrating any judgment or order of the court.

In some Australian and overseas jurisdictions forms of pre-action procedure have recently been introduced for a fundamentally different purpose—to avoid litigation entirely. These pre-action procedures seek to encourage:

- (a) early and full disclosure of relevant information and documents
- (b) settlement
- (c) where settlement is not achieved, identification and narrowing of the real issues in dispute in order to reduce the costs and delays involved in litigation.

The ways used to achieve these objectives vary considerably between and within jurisdictions.

In its Justice Statement the Victorian Government foreshadowed that it:

will investigate the scope for pre-litigation protocols that require a party initiating litigation to have initially made a genuine attempt to resolve the dispute without resorting to litigation.²

The commission has sought the views of interested parties through both the Consultation Paper in October 2006 and the draft proposals set out in the exposure draft released in June 2007. The submissions received are summarised at the end of this chapter. The chapter also reviews the development of pre-action protocols in various Australian jurisdictions and in other countries.

The commission believes there is a need for greater disclosure of information and cooperation before legal proceedings are commenced. A key policy objective of the commission's proposals is to accelerate disclosure of relevant information and provide time frames for communication and standards of sensible conduct *before* proceedings are commenced, to avoid the necessity for litigation in many cases. This is proposed through the introduction of pre-action protocols. The commission's recommendations are set out in the final part of this chapter.

1.1 LEGAL CHALLENGE TO PRE-ACTION PROTOCOLS

If pre-action protocols are seen to present a barrier to access to the courts, they may be open to challenge as being incompatible with the right to have a dispute decided by a 'competent and impartial court or tribunal after a fair and public hearing' under the Victorian *Charter of Human Rights and Responsibilities Act* (2006) (the Charter).³ As has been noted in the English context: '[t]he tentacles of the *Human Rights Act* 1998 reach into some unexpected places'.⁴

The commission's proposals in relation to pre-action protocols do not seem to be incompatible with the provisions of the Charter. Although parties in dispute would be expected to meet the requirements of the pre-action protocols there would be no bar to the commencement of legal proceedings in the event of noncompliance (although there might be costs or other consequences of noncompliance). Accordingly, the protocols would not deny access to the courts.

Section 24(1) of the Charter applies to a 'party' to a 'proceeding'. The pre-action protocols are intended to apply to persons in dispute before they become parties to a legal proceeding and are designed to facilitate resolution of the dispute without the need for legal proceedings. Even if a

1 Neil Andrews, 'The Pre-Action Phase: General Report' (Paper presented at the World Congress of Procedural Law, International Association of Procedural Law, September 2007, Brazil) 35.

2 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 36.

3 *Charter of Human Rights and Responsibilities Act 2006* s 24(1).

4 *Mousaka v Golden Seagull Marine* [2002] 1 WLR 395.



Facilitating the Early Resolution of Disputes without Litigation

court orders a stay of proceedings commenced by a party who has failed to comply with applicable pre-action protocol requirements, this is unlikely to provide a basis for challenge under the provisions of the Charter. The disclosure and other obligations imposed under pre-action protocols are similar to those imposed by civil procedural rules, which apply in any event to parties once proceedings are commenced. The pre-action protocol disclosure and other obligations are intended to serve the same purpose as the Charter: to facilitate a 'fair' hearing of disputes unable to be resolved by agreement between the parties.

The commission has also proposed that where parties have complied with pre-action protocol requirements the courts should consider a means of 'fast tracking' cases where the dispute has not resolved, and possible dispensation with certain interlocutory steps.

2. TRADITIONAL PRE-ACTION PROCEDURES

A wide variety of 'ancillary' orders may be made by various courts prior to the formal commencement of proceedings for 'primary' relief. The power to make such orders may come from procedural rules or from the inherent, implied or statutory jurisdiction of the court.

2.1 PRESERVATION AND OTHER ORDERS

As in most common law jurisdictions, civil procedural rules in Victoria enable a prospective party to seek court orders to search for and to preserve evidence as well as property in dispute.⁵ The power to make such orders is also part of the inherent, implied or statutory jurisdiction of some courts, including the Supreme Court of Victoria.

Prospective plaintiffs may also apply for 'freezing' orders to restrain defendants or prospective defendants from removing, disposing of, dealing with or diminishing the value of their assets where this would prevent the plaintiff or prospective plaintiff from satisfying any judgment made by the court.⁶

The court may also make an order related to a freezing order, including for obtaining information about assets relevant to the freezing order or prospective freezing order.⁷ This may encompass discovery of documents and interrogatories.

These orders, developed out of and often described as *Anton Piller*⁸ and *Mareva*⁹ orders respectively, are usually made ex parte.

In urgent situations, the court may, on the application of a person who intends to commence a proceeding, make any order which the court might make if the applicant had commenced a proceeding and the application was made in the proceeding.¹⁰ This may include injunctive relief or discovery.

2.2 DISCLOSURE TO IDENTIFY A DEFENDANT OR DETERMINE MERIT

In Victoria, as in most Australian jurisdictions, rules of court make provision for pre-action disclosure in a variety of situations. Some provisions permit pre-action discovery to enable a person to identify a prospective defendant.¹¹ Other provisions enable a person to seek discovery from a prospective defendant to determine whether to commence an action.¹² In addition to discovery of documents, oral examination before the court may be ordered in certain circumstances.¹³ Apart from provisions for disclosure in court rules, the principles of equitable discovery may be relied upon in the higher courts in some situations.

3. 'NEW' PRE-ACTION REQUIREMENTS

A different model of pre-action procedure is developing in some Australian jurisdictions. Although most civil procedural rules traditionally started with the commencement of proceedings, various forms of pre-action protocol now seek to govern the conduct of parties to disputes before they begin litigation, to assist them to resolve the dispute without litigation. These protocols also provide for mutual exchange of information and documentation and aim to narrow the issues in dispute if litigation is unavoidable.

In different jurisdictions, pre-action protocol requirements may be voluntary or mandatory. However, such procedures usually regulate the commencement of litigation of matters which are unable to be resolved by other methods, rather than being a means of precluding access to the courts. Attempts

to preclude access to the courts may give rise to legal challenges on human rights or constitutional grounds (see Legal Challenge to Pre-action Protocols, above).¹⁴

Apart from the introduction of formal pre-action procedural rules or protocols, Andrews notes the 'interesting suggestion' that procedural systems should recognise a 'duty of cooperation' between persons in dispute, even within the pre-action phase.¹⁵ As he observes, there are a number of international developments in this direction.

In some situations parties may be required to attempt to resolve disputes by means other than litigation as a result of pre-dispute contractual arrangements between the parties. This is discussed in detail in Chapter 4.

3.1 ENGLAND AND WALES

English courts have recognised a 'constitutional right' to bring legal proceedings before the courts.¹⁶ In *Ex parte Witham* Justice Laws concluded that it was not lawful to set court fees at a level which made them unaffordable to persons on income support, thus in effect depriving them of their right to sue.¹⁷ The constitutional right at common law of access to the courts can be set aside by a specific provision in primary legislation or by subordinate legislation where the primary legislation specifically gives the power to do so.¹⁸ However, such legislation may itself be subject to challenge as being incompatible with human rights provisions which seek to protect the right to trial.

Notwithstanding the 'right' of access to the courts, pre-action protocols were introduced in England and Wales in 1999 as part of the English civil procedure reforms following the recommendations of Lord Woolf. In the course of his inquiry, Lord Woolf examined a number of civil procedural innovations in Australia. By 1995 at least one jurisdiction, South Australia, had introduced a form of pre-action disclosure regarded as very successful. Pre-action protocols were adopted in England and Wales when major changes were incorporated in the *Civil Procedure Rules 1998* (SI 1998/3132).

Lord Woolf described the introduction of pre-action protocols as one of the most significant of the procedural changes he was recommending.¹⁹

In his final report, Lord Woolf stated that the purposes of pre-action protocols are:

- (a) to focus the attention of litigants on the desirability of resolving disputes without litigation;
- (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
- (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and
- (d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.²⁰

Lord Woolf recommended:

- (1) Pre-action protocols should set out codes of sensible practice which parties are expected to follow when faced with the prospect of litigation ...
- (2) When a protocol is established for a particular area of litigation, it should be incorporated into the relevant practice guide.
- (3) Unreasonable failure by either party to comply with the relevant protocol should be taken into account by the court, for example in the allocation of costs or in considering any application for an extension of the timetable.
- (4) The operation of the protocols should be monitored and their detailed provisions modified so far as is necessary in the light of practical experience.²¹

It was not proposed that such protocols would cover all areas of litigation. Instead, they were intended to deal with particular problems in specific areas, including personal injury, medical negligence and housing.²²

Rather than appearing in the Civil Procedure Rules themselves, the protocols have been implemented by way of a Practice Direction. This sets out the requirements for compliance with the protocols and the consequences of noncompliance, and provides guidance for those cases not covered by a pre-existing protocol. The Practice Direction applies to pre-action protocols which have been approved by the Head of Civil Justice.

- 5 See, eg, *Supreme Court (Chapter 1 Amendment No. 2) Rules 2006* O 37B. See also *Uniform Civil Procedure Rules 2005* (NSW) r 25.19, *Supreme Court Civil Rules 2006* (SA) O 148.
- 6 See *Supreme Court (Chapter 1 Amendment No. 2) Rules 2006* O 37A. See also *Uniform Civil Procedure Rules 2005* (NSW) r 25.11, *Supreme Court Civil Rules 2006* (SA) O 247.
- 7 See *Supreme Court (Chapter 1 Amendment No. 2) Rules 2006* O 37A.03.
- 8 See *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55.
- 9 See *Mareva Compania Naviera SA of Panama v International Bulk Carriers* [1975] 2 Lloyd's L Rep 509.
- 10 See *Supreme Court (General Civil Procedure) Rules 2005* O 4.08.
- 11 See *Supreme Court (General Civil Procedure) Rules 2005* r 32.03; *Rules of the Supreme Court 1971* (WA) O 26A r 3; *Uniform Civil Procedure Rules 2005* (NSW) r 5.2.
- 12 See *Supreme Court (General Civil Procedure) Rules 2005* r 32.05; *Federal Court Rules 1979* (Cth) O 15A r 6; *Supreme Court Civil Rules 2006* (SA) r 146; *Supreme Court Rules 2007* (NT) r 32.05.
- 13 See *Supreme Court (General Civil Procedure) Rules 2005* O 31.
- 14 Submission CP 36 (Human Rights Law Resource Centre).
- 15 Neil Andrews, 'The Pre-action Phase: General Report' (Paper presented at the World Congress of Procedural Law, International Association of Procedural Law, Brazil, September 2007) 11.
- 16 See, eg, *R v Lord Chancellor, ex parte Witham* [1998] QB 575, Div Ct referred to in Neil Andrews (2007), above n 15, note 27.
- 17 See also *R v Lord Chancellor, ex parte Lightfoot* [1999] 2 WLR 1126 and the subsequent decision of the Court of Appeal; *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597.
- 18 See, eg, the decision of the Court of Appeal in *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597. See also the discussion in Joseph M Jacob, *Civil Justice in the Age of Human Rights* (2007) ch 3.
- 19 Lord Woolf, *Access to Justice—Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ch 9 [2].
- 20 *ibid*, ch 10 [1].
- 21 *ibid*, ch 10 Recommendations.
- 22 *ibid*, ch 10 Recommendations [1].

Chapter 2



Facilitating the Early Resolution of Disputes without Litigation

In England and Wales, the Practice Direction relating to pre-action protocols provides that the objectives of such protocols are:

- (1) to encourage the exchange of early and full information about the prospective legal claim
- (2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings
- (3) to support the efficient management of proceedings where litigation cannot be avoided.²³

When Lord Woolf prepared his final report in July 1996, pre-action protocols were being developed in the areas of housing disrepair, medical negligence, construction industry disputes, and personal injury cases. This involved a process of consultation among various interest groups in each of these areas. As Lord Woolf noted:

*Protocols will be most effective if they are agreed, broadly speaking, on behalf of those most likely to be frequent users of the procedures, whether as litigants or as professional advisers.*²⁴

Two protocols had been finalised when the rules were introduced in 1999. These were for personal injury (in force since 26 April 1999) and clinical negligence (in force since 26 April 1999). Subsequent protocols cover:

- construction and engineering disputes (2 October 2000, revised from 6 April 2007)
- defamation (2 October 2000)
- professional negligence (16 July 2001)
- judicial review (4 March 2002)
- disease and illness (8 December 2003)
- housing disrepair (8 December 2003)
- possession claims based on rent arrears (2 October 2006).²⁵

Unlike the personal injury protocol and other protocols, the clinical negligence protocol incorporates 'good practice commitments' which extend beyond the legal claims process and adopt best practice procedures for dealing with the reporting of adverse health outcomes, patient dissatisfaction and complaint mechanisms.²⁶ For example, health care providers are required to ensure that patients receive clear and comprehensible information in an accessible form about how to raise concerns or lodge complaints.²⁷ However, a study of the impact of the Woolf reforms noted that, although communication between complaints and claims departments seemed to work well, claims managers were uncertain about the extent of their duty to advise patients of the steps open to them following an adverse incident. Moreover, they remained reluctant to admit liability unprompted by a claim or to advise patients to seek legal advice. This was said to be sanctioned by Department of Health policy.²⁸

In September 2001 the Lord Chancellor's Department (now the Ministry of Justice) published a consultation document proposing a general pre-action protocol for all types of litigation.

The Civil Justice Council considered whether a general protocol should be developed to cover all cases not caught by specific protocols. Although initially deciding against this, given the general guidance provided by the Practice Direction, the council has further considered the introduction of a consolidated pre-action protocol. This arose out of growing concern about the proliferation of pre-action protocols, many of which have common or identical elements. One option under consideration was to reduce the present nine protocols to one protocol incorporating the core steps and guidance common to all the protocols but with separate appendices for particular subject areas.

Following further recent consultation it became apparent that there was considerable opposition to such a proposal, including from stakeholders who had been involved in the drafting of the present specific protocols. Accordingly, the Civil Justice Council is presently preparing a General Pre-Action Protocol which would apply, by default, where other specific pre-action protocols were not applicable. In due course this could be used as a template for the purpose of reviewing and modifying the various individual protocols.

The existing protocols incorporate different guidelines and different time frames for responses, etc. Some include full precedents, such as letters of claim, letters of response and letters of instruction to medical experts (eg, the personal injuries protocol). Others use templates (eg, the clinical negligence protocol) or simply provide general guidance (eg, the judicial review protocol).

These protocols have become quite lengthy and detailed. In some ways they constitute their own procedural code. They set out the steps that must be taken, a timetable and, instead of forms, a series of draft documents that can be adapted to meet the circumstances of the claim.

For cases not covered by a protocol, the Practice Direction sets out detailed steps which each of the parties to the dispute is expected to take. These are summarised below. At present the Practice Direction is under review and a revised draft has been circulated by the Civil Justice Council for comment. In the draft, arbitration has been added to the list of alternative dispute resolution options. Also, there is a more explicit statement that parties are expected to make continual efforts to settle, both before a case is commenced and during proceedings.

The pre-action protocols are not intended to be exhaustive but prospective parties are required to substantially comply with approved protocols.²⁹ Noncompliance can result in cost orders and/or interest penalties.

In England and Wales the Civil Procedure Rules enable the court to take into account compliance or noncompliance with an applicable pre-action protocol when giving directions for the management of proceedings³⁰ and when making orders for costs.³¹

The Practice Direction relating to pre-action protocols provides that if the court is of the opinion that noncompliance has led to the commencement of proceedings which might otherwise not have been commenced, or has led to costs being incurred that might otherwise not have been incurred, the orders the court may make include:

- (1) *an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;*
- (2) *an order that the party at fault pay those costs on an indemnity basis;*
- (3) *if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;*
- (4) *if the party at fault is a defendant and an order for the payment of damages or some other specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10% above base rate (cf. CPR rule 36.21(2)), than the rate at which interest would otherwise have been awarded.*³²

The Practice Direction further provides that the court will exercise its powers under paragraphs 2.1 and 2.3 with the object of placing the innocent party in no worse position than that party would have been in if the protocol had been complied with.³³

The Practice Direction specifies various circumstances where either a claimant or a defendant may be found to have failed to comply with the protocol. For claimants, this may be supplying insufficient information to the defendant or not following the procedure required by the protocol.³⁴ For defendants, this may be failing to respond to the letter of claim within the time period specified in the protocol, not making a full response within the specified time, or not disclosing documents required to be disclosed by the protocol.³⁵

The court is not likely to be concerned with 'minor infringements' of the practice direction or protocols and is likely to look at the effect of noncompliance on the other party in determining whether to impose sanctions.³⁶

Where a party to a dispute or potential dispute fails to consider whether some other form of alternative dispute resolution (ADR) would be more suitable than litigation or fails to endeavour to agree on which form of ADR to adopt, the court will take this into account when determining costs.³⁷

Compliance or noncompliance with a relevant pre-action protocol will be taken into account by a court only where the claim was started after the protocol came into effect.³⁸ Where a claim is started

23 Department for Constitutional Affairs, *Practice Direction: Protocols* (2006) [1.4] <www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm> at 3 December 2007.

24 Lord Woolf (1996), above n 19, ch 10 [13].

25 Each of the protocols is available online on the Department for Constitutional Affairs website: <www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm> at 3 December 2007.

26 Ministry of Justice [UK], *Pre-Action Protocol for the Resolution of Clinical Disputes* (1999) [3.4]–[3.5] <www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rcd.htm> at 3 December 2007.

27 *ibid* at [3.4(v)].

28 Tamara Goriely, Richard Moorhead and Pamela Abrams, *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour*, Research Study 43, The Law Society & the Civil Justice Council (2002) 221–2.

29 Ministry of Justice [UK], *Practice Direction—Protocols* (2006) [2.2] <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm> at 26 November 2007.

30 *Civil Procedure Rules 1998* (SI 1998/3132) rr 3.1(4)–(5), 3.9(e).

31 *Civil Procedure Rules 1998* (SI 1998/3132) r 44.3 (5)(a). See also r 36.10 in relation to pre-action offers of compromise.

32 Ministry of Justice [UK] (2006), above n 29, [2.3].

33 *ibid*, [2.4].

34 *ibid*, [3.1].

35 *ibid*, [3.2].

36 *ibid*, [3.4].

37 *ibid*, [4.7].

38 *ibid*, [5.2].



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after a protocol has come into force and a party has, by work done before that date, achieved the objectives sought to be achieved by certain requirements of that protocol, then the party need not take further steps to comply with those requirements.³⁹

However, as noted above, the Practice Direction prescribes various standards of pre-action conduct and disclosure expected of parties in dispute or potentially in dispute even if there is no pre-action protocol applicable—either at all, or at the relevant time—to the type of dispute in question.

Pre-action protocols arose out of the recognition that the early stages of civil disputes, which had ‘hitherto been neglected and largely unregulated [are] no less important than the ... stages which ensue once litigation is commenced’.⁴⁰

In the Court of Appeal Lord Justice Brooke noted the importance of pre-action protocols:

The introduction of pre-action protocols, and of the procedures they suggest for the obtaining of expert evidence, represents a major step forward in the administration of civil justice. Any practitioner or judge with significant experience of personal injuries litigation will have been very familiar with the mischiefs they seek to remedy. Under the former regime, in many disputed cases of any substance nothing very effective seemed to happen until a writ was issued close to the expiry of the primary limitation period ... The resolution of these difficulties required ingenuity and imagination. [The protocols] are guides to good litigation and pre litigation practice, drafted and agreed by those who know all about the difference between good and bad practice.⁴¹

3.1.1 Pre-action conduct not covered by approved protocol

Even where there is no specific protocol in place covering a particular type of litigation, the court may take into account the need for cooperative pre-action disclosure.⁴² The Practice Direction deals in detail with the expected conduct of parties to a dispute in situations not covered by any approved protocol.

In such situations the court will expect the parties, in accordance with the overriding objective and the matters referred to in rules 1.1(2)(a), (b) and (c), to ‘act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings’.⁴³

The Practice Direction provides that parties to a potential dispute should follow ‘a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation’.⁴⁴ Such reasonable procedure should normally include:

- (a) the claimant writing to give details of the claim;
- (b) the defendant acknowledging the claim letter promptly;
- (c) the defendant giving within a reasonable time a detailed written response; and
- (d) the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.⁴⁵

The Practice Direction provides further detailed suggestions concerning the nature and extent of information and documentation which should be exchanged between the parties to the ‘potential dispute’.

The letter from the claimant should:

- (a) give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;
- (b) enclose copies of the essential documents which the claimant relies on;
- (c) ask for a prompt acknowledgement of the letter, followed by a full written response within a reasonable stated period [with one month suggested as a normal reasonable period for many claims] ...
- (d) state whether court proceedings will be issued if the full response is not received within the stated period;
- (e) identify and ask for copies of any essential documents, not in [the claimant’s] possession, which the claimant wishes to see;

- (f) state (if this is so) that the claimant wishes to enter into mediation or another alternative method of dispute resolution; and
- (g) draw attention to the court's powers to impose sanctions for failure to comply with the practice direction and, if the recipient is likely to be unrepresented, enclose a copy of the practice direction.⁴⁶

The Practice Direction also sets out in detail what is expected of defendants when they receive notification of a claim. The defendant should acknowledge the claimant's letter in writing within 21 days of receiving it.⁴⁷ The acknowledgement should state that the defendant will give a full written response. If the time for this is longer than the period stated by the claimant, the defendant should give reasons why a longer period is necessary.⁴⁸

In the full written response the defendant should, as appropriate:

- (a) accept the claim in whole or in part and make proposals for settlement; or (b) state that the claim is not accepted [or if accepted in part clearly state] which part is accepted and which part is not accepted.⁴⁹

With a view to avoiding mere bare denials of liability, the Practice Direction suggests that where a defendant does not accept a claim in whole or in part, the written response should:

- (a) give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions are accepted and which are in dispute;
- (b) enclose copies of the essential documents which the defendant relies on;
- (c) enclose copies of documents asked for by the claimant, or explain why they are not enclosed;
- (d) identify and ask for copies of any further essential documents, not in [the defendant's] possession, which the defendant wishes to see; and ...
- (e) state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.⁵⁰

In addition to the abovementioned provisions in relation to mediation and ADR, the Practice Direction makes further detailed provision for resolution of the dispute through alternative dispute resolution.

The Practice Direction provides that parties should consider whether some form of ADR would be more suitable than litigation and if so endeavour to agree which form to adopt. Both the claimant and the defendant may be required by the court to provide evidence that alternative means of resolving the dispute were considered, as the court takes the view that litigation should be a last resort.⁵¹ The Practice Direction outlines some of the options for resolving disputes without litigation: discussion and negotiation; early neutral evaluation by an independent party; and mediation, which is described as 'a form of facilitated negotiation assisted by an independent neutral party'.⁵² The Practice Direction expressly recognises that no party can or should be forced to mediate or enter into any form of ADR.⁵³

The Practice Direction provides that documents disclosed by either party in accordance with the Practice Direction may not be used for any purpose other than for resolving the dispute unless the other party agrees.⁵⁴

If an expert is needed, the Practice Direction provides that the parties should, wherever possible and to save expense, engage a mutually agreed upon expert, and warns that if the matter proceeds to litigation the court may not allow the use of an expert's report. Furthermore, its cost is not always recoverable.⁵⁵

The Practice Direction states that where a person enters into a funding arrangement within the meaning of rule 43.2(1)(k) the party should inform other potential parties that a funding arrangement has been entered into.⁵⁶

Apart from the Practice Direction, the rules make provision for offers of compromise to be made before proceedings are commenced, and where the offer complies with the procedural requirements, the court will take that into consideration on the question of costs in any proceedings.⁵⁷

39 Ibid, [5.3]. See also [5.4], where the noncompliance is because the time period between the publication date and the coming into force of the protocol was too short.

40 Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (2003) [1.15].

41 *Carlson v Townsend* [2001] 3 All ER 663, 24, 28, 31.

42 *Ford v GKR Construction Ltd* [2000] 1 All ER 802, 810 (Lord Woolf MR).

43 Ministry of Justice [UK] (2006), above n 29, [4.1].

44 Ibid, [4.2].

45 Ibid.

46 Ibid, [4.3].

47 Ibid, [4.4].

48 Ibid.

49 Ibid, [4.5].

50 Ibid, [4.6].

51 Ibid, [4.7].

52 Ibid.

53 Ibid.

54 Ibid, [4.8].

55 Ibid, [4.9], [4.10].

56 Ibid, [4A.1]; [4A.2] provides that this applies to all proceedings, whether or not a pre-action protocol applies. As the practice direction notes, r 44.3B(1)(c) provides that 'a party may not recover [by way of costs] any additional liability for any period in the proceedings during which the party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order'.

57 See *Civil Procedure Rules 1998* (SI 1998/3132) r 36.10.



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3.1.2 Compulsory pre-action disclosure by court order

Where pre-action disclosure cannot be obtained through cooperation between those in dispute or their lawyers, an application may be made to the court for orders for pre-action disclosure. However, such applications need to satisfy certain jurisdictional requirements and involve the exercise of judicial discretion.

In *Stoke-on-Trent City Council v Waller*⁵⁸ the Court of Appeal reaffirmed the importance of pre-action protocols in considering the effect of its holding that admissions in pre-action protocols were not governed by the rules relating to withdrawal of admissions:

*Now that such a valuable pre-action procedure has been introduced in advance of the formalities of litigation procedure, anything that lends uncertainty to the value of a pre-action admission of liability (given in these circumstances) appears to me to run against the grain of the overriding objective, and be likely to lead to avoidable delay, expense and worry.*⁵⁹

The Practice Direction and the various pre-action protocols do not alter the time frame for the commencement of proceedings or any time limits required by the rules or ordered by the court. Where proceedings are for any reason started before the parties have followed the procedures in the Practice Direction, the parties are 'encouraged to agree to apply to the court for a stay of the proceedings while they follow the practice direction'.⁶⁰

3.1.3 Legal challenge to pre-action discovery

In *Burrells Wharf Freeholds Ltd v Galliard Homes Ltd*⁶¹ Justice Dyson rejected the argument that the provision which removed the restriction of pre-action disclosure to personal injury and death claims⁶² was *ultra vires*.

3.2 CANADA

Pre-action protocols do not appear to be a standard feature of the litigation landscape in North American jurisdictions. However, protocols and other pre-action requirements have been considered in the course of several recent reform projects in Canada. The issue has also been considered in the United States and some limited reforms have been introduced.

In Canada, as in many other jurisdictions including the United States, there are many specific legal contexts where certain steps must be taken, or leave sought, before legal proceedings may be commenced. For example, where a landlord wishes to take action against a tenant for breach of a covenant or condition of a lease, the tenant must first be given notice of such intention with a view to resolving the issue before taking legal action.⁶³

3.2.1 Canadian Bar Association report

The Canadian Bar Association's 1996 *Systems of Civil Justice Task Force Report* noted:

*The Task Force is persuaded that a focus on early consensual resolution of disputes holds the greatest promise for reducing costs and delays ... the Task Force has concluded that all jurisdictions must provide the opportunity for early, non-binding dispute resolution in the civil justice system ... the goal of all such processes should be both to provide the opportunity as early as possible and to ensure that the opportunity is used by the parties.*⁶⁴

However, the task force did not favour rendering participation in a non-binding dispute resolution process a prerequisite for commencing an action:

*In our view ... this would be an unrealistic requirement in many situations. For example, time might not permit participation in such a process before commencement of legal proceedings if the interests and rights of the client are to be protected. Moreover, in many circumstances, the issues between the parties are not defined until the close of pleadings, that is, until the parties have exchanged the formal statements (pleadings) setting out the issues they believe to be relevant and in dispute.*⁶⁵

The task force did, on the other hand, recommend the imposition 'on all litigants [of] a positive, early and continuing obligation to canvass settlement possibilities and to consider non-binding dispute resolution processes'.⁶⁶ This recommendation has been the subject of limited implementation. Shone notes that '[t]he trend in most jurisdictions has been to build in procedures, often in conferences with judges ... that encourage litigants to look to [settlement] possibilities'.⁶⁷

3.2.2 Alberta Rules of Court Project

The use of pre-action protocols has in recent times been considered in the context of the Alberta Rules of Court Project, overseen by the Alberta Law Reform Institute. The Consultation Memorandum, *Management of Litigation*,⁶⁸ expressed the view that 'it would be too radical a change in Alberta to implement pre-action protocols'.⁶⁹ The Management of Litigation Committee felt that although pre-action protocols were 'seen as effective' in some other jurisdictions, the length of limitation periods in Alberta and possible opposition from the profession militated against their introduction.⁷⁰

The committee was of the opinion that 'best practice' protocols were better confined to steps to be taken after the commencement of an action, and called for feedback on whether such protocols ought to be formulated.⁷¹

The Early Resolution of Disputes Committee also considered the use of pre-action protocols, as discussed in its Consultation Memorandum.⁷² It noted that 'settlement prior to litigation advances the civil justice system objectives of reducing cost and delay',⁷³ and made note of two distinct options:

- (a) Making settlement efforts a prerequisite to commencing litigation. The committee recognised that a requirement that the prospective parties 'participate' in some form of non-binding dispute resolution process prior to the commencement of action would be 'onerous', noting that such a requirement had been rejected in the Canadian Bar Association's Report. However, it stated that a less demanding requirement 'that the parties attest to having "canvassed" settlement options' could serve to '[engage] the parties in thinking about settlement possibilities and the processes that might be used to achieve settlement'.⁷⁴ The committee sought feedback as to whether resort to non-binding ADR processes ought to be a prerequisite to litigation.⁷⁵
- (b) Introducing some form of pre-action protocols. The committee recognised that this idea had been rejected by the Management of Litigation Committee (see above), but felt that it warranted fresh consideration given the differing emphasis of its work.⁷⁶ The committee noted that there were indications that the pre-action protocols introduced pursuant to the Woolf reforms in England had made 'a positive contribution to the goal of settling claims' and effected a measure of 'cultural change in the approach to litigation'.⁷⁷ It concluded that there was:

*merit in the idea of developing pre-action protocols for use in particular actions relating to specific subject areas. In particular, we believe that an early exchange of information by the parties would promote the possibility of settlement before positions become fixed, as they tend to do once a statement of claim is filed. On the other hand, we recognise that settlement with insufficient information can be risky. Factual discovery and the exchange of expert reports may be a necessary prerequisite to settlement in some cases.*⁷⁸

The committee sought feedback 'about the idea of introducing pre-action protocols, and who should be responsible to develop them'.⁷⁹

It should be noted that the Draft Rules recently released by the Alberta Law Reform Institute do not appear to make provision for pre-action protocols.⁸⁰ The Draft Rules do oblige good faith participation in certain dispute resolution processes, but do not compel this at a pre-commencement stage.⁸¹

3.2.3 Nova Scotia rules revision project

The Supreme Court of Nova Scotia is undertaking a review of the civil procedure rules in the province. As part of the review, an Early Dispute Resolution Working Group released a Progress Report in 2005.⁸² However, its proposals were in the main directed to dispute resolution 'at the end of the disclosure process after documents are exchanged and the parties' principal witnesses are examined on discovery',⁸³ and it did not consider the imposition of pre-action obligations.

- 58 [2006] EWCA Civ 1137.
- 59 [2006] EWCA Civ 1137 [Brooke LJ].
- 60 Ministry of Justice [UK] (2006), above n 29, [3-5].
- 61 [2000] CP Rep 4.
- 62 *Civil Procedure (Modification of Enactments) Order 1998* (UK) SI 1998/2940, art 5.
- 63 See the examples given by Colleen Hanycz in the *National Report for Canada* prepared for the World Congress of Procedural Law, International Association of Procedural Law, Brazil, September 2007, and referred to by Andrews (2007), above n 15, notes 23 and 25.
- 64 Canadian Bar Association, *Systems of Civil Justice Task Force Report* (1996) 32.
- 65 *Ibid*, 32-3.
- 66 *Ibid*, 34 (Recommendation 2). It was noted that 'the parties should be required to attest in an appropriate way that settlement options have been canvassed before they can use the court system'.
- 67 M Shone, 'Into the Future: Civil Justice Reform in Canada 1996 to 2006 and Beyond' (Paper presented at the Agenda for Civil Justice Reform, April-May 2006, Canada, and subsequently modified as a report) 15.
- 68 Alberta Law Reform Institute, *Management of Litigation*, Alberta Rules of Court Project Consultation Memorandum No 12.5 (2003).
- 69 *Ibid*, 53.
- 70 *Ibid*, 52-3. The committee also suggested that the use of oral examinations in Alberta affected the appropriateness of pre-action protocols.
- 71 *Ibid*, 53.
- 72 Alberta Law Reform Institute, *Promoting Early Resolution of Disputes by Settlement*, Alberta Rules of Court Project Consultation Memorandum No 12.6 (2003).
- 73 *Ibid*, [50].
- 74 *Ibid*, [51].
- 75 *Ibid*, [52].
- 76 *Ibid*, [53].
- 77 *Ibid*, [60]-[61].
- 78 *Ibid*, [63].
- 79 *Ibid*, [64].
- 80 Alberta Law Reform Institute, *Alberta Rules of Court: Test Draft 3* (2007).
- 81 *Ibid*, r 4.5.
- 82 Early Dispute Resolution Working Group, Nova Scotia, *Progress Report* (2005).
- 83 *Ibid*, 3.



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3.2.4 British Columbia justice review

In November 2006 the British Columbia Civil Justice Reform Working Group produced its report.⁸⁴ The report includes a number of recommendations designed to improve the *pre-litigation* process of resolving disputes. This includes the provision of information and assistance to those with disputes and the establishment of a 'central hub' to provide information, advice, guidance and other services required to assist people in solving their own legal problems.⁸⁵ The report further recommended a requirement that parties personally attend a case planning conference before they actively engage the civil justice system beyond initiating or responding to a claim.⁸⁶ The case planning conference would seek to address settlement possibilities and processes, and also seek to narrow the issues and determine procedural steps and deadlines for the conduct of litigation in the event that settlement is not possible.

3.2.5 Ontario Civil Justice Reform Project

In 2006, the Government of Ontario established the Civil Justice Reform Project, and a Consultation Paper was issued.⁸⁷ The aim of the project is to develop reform options to render the civil justice regime in that province 'more accessible and affordable'.⁸⁸ One option canvassed in the Consultation Paper is the introduction of pre-action protocols 'for specific case types on a pilot basis (ie, case types determined to involve the greatest amount of delay)'.⁸⁹ It was noted that '[c]ertain pre-action protocols may work to weed out cases early, or at least unnecessary parties, at the front end of the litigation process',⁹⁰ and further, that:

*Pre-action protocols [in England] have been very effective in promoting early settlement of cases. However, they have also been criticized for raising litigants' costs for certain case types early in the litigation process.*⁹¹

Comments and suggestions were sought as to the possible use of pre-action protocols in Ontario. The report, issued in November 2007, does not contain any recommendations in relation to pre-action protocols.

3.3 UNITED STATES

In a recent review article, Richard Marcus, in discussing the emergence of pre-action protocols in England, noted that:

*Such a pre-litigation exchange of views has enjoyed occasional popularity in the U.S.; the first President Bush issued an Executive Order directing federal litigators to employ such a strategy.*⁹²

The order Marcus refers to is directed to setting an example for American litigants and states:

*No litigation counsel [representing a federal agency] shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that had previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.*⁹³

However, as Marcus also observes in another context, putting formal legal impediments in the path of plaintiffs wanting to litigate is frowned on in the United States, where access to the courts is highly valued.⁹⁴ Notwithstanding this, there are many specific legal contexts where pre-action notification is required, including environmental complaints, employment discrimination, and claims against public entities. In some other contexts there is also a need to exhaust alternative remedies or processes before court proceedings can be commenced against administrative agencies or in respect of corporate governance. More controversial has been the development of mandatory processes for pre-action submission to non-binding arbitration or expert complaints processes in medical negligence cases.⁹⁵

3.4 HONG KONG

The use of pre-action protocols was considered in Hong Kong in 2004, as part of the final report of the Chief Justice's Working Party on Civil Justice Reform. The report noted there was substantial evidence that pre-action protocols in England and Wales had led to significant front-loading of costs. It considered that:

*Protocols should therefore only be adopted where such front-loading is considered justifiable in that the benefits of early settlement resulting from the protocol are likely to outweigh the disadvantages of such front-loading.*⁹⁶

This militated against an attempt to devise a protocol applicable ‘across the board’. The report also noted that there had been difficulties in securing the meaningful enforcement of protocols in England and Wales, stressing that if a protocol was to remain credible, conscientious parties must be able to ensure compliance on the part of their opponents in an efficient and economic fashion:

*These concerns suggest that pre-action protocols should only be introduced in specialist lists where there is active support for the system by the court and court-users so that enforcement and effective sanctions are likely.*⁹⁷

Accordingly, the report concluded that pre-action protocols of a global nature ought not to be introduced, but recommended that courts operating specialist lists be permitted to create protocols of more limited scope, ‘subject to the approval of the Chief Judge of the High Court and after due consultation with all relevant persons’ (ie, regular users of those courts and any other interested persons).⁹⁸

The report recommended that rules should be introduced to enable the court to take into account noncompliance with an applicable protocol in exercising any relevant discretionary power,⁹⁹ although it specified that ‘special allowances may have to be made in relation to unrepresented litigants’.¹⁰⁰

The Hong Kong report also considered the issue of costs where a dispute is settled pursuant to a pre-action protocol. It noted that it was ‘important that [allocating] the front-loaded costs generated by pre-action protocols should not be allowed to undermine settlements achievable on the substantive dispute’.¹⁰¹ The report recommended there should be available a procedure analogous to that developed in England and Wales, whereby separate ‘costs-only’ proceedings can be brought in relation to the taxation of costs where a dispute has been settled at a pre-commencement stage.¹⁰² The Civil Justice (Miscellaneous Amendments) Bill, introduced into the Legislative Council on 25 April 2007, makes provision for such proceedings.¹⁰³

3.5 OTHER JURISDICTIONS

Pre-action procedures designed to provide for early exchange of information and settlement of disputes without the necessity for litigation have recently been introduced or recommended in numerous countries.

In Finland the Finnish Bar Association has adopted rules of professional conduct which provide that, prior to commencing proceedings, an advocate must notify the opposing party of their client’s claim and give the opposing party both reasonable time to consider the claim and an opportunity to reach an amicable settlement.¹⁰⁴ In many other jurisdictions the rules of professional legal bodies exhort lawyers to proactively encourage their clients to pursue ADR rather than litigation.¹⁰⁵

In Norway the parliament enacted new legislation governing civil procedure in June 2005 although the provisions did not come into force until January 2008.¹⁰⁶ In part, the reforms are intended to facilitate resolution of disputes outside the courts. Norwegian civil procedure differs from other Scandinavian civil procedure because a pre-action procedure is normally obligatory before legal proceedings can be commenced. A Conciliation Board has been established to facilitate resolution of disputes without the need for litigation. The compulsory nature of proceedings before the Conciliation Board has given rise to concerns that this may not be compatible with the requirement of Article 6 of the *European Charter of Human Rights*. However, the Ministry of Justice has adhered to the obligatory procedure because of the possibility of bringing the claim before a court later and also because the conciliation procedures are cheaper and simpler than court proceedings and ‘more decentralised than the court system’.¹⁰⁷

Under the new Code of Civil Proceedings and Mediation, which came into force in January 2008, parties are required to attempt to reach an amicable settlement of the dispute prior to commencing legal action. This may be attempted through conciliation: before the Conciliation Board, by non-judicial mediation, or through a non-judicial dispute resolution board. Where a party unreasonably opposes attempts at achieving settlement, costs sanctions may later be imposed by the court.¹⁰⁸

- 84 Civil Justice Reform Working Group, British Columbia, *Effective and Affordable Civil Justice* (Report to the Justice Review Task Force) (2006).
- 85 *Ibid*, Recommendation 1.
- 86 *Ibid*, Recommendation 2.
- 87 Coulter Osborne, *Ontario Civil Justice Reform Project: Consultation Paper* (2006).
- 88 *Ibid*, 1.
- 89 *Ibid*, 7.
- 90 *Ibid*, 6.
- 91 *Ibid*, 7.
- 92 Richard L Marcus, ‘Putting American Procedural Exceptionalism into a Globalized Context’ (2005) 53 *American Journal of Comparative Law* 709, 715.
- 93 Executive Order 12778, 57 CFR 3640 §1(a) (1991). Richard Marcus notes that ‘Executive Order No 12778 was superseded by Executive Order No 12998, which retained the provisions of §1(a) of Executive Order No 12778. See Executive Order No 12988, 61 CFR 4729 (1996)’: Marcus (2005), above n 92, note 18.
- 94 See the *National Report for the US*, prepared for the World Congress of Procedural Law, International Association of Procedural Law, Brazil, September 2007, and referred to by Andrews (2007), above n 15, 3 (n 12).
- 95 Andrews (2007), above n 15, 6 (note 24).
- 96 Chief Justice’s Working Party on Civil Justice Reform, *Civil Justice Reform: Final Report* (2004) [126].
- 97 *ibid*, [130].
- 98 *ibid*, Recommendations 5, 6.
- 99 *ibid*, Recommendation 7.
- 100 *ibid*, Recommendation 8.
- 101 *ibid*, [134].
- 102 *ibid*, Recommendation 9.
- 103 Civil Justice (Miscellaneous Amendments) Bill 2007 (HK) pt 2. It is hoped that the Bill will come into force by mid-2008: Government Information Centre, *Civil Justice (Miscellaneous Amendments) Bill to be Gazetted* (2007) <www.info.gov.hk/gia/general/200703/28/P200703280249.htm> at 3 January 2008.
- 104 See Laura Ervo, ‘Scandinavian Trends in Civil Pre-trial Proceedings’ (2007) 26 *Civil Justice Quarterly* 466, 473–4.
- 105 Andrews refers to Canada, Denmark, England and France in addition to Finland: Andrews (2007), above n 15, 18.
- 106 *The Code of Civil Proceedings and Mediation 2005* (Norway). For more information, see Ervo, above n 104, 479–80.
- 107 See generally, Ervo, above n 104, 480.
- 108 See the *National Report* by Laura Ervo referred to by Andrews (2007), above n 15, 7 (footnotes 33–7).

Chapter 2



Facilitating the Early Resolution of Disputes without Litigation

In the Netherlands, recent reviews of the law of civil procedure have recommended various reforms in relation to the ‘forgotten’ pre-action phase of disputes.¹⁰⁹ These include the proposed introduction of pre-action protocols to provide for a systematic approach to the early exchange of information between parties in dispute.

As noted by Andrews, Japan has recently introduced a voluntary pre-action regime designed to facilitate the early exchange of information between parties in dispute, access to information from other sources, settlement and better preparation for formal proceedings where disputes do not resolve.¹¹⁰

In Brazil pre-action procedures in various regions seek to encourage parties to negotiate openly and frankly with a view to resolving disputes without the necessity of litigation. Where a person intends to file proceedings against another party they are required to write to the other party informing them of their intention. The other party is required to respond within a reasonable period. The parties are then required to negotiate. Penalties can be imposed for failure to comply with the negotiation protocols.¹¹¹

Mandatory pre-action conciliation has a long history in Switzerland.¹¹²

In Italy mandatory mediation procedures apply in some legal contexts.¹¹³

As Andrews notes, pre-action procedures:

*are useful mechanisms for (a) reminding parties that they might avoid litigation and instead achieve a settlement, whether by simple negotiation or ADR, notably mediation, (b) sponsoring informed settlement by the exchange of information between disputants, (c) fostering a spirit of co-operation between adversaries so that the dispute can be narrowed or even resolved amicably, and (d) canalising preparation for litigation (if settlement is elusive).*¹¹⁴

However, as he also observes, pre-action regulation should not be ‘excessively prescriptive; over-scrupulous regulation might generate disproportionate costs’.¹¹⁵

3.6 AUSTRALIAN PRE-ACTION PROCEDURES¹¹⁶

In some Australian jurisdictions, pre-action disclosure and other obligations have been introduced pursuant to statutory provisions (eg, in Queensland for certain types of personal injury litigation), rules of court (eg, in South Australia and in the Family Court) or by agreement between stakeholder groups (eg, in Victoria for transport accident claims). Each of these developments is summarised below.

3.6.1 Queensland

In recent years a number of reforms implemented in Queensland either impose specific pre-action obligations on persons in certain types of dispute or facilitate the making of various types of court orders before litigation begins.

Queensland has enacted the *Personal Injuries Proceedings Act 2002* and amended other legislation to provide for new pre-action procedures for certain categories of personal injury claims. The main purpose of the legislation is ‘to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury’.¹¹⁷

This is sought to be achieved by:

- (a) *providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies; and*
- (b) *promoting settlement of claims at an early stage wherever possible; and*
- (c) *ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial ...*¹¹⁸

The Personal Injuries Proceedings Act makes provision for notification of claims,¹¹⁹ compulsory disclosure of information and documents,¹²⁰ a compulsory conference,¹²¹ compulsory final offers,¹²² and costs.¹²³ Similar provisions exist in separate legislation for injury claims arising from motor vehicle and work-related accidents. Accordingly, major areas of Queensland personal injury claims are now governed by extensive pre-action procedures.

In certain situations, the provisions require a prospective plaintiff to provide prospective defendants with extensive details within nine months of the incident or symptoms becoming manifest or one month of consulting a lawyer, whichever is the earlier. This includes personal information about the

claimant, including the consumption of alcohol or drugs in the 12 hours prior to the incident giving rise to the claim, extensive details about the injuries, and the names, addresses and telephone numbers of any witnesses.¹²⁴

In addition to the notice of claim and provision of information, the claimant is required to grant the prospective defendant authority to obtain information about the claim and the claimant from a wide variety of sources. The parties are required to attend a compulsory conference, which may be a mediation, to attempt to resolve the matter. If the claim remains unsettled, parties must file final offers. The provisions are examined in further detail below.

Personal Injuries Proceedings Act

The Personal Injuries Proceedings Act introduced major procedural reforms,¹²⁵ which, as noted above, are said to have been designed to ensure the affordability of insurance.¹²⁶

In particular, the legislation seeks to:

- provide ‘a procedure for the speedy resolution of claims for damages for personal injury to which the Act applies’
- promote ‘settlement of claims at an early stage wherever possible’
- ensure ‘that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial’
- impose reasonable limits on awards of damages
- minimise the costs of claims
- regulate inappropriate advertising and touting.¹²⁷

The Act applies in relation to all personal injuries arising out of an incident occurring before, on or after 18 June 2002,¹²⁸ with the exception of various categories of personal injury, such as motor accidents and accidents at work.¹²⁹ Some of these other categories of personal injury are governed by separate legislation.

Provision is made for notice of a claim to be given in an approved form.¹³⁰ The legislation sets out certain steps which a claimant and a person against whom a claim is made are required to take before legal proceedings are commenced.

*Claims procedures*¹³¹

The claimant must give written notice of the claim in the approved form.¹³² This may include information required to be verified by statutory declaration.¹³³ The notice authorises access to records and sources of information relevant to the claim¹³⁴ and must be accompanied by documents required under a regulation.¹³⁵ Notice must be given in two parts and there are different time limits applicable to each part.¹³⁶

Separate provisions apply to notice of a claim in medical negligence cases.¹³⁷ A person to whom an initial notice is given is required, within one month after receiving the notice, to

109 W D H Asser, H A Groen and J B M Vranken (with the aid of I N Tzankova), *A Fundamental Review of the Dutch Law of Civil Procedure: Interim Report* (2003) and *Final Report* (2006), referred to by Andrews (2007), above n 15, 2–3.

110 Andrews (2007), above n 15, 3. In 2004 the Japanese Code of Civil Procedure was amended and a pre-action procedure was introduced as a general provision for all cases. The procedure is voluntary and there are apparently no sanctions for noncompliance.

111 *Ibid*, 6 (n 22).

112 *Ibid*, 8.

113 *Ibid*.

114 *Ibid*, 35.

115 *Ibid*, 36.

116 The commission is grateful for the information provided by David Bamford, Associate Professor and Deputy Dean of the School of Law, Flinders University, including the paper ‘Stretching Civil Procedure: The Growth of Pre-action Requirements’ (Paper presented at the Civil Litigation Conference, University of Melbourne Law School, 22 September 2006).

117 *Personal Injuries Proceedings Act 2002* (Qld) s 4(1).

118 *Personal Injuries Proceedings Act 2002* (Qld) s 4(2).

119 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, ss 9–20.

120 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, div 2, ss 30–34.

121 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, div 4, ss 36–38.

122 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, div 4, s 39.

123 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 3, s 56.

124 *Personal Injuries Proceedings Regulation 2002* (Qld) reg 3.

125 Various provisions are deemed to be ‘substantive’ rather than ‘procedural’: *Personal Injuries Proceedings Act 2002* (Qld) s 7. However, see the decision of the NSW Court of Appeal in *Hamilton v Merck and Co Inc; Hutchinson v Merck Sharp and Dohme (Australia) Pty Ltd* [2006] NSWCA 55 (Spigelman CJ, Handley and Tobias JJA).

126 *Personal Injuries Proceedings Act 2002* (Qld) s 4(1).

127 *Personal Injuries Proceedings Act 2002* (Qld) s 4(2).

128 *Personal Injuries Proceedings Act 2002* (Qld) s 6(1).

129 These exceptions, and relevant governing legislation, are set out in detail in s 6 (2)–(5) of the *Personal Injuries Proceedings Act 2002* (Qld).

130 *Personal Injuries Proceedings Act 2002* (Qld) s 7(2), (3).

131 See *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, div 1.

132 *Personal Injuries Proceedings Act 2002* (Qld) s 9(1).

133 *Personal Injuries Proceedings Act 2002* (Qld) s 9(1B).

134 *Personal Injuries Proceedings Act 2002* (Qld) s 9(2)(b).

135 *Personal Injuries Proceedings Act 2002* (Qld) s 9(2)(c).

136 *Personal Injuries Proceedings Act 2002* (Qld) s 9(3), (3A).

137 *Personal Injuries Proceedings Act 2002* (Qld) s 9A.



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provide a written response advising whether any documents are held in relation to the medical services mentioned in the notice and providing a copy of all documents held by the person about the medical services.¹³⁸

The legislation requires a person to whom a notice is given to provide a written response, within a prescribed period, dealing with, among other things, the issue of whether that person is a proper respondent to the claim.¹³⁹ There are pecuniary penalties for failure to comply with the various obligations.

Where a proper respondent receives a notice that person is required, within a prescribed time, to provide written notice to the claimant about compliance with the obligations in part 1 of a notice of claim.¹⁴⁰ Except in certain circumstances, a claimant is prohibited from proceeding with a claim if they fail to comply with the notice requirements applicable to part 1 of a notice of claim.¹⁴¹ The claimant may seek authorisation from the court to proceed despite noncompliance.¹⁴²

Notification of claims on behalf of children

There are special provisions for notification of claims in relation to children.¹⁴³

If part 1 of the required notice is not given within the prescribed time the person to whom the notice is given may apply to the court for an order that the claim not proceed further.¹⁴⁴ In considering an application under this section, the court must consider the justice of the case, having regard to:

- (a) *the extent of injuries;*
- (b) *the reason for the delay;*
- (c) *any prejudice suffered by the applicant;*
- (d) *the nature of the parties' conduct; and*
- (e) *any other relevant matter.*¹⁴⁵

Following receipt of a claim a respondent is obliged to, among other things, take reasonable steps to obtain information about the incident alleged to have given rise to the personal injury, indicate whether liability is admitted or denied (and if contributory negligence is claimed, indicate the degree of contributory negligence, expressed as a percentage), indicate whether any offer made by the claimant is accepted or rejected, make a fair and reasonable estimate of the damages and make a written offer, or counteroffer, setting out in detail the basis on which the offer is made.¹⁴⁶

An offer or counteroffer of settlement must be accompanied by a copy of medical reports, assessments of cognitive functional or vocational capacity and all other material, including documents relevant to economic loss, in the possession of the offeror that may help the person to whom the offer is made make a proper assessment of the offer.¹⁴⁷

Particular provisions apply to notice of a claim for damages for a child, including an obligation on a parent or legal guardian of the claimant to give notice and obligations on legal practitioners acting for a parent or guardian.¹⁴⁸ A failure on the part of the legal practitioner to comply is deemed to be professional misconduct.¹⁴⁹

Even if an application for an order that the claim not proceed is dismissed, the claimant is not entitled to recover an amount for costs incurred by the claimant's parent or legal guardian for medical or other expenses, or legal costs paid or incurred, and an amount for gratuitous services provided by the parent or legal guardian unless the court orders otherwise.¹⁵⁰

Provision is made for notice of an adverse incident to be given by a person providing medical treatment to the parent or legal guardian of the child.¹⁵¹ Where a notice of adverse event is given and a notice of a claim is not given within the required time, such notice can only be given with leave of the court and the claimant must show why the claim should proceed.¹⁵² Certain costs may not be recovered unless the court orders otherwise.¹⁵³

Disclosure obligations of parties

Division 2 of the Act relates to the obligations of the parties and is intended to put the parties in a position where they have enough information to assess liability and quantum.¹⁵⁴

The claimant has a duty to provide certain documents and information to the respondent.¹⁵⁵ The respondent may require the claimant to verify certain information by statutory declaration.¹⁵⁶ If a claimant fails, without proper reason, to comply fully with a request by a respondent, the claimant is liable for costs to the respondent resulting from the failure.¹⁵⁷

A respondent and claimant may jointly arrange an expert report, although neither has an obligation to agree to such a report.¹⁵⁸ Provision is also made for payment of the costs of the report.¹⁵⁹ If the claimant does not agree to an expert report in respect of certain prescribed matters, the claimant must comply with a request by the respondent to undergo, at the respondent's expense, either or both a medical examination or an assessment.¹⁶⁰

A respondent must provide documents and information to the claimant¹⁶¹ within certain prescribed time limits. The claimant may require the respondent to verify certain information by statutory declaration.¹⁶² If the respondent fails, without proper reason, to fully comply, the respondent is liable for costs to the claimant resulting from the failure.¹⁶³

There are also obligations on respondents to give documents to any contributor added by the respondent,¹⁶⁴ and obligations on contributors to give documents to the respondent.¹⁶⁵

The obligations to provide documents and give disclosure do not apply to information or documents protected by legal professional privilege.¹⁶⁶ Investigative reports, medical reports and reports relevant to the claimant's rehabilitation must be disclosed even though otherwise protected by legal professional privilege, but the statements of opinion may be omitted.¹⁶⁷

Where the respondent has reasonable grounds to suspect a claimant of fraud, 'the respondent may apply, ex parte, to the court for approval to withhold from disclosure ... documents that (a) would alert the claimant to the suspicion; or (b) could help further the fraud'.¹⁶⁸

There are pecuniary penalties if respondents withhold information or documentation other than as permitted by the legislation or with court approval.¹⁶⁹

Where a document is not provided to the other party and this amounts to a failure to comply with the legal obligations for disclosure, the document cannot be used in any subsequent court proceedings based on the claim unless the court otherwise orders.¹⁷⁰

There is no obligation to provide documents or information to another party already in possession of such information or documents.¹⁷¹

Powers of enforcement

Where a party fails to comply with a duty imposed under division 1 or 2, the court may order the party to take specified action to remedy the default and the court may make consequential or ancillary orders, including orders as to costs.¹⁷²

138 *Personal Injuries Proceedings Act 2002* (Qld) s 9A(8).

139 *Personal Injuries Proceedings Act 2002* (Qld) s 10.

140 *Personal Injuries Proceedings Act 2002* (Qld) s 12; see also s 13 concerning presumed compliance if the respondent does not respond within the required time.

141 *Personal Injuries Proceedings Act 2002* (Qld) s 18.

142 *Personal Injuries Proceedings Act 2002* (Qld) s 18(1)(c)(ii).

143 See *Personal Injuries Proceedings Act 2002* (Qld) div 1A.

144 *Personal Injuries Proceedings Act 2002* (Qld) s 20D.

145 *Personal Injuries Proceedings Act 2002* (Qld) s 20E.

146 *Personal Injuries Proceedings Act 2002* (Qld) s 20(1).

147 *Personal Injuries Proceedings Act 2002* (Qld) s 20(3).

148 *Personal Injuries Proceedings Act 2002* (Qld) ss 20C(1), (2).

149 *Personal Injuries Proceedings Act 2002* (Qld) s 20C(3).

150 *Personal Injuries Proceedings Act 2002* (Qld) s 20F.

151 *Personal Injuries Proceedings Act 2002* (Qld) s 20G.

152 *Personal Injuries Proceedings Act 2002* (Qld) s 20H. The court is required to consider the same factors identified in 20E for an application under s 20D. See s 20I.

153 *Personal Injuries Proceedings Act 2002* (Qld) s 20J.

154 *Personal Injuries Proceedings Act 2002* (Qld) s 21.

155 *Personal Injuries Proceedings Act 2002* (Qld) s 22.

156 *Personal Injuries Proceedings Act 2002* (Qld) s 22(7).

157 *Personal Injuries Proceedings Act 2002* (Qld) s 22(8).

158 *Personal Injuries Proceedings Act 2002* (Qld) s 23.

159 *Personal Injuries Proceedings Act 2002* (Qld) s 24.

160 *Personal Injuries Proceedings Act 2002* (Qld) s 25(1), (2).

161 *Personal Injuries Proceedings Act 2002* (Qld) s 27.

162 *Personal Injuries Proceedings Act 2002* (Qld) s 27(3).

163 *Personal Injuries Proceedings Act 2002* (Qld) s 27(4).

164 *Personal Injuries Proceedings Act 2002* (Qld) s 28.

165 *Personal Injuries Proceedings Act 2002* (Qld) s 29.

166 *Personal Injuries Proceedings Act 2002* (Qld) s 30.

167 *Personal Injuries Proceedings Act 2002* (Qld) s 30(2).

168 *Personal Injuries Proceedings Act 2002* (Qld) s 30(3).

169 *Personal Injuries Proceedings Act 2002* (Qld) s 31.

170 *Personal Injuries Proceedings Act 2002* (Qld) s 32.

171 *Personal Injuries Proceedings Act 2002* (Qld) s 34.

172 *Personal Injuries Proceedings Act 2002* (Qld) s 35.



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Compulsory conferences

In addition to the pre-action disclosure obligations, the legislation also provides for compulsory conferences *before* a court proceeding is started.¹⁷³ There are provisions for the exchange of documents, etc., before any compulsory conference.¹⁷⁴ The Act prescribes the procedure at compulsory conferences.¹⁷⁵

Costs disclosure

Where a party is legally represented, the lawyer is required to give the client a costs statement containing:

- (a) details of the party's legal costs ... up to the completion of the compulsory conference
- (b) an estimate of the likely legal costs ... if the claim proceeds to judicial determination at trial and
- (c) a statement of the consequences to the party ... in each of the following cases:
 - (i) if the damages awarded are equal to, or more than, the claimant's mandatory final offer;
 - (ii) if the ... damages awarded [are] less than the claimant's mandatory final offer but more than the respondent's ... mandatory final offer;
 - (iii) if the damages awarded ... [are] equal to, or less than, the respondent's ... offer.¹⁷⁶

Mandatory final offers

Mandatory final offers are required to be exchanged if the claim is not settled at the compulsory conference, unless the court dispenses with this obligation.¹⁷⁷ The Act provides for the time for acceptance of such offers and for costs.¹⁷⁸

Time for commencement of proceedings

The legislation specifies the time for starting a proceeding after the conclusion of the compulsory conference¹⁷⁹ and for the commencement of proceedings in urgent cases.¹⁸⁰

Failure to comply with requirements

The legislation provides for costs consequences for failure to comply with claims procedures,¹⁸¹ in addition to the abovementioned costs provisions, penalty provisions, and sections relating to professional misconduct by lawyers.

Costs generally

The Act contains detailed provisions in relation to legal costs.¹⁸²

Limitation period provisions

Proceedings may be commenced, within prescribed time limits, after the expiration of a period of limitation where a claimant has given a part 1 notice before the limitation period expires.¹⁸³

Fraud

A respondent may recover from a claimant or other person costs reasonably arising from fraud or attempted fraud.¹⁸⁴ A person who defrauds or attempts to defraud a respondent, deliberately misleads or attempts to deliberately mislead a respondent or 'connives at conduct' by another that contravenes the relevant provisions may be fined or imprisoned.¹⁸⁵

False or misleading information or documents

The Act provides for fines and imprisonment for knowingly making or providing false or misleading statements and documents.¹⁸⁶

Motor Accident Claims

The *Motor Accident Insurance Act 1994* (Qld) makes provision for notification of claims,¹⁸⁷ compulsory disclosure,¹⁸⁸ a compulsory conference,¹⁸⁹ compulsory final offers,¹⁹⁰ and costs.¹⁹¹

Workers Compensation Claims

The *Workers Compensation and Rehabilitation Act 2003* (Qld) makes similar provision for notification of claims,¹⁹² compulsory disclosure,¹⁹³ a compulsory conference,¹⁹⁴ compulsory final offers,¹⁹⁵ and costs.¹⁹⁶ Various provisions are intended 'to facilitate the just and expeditious resolution of the real issues in a claim for damages at a minimum of expense'.¹⁹⁷

There are also relevant provisions under the *WorkCover Queensland Act 1996* (Qld).

Personal Injury Uniform Pre-Action Procedures

In late 2003 the Queensland Attorney-General appointed a stakeholder reference group,¹⁹⁸ chaired by Richard Douglas SC, to consider a common pre-proceedings process for personal injury claims.¹⁹⁹ The reference group was assisted by an interdepartmental working group.²⁰⁰

In June 2004 the reference group prepared a report which proposed a revised pre-proceedings process for personal injury claims. It recommended that this process replace the existing regimes established by the *Personal Injuries Proceedings Act 2002* (Qld), the *Motor Accident Insurance Act 1994* (Qld), the *Workers' Compensation and Rehabilitation Act 2003* (Qld) and the *WorkCover Queensland Act 1996* (Qld). The proposed pre-proceedings process would apply to all cases of personal injury other than dust-related diseases, medical negligence and claims from minors.

It was proposed that, as far as practicable, uniform procedures and processes would be introduced in the following five areas:

- early notification of claims
- compulsory disclosure of information and documents
- a compulsory conference
- compulsory final offers
- costs.²⁰¹

The advantages of a common pre-action procedure were said to include:

- simplification and standardisation of the claims process
- allowing a broader base of lawyers to initiate claims
- the earlier reporting of claims
- expediting the claim process
- avoiding lawyer-driven delays
- introducing a barrier to marginal claims
- consistency of practice for lawyers and insurers
- consistency of time frames for all personal injury claims
- reduced disputation costs
- enforcement of positive claim management practices and disciplines
- providing a catalyst for legal cost reforms

173 *Personal Injuries Proceedings Act 2002* (Qld) s 36.

174 *Personal Injuries Proceedings Act 2002* (Qld) s 37.

175 *Personal Injuries Proceedings Act 2002* (Qld) s 38.

176 *Personal Injuries Proceedings Act 2002* (Qld) s 37(4).

177 *Personal Injuries Proceedings Act 2002* (Qld) s 39.

178 *Personal Injuries Proceedings Act 2002* (Qld) s 40.

179 *Personal Injuries Proceedings Act 2002* (Qld) s 42.

180 *Personal Injuries Proceedings Act 2002* (Qld) s 43.

181 *Personal Injuries Proceedings Act 2002* (Qld) s 48.

182 *Personal Injuries Proceedings Act 2002* (Qld) s 56. See also s 48.

183 *Personal Injuries Proceedings Act 2002* (Qld) s 59.

184 *Personal Injuries Proceedings Act 2002* (Qld) s 60.

185 *Personal Injuries Proceedings Act 2002* (Qld) s 72.

186 *Personal Injuries Proceedings Act 2002* (Qld) s 73.

187 *Motor Accident Insurance Act 1994* (Qld) ss 37–44.

188 *Motor Accident Insurance Act 1994* (Qld) pt 4, div 4.

189 *Motor Accident Insurance Act 1994* (Qld) pt 4, div 5A, ss 51A, 51B.

190 *Motor Accident Insurance Act 1994* (Qld) pt 4, div 5A, s 51C.

191 *Motor Accident Insurance Act 1994* (Qld) pt 4, div 6, s 55F.

192 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 5, ss 275–287.

193 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 5, ss 284–287.

194 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 6, div 1, ss 288–290A.

195 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 6, div 1, s 292.

196 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 12, ss 310–318.

197 *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 273.

198 For the list of participants in the reference group, see Report of a Stakeholder Reference Group, *A Review of the Possibility of a Common Personal Injuries Pre-Proceedings Process for Queensland* (2004).

199 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 1271 (R J Welford, Attorney-General and Minister for Justice).

200 The group comprised staff from the Motor Accident Insurance Commission, the Department of Industrial Relations and the Department of Justice and Attorney-General. See Report of a Stakeholder Reference Group (2004), above n 199, 6.

201 *Ibid*, 3.



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- overcoming identified concerns with existing processes
- consistency with the objectives of the Uniform Civil Procedure Rules to facilitate the just and expeditious resolution of the real issues in dispute at minimum expense.²⁰²

The disadvantages of the proposed reform were said to include:

- time and expense incurred in becoming familiar with the new process
- additional interlocutory applications which would have an impact on the courts
- possible alienation of claimants not represented by a lawyer
- the risk of increased claimant participation as a result of simplification
- the need for consequential amendment of personal injury claim legislation.²⁰³

The group recommended that the proposed common pre-proceedings process should be 'substantive' rather than 'procedural' in nature.²⁰⁴ All personal injuries claims (other than the excluded claims referred to above) would be handled in accordance with the proposed common procedures. The filing of a notice of claim would give rise to a stay of the limitation period under the *Limitation of Actions Act 1974*, either by order of the court or by agreement of the defendant.²⁰⁵

Pre-proceedings expert appointments

In Queensland, the *Uniform Civil Procedure Rules 1999* make provision for persons in dispute to apply to the court for the appointment of an expert to prepare a report giving an opinion on an agreed issue in dispute before a proceeding is started.²⁰⁶ The rule may be invoked where there is a dispute that will 'probably' result in a proceeding and where immediate expert evidence may help in resolving a substantial issue in dispute.²⁰⁷

Apart from the provision for a jointly agreed pre-action expert, the Rules also allow one of the persons to a dispute that will 'probably' result in a proceeding to apply to the court for the appointment of an expert to prepare a report giving an opinion on a 'substantial' issue where this may help in resolving that issue.²⁰⁸ In deciding whether to appoint an expert, the court may consider:

- the complexity of the issue; and*
- the impact of the appointment on the costs of the contemplated proceeding; and*
- the likelihood of the appointment expediting or delaying the contemplated proceeding;*
and
- the interests of justice; and*
- any other relevant consideration.*²⁰⁹

Where an expert is appointed under any of the above provisions and a proceeding is subsequently commenced, the expert appointed is the only expert who may give expert evidence on the issue in question, unless the court otherwise orders.²¹⁰

3.6.2 Family law proceedings

The Family Court has extensive pre-action procedures. Before starting a case, each prospective party is required to comply with the pre-action procedures.²¹¹ These include a requirement that they must attempt to resolve the dispute using dispute resolution methods.²¹²

The pre-action procedures apply to financial cases (property settlement and maintenance)²¹³ and parenting cases,²¹⁴ but do not have to be complied with in certain circumstances.²¹⁵ The procedures also allow the court to accept that it was not possible or appropriate for a party to follow the pre-action procedures in some circumstances, including where there is a genuinely intractable dispute, where a person would be unduly prejudiced or adversely affected if notice of an intention to start a case is given to another person in the dispute, and where a time limitation period is close to expiring.²¹⁶

The court may take into account a party's failure to comply with a pre-action procedure when making an order, including in relation to costs.²¹⁷ Similarly, where a party applies for relief from certain rules or orders, the court may consider the extent to which a party has complied with pre-action procedures.²¹⁸

Each prospective party to a case in the Family Court is required to make a genuine effort to resolve the dispute before commencing proceedings. This requires participation in dispute resolution procedures such as negotiation, conciliation, arbitration and counselling; exchanging a notice of intention to claim

and exploring options for settlement by correspondence; and complying, as far as practicable, with the duty of disclosure.²¹⁹ The range of information and documentation required to be exchanged is extensive.²²⁰

The objects of the pre-action procedures are:

- (a) to encourage early and full disclosure by the exchange of information and documents;
- (b) to provide the parties in dispute with a process to help them avoid legal action by reaching a settlement;
- (c) to provide a procedure to resolve cases quickly and limit costs;
- (d) to help the efficient management of the case, if proceedings become necessary, by clear identification of the real issues so as to reduce the duration and cost of the proceedings; and
- (e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence.²²¹

The Family Court in its public information brochure states that '[t]he aim of the pre-action procedures is to explore areas of resolution and, where a dispute cannot be resolved, to narrow the issues that require a court decision. This should control costs and if possible, resolve disputes quickly, ideally without the need to apply to a court'.²²²

In addition to the obligations imposed on parties to the dispute, the pre-action procedures also impose obligations on lawyers, including to:

- (a) advise clients of ways of resolving disputes without starting legal action;
- (b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;
- (c) ... endeavour to reach a solution by settlement rather than start or continue legal action;
- (d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if [it is], in the lawyer's opinion ... reasonable ...;
- (e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and
- (f) advise clients of the estimated costs of the legal action ...²²³

Lawyers are also required to 'actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable'.²²⁴ It is noted in the pre-action procedures that the court recognises that pre-action procedures cannot override a lawyer's duty to the client and that a pre-action procedure may not be complied with because

202 Ibid, 7–8.

203 Ibid, 8.

204 Ibid 3

205 Ibid

206 *Uniform Civil Procedure Rules 1999* (Qld) r 429R.

207 *Uniform Civil Procedure Rules 1999* (Qld) r 429R(1)(a).

208 *Uniform Civil Procedure Rules 1999* (Qld) r 429S.

209 *Uniform Civil Procedure Rules 1999* (Qld) r 429S(7).

210 *Uniform Civil Procedure Rules 1999* (Qld) rr 429R(6), 429S(11).

211 The pre-action procedures are set out in Schedule 1 of the *Family Law Rules 2004* (Cth).

212 *Family Law Rules 2004* (Cth) r 1.05.

213 *Family Law Rules 2004* (Cth) pt 1, sch 1.

214 *Family Law Rules 2004* (Cth) pt 2, sch 1. See also s 60I(2) and (3) of the *Family Law Act 1975* (Cth), which require that a party comply with r 1.05 and pt 2 of sch 1 of the *Family Law Rules 2004* (Cth) before an application is made for a parenting order.

215 The pre-action procedures are not required to be complied with (a) in parenting cases involving allegations of child abuse or family violence; (b) in property cases involving allegations of family violence or fraud; (c) where the application is urgent; (d) where the applicant would be unduly prejudiced; (e) where there has been a similar application in the same cause of action in the 12 months preceding the start of the case; (f) in applications for divorce; (g) in child support applications or appeals; or (h) in bankruptcy proceedings within the court's jurisdiction under s 35 or 35B of the *Bankruptcy Act*. See *Family Law Rules 2004* (Cth) r 1.05(2).

216 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 1(4) and pt 2, s 1(4).

217 *Family Law Rules 2004* (Cth) r 1.10 (2) (d).

218 *Family Law Rules 2004* (Cth) r 11.03 (2)(b). See also r 19.10(1)(b), which provides for orders to be made against a lawyer if they fail to comply with a pre-action procedure.

219 *Family Law Rules 2004* (Cth) r 1.05 and sch 1, s 1. Rule 13.01(2) provides that the general duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalised.

220 See *Family Law Rules 2004* (Cth) sch 1 and the disclosure obligations listed in ch 13, pt 4, sch 1.

221 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 1(5).

222 Family Court of Australia, *Before you file – pre-action procedure for financial cases* (2006) <www.familycourt.gov.au/presence/resources/file/eb001243e3d0999/BRPreFin_0706w.pdf> at 28 November 2007.

223 *Family Law Rules 2004* (Cth) sch 1, pt 1, ss 6(1)(a)–(f) and sch 1, pt 2, ss 6(1)(a)–(f).

224 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 6(1)(i) and sch 1, pt 2, s 6(1)(i).

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a client may refuse to accept advice. However, lawyers are required not to mislead the court and have an obligation to cease to act if a client wishes not to disclose a fact or document that is relevant to the case.²²⁵

The pre-action procedures also include detailed provisions relating to expert witnesses. Expert witnesses must be instructed in writing and be 'fully informed' of their obligations.²²⁶ Experts should only be retained on an issue where the expert evidence is 'necessary to resolve the dispute'.²²⁷ If practicable, the 'parties should agree to obtain a report from a single expert witness instructed by both parties'.²²⁸ If separate experts' reports are obtained, the pre-action procedural provisions state that the court requires the reports to be disclosed.²²⁹

3.6.3 South Australia

Since 1992 South Australia has continued to expand pre-action procedures in all courts. Provisions requiring the exchange of a formulated claim and expert reports prior to commencing proceedings were initially limited to personal injury cases, but have been extended to all claims for liquidated and unliquidated damages since September 2000. This has been effected through rules of court.

The *Supreme Court Rules 2006 (SA)* and the *District Court Rules 2006 (SA)* provide that a plaintiff must, at least 90 days before commencing an action to which the rule applies, give the defendant a written notice containing or accompanied by:

- (a) an offer to settle the ... claim on the basis set out in the notice; and
- (b) sufficient details of the claim, and sufficient supporting material, to enable the defendant to assess the reasonableness of the plaintiff's offer of settlement and to make an informed response ...; and
- (c) if the plaintiff is in possession of expert reports relevant to the claim—copies of the expert reports.²³⁰

If the plaintiff believes that the defendant is insured and knows the identity of the insurer, the plaintiff must send a copy of the notice and accompanying material to the insurer.²³¹

The defendant must, within 60 days after receiving the notice, respond in writing by '(a) accepting the plaintiff's offer of settlement; or (b) making a counter-offer; or (c) stating that liability is denied and the grounds on which it is denied'.²³² The defendant must provide the plaintiff with a copy of any expert reports relevant to the claim in the defendant's possession.²³³

Where a court proceeding is subsequently commenced, the originating process must include a statement as to whether the plaintiff has complied with the requirements of the rule and if not, why not.²³⁴ The plaintiff's notice to the defendant and the defendant's response must be filed in the court as a 'suppressed file'.²³⁵ In awarding costs of the action the court may take into account whether the parties have complied with their obligations under the rule and the terms of any offer, counteroffer and any responses and the extent to which they are 'reasonable or unreasonable in the circumstances'.²³⁶

In both the Supreme and District Courts the rule relating to pre-action obligations applies to monetary claims, with some exceptions.²³⁷

At the Magistrates Court level the rules make provision for a prospective plaintiff to serve on the prospective defendant notice of an intended claim.²³⁸ Subject to any order of the court, a plaintiff is not entitled to the costs for filing a claim unless notice of an intended claim was given not less than 21 days before the filing of the claim.²³⁹ In an action for damages for personal injury 'notice of the claim must be given at least 90 days before the filing of the claim'.²⁴⁰ Notice must be given to the defendant's insurer if the identity of the insurer is known to the prospective plaintiff.²⁴¹ The notice must include notice of any intended claim for past and future economic loss and be supported by 'medical reports setting out the nature and extent of the plaintiff's injuries and residual disabilities as known to the plaintiff at the time of giving the notice'.²⁴² Generally, the notice should briefly outline the nature and amount of the plaintiff's claim and inform the prospective defendant of the options for settling the claim, including free mediation prior to the commencement of proceedings.

In the Magistrates' Court, a person intending to bring an action may also, 'by notice in writing to another person, request the ... person to make discovery of documents and disclose the ... whereabouts of any document or property that is relevant to the proposed action'.²⁴³ Where there is noncompliance within seven days of service of the notice, 'the court may order ... discovery and disclosure by letter or affidavit'.²⁴⁴

The new South Australian pre-action provisions contain no explicit objectives but are clearly intended to promote early settlement. In *Stewart v Jacobsen* the Full Court of the South Australian Supreme Court stated:

*The purpose of the 90 day Rule is to ensure that litigants take all such proper steps to address the relevant issues prior to the issue of proceedings. The rule is designed to encourage an exchange of information at an early stage in the hope that parties can resolve matters by negotiation and discussion rather than by litigation.*²⁴⁵

The court went on to uphold a 10 per cent reduction in costs awarded for failure to comply with pre-action requirements.

3.6.4 New South Wales

In New South Wales there are no statutory provisions or rules of court which impose general pre-action obligations on persons in dispute. There are, however, provisions for pre-action orders of the court to be obtained in various circumstances, including to identify a potential defendant, to ascertain the merits of a proposed cause of action and to prevent the removal or dissipation of assets. Also, in some circumstances there are obligations to obtain experts' reports or other documents prior to the commencement of litigation and to disclose such documents to parties when proceedings are commenced or pleadings are served (see Disclosure and Service of Documents, below).

3.6.5 Victoria

Magistrates' Court

During 2003 the Magistrates' Court canvassed a proposal requiring prospective claimants to send prospective defendants a standard form of letter of claim outlining the nature of the claim and the circumstances in which it was said to have arisen. The recipient was to be given 21 days in which to either 'pay the amount claimed or contact the claimant to discuss resolution of the dispute or agree to attend a mediation'. It was proposed that the services of the Victorian Dispute Resolution Service would be available to provide mediation services at no cost to the parties. In the event of noncompliance the claimant would be deprived of the costs of issuing proceedings. The proposal was not implemented due to 'vehement opposition from both arms of the legal profession'.²⁴⁶

During 2004, the Magistrates' Court introduced a modified version of this proposal.²⁴⁷ Parties were encouraged to mediate their dispute before the issue of proceedings. The costs of mediation would form part of the costs of the action if the matter proceeded to litigation.²⁴⁸ Where the pre-action procedures had been followed the court would fast-track the case to trial and give the matter priority on the day of hearing over all other proceedings except those which were partially heard. According to the Magistrates' Court's submission to

225 *Family Law Rules 2004* (Cth) sch 1, pt 1, ss 6(1)(i), (2)–(4) and sch 1, pt 2, ss 6(1)(i), (2)–(4).

226 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 5(2)(a) and sch 1, pt 2, s 5(2)(a).

227 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 5(2)(b) and sch 1, pt 2, s 5(2)(b).

228 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 5(2)(c) and sch 1, pt 2, s 5(2)(c).

229 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 5(2)(d) and sch 1, pt 2, s 5(2)(d). See also *Family Law Rules 2004* (Cth) pt 15.5.

230 *Supreme Court Civil Rules 2006* (SA) s 33(2); *District Court Civil Rules 2006* (SA) s 33(2).

231 *Supreme Court Civil Rules 2006* (SA) s 33(3); *District Court Civil Rules 2006* (SA) s 33(3).

232 *Supreme Court Civil Rules 2006* (SA) s 33(4); *District Court Civil Rules 2006* (SA) s 33(4).

233 *Supreme Court Civil Rules 2006* (SA) s 33(5); *District Court Civil Rules 2006* (SA) s 33(5).

234 *Supreme Court Civil Rules 2006* (SA) s 33(6)(a); *District Court Civil Rules 2006* (SA) s 33(6)(a).

235 *Supreme Court Civil Rules 2006* (SA) s 33(6)(b); *District Court Civil Rules 2006* (SA) s 33(6)(b).

236 *Supreme Court Civil Rules 2006* (SA) s 33(7); *District Court Civil Rules 2006* (SA) s 33(7).

237 Section 33(1) of the *Supreme Court Civil Rules 2006* (SA) and the *District Court Civil Rules 2006* provides that the rule does not apply to (a) an action in which urgent relief is sought; (b) an action brought in circumstances where the plaintiff reasonably believes there is a risk that the defendant will take action to remove assets from the jurisdiction and intends to seek an injunction to prevent this; or (c) an action excluded from the application of the rule by direction of the court.

238 *Magistrates Court (Civil) Rules 1992* (SA) rr 20, 20A, 20B, 21.

239 *Magistrates Court (Civil) Rules 1992* (SA) r 20A(1).

240 *Magistrates Court (Civil) Rules 1992* (SA) r 20A(2).

241 *Magistrates Court (Civil) Rules 1992* (SA) r 20A(2).

242 *Magistrates Court (Civil) Rules 1992* (SA) r 20A(2).

243 *Magistrates Court (Civil) Rules 1992* (SA) r 20(1).

244 *Magistrates Court (Civil) Rules 1992* (SA) r 20(2).

245 *Stewart v Jacobsen* [2000] SASC 198, [78] (Nyland J).

246 Submission CP 55 (Magistrates' Court of Victoria).

247 See Practice Direction No 13 of 2004 of the Magistrates' Court, *Pre-issue Mediation* (2004) operative from 1 January 2005, <[www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Chief_Magistrates_Directions/\\$file/pd1304.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Chief_Magistrates_Directions/$file/pd1304.pdf)> at 4 December 2007.

248 Submission CP 55 (Magistrates' Court of Victoria).

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the commission, the procedure has not been utilised. In its submission, the Magistrates' Court suggested that based on its experience any form of compulsory pre-action steps must have a legislative basis.²⁴⁹

Transport Accident Claims In Victoria

Protocols have been adopted in Victoria for procedures associated with benefit delivery and disputes arising out of transport accident claims.

The protocols are of particular interest because of the specific pre-action procedural requirements, the process through which they were developed, and the provisions relating to costs.²⁵⁰

Protocol development process

The protocols were developed through a process of negotiation between representatives of stakeholders, which commenced in early 2004. On 12 October 2004, representatives of the Law Institute of Victoria, the Australian Plaintiff Lawyers' Association (now the Australian Lawyers Alliance) and the Transport Accident Commission (TAC) signed three protocols. These deal with no-fault dispute resolution, impairment benefit claims and serious injury and common law claims. Two of the protocols applied from 1 March 2005 and the third came into force from 1 April 2005. They have been subsequently amended a number of times.

The protocols recognise that further review and amendment may be necessary and provide for 'review forums' to be attended by representatives of the abovementioned bodies. Such review forums are to be held at least once every six months.

Although essentially voluntary in nature the protocols are said to 'bind' the TAC and all members of the Law Institute of Victoria and the Australian Lawyers Alliance. The legal status of the protocols is unclear. The two legal professional organisations do not seem to have the power to bind their members. Nor do the members of the legal profession appear to have authority to bind present or future clients in the absence of instructions. It is also unclear how a court would regard noncompliance with the protocols in any subsequent legal proceedings. This could presumably be taken into account in the exercise of discretion in relation to costs. However, the protocols provide a useful framework for the resolution of disputes and appear to have been widely accepted and successfully applied in practice.

Pre-action disclosure requirements

One of the objectives of the no-fault dispute resolution protocols is to facilitate the 'mutual and early exchange of relevant and reasonable information and documents'.²⁵¹ The protocol applies to benefit disputes arising out of decisions under Part 3 and Part 10 of the *Transport Accident Act 1986*. The objective is to resolve such disputes without the need for 'contested review proceedings before the Victorian Civil and Administrative Tribunal (VCAT)'.²⁵²

The protocol applies to disputes where the claimant has 'retained a lawyer, who is a member of the [Law Institute of Victoria] or the [Australian Lawyers Alliance], to provide advice about the consequences of the accident injury'.²⁵³

Before applying for VCAT to review the disputed decision, the protocol requires completion of a pre-issue review (dispute application). The pre-issue review involves the exchange of prescribed information, followed by a pre-issue conference.²⁵⁴

The protocol specifies the time frames within which various steps must be carried out.

Recognising that different 'dispute resolution pathways' should be available, the protocol allows parties in dispute: '(a) to appoint an independent mediator ... or (b) to appoint a facilitator to assist with resolution, or (c) [to appoint a] joint expert ... where medical benefits or services ... are in dispute or (d) ...[to] appoint a joint expert or special referee' where a novel issue of interpretation of the AMA Guidelines arises.²⁵⁵ The costs of the mediator, facilitator, joint expert or special referee are to be paid by the TAC.²⁵⁶

At the conclusion of the pre-issue review the TAC is required to affirm, vary or set aside its decision or to confirm that the dispute has been resolved.²⁵⁷ If the dispute is not resolved the matter may proceed to litigation.²⁵⁸

Depending on the nature of the dispute in question there are differing requirements in relation to pre-action disclosure of information and documents. Disputes have been categorised into:

- *disputes involving an eligibility decision under ss 3 and 35 of the Transport Accident Act 1986;*
- *loss of earnings rate disputes;*
- *loss of earnings duration and loss of earning capacity disputes;*
- *medical and like benefit disputes;*
- *dependency and death benefit disputes; and*
- *impairment disputes.*²⁵⁹

For example, where the dispute relates to eligibility, unless already provided before the disputed decision, the claimant is required to provide to the TAC:

- *a signed statement by the claimant setting out the relevant facts known to the claimant regarding the ... accident;*
- *any statements or reports of any witnesses relied upon by the claimant ...;*
- *medical reports having regard to the denial of eligibility;*
- *relevant photographs or diagrams;*
- *medical reports and treating medical or allied health professional practitioner notes ...;*
- *any report by a non medical witness ... [which is to] be relied upon;*
- *when relevant, legal contentions, including citations of any legal authorities relied upon.*²⁶⁰

In such cases, unless already provided to the claimant, the TAC is required to provide to the claimant's lawyers, within a specified time:

- *police reports and statements taken by the police where the TAC has them;*
- *any report by a non medical expert witness ...;*
- *statements of any witnesses ... [obtained by the TAC];*
- *copies of any investigation reports ... [obtained by the TAC];*
- *copies of any medical reports and records ... relied on to deny the claim; and*
- *when relevant, legal contentions [and legal authorities] relied upon.*²⁶¹

Where the dispute is not resolved and the matter proceeds to a contested proceeding before VCAT, compliance with the requirements of the protocol is intended to avoid the need for compulsory conferences or further mediation.²⁶²

When a dispute has been the subject of a pre-issue review, the application for review should have 'defined and confined the issues remaining in dispute and ... all relevant documentation required for review of the decision ... should have been exchanged'.²⁶³

The protocol provides that in any proceeding before VCAT a party should not call a witness 'whose statement has not [been exchanged] or adduce evidence in chief beyond that contained in any statement [exchanged], except by consent or by the leave of the VCAT'.²⁶⁴

Apart from the obligations arising out of the protocol, the TAC has made a commitment to adhere to model litigant guidelines in conducting litigation and in seeking to resolve disputes. Recently, there have been several instances where it is alleged that the TAC has not in fact complied with such guidelines.²⁶⁵

Provisions relating to costs

Representatives of the abovementioned stakeholders reached agreement on the legal costs to be paid by the TAC to claimants' lawyers in connection with disputes resolved according to the various protocols. Each of the three protocols specifies the circumstances in which such fees are payable and the fixed lump-sum amount payable.²⁶⁶

For example, the no-fault dispute resolution protocol provides that specified amounts are payable by the TAC to the claimant's lawyer where the TAC revokes or varies the decision under review.²⁶⁷ Although fixed lump-sum amounts are payable for legal costs, the amounts vary according to the

249 Submission CP 55 (Magistrates' Court of Victoria).

250 The commission is grateful for the information about TAC protocols provided by solicitors, including John Voyage, Clara Davies, Peter Burt and Cath Evans. TAC officers also provided valuable assistance and information.

251 Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2005, amended as from August 2007) [2.1] <www.tac.vic.gov.au/upload/Dispute%20Resolution%20Protocols.pdf> at 28 November 2007.

252 *Ibid.*, [2.4].

253 *Ibid.*, [3.2].

254 *Ibid.*, [6.7].

255 *Ibid.*, [7.6].

256 *Ibid.*, [7.10].

257 *Ibid.*, [8.1].

258 *Ibid.*, [8.3].

259 *Ibid.*, [9–14].

260 *Ibid.*, [9.2].

261 *Ibid.*, [9.3].

262 *Ibid.*, [16.5].

263 *Ibid.*, [16.6].

264 *Ibid.*, [16.9].

265 See, eg, *Cracknell v TAC (General)* [2007] VCAT 1615 (31 August 2007) [49]–[59].

266 See, eg, Transport Accident Commission (2005), above n 251, [15].

267 *Ibid.*, [15.1].

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nature of the dispute and the stage at which it is resolved in the claimant's favour.²⁶⁸ Additional amounts are payable for the reasonable costs of records or reports, fees for Freedom of Information Act requests, interpreter fees, etc.²⁶⁹

The protocols provide that the fixed lump-sum amounts for costs will be indexed annually from 1 January 2006 in accordance with the Consumer Price Index for Melbourne.²⁷⁰

The protocols also specify the basis on which costs may be recovered following a merits review at VCAT.²⁷¹ Where there is a TAC order to pay an applicant's legal costs, then such costs shall, by consent of the parties, be limited in cases of pre-issue review to the lump-sum amount specified in the protocol plus costs for activity following the conclusion of the pre-issue review.²⁷² The common law protocols also deal with how party-party costs are to be calculated in legal proceedings following failure to resolve the dispute according to the protocols.²⁷³ The impairment assessment protocols contain various provisions relating to payment of costs.²⁷⁴

Any costs payable by the TAC on a party-party basis are separate from legal costs payable to the claimant's lawyers on a solicitor-client basis under a fee and retainer agreement. There is no prohibition on charging solicitor-client costs.

Additional protocols

There are two other protocols relating to transport accident disputes.

The impairment assessment protocols apply to the determination of impairment benefits in accordance with sections 46A, 47, 48, 54 and 55 of the *Transport Accident Act 1986*.²⁷⁵

The common law protocols apply to various procedures and proceedings under section 93 of the *Transport Accident Act 1986*. These are requests to the TAC for a serious injury certificate, applications to a court for leave to bring an action for damages, actions for damages where the TAC is on risk.²⁷⁶ The protocol provides that a common law damages claim cannot be issued before the processes prescribed in the protocol have been completed.²⁷⁷ The protocols seek to facilitate the exchange of information and documentation without the necessity for seeking formal orders of the Court. However, the protocols envisage that there may be a need to apply to the Court for orders, including in respect of interrogatories and discovery. The County Court Rules provide that both of these procedural steps require leave of the court.²⁷⁸

As with the other protocols, there are time frames within which each party is required to disclose material information and documents to the other side. This includes an obligation on claimants to provide the TAC with liability information and documents, including experts' reports, within 30 days of being given a serious injury certificate.²⁷⁹ This may prove onerous or unworkable in some cases.

General comments on the protocols

One important advantage of the protocols is that they streamline and seek to expedite the various procedures and processes involved in dispute management. They also seek to facilitate early mutual disclosure of relevant information and documentation. This will no doubt enhance the prospect of early resolution of disputes in many instances. The constraint on the subsequent use in court proceedings of information or documents not disclosed serves an important incentive for both early investigation and compliance.

According to the TAC, since the protocols were introduced in December 2004, there has been a 27 per cent decline in VCAT applications for review.²⁸⁰ It would appear there has also been a reduction in common law litigation and a decrease in the time taken to resolve serious injury disputes.²⁸¹

As the TAC notes in its submission to the commission,

[i]n the future the court may be able to fast track the minority of disputes that have not resolved at the pre-issue stage because there will already have been mutual exchange of documents and clarification of the key issues of law and fact in dispute.²⁸²

Importantly, the protocols reflect the agreement of representatives of the various stakeholders. They also incorporate mechanisms for regular review and modification.²⁸³ Thus, they may be adapted in the light of experience. This provides for greater flexibility and stakeholder input than a number of other methods of prescribing procedural rules, including legislation, subordinate legislation or practice notes.

The specification of fixed costs payable in prescribed circumstances, with regular adjustments based on the Consumer Price Index, achieves a greater level of predictability and less complication and expense than other methods for the individualised determination and quantification of party-party costs.²⁸⁴

Although the mechanisms for review and revision of the protocols by representatives of the various stakeholder groups are important, there is no provision for an independent ‘umpire’ or ‘facilitator’ to assist in resolving ongoing disputes between the interest groups.

4. CONSEQUENCES OF NONCOMPLIANCE

Australian jurisdictions, and provisions within jurisdictions, vary in their approach to the consequences of noncompliance with pre-action procedural requirements.

Various legislative provisions in Queensland require, except in limited exceptional circumstances, compliance with notification and other disclosure requirements before certain personal injury proceedings can be commenced in a court for damages.

Queensland legislation provides for significant sanctions for noncompliance with the newer pre-action procedures—a plaintiff cannot proceed further with the claim unless the respondent waives the requirement or a court authorises the plaintiff to proceed.²⁸⁵ In circumstances of urgency, proceedings may be commenced despite noncompliance with the pre-action procedural requirements.

Failure to comply with the newer general pre-action disclosure requirements in South Australia and the Family Court does not prevent a plaintiff from commencing proceedings. Generally, cost penalties exist for noncompliance and the *Family Court Rules 2004* (Cth) expressly provide that such noncompliance can be taken into account when making case management orders.²⁸⁶

In England and Wales costs and other sanctions may be imposed for unreasonable pre-action conduct even if there is no specific pre-action protocol applicable to the dispute in question.

The Queensland legislative provisions applicable to certain types of personal injury proceedings appear to be the most onerous to comply with and the most draconian in the event of noncompliance. They are intended to prevent the commencement or continuance of legal proceedings for damages where there has been a failure to comply with the notification, disclosure and other obligations.

5. IMPACT OF PRE-ACTION PROCEDURES

The pre-action procedures appear to have had a major impact. They have:

- facilitated the resolution of many disputes that would otherwise have been litigated
- ensured early disclosure of information and documentation
- assisted in narrowing the issues in dispute, even where the matter proceeds to litigation, thereby reducing costs and delay
- fostered a more cooperative approach to dispute resolution on the part of both parties and lawyers.

However, there is insufficient evidence to fully assess the impact of the various pre-action procedures. The limited data available suggests a significant decrease in the number of civil actions commenced in those jurisdictions where the newer pre-action procedures have been introduced. Although in some Australian jurisdictions it may be difficult to discern the simultaneous effect of legislative tort reform measures and other procedural changes, it would seem that the substantial decrease in the volume of civil litigation before the higher courts in England and Wales is in large measure due to the impact of pre-action protocols.

A detailed research study of the impact of pre-action protocols in England and Wales was commissioned jointly by the Law Society and the Civil Justice Council two years after the reforms were introduced.²⁸⁷ The study examined three areas of dispute: personal injury, clinical negligence and housing disrepair. At the time, pre-action protocols had been introduced in respect of both personal injury and clinical negligence claims. The research was mainly qualitative and involved in-depth interviews with 54 lawyers, insurers and claims managers.²⁸⁸ This was supplemented with a study of personal injury files in matters concluded both before and after the introduction of the Woolf reforms.²⁸⁹

268 See, eg, *ibid*, [15.2], [15.3].

269 *Ibid*, [15.4]; Transport Accident Commission, *Impairment Assessment Protocols* (2005, amended as from August 2007) [7.1] <www.tac.vic.gov.au/upload/Impairment%20Protocols.pdf> at 28 November 2007.

270 Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2005), above n 251, [15.6].

271 Scale A of the County Court scale of costs: Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2005), above n 251, [15.5].

272 *Ibid*.

273 Transport Accident Commission, *Common Law Protocols* (2005, amended as from August 2007) [cl 12] <www.tac.vic.gov.au/upload/Common-Law-Protocols.pdf> at 28 November 2007.

274 Transport Accident Commission, *Impairment Assessment Protocols* (2005), above n 269, [7].

275 *ibid*, [3.1].

276 Transport Accident Commission, *Common Law Protocols* (2005), above n 273, [3.1].

277 *Ibid*, [2.1.5].

278 *County Court Rules of Procedure in Civil Proceedings* 1999 r 34A.17.

279 Transport Accident Commission, *Common Law Protocols* (2005), above n 273, [9.1.1].

280 Transport Accident Commission, *Annual Report 2006* (2006) 20–1 and fig 7 <www.tac.vic.gov.au/upload/TAC_AR_Front%20Section.pdf> at 28 November 2007.

281 *ibid*, 20–21 and Fig 8.

282 Submission CP 37 (Transport Accident Commission).

283 Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2005), above n 251, [17].

284 *Ibid*, [15.6].

285 See, eg, *Personal Injuries Proceedings Act 2002* (Qld) s 18; *Workers’ Compensation and Rehabilitation Act 2003* (Qld) ss 275, 276, 295, 296, 297, 298, 299.

286 *Family Law Rules 2004* (Cth) r 11.03(2) (b).

287 Goriely, Moorhead and Abrams (2002), above n 28.

288 *Ibid*, xi.

289 *Ibid*.



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In general, the study found that the protocols had been well received. There appeared to have been improvements in the levels of cooperation and settlement.²⁹⁰ However, concern was expressed that opponents had failed to comply with the protocol requirements or had complied late. Moreover, the problem of costs appeared to be intractable.²⁹¹

The reforms were liked because they provided a clearer structure, greater openness and made settlements easier to achieve.

There were four main areas of concern or criticism.²⁹² First, there was a perceived lack of sanctions in cases where there had been a failure to act reasonably or in accordance with the protocol requirements.

Second, expert evidence remained controversial, with resistance to the move towards joint experts and continuing disputes over various issues.

Third, there were perceived to be failings within the courts, especially with regards to case management, inefficiency and delay.

Fourth, defendants complained that the Woolf reforms had failed to reduce the cost of litigation.²⁹³

As the research study notes, procedural reforms need to be understood in the context of the funding and organisational developments affecting different forms of litigation. The research suggested that court reforms work best when they correspond with other changes so as to transform the prevailing culture and approach 'beyond the details of the specific rule'.²⁹⁴ The study examined:

- changes in the insurance industry in the area of personal injury
- changes in funding with the abolition of legal aid and the introduction of conditional fee agreements
- the substantial reduction in the workload of defendants' solicitors arising out of the increase in settlements and the increase in cases settled 'in-house' by insurers
- increasing specialisation and the concentration of certain categories of work (eg, clinical negligence) among a smaller group of specialist firms
- more centralised claims handling by defendants in clinical negligence matters
- more proactive methods of claims management.²⁹⁵

In some areas, defendants had experienced an increase in workload arising out of the need to investigate a greater number of cases at an earlier stage.²⁹⁶ Solicitors in all three areas of dispute reported a reduction in the use of barristers.²⁹⁷ Although this was considered to be a general trend which would have occurred independently of the reforms, the reforms themselves made solicitors 'more conscious of the need to keep control of proceedings, to respond quickly and to show that costs were proportionate'.²⁹⁸ This contributed to a more selective use of counsel.

In some areas the pre-action protocol requirements increased the amount of work required in the early stages of the case and the time taken to send the first letter to the defendant.²⁹⁹ The tight time limits for compliance with protocol requirements were not adhered to in a significant proportion of cases.³⁰⁰ However, it is clear that the protocols substantially improved the quality, quantity and pace of disclosure compared with previous practice.³⁰¹

In personal injury claims the file study showed that insurers were 'more likely to make admissions of liability and less likely to simply indicate a willingness to negotiate'.³⁰² However, over half of the protocol responses involved 'some form of equivocation' on the part of insurers.³⁰³ Where there were denials of liability it was generally agreed that these were 'more reasoned' and this represented an improvement on the previous position.³⁰⁴

The findings of the study on the impact of the reforms in relation to expert evidence are considered in Chapter 7.

The study found that alternative dispute resolution techniques such as mediation have made 'almost no impact on the three subject areas studied'.³⁰⁵

Almost all respondents in the study were of the view that more cases were now resolved without court involvement.³⁰⁶ This was particularly so in personal injury cases, where a number of insurers estimated a one-third reduction in litigation.³⁰⁷ Clinical negligence cases were found to be more difficult to resolve and were therefore more likely to proceed to litigation, although some 'small, straightforward cases were more likely to settle without proceedings being issued'.³⁰⁸ Housing disrepair cases were

also felt to be 'considerably more likely' to settle without litigation.³⁰⁹ A study by the Lord Chancellor's Department found a substantial drop in claims immediately after the reforms were introduced, with the overall trend remaining at a lower level than before.³¹⁰

The research study by the Civil Justice Council and the Law Society notes that the 'perceived effect of less court involvement depends on one's point of view'.³¹¹ Personal injury insurers saw it as a 'major improvement' given that they were able to settle more cases through in-house claims handlers rather than through solicitors.³¹² Perhaps not surprisingly, defendants' solicitors were 'less positive'.³¹³ Claimants' solicitors considered that 'much the same work was required to be done to prepare and settle claims, but it was done [earlier and] without court involvement'.³¹⁴

Although the claims resolution process had become less adversarial and more settlement focused, most respondents were of the view that the move away from adversarialism 'still had some way to go'.³¹⁵ There was some ongoing concern about various matters, including insurers using inexperienced claims handlers, insurers' lack of resources, unacceptable rudeness on the part of some claimants' solicitors, a prevalent 'culture' of nonadmission in housing disrepair cases, a lack of openness in certain cases, and alleged prolongation of cases for financial gain on the part of lawyers.³¹⁶ Notwithstanding earlier settlement in many cases, 'most negotiations were conducted on a "without prejudice" basis, and actual admissions were extremely rare'.³¹⁷

These perceptions were tested on the basis of data from the study of personal injury files. It was found that 'once a medical report had been obtained the remaining stages of the case were concluded more quickly'.³¹⁸ Claimant offers were thought to have expedited the process and there was support for the assertion that insurers were more focused on 'achieving settlements quickly'.³¹⁹

The file survey found that there did not appear to be any change in the number of pre-action contacts but there was some evidence that the quality had improved.³²⁰ However, procedural arguments had clearly not been eliminated and the requirements of the protocols themselves provided a 'whole new area' for disputes in relation to compliance.³²¹

Overall, the study concluded that it was 'difficult to gauge the effect of the reforms on the duration of cases'.³²² The pattern of results varied across the types of cases examined. In some areas cases appeared to be settling earlier but in other instances some cases were taking longer to resolve.³²³

Although a reduction in costs was a 'major objective' of the reforms, the evidence on this issue was found to be inconclusive.³²⁴ Initial indications suggested that case costs had not decreased.³²⁵ Each area where there were potential savings was offset by other areas where more work was required to bring about a faster resolution of the case.³²⁶ The data suggested that the costs of settling a simple personal injury case had increased slightly faster than the rate of inflation since the reforms were introduced.³²⁷ The data analysed in relation to personal injury cases came from cases dealt with before the introduction of recoverable success fees, which have substantially increased the costs borne by insurers.

In personal injury cases there were said to be two possible explanations for the increase in costs since 1999. One relates to the 'front loading' of work. The other explanation is that there had been general inflation within the personal injury industry.³²⁸ Both costs and damages appeared to have increased for certain types of case. Thus, when expressed as a proportion of damages, costs had remained constant.³²⁹ A further complication was the excessive time spent arguing about costs. This problem had been exacerbated by the introduction of recoverable success fees and insurance premiums in conditional fee agreement cases. Insurers expressed concern that without a fixed fee regime, the Woolf proposals had only been 'partially implemented'.³³⁰

The authors of the Law Society–Civil Justice Council study concluded that 'although many of the findings reflect well on the reforms, [the achievement of] Lord Woolf's objectives will require ongoing review and reform'.³³¹

Almost all of the pre-action procedures in various jurisdictions are likely to result in an increase in activity at an earlier point in time than would be the case in the absence of such provisions. However, it seems reasonable to conclude that, notwithstanding this front loading of costs, pre-action protocols provide considerable scope for an overall reduction in costs in both settled and litigated disputes. This appears to be particularly the case for personal injury litigation.³³²

290 Ibid, xiii.

291 Ibid.

292 Ibid, xiv.

293 Ibid.

294 Ibid, xvi.

295 Ibid, xvi–xx.

296 Ibid, xx.

297 Ibid, xxi.

298 Ibid.

299 Ibid, xxii.

300 Ibid, xxiv.

301 Ibid, xxiv–xxv.

302 Ibid, xxiv.

303 Ibid.

304 Ibid, xxv.

305 Ibid, xxxii.

306 Ibid, xxxiv.

307 Ibid.

308 Ibid.

309 Ibid.

310 Department for Constitutional Affairs, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (2001) [3.1]–[3.16] <www.dca.gov.uk/civil/merge/merge.htm> at 28 November 2007.

311 Goriely, Moorhead and Abrams (2002), above n 28, xxxiv.

312 Ibid.

313 Ibid.

314 Ibid.

315 Ibid, xxxv.

316 Ibid.

317 Ibid.

318 Ibid, xxxvi.

319 Ibid.

320 Ibid.

321 Ibid.

322 Ibid.

323 Ibid, xxxvi–xxxvii.

324 Ibid, xxxvii.

325 Ibid.

326 Ibid.

327 Ibid, xxxviii.

328 Ibid, xxxviii–xxxix.

329 Ibid, xxxix.

330 Ibid.

331 Ibid.

332 Ibid, xxxviii.



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There appears to be little evidence concerning the extent to which self-represented parties comply with pre-action procedural requirements. In some instances, such as the transport accident scheme in Victoria, the pre-action protocols only apply to parties who are legally represented.³³³ In some respects, the incorporation into pre-action procedures of explicit and detailed identification of steps required to be taken and of information and documentation required to be disclosed, together with precedent or model letters and letters of instruction to medical experts, etc., should make the process easier for parties who are not professionally represented.

Cairns suggests that the effect of the Queensland pre-action procedures has been that '[m]ost personal injury litigation has disappeared'.³³⁴ A significant proportion of personal injury cases are settled before proceedings are commenced.

Similarly, the impact of the Family Court provisions appears to have been considerable. Altobelli argues that '[t]he pre-action procedure provisions in the new Rules may well be one of the most significant developments in and dramatic changes to, family law practice and procedure, since the *Family Law Act 1975* (Cth) was enacted'.³³⁵ However, it should be borne in mind that in recent years the development of 'collaborative law' is also likely to have had a major impact on dispute resolution in the family law context. This is discussed in Chapter 4.

In 2000, Cannon's research in South Australia found that the introduction of pre-action disclosure had had a dramatic effect on litigation. The number of personal injuries claims commenced fell by 75 per cent, which was not accompanied by a sufficient fall in accident rates to explain the reduction in claims.³³⁶ The sole insurer for personal injuries arising from motor vehicle accidents indicated that its medico-legal costs fell from \$44 million to \$26 million in the three years following the introduction of the pre-action procedure in 1992.³³⁷

Cannon suggests that the introduction of quasi-mandatory pre-action disclosure was accompanied by a change in culture on the part of insurers who aggressively attempted to settle claims, and that the changes in litigation may have resulted more from the culture change than simply the rule changes.³³⁸

The cumulative effect of empirical and other evidence supports the conclusion that pre-action protocols play an important part in facilitating earlier disclosure and settlement, reducing the number of litigated cases, narrowing the issues in litigated disputes, encouraging a more cooperative, less adversarial approach to dispute resolution and reducing costs and delays. However, they are not in themselves a panacea for the problems of cost and delay.

6. DISCLOSURE AND SERVICE OF DOCUMENTS WHEN COMMENCING PROCEEDINGS

Rather than requiring disclosure of information *before* the commencement of legal proceedings, some procedural provisions provide for disclosure and service of information and documents *contemporaneously* with the commencement of litigation. This is in a sense a halfway house between pre-action procedures and those applicable following the commencement of litigation.

6.1 NSW PROFESSIONAL NEGLIGENCE CLAIMS

The *Uniform Civil Procedure Rules 2005* (NSW) provide that a person commencing a professional negligence claim (other than a claim against a legal practitioner) must, unless the court orders otherwise, file and serve *with* the statement of claim an expert's report that includes an opinion supporting:

- (a) the breach of duty of care, or contractual obligation, alleged against each person sued for professional negligence; and
- (b) the general nature and extent of damage alleged (including death, injury or other loss or harm and prognosis, as the case may require); and
- (c) the causal relationship alleged between such breach of duty or obligation and the damage alleged.³³⁹

Failure to comply may result in an order dismissing the whole or any part of the proceeding.³⁴⁰

6.2 NSW WORKERS COMPENSATION PROCEEDINGS

In workers compensation proceedings before the Workers Compensation Commission in NSW the *Workers Compensation Commission Rules 2006* require an applicant and respondent to lodge all relevant documents they propose to rely on and which are in their possession, at the time of filing an application, reply and response.³⁴¹

Where relevant evidence is not available at the time of lodgement a party must seek leave to introduce the evidence. Leave will be granted if the commission is satisfied that it is necessary to do so in the interests of justice.³⁴²

Section 344 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) enables the commission to make certain orders in respect of the payment of costs by a legal practitioner where that practitioner's serious neglect, serious incompetence or serious misconduct delays or contributes to delaying the determination of the matter.

6.3 NSW DUST DISEASES PROCEEDINGS

In NSW, the *Dust Diseases Tribunal Regulation 2007* requires a plaintiff to file and serve on each defendant, with the statement of claim, prescribed particulars of the plaintiff's claim and certain documents and information. This does not include witness statements and expert or other reports.³⁴³

A defendant is required to file and serve a reply to the claim and in doing so is required to provide certain prescribed information and documents.³⁴⁴

7. SUBMISSIONS

7.1 SUPPORT FOR PRE-ACTION PROTOCOLS

The Insurance Council of Australia and its members expressed support for the early exchange of relevant information 'to aid settlement and to avoid the necessity for litigation in many cases'. Its members believe that the early identification of relevant material in other jurisdictions has been useful in promoting the early resolution of disputes.³⁴⁵

Both the Magistrates' Court and the Supreme Court were generally supportive of introducing pre-action requirements of some kind.

In its submission, the Magistrates' Court noted that in 2003 it considered introducing a requirement that a prospective claimant send a prospective defendant a standard form letter of claim, giving brief particulars of the circumstances said to give rise to the claim and inviting the prospective defendant to enter into settlement negotiations or mediation. The sending of the letter would have been a prerequisite to recovering costs specific to the issuing of proceedings. However, the proposal was abandoned 'owing to vehement opposition from both arms of the legal profession'. The court subsequently sought to encourage parties to engage in pre-action mediation by undertaking to ensure that the costs of doing so would be regarded as litigation costs and fast-tracking mediated proceedings to trial where mediation was unsuccessful. It reported that 'the take-up of this procedure has been non-existent'. Based on these experiences, the court submitted that 'any form of compulsory pre-action steps must have a legislative basis'. It also said that '[a]lthough the areas covered by pre-action protocols in England and Wales have been limited to nine, this is no reason for such protocols to be so limited in this State'.³⁴⁶

A further joint submission from the Magistrates' Court and the Victorian Dispute Settlement Centre suggested that during the pre-action stage the Dispute Settlement Centre could offer a large pool of trained and quality controlled mediators with broad representation around Victoria to assist in resolving disputes. This submission also suggested that it might be useful to consider a 'reverse' costs scale that 'provides a greater or equal cost award for pre-action activity than that which may have been awarded if the matter had been issued and settled shortly thereafter'.³⁴⁷

The Supreme Court supported investigating the introduction of pre-action protocols, although it cautioned that such protocols could have 'unintended adverse consequences' if insufficient care was taken in their implementation. The court emphasised the need to differentiate between different kinds of proceedings in formulating protocols, but suggested their provisions could address such matters as the pre-commencement exchange of information and disclosure, pre-commencement offers of

333 See, eg, Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2007), above n 251, [3.2].

334 Bernard Cairns, 'A Review of Some Innovations in Queensland Civil Procedure' (2005) 26 *Australian Bar Review* 158, 184.

335 Tom Altobelli, 'Family Law Rules 2004' (2004) 18 *Australian Journal of Family Law* 1, 8.

336 Andrew Cannon, *Some desirable features of lower court systems to verify and enforce civil obligations* (D Phil Thesis, University of Wollongong, 2000) 204. See also Andrew Cannon, *An evaluation of some ways of limiting and reducing the costs to parties of conducting litigation in the Magistrates Court (Civil Division) in South Australia* (Unpublished LLM (Hons) Thesis, University of Wollongong, 1996).

337 Andrew Cannon (2000), above n 336, 204.

338 *ibid.*, 205. See also David Bamford, 'Litigation reform 1980–2000: a radical challenge' in Wilfrid Prest and Sharyn Roach Anleu (eds), *Litigation: Past and Present* (2004) 146.

339 *Uniform Civil Procedure Rules 2005* (NSW) r 31.36(1).

340 *Uniform Civil Procedure Rules 2005* (NSW) r 31.36(3).

341 *Workers Compensation Commission Rules 2006* (NSW) r 10.3(1).

342 *Workers Compensation Commission Rules 2006* (NSW) r 10.3(3); see also Practice Direction No 2 of the Workers Compensation Commission, *Adjournment of Commission Proceedings and Leave to Introduce Evidence* (2006) <www.wcc.nsw.gov.au/NR/rdonlyres/ADB62A10-C507-4CAD-AA0C-93BD7E336958/0/No2PracticeDirection2.pdf> at 29 November 2007.

343 *Dust Diseases Tribunal Regulation 2007* (NSW) reg 24.

344 *Dust Diseases Tribunal Regulation 2007* (NSW) reg 26.

345 Submission ED1 21 (Insurance Council of Australia).

346 Submission CP 55 (Magistrates' Court of Victoria).

347 Submission ED1 30 (Magistrates' Court of Victoria and the Victorian Dispute Settlement Centre).

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settlement, pre-commencement mediation and ADR, and the use of experts. It considered that there would need to be some kind of incentive for compliance with the protocols, and noted that under the South Australian scheme parties who are uncooperative in this regard can receive costs penalties.³⁴⁸

The Supreme Court also stressed 'the need to ensure interaction between procedural reforms and changes to the culture and structure of the legal profession, if the goals of the reforms are to be met'. It considered that '[t]he introduction of pre-action processes should be accompanied by training programmes for lawyers and possibly a Judicial College of Victoria seminar for Judges'.³⁴⁹

Victoria Legal Aid expressed general support for the disclosure of relevant information before proceedings are commenced. However, it was concerned that the proposed protocols could 'increase the administrative burden and cost of litigation' and the 'costs consequences of noncompliance may disproportionately affect financially disadvantaged parties and self-represented litigants'. It suggested that if such protocols were introduced the proposal to allow parties to dispense with compliance by consent or where the dispute was 'intractable' could allow parties with more bargaining power to avoid compliance. It strongly supported the introduction of some form of privilege to ensure information and documents obtained could not be used for any other purpose, and referred to the provisions of the Charter in relation to privacy.³⁵⁰

The Victorian Aboriginal Legal Service supported the introduction of a 'pre-issuing procedure' designed 'to determine the merit of [an] application'. Under this model, a standard form originating process would need to 'have attached to it all the facts, law, legal claims, list all witnesses, specialists (medical/others), pleadings and discoverable documents to be relied upon', which would need to be assessed and approved by a judge prior to service on a defendant. The defendant would be required to file similar documentation, and a mediation conference would need to take place before the matter proceeded to a directions hearing.³⁵¹

Some submissions were supportive of particular pre-commencement initiatives. The joint submission of AXA Australia and TurksLegal suggested that making mediation a prerequisite to the commencement of litigation might encourage settlement in some kinds of dispute (and in particular contractual disputes).³⁵²

In response to the commission's first draft proposals, AXA and TurksLegal suggested the ambit of the pre-action discovery obligations was uncertain and their scope might be unclear in the absence of pleadings. They said the issue of costs required further consideration, particularly the draft proposal that there should be access to the court in respect of costs even though the dispute had been settled without litigation. However, they supported the proposal that specific pre-action protocols should be developed by the Civil Justice Council in conjunction with representatives of stakeholder groups.³⁵³

Peter Mair suggested that prospective litigants should be compelled to meet before an 'independent reviewer' to discuss their dispute at the outset, and that they should be required to come to some agreement as to the costs of the proceeding should it go to hearing. In his view, 'natural justice demands that those accused be given an opportunity to respond before formal proceedings are commenced'.³⁵⁴

The Police Association suggested that pre-commencement screening of claims by an 'appropriate person' would assist to eliminate 'frivolous or vexatious' legal actions prior to engagement in mediation.³⁵⁵

Edison Masillamani advocated a pre-action step involving the discussion of issues in dispute between prospective parties before a 'Conciliation Officer', without the involvement of legal practitioners.³⁵⁶

The Legal Practitioners' Liability Committee supported a requirement that a plaintiff forward a letter to a prospective defendant 'detailing the nature and quantum of the plaintiff's claim' prior to commencing proceedings:

*LPLC's experience is that if this were done more frequently, much litigation would be avoided. Many cases are settled by LPLC in house without incurring costs because of this.*³⁵⁷

Other submissions expressed support for the introduction of pre-action requirements in particular areas. For example, the Construction & Infrastructure Law Committee (Victorian Group) of the Law Council of Australia considered that pre-litigation protocols along the lines of those applicable in England would be beneficial in construction cases.³⁵⁸ The SRC Legal Service favoured rules to encourage the non-litigious resolution of debt and motor vehicle claims. In particular, it suggested

that providing a debtor with the chance to serve an affidavit of financial circumstances in response to a creditor's letter of demand could assist the creditor to make a more realistic assessment of the probable usefulness of litigation, and encourage compromise.³⁵⁹ On the other hand, Maurice Blackburn contended that pre-commencement requirements would *not* be appropriate in the context of medical negligence, in part because of the well-developed case management approach already used on the relevant specialist list.³⁶⁰

Other submissions made favourable comment on existing pre-litigation procedures that have been implemented in particular contexts. Dr Dooley noted that most states in the United States have, since the 1960s, introduced mandatory panel reviews in medical liability cases. Such reviews occur before proceeding to trial, and result in as many as 40–50 per cent of plaintiffs withdrawing their cases. Dr Dooley suggested that such a panel be introduced in Victoria, similar to the current system of workers compensation claims, to provide parties with an 'immediate, unbiased consensus opinion on liability and extent of harm'.³⁶¹

The TAC submission noted its own pre-litigation dispute resolution protocols (discussed under Transport Accident Claims in Victoria, above). The TAC stated that, although it is too soon to be conclusive, there are strong indications that the protocols are proving effective. Even where a matter cannot be resolved at a pre-litigation stage, adherence to the process set out in the protocol should allow it to be developed to such a point that it can be fast-tracked to trial. The TAC suggested that pre-commencement requirements could be reinforced by, for example, precluding parties from later relying on documents that ought to have been disclosed prior to commencement.³⁶²

WorkCover drew attention to its own 'statutory pre-litigated dispute resolution procedure', which is 'supported by Ministerial Directions and Ministerial Costs Orders':

*In essence the pre-litigated process provides for the formal exchange of all material in the possession of a party on which the party seeks to rely and includes a draft statement of claim defining the cause of action. A party who fails to disclose documentation in the party's possession cannot later rely upon this document. A similar obligation, including the provision of a draft defence, rests with the prospective defendant/employer. The process is supported by fixed costs payable by the defendant where damages are recovered and also incorporates potential costs penalties where the matter is not resolved in the pre-litigated process.*³⁶³

The authority found this 'cards upon the table' approach effective in producing earlier settlement of claims. It also spoke favourably of the mandatory conciliation process it uses in non-common law benefits disputes, which must be certified as 'genuine' before proceedings can be commenced.³⁶⁴

A confidential submission advocated that the regime adopted in the *Accident Compensation Act 1985* with respect to 'serious injury' workplace accident matters ought, with some modification, to be of general application. The submission stated:

*My experience indicates that pleadings have become a device for clouding and obscuring the issues in dispute rather than the reverse. Generally speaking, I think they should be abandoned. In their stead, I suggest the plaintiff should articulate what his cause of action is in a summary way and then swear an affidavit deposing to the relevant evidence on which he relies to prove his case. This should be done, as with 'serious injury' applications, before any proceeding is filed in the court ... Likewise the defendant insurer should be required to indicate, also by filing an affidavit, why the application is opposed ... Both parties should be on affidavit at, or soon after, any proceeding is commenced in the Court. In my view, such a procedure would go a long way to ridding the system of unmeritorious claims and defences.*³⁶⁵

The submission also expressed concern at the conduct of defendants' insurers and the prevalence of trial by ambush. In particular, where surveillance film is available to contradict crucial elements of the plaintiff's case it is said to be often withheld until late in the litigation process. If disclosed earlier it may lead to settlement or withdrawal of the application.

Some submissions expressed general support for pre-action protocols but raised particular concerns, including about their impact on certain categories of persons. The Mental Health Legal Centre suggested that better access to information and expert advice to assist people to evaluate their legal position would be preferable to the imposition of 'additional "hurdles" or threshold requirements'.³⁶⁶

- 348 Submission CP 58 (Supreme Court of Victoria). The court gives 'commercial litigation, serious injury cases, and neighbourhood disputes' as 'possible examples' of types of litigation in which pre-action protocols might be of particular benefit.
- 349 Submission CP 58 (Supreme Court of Victoria).
- 350 Submission ED1 25 (Victoria Legal Aid). Section 13 of the *Charter of Human Rights and Responsibilities Act 2006* provides that 'a person has the right not to have his or her privacy ... or correspondence unlawfully or arbitrarily interfered with'.
- 351 Submission CP 27 (Victorian Aboriginal Legal Service).
- 352 Submission CP 41 (AXA Australia and TurksLegal). Submission CP 53 (Michael Redfern) supported '[compulsory] pre-litigation mediation except in those cases where urgent relief is required'.
- 353 Submission ED1 22 (AXA Australia and TurksLegal).
- 354 Submission CP 10 (Peter Mair).
- 355 Submission CP 6 (Police Association Victoria).
- 356 Submission CP 15 (Edison J Masillamani).
- 357 Submission CP 21 (Legal Practitioners' Liability Committee).
- 358 Submission CP 12 (Construction & Infrastructure Law Committee (Victorian Group) of the Law Council of Australia).
- 359 Submission CP 3 (SRC Legal Service).
- 360 Submission CP 7 (Maurice Blackburn).
- 361 Brendan J Dooley, 'Medical Indemnity in New Zealand and Australia: Suggestions for Reform' (Paper presented at the Annual Scientific Meeting of Royal Australasian College of Surgeons, Christchurch, 8 May 2007) referred to in Submission CP 60 (Royal Australasian College of Surgeons).
- 362 Submission CP 37 (Transport Accident Commission).
- 363 Submission CP 48 (Victorian Workcover Authority).
- 364 Submission CP 48 (Victorian Workcover Authority).
- 365 Submission CP 5 (Confidential submission, permission to quote granted 4 February 2008).
- 366 Submission CP 22 (Mental Health Legal Centre).

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Although accepting that pre-action protocols, which clarify and simplify proceedings and have the potential to avoid the need for litigation, were clearly of benefit for all parties, it suggested there should be sufficient flexibility to accommodate vulnerable or disadvantaged parties. This included those with psychiatric disability and self-represented persons. The legal centre suggested that the 'exceptional circumstances' where compliance with pre-action protocols would not be required should be expanded to include situations where a party did not have adequate resources or capacity.³⁶⁷

The Public Interest Law Clearing House (PILCH) also expressed concern about the possible adverse effect of pre-action protocols on self-represented persons. PILCH suggested that such persons would require legal advice about compliance with the requirements and that this would put added pressure on both courts and legal aid/pro bono organisations. It recommended that compliance with pre-action requirements should not be mandatory for self-represented litigants.³⁶⁸

The Human Rights Law Resource Centre also cautioned against measures that would have the effect of screening out proceedings deemed to be 'unmeritorious' without their having been considered by a court, stating that such measures would restrict parties' access to a fair hearing.³⁶⁹

IMF (Australia) proposed that Victoria should introduce a system of pre-litigation conferences, which parties would be required to attend before proceeding with litigation.³⁷⁰ It referred to the model for a case planning conference proposed by the Civil Justice Reform Working Group in British Columbia in its recent report.³⁷¹ IMF proposed that Victoria should adopt the Canadian model with some additional provisions for detailed legal budgets, limiting interlocutory disputes, limits on costs, and opting out. The 'pre-litigation' conferences would be presided over by a judicial officer and would be convened after commencement of a proceeding but before any steps were taken in the litigation.³⁷²

Judge Wodak supported pre-action protocols but had reservations about whether they should be implemented by way of practice notes, the force and effect of which was 'unclear'. He suggested that it would be preferable if they had a statutory basis. He expressed further concerns about costs, including the fairness of the presumption that each party should bear its own costs where such costs are relatively modest. He suggested that this might create hardship for individuals required to establish a claim against a large corporation and that successful claimants should not be out of pocket. He supported protection from disclosure or collateral use of information and documents obtained through compliance with pre-action protocols.³⁷³

Other submissions expressing general support for pre-action protocols included one from an individual litigant who wished to remain anonymous³⁷⁴ and one from the law firm Corrs Chambers Westgarth. In Corrs' experience the majority of disputes at present go through some form of pre-action process. Its primary concern was that pre-action protocols should not apply to all disputes. Corrs also expressed concern at the potential sanctions applicable in the event of noncompliance. It suggested that this might encourage practitioners seeking to delay proceedings to initiate interlocutory applications alleging noncompliance with pre-action steps.³⁷⁵

7.2 OPPOSITION TO PRE-ACTION PROTOCOLS

The Victorian Bar opposed the introduction of pre-action protocols, arguing that at present cost factors work to prevent overhasty commencement of proceedings. It considered the informal exchange of correspondence to be usually sufficient to define the issues in dispute at a pre-action stage. Pre-action protocols would therefore be unjustified, and would serve to inflate costs.³⁷⁶ In a further submission the Bar noted mixed reports as to the success of pre-action protocols in the UK and said the empirical evidence should be closely investigated. It suggested that 'research needs to be undertaken to identify the areas of civil litigation where the introduction of pre-action protocols is likely to be most useful'.³⁷⁷

The Bar also contended that the proposal that the court should be able to order a stay of proceedings pending compliance with pre-action protocol requirements might give rise to unnecessary 'satellite litigation'. It suggested it would be preferable that 'unreasonable failure to comply would be a matter that the Court could take into account in its discretion in awarding costs [or] in making procedural directions'.³⁷⁸

The Bar indicated that it would like to be involved in the development of any pre-action protocols. Although agreeing that the costs of compliance with pre-action protocols should be recoverable in any civil proceedings, it expressed concern at the concept of fixing such costs. It contended that the fixing of costs was likely to be arbitrary, especially in commercial litigation where cases differ substantially in terms of complexity and may not always involve the recovery of money.³⁷⁹

The Law Institute of Victoria made submissions to similar effect. It contended that the proposed protocols would have the effect of delaying the onset of litigation and increasing costs in cases that were unable to be resolved. It also suggested that compliance with the pre-action protocol requirements in WorkCover and TAC matters had led to high settlement rates but had also incurred significant legal costs.³⁸⁰

The Law Institute expressed concern at the likely impact on self-represented persons. It said indemnity costs orders against such persons for failure to comply with the protocol requirements were a 'draconian consequence'.³⁸¹

The Law Institute also opposed the notion of having fixed costs for work carried out in compliance with the protocol requirements. However, it contended that the present regime of fixed costs in WorkCover and TAC matters was appropriate because of the limited ability to recover from clients any difference between actual costs and the recoverable fixed costs and because the work was of a standard nature with the potential for costs savings through efficiencies and the use of technology. It suggested that fixed costs were not appropriate for Supreme Court matters because of the enormous variation in the work. Fixed costs would also disadvantage clients because firms would recover from the client any shortfall between the actual costs and the recovered fixed costs.³⁸²

The Law Institute said the proposed provision for costs applications to the court in cases where the matter had been settled without litigation was unrealistic, as parties would be pressured to abandon the claim for costs as a price of settling the dispute. The proposed presumption that parties should bear their own costs where they were 'relatively modest' was criticised on the grounds that such costs might still represent an enormous sum to an individual litigant.³⁸³

Maurice Blackburn noted (in the context of medical negligence claims) a number of concerns about the introduction of pre-commencement requirements, including their potential to generate pre-commencement disputes and to add to delays and costs. The firm '[did] not believe that imposing additional requirements on plaintiffs [in medical negligence cases] by way of pre-commencement requirements would reduce costs, enhance efficiency or promote fairness'.³⁸⁴

Several submissions urged consideration of the access to justice implications of pre-action requirements.³⁸⁵

Some submissions expressed concerns about specific aspects. Slater & Gordon stressed the need to ensure that the effective benefits of particular pre-action requirements were balanced against any additional expense or delay caused:

As an example, we would support a requirement that the parties swear to the facts in their statement of claim and defence at the time those documents were served. This would not impose any great additional cost or delay, but could narrow the issues between the parties. However, we would oppose a move towards pre-action service of expert material etc which we believe results in the 'front-ending' of costs, which might prove ultimately unnecessary to the resolution of a claim'.³⁸⁶

The Human Rights Law Resource Centre expressed concern at the possible impact of pre-action protocols on self-represented parties. The centre considered that such persons would require legal advice during the pre-litigation process. In the absence of additional funding for civil legal aid and community legal centres, this was likely to place additional burdens on them, as well as on courts and pro bono organisations that are already under resourced. The prospect of an indemnity costs order for failure to comply with the applicable pre-action protocol requirements was likely to have an adverse impact on self-represented persons, and the necessity to comply with pre-action protocol requirements had the potential to increase costs and delays.³⁸⁷

The Australian Corporate Lawyers Association supported the aim of earlier resolution and communication between the parties but expressed concern that pre-action protocols would not reduce the costs of litigation but rather might increase them through the additional steps imposed.³⁸⁸

Telstra noted that many commercial organisations have established methods of addressing customer compensation without the need for court proceedings. It stated that the 'aim of these procedures is to resolve issues, without the need to engage lawyers', and to 'maintain satisfied customers'. It suggested that the proposed pre-action protocols could become a bureaucratic hurdle that impeded established dispute resolution processes.³⁸⁹

- 367 Submission ED1 11 (Mental Health Legal Centre).
- 368 Submission ED1 20 (Public Interest Law Clearing House).
- 369 Submission CP 36 (Human Rights Law Resource Centre).
- 370 Submission CP 57 (IMF (Australia)).
- 371 Civil Justice Reform Working Group, British Columbia, *Effective and Affordable Civil Justice* (Report to the Justice Review Task Force) (2006).
- 372 Submission CP 57 (IMF (Australia)).
- 373 Submission ED1 7 (Judge Wodak).
- 374 Submission ED1 5 (Confidential submission, permission to quote granted 17 January 2008).
- 375 Submission ED1 32 (Corrs Chambers Westgarth, Confidential Submission, permission to quote granted 14 January 2008).
- 376 Submission CP 33 (Victorian Bar).
- 377 Submission ED1 24 (Victorian Bar).
- 378 Submission ED1 24 (Victorian Bar).
- 379 Submission ED1 24 (Victorian Bar).
- 380 Submission ED1 31 (Law Institute of Victoria).
- 381 Submission ED1 31 (Law Institute of Victoria).
- 382 Submission ED1 31 (Law Institute of Victoria).
- 383 Submission ED1 31 (Law Institute of Victoria).
- 384 Submission CP 7 (Maurice Blackburn).
- 385 Submissions CP 20 (Slater & Gordon Lawyers); ED1 19 (Human Rights Law Resource Centre); CP 37 (Transport Accident Commission); CP 58 (Supreme Court of Victoria).
- 386 See, eg, submission CP 20 (Slater & Gordon).
- 387 Submission ED1 19 (Human Rights Law Resource Centre).
- 388 Submission ED1 16 (Australian Corporate Lawyers Association).
- 389 Submission ED1 17 (Telstra Corporation) annexure.



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An anonymous submission from a law firm expressed the view that at the Magistrates' Court level pre-action protocols would add to delay and increase costs. It contended that this would only serve the interests of 'deep pocketed and insured litigants who already have access to the best of representation'.³⁹⁰

Law firm Battley & Co expressed concern that the proposed pre-action protocols would remove the current commercial realities of pre-action negotiation and that accident victims would incur greater unrecoverable costs, which would force them to accept unreasonable offers of settlement. The firm suggested that an item should be introduced into the scale of costs dealing specifically with matters resolved on a pre-action basis. It also suggested that the recoverable costs where the matter is settled at the pre-action stage should be two-thirds of the scale costs allowable for 'instructions to sue' where litigation has been commenced.³⁹¹

The Australian Bankers' Association questioned whether mandatory 'strict adherence to pre-action protocols might actually foment an atmosphere conducive to litigation'.³⁹² The submission noted the ADR schemes established by private industries in recent years. Banks and other organisations licensed to carry on financial services businesses under Chapter 7 of the *Corporations Act 2001* (Cth) are, as a condition of their licence, required to provide clients with access to an independent ADR scheme. This is provided through the Banking and Financial Services Ombudsman. There are similar schemes covering general insurance, life insurance and the financial advisory and planning industry. Other ADR schemes provide both dispute resolution and compensatory relief in parts of the mortgage finance industry. VCAT also has jurisdiction in disputes concerning consumer credit and the Consumer Credit Code.³⁹³ The commission acknowledges the importance of these schemes, which are discussed in Chapter 4 of this report.

Law firm Clayton Utz questioned the assumption that parties in dispute needed to be compelled or given an incentive to cooperate to resolve matters before resorting to litigation, especially in the area of commercial disputes. The firm said pre-action protocols were unnecessary, and raised three main concerns about them. They added 'another layer of complexity' and therefore were likely to increase cost and delay. They were likely to 'impose further burdens on the courts', which would be required to adjudicate on the conduct of the parties at the pre-trial stage. Where they required an exchange of information they would be susceptible to abuse by encouraging 'fishing'. This would subvert the 'well established principles in relation to pre-action discovery'. If such pre-action protocols were to be introduced, then:

- (a) compliance with the protocol should not be required in all cases where an interlocutory injunction was sought
- (b) there should be an implied undertaking that any documents produced would not be used for any purpose other than in connection with the resolution of the dispute between the parties
- (c) there was little to commend 'costs only' proceedings.³⁹⁴

7.3 OTHER ISSUES RAISED IN SUBMISSIONS

The Legal Services Commissioner raised a concern about how the obligations on practitioners in respect of pre-action protocols would interact with the rules governing the conduct of the legal profession.³⁹⁵

The Police Association suggested it should be made clear that documents which fall within the ambit of client legal privilege and those classified under 'public interest immunity' should be exempt from pre-action disclosure.³⁹⁶

RECOMMENDATIONS

1. Pre-action protocols should be introduced for the purpose of setting out codes of 'sensible conduct' which persons in dispute are expected to follow when there is the prospect of litigation.
2. The objectives of the protocols would be:
 - to specify the nature of the information required to be disclosed to enable the persons in dispute to consider an appropriate settlement
 - to provide model precedent letters and forms

- to provide a time frame for the exchange of information and settlement proposals
 - to require parties in dispute to endeavour to resolve the dispute without proceeding to litigation
 - to limit the issues in dispute if litigation is unavoidable so as to reduce costs and delay.
3. Although information and documentation about the merits and quantum of the claim and defence would be available for use in any subsequent litigation, offers of settlement made at the pre-action stage would be on a 'without prejudice' basis but would be able to be disclosed, following the resolution of the dispute after the commencement of proceedings, and would be taken into account by the court in determining costs.
 4. The general standards of pre-action conduct expected of persons in a dispute would be incorporated in statutory guidelines. Each person in a dispute and the legal representative of such person would be required to bring to the attention of each other or potential party to the dispute the general standards of pre-action conduct and any specific pre-action protocols applicable to the type of dispute in question (where such other person is not aware of such protocols).
 5. The statutory guidelines should provide that, where a civil dispute is likely to result in litigation, prior to the commencement of any legal proceedings the parties to the dispute shall take reasonable steps, having regard to their situation and the nature of the dispute, to resolve the matter by agreement without the necessity for litigation or to clarify and narrow the issues in dispute in the event that legal proceedings are commenced. Such reasonable steps will normally be expected to include the following:
 - (a) *The claimant shall write to the other party setting out in detail the nature of the claim and what is requested of the other party to resolve the claim, and specifying a reasonable time period for the other person to respond.*
 - (b) *The letter from the person with the claim should:*
 - (i) *give sufficient details to enable the recipient to consider and investigate the claim without extensive further information*
 - (ii) *enclose a copy of the essential documents in the possession of the claimant which the claimant relies upon*
 - (iii) *state whether court proceedings will be issued if a full response is not received within a specified reasonable period*
 - (iv) *identify and ask for a copy of any essential documents, not in the claimant's possession, which the claimant wishes to see and which are reasonably likely to be in the possession of the recipient*
 - (v) *state (if this is so) that the claimant is willing to undertake a mediation or another method of alternative dispute resolution if the claim is not resolved*
 - (vi) *draw attention to the courts' powers to impose sanctions for failure to comply with the pre-action protocol requirements in the event that the matter proceeds to court.*
 - (c) *The person receiving the written notification of the claim shall acknowledge receipt of the claim promptly (normally within 21 days of receiving it), specify a reasonable time within which a response will be provided and indicate what additional information, if any, is reasonably required from the claimant to enable the claim to be considered.*
 - (d) *The person receiving the written notification of the claim, or that person's agent, shall respond to the claim within a reasonable time and provide a detailed written response specifying whether the claim is accepted and if not the detailed grounds on which the claim is rejected.*
 - (e) *The full written response to the claim should, as appropriate:*
 - (i) *indicate whether the claim is accepted and if so the steps to be taken to resolve the matter*
 - (ii) *if the claim is not accepted in full, give detailed reasons why the claim is not*

390 Submission ED1 27 (anonymous). The submission also expressed concern that the introduction of the small claims 'arbitration system in the Magistrates' Court, and the consequential capping of costs, has proved to be a bonus for insured litigants and a powerful disincentive for private uninsured litigants to prosecute claims of less than \$10 000'.

391 Submission ED1 13 (Battley & Co).

392 Submission ED1 29 (Australian Bankers' Association). However, as noted above, the commission's proposed pre-action protocols are not intended to be mandatory in the sense that they must be complied with before legal proceedings can be validly commenced.

393 Submission ED1 29 (Australian Bankers' Association).

394 Submission ED1 18 (Clayton Utz).

395 Submission ED1 10 (Legal Services Commissioner).

396 Submission ED1 2 (Police Association Victoria).

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- accepted, identifying which of the claimant's contentions are accepted and which are disputed and the reasons why they are disputed*
- (iii) *enclose a copy of documents requested by the claimant or explain why they are not enclosed*
- (iv) *identify and ask for a copy of any further essential documents, not in the respondent's possession, which the respondent wishes to see*
- (v) *state whether the respondent is prepared to make an offer to resolve the matter and if so the terms of such offer*
- (vi) *state whether the respondent is prepared to enter into mediation or other form of dispute resolution.*
- (f) *In the event that the claim is not resolved or withdrawn, the parties should conduct genuine and reasonable negotiations with a view to resolving the claim economically and without court proceedings.*
- (g) *Where a person in dispute makes an offer of compromise before any legal proceedings are commenced the court may, after the determination of the court proceedings, take that into consideration on the question of costs in any proceedings.³⁹⁷*
6. Specific pre-action protocols applicable to particular types of dispute should be developed by the proposed Civil Justice Council in conjunction with representatives of stakeholder groups in each relevant area (eg, commercial disputes, building disputes, medical negligence, general personal injury, etc.).
7. Where a specific pre-action protocol is developed for a particular type of dispute it would be referred to the Rules Committee for approval and implementation by way of a practice note in each of the Magistrates' Court, the County Court and the Supreme Court, with such modifications as may be appropriate in each of the three jurisdictions.
8. Except in (defined) exceptional circumstances, compliance with the requirements of the practice notes would be an expected condition precedent to the commencement of proceedings in each of the three courts. The obligation to comply with the requirements of applicable practice notes would be statutory. A person seeking to formally commence a legal proceeding should be required to certify whether the pre-action protocol requirements have been complied with, and where they have not to set out the reasons for such non compliance.
9. Because it would not be practicable for court registry staff to determine whether there had been compliance with the pre-action protocol requirements or to evaluate the adequacy of the reasons for noncompliance, the court would not have power to decline to allow proceedings to be commenced because of noncompliance.³⁹⁸ However, where the pre-action protocol requirements have not been complied with the court could, in appropriate cases, order a stay of proceedings pending compliance with such requirements.
10. The 'exceptional' circumstances where compliance with any pre-action protocol requirements would not be mandatory would include situations where:
- a limitation period may be about to expire and a cause of action would be statute barred if legal proceedings are not commenced immediately
 - an important test case or public interest issue requires judicial determination
 - there is a significant risk that a party to a dispute will suffer prejudice if legal proceedings are not commenced, in circumstances where advance notification of proceedings may result in conduct such as the dissipation of assets or destruction of evidence
 - there is a reasonable basis for a person in dispute to conclude that the dispute is intractable
 - the legal proceeding does not arise out of a dispute
 - the parties have agreed to dispense with compliance with the requirements of the protocol.
11. Unreasonable failure to comply with an applicable protocol or the general standards of pre-action conduct should be taken into account by the court, for example in determining costs, in making orders about the procedural obligations of parties to litigation, and in the awarding of interest

on damages. Unless the court orders otherwise, a person in dispute who unreasonably fails to comply with the pre-action requirements:

- would not be entitled to recover any costs at the conclusion of litigation, even if the person is successful
 - would be ordered to pay the costs of the other party on an indemnity basis if unsuccessful.
12. The operation of the protocols and general standard of pre-action conduct should be monitored by the Civil Justice Council, in consultation with representatives of relevant stakeholder groups, and modified as necessary in the light of practical experience.
 13. There should be an entitlement to recover costs for work done in compliance with the pre-action protocol requirements in cases which proceed to litigation. Specific pre-action protocols should attempt to specify the amount of costs recoverable, on a party-party basis, for carrying out the work covered by the protocols. As with the current Transport Accident Commission (TAC) protocols in Victoria, such costs should be either fixed (with allowance for inflation) or calculated in a determinate manner (eg, like the fixed costs payable in certain types of simple cases in England and Wales, where costs are calculated on a fixed base amount plus an additional percentage of the amount claimed). Consideration should be given to whether specific pre-action protocols should include a procedure for mandatory pre-trial offers which would be taken into account by the court when determining costs at the conclusion of any legal proceeding.
 14. Where the parties to a dispute have agreed to settle the dispute before starting proceedings but have not agreed on who is to pay the costs of and incidental to the dispute or the amount to be paid³⁹⁹, and there is no pre-action protocol which provides for such costs, any party to the dispute may apply to the court for an order:
 - (i) for the costs of and incidental to the dispute to be taxed or assessed, or
 - (ii) awarding costs to or against any party to the dispute, or
 - (iii) awarding costs against a person who is not a party to the dispute, if the court is satisfied that it is in the interests of justice to do so.
 15. Where, taking into account the nature of the dispute and the likely means of the parties, the costs of and incidental to the dispute are relatively modest, there should be a presumption that each party to the dispute will bear its own costs. The court should have power to determine the application on the basis of written submissions from the parties, without a hearing and without having to give reasons, or refer the matter to mediation or other form of alternative dispute resolution.

PRE-ACTION PROTOCOLS: ADDITIONAL MATTERS

1. Where a defendant only agrees to settle a case, prior to commencement of proceedings, without payment of any costs and on condition that the other party *not* seek an order for costs, the other party will have to elect to either settle the case on the terms proposed or proceed with litigation of the claim, notwithstanding the settlement offer. Where the matter proceeds to litigation, the reasonableness of the conduct of each party, including in relation to costs, could be later taken into account by the court.
2. A statutory provision is required to protect the information and documents provided in accordance with the protocol, to ensure they are not used for a purpose other than in connection with the resolution of the dispute between the parties. This could be an implied undertaking as for documents produced on discovery in litigation, or an express statutory prohibition on use other than in connection with the dispute and any litigation arising out of the dispute.
3. Where a party to a dispute is particularly vulnerable, under a disability or otherwise not reasonably capable of complying with the pre-action protocol requirements, this may be taken into account by the court as an acceptable ground for noncompliance if the dispute proceeds to litigation. This should provide some protection for some self-represented persons.

397 These draft guidelines are based substantially on the Protocols Practice Direction, October 2006, adopted in England and Wales. See the discussion below, and the Department for Constitutional Affairs, *Practice Direction: Protocols* (2006) <www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm> at 3 December 2007.

398 Accordingly, unlike in Queensland under the *Personal Injuries Proceedings Act 2002* (Qld), it will not be necessary to consider the question of whether proceedings can be *validly* commenced when the pre-action requirements have not been complied with. It is also presumably unnecessary to specify whether or not the requirements are 'procedural' or 'substantive'. See the consideration of the *Personal Injuries Proceedings Act 2002* (Qld) in the decision of the NSW Court of Appeal in *Hamilton v Merck and Co Inc* [2006] NSWCA 55 (Spigelman CJ, Handley JA and Tobias JA). Any proceedings commenced would not be a nullity merely because of noncompliance with the pre-action requirements, but the court would be empowered to stay proceedings pending compliance, in appropriate cases.

399 In Hong Kong, the Civil Justice (Miscellaneous Amendments) Bill 2007 (HK) makes provision for 'costs only proceedings', including where a dispute is settled before proceedings are commenced and where the parties have agreed on who is to pay the costs of and incidental to the proceedings but have not agreed on the amount of such costs (s 52B(1)): above n 103.

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4. The basis on which costs can be awarded by the court in circumstances where the dispute has settled without proceedings being commenced requires further consideration when specific pre-action protocols are developed. Should such costs be on the scale which would have applied if proceedings had been commenced? This may be problematic as it may not be clear which court the proceedings might have been commenced in, particularly given the overlapping jurisdictions of the civil courts. The commission has received suggestions from stakeholders about how such costs should be dealt with. Although the commission is in favour of such costs being reasonably certain, particularly to avoid ongoing disputes about costs and the further costs that these entail, there is no simple solution likely to be applicable to all types of dispute. In relatively straightforward and standardised disputes, a fixed costs regime makes sense. In other types of disputes, which vary in complexity and in quantum, there is clearly a need for greater flexibility.
5. Similar considerations apply in determining costs payable for compliance with pre-action protocol requirements in cases which do not settle before litigation.
6. Where parties have complied with pre-action protocol requirements the courts should consider a means of 'fast-tracking' any legal proceedings where the dispute is not resolved, and possible dispensation with certain interlocutory steps. Since compliance with pre-action protocol requirements may 'front end' certain costs and cause additional delays in the commencement of proceedings, the parties should get priority over cases where pre-action protocol requirements have not been complied with, and a dispensation from having to comply with such court procedural steps as may duplicate or overlap with pre-action steps already taken. The details of how this might be achieved would vary between different types of cases. This matter should be investigated further by the Civil Justice Council.

Chapter 3

Improving the Standards of Conduct of Participants in Civil Litigation



Chapter 3



Improving the Standards of Conduct of Participants in Civil Litigation

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The success of the Woolf reforms owed much to the success of the cultural shifts made by the judiciary and the legal profession. For example, barristers and solicitors had to learn that it is no longer acceptable to expect to use civil processes to gain tactical advantages in litigation. This type of change represented a fundamental shift in deeply ingrained mindsets. We suggest that a similar willingness to make radical changes to philosophies and practices will also be required to successfully embed Victorian reform efforts.¹

1. INTRODUCTION AND SUMMARY

In response to concerns about costs and delays in recent years, provisions have been introduced in a number of jurisdictions into statutes and rules of court to impose certain obligations on courts in the conduct of civil litigation. In some instances obligations have also been imposed on litigants and lawyers to assist the court in achieving the overriding objectives.

Although the commission considers that these are important initiatives, which we have in large measure drawn on, we have concluded that the primary focus should be on the participants in civil litigation: the parties, their lawyers and others who exercise commercial or other influence or control over the conduct of proceedings.

This chapter outlines the commission's proposal to create a new set of statutory provisions to define the overriding obligations and duties (the 'overriding obligations') to be imposed on all key participants in civil proceedings before Victorian courts, and to more clearly define the 'overriding purpose' sought to be achieved by the courts in civil proceedings. The introduction of these provisions aims to address one of the key policy objectives of this review, improving the standards of conduct of participants in the civil justice system to facilitate early dispute resolution, to narrow the issues in dispute and to reduce costs and delay.

1.1 OVERRIDING OBLIGATIONS IMPOSED ON PARTICIPANTS

The commission's recommendations encompass various legal obligations and duties to regulate the manner in which civil proceedings are conducted in the Magistrates' Court, the County Court, the Supreme Court and the Court of Appeal. It is proposed that these obligations would be imposed on key participants in the Victorian civil justice system.

The overriding obligations and duties (the 'overriding obligations') would apply to the following participants:

- the parties to a civil proceeding
- the lawyers or any other representatives acting on behalf of the parties
- any law practice acting on behalf of a party to a civil proceeding
- any person, including insurers or providers of funding or financial support, providing any financial or other assistance to any party to a civil proceeding, insofar as such person exercises any direct or indirect control or influence over the conduct of a party.

The obligations would not apply to witnesses as to fact but a number of the obligations would apply to expert witnesses.²

It is proposed that these overriding obligations be imposed by statute and have priority over other obligations and duties which the participants may have, including any legal, ethical or contractual obligations. In particular, the legislation should provide that the obligations are to apply despite any obligation that a lawyer or law practice may have to act in accordance with the wishes or instructions of a client.³

The aim of the proposal is to create a uniform 'model standard' for the conduct of key participants in the civil justice system. The provision would restate and clarify existing obligations and duties and impose new obligations and duties, with a view to improving standards of conduct within the civil justice system.

This proposal is a response to persistent concerns about the conduct of various participants in the civil justice system. It is also an attempt to provide an approach which is consistent across the system. To date, in Victoria and in other jurisdictions, various piecemeal measures have been introduced to address problems in particular areas.

- 1 Submission CP 62 (Victorian Bar).
- 2 The commission originally envisaged that the provisions would also apply to any person who is a witness or potential witness, including an expert witness, who has knowledge or documents relevant to any aspect of a civil proceeding. This position had some support in a number of submissions and consultations (for example, Submission ED1 7 (Judge Wodak) and in consultation with several judges of the Supreme Court (2 August 2007). However, following further consideration it was resolved that in fact witnesses should be excluded and that only some of the obligations were appropriate for imposition on expert witnesses. Thus, the common law immunity that witnesses presently enjoy is largely preserved. See Submission ED 1 24 (Victorian Bar), which makes reference to *Cabassi v Villa* (1940) 64 CLR 130, 141. There is a more detailed discussion of witnesses below.
- 3 Section 345(3) of the *Legal Profession Act 2004* (NSW) is similar.

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This approach adopted by the commission is not entirely new. It is an extension of a trend of civil justice reforms in Australia and other common law jurisdictions, which are discussed below. Many of these reforms seek to change the 'adversarial' culture, in particular by emphasising 'cooperation, candidness and respect for truth'.⁴ However, many of these reforms have been limited in scope. Some are applicable only to certain categories of litigation; others only encompass particular participants in the litigation process.

The proposed overriding obligations are confined to conduct in relation to civil proceedings before a Victorian court. This includes the conduct or defence of any aspect of a civil proceeding, including any interlocutory proceeding and any appeal from any order or judgment in a civil proceeding. The provisions also apply to any dispute resolution processes which are ancillary to court proceedings, including negotiation and mediation. The commission is of the view that the same high standards of conduct should govern both the formal conduct of litigation and the informal processes of dispute resolution conducted by those who are parties to court proceedings.

The commission considered whether the provisions should also apply to civil disputes prior to the commencement of legal proceedings. It was decided that the obligations should apply only from the point of commencement of civil proceedings. Prior to the commencement of proceedings the conduct of parties in dispute, where there is a prospect of litigation, is dealt with by the commission's recommendations in relation to pre-action protocols, which are discussed in Chapter 2.

The overriding obligations are a set of positive obligations and duties. These commence with a statement of a paramount duty to the court to further the administration of justice, and then set out 10 more specific obligations and duties.

Each of the persons to whom the overriding obligations are applicable:

- shall at all times act honestly
- shall refrain from making or responding to any claim in the proceeding, where a reasonable person would be of the belief that the claim or response (as appropriate) is frivolous, vexatious, for a collateral purpose or does not have merit⁵
- shall not take any step in the proceeding unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding
- has a duty to cooperate with the parties and the court in connection with the conduct of the proceeding⁶
- shall not engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive or knowingly aid, abet or induce such conduct
- shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution (ADR) processes
- where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute
- shall use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute
- shall use reasonable endeavours to act promptly and to minimise delay
- has a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege⁷ which has not been expressly or impliedly waived, or under any other statute.⁸

While the paramount duty is owed by the participants to the court some of the specific duties are owed by the participants to each other.

In addition to the overriding obligations various certification provisions are proposed in relation to both parties and legal practitioners.

Parties would be required to personally certify that they have read and understood the overriding obligations. In addition, when filing any pleading they would be required to certify, or verify by affidavit or statutory declaration, that they believe that any allegation of fact made by them has merit, that any allegation of fact which is denied by them does not have merit and that where they do not admit any allegation of fact that after reasonable inquiry they do not know whether such allegation has merit. A determination by a party as to the merit of any allegation must be based on a reasonable belief as to the truth of the allegation.

In the case of legal practitioners, certification is required when filing any statement of claim or other originating process, defence or further pleading.⁹ It is required for any allegation or denial. In the case of nonadmissions, certification is required that there is an inability to determine the merit of the allegation. The determination of merit by lawyers is required to be based on the available factual material and evidence, and a reasonable view of the law.

The primary objective of the overriding obligations is to bring about improvements in practices and the conduct of participants in the civil justice system, rather than to punish misconduct. However, in order to ensure compliance, the commission proposes that there should be a broad range of sanctions and remedies available to the court to deal with nonconforming behaviour. Some of these are compensatory as well as punitive. They include payment of legal costs, expenses or compensation, requiring that steps be taken to remedy the breach and precluding a party from taking certain steps in the proceeding.

The penalty and other provisions may be invoked on application by any party or person with sufficient interest or by the court of its own motion. However, because of the commission's concern about the undesirability of 'satellite' litigation in respect of sanctions and remedies for alleged breaches of the overriding obligations, it is proposed that applications by a party or person with sufficient interest would require leave of the court.

In order to ensure that relevant participants become familiar with the applicable overriding obligations before the sanctions and other remedies come into force, the commission has recommended that the provisions relating to penalties for breach of the overriding obligations not come into effect until 12 months after the date of implementation of the overriding obligations provisions. Moreover, it is proposed that such penalties would only apply to breaches arising after that date. However, this delayed implementation would not prevent the courts from exercising any powers they already have, including in relation to costs.

Where leave is granted and an application for sanctions or other remedies is to be determined the commission is of the view that it is preferable for such application to be determined in the court in which the primary proceeding is heard. Where practicable, and without limiting the discretion of the court to decide how and by whom such application should be determined, the commission is of the view that the application should be dealt with initially by the judicial officer who is most familiar with the proceeding which gave rise to the application. This would reduce costs and avoid the necessity for another judicial officer to become familiar with the facts giving rise to the application.

In the interests of finality it is proposed that any application for sanctions or other remedies should normally be made not later than 28 days from the date of determination of the proceedings. However, the commission is mindful that in some situations a party or other interested person may not become aware of relevant facts within this time period and that there may need to be provision for extensions of time for the making of applications.

There may also need to be specific provisions dealing with how the obligations and sanctions would apply to corporations and law firms. In general, it is not the commission's intention to render employees of parties or other participants personally liable for breach of the overriding obligations. In the case of corporations, it is intended that the corporation should be liable for the acts of any director, servant or agent acting within the scope of their actual or apparent authority. In the case of a law firm acting for a party, both the law firm and the individual lawyer(s) who breach the overriding obligations should be liable, but nonlegally qualified employees should not be personally liable for any breach.

Where penalty or other proceedings for breach have been instituted there may be circumstances where, for the purpose of defending such proceedings, a lawyer may seek to rely on information or advice which is subject to legal professional privilege. In particular, this may be the case where it is alleged that the proceedings in issue were without merit. In this context we note that the *Migration*

- 4 Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (4th ed, 2005) [13.16].
- 5 This and other provisions are not intended to prevent the taking of preliminary steps, preliminary legal work or preliminary or other assistance for the purpose of ascertaining the merit of a claim or defence. See, eg., *Legal Profession Act 2004* (NSW) s 346 in respect of the steps required for 'a proper and reasonable consideration of whether a claim, proceeding or defence of a claim or proceeding has reasonable prospects of success'.
- 6 It was originally proposed that there would be a duty to each of the other participants 'to act in good faith'. Following the consultation process this was modified to the present obligation 'to cooperate'. This is discussed further below.
- 7 In relation to self-incrimination, see Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, Issues Paper 33 (2007) 195–6.
- 8 This is not intended to require further disclosure of information or documents already disclosed in compliance with pre-action protocols or an order for preliminary discovery.
- 9 'Court documentation' may be preferable to the term 'pleading'. See, eg, *Legal Profession Act 2004* (NSW) s 347(4).



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Act 1958 (Cth) provides for a limited statutory waiver of legal professional privilege in proceedings to determine whether a costs or other order should be made in respect of migration litigation which was commenced or continued without any reasonable prospect of success.¹⁰

The draft overriding obligation provisions (including penalty provisions) and the draft certification provisions are set out in the final section of this chapter. The additional provisions relating to the overriding purpose and duties of the court are discussed below.

1.2 OVERRIDING PURPOSE AND DUTIES OF THE COURT

At present there are various provisions which seek to define the purpose and duties of Victorian courts in civil matters. These are discussed below. The commission proposes that there should be a uniform statement of ‘overriding purpose and duties’ applicable to all Victorian civil courts.

Following other models discussed in this chapter, the commission proposes that legislation should provide that the overriding purpose of the relevant legislation and the rules of court is to facilitate the ‘just, efficient, timely and cost effective resolution of the real issues in dispute’. This would apply not only to the determination of proceedings by the court but also to the alternative dispute resolution processes agreed to by the parties or ordered by the court.

The commission’s proposals would require the courts to seek to give effect to such overriding purpose when interpreting or exercising any powers in connection with civil disputes, whether derived from procedural rules or as part of the courts’ inherent, implied or statutory jurisdiction. Parties and legal practitioners or others acting on behalf of parties would be required to assist the court to further the overriding purpose (in addition to being subject to the overriding obligations directly applicable to such persons).

In addition to this general overriding purpose the commission’s recommendations encompass specific subsidiary objects which the courts would be required to consider in making any order or giving any direction. These are:

- the just determination of the proceeding
- the public interest in settlement of disputes
- the efficient disposal of court business
- the efficient use of resources
- the timely disposition of proceedings
- dealing with cases in ways proportionate to the amount involved, the importance and complexity of the issues and the financial position of the parties.

In addition to these matters, the court may have regard to other matters considered relevant, including:

- compliance by parties with pre-action procedural obligations or protocols
- the extent to which the parties have used reasonable endeavours to resolve the dispute
- the degree of expedition with which the parties have approached the proceeding
- the extent of compliance with the overriding obligations
- the degree of injustice that may be suffered by a party as a consequence of any order or direction.

Finally, the courts would be required to have regard to the objective of minimising delay between the commencement of cases and listing for trial.

2. RATIONALE FOR THE RECOMMENDATIONS

Regardless of the rights and responsibilities of parties, lawyers and financial entities outside the context of civil litigation, by invoking the processes of the courts, litigants subject others to compulsory processes and expense, deploy publicly funded court facilities and judicial and other court resources and have an impact on the capacity of the legal system to deal with other cases.

Accordingly, it is the commission’s view that high standards of conduct are required on the part of all participants in the civil litigation process and are in the best interests of the parties to disputes.

To date, various governments and government instrumentalities have adopted 'model litigant' guidelines in respect of their own conduct in litigation. Such model provisions do not apply to the other parties to the litigation. Statutory and other provisions applicable to certain types of litigation are limited in scope. The commission's proposal extends these concepts to all litigants, lawyers and others involved in the civil litigation process, specifies the particular duties and obligations required to be complied with and provides for sanctions and other remedies for noncompliance. It thus provides a uniform and comprehensive set of standards and sanctions applicable to all participants in all litigation before all Victorian courts.

Anecdotally, there are persistent complaints about conduct issues, concerning not only lawyers but also other participants in the civil justice system, including the parties themselves. These complaints relate to:

- adversarial conduct which may exacerbate the dispute and contribute to the partisan attitudes and practices of lawyers, the parties and witnesses, particularly expert witnesses
- a lack of cooperation and disclosure, particularly at an early stage of proceedings
- the use of procedural tactics, including to delay proceedings, where it is perceived to be in a litigant's interest
- incurring unnecessary or disproportionate legal and other costs.

Even where model litigant guidelines are in place to regulate the conduct of government parties or instrumentalities, allegations of inappropriate behaviour such as a 'win-at-all-costs' approach to litigation, continue.¹¹

In *Managing Justice*, the Australian Law Reform Commission (ALRC) catalogued the following criticisms levelled at lawyers in submissions to that reference:

- *fostering or encouraging litigation for financial benefit;*
- *abandoning clients when the money runs out;*
- *pressuring a client to accept a result that does not meet the client's needs or desires;*
- *failing to act on the client's instructions;*
- *competitive strategies to win the case at the expense of efficacy and equity;*
- *frustrating the client and the legal process by conduct designed to maintain conflict;*
- *lack of understanding or sympathy for the client's specific situation;*
- *failure to inform the client about the progress or status of the case;*
- *abuse of subpoenas;*
- *controlling, obstructing or discouraging communication between disputants;*
- *delays in correspondence;*
- *lacking relevant knowledge of issues or facts;*
- *ignorance of ADR processes.*¹²

Several submissions to this present inquiry raised conduct-related issues. In light of the difficulties faced in litigation, one submission suggested that in cases where the parties to litigation have vastly different means, a panel of retired senior counsel or judges should be available to examine each party's rights and obligations. Where one party's case is clearly stronger, it was proposed that the panel should refer the matter to a mediation in which the mediator is given 'enhanced powers to force a settlement'.¹³ Another submission focused on negative conduct associated with the adversarial system, such as overly confrontational behaviour, suppression of relevant evidence and the costs and delays that such behaviour can lead to.¹⁴ Overall, however, there were relatively few complaints about the conduct of the legal profession but a multitude of suggestions about reforms needed. Conduct of participants other than lawyers, such as insurers and litigation funders, was identified as an area that should attract regulation given that 'they have a greater capacity than most to systematically assist or retard the Court in achieving its Overriding Purpose'.¹⁵

The rationale for the commission's recommendations in relation to overriding obligations does not arise out of any serious concern about widespread 'improper' conduct on the part of the Victorian legal profession. In part, the proposals arise out of the view that what has been traditionally regarded

10 See *Migration Act 1958* (Cth) s 486H.

11 See, eg, Marcus Priest, 'Breaches belie the rules of fairness', *Australian Financial Review* (Sydney), 4 April 2007, 57.

12 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [3.8] and footnotes.

13 CP 1 (Confidential Submission, permission to quote granted 17 January 2008).

14 CP 5 (Confidential Submission, permission to quote granted 4 February 2008). See also Submission CP 57 (IMF Australia), and Submission ED1 7 (Judge Wodak), who suggested that '[c]ontrols of the use of litigation tactics and procedures must be and remain in the hands of judicial officers'.

15 Submission CP 57 (IMF Australia).



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as 'proper' or normal professional conduct, and in particular the adversarial approach to litigation and the primacy often given to the partisan interests of clients, has not always been conducive to the quick, efficient or economical resolution of disputes.

In making its recommendations the commission is also mindful of recent expressions of concern at what some have described as the increasing trend towards 'commercialisation' of the practice of law. Such expressions of concern have emanated from the judiciary,¹⁶ regulators¹⁷ and from within the profession itself.¹⁸ Aspects of this trend are the move towards the incorporation of legal practices, the commercial alliance between legal practices and other commercial entities and, more recently, the public listing of law firms on the stock exchange. These developments, coupled with the deregulation of legal fees and the pervasive use of time-based charging practices, may tend to exacerbate ongoing tensions between professional duties and commercial desires. On the one hand, lawyers have professional obligations, including their duty to the court. On the other hand, law firms seek to be responsive to the demands of clients and the desire to maximise profitability. However these tensions are sought to be resolved outside the court system, the commission is of the view that those who seek to utilise publicly funded courts and judicial officers for the purpose of resolving disputes should be required to adhere to high standards of forensic conduct.

It is of interest to note that the perceived conflict between economic and ethical obligations arising out of the incorporation of legal practices in various jurisdictions in Australia has been resolved by the introduction of statutory overriding provisions. As Steve Mark has noted, in 2001 in New South Wales in the drafting of the legislation permitting incorporation, it was expressly provided in section 47S of the *Legal Profession Act 1987* (NSW) that where there is an inconsistency between the *Corporations Act 2001* (Cth) and the *Legal Profession Act 1987* (NSW), the latter legislation prevails to the extent of the inconsistency. As Mark proceeds to note, the *Legal Profession Act 2004* (NSW) attempted to incorporate the same concept through the provision in section 163 that *Corporations Act* displacement provisions are to be established by the *Legal Profession Regulation 2005* (NSW).¹⁹

In Victoria a similar approach has been adopted in the *Legal Profession Act 2004*. Regulations made under the Act may declare any matter relating to an incorporated legal practice that is prohibited, required, authorised or permitted by the Act or regulations to be an 'excluded matter' for the purposes of section 5F of the *Corporations Act 2001* (Cth).²⁰ Moreover, the provisions of the *Legal Profession Act 2004* or the regulations that apply to an incorporated legal practice (that is not a company within the meaning of the *Corporations Act*) prevail, to the extent of any inconsistency, over the provisions of the legislation by which the corporation is established or regulated.²¹

In the recent public listing of the law firm Slater & Gordon, the prospectus noted that:

The constitution states that where an inconsistency or conflict arises between the duties of the company (and the duties of lawyers employed by the company) the company's duties to the court will prevail over all the duties and the company's duty to its clients will prevail over the duty to shareholders.

Thus, through various means, the above provisions seek to implement a form of overriding obligations to deal with the potential conflict between 'commercial' obligations to shareholders and 'professional' obligations to clients and the court.

The commission's recommendations in relation to overriding obligations:

- specify high standards of conduct in the civil justice system
- restate what is already accepted, on the part of the legal profession, as a paramount duty to the court and to the administration of justice
- seek to guide, improve and regulate the conduct of all key participants in the system
- will assist in facilitating further transformation of the culture in the system.

The force of the obligations will be enhanced by incorporating them in statute and providing for enforcement mechanisms and sanctions.

This approach is not entirely new. It is an extension of the trend of civil justice reforms in Australia and other common law jurisdictions. Many of these reforms have been directed to ameliorating the adversarial culture, in particular by emphasising 'cooperation, candidness and respect for truth'.²² A number of such reforms are also intended to achieve a more level litigious playing field where there are asymmetries of resources, power and expertise between parties to litigation.²³

In some cases, the strategy has been to articulate key aims, objectives and principles for the operation of the civil justice system and the courts, often in statute or court rules. Such statements have been extended to impose obligations on the parties and the lawyers to assist in furthering certain aspirations. This strategy is discussed further below.

There are also more diverse and ad hoc examples in Victoria and elsewhere in Australia of measures aimed at modifying the conduct of participants in the civil justice system, including litigants and lawyers, through such mechanisms as statutes, practice rules, rules of court, guidelines, etc. A number of these are referred to in this chapter. They encompass provisions directed at certain types of litigation, such as damages actions,²⁴ migration proceedings,²⁵ industrial relations cases,²⁶ or patent litigation,²⁷ specific types of fee arrangements²⁸ and particular types of conduct.²⁹ In a number of situations there may be costs sanctions or disciplinary consequences for lawyers.³⁰ Most of these provisions are limited in scope and apply only to selected participants in the civil justice system. All these measures stop short of imposing affirmative obligations on *all* participants to behave in a particular way.

All of these measures have one thing in common—they seek to improve the primary standard of conduct of various participants in the civil justice process and impose sanctions and penalties for nonconforming behaviour. A number of these developments are discussed in further detail below.

The commission has concluded that it is preferable for there to be more clearly defined and more broadly applicable provisions which seek to both constrain undesirable conduct and to affirmatively promote the expeditious, efficient and cost effective resolution of civil litigious disputes, not only through judicial determination of the merits but also through alternative dispute resolution. Placing the duties and responsibilities on the participants in civil litigation will facilitate the more effective operation of the civil justice system.

The submissions received by the commission were divided on some aspects of the proposals, and the final form of the recommendations has been modified in light of the views of various stakeholders. In particular, the criterion in relation to the merit of proceedings has been changed from the earlier proposal, and the previously proposed obligation to act in 'good faith' has been modified to an obligation to cooperate.

The general thrust of the commission's proposals received significant support in submissions. The Supreme Court submitted that its capacity to implement the court's objectives could be enhanced by the commission's proposals. As the court noted:

Lawyers, and to a much lesser extent parties and witnesses, have a range of ethical and similar obligations under present law and practice ... These obligations have developed in response

16 See, eg, J Spigelman, 'Address' (Speech delivered at the Medico-Legal Society of New South Wales Annual General Meeting) and J Spigelman, 'Measuring Court Performance' (Speech delivered at the 24th AJA Conference, 16 September 2006, Adelaide). See also *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, [172], [183] (Callinan J).

17 Steve Mark, 'The Corporatisation of Law Firms—Conflicts of Interests for Publicly Listed Law Firms' (Paper presented at the Australian Lawyers Alliance National Conference, 2007, Hobart, 13 October) 1–2, 8–13. See also Steve Mark 'Notes on the Listing of Law Firms in New South Wales and on the Incorporation of Law Firms' (Paper presented at joint NOBC, APRL and ABA Centre for Professional Responsibility panel entitled 'Brave New World: The Changing Face of Law Firms and the Practice of Law from a Professional Responsibility Perspective' San Francisco, 10 August 2007).

18 Bret Walker SC, 'Lawyers and Money' (Speech delivered at the 2005 Lawyers' Lecture, St James Ethics Centre, Sydney, 18 October 2005).

19 Mark (13 October 2007) above n 17, 5. See also M Regan, B MacEwen and L Ribstein, 'Law Firms, Ethics and Equity Capital: A Conversation', (2008) 21(1) *Georgetown Journal of Legal Ethics* 61.

20 *Legal Profession Act 2004* s 2.7.34.

21 *Legal Profession Act 2004* s 2.7.33. See also ss 2.7.13, 2.7.14, 2.7.17, 2.7.32.

22 Ross (2005) above n 4, [13.16], referring to reforms identified by Justice David Ipp as modifying the 'adversarial ethic'. See also David Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part I' (1995) 69(9) *Australian Law Journal* 705; David Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part II' (1995) 69(10) *Australian Law Journal* 790 and David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.

23 See, eg, the United Kingdom's *Civil Procedure Rules 1998* (SI 1998/3132) r 1.1(2)(a) in relation to the overriding objective. It states that one of the aspects of dealing with a case justly is ensuring that 'parties are on an equal footing'.

24 See, eg, *Legal Profession Act 2004* (NSW) ss 345–8, discussed below. See also Phillipa Alexander, 'Reasonable Prospects of Success and Costs Orders against Solicitors' (2006) 75 *Precedent* 44.

25 See *Migration Act 1958* (Cth) ss 486E–486J, discussed below.

26 See *Workplace Relations Act 1996* (Cth) ss 676, 679.

27 *Therapeutic Goods Act 1989* (Cth) s 26C.

28 See *Legal Profession Act 2004* (Vic) s 3.4.28(4)(a).

29 For example, in Victoria document destruction is now a criminal offence. See the *Crimes (Document Destruction) Act 2006*, s 3.

30 See, eg, *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300, where costs orders against a solicitor were overturned by the Court of Appeal 'as there was no *prima facie* case that the solicitor had provided legal services without reasonable prospects of success' (see Alexander (2006) above n 24, 45), and *Eurobodalla Shire Council v Wells & 2 Ors* [2006] NSWCA 5 (21 February 2006), where *Lemoto* was applied and costs orders made against both a solicitor and a barrister. See also *Migration Act 1958* (Cth) s 486F and *Civil Procedure Act 2005* (NSW) s 56(5). The *Therapeutic Goods Act 1989* (Cth) provides for a penalty of up to \$10 million: s 26C(5).

3

Chapter 3



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to changes in the scope and nature of litigation over time. In the light of modern circumstances, it is appropriate to consider the consolidation and extension of these obligations, and bringing parties and witnesses more fully within their operation.³¹

Government departments, agencies and instrumentalities are frequent participants in litigation before Victorian courts. Given that they are already subject to self-imposed model litigant guidelines, the application of the proposed overriding obligations to such entities is unlikely to be problematic in policy terms. For other categories of litigants, and in particular corporations and self-represented litigants, other policy considerations need to be addressed.

Corporations are also frequent litigants, both as plaintiffs and defendants, and often have considerably greater resources, litigation experience and access to both in-house and external legal expertise than most individual litigants. They are also at an economic advantage insofar as their legal costs may be tax deductible. Because of the adversarial nature of civil litigation and the traditional emphasis on party control of the proceedings, litigants with greater resources and legal expertise are often in a better position to adopt strategic or tactical procedural moves designed to delay or frustrate the resolution of the dispute if the outcome is not considered likely to be to their commercial advantage. There may of course also be disparities in resources and expertise between individual litigants.

Although corporations may be resistant to the imposition of regulatory constraints on their behaviour as civil litigants, as several submissions received by the commission confirm,³² there are a number of reasons why the imposition of the proposed overriding obligations on corporations may be considered not only appropriate but also necessary.

In a forthcoming article, Cameron and Taylor-Sands outline the case for corporations to adopt a model litigant code and suggest how such a code might be implemented.³³ The authors contend that some corporations³⁴ should be subject to model litigant rules (similar to the overriding objectives recommended by the commission) in view of, inter alia:

- the similarities between corporations and governments, especially their status as frequent litigants
- the increasingly public role of corporations and their impact on the community
- the potential unfairness which results when government entities are subject to model litigant rules where their forensic adversaries are not
- the inadequacies of existing professional codes of conduct and civil procedure rules
- the application of 'modern principles of corporate social responsibility'
- the limited and questionable effectiveness of adverse costs orders on well resourced litigants
- the desirability of creating a corporate culture of responsible litigation behaviour
- the fact that publicly funded litigation and dispute resolution systems are a 'scarce' resource and the consequent necessity for them to be managed wisely, especially by frequent users.³⁵

The authors contend that there are special reasons why corporations should be subject to more onerous standards in the conduct of litigation than other litigants, and propose that a corporate model litigant code should be prepared by corporations rather than imposed by legislatures or regulatory authorities. In contrast, the commission's recommendations would subject all litigants to the same obligations, which would be imposed by legislation.

Before further discussing the commission's recommendations, the following part of this chapter examines existing legal and other obligations on participants in the civil litigation process.

3. EXISTING OBLIGATIONS ON PARTICIPANTS IN CIVIL LITIGATION

3.1 OVERRIDING OBJECTIVES

A number of major civil justice reviews in common law jurisdictions have sought to identify and articulate key aims, objectives and principles for the operation of the civil justice system and the courts.³⁶

In some instances aspirations have been committed to court rules and given prominence. One notable example is Lord Woolf's formulation of an 'overriding objective' stated at the outset of the *Civil Procedure Rules* (SI 1998/3132) which came into operation in late April 1999. Rule 1.1(1) provides that the 'overriding objective' of the rules is to enable the court to deal with cases justly. The rule goes on to provide that:

- (2) *Dealing with a case justly includes, so far as is practicable:*
 - (a) *ensuring that the parties are on an equal footing;*
 - (b) *saving expense;*
 - (c) *dealing with the case in ways which are proportionate—*
 - (i) *to the amount of money involved;*
 - (ii) *to the importance of the case;*
 - (iii) *to the complexity of the issues; and*
 - (iv) *to the financial position of each party;*
 - (d) *ensuring that it is dealt with expeditiously and fairly; and*
 - (e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*³⁷

The court must seek to give effect to the overriding objective when it exercises any power under the rules or interprets any rule.³⁸ The parties are required to help the court to further the overriding objective.³⁹

The rules also provide that the court must further the overriding objective by actively managing cases.⁴⁰ Active case management is defined to include:

- (a) *encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- (b) *identifying the issues at an early stage;*
- (c) *deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- (d) *deciding the order in which issues are to be resolved;*
- (e) *encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
- (f) *helping the parties to settle the whole or part of the case;*
- (g) *fixing timetables or otherwise controlling the progress of the case;*
- (h) *considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- (i) *dealing with as many aspects of the case as it can on the same occasion;*
- (j) *dealing with the case without the parties needing to attend at court;*
- (k) *making use of technology; and*
- (l) *giving directions to ensure that the trial of a case proceeds quickly and efficiently.*⁴¹

Notably the 'overriding objective' in the rules imposes the principal obligation on the court, rather than explicitly imposing it directly on the participants. This reflects the shift in emphasis precipitated by the Woolf reforms:

*Control over litigation has been taken away from the parties and entrusted to the court, thereby enabling the court to determine the best way of proceeding to a resolution of the dispute. To this end, an overriding objective has been elaborated in order to guide the court in exercising both its new case management powers and its traditional discretion in matters of procedure.*⁴²

The Civil Procedure Rules also seek to change the behaviour of the parties who are required to help the court to further the overriding objective.

31 Submission CP 58 (Supreme Court of Victoria). However, the submission points out that the 'view is not universally held by Judges of the Court'.

32 See the discussion of submissions at the end of this chapter.

33 Camille Cameron and Michelle Taylor-Sands, "'Corporate Governments' as Model Litigants' (2007) 10(2) *Legal Ethics* (forthcoming).

34 The article does not define the boundaries for determining which corporations should be subject to such a code.

35 Cameron and Taylor-Sands (2007) above n 33, 1, 11–12, 16.

36 Peter Sallmann and Richard Wright, *Going to Court: A Discussion Paper on Civil Justice in Victoria* (2000) 27.

37 *Civil Procedure Rules* (UK) (SI 1998/3132) r 1.1(2).

38 *Civil Procedure Rules* (UK) (SI 1998/3132) r 1.2.

39 *Civil Procedure Rules* (UK) (SI 1998/3132) r 1.3.

40 *Civil Procedure Rules* (UK) (SI 1998/3132) r 1.4(1).

41 *Civil Procedure Rules* (UK) (SI 1998/3132) r 1.4(2).

42 Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2006) 1.



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The rules require the court to encourage ‘the parties to co-operate with each other in the conduct of the proceedings’.⁴³ These obligations indirectly apply equally to the lawyers (as representatives of the parties).⁴⁴ As Professor Zuckerman notes, this has resulted in a significant cultural change:

*Before the CPR, parties had no comparable duty. They were of course obliged to perform their process duties, but beyond that they were free to refrain from responding to questions from their opponent, free to withhold information unless and until they came under a disclosure duty, free to resist settlement negotiations and free to treat any approach from an opponent with disdain. If they engaged in negotiations, they remained free to drag out the talks to no end other than to make their opponent’s life difficult.*⁴⁵

The approach to reform adopted by the commission is similar to but different in focus from the Woolf approach. Thus, for example, the commission’s recommendations place a direct affirmative obligation on the parties to cooperate both with the other parties and with the court, rather than merely imposing an obligation on the court to encourage the parties to cooperate with each other.

To date, various aspirational statements have been implemented or recommended for inclusion in statutes and rules of court in some Australian jurisdictions.

In NSW in 2000 a new overriding purpose was inserted at the commencement of the *Supreme Court Rules*. This stated that the objective of the rules was to facilitate the ‘just, quick and cheap’ resolution of the real issues in the proceeding.⁴⁶ In 2005, with the implementation of the *Civil Procedure Act 2005* (NSW), the overriding purpose was given statutory status and obligations extended to the court, the parties and their legal representatives. Section 56 states:

- (1) *The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.*
- (2) *The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.*
- (3) *A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.*
- (4) *A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).*
- (5) *The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.*⁴⁷

At the same time the *Uniform Civil Procedure Rules 2005* (NSW) were implemented. The overriding purpose is echoed in rule 2.1 regarding the making of directions and orders for the ‘just, quick and cheap’ disposal of proceedings.⁴⁸

In Queensland, the *Uniform Civil Procedure Rules 1999* set out the overriding obligations of the court and the parties and specifically provide for sanctions for noncompliance. Rule 5 provides:

Philosophy—overriding obligations of parties and court

- (1) *The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.*
- (2) *Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.*
- (3) *In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.*
- (4) *The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.*

The example which accompanies the rules elaborates that the ‘court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court’.⁴⁹

In South Australia, rule 3 of the *Supreme Court Civil Rules 2006* provides that the objects of the rules are:

- (a) to establish orderly procedures for the just resolution of civil disputes; and
- (b) to facilitate and encourage the resolution of civil disputes by agreement between the parties; and
- (c) to avoid all unnecessary delay in the resolution of civil disputes; and
- (d) to promote efficiency in dispute resolution so far as that object is consistent with the paramount claims of justice; and
- (e) to minimise the cost of civil litigation to the litigants and to the State.

In Victoria the Magistrates' Court has, since 1 January 2005, had overriding objective and case management rules which are substantially similar to the *Civil Procedure Rules* in the United Kingdom.⁵⁰ As with the Woolf approach, the overriding objective is framed as a paramount concern for the conduct of the court's business.⁵¹

This approach can be contrasted with the current rule 1.14(1)(a) of the Victorian *Supreme Court (General Civil Procedure) Rules 2005*. This rule requires the court, in exercising any power under the rules, to 'endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined'. Although the rule seeks to achieve the same outcome as the UK rules' overriding objective, it does not explicitly address many of the specific matters addressed in other models. For example, it does not refer to the issue of 'proportionality'.⁵²

In its submission to this review, the Supreme Court of Victoria indicated that it has considered whether rule 1.14:

*might be expanded and strengthened to make explicit aspects of the Court's inherent power to control its own proceedings, to encourage proportionality, and to foster a culture of just and efficient dispute resolution.*⁵³

The submission notes that:

*There is a view within the Court that an expanded version of Rule 1.14 would have a positive impact, particularly in stating the obligations of parties and their legal practitioners to conduct litigation with regard to the overriding objective. Such provisions may provide an appropriate preamble or 'objects clause' to the Rules, similar to those found in modern legislation.*⁵⁴

While the submission points out that there is a view within the court that the inclusion of provisions of this type in the rules would be appropriate, it also indicates that this view is not universally held by the judges of the court.

The Supreme Court has also given consideration to how an expanded rule might be drafted and has taken sections of the *Civil Procedure Act 2005* (NSW) as a model. The draft prepared by the Supreme Court provides as follows:

- 1 *Overriding Purpose*
 - (1) *The overriding purpose of these rules is to facilitate the just, quick and cost effective resolution of the real issues in any proceedings governed by these rules.*
 - (2) *The Court shall seek to give effect to the overriding purpose when it interprets or exercises any of the powers given to it by these rules.*
- 2 *Obligations of the parties*
 - (1) *A party to a proceeding governed by these rules shall assist the court to further the overriding purpose and, to that effect, shall participate in the processes of the court and comply with all directions and orders of the court in the proceeding.*
 - (2) *A practitioner shall not by his or her conduct cause his or her client to be put in breach of paragraph (1).*
 - (3) *The Court may take into account any failure to comply with paragraph (1) or (2) in exercising its discretion with respect to costs.*

43 *Civil Procedure Rules* (UK) (SI 1998/3132) r 1.4(2)(a).

44 *Skjevesland v Gevevan Trading Co Ltd* [2002] EWCA Civ 1567, [37].

45 Zuckerman (2006) above n 42, 41.

46 See also r 1.2A *Compensation Court Rules 1990* (now repealed); Schedule 1 of the *Compensation Court Rules (Efficient Resolution of Proceedings) 2000* (NSW), made under the *Compensation Court Act 1984* (NSW). From 1 November 2006 the *Workers Compensation Commission Rules 2006* came into force.

47 See also s 57 on the objects of case management, s 58, which requires the court to 'act in accordance with the dictates of justice' (s 58(1)(b)), s 59 on the elimination of delay and s 60 on proportionality of costs.

48 *Uniform Civil Procedure Rules 2005* (NSW) r 2.1.

49 *Uniform Civil Procedure Rules 1999* (Qld), example accompanying r 5.

50 *Magistrates' Court Civil Procedure Rules 1999* (Vic) rr 1.19–1.22.

51 Sallmann and Wright (2000) above n 36, 31.

52 *Ibid.*

53 Submission CP 58 (Supreme Court of Victoria).

54 Submission CP 58 (Supreme Court of Victoria).



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3 *Order and directions*

For the purpose of furthering the overriding purpose referred to in rule 12A(1), the court in making any order or giving any direction in a proceeding governed by these rules and generally in the management of any such proceeding—

(a) shall have regard to the following objects:

- (i) the just determination of the proceeding;*
- (ii) the efficient disposal of the business of the Court;*
- (iii) the efficient use of available judicial and administrative resources; and*
- (iv) the timely disposal of the proceeding; and*

(b) may, in addition to any other matter, have regard to the following considerations to the extent that the court thinks relevant:

- (i) the degree of difficulty or complexity of the issues in the proceeding;*
- (ii) the degree of expedition with which the respective parties have approached the proceeding, including the degree to which they have been timely in their interlocutory steps;*
- (iii) the degree to which any lack of expedition in approaching the proceeding has arisen from circumstances beyond the control of the respective parties;*
- (iv) the degree to which the respective parties have complied with Rule 1.12B(1)*
- (v) the use that a party has made or could have made of any opportunity that was available in the course of the proceeding, whether under these rules, the practice of the court or any order made or direction given in the proceeding; and*
- (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction under consideration.*

4 *Delay and proportionality of costs*

In any proceeding governed by these rules, the practice and procedure of the court should be implemented with the following objects:

- (a) the elimination of any lapse of time between the commencement of the proceedings and its listing for trial beyond that which is reasonably required for the interlocutory steps necessary for the fair and just determination of the issues in dispute and the preparation of the case for trial; and*
- (b) the resolution of the issues between the parties in such a way that the costs of the proceeding are proportionate to the importance and complexity of the subject matter of the dispute, including the amount involved.⁵⁵*

The 'overriding purpose' provision drafted by the commission is based on but differs in some respects from that proposed by the Supreme Court.

While supporting the expansion of obligations on lawyers, parties and witnesses in principle, the court notes that 'the obligations would have to be defined with care, in consultation with the courts and the profession'.⁵⁶ However, it considers the draft overriding purpose as supplying 'a basis for moving forward'.⁵⁷ As noted above, the earlier draft proposal prepared by the commission was modified following further consultations with the Supreme Court, other judicial officers and the profession.

The value of aspirational statements, particularly as a tool for facilitating change in litigation culture, has been noted in law reform contexts and elsewhere.

In 1999, the Law Reform Commission of Western Australia recommended the development of a set of objectives to be incorporated into civil justice legislation to be used as a 'guide to the interpretation of legislation and rules in order to provide standards against which lawyers' and others' conduct can be assessed'.⁵⁸

In *Going to Court* the concept of an overriding objective was considered a 'good idea' with the potential 'to operate at a broad, strategic policy level for the system as a whole'.⁵⁹ It was also considered an 'extremely useful point of reference for individual courts, judicial officers and lawyers in dealing with particular pieces of litigation'.⁶⁰

Recently the Federal Litigation Section of the Law Council recommended the insertion of an 'overriding objective' in the Federal Court Rules.⁶¹ While noting that the insertion of 'mere words ... will do little to transform attitudes', the council suggested that it may signal a desire by the court for a change 'if accompanied by strong action by the judges of the Court to make it clear that delay, continued disregard of directions, obfuscation and conduct which clearly is likely to be far more productive of an increase in costs and delays than in resolution of true issues in the proceeding, will be dealt with harshly'.⁶²

Speaking of the NSW experience, Justice Hamilton of the Supreme Court of NSW and chair of the NSW Attorney General's Working Party on Civil Procedure has said:

*I must admit that I was something of a sceptic (although not an opponent) when [the overriding purpose] was introduced in 2000, avowedly as a culture changing measure. I have since become a devotee. I have found the ability to refer to the rule in court very useful in dealing with recalcitrant parties. I have also found it a useful way of reminding practitioners of their duties in this regard, without the appearance of personal criticism of one side's representatives.*⁶³

In consultations, Chief Magistrate Ian Gray commented similarly that the insertion of the overriding objective had proved a useful judicial tool.⁶⁴

Conversely, the limitations of such statements have also been noted. For instance in *Going to Court* it was noted that:

*Even those who are attracted in principle to the approach [of an overriding objective] may tend to say that stating aspirations of this nature is simple enough but giving them meaning and putting flesh on them are very different matters.*⁶⁵

Rule 11 of the United States *Federal Rules of Civil Procedure* provides an example of a mechanism aimed at regulating litigation conduct with the added consequence of explicit sanctions. The rule provides that 'every pleading, written motion and other paper [presented to the court shall] be signed by at least one attorney of record', or, if the party is not represented by an attorney, shall be signed by the party.⁶⁶ By signing the document the attorney (or party) certifies that:

- the document is not being presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase in the cost of litigation
- the claims, defences and legal contentions are warranted by existing law or by nonfrivolous argument [for the modification of the law]
- any allegation and other factual contentions or denials of such have evidential support.⁶⁷

The scope of the rule is very broad. Moreover, sanctions may be imposed on lawyers, law firms, or parties who are responsible for any violation of the requirements.

In *Managing Justice*, the ALRC recommended that 'the thrust of Rule 11 of the United States *Federal Rules of Civil Procedure* ... be incorporated into Australian federal court and tribunal rules and professional practice rules'.⁶⁸ The ALRC was of the view that the wording of the provision should, however, be changed in the Australian context. It suggested that 'the requirement should be couched in terms of "to the best of the practitioner's knowledge or information"', omitting the word "belief".⁶⁹ There has been further support for the implementation of such a requirement by judges such as Justice David Ipp, who has argued that rule 11 'could well be a model in Australia for legislative regulation of the conduct of lawyers'.⁷⁰

Overall, the ALRC did not support a 'broad statement of lawyer, litigant and litigation objectives'.⁷¹ Rather, it favoured statements of express obligations, which lawyers owe the administration of justice.⁷² The ALRC noted several arguments for and against the implementation of legislation and rules of court to regulate litigation conduct. Interestingly, it noted the US experience of standards enshrined as rules of court as an example of standards being 'utilised as part of the battle of litigation'.⁷³

55 Submission CP 58 (Supreme Court of Victoria).

56 Submission CP 58 (Supreme Court of Victoria).

57 Submission CP 58 (Supreme Court of Victoria).

58 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report No 92 (1999) [6.7].

59 Sallmann and Wright (2000) above n 36, 31.

60 Ibid.

61 Federal Court Liaison Committee (Federal Litigation Section), Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006) 13.

62 Ibid 12.

63 Justice Hamilton, 'The New Procedure: Nuts and Bolts for Judicial Officers' (Speech delivered at the Judicial Commission of NSW, 16 August 2005, Sydney).

64 Consultation with Chief Magistrate Ian Gray and Deputy Chief Magistrate Peter Lauritsen (3 November 2006).

65 Sallmann and Wright (2000) above n 36, 29.

66 *Federal Rules of Civil Procedure* [US] ('Fed. R. Civ. P.'): 11(a).

67 Fed. R. Civ. P. 11(b).

68 ALRC (2000) above n 12, [3.96].

69 Ibid.

70 Ipp, Part I (1995) above n 22, 730.

71 ALRC (2000) above n 12, [3.40].

72 Ibid.

73 Ibid [3.48].



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3.2 LAWYERS' DUTY TO THE COURT

It is trite to say that lawyers owe a paramount duty to the court. This takes precedence over other duties, including the duty owed to the client.⁷⁴ The 'duty to the court' is often referred to interchangeably as the 'duty to the administration of justice'.

This general duty to the court has been described as an 'omnibus' duty.⁷⁵ It comprises a number of discrete duties which 'have developed over time as a network of pragmatic rules laid down by judges in circumstances very much of an ad hoc nature'.⁷⁶

One difficulty with concurrent duties and obligations to clients, other lawyers and to the court is that there will inevitably be tension between these requirements. Moreover, as noted by Professor Richard Abel:

*A duty cannot be both paramount and subordinate ... lawyers offer no principled basis for accommodating those inconsistent loyalties.*⁷⁷

Recently, the High Court⁷⁸ summarised the duties on lawyers in terms of:

- not deceiving the court
- not withholding information or documents that are required to be disclosed or produced under the rules concerned with discovery, interrogatories and subpoenas
- not abusing the process of the court by preparing or arguing unmeritorious applications
- not wasting the court's time by prolix or irrelevant arguments
- not coaching clients or their witnesses as to the evidence they should give
- not using dishonest or unfair means or tactics to hinder an opponent in the conduct of his or her case.⁷⁹

The High Court also pointed to the duty to inform the court of the authorities which bear on the matters in issue, irrespective of whether or not a particular authority assists the client's case.⁸⁰

The duties have also been categorised as principally the duty:

- of disclosure to the court
- to avoid abuse of the court process
- not to corrupt the administration of justice
- to conduct cases 'efficiently and expeditiously'.⁸¹

At least in England and Australia, the duties 'have not been collected and systematised as a principled, structured body of law'.⁸²

There are, however, important recent changes. In the United Kingdom, advocates and litigators are now subject to statutory duties to act 'with independence in the interest of justice' and to comply with the rules of conduct of their respective professional bodies.⁸³ More recently in the United Kingdom, new statutory obligations relating to persons appearing as advocates or conducting proceedings before courts were introduced by the *Legal Services Act 2007* (c 29).

Section 188 sets out the duties of advocates and litigators. The provisions apply to a person who '(a) exercises before any court a right of audience, or (b) conducts litigation in relation to proceedings in any court by virtue of being an authorised person in relation to the activity in question'.⁸⁴

Any person to whom the provisions apply 'has a duty to the court in question to act with independence in the interests of justice'.⁸⁵ Moreover, it is provided that that duty, and the duty to comply with relevant conduct rules imposed on the person,⁸⁶ 'override any obligations which the person may have (otherwise than under the criminal law) if they are inconsistent with them'.⁸⁷

In Australia there is no statutory statement of lawyers' general duty to the court. However, various specific duties to the court are addressed in professional rules, which are subject to a general move toward consistency across jurisdictions.

The Law Council of Australia's *Model Rules of Professional Conduct and Practice* (2002) state that in respect of advocacy and litigation:

Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence,

*honesty and candour. Practitioners should be frank in their responses and disclosures to the court, and diligent in their observance of undertakings which they give to the court or their opponents.*⁸⁸

This statement appears in professional rules, eg, in the ACT, NSW, NT and SA. In Victoria it appears as the preamble in the Law Institute of Victoria's *Professional Conduct and Practice Rules 2005*.⁸⁹ It precedes rules which address the duty to the client, independence, frankness in court (including not misleading the court), delinquent or guilty clients, responsible use of privilege, integrity of evidence, communications with opponents, integrity of hearings and prosecutor's duties.

In most jurisdictions, the rules regulating the conduct of barristers state that 'the administration of justice is best served by reserving the practice of law to those who owe their paramount duty to the administration of justice'.⁹⁰

In Victoria, the Bar Rules do not provide a specific statement of a paramount duty but address a range of matters, including:

- not knowingly misleading the court⁹¹
- exercising independent judgment (including deciding which witnesses to call, what questions to ask in cross-examination and which issues are to be raised)⁹²
- providing assistance to the court (including informing the court of any misapprehension by the court as to the effect of an order which the court is making)⁹³
- not assisting improper conduct (including not pleading an allegation without a proper factual basis⁹⁴ or not alleging fraud, misconduct or dishonesty without a proper factual basis⁹⁵ and not casting unjust aspersions)⁹⁶
- dealing properly with witnesses.⁹⁷

The *New South Wales Barristers' Rules* address similar matters but go a step further and provide a specific duty to advance the 'efficient administration of justice'.⁹⁸ The Rules were amended in 2000 to include new rules, which emphasise a barrister's responsibility in ensuring the efficient and expeditious conduct of their work. In particular the relevant rules require that a barrister:

- complete work which they are briefed to do 'in sufficient time to enable compliance with orders, directions, rules or practice notes of the court'⁹⁹
- 'confine the case to identified issues which are genuinely in dispute
- have the case ready to be heard as soon as practicable
- present the identified issues in dispute clearly and succinctly

74 *Giannarelli v Wraith* (1988) 165 CLR 543, 555–6 (Mason CJ), 572 (Wilson J); cf *Rondel v Worsley* [1969] 1 AC 191, 231, 251, 272–3, 282.

75 Brian Watson, *Litigation Liabilities* (2002) 19.

76 Ipp (1998) above n 22, 65.

77 R Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (2003) 497.

78 *D'Orta-Ekenaike v Victoria Legal Aid ('D'Orta-Ekenaike')* (2005) 223 CLR 1.

79 *D'Orta-Ekenaike* (2005) 223 CLR 1, 41.

80 *D'Orta-Ekenaike* (2005) 223 CLR 1, 41. (Gleeson CJ, Gummow, Hayne and Heydon JJ).

81 Ipp (1998) above n 22, 65.

82 *Ibid.*

83 See ss 27(2A) and 28(2A) of the *Courts and Legal Services Act 1990* [UK] (c 41).

84 *Legal Services Act 2007* (c 29) ss 188(1) (a), (b).

85 *Legal Services Act 2007* [UK] (c 29) s 188(2). See also s 1(3)(d) in respect of the regulatory objectives of the legislation.

86 The duty is imposed by s 176(1) of the *Legal Services Act 2007* [UK] (c 29).

87 *Legal Services Act 2007* [UK] (c 29) s 188(3).

88 Law Council of Australia, *Model Rules of Professional Conduct and Practice* (2002) 12.

89 The rules are available from the Law Institute of Victoria, <www.liv.asn.au/regulation/pdf/arf/conductrules2005.pdf> at 30 January 2008.

90 See the Australian Bar Association, *Australian Bar Association Model Rules* (2002) [1] <www.austbar.asn.au/images/stories/PDFs/CurrentABAModelRules2002.pdf> at 30 January 2008. The statement also appears in the barristers' rules in the ACT, NSW, NT, Qld and WA.

91 The Victorian Bar Inc, *Practice Rules: Rules of Conduct and Compulsory Continuing Legal Education Rules* (2005) r 19 <www.vicbar.com.au/webdata/pdf/New_Bar_rules.pdf> at 31 January 2008.

92 *Ibid* rr 16, 17, 18.

93 *Ibid* r 28.

94 *Ibid* rr 32, 35.

95 *Ibid* r 34, 38, 42.

96 *Ibid* r 31, 37.

97 *Ibid* r 44, 45.

98 The NSW Bar Association, *The New South Wales Barristers' Rules* (2001) rr 41, 42, 42A <www.nswbar.asn.au/docs/professional/legislation/Rules_april2001.pdf> at 31 January 2008.

99 *Ibid* r 41(a).

Chapter 3



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- limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case
- occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case'.¹⁰⁰

Rule 23 of the *New South Wales Barristers' Rules* also expressly imposes a duty to ensure the court is not misled because of an opponent's error, and promotes an obligation of candour.

The explicit expression of a lawyer's duty to conduct cases efficiently and expeditiously reflects the 'current changes in community attitudes and standards'.¹⁰¹ It is also consistent with statements of aspirations and objectives aimed at promoting the just, efficient and economical resolution of civil claims that now appear in court rules in the United Kingdom and Australia, as discussed above.

It has been noted by English courts that the balance between a lawyer's duty to the court and the duty to the client may be subject to 'evolutionary change within the civil justice system'.¹⁰²

Traditionally, the duty to the client has involved advancing and protecting the client's interests by every legitimate means. This should be 'to the best of the [lawyer's] skill and diligence, uninfluenced by the [lawyer's] personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the [lawyer]'.¹⁰³ A lawyer is also obliged to act 'honestly', 'fairly' and with 'competence and diligence' in the service of the client.¹⁰⁴

While observing and upholding his or her duties to the client, a lawyer must first and foremost comply with the duties to the court. Where the duties conflict, 'the duty to the court is paramount' and the lawyer must comply with it even if to do so is 'contrary to the interests or wishes of the client'.¹⁰⁵

Despite these long-standing principles and perhaps as a consequence of adversarialism, it has been suggested that:

*In practice, it is generally recognised that interests of the client are given greater weight by lawyers. Duties to the administration of justice may also be interpreted narrowly so that they do not restrict a lawyer's ability to present the best possible case for their client.*¹⁰⁶

For example, distinctions may be made between falsifying evidence and not disclosing evidence, including unfavourable expert evidence.¹⁰⁷ Other strategies may include issuing or pleading claims or defences which have little or no legal merit, not admitting facts known to be true, using dubious litigation tactics (such as burying critical documents in voluminous discovery) or not acting cooperatively or candidly with an opponent.

In many instances there may be a fine line between what is forensically acceptable and what is professionally prohibited. In *D'Orta* the High Court noted that:

*Under the adversarial system of justice, a barrister has no obligation to the court to assist an opponent to prove a cause of action or defence. A barrister is under no obligation to tell an opponent or a witness anything that may assist the opponent's cause. Nor does a barrister owe a duty to the court to assist the opponent to plead the facts in a way best calculated to obtain a just result according to law. As long as the barrister does not mislead the court, he or she is entitled to make the opponent prove that person's case even though the barrister knows that the facts alleged by the opponent are true.*¹⁰⁸

The proposition that a lawyer is 'under no obligation to tell an opponent ... anything that may assist the opponent's cause' is, as noted by the High Court, subject to the requirement that the court not be misled. There may of course be circumstances where the failure to disclose factual information known to lawyers and their clients may mislead the other parties and the court.

In a recent Queensland case, in the course of a mediation leading to a settlement, medical information became known to a barrister and his client that the projected life expectancy of the client might be reduced because of a recently discovered medical condition. This was likely to have an important bearing on the quantum of damages payable for the personal injuries giving rise to the claim. The case was settled without disclosure of this information. The defendant and the defendant's insurer subsequently became aware of this information and this resulted in an application to have the settlement set aside and disciplinary proceedings against the barrister. The Legal Services Tribunal found the barrister guilty of professional misconduct for the failure to disclose the recently discovered medical evidence.¹⁰⁹

The commission does not believe there is cause for serious concern about the conduct of lawyers or litigants in most cases in Victorian courts. However, it believes the existing civil procedural rules and the practices of the profession and litigants do not always facilitate the most efficient, economical and expeditious resolution of civil litigation, particularly in the higher courts in Victoria.

Accordingly, the commission has concluded that it is desirable to explicitly 'strengthen ... the duty to the court' with a view to achieving reform.¹¹⁰ A statutory statement of lawyers' duty to the court would serve to emphasise the paramountcy of this obligation. If the statement is expressed to be 'overriding', this would clarify that it prevails over any other legal or ethical duties to the extent of any inconsistency. Further, by extending the duty to other participants in the civil justice system, particularly the parties to litigation, there would be symmetry of obligation and less scope for conflict of duties between lawyers and clients.

3.3 DUTIES OF THE PARTIES

The efficient and effective operation of the civil justice system is influenced not only by the behaviour of lawyers, but also by the behaviour of the parties themselves.

Parties are bound to comply with the orders of the court and are subject to proceedings for contempt. Abuses of court process and failure to comply with obligations, such as for discovery, can result in adverse costs orders, dismissal of proceedings or the entry of judgment.

However, traditionally parties to civil litigation do not owe a direct duty to the court, nor are they governed by specific obligations and responsibilities or codes of conduct. In these respects, they are not subject to the same influences and constraints on their conduct as lawyers appearing before the court.

As the ALRC has noted:

*While practice rules assist to define appropriate conduct for lawyers, many of the conduct issues associated with litigation concern not lawyers, but the litigants themselves. The justice system would operate quite differently if all litigants were reasonable, prudent, cooperative and fair.*¹¹¹

In its submission the Supreme Court of Victoria points out the role and influence of the parties as 'direct participants in litigation'. As the court notes:

*Usually following legal advice, they initiate and defend proceedings and seek and oppose orders. On their instructions, steps are taken in litigation. Parties are therefore in a special position to influence the conduct of litigation.*¹¹²

Issues in relation to the conduct of parties are often apparent in cases involving self-represented litigants. Parties who do not have a professional intermediary may lack the knowledge, experience or insight to act in the most appropriate manner or to modify their conduct in accordance with the requirements of the civil litigation process. As the Australasian Institute of Judicial Administration has noted:

*The court system is designed to operate on a professional level with the participants in the process having various duties to the court. The courts and the legal profession are interdependent. Not being part of this system and bearing no duties to the court, litigants in person will inevitably create problems for courts that are not able to be easily or wholly resolved. They should be aware they face difficulties which may prejudice the proper presentation of their case. It should not be thought that the system could operate effectively or efficiently unassisted by barristers and solicitors in most cases.*¹¹³

As discussed above, in recent years there have been developments in civil justice reform. In some jurisdictions court rules and statutes have been introduced to impose obligations on the parties and some other participants (as well as lawyers), with a view to modifying conduct and encouraging appropriate forensic behaviour.

100 Ibid r 42.

101 Ipp (1998) above n 22, 65.

102 *Vernon v Bosley (No 2)* [1999] QB 18, 64 (Thorpe LJ).

103 See Law Council (2002) above n 88, r 12.1; Law Institute (2005) above n 88, r 12.1; and Victorian Bar (2005) above n 91, r 11.

104 See the similar formulations in Law Council (2002) above n 88, r 1.1; Law Institute (2005) above n 88, r 1.1; and Victorian Bar (2005) above n 91, r 3.

105 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [111] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

106 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (1997) [11.15].

107 Ipp (1998) above n 22, 68.

108 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [110] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

109 *Legal Services Commissioner v Mullins* [2006] LPT 012.

110 *Vernon v Bosley (No 2)* [1999] QB 18, 64 (Thorpe LJ).

111 ALRC (2000) above n 12, [3.5].

112 Submission CP 58 (Supreme Court of Victoria).

113 Australian Institute of Judicial Administration Inc, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2000) 1.



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However, as the Federal Civil Justice System Strategy Paper has noted, self-represented litigants are less likely than lawyers to be viewed as owing formal duties to the court. The lack of formal duties, especially the duty to ensure the 'speedy and efficient administration of justice', combined with an apparent lack of understanding about the rules of the game, present particular challenges for the courts and parties involved in litigation against [a self-represented litigant].

*Some courts are beginning to extend their scrutiny of conduct to litigants who are self-representing, as well as to lawyers [114] ... Further consideration of this initiative is to be encouraged, recognising that, if courts require [self-represented litigants] to do what they can to ensure they are fully informed about how to run their cases and properly prepared, the courts have a concomitant responsibility to provide the information and infrastructure to enable them to do so.*¹¹⁵

Importantly, the expansion of obligations to the parties to litigation has received support from the Supreme Court, which submitted that:

*Because [the parties] make many of the important decisions about the initiation and conduct of litigation, it is appropriate to consider bringing them into a system of broader obligations. Such a system should apply equally to all the key participants, and it is difficult to see how it could be workable if the parties and their lawyers were not bound by the same essential rules.*¹¹⁶

The development of obligations to act 'in good faith' has been one area where recent statutory provisions, common law developments and civil procedural reforms have sought to influence the litigious and other conduct of both lawyers and litigants.

In the context of contractual relationships, courts have been grappling with the question of whether, independently of the express terms of contract, parties have an obligation to each other to act in good faith.¹¹⁷ In some instances courts have also dealt with contractually imposed express obligations to act in good faith in circumstances where parties have proceeded to litigation allegedly without complying with such obligations.¹¹⁸

Perhaps more relevant for present purposes are statutory obligations imposed on parties to act in good faith. In the area of insurance law, such obligations between insurers and the insured have a long history.¹¹⁹ More recently, various statutes have imposed more broad-ranging good faith obligations, including in respect of the conduct of negotiations and mediations.

Section 31(1) of the *Native Title Act 1993* (Cth) relevantly provides:

- (1) *Unless ... the Government party considers the act attracts the expedited procedure:*
- (a) *the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and*
 - (b) *the negotiation parties must negotiate in **good faith** with a view to obtaining the agreement of each of the native title parties to:*
 - (i) *the doing of the act; or*
 - (ii) *the doing of the act subject to conditions to be complied with by any of the parties. [emphasis added].*

In *Western Australia v Taylor*¹²⁰ the tribunal member set out a list of indicators in relation to the *Native Title Act 1993* (Cth) which assist in determining whether negotiations have been conducted in good faith. These include:

- *unreasonable delay in initiating communications in the first instance;*
- *failure to make proposals in the first place;*
- *the unexplained failure to communicate with the other parties within a reasonable time;*
- *failure to contact one or more of the other parties;*
- *failure to follow up a lack of response from the other parties; ...*
- *failure to take reasonable steps to facilitate and engage in discussions between the parties;*
- *failing to respond to reasonable requests for relevant information within a reasonable time;*

- *stalling negotiations by unexplained delays in responding to correspondence or telephone calls;*
- *unnecessary postponement of meetings;*
- *sending negotiators without authority to do more than argue or listen;*
- *refusing to agree on trivial matters ...;*
- *shifting position just as agreement seems in sight;*
- *adopting a rigid non-negotiable position;*
- *failure to make counter proposals;*
- *unilateral conduct which harms the negotiating process ...;*
- *refusal to sign a written agreement in respect of the negotiation process or otherwise;*
- *failure to do what a reasonable person would do in the circumstances.*¹²¹

There has been extensive case law developed on the meaning of 'good faith' in contract law and more recently in the area of mediation.

In *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*¹²² Justice Giles outlined what the obligation to participate in ADR in good faith might mean. This involves a willingness to

'subject oneself to the process of negotiation or mediation, to have an open mind in the sense of a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate, and a willingness to give consideration to putting forward options for resolution of the dispute'.

However, the obligation to participate in good faith does not oblige a party 'to act for or on behalf or in the interests of the other party or to act otherwise than by having regard to self-interest'.¹²³

The Law Reform Commission of Western Australia in 1999 suggested that the expectation that parties make a good faith effort to resolve the dispute by an appropriate method of ADR means only that parties are expected to reconsider those parts of their case which they accept, or after discussion realise, are not clear or strong.

The National Alternative Dispute Resolution Advisory Council (NADRAC) has said that although there is value in making parties participate fully in ADR so as to allow constructive discussion and to narrow the issues in dispute,¹²⁴ it does not favour the use of the term 'in good faith' because of its legalistic overtones.¹²⁵ NADRAC suggests that it may be preferable to require parties to use their 'best endeavours' during an ADR process to work towards a resolution of the dispute, and that such a requirement may deter a party from behaving unreasonably or from walking out of the ADR process.¹²⁶

NADRAC has also noted that a party who does not want to participate in ADR and is compelled to do so may not participate in good faith and this may render the process unsuccessful and even harmful by increasing costs and delay.¹²⁷

In Australia, there are a number of statutory provisions that require parties to participate in 'good faith' in a mediation. For example, section 27 of the *Civil Procedure Act 2005* (NSW) provides that it is the 'duty of each party to proceedings that have been referred to mediation to participate, in good faith, in the mediation'. The *Farm Debt Mediation Act 1994* (NSW) also requires parties to mediate in good faith, and section 11 of the Act provides for consequences where parties do not take part in 'mediation in good faith'.

The *Therapeutic Goods Act 1989* (Cth) provides that where a person intends to commence certain proceedings under the *Patents Act 1990* for infringement of a patent for therapeutic goods, the person is required to certify that the proceedings are to be commenced in good faith.¹²⁸

The concept of 'good faith' is referred to in the US *Federal Rules of Civil Procedure*. As noted by the Supreme Court in its submission, rule 37 (relating to discovery) requires parties to undertake 'good faith attempts at resolving interlocutory disputes before bringing applications ... These are made enforceable by costs and other penalties which may be imposed on clients or their attorneys'.¹²⁹

The Productivity Commission is currently examining the notion of 'good faith' in the context of Australia's consumer policy framework.¹³⁰

114 See, eg, *Family Law Rules 2004* (Cth) rr 1.04–1.08.

115 Attorney-General's Department, Parliament of Australia, *Federal Civil Justice System Strategy Paper* (2003) 99.

116 Submission CP 58 (Supreme Court of Victoria).

117 See, eg, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Ltd v Scarcella & Others* (1998) 44 NSWLR 349; *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Vodafone Pacific Limited and Ors v Mobile Innovations Limited* [2004] NSWCA 15; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (Receivers and Managers Appointed) (Administrators Appointed)* [2005] VSCA 228; *Australian Mutual Provident Society v 400 St Kilda Road Pty Ltd* [1991] 2 VR 417; *Central Exchange Limited v Anaconda Nickel Limited* [2002] WASCA 94. There would appear to be a divergence between appellate courts in Victoria and NSW on this issue.

118 See *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 (Einstein J).

119 See, eg, *Insurance Contracts Act 1984* (Cth) s 13.

120 (1996) 134 FLR 211.

121 *Western Australia v Taylor* (1996) 134 FLR 211, 224–5.

122 (1992) 28 NSWLR 194 at 196.

123 See also *Aiton v Transfield* [1999] NSWSC 996 [156] per Einstein J, generally affirming *Hooper Bailie*.

124 NADRAC, 'Legislating for Alternative Dispute Resolution – A Guide for Government Policy-Makers and Legal Drafters', November 2006, <www.nadrac.gov.au> at 24 April 2007.

125 NADRAC submission to the Review of the Franchising Code of Conduct, which addresses the questions raised in Discussion Paper No 1 relating to the dispute resolution provisions of the Franchising Code of Conduct, <www.nadrac.gov.au> at 30 April 2007.

126 NADRAC (November 2006) above n 124.

127 NADRAC submission to Review of the Franchising Code of Conduct, above n 125.

128 *Therapeutic Goods Act 1989* (Cth) s 26C(3)(a). The legislation provides for pecuniary penalties of up to \$10 million.

129 Submission CP 58 (Supreme Court of Victoria).

130 See Productivity Commission, *Review of Australia's Consumer Policy Framework*, draft report (2007). The Commission considers that the high level objective for the future consumer policy framework should be 'to promote the confident and informed participation of consumers in competitive markets in which consumers and suppliers can trade fairly and in good faith'.



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3.4 MODEL LITIGANT GUIDELINES

Governments, their agencies and statutory authorities are important 'repeat' litigants in civil proceedings before Victorian courts. Such bodies have already taken the lead in terms of forensic duties and obligations by imposing on themselves, and on lawyers acting on their behalf, model litigant guidelines.

The development of model litigant guidelines represents an important mechanism for the setting of high forensic standards and the regulation of the conduct of parties in civil litigation.

Both Commonwealth and state governments have now adopted model litigant guidelines.¹³¹ These apply to government departments and agencies, as well as to the lawyers representing government interests.

In Victoria, the guidelines apply to:

- government departments and agencies, as well as ministers and officers where the government provides a full indemnity in respect of an action for damages brought against them personally¹³²
- lawyers representing government interests, including private lawyers, departmental lawyers and government solicitors.¹³³

The guidelines are also adhered to by some independent statutory bodies.¹³⁴

The obligations apply to litigation, including 'before courts, tribunals, inquiries and in arbitration and other dispute resolution processes'.¹³⁵ They extend to all litigation involving the government, irrespective of the its status as plaintiff, defendant or third party.¹³⁶

As well, the guidelines refer to the handling of 'claims' and specifically to avoiding litigation, where possible. They apply before proceedings are commenced and cover the process of asserting or responding to a claim and to negotiations.

To a large extent the model litigant guidelines represent the codification of long-established principles concerning the manner in which governments should conduct themselves as litigants.

For example, in 1912 Chief Justice Griffith in *Melbourne Steamship Co Ltd v Moorehead*¹³⁷ referred to

*the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary.*¹³⁸

As a participant in the civil justice system, the government is entitled to pursue its substantive rights. However, the position of the government differs from that of other litigants as it 'has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve'.¹³⁹ This absence of self-interest provides the philosophical basis for the legal expectations of fair play manifested in the model litigant guidelines:

*Having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.*¹⁴⁰

The guidelines are also a reflection of policies in the law: '(a) of protecting the reasonable expectations of those dealing with public bodies; (b) of ensuring that the powers possessed by a public body, "whether conferred by statute or by contract", are exercised "for the public good" ... and (c) of requiring such bodies to act as "moral exemplars"'.¹⁴¹

As Cameron and Taylor-Sands note, justification for a model litigant code for governments also arises out of their role as repeat players in litigation, thus giving rise to advantages over other litigants through their greater expertise, experience, access to specialist knowledge and established reputation before the courts and tribunals.¹⁴²

As they also note, at the Commonwealth level, compliance with model litigant guidelines is also consistent with the statutory obligations to manage agency affairs in a way that promotes the efficient, effective and ethical use of government resources.¹⁴³

The Commonwealth first formalised the model litigant guidelines in 1995 by way of the *Attorney-General's Legal Practice Guidelines on Values, Ethics and Conduct*, which was intended to supplement the professional conduct rules applicable to lawyers.¹⁴⁴ The guidelines were expanded, made applicable to private lawyers acting on behalf of government departments and agencies and adopted as legally binding statutory obligations in 1999.¹⁴⁵

Further amendments were subsequently made and revised Model Litigant Rules came into force on 1 March 2006.¹⁴⁶ In Victoria the guidelines have been in place since 2002.¹⁴⁷ The Victorian guidelines represent a 'best practice' model and are not legally enforceable as such.

The Victorian guidelines substantially mirror the Commonwealth version, with a number of exceptions. Underpinning the guidelines is the model litigant principle, which obliges the government to act as a model litigant for the purpose of maintaining 'proper standards in litigation'.¹⁴⁸

In summary, a model litigant is required to 'act with complete propriety, fairly and in accordance with the highest professional standards'.¹⁴⁹ The guidelines also state that:

*The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.*¹⁵⁰

The guidelines set out the nature of the obligation. They prescribe certain conduct and prohibit other behaviour. Both the Commonwealth and Victorian provisions require the government and its agencies to:

- *act fairly ...;*
- *act consistently ...;*
- *avoid litigation, wherever possible;*
- *pay legitimate claims without litigation; and*
- *... keep costs of litigation to a minimum.*¹⁵¹

They also require that the government:

- *not rely on technical defences ...;*
- *... not take advantage of a claimant who lacks resources to litigate a legitimate claim ...; and*
- *... not undertake and pursue an appeal unless [it] believes that it has reasonable prospects for success or the appeal is justified in the public interest.*¹⁵²

In addition the Commonwealth Rules impose obligations on the government:

- *to deal with claims promptly and not cause 'unnecessary delay'*¹⁵³ *and*
- *to apologise 'where the Commonwealth or its agency ... have acted wrongfully or improperly'.*¹⁵⁴

In the 2005 amendments, which came into force on 1 March 2006, the Commonwealth Rules adopted a positive obligation to consider the use of ADR processes.¹⁵⁵ The Commonwealth

131 See Annexure B to the *Legal Services Direction 2005* made under s 55ZF of the *Judiciary Act 1903* (Cth) (referred to as the 'Commonwealth Model Litigant Guidelines') and Department of Justice, *Guidelines on the State of Victoria's Obligation to Act as a Model Litigant* ('Victorian Model Litigant Guidelines') (these guidelines were originally contained in the State of Victoria, *Legal Services to Government Panel Contract* (2002)).

132 Commonwealth Model Litigant Guidelines, above n 131, Note 1 and Victorian Model Litigant Guidelines, above n 131, Note 2.

133 Ibid.

134 See Transport Accident Commission (TAC), *Common Law Protocols* (2005, amended as at August 2007) [2.1.3] <www.tac.vic.gov.au/upload/Common-Law-Protocols.pdf> at 31 January 2008, TAC, *Impairment Assessment Protocols* (2005, amended as at August 2007) [d 2.3] <www.tac.vic.gov.au/upload/Impairment%20Protocols.pdf> at 31 January 2008, and TAC, *No Fault Dispute Resolution Protocols* (2005) [cl 2.3] <www.tac.vic.gov.au/upload/DRP%201%20March%202005.pdf> at 31 January 2008. The Victorian WorkCover Authority also adheres to the Victorian Model Litigant Guidelines (see <www.workcover.vic.gov.au/wps/wcm/resources/file/eb3e7d43cc74cf6/Guidelines%20model%20litigant.pdf> at 31 January 2008).

135 Commonwealth Model Litigant Guidelines, above n 131, Note 1; Victorian Model Litigant Guidelines, above n 131, Note 2.

136 Stephen Lee, 'The State as Model Litigant' (Speech delivered as part of the Victorian Government Solicitor's Office Lunchtime Seminar Series, Melbourne, 28 September 2006) 1.

137 (1912) 15 CLR 333.

138 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342. See also *Scott v Handley* [1999] 58 ALD 373; *Yong Jun Chin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155; *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263; *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346; *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366, all referred to by Camille Cameron and Michelle Taylor-Sands, "'Playing Fair": Governments as Litigants' (2007) 26 (Oct) *Civil Justice Quarterly* 497.

139 *Hughes Aircraft Systems International v Aircservices Australia* ('*Hughes Aircraft Systems*') (1997) 76 FCR 151, 196 (Finn J). See also ALRC(2000) above n 12, [3.5].

140 *Hughes Aircraft Systems* (1997) 76 FCR 151, 196.

141 *Hughes Aircraft Systems* (1997) 76 FCR 151, 197. For an analysis of these principles, see Cameron and Taylor-Sands (2007) above n 138, 500–4.

142 Ibid 504–6.

143 See the *Financial Management and Accountability Act 1997* (Cth) s 44, referred to in ibid 506. *Financial Management Act 1994* ss 23C, 23D promote similar objectives of financial responsibility, and several provisions of the *Audit Act 1994* relate to the Auditor-General's role in ensuring that business practices in Victoria are economical and efficient (see, eg, ss 1, 3A, 15, 16A and 16C).

144 The history is summarised in Cameron and Taylor-Sands (2007) above n 138, 498–9, 507–8.

145 Commonwealth Model Litigant Guidelines, above n 131, introduced by the *Judiciary Amendment Act 1999* (Cth).

146 Cameron and Taylor-Sands (2007) above n 138, 508.

147 Victorian Model Litigant Guidelines, above n 131, [1].

148 Commonwealth Model Litigant Guidelines, above n 131, [1]; Victorian Model Litigant Guidelines, above n 131, [1].

149 Commonwealth Model Litigant Guidelines, above n 131 Note 2; Victorian Model Litigant Guidelines, above n 131 Note 3.

150 Commonwealth Model Litigant Guidelines, above n 131 Note 3; Victorian Model Litigant Guidelines, above n 131 Note 4.

151 Victorian Model Litigant Guidelines, above n 131 [2(a)-(e)] (See also the Commonwealth Model Litigant Guidelines, above n 131 [2]).

152 Victorian Model Litigant Guidelines, above n 131 [2(f)-(h)] (See also the Commonwealth Model Litigant Guidelines, above n 131 [2]).

153 Commonwealth Model Litigant Guidelines, above n 131 [2(a)].

154 Commonwealth Model Litigant Guidelines, above n 131 [2(i)].

155 Commonwealth Model Litigant Guidelines, above n 131 [2(d)].



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Rules also provide that when participating in ADR, the Commonwealth and its agencies are to:

- (a) *participate fully and effectively, and*
- (b) *wherever practicable, ensure that their representatives have authority to settle the matter, or at least clear instructions on the possible terms of settlement that would be acceptable to the Commonwealth, so as to facilitate appropriate and timely resolution of a dispute.*¹⁵⁶

These amendments reflect the implementation of a recommendation contained in the Federal Civil Justice System Strategy Paper.¹⁵⁷

In the Victorian Attorney-General's Justice Statement published in 2004 it was stated that:

*The Government will review its model litigant policy to determine whether there is scope to emphasise the desirability of using ADR for some types of dispute. In doing so, the Government will be mindful of a tendency for some litigants to sue the Government on the basis of its 'deep pockets' in the hope of achieving a settlement regardless of the merits of the claim, but it will also recognise that it can take a leading role in encouraging the use of non-litigious dispute resolution.*¹⁵⁸

To date there has been no amendment of the Victorian guidelines in accordance with this stated policy.

Apart from providing a tool for managing the behaviour of participants in the civil justice system, the model litigant guidelines also have the potential to be influential in precipitating cultural change. For instance, the TAC comments:

*It is an area where you need to be bold in how you implement the cultural changes needed to be open, honest, fair and reasonable and then placing business metrics around this. We have a detailed program in place, with metrics, and regularly test the business controls through our internal audit program.*¹⁵⁹

The TAC also sees the guidelines as encouraging its employees to be

*open, honest, fair and reasonable—that way, we are focussed on risk mitigation, more so than breaches.*¹⁶⁰

A paper by the Assistant Victorian Government Solicitor comments that:

*Far from being a handicap that fetters the State, I see the model litigant obligation as a prism within which to assess the State's conduct to ensure the highest standard of propriety and ethics are met.*¹⁶¹

The potential for the guidelines to extend beyond government has been raised by several commentators.

The ALRC has noted that:

*If all parties acted as model litigants, the civil justice system would be more effective and efficient.*¹⁶²

In *Managing Justice* the ALRC also suggested that, notwithstanding government's particular role in civil litigation, the model litigant guidelines 'may have broader application to the conduct of the parties in litigation and dispute resolution.'¹⁶³ However, the suggestion was taken no further in that report. This possibility is also addressed in submissions received by this commission. These are discussed below.

Anecdotally, one of the persistent complaints about model litigant guidelines is that often they are not complied with and breaches are seldom sanctioned.

Ensuring compliance with the obligation primarily lies with the department or agency which has responsibility for the litigation.¹⁶⁴ The notes to the guidelines also provide that the lawyers engaged in litigation, whether the Australian Government Solicitor, the Victorian Government Solicitor, in-house or private, 'need to act in accordance with the obligation [themselves and to also] assist their client agency [or department] to do so'.¹⁶⁵

At the Commonwealth level, the Office of Legal Services Coordination within the federal Attorney-General's Department monitors compliance with the guidelines and receives and investigates complaints.¹⁶⁶ Breaches are referred to the Attorney-General. Although the Model Litigant Guidelines

themselves do not incorporate sanctions for breaches, the Legal Services Directions make it clear that sanctions may be imposed for non-compliance.¹⁶⁷ Moreover, agencies are required to include penalty provisions for breach of the directions in contracts with legal services providers.¹⁶⁸ From 1 March 2006 the chief executive of each agency is required to issue an 'annual certificate of compliance with the Legal Services Directions and to provide the [Office of Legal Services Coordination] with details of any agency breaches and remedial action taken'.¹⁶⁹

The *Judiciary Act 1903* (Cth) provides compliance with the Commonwealth Litigant Rules 'is not enforceable except by, or upon the application of, the Attorney-General'.¹⁷⁰ Further, '[t]he issue of non-compliance with a [rule] may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth'.¹⁷¹ It was noted in the Explanatory Memorandum in respect of the Judiciary Amendment Bill 1998:

*Any other approach could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth. For example, it is not intended that a litigant be able to argue that the Commonwealth was making a technical argument in breach of the model litigant obligation (if this were provided in the Legal Services Directions). The alleged breach could, however, be raised by the litigant with the Attorney-General or the Office of Legal Services Coordination.*¹⁷²

At the Commonwealth level the government has been publicly criticised, particularly in the media, for not enforcing the guidelines for the external legal services it obtains from private law firms engaged to do its work. Former shadow Attorney-General Joe Ludwig has made several claims in relation to the previous government's failure to enforce the guidelines, commenting that the government had been "'dragged kicking and screaming to the table" on the issue of enforcing the rules after [the Labor Party] had been asking questions for six years about the issue'.¹⁷³ He went on to comment that this tendency revealed an 'unwillingness by [the] government to use the legal service directions in a way that enforces compliance with them'.¹⁷⁴

In a recent article the *Australian Financial Review* reported that former Federal Attorney-General Phillip Ruddock had said the government's emphasis was on 'education and facilitation, rather than penalty'.¹⁷⁵

Mr Ruddock was further quoted as saying:

*There are, however, occasions on which the government's policy objectives can only be met by the imposition of sanctions ... At the most extreme, this may involve me issuing a direction about the conduct of particular commonwealth legal work. A direction could be about any aspect of the work in question, including whether a particular legal firm is or is not permitted to perform the work, or in what manner.*¹⁷⁶

The commission is aware, from submissions and consultations, of a number of reported instances of alleged failure on the part of the Commonwealth, or its agencies, to comply with the Model Litigant Guidelines. These cases include damages actions against the Commonwealth and others arising out of injuries allegedly suffered by children in detention centres and by survivors of the *Voyager* disaster.

In their analysis of the role of governments as litigators Cameron and Taylor-Sands provide instances of the more common types of situations where Commonwealth government departments and agencies have not complied with applicable model litigant guidelines and rules. Their analysis is based on a number of sources.¹⁷⁷

Identified problems include allegations or findings of:

- an apparently low rate of settlement of cases
- excessively adversarial behaviour
- reliance on technicalities
- incivility
- unwillingness to negotiate
- delay in compliance with court orders
- overzealous or obstructive behaviour
- failure to act in a timely manner
- failure to allow other parties to respond to adverse evidence

- 156 Commonwealth Model Litigant Guidelines, above n 131 [5].
- 157 Attorney-General's Department, Parliament of Australia, *Federal Civil Justice System Strategy Paper* (2003) 140 (Recommendation 19).
- 158 Attorney-General's Justice Statement, *New Directions for the Victorian Justice System 2004–2014* (2004) 38.
- 159 Email from Paul O'Connor, Chief Executive Officer, TAC, to the commission, 4 February 2008.
- 160 Email from Paul O'Connor, Chief Executive Officer, TAC, to the commission, 12 April 2007.
- 161 Stephen Lee, 'The State as Model Litigant' (Speech delivered as part of the Victorian Government Solicitor's Office Lunchtime Seminar Series, 28 September 2006, Melbourne) 1.
- 162 ALRC, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999) [8.51].
- 163 ALRC (2000) above n 12, [3.5].
- 164 Commonwealth Model Litigant Guidelines, above n 131 Note 1; Victorian Model Litigant Guidelines, above n 131 Note 2.
- 165 *Ibid.*
- 166 Cameron and Taylor-Sands (2007) above n 138, 509–10.
- 167 *Ibid* 510.
- 168 *Ibid.*
- 169 *Ibid* 522.
- 170 *Judiciary Act 1903* (Cth) s 55ZG(2).
- 171 *Judiciary Act 1903* (Cth) s 55ZG(3).
- 172 Explanatory Memorandum, Judiciary Amendment Bill 1998.
- 173 Marcus Priest (2007) above n 11.
- 174 *Ibid.* See also Cameron and Taylor-Sands (2007) above n 138, 519.
- 175 Marcus Priest (2007) above n 11.
- 176 *Ibid.*
- 177 This includes research carried out for the Australian Law Reform Commission, a survey of responses of those involved in litigation for and against the Commonwealth, a report analysing Commonwealth legal services reforms and a review of Federal Court and AAT cases. See Cameron and Taylor-Sands (2007) above n 138, 511–14.



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- failure to provide all relevant information
- failure to act consistently
- inadequate knowledge of the law
- reluctance to settle or agree to ADR.¹⁷⁸

According to Cameron and Taylor-Sands, in cases where the Commonwealth has been found to have breached the Model Litigant Rules, courts and tribunals have played 'an important role in scrutinising the behaviour of the Commonwealth and educating it for future cases'.¹⁷⁹ Moreover, in cases of breach the legal representatives were more often in-house government departmental lawyers or private lawyers rather than those with the Australian Government Solicitors Office, where there was more likely to be a 'culture of compliance'.¹⁸⁰ According to the authors:

*It may take some time for private lawyers to shed the traditional adversarial mindset and move from 'adversarial advocate' to 'responsible lawyer'.*¹⁸¹

Cameron and Taylor-Sands are of the view that the Commonwealth Model Litigant Rules have on the whole been reasonably effective in controlling Commonwealth litigant behaviour and that model litigant standards or codes are a valuable tool in regulating litigant behaviour.

In Victoria, the Attorney-General has responsibility for ensuring the guidelines are complied with. On a practical level, the Office of Government Legal Services within the Department of Justice 'monitors and investigates the application of the Guidelines' as they relate to the conduct of private sector firms providing legal services to government ('panel firms') and government departments, and reports to the Attorney-General.¹⁸²

According to the annual report of Government Legal Services for 2002–03:

*The application of the guidelines was raised by the plaintiffs and others in the context of litigation relating to the Home Borrowers Scheme administered by the Department of Human Services. After examination of the response of the defendant to the concerns raised, advice was provided to the Attorney-General that the defence of the litigation, while robust, did not breach the model litigant guidelines.*¹⁸³

In 2003–04, 'no allegations concerning a possible breach of the Guidelines were made against any Panel firm or Department'.¹⁸⁴ There were no references to allegations of breach or actual breach in the annual reports for Government Legal Services for 2004–05¹⁸⁵ or 2005–06.¹⁸⁶ This dearth of formal complaints has been confirmed in correspondence with the Victorian Government Solicitor's Office, which commented:

*The wholesale absence of complaints underscores our successful adherence to ML principles. We take the view that adherence to these principles is the best way to immunise our clients from judicial criticism for improper litigious behaviour.*¹⁸⁷

There have, however, been recent instances where the Transport Accident Commission has apparently acted in a manner inconsistent with its obligations under the Victorian model litigant guidelines. One such case is *Cracknell v TAC (General)*,¹⁸⁸ in which Justice Bowman characterised the TAC's behaviour as demonstrating a "'win at all costs" attitude' after it seemingly omitted evidence that was unfavourable to its case.¹⁸⁹

3.5 DUTIES OF WITNESSES, INCLUDING EXPERT WITNESSES

As noted earlier in this chapter, it is not proposed that the overriding obligations apply to witnesses as to fact, and only certain of the obligations are intended to apply to expert witnesses.

As a general principle, the fundamental duty owed by a witness in litigation is to tell the truth. For lay witness this is the only duty.

Currently, there are no duties on lay witnesses to assist the court or the parties. They may, however, be compelled to attend court for the purpose of giving evidence.

Witnesses (including expert witnesses) are generally immune from any form of civil action in respect of evidence given by them in court. However, they may face criminal charges for perjury for giving dishonest evidence or in certain circumstances for contempt of court.

In one of the seminal Australian cases, which addresses witness immunity (but which concerned immunity of barristers),¹⁹⁰ the majority of the High Court (Gleeson CJ, Gummow, Hayne and Heydon JJ) said:

From as early as the sixteenth century, a disappointed litigant could not sue those who had given evidence in the case. That is, the disappointed litigant could not seek to demonstrate that witnesses had given, or parties had suborned, perjured evidence or that witnesses or parties had conspired together to injure that litigant. Nor could the disappointed litigant seek to demonstrate that what was said by the witnesses had defamed that litigant. All such actions were precluded or answered by an absolute privilege ... No action lay, or now lies, against a witness for what is said or done in court. It does not matter whether what is done is alleged to have been done negligently or even done deliberately and maliciously with the intention that it harm the person who would complain of it. The witness is immune from suit and the immunity extends to preparatory steps.¹⁹¹

The rationale of this immunity is founded in public policy. In the words of Justice Starke in *Cabassi v Vila*:

The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice.¹⁹²

Other considerations underlying the public policy argument are:

- ensuring witnesses assist in the judicial process by giving evidence without fear of the consequences
- avoiding the possibility of issues being reopened and re-litigated by dissatisfied parties.¹⁹³

The immunity extends to all witnesses (lay and expert) in respect of the evidence that they give in court and reports and statements made in preparation for giving evidence in court. In the recent case of *Griffiths v Ballard*¹⁹⁴ it was stated that:

If the immunity is to operate, as the High Court has stated, and it is to operate consistently, then all that a witness does in court must be immune and so too all that is done by the witness out of court, which is so intimately connected with the evidence or the manner it is given, must also be immune. This is whether the act is deliberate or inadvertent.¹⁹⁵

A number of recent English decisions have examined the extent of the immunity of expert witnesses. In particular, the English Court of Appeal in the *Meadow* case¹⁹⁶ held that the witness immunity doctrine does not protect an expert witness from prosecution before a professional disciplinary body in respect of the evidence given in court.¹⁹⁷ This case is discussed further below in the context of sanctions against expert witnesses.

There has been recent debate in NSW, arising out of the NSW Law Reform Commission report on expert witnesses, concerning the issue of sanctions for aberrant behaviour by such witnesses.¹⁹⁸

In *Phillips v Symes (No 2)*,¹⁹⁹ a single judge of the English High Court held that an order for costs may be made against an expert witness where there is a gross dereliction of the witness's duty to the court.²⁰⁰ The jurisdiction of the court to make such order was said to be similar to the jurisdiction of the court to make a 'wasted costs' order against a delinquent barrister.²⁰¹ It is noteworthy that the English court had such jurisdiction even before the House of Lords declared that barristers no longer enjoyed any immunity from suit in respect of their conduct in court.²⁰² In other words, the making of an order for costs against a delinquent barrister (who enjoyed immunity) was not seen to be inconsistent with barrister's immunity. In most Australian jurisdictions courts have the express power to make 'wasted costs' orders against advocates.²⁰³

It is quite another thing, however, to expose an expert witness to an action in damages in respect of the evidence given by them in court. This strikes at the heart of witness immunity. Presently, any such action could be summarily dismissed.²⁰⁴

178 Ibid 511–18.

179 Ibid 519.

180 Ibid.

181 Ibid.

182 Government Legal Services, Department of Justice, Victoria, *Annual Report to Attorney-General 2003–2004* (2005) 4.

183 Government Legal Services, Department of Justice, Victoria, *Annual Report to Attorney-General 2002–2003* (2003) 4.

184 Government Legal Services, Department of Justice, Victoria, *Annual Report to Attorney-General 2003–2004* (2005) 4.

185 Government Legal Services, Department of Justice, Victoria, *Annual Report to Attorney-General 2004–2005* (2006) 4.

186 Government Legal Services, Department of Justice, Victoria, *Annual Report to Attorney-General 2005–2006* (2007) 3.

187 Email from Stephen Lee, Assistant Victorian Government Solicitor, to the commission, 13 April 2007.

188 [2007] VCAT 1615 (31 August 2007).

189 *Cracknell v TAC (General)* [2007] VCAT 1615 (31 August 2007) [49]. See paragraphs [49]–[59] of the judgment for Bowman J's ruling on the TAC's behaviour. See also Leonie Wood and Stephen Moynihan, 'The curious case of a cyclist's life destroyed', *The Age* (Melbourne), 12 September 2007.

190 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

191 *D'Orta-Ekenaike* (2005) 223 CLR 1, [39] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *Cabassi v Vila* (1940) 64 CLR 130, 141 (Starke J).

192 *Cabassi v Vila* (1940) 64 CLR 130, 141.

193 See *Hargreaves v Bretherton* [1959] 1 QB 45, 52 and *Roy v Prior* [1971] AC 470, 480.

194 [2005] NSWSC 1350.

195 *Griffiths v Ballard* [2005] NSWSC 1350, [36] (Rothman J). See also M McSweeney, 'Immunity from Suit of Expert Witnesses' (2002) 22 *Australian Bar Review* 131.

196 *Meadow v General Medical Council* [2007] QB 462.

197 *Meadow v General Medical Council* [2007] QB 462, [30]–[41] (Clarke MR), [112–114] (Auld LJ).

198 NSW Law Reform Commission, *Expert Witnesses*, Report No 109 (2005).

199 [2004] EWHC 2330 (Ch).

200 [2004] EWHC 2330 (Ch) [98]–[99].

201 [2004] EWHC 2330 (Ch) [24].

202 See *Arthur J S Hall & Co (A firm) v Simons* [2002] 1 AC 615.

203 See Cameron Ford, 'Advocates' Liability for Wasted Costs' (2005) 16 *Insurance Law Journal* 153.

204 See *Griffiths v Ballard* [2005] NSWSC 1350, [47].



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3.5.1 Expert Witnesses

Expert witnesses have a duty to tell the truth, in the same way as lay witnesses do. However, the situation with experts is not as straightforward. They are often in a different position to other witnesses:

First, expert witnesses of opinion are paid for their services, while witnesses of fact are not. Secondly, the former are selected by the parties from outside the factual matrix of the case, and are in practice volunteers, while the latter are bound up in the factual matrix, and are as such required to attend to assist the court as fact finder. Thirdly, the nature of expert opinion evidence lends itself to a wide range of choices of what material to select, what weight to give to that material, and how to interpret material, while evidence of fact is restricted to what the witness has seen and heard.²⁰⁵

Expert witnesses are also 'permitted to offer opinions to parties and to the court as to the meaning and implications of other evidence'.²⁰⁶

Consideration of the role of expert witnesses involves a variety of matters, including:

- the nature and extent of their pre-existing or ongoing relationship with or allegiances to one or more of the parties
- their ethical obligations within their field of specialist expertise
- their contractual and financial arrangements with one or more of the litigants
- their standing, expertise and reputation within their field of specialisation
- the extent to which they have used methods of analysis or research methodologies which are generally scientifically accepted within their particular discipline and
- the nexus between relevant proved facts and expressions of expert opinion.

These factors and other considerations have the potential to bear on the quality, reliability and integrity of expert evidence. Inevitably, experts called by litigants are 'partisan' in the sense that a party will generally not call as a witness a person whose expert opinions are not favourable to that party's case. Moreover, lawyers for the parties usually work closely with experts and are often directly involved in assisting in the preparation of the experts' forensic reports and opinions.²⁰⁷

For various reasons there has been ongoing concern, and frequent expressions of judicial disquiet, about the partisan nature and lack of objectivity of expert evidence in civil litigation.

Such concerns have given rise to various attempts to formulate statements of experts' duties and responsibilities. These transcend the mere obligation to tell the truth. Initially articulated in case law, these have been recently enshrined in rules of court, codes of conduct or practice directions. These statements do not address all aspects of expert witnesses' duties, but focus on duties relating to the giving of opinion evidence in court.²⁰⁸

One of the most often cited statements of the duties and responsibilities of an ethical nature of expert witnesses is found in the *Ikarian Reefer* case:²⁰⁹

- (1) *Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...*
- (2) *An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his [or her] expertise ... An expert witness ... should never assume the role of an advocate.*
- (3) *An expert witness should state the facts or assumptions upon which his conclusion is based. He should not omit to consider material facts which could detract from his concluded opinion ...*
- (4) *An expert witness should make it clear when a particular question or issue falls outside his expertise.*
- (5) *If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one ... In cases where an expert witness who has prepared a report*

could not assert the report contained the truth, the whole truth and nothing but the truth without some qualification, the qualification should be stated in the report ...

- (6) *If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and where appropriate to the court ...*²¹⁰

Other statements of experts' duties are found in numerous cases.²¹¹

Codes of conduct, rules of court and practice notes in England and Australia build on common law duties and seek to further formalise and raise awareness of experts' duties. Some codes of conduct are also promulgated by professional associations and other bodies, not just by the courts.²¹²

In Victoria an Expert Witness Code of Conduct ('the Victorian Code') is part of the *Supreme Court (General Civil Procedure) Rules 2005* ('the Supreme Court Rules').²¹³ Those rules provide that an expert witness shall be provided with a copy of the Victorian Code by the party who intends to adduce evidence of the expert at trial.²¹⁴ The expert is to acknowledge in writing having read the code and agreeing to be bound by it. Clause 1 of the Victorian Code provides that an expert witness has an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise. Clause 2 states that an expert witness is not an advocate for a party.

The code also encapsulates the substance of the duties extracted from the *Ikarian Reefer* case as set out above.

The Commercial List of the Supreme Court of Victoria Practice Note introduced in December 2004 states that the court expects expert witnesses 'to express an opinion arrived at independently from any pressure brought to bear by or on behalf of the party engaging the expert'.²¹⁵

Similar statements emphasising an expert's paramount or overriding duty or obligation to the court appear in other Australian jurisdictions. For instance, paragraph 1 of the *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* provides:

- (1) *An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise;*
- (2) *An expert witness is not an advocate for a party ...;*
- (3) *An expert witness's paramount duty is to the Court and not to the person retaining the expert.*²¹⁶

In NSW, rule 31.23(1) of the *Uniform Civil Procedure Rules 2005* provides that 'an expert witness must comply with the code of conduct set out in Schedule 7' ('the NSW Code'). Clause 2 of the NSW Code sets out an expert's general duty to the court in similar terms to the general duty enunciated in the

205 D Dwyer, 'The Effective Management of Bias in Civil Expert Evidence' (2007) 26 *Civil Justice Quarterly* 63. See also D Dwyer, 'The Causes and Manifestations of Bias in Civil Expert Evidence' (2007) 26 *Civil Justice Quarterly* 425.

206 McSweeney (2002) above n 195, 133.

207 On the role of lawyers in the preparation of experts' reports see, eg, *Harrington-Smith v Western Australia* (No 7) (2003) 130 FCR 424, [19] (Lindgren J); Justice Robert McDougall, 'Expert Evidence' (Paper presented at the Institute of Arbitrators and Mediators Australia, Sydney, 13 February 2004, and subsequently revised and expanded) [45] et seq, <www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcdougall130204> at 4 February 2008.

208 Federal Court of Australia, *Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (Version 5, 6 June 2007) (2007) [1] <www.fedcourt.gov.au/how/prac_direction.html> at 4 February 2008.

209 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* ('*The Ikarian Reefer*') [1993] 2 Lloyd's Rep 68.

210 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* ('*The Ikarian Reefer*') [1993] 2 Lloyd's Rep 68, 81-2.

211 See, eg, *Whitehouse v Jordan* [1981] 1 All ER 267, *Re VBN and Australian Prudential Regulation Authority* (No 5) (V2005/686) (2006) 92 ALD 259, [261] and *Lines MacFarlane and Marshall Pty Ltd v Fletcher Construction Australia Ltd* [2000] VSC 358, [308]. See also Robert Stitt QC, 'Cross-examination of expert witnesses: A practical approach via a personal excursion' (2005) 26 *Australian Bar Review* 219 and M McSweeney, 'Immunity from suit of expert witnesses' (2002) 22 *Australian Bar Review* 131.

212 For example, the Expert Witness Institute of Australia has published a Code of Practice applicable to its members. See the Expert Witness Institute of Australia, *Code of Practice* (2003) <www.ewia.org.au/practice.html> at 4 February 2008.

213 *Supreme Court (General Civil Procedure) Rules 2005*, O 44, Form 44A. See also *County Court Rules of Procedure in Civil Proceedings 1999*, O 44, Form 44A which is in substantially the same terms. The Victorian Code was introduced in November 2003. VCAT has also introduced guidelines for expert evidence by way of practice note (VCAT, *Practice Note: PNVCAT 2—Expert Evidence* (1999) [2] <[www.vcat.vic.gov.au/CA256902000FE154/Lookup/VCAT_Practice_Notes/\\$file/practice_note_vcat%20_2_.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/VCAT_Practice_Notes/$file/practice_note_vcat%20_2_.pdf)> at 4 February 2008. There is no expert witness code of conduct for Magistrates' Court proceedings (See the *Magistrates' Court Civil Procedure Rules 1999*).

214 *Supreme Court (General Civil Procedure) Rules 2005*, r 44.03(1)(a).

215 Supreme Court of Victoria, *Practice Note 4 of 2004 (as amended by Practice Note 6 of 2007): Commercial List* (2004) [11], <www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/ebf29a437ddac90/Practice%20Note%20No.%204%20of%202004%20-%20Commercial%20List.pdf> at 4 February 2008.

216 Federal Court of Australia (2007) above n 208, [1]. See also *Uniform Civil Procedure Rules 2005* (NSW) sch 7 (Expert Witness Code of Conduct) [2]; *Uniform Civil Procedure Rules 1999* (Qld) r 426; *Court Procedures Rules 2006* (ACT) sch 1, [1.2]; Supreme Court of SA, *Practice Direction No 46A: Guidelines for Expert Witnesses in Proceedings in the Supreme Court of South Australia* (2002) [4] <www.courts.sa.gov.au/lawyers/index3.html> at 4 February 2008.

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Federal Court Guidelines. The NSW Code also provides that an expert must 'abide by any direction of the court'²¹⁷ and has a 'duty to work co-operatively with other experts'.²¹⁸ These are relatively new inclusions in the NSW Code.²¹⁹

In England, an expert's obligations appear in rule 35.3 of the Civil Procedure Rules (CPR). This was the first response to the review of the civil procedure rules relating to expert evidence undertaken as part of the Woolf report in the UK.²²⁰ It provides that 'it is the duty of an expert to help the court on matters within his expertise'²²¹ and that 'this duty overrides any obligation to the person from whom he has received instructions or by whom he is paid'.²²² Under rule 35.10, an expert's report 'must comply with the requirements set out in the ... practice direction' and the expert must sign a statement that he 'understands his duty to the court' and that 'he has complied with that duty'.²²³

Part 35 of the UK rules is supplemented by a practice direction, which sets out the requirements for form and content of expert reports.²²⁴ This includes a separate requirement that a report be verified by a statement that the opinions are made from the expert's own knowledge, that the expert believes them to be true and they represent the expert's true and complete professional opinion.²²⁵ The next paragraph states the consequences of verifying a document containing a false statement without an honest belief in its truth, namely, the potential for proceedings for contempt of court.²²⁶

The *Protocol for the Instruction of Experts to give Evidence in Civil Claims* drafted by the UK Civil Justice Council relates experts' duties to the statement of the court's overriding objective found in the rules of court.²²⁷ It states:

*Experts should be aware of the overriding objective that courts deal with cases justly. This includes dealing with cases proportionately, expeditiously and fairly (CPR 1.1). Experts are under an obligation to assist the court so as to enable them to deal with cases in accordance with the overriding objective.*²²⁸

Although statements produced by courts vary in form, they have much common substance, including statements of the main elements of experts' duties:

- a paramount duty or an overriding obligation to the court. In the event of conflict, this duty takes precedence over any duty to a party and/or the person who engages or instructs the expert²²⁹
- a duty to assist the court in matters relevant to the expert's expertise
- a prohibition on the expert becoming an advocate for a party.

In most cases, experts are no doubt aware that they are subject to a network of professional, ethical, legal and personal obligations and duties. However, as complaints about expert witnesses and the quality of their evidence persist,²³⁰ the issue arises as to whether the existing statements of obligations and duties of expert witnesses are adequate to address conduct issues.

The value of statements of obligations and duties in modifying conduct has been a subject of some debate. It is recognised that such statements alone 'will not eliminate adversarial bias'.²³¹ Indeed, one submission to the commission noted that 'sceptics would say that [codes relating to experts' conduct have] had little effect'.²³² Others point to statements of obligations and duties producing limited changes in behaviour such as

*encouraging experts to divulge slightly more information, structure their reports differently or incline them toward circumspection.*²³³

Some are more positive, suggesting:

*They provide a convenient mechanism to communicate the Courts' views on the conduct of experts to both experts and those who retain and instruct them.*²³⁴

However, statements of obligations and duties are only one of a number of measures that have been introduced in recent years to counter the complaints of 'partiality and proliferation' of expert witnesses that were addressed, in particular, by Lord Woolf in England in the 1990s.²³⁵ Other measures include:

- the strengthening of case management powers
- compelling 'the exchange of expert reports and the use of the reports as evidence in chief'
- 'compulsory conferences between experts'
- providing for 'hot tubbing' and 'the giving of evidence concurrently by more than one expert'.²³⁶

On their own, statements of experts' obligations and duties may have a limited value. However, in conjunction with other reform initiatives they clearly have a role to play, particularly insofar as they enunciate various aspects of experts' duties. There are, however, a number of ways in which their content and form can be improved and their effect strengthened.

First, there is an issue with the content of such statements which may affect the appreciation and understanding of the principal obligation, namely, an expert's paramount duty or overriding obligation to the court. Statements of experts' duties are generally silent as to the nature and content of this duty.

Second, while existing rules of court, codes of conduct and practice notes generally place emphasis on an expert's duty to the court and are substantially similar, there is some variation between courts and different lists within courts. There are also variations in levels of case management, which can impact on the control of expert evidence. For instance, the Victorian Code makes no mention of an expert witness's paramount duty to the court in the event of a conflict of duty with the party or person retaining the expert. This duty is explicit in statements in other jurisdictions, such as the Federal Court Guidelines and the NSW Code.²³⁷ In other Victorian jurisdictions, for example the Magistrates' Court, there is no comprehensive statement of experts' duties.

The lack of uniformity between statements of experts' obligations and duties has been noted in submissions, with one submission suggesting that

*achieving a greater degree of uniformity would be likely to assist in the process of educating experts, and the lawyers that instruct experts, on their various roles and duties.*²³⁸

Further, rules of court, codes of conduct or practice notes fall short of statutory obligations and duties.

Finally, while statements of experts' obligations and duties, including codes of conduct, suggest the potential for a regime of sanctions, they do not make explicit provision for 'sanctioning breaches of [the obligations and duties] they define'.²³⁹

The introduction of the proposed statement of overriding obligations would provide a fundamental set of obligations and duties that all key participants in the civil justice system, including experts, would owe equally. It has the potential to have a normative affect, providing a base standard of conduct for everyone.

For expert witnesses, the overriding obligations provision is not intended to replace other statements of their obligations and duties. The obligations enunciated in the new provision would be for the most part consistent with and supplementary to existing obligations. It would also address some of the inadequacies in existing statements of obligations and duties as set out above.

217 *Uniform Civil Procedure Rules 2005* (NSW) sch 7, [3].

218 *Uniform Civil Procedure Rules 2005* (NSW) sch 7, [4].

219 The revised version of the NSW Code of Conduct was introduced on 8 December 2006, following the NSW Attorney-General's Working Party on Civil Procedure's response to the NSW Law Reform Commission's Report on *Expert Witnesses*, Report No 109 (2005).

220 See Lord Woolf, *Access to Justice—Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ch 13.

221 *Civil Procedure Rules 1998* (UK) (SI 1998/3132) r 35.3(1).

222 *Civil Procedure Rules 1998* (UK) (SI 1998/3132) r 35.3(2).

223 *Civil Procedure Rules 1998* (UK) (SI 1998/3132) r 35.10(1), (2)(a), (b).

224 Ministry of Justice (UK), *Practice Direction: Experts and Assessors* [2] <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm> at 4 February 2008.

225 *Ibid* [2.4].

226 *Ibid* [2.5]. See also *Civil Procedure Rules 1998* (SI 1998/3132) r 32.14 in relation to the consequences alluded to above.

227 Civil Justice Council, *Protocol for the Instruction of Experts to give Evidence in Civil Claims* (2005). <www.justice.gov.uk/civil/procrules_fin/contents/form_section_images/practice_directions/pd35_pdf_eps/pd35_prot.pdf> at 4 February 2008. The protocol is an annexure to Practice Direction 35, which expands on Part 35 of the Civil Procedure Rules.

228 *Ibid* [4.2].

229 This duty is not stated in the same terms in the Victorian Code, which provides that '[a] person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness'. See the *Supreme Court (General Civil Procedure) Rules 2005*, Form 44A[1].

230 See, eg, *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* [2005] FCA 1242, [23]-[26].

231 NSW Law Reform Commission, *Expert Witnesses*, Report No 109 (2005) [9.8].

232 Submission CP 41 (TurksLegal and AXA Australia).

233 G Edmond, 'After Objectivity: Expert Evidence and Procedural Reform' (2003) 25(2) *Sydney Law Review* 131, 148. see also G Edmond, 'Secrets of the "Hot Tub": Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia' (2008) 27 *Civil Justice Quarterly* 51.

234 Submission CP 25 (Institute of Chartered Accountants in Australia [Forensic Accounting Special Interest Group]), citing a copy of their annexed submission to NSW Law Reform Commission's reference on expert witnesses ([29]).

235 NSW Attorney General's Working Party on Civil Procedure, *Reference on Expert Witnesses: Report* (2006), 3. See also Woolf (1996) above n 220, ch 13.

236 NSW Attorney General's Working Party on Civil Procedure (2006) above n 235, 3. 'Hot tubbing' and concurrent evidence are only provided for specifically in the Supreme Court of Victoria: see Supreme Court (2004) above n 215, [11.4]. Otherwise the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) are silent. See also Edmond (2008) above n 233.

237 See Federal Court of Australia (2007) above n 208, [1], and *Uniform Civil Procedure Rules 2005* (NSW) sch 7 (Expert Witness Code of Conduct) [2].

238 Submission CP 25 (Institute of Chartered Accountants in Australia [Forensic Accounting Special Interest Group]), citing a copy of their annexed submission to NSW Law Reform Commission's reference on Expert Witnesses, [36].

239 Submission CP 25 (Institute of Chartered Accountants in Australia [Forensic Accounting Special Interest Group]), citing submission to NSWLRC, above n 234, [77].



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In particular, it will further define the content of an expert's paramount duty or overriding obligation. This may serve to clarify its meaning, give it renewed emphasis and reinforce its fundamental importance.

Under the commission's recommendations, expert witnesses, like other key participants in the civil justice system, would have an overriding statutory obligation to assist the court in the administration of justice and, in particular, to:

- act honestly
- cooperate with the parties and the court
- not engage in misleading and deceptive conduct
- use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the issues in dispute
- use reasonable endeavours to ensure that costs are minimised and proportionate to the complexity or importance of the issues and the amount in dispute
- use reasonable endeavours to act promptly and to minimise delay
- disclose, at the earliest practicable time, the existence of documents in their possession, custody or control which they are aware of and which they consider relevant to any issue in dispute in the proceedings.

Expert witnesses would, for obvious reasons, not be subject to other specific provisions of the proposed overriding obligations relating to the making of unmeritorious claims or responses in the proceedings, and the taking of steps in the litigation or the use of reasonable endeavours to resolve the civil dispute by agreement between the parties or through alternative dispute resolution processes.

The introduction of a single statement of overriding obligations would provide consistency across all Victorian courts.

The proposed provision would also place the overriding obligations on a statutory footing. Ancillary matters could be accommodated in the rules, codes of conduct or practice notes applicable in the various courts or lists.

3.5.2 Sanctions and expert witnesses

For expert witnesses, one of the significant potential impacts of the proposed overriding obligations provision is the explicit introduction of a regime of sanctions. The commission's proposal provides for a range of sanctions (some compensatory and some punitive) to be imposed for behaviour that does not conform with the overriding obligations.

Undesirable conduct on the part of expert witnesses ranges from instances where an expert's evidence favours one party's case because of a level of unconscious bias, to more extreme cases of misconduct or dishonest behaviour. It is in the extreme scenarios that the issue of sanctions arises.

The NSW Law Reform Commission in its report on expert witnesses summarised a number of possible existing sanctions for expert witnesses, depending on the nature of the conduct complained of:

- The expert witness might be criticised by the court, and might lose credibility, and thus a reduced prospect of further work as an expert witness.
- Disciplinary proceedings might be taken against the expert witness within the relevant profession.
- The court might make a costs order against the expert witness.
- The expert witness might be charged with contempt or perjury.²⁴⁰

It is also possible that the expert's costs could be disallowed, either between their client and another party, or between their client and themselves.

The NSW commission considered that the sanctions outlined are 'appropriate and sufficient' but recommended that there should be a rule or practice note requiring that expert witnesses be informed of sanctions for dishonest, inappropriate or unethical conduct.²⁴¹ This approach is supported in some submissions to this review.²⁴² It is also, to a limited extent, reflected in the Practice Direction which accompanies the English Civil Procedure Rules Part 35, and which warns experts of the consequences of verifying a document containing a false statement without an honest belief in its truth.²⁴³

In December 2006 the NSW Attorney General's Working Party on Civil Procedure responded to a range of issues raised by the NSW commission. In particular, it considered:

- whether, in fact, the power exists to make a costs order against an expert witness and the need for any amendment to the rules to facilitate such orders and
- the need for a requirement that expert witnesses be made aware of the possible sanctions that can be made against them.²⁴⁴

The working party concluded that the NSW commission erred in believing there is already a power in the courts to order costs against an expert witness. The Working Party's reasoning stems from reading section 98 of the *Civil Procedure Act 2005* (NSW) in conjunction with rule 42.3 of the *Uniform Civil Procedure Rules 2005* (NSW).²⁴⁵ Subject to the rules, section 98 gives the court a wide discretionary power to award costs, while rule 42.3 of the limits the scope of the court's power to award costs against a non-party.²⁴⁶

In other jurisdictions there is the potential for the court to make a costs order against an expert. For example, in *Phillips v Symes (No 2)*²⁴⁷ Justice Peter Smith held that English courts may make orders for costs²⁴⁸ directly against expert witnesses who by their evidence cause significant expense to be incurred, and do so in 'flagrant reckless disregard of [their] duties to the Court'.²⁴⁹ This would also appear to be currently the case in Victoria.²⁵⁰

In NSW, the working party concluded that the need to use costs sanctions against experts was so rare that the benefits of making provision for such sanctions were outweighed by the risk of causing expert witnesses to withdraw their services, thus shrinking the pool of those available to give evidence. In light of this, it concluded that there was no need to amend the rules to provide for costs sanctions or to 'wave' sanctions 'under the nose of prospective witnesses'.²⁵¹

The concern expressed by the NSW commission about sanctions or an overly punitive approach acting as a deterrent to prospective expert witnesses is repeated in submissions to this review. One submission reported that:

*There are already many anecdotal examples of parties having difficulty in obtaining appropriately qualified expert witnesses, and any significant increase in such obligations would serve to potentially further reduce the pool of such qualified professionals prepared to act as expert witnesses.*²⁵²

Another stated that it is already

*often difficult to find suitable experts, particularly as they are commonly required to comment adversely on the conduct of their peers.*²⁵³

Although mindful of such concerns the commission is not persuaded that the availability of costs or other sanctions is likely to deter persons from agreeing to give expert evidence. Moreover, as a safeguard against inappropriate, frivolous or vexatious resort to sanctions and with a view to placing constraints on 'satellite litigation', the commission is recommending that applications for sanctions should require leave of the court. The sanctions would not be operative until 12 months after the proposed overriding obligations come into force.

Despite the approach recently adopted in NSW, the commission is of the view that expert witnesses should not be placed in a privileged position compared with other key participants in civil litigation before Victorian courts. We believe it is desirable to have a regime of sanctions which is uniformly applicable to those who transgress the requisite standards.

With regard to costs orders, as Justice Peter Smith said in *Phillips v Symes (No 2)*:

*It seems to me that in the administration of justice, especially, in light of the clearly defined duties now enshrined in CPR Pt 35 [and CPR PD 35], it would be quite wrong of the court to remove from itself the power to make a costs order in appropriate circumstances against an expert who, by his evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the court.*²⁵⁴

The Supreme Court's submission supported an explicit statement of the availability of costs sanctions against experts. It recommended the introduction of a range of procedures in dealing with expert evidence, particularly in complex cases in specialist lists where expert evidence forms a significant aspect of the case. In relation to costs the court submitted:

- 240 NSWLRC (2005) above n 231, [9.75].
241 Ibid [9.76].
242 Submissions CP 39 (Mallesons Stephen Jaques), CP 33 (Victorian Bar).
243 Ministry of Justice (UK), above n 224.
244 NSW Attorney General's Working Party (2006) above n 235, [29]–[33].
245 Ibid [30].
246 See the *Uniform Civil Procedure Rules 2005* (NSW) r 42,3 and *ibid*.
247 [2004] EWHC 2330 (Ch)
248 Under s 51 of the *Supreme Court Act 1981* (c 54).
249 *Phillips v Symes (No 2)* [2004] EWHC 2330 (Ch) [95]. See also *Civil Justice Council* (2005) above n 227, [4.7].
250 See Neil Williams, *Civil Procedure—Victoria*, vol 1 (at January 2008) (LexisNexis Butterworths) 1 44.01.27, 1 63.02.35, 1 63.02.50 and the cases referred to therein. In the *Supreme Court of Victoria*, s 24(1) of the *Supreme Court Act 1986* provides that costs are 'in the discretion of the Court', which has 'full power to determine by whom and to what extent the costs are to be paid'.
251 NSW Attorney General's Working Party (2006) above n 235, [32].
252 Submission CP 25 (Institute of Chartered Accountants in Australia [Forensic Accounting Special Interest Group]).
253 Submission CP 49 (Mallesons Stephen Jaques).
254 [2004] EWHC 2330 (Ch) [95].

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Experts who breach the Code may be personally liable for the costs of their evidence. The Rule would resemble r 63.23, and reference to it be incorporated into the Code of Conduct.²⁵⁵

There are also issues about the adequacy of the other existing potential sanctions against expert witnesses, particularly with regard to compensating the opposing party or parties for the consequences of inappropriate expert conduct. In *Phillips v Symes (No 2)*,²⁵⁶ Justice Peter Smith pointed to the available sanctions other than costs (such as censure, committal for contempt or perjury, reporting to professional bodies, etc.) as not being either

effective or anything other than blunt instruments. The proper sanction is the ability to compensate a person who has suffered loss by reason of that evidence. This flows from Myers v Elman^[257] ... applied to experts. I do not accept that experts will, by reason of this potential exposure, be inhibited from fulfilling their duties. That is a cri de coeur often made by professionals, but I cannot believe that an expert would be deterred, because a costs order might be made against him in the event that his evidence is given recklessly in flagrant disregard for his duties. The high level of proof required to establish the breach cannot be ignored. The floodgates argument failed as regards lawyers^[258] and is often the court of last resort.²⁵⁹

The availability of sanctions against expert witnesses in the context of disciplinary proceedings has recently been considered in England in the high profile case of *Meadow v General Medical Council*.²⁶⁰ The case raised the question of whether the doctrine of witness immunity provides protection for expert witnesses against professional misconduct proceedings.

The case involved an appeal by the General Medical Council (GMC) from a judgment of Justice Collins, who had allowed an appeal by Professor Meadow, a retired eminent paediatrician, against a finding by the GMC that he was guilty of serious professional misconduct and ordered that his name be removed from the register.²⁶¹ The alleged misconduct arose in connection with expert evidence given by Professor Meadow in the criminal prosecution of Sally Clark for the alleged murder of her two infant sons. Professor Meadow's evidence was used to refute the proposition that Mrs Clark's children had died from sudden infant death syndrome.²⁶² Mrs Clark was initially convicted and sentenced to more than 15 years jail but an appeal was ultimately successful and her convictions were quashed.

At first instance, Justice Collins held that Professor Meadow was, as an extension of the immunity from suit enjoyed by witnesses in legal proceedings, entitled to immunity from disciplinary proceedings in respect of his evidence in Mrs Clark's trial.²⁶³ However, on appeal, the Court of Appeal held unanimously that witness immunity did not extend to disciplinary proceedings. In his judgment, Sir Anthony Clarke MR said:

It would to my mind be very striking, not to say astonishing, if the way in which an expert gave evidence or the content of that evidence showed that he was not fit to practise in a particular discipline, but the [Fitness to Practise Panel] could not consider it because the expert was immune from disciplinary proceedings by some absolute common law immunity.

That would especially be so if the only evidence of unfitness to practise derived from evidence given in court.²⁶⁴

Disciplinary proceedings have a deterrent quality as well as being a mechanism intended to protect the public. As Sir Anthony Clarke MR continued:

The threat of FTP [fitness to practise] proceedings is in the public interest because it helps to deter those who might be tempted to give partisan evidence and not to discharge their obligation to assist the court by giving conscientious and objective evidence. It helps to preserve the integrity of the trial process and public confidence both in the trial process and in the standards of the professions from which expert witnesses come. As stated earlier, the purpose of the FTP proceedings is the protection of the public.²⁶⁵

In the end result, a majority of the Court of Appeal (Sir Anthony Clarke MR dissenting) held that Professor Meadow was not guilty of serious professional misconduct and dismissed the appeal on this basis.

In Australia, the issue of whether there is immunity from disciplinary proceedings in respect of alleged unprofessional conduct arising out of evidence given in court by an expert witness was considered by the Full Court of the South Australian Supreme Court in *James v Medical Board of South Australia and Keogh*.²⁶⁶

In NSW it has recently been reported that a prominent psychiatrist has been reprimanded by the NSW Medical Board after its professional standards committee disagreed with an expert opinion given in a criminal case.²⁶⁷

Apart from possible disciplinary proceedings applicable to their particular specialist field, at present expert witnesses, like any witness, may be subject to proceedings for perjury, contempt of court or perverting the course of justice.

The commission is not persuaded that the availability of these alternative sanctions, or the traditional rationale for witness immunity, should prevent its recommended obligations and sanctions applying to expert witnesses. However, the commission is of the view that the overriding objectives and sanctions for noncompliance should not be applicable to nonexpert witnesses. Moreover, we propose that all applications for sanctions or other remedies for contravention of the overriding obligations, including against experts, should require leave of the court.

3.6 DUTIES OF CORPORATIONS

Corporations are often parties to civil litigation. Considering the existing duties of corporations as litigants raises the question of whether the application of the proposed statutory overriding obligations to corporations in the conduct of civil litigation may be inconsistent with other statutory provisions or the general law applicable to corporations. This issue may also arise in relation to insurers and litigation funders (insofar as they are corporations). This is discussed below.

Submissions to the commission were divided on whether the obligations and sanctions should be applicable to corporations. For example, Telstra expressed the view that there is 'adequate regulation of the conduct of corporations through the Corporations Law and associated regulations'.²⁶⁸ However, the specific application of the provisions to corporations was not explicitly addressed in many submissions.

Although there may be scope for argument, the commission is not persuaded that the statutory or other duties imposed on corporations generally and directors in particular, including the obligation to act in the best interests of the company,²⁶⁹ are necessarily inconsistent with the overriding obligations, which the commission recommends should be imposed on participants in civil litigation before Victorian courts.²⁷⁰

The *Corporations Act 2001* (Cth) is not intended to exclude or limit the concurrent law of a state,²⁷¹ and in particular is not intended to exclude or limit the concurrent operation of a law of a state that imposes additional obligations or liabilities on a company.²⁷² If there is inconsistency between the proposed overriding obligations and provisions of the *Corporations Act 2001* (Cth), the Victorian Parliament could pass legislation declaring a matter to be an excluded matter so that relevant inconsistent provisions of the corporations legislation did not apply to that matter.²⁷³

The policy issue of whether the proposed overriding obligations should be applicable to corporations as litigants is discussed above and also referred to below in the analyses of the submissions received by the commission.

3.7 DUTIES OF INSURERS AND LITIGATION FUNDERS

As noted above, the proposed overriding obligations would not only apply to litigants and lawyers, but also to litigation funders and insurers to the extent that such entities or persons exercise any direct or indirect control or influence over the conduct of any party in a civil proceeding.

They would not be applicable to a litigation funder or an insurer that merely provided financial support or indemnity to a party to civil proceedings. Whether direct or indirect control or influence over the conduct of a party exists is a question of fact to be determined in the circumstances of each case. In most instances this is unlikely to be problematic.

If a litigation funder or insurer is incorporated then the issues discussed above in relation to the imposition of overriding obligations on corporations may arise.

255 Submission CP 58 (Supreme Court of Victoria).

256 [2004] EWHC 2330 (Ch).

257 [1940] AC 282.

258 Referring to, in England, the abolition of immunity from civil action conferred on barristers with respect to work in court in the case of *Arthur J S Hall & Co (A firm) v Simons* [2002] 1 AC 615.

259 *Phillips v Symes* (No 2) [2004] EWHC 2330 (Ch) [96].

260 [2007] QB 462.

261 *Meadow v General Medical Council* [2007] QB 462, 465.

262 *Meadow v General Medical Council* [2007] QB 462, 471.

263 See the discussion of this decision in Ian Freckelton, 'Editorial: Immunity for Experts from Disciplinary Regulation' (2006) 13 *Journal of Law and Medicine* 393.

264 *Meadow v General Medical Council* [2007] QB 462, 480–1.

265 *Meadow v General Medical Council* [2007] QB 462, 484.

266 [2006] SASC 267 (Bleby, Gray and Anderson JJ). The expert evidence included evidence arising out of a post mortem given at a criminal trial, which led to a conviction for murder. The decision was handed down before the English Court of Appeal decision in the *Meadow* case. The SA Full Court also rejected the argument that witness immunity precluded disciplinary proceedings in respect of unprofessional conduct based (in this case, in part) on expert evidence given in court.

267 Louise Hall, 'Prominent psychiatrist ordered to seek help', *Sun Herald* (Sydney), 27 January 2008, 39. An electronic search of the decisions of the NSW Medical Board on 5 February 2008 failed to disclose the determination, which was reported as being subject to a nondisclosure order.

268 Submission ED1 17 (Telstra Corporation).

269 See, eg, *Corporations Act 2001* (Cth) s 181.

270 The two 'laws' are directed at different subject matter and the relevant Commonwealth law does not intend to 'cover the field' of the proposed state legislation: see, eg, *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J).

271 *Corporations Act 2001* (Cth) s 5E(1).

272 *Corporations Act 2001* (Cth) s 5E(2) (a)(ii). Thus, eg, as Ford notes: 'state environmental and industrial laws which impose additional duties and liabilities upon directors and officers, and special industry laws which limit maximum shareholdings in companies such as gas or electricity utilities or gambling casinos, are laws permitted to operate concurrently with the Corporations Act'. Butterworths, *Ford's Principles of Corporation Law*, vol 1 (at 25 February 2008) '3 Regulating Companies' [3.101].

273 As contemplated by *Corporations Act 2001* (Cth) s 5F.



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Although litigation funders and insurers are not presently directly regulated in relation to the conduct of litigation, depending on their legal status they may be subject to other legislative and regulatory requirements which may be relevant to the conduct of litigation and which may give rise to possible inconsistency between such requirements and the proposed overriding obligations.

Apart from provisions in the *Corporations Act 2001* (Cth) applicable to companies, referred to above, publicly listed companies have additional obligations, including those arising out of the ASX listing rules. As well, insurers are subject to the provisions of the *Insurance Act 1973* (Cth) and the *Insurance Contracts Act 1984* (Cth), and litigation funders may be regulated under Chapter 7 of the *Corporations Act 2001* (Cth) as financial services providers.

Proposals for the regulation of litigation funding arrangements are presently under consideration by the Standing Committee of Attorneys General.²⁷⁴ The Council of Chief Justices is also examining the issue of litigation funding.²⁷⁵

The commission does not believe that the proposed overriding obligations are necessarily inconsistent with or incompatible with present or proposed legislative or regulatory provisions applicable to litigation funders or insurers.

Because litigation funders and insurers often exercise direct or indirect influence or control over the forensic conduct of parties that they are funding or indemnifying in civil proceedings the commission is of the view that they should be subject to the same overriding obligations as litigants and lawyers. Thus, all relevant participants in litigation would be subject to the same standards and sanctions. In Chapter 6 we outline our proposals for the disclosure of litigation funding and insurance arrangements.

4. SPECIFIC OBLIGATIONS

Each of the specific obligations incorporated in the proposed overriding obligations is discussed below.

4.1 THE OBLIGATION TO ACT HONESTLY

Each of the key participants would at all times be required to act honestly.

At present legal practitioners are obliged to act honestly. Professional conduct rules and rules of conduct applicable to solicitors and barristers in Victoria impose such an obligation. For example, rule 1.1 of the *Professional Conduct and Practice Rules 2005* provides that: 'A practitioner [solicitor] must, in the course of engaging in legal practice, act honestly.' Similar provisions are contained in the *Victorian Bar Rules of Conduct 2005*.²⁷⁶

Dishonest conduct, including by parties and others engaged in the conduct of litigation, may give rise to various legal remedies and have disciplinary consequences for lawyers.

4.2 THE REQUIREMENT OF MERIT

The overriding obligations incorporate a prohibition on making or responding to any claim, or assisting in the making of or response to a claim, where a reasonable person would be of the belief that the claim or response (as appropriate) is frivolous, vexatious, for a collateral purpose or without merit.

The term 'claim' is intended to include not just the formal pleaded causes of action or defences, but also interlocutory applications and responses to such applications.

The use of a 'reasonable person' test is for the purpose of having an objective standard, rather than one of subjective intent or belief of the relevant participant.

At present there are various rules of court and other legal principles dealing with frivolous and vexatious proceedings and abuse of the court's process.

In some jurisdictions in Australia, legal and/or ethical obligations have been imposed on lawyers requiring that they be satisfied as to the merit of a client's case. In Victoria, the *Legal Profession Act 2004* provides that if a conditional costs agreement relates to a litigious matter 'the agreement must not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely'.²⁷⁷ In NSW, lawyers are prohibited from providing legal services in connection with damages claims or defences which do not have merit.²⁷⁸ There may be costs and disciplinary consequences.

At the Commonwealth level, the *Migration Act 1958* prohibits persons from encouraging litigants to commence or pursue migration litigation if it has no reasonable prospect of success.²⁷⁹ The prohibition applies despite any obligation that the person may have to act in accordance with the instructions or wishes of the litigant.²⁸⁰ There is a prohibition on lawyers filing documents to commence migration litigation unless they certify in writing that there are reasonable grounds for believing that the litigation has a reasonable prospect of success.²⁸¹ Costs orders may be made against lawyers and others engaged in unmeritorious migration proceedings and appeals.²⁸²

Similarly, the *Therapeutic Goods Act 1989* (Cth) provides that a person proposing to bring patent infringement proceedings must certify, before the date of commencement of proceedings, that the proposed proceedings are 'to be commenced in good faith ... have reasonable prospects of success' and 'will be conducted without unreasonable delay'.²⁸³ Proceedings have reasonable prospects of success if the person or persons had reasonable grounds, on the basis of what they knew or ought to have known for believing that they would be entitled to be granted final relief by the court against the other party for patent infringement, for believing that each of the claims of infringement is valid, and the proceedings are not otherwise vexatious or unreasonably pursued.²⁸⁴ If the certificate is 'false or misleading in a material particular', or the person 'breaches an undertaking given in the certificate', pecuniary penalties of up to \$10 million payable to the Commonwealth may be imposed on the person.²⁸⁵

The *Model Rules of Professional Conduct* of the American Bar Association provide that a lawyer 'shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so that is not frivolous'.²⁸⁶ This does not prevent a 'good faith argument for an extension, modification or reversal of existing law'.²⁸⁷ According to the commentary on the rule a claim or defence is not frivolous 'merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery'.²⁸⁸

The commission is of the view that the proposed requirement of legal merit is consistent with an increasing array of ethical and legal provisions governing the conduct of civil litigation and is of critical importance.

4.3 THE OBLIGATION TO ONLY TAKE STEPS TO RESOLVE OR DETERMINE THE DISPUTE

The proposed overriding obligations include a prohibition on the taking of any step in the proceeding in connection with a claim or response to a claim, or assisting in the taking of any step or response to a step, unless the participant reasonably believes that such step is reasonably necessary to facilitate the resolution or determination of the proceeding.

It is clearly desirable for civil proceedings to be conducted in a manner that avoids or minimises undue delay, expense and technicality. A number of civil procedural reforms or legislative provisions²⁸⁹ applicable to particular types of proceedings seek to achieve this through imposing overriding obligations with this objective.

This element of the commission's proposals seeks to focus the attention of participants in civil litigation on the steps reasonably required to facilitate resolution of the issues in dispute and to curtail the taking of steps that do not satisfy this requirement.

4.4 THE OBLIGATION TO COOPERATE

In its earlier draft proposal in respect of overriding obligations the commission proposed that there should be an obligation to act 'in good faith'. At the time, the commission conceded that it had a concern about the vagueness of such an obligation. As noted above, 'good faith' obligations arise in a number of legal contexts at present.²⁹⁰ However, a number of submissions raised concerns about the utility of such an obligation. For example, the Victorian Bar noted that one academic commentator has defined good faith as 'a concept which means different things to different people in different moods at different times and in different places'.²⁹¹

Following further consultations, particularly with the Supreme Court, the commission resolved to replace the obligation to act in good faith with an obligation to 'cooperate'. Under the present proposal, relevant participants in civil litigation would have a duty to cooperate with the parties and the court in connection with the conduct of the proceeding.

274 See Standing Committee of Attorneys General, *Litigation Funding in Australia*, Discussion Paper (2006).

275 See Peter O'Donahoo, Paul Nicholls, Tracey Harrip, Kim Reid and Simon McConnell, *Focus: Commercial Litigation — February 2008* (2008) Allens Arthur Robinson <www.aar.com.au/pubs/ldr/focfeb08.htm> at 25 February 2008.

276 Victorian Bar (2005) above n 91, r 3.

277 *Legal Profession Act 2004* (Cth) s 3.4.28(4) (a). There is a civil penalty for contravention and there may also be disciplinary consequences.

278 *Legal Profession Act 2004* (NSW) ss 345–348; see also its predecessor, *Legal Profession Act 1987* (NSW) ss 198L–198N.

279 *Migration Act 1958* (Cth) s 486E.

280 *Migration Act 1958* (Cth) s 486E(3).

281 *Migration Act 1958* (Cth) s 486I.

282 *Migration Act 1958* (Cth) s 486F.

283 *Therapeutic Goods Act 1989* (Cth) s 26C(3)(a), (b) and (c).

284 *Therapeutic Goods Act 1989* (Cth) s 26C(4)(a), (b) and (c).

285 *Therapeutic Goods Act 1989* (Cth) s 26C(5).

286 American Bar Association, *Model Rules of Professional Conduct* (2007) r 3.1: Meritorious Claims and Contentions <www.abanet.org/cpr/mrpc/model_rules.html> at 8 February 2008.

287 *Ibid.*

288 *Ibid.*

289 See, eg, *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 274.

290 See the discussion above in relation to the duties of parties to litigation.

291 Michael Bridge, 'Does Anglo-Australian Contract Law Need a Doctrine of Good Faith?' (1984) 9 *Canadian Business Law Journal* 385, 407, cited by Gordon J in *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066, 136.



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Statutory or other civil procedural obligations on parties to cooperate in relation to disclosure of documents or information and the conduct of civil proceedings have become increasingly common.²⁹²

Civil procedure expert Neil Andrews has noted the ‘interesting suggestion’ that procedural systems should recognise a duty of cooperation between disputants, even within the pre-action phase.²⁹³ This appears to have developed as part of the Dutch law of civil procedure. He also notes that English pre-action protocols rest on a principle of cooperation between disputants and lawyers, and in England this principle is now accepted by courts and, through practice directions, operates independently of the strict letter on individual pre-action protocols.

In Australia and other jurisdictions in recent years, various professional practices and procedures have been developed in the area of ‘collaborative law’, particularly in family law. This represents a major shift away from traditional adversarial methods for the resolution of disputes.

Collaborative law has been described variously as:

- a diplomatic process of joint problem solving²⁹⁴
- an interest-based negotiation model²⁹⁵
- emphasising ‘client empowerment’²⁹⁶
- a non-adversarial dispute resolution process facilitated by lawyers with the objective of achieving an ethical and enduring settlement for the clients.²⁹⁷

Collaborative law has at its core a number of key features:

- Clients and lawyers sign a contract agreeing to negotiate in ‘good faith’ to resolve a dispute without resort to litigation.
- If the dispute is unable to be resolved by negotiation the lawyers acting for all parties will withdraw and not act for their clients in any litigation proceedings.
- The negotiation process consists of a number of four-way meetings involving the parties and their lawyers together.
- Advice is to be given with the aim of achieving a fair process and just outcomes for both parties.
- The process promotes ongoing communication.
- One objective is to ensure that costs are not incurred unreasonably.²⁹⁸

The process relies on trust and cooperation between lawyers, in particular as disclosure of all documents and information is not subject to the control of court procedures.

At present, a number of professional conduct rules governing the legal profession fall short of imposing an affirmative obligation to cooperate with other practitioners or parties. Duties are often limited to a requirement to be courteous and to refrain from offensive or provocative language or conduct.²⁹⁹ However, civility is a less demanding requirement than cooperation.

4.5 THE OBLIGATION NOT TO MISLEAD OR DECEIVE

The commission’s proposed overriding obligations impose a duty on relevant participants in civil litigation not to:

- (i) engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive, or
- (ii) knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive.

Under the existing law, a number of legal, equitable and ethical obligations apply to various participants in civil litigation. Context influences the nature and extent of these obligations.³⁰⁰

Such obligations include those arising out of tort law in respect of deceit and negligent misrepresentations, and statutory provisions relating to false or misleading and deceptive conduct.

Section 52 of the *Trade Practices Act 1974* (Cth) provides:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 52 of the *Trade Practices Act* is directed to corporations; the counterpart legislation in Victoria (and other states) is directed at the conduct of individuals. Section 9 (1) of the *Fair Trading Act 1999* (Vic) provides:

*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*³⁰¹

Considering that these provisions or other state legislative equivalents³⁰² are among the most litigated statutory provisions in Australia, it is perhaps surprising that there are relatively few cases involving lawyers. Clearly, there are circumstances where a lawyer may be liable for engaging in conduct which is misleading or deceptive.³⁰³ However, the legal requirement that such conduct be in 'trade or commerce' limits the extent of such liability:

*Dealings between lawyers and clients have not, in the usual case, been construed as being in trade or commerce, and plaintiffs who resort to the contrary assumption, it has been said, 'may well be in trouble'.*³⁰⁴

Lawyers may also be liable for aiding and abetting contraventions by their clients.³⁰⁵ The legislation extends liability to 'any person involved in the contravention', which includes a person who 'has aided, abetted, counselled or procured the contravention', or 'has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention'.

Whether conduct is misleading and deceptive for the purposes of section 52 of the *Trade Practices Act* involves an objective test and does not require proof of intention or knowledge.³⁰⁶ Mere inadvertence is sufficient. It has been said 'Honest blundering or carelessness by solicitors may be subject to s 52 liability.'³⁰⁷

The misconception can be caused through oral or written statements, actions or conduct. Failure to act and, in some circumstances, silence may also amount to misleading conduct. In particular, 'conduct' is defined to include refraining from acting.³⁰⁸ Silence will be caught by this definition only if it is deliberate or 'otherwise than inadvertent'.³⁰⁹

Additionally, as noted above, there is a range of professional obligations that specifically apply to lawyers.

The *Model Rules of Professional Conduct and Practice* of the Law Council of Australia 2002 contain various prohibitions on misleading and deceptive conduct. For example, rule 18.1 states:

A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).

Rule 28 states:

A practitioner must not, in any communication with another person on behalf of a client:

- (1) *represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or*
- (2) *make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client.*

Identical rules are incorporated in the *Professional Conduct and Practice Rules 2005* in Victoria. Such rules also require that steps be taken to correct inadvertent false statements:

- 18.2 *A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.*
- 18.3 *A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.*

Relevant provisions of the Victorian Bar Practice Rules are:

Rule 19: A barrister must not knowingly make a misleading statement to a court on any matter.

Rule 20: A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware the statement was misleading.

292 See, eg, *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 279.

293 Neil Andrews, 'The Pre-Action Phase: General Report' (Paper presented at the World Congress of Procedural Law, Salvador, Brazil, 16–21 September 2007).

294 John H Wade, 'Collaborative Lawyering—Some Preliminary Thoughts for Australia' (2004) 16 *Bond Dispute Resolution News*, p 6.

295 Collaborative Law in Australia (2008) <www.collaborativelaw.asn.au> at 5 February 2008.

296 Collaborative Professionals Victoria (2008) <www.liv.asn.au/collablav> at 5 February 2008.

297 Collaborative Professionals Victoria (2008) <www.liv.asn.au/collablav/collaborative-law.html> at 5 February 2008.

298 *Ibid.*

299 See, eg, Law Council of Australia (2002) above n 88, r 21.1.

300 See, eg, *Legal Services Commissioner v Mullins* [2006] LPT 012, 27.

301 Similar to the Commonwealth legislation, there are also provisions dealing with unconscionable conduct and false representations.

302 For example s 42 *Fair Trading Act 1987* (NSW) and corresponding legislation in other jurisdictions.

303 See generally Stephen G. Corones, 'Solicitors' Liability for Misleading Conduct' (1998) 72 *Australian Law Journal* 775.

304 Gino Evan Dal Pont, *Lawyers' Professional Responsibility* (2006) 98 [5.15] referring to *Metcash Trading Ltd v Hourigan's IGA Umina Pty Ltd* (2003) 11 BPR 21, 129 [51] (Young CJ in Eq).

305 See *Trade Practices Act 1974* (Cth) ss 82, 75B; and *Fair Trading Act 1999* ss 145, 159.

306 See, eg, *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1977–1978) 140 CLR 216, 227–228 (Stephen J).

307 Corones (1998) above n 303, 776.

308 See *Trade Practices Act 1974* (Cth) s 4(2) and *Fair Trading Act 1999* s 3.

309 *Trade Practices Act 1974* (Cth) s 4(2)(c).



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Rule 21: A barrister will not have made a misleading statement to a court simply by failing to correct an error on any matter stated to the court by the opponent or any other person.

Rule 9 defines 'court' to include arbitrations and mediations.

Rule 50: A barrister must not knowingly make a false statement to the opponent concerning the facts of, evidence in support of or law applicable to the client's case.

Rule 51: A barrister must take all necessary steps to correct any false statement of the kind referred to in Rule 50 unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.

The *Legal Profession Act 2004* provides that legal profession rules are binding on Australian legal practitioners, incorporated legal practices, multidisciplinary partnerships and locally registered foreign lawyers.³¹⁰

In Queensland rule 325 of the *Uniform Civil Procedure Rules 1999* provides that the 'parties must act reasonably and genuinely in ... mediation'. Rule 23 of the *Rules of the Bar Association of Queensland* provides that 'a barrister must not knowingly make a misleading statement to a court on any matter'.³¹¹ 'Court' is defined to include a 'mediation'.³¹²

At the risk of overgeneralisation, the ethical rules governing the legal profession are largely directed at 'knowingly' false or misleading statements whereas the general statutory provisions in relation to misleading and deceptive conduct contained in Commonwealth and Victorian legislation give rise to civil liability based on objective standards.

In the United States the American Bar Association's *Model Rules of Professional Conduct* include:

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or*
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.*³¹³

The comment on Rule 4.1 states:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

*[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. **Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.** Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.*³¹⁴ (emphasis added)

Interestingly, these provisions appear to countenance a different standard in negotiation compared with the conduct of litigation.

The Law Society of Alberta *Code of Professional Conduct* is an example of a code specifically directed to the lawyer in the role as negotiator. Chapter 11, titled 'The lawyer as negotiator', commences with a statement of general principle:

*When acting as negotiator, a lawyer has a duty to seek a resolution in accordance with the client's instructions, subject to limitations imposed by law or professional ethics.*³¹⁵

The rules which follow state:

1. A lawyer must not lie to or mislead an opposing party.
2. If a lawyer becomes aware during the course of a negotiation that:
 - (a) the lawyer has inadvertently misled an opposing party, or
 - (b) the client, or someone allied with the client or the client's matter, has misled an opposing party, intentionally or otherwise, or
 - (c) the lawyer or the client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,then, (subject to confidentiality ...) the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.
3.
 - (a) A lawyer must not make a settlement offer on behalf of a client except on the client's instructions.
 - (b) A lawyer must promptly and fully communicate all settlement offers to the client.
4. A lawyer must not negotiate an agreement that the lawyer knows to be criminal, fraudulent or unconscionable.
5. When negotiating with an opposing party who is not represented by counsel, a lawyer must:
 - (a) advise the party that the lawyer is acting only for the lawyer's client and is not representing that party; and
 - (b) advise the party to retain independent counsel.³¹⁶

The rules are elaborated on in extensive commentary. For rule 1, which concerns lying and misleading, the commentary states in part:

*The process of negotiation often involves representations as to the extent of a lawyer's authority. For example, a client may authorize a lawyer to settle an action for no more than \$100,000.00. The lawyer may not pretend a lack of authority to offer more than \$50,000.00 or \$75,000.00 or any other amount under \$100,000.00. In response to a direct question about the monetary limits of the lawyer's authority, the alternatives of the lawyer are to respond truthfully or simply decline to answer. The lawyer is not entitled to offer a response intended or likely to create a misleading impression, which would be tantamount to lying.*³¹⁷

On the concept of 'misleading', particularly in relation to rule 2, the commentary states:

*The concept of 'misleading' includes creating a misconception through oral or written statements, other communications, actions or conduct, failure to act, or silence. A lawyer may have provided technically accurate information that is rendered misleading by the withholding of other information; in such a case, there is an obligation to correct the situation. In paragraph (c) of Rule #2, the concept of an inaccurate representation is not limited to a misrepresentation that would be actionable at law.*³¹⁸

The commission's proposed prohibition on misleading and deceptive conduct in connection with civil litigation is consistent with the generally high standards expected of lawyers and provisions of the general law, including statutory provisions applicable to those engaged in 'trade or commerce'.

310 *Legal Profession Act (2004)* s 3.d2.17.

311 The Queensland Bar Association, 2007 *Barristers Rule* (2007) r 23 <www.qldbar.asn.au/index.php?option=com_content&task=view&id=28&Itemid=42> at 8 February 2008.

312 *Ibid* r 15.

313 American Bar Association (2007) above n 286, r 4.1: Truthfulness In Statements To Others.

314 *Ibid*.

315 Law Society of Alberta, *Code of Professional Conduct* (2007) ch 11 <www.lawsocietyalberta.com/files/Code.pdf> at 8 February 2008.

316 *Ibid*.

317 *Ibid*, Commentary on ch 11, r 1.



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4.6 THE OBLIGATION TO USE REASONABLE ENDEAVOURS TO RESOLVE THE DISPUTE

The proposed overriding obligations include an obligation to use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes.

Various civil procedural reforms and legislative provisions applicable to particular types of cases seek to directly or indirectly facilitate the resolution of civil disputes by agreement between the parties. Indirect methods include the express conferral of powers on courts to require litigants to engage in ADR processes, usually mediation. Direct methods include statutory obligations on parties to endeavour to resolve claims.³¹⁹

Courts are increasingly involved in active case management and various forms of ADR are increasingly used and promoted to facilitate the resolution of disputes. Most recently, as noted above, collaborative lawyering agreements are gaining prominence as a new form of ADR, particularly in family law disputes.

Some rules of professional conduct applicable to the legal profession incorporate provisions relating to ADR. For example, in Victoria the *Professional Conduct and Practice Rules 2005* provide that:

*A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.*³²⁰

However, the duty, 'where appropriate', to advise of ADR alternatives is clearly different from the proposed affirmative obligation to use reasonable endeavours to resolve the dispute.

There are of course numerous situations where it may be necessary or appropriate for civil litigation to proceed to a final adjudication of the merits. This includes test cases, public interest litigation and commercial and other cases where there is utility in obtaining a judgment of the court. However, these situations are the exception rather than the norm. The commission is of the view that most parties in most civil litigation prefer a resolution of the dispute rather than a trial with the consequential risks, delays and costs.

4.7 THE OBLIGATION TO NARROW THE ISSUES IN DISPUTE

The proposed overriding obligations include an obligation to use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute.

It is an explicit objective of most formal and informal provisions relating to the judicial management of litigation to achieve a narrowing of the 'real issues' in dispute. The commission's proposed overriding obligations impose this requirement directly on the litigants, lawyers and other relevant participants in civil litigation.

At present, some professional conduct rules applicable to the legal profession explicitly provide for the exercise of forensic judgment to confine any hearing to those issues considered by the lawyer to be the real issues in dispute.³²¹

Also, various legislative provisions or rules of court require parties to endeavour to clarify or narrow the issues in dispute.³²²

4.8 THE OBLIGATION TO MINIMISE COSTS

The proposed overriding obligations include a duty to use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceedings are minimised and proportionate to the complexity or importance of the issues and the amount in dispute.

Cost minimisation and 'proportionality' are key elements of recent civil justice procedural reforms in a number of jurisdictions.

Some legislative reforms have focused on the role of the courts; others have imposed obligations on parties. An example of the latter is the *Workers' Compensation and Rehabilitation Act 2003* (Qld), which imposes overriding obligations on parties 'to avoid undue delay, expense and technicality',³²³ with provision for sanctions for noncompliance. Similar provisions are found in other legislation.³²⁴

4.9 THE OBLIGATION TO MINIMISE DELAY

The proposed overriding obligations include a requirement that relevant participants in civil litigation use reasonable endeavours to act promptly and to minimise delay.

In various contexts and in numerous ways civil procedural reforms and legislative provisions³²⁵ applicable to certain types of proceedings seek to impose overriding obligations intended to achieve the expeditious conduct of proceedings.

At present, various professional conduct rules applicable to the legal profession impose a general obligation to complete legal work with expedition,³²⁶ but such provisions usually do not explicitly apply to the conduct of litigation.

4.10 THE OBLIGATION OF DISCLOSURE

The proposed overriding obligations include a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.

This is not intended to require duplicate disclosure of documents which have already been disclosed under pre-action disclosure obligations or pre-existing orders for preliminary or other discovery.

The provision does not seek to put a specific time frame on disclosure other than the requirement that this be done 'at the earliest practicable time'.

The obligation does not require a party to search for, review or actually disclose the documents themselves. It is intended to facilitate disclosure of the existence of documents which a party is already aware of and only insofar as the party has already considered such documents relevant to any issue in dispute in the proceedings.

The existence of documents which are protected from disclosure, including on the grounds of privilege, is not required to be disclosed.

The commission is of the view that early disclosure of the existence of material documents is an important means of facilitating resolution of disputes, of narrowing issues which may be required to be litigated and in reducing costs and delays. In many instances it is to be hoped that such material documents will already have been disclosed, prior to the commencement of proceedings, through compliance with pre-action protocol requirements. Such pre-action protocols should also facilitate early identification of the real issues in dispute between the parties.

The approach adopted by the commission is consistent with a number of other recent civil justice reforms, both in Australia and in other countries. For example, as discussed in Chapter 6, in a number of Australian jurisdictions there are now requirements for the mandatory disclosure of certain documents prior to, or at the time of, commencement of legal proceedings.

In some jurisdictions early disclosure obligations are considerably more onerous than those proposed by the commission. For example, in the United States rule 26(a)(1)(A) of the *Federal Rules of Civil Procedure* provides that a party must, without awaiting a discovery request, provide to the other parties:

- (i) *the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defences, unless solely for impeachment, identifying the subjects of the information;*
- (ii) *a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defences, unless solely for impeachment;*
- (iii) *a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and*

318 Ibid, Commentary on ch 11, r 2.

319 See, eg, *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 281.

320 *Professional Conduct and Practice Rules 2005*, r 12.3; see also Law Council (2002) above n 88, r 12.3.

321 See, eg, Victorian Bar (2005) above n 91, r 17 (a).

322 See, eg, *Victorian Civil and Administrative Tribunal Act 1998* s 83; *Dust Diseases Tribunal Regulation 2001* (NSW) reg 37; *District Court Rules 2005* (WA) r 40(3); *Rules of the Supreme Court 1971* (WA) O 29A r 11; *Rules of the Supreme Court 1971* (WA) O 31A r 10(4); *Federal Court Rules 1979* (Cth) O 10 r 1(2).

323 *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 274(1).

324 See eg, s 4(2)(e) *Personal Injuries Proceedings Act 2002* (Qld), which provides that one of the purposes of the legislation is to 'minimise the cost of claims'.

325 See, eg, *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 274(2).

326 See eg, *Professional Conduct and Practice Rules 2005*, r 1.2.



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- (iv) *for inspection and copying under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.*³²⁷

Initial disclosure under these provisions is required to be made at or within 14 days after the conference provided for by rule 26(f) unless a different time is set by agreement or court order.³²⁸ Where a party objects at a conference that such disclosure is not appropriate in the circumstances of the action and states the objection in the rule 26(f) discovery plan, the court may then determine what disclosure is to be made and set a time for disclosure.³²⁹

A party is required to provide such initial disclosure 'based on the information then reasonably available to it' and is 'not excused from [making disclosure] because it has not fully [completed its investigation of the case] or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures'.³³⁰ There are additional disclosure obligations in respect of expert witnesses³³¹ and evidence that a party may present at trial.³³²

Parties are required to confer, within a specified time frame, to consider the 'nature and basis of their claims and the possibilities for promptly settling or resolving the case, [to] make or arrange for the [initial disclosure] required by Rule 26(a)(1), [to] discuss any issues about preserving discoverable information and...develop a proposed discovery plan'.³³³ Lawyers and unrepresented parties are obligated to attempt in good faith to agree on the proposed discovery plan.³³⁴

Although in part modelled on the initial disclosure obligations in the US *Federal Rules of Civil Procedure*, the disclosure component of the commission's proposed overriding obligations is far less onerous. It is intended to only require disclosure of the existence of documents already identified by a party as relevant to the issues in dispute in the proceedings. The commission's further proposals for document discovery and disclosure are dealt with in Chapter 6.

Although not preliminary discovery in the sense in which that term is normally used, the commission's proposal in respect of early disclosure of the existence of documents considered by a party to be relevant to the issues in dispute will accelerate disclosure of such information, provide the parties with an early opportunity to consider the strength of the other party's position and help to facilitate settlement.

5. APPLICATION TO ANCILLARY NEGOTIATIONS AND DISPUTE RESOLUTION PROCESSES

The commission's proposed overriding objectives would apply to any ADR process undertaken in relation to any civil proceeding pending in a Victorian court. This is not intended to be limited to 'formal' processes such as mediation, but would also include informal processes, including negotiation.

A number of professional practice ethical rules and legislation in various jurisdictions already make explicit reference to conduct in ADR processes, including mediation and negotiation.

In *Managing Justice* the ALRC suggested that professional practice rules should provide more guidance for lawyers on expected standards of conduct in negotiations in civil matters. In particular, it was recommended that a standard of 'good faith' should be required where lawyers are negotiating on behalf of a client.³³⁵ Although the commission earlier considered the adoption of an obligation to act in good faith as part of the overriding obligations, following consultations this was abandoned in favour of the present obligation to 'cooperate'.

Professional rules relating to honesty are applicable equally to negotiations and mediations as they are to other aspects of legal practice. However, in some circumstances lawyers may not regard the standards applicable to the conduct of litigation as being equally applicable to the more informal processes of mediation and negotiation. Also, some professional practice ethical rules explicitly accept a differing standard in the context of negotiations and mediation.

The commission is of the view that the same high standards proposed for the conduct of civil litigation should apply to any ADR process undertaken in relation to any civil proceedings pending in a Victorian court. The commission does not accept that lesser standards of conduct should be permissible in the context of mediation or in the conduct of negotiations.

5.1 CONFIDENTIAL AND 'WITHOUT PREJUDICE' ADR PROCESSES

Given that the commission's proposed overriding obligations would apply to ADR processes such as mediation and negotiation (when conducted in relation to civil proceedings pending in a Victorian court) it is necessary to consider the fact that the conduct of participants in such processes is often subject to confidentiality agreements or obligations and on a 'without prejudice' basis. As noted below, this is often protected by statute, subject to exceptions.

The without prejudice nature of such conduct is usually understood to mean that for the purpose of the legal adjudication of the dispute, the conduct in issue cannot be invoked for forensic advantage. However, it does not necessarily follow that such conduct may not be relevant for other purposes, including costs sanctions and disciplinary proceedings. In fact, as noted below, certain legislative provisions expressly provide that without prejudice conduct may be taken into account by the court (after the resolution of the dispute) on the issue of costs. The conduct of the legal practitioner which gave rise to disciplinary proceedings in the recent Queensland case referred to above,³³⁶ took place in the context of an otherwise confidential mediation.

It has been suggested that the confidentiality of what happens in negotiations and mediations should be preserved. In this event conduct in contravention of the overriding obligations would not be able to be disclosed, either in connection with costs or in any ancillary proceeding relating to sanctions or other remedies.

The alternative is to allow for exceptions to the protection of confidentiality in certain circumstances. However, the prospect of conduct in settlement negotiations or a mediation being scrutinised by the court raises a range of issues. For example:

- it may inhibit the process of settlement negotiations or mediation in that parties may be reluctant to expose themselves to the risk of subsequent disclosure
- it creates the potential for re-ventilating in court what happened during the course of settlement negotiations or a mediation.
- it raises the possibility of mediators being called to give evidence about what transpired at a mediation.

There are clearly a number of public policy arguments that favour protecting the confidentiality of communications made during settlement negotiations and mediations. These include the view that the parties should be encouraged to settle disputes without fear that information provided may be subsequently used against them. Hence the settlement or mediation process is generally considered subject to confidentiality requirements at common law,³³⁷ in statute³³⁸ and in private contractual agreements.

However, communications in the course of settlement negotiations or mediations are not protected by absolute confidentiality constraints. There are various exceptions and limitations to the protection. These are discussed below.

5.1.1 Current sources of confidentiality

Common law

At common law, 'without prejudice' communications (oral or written) made with the bona fide intention of settling a dispute are inadmissible in court proceedings about the same subject matter without the consent of the parties.

In *Field v Commissioner for Railways (NSW)* the High Court said:

The law relating to communications without prejudice is of course familiar. As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhampered. This form of privilege, however, is directed against the admission in evidence of express or implied admissions. It covers admissions by words or conduct. For example, neither party can use the readiness of the other to negotiate as an implied

327 Fed. R. Civ. P. 26(a)(1)(B) sets out categories of proceedings that are exempt from these initial disclosure obligations.

328 Fed. R. Civ. P. 26(a)(1)(C).

329 Fed. R. Civ. P. 26(a)(1)(C).

330 Fed. R. Civ. P. 26(a)(1)(E).

331 Fed. R. Civ. P. 26(a)(2).

332 Fed. R. Civ. P. 26(a)(3).

333 Fed. R. Civ. P. 26(f)(1), (2).

334 Fed. R. Civ. P. 26(f)(2).

335 ALRC (2000) above n 12, [3.115].

336 *Legal Services Commissioner v Mullins* [2006] LPT 012.

337 See, eg, *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285.

338 See, eg, *Evidence Act 1958* s 21L, 21M; *Evidence Act 1995 (NSW)* s 131(1); *Evidence Act 2001 (Tas)* s 131(1).

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*admission. It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence. But it is concerned with the use of the negotiations or what is said in the course of them as evidence by way of admission. For some centuries almost it has been recognised that parties may properly give definition to the occasions when they are communicating in this manner by the use of the words 'without prejudice' and to some extent the area of protection may be enlarged by the tacit acceptance by one side of the use by the other side of these words.*³³⁹

It is notable that the Court drew the distinction between, on the one hand, admissions by words or conduct made in negotiations that are protected from subsequent admission in evidence and, on the other, objective facts ascertained in negotiations that are not protected.

This issue was more recently considered in a mediation context in the Supreme Court of NSW in the case of *789TEN v Westpac*.³⁴⁰ Justice MacDougall said:

*I think that the analogy between without prejudice discussions and mediation is compelling. I do not think that the relative formality of the latter process affords a relevant ground of distinction. Nor do I think that the perceived need for greater frankness in the latter process does so. **There is no compulsion on a party to disclose information for the purposes of mediation. If a party wishes to protect itself from the consequences of disclosure, it is open to it to seek to do this by an appropriately drafted mediation agreement. If the parties do not do so, I do not think that, on policy grounds, the Court should do it for them ...***

In any event ... I would conclude that the relevant privilege requires a distinction to be drawn between communications (written or oral) and the information contained in them ... Any attempt to extend the common law privilege from statements or documents to information contained in them would raise well nigh insuperable problems. [emphasis added]

In this case Justice MacDougall highlighted the limitations of the without prejudice privilege and the potential for the subsequent disclosure of factual material unless there is a mediation agreement precluding this.

Another apparent example of an exception to the without prejudice privilege is statements made in the course of negotiations that amount to misleading and deceptive conduct within the meaning of section 52 of the *Trade Practices Act 1974* (Cth). In *Quad Consulting Pty Ltd v David R Bleakley & Assoc* Justice Hill observed:

*It seems to me that if, in the course of 'without prejudice' negotiations, a party to those negotiations engages in conduct which is misleading or deceptive or likely to mislead or deceive contrary to s 52 of the Trade Practices Act and as a result the other party to the negotiations relying, for example, upon the misleading or deceptive conduct suffers loss, proof of the negotiations should not be rendered impossible by the 'without prejudice' rule. There is, in such a case, no longer the same subject matter in dispute between the parties as was in dispute at the time of the negotiations. A fortiori where the party suffering damage was not at all a party to the negotiation. The public policy to be found in Pt V of the Trade Practices Act is not to be rendered nugatory by permitting a party to hide behind the fact that his or her conduct, which is misleading or deceptive conduct, occurred during the course of 'without prejudice' negotiations. A party cannot, with impunity, engage in misleading or deceptive conduct resulting in loss to another under the cover of 'without prejudice' negotiations.*³⁴¹

This position is now reflected in section 131(2)(i) of the *Uniform Evidence Act*, which is discussed below.

Statutory requirements of confidentiality

Section 21L of the *Evidence Act 1958* provides for confidentiality of mediation conferences. Evidence of anything said or of admissions or agreements made at, or documents prepared for the purpose of, a conference with a mediator with a dispute settlement centre is not admissible in any court or legal proceedings, except with the consent of all persons present at the conference. Section 21M imposes

confidentiality constraints on mediators, members, employees of and persons working with or for dispute settlement centres. Section 21L exempts mediators and others working with or for dispute settlement centres from liability for things done in good faith for the purpose of a conference with a mediator.

Section 131(1) of the Uniform Evidence Act (which is soon to come into force in Victoria) provides that evidence is not to be adduced of a communication made in connection with an attempt to negotiate a settlement of a dispute, including communications made with third parties. The section applies only to civil matters, and not to negotiations concerning criminal charges.

In the joint Uniform Evidence Act report, the Australian, NSW and Victorian Law Reform Commissions considered whether mediations fall within the scope of section 131.³⁴² They concluded that the section applies to communications in mediations, other than court-ordered mediations, which are typically covered by the legislation of the court.³⁴³

A number of exceptions to the confidentiality constraints in section 131(1) are set out in sub-section (2), including:

- where the parties consent
- where the substance of the evidence has been disclosed
- where the communication included a statement to the effect that it was not to be treated as confidential
- where the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute
- where the communication is relevant to determining liability for costs
- where making the communication affects a right of a person
- where the communication was made in furtherance of the commission of a fraud or an offence.

These exceptions have been developed along similar lines to those established under the common law³⁴⁴ and have been said to apply to

*communications which are of a criminal or tortious nature, or are capable of affecting rights and liabilities (such as—acts of bankruptcy, defamatory statements, illegal threats, the election of alternative courses of action); and open offers of settlement.*³⁴⁵

Notably, the exception in section 131(2)(i) concerns the making of a communication affecting a right of a person. Possible examples are:

- defamatory statements
- acts of bankruptcy
- threats (constituting a tort or a crime)
- misleading and deceptive conduct contrary to section 52 of the *Trade Practices Act 1974* (Cth) or the state equivalent
- the exercise of an option
- a contractual offer
- conduct amounting to an election.³⁴⁶

Such a right has been held to be an existing right, not a right coming into existence on the making of a communication.³⁴⁷

The exception concerning a communication relevant to determining liability for costs has been considered in numerous cases. In *The Silver Fox Pty Ltd v Lenard's Pty Ltd (No 3)*³⁴⁸ the applicants successfully tendered affidavit evidence of a communication at a mediation to justify their application for costs of the proceeding. This was despite the fact that the mediation agreement imposed obligations of confidentiality. When considering sub-section 131(2)(h), which provides the relevant exception to section 131(1), Justice Mansfield observed:

Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations—whether private or by mediation—are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations to explore resolution of proceedings should not

339 (1957) 99 CLR 285, 291–292.

340 [2004] NSWSC 594,[27]–[29].

341 [1990] 98 ALR 659, 666 (Hill J).

342 ALRC, NSWLRC and VLRC, *Uniform Evidence Law: Report*, Australian Law Reform Commission Report No 102 (2005).

343 *Ibid* [15.173]–[15.175].

344 *Ibid* [15.168].

345 Australian Law Reform Commission, *Evidence*, Final Report (interim) No 26, Vol 1 (1985) [891].

346 Stephen Odgers, *Uniform Evidence Law* (6th ed, 2004) 545.

347 *Glass v Demarco* [1999] FCA 482, [10] (Emmett J).

348 [2004] FCA 1570.



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be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of s 131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of the expression 'without prejudice' or by a mediation agreement.³⁴⁹

Statutory confidentiality in mediations

Some federal and state statutes provide that mediations in certain contexts are confidential, that evidence of anything said or done or of any admission made in the mediation is not admissible in court proceedings, and/or that documents prepared for the purposes of, or in the course of, or pursuant to the mediation are also inadmissible.

For example, section 53A of the *Act 1976* (Cth) provides for referral of the proceedings in the court, or any part of them or any matter arising out of them, to mediation (or arbitration). Section 53B provides:

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

- (a) **in any court** (whether exercising federal jurisdiction or not); or
- (b) **in any proceedings** before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence. [Emphasis added]

Section 53C relevantly provides that a mediator has, in mediating anything referred under section 53A, the same protection and immunity as a judge has in performing the functions of a judge. Therefore, in a court-ordered mediation in the Federal Court the mediator is immune from actions for negligence and is not a compellable witness.

In a further example, in NSW, section 15 of the *Farm Debt Mediation Act* (1994), in its original form, provided:

- (1) *Evidence of anything said or admitted during a mediation session and a document prepared for the purposes of, in the course of or pursuant to, a mediation session are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.*
- (2) *In this section, mediation session includes any steps taken in the course of making arrangements for a mediation session or in the course of the follow-up of a mediation session.*

Section 16 of the Act provides a penalty for disclosure of information obtained in a mediation session, with defined exceptions.

In a number of cases issues have arisen as to the terms of agreements purportedly reached at mediations or in connection with the enforcement or rectification of agreements purportedly reached.³⁵⁰ Following a review of the legislation the Act was amended by the *Farm Debt Mediation Amendment Act 2002* (NSW) with effect from 3 March 2003. The amendments included the introduction of section 15(3), which excludes from the confidentiality constraints heads of agreement, any contract, deed, mortgage or other instrument entered into as a result of or pursuant to heads of agreement and a summary of the mediation (under section 18A).

The rationale for the confidentiality provisions was reviewed in a recent decision by Justice Bergin of the NSW Supreme Court:

Gain v Commonwealth Bank of Australia was a case in which settlement was not achieved at mediation. Gleeson CJ observed that the provisions of s 15 were to encourage candid discussions at mediations and remove the risk of having what is said at mediations used against participants, 'if the mediation does not result in settlement' (at 256). The policy identified by Gleeson CJ is particularly directed to the protection of participants in an unsuccessful mediation from having disclosures or admissions made during the mediation used against them when the dispute is litigated. The need for such a policy in relation to successfully mediated disputes is not as clear. However, parties who have reached a mediated settlement may, for various reasons, wish to keep their negotiations

confidential, for instance to protect sensitive commercial information.

Matters peripheral to the dispute between the parties may also be the subject of discussion at the mediation. Indeed, matters relevant to disputes between a participant to the mediation and some third party may be the subject of discussion. It may even be the case that statements adverse to the participant's interests in that other dispute may be disclosed. There may be all sorts of things discussed at mediation, both innocuous and damaging that the parties may wish to keep confidential. If parties to the mediation were cognisant of the prospects of disclosure of their discussions should they succeed in reaching agreement at the mediation, the candid nature of the discussions would probably be compromised. This may lead to fewer settlements being achieved or more mediations being adjourned, in both instances adding to the additional costs of the parties.³⁵¹

Although these policy considerations are important there are also other relevant policy considerations. The availability of sanctions for dishonest or misleading and deceptive conduct in the course of mediations or negotiations and the absence of statutory confidentiality constraints in respect of such conduct may have a beneficial impact on the behaviour of participants and the integrity of the processes.

In Victoria limitations are imposed on the admissibility of evidence of anything said or done at a court-ordered mediation, unless the parties agree.³⁵² For example section 24A of the *Supreme Court Act 1986* provides:

Where the court refers a proceeding or any part of a proceeding to mediation, unless all the parties who attend the mediation agree otherwise in writing, no evidence shall be admitted at the hearing of the proceedings of anything said or done by any person at the mediation. [Emphasis added]

It is notable that this section is narrower than the Federal Court provision (and the NSW provisions). For instance, the *Supreme Court Act* only makes the evidence of what is said or done at the mediation inadmissible at the hearing of the proceeding, while the *Federal Court of Australia Act 1976* (and the NSW provisions) makes it inadmissible in any court or other proceedings. Arguably, therefore, evidence arising out of a Supreme Court ordered mediation would not be afforded statutory protection in another related proceeding or in an action arising out of the conduct of the participants in the negotiations or mediation. This could include an action against the mediator,³⁵³ the legal representatives or the parties.

In NSW the broad confidentiality provisions previously found in the *Supreme Court Act 1970* (NSW) have been superseded by the provisions of the *Civil Procedure Act 2005* (NSW), which are also broad.³⁵⁴

349 *The Silver Fox Pty Ltd v Lenard's Pty Ltd* (No 3) [2004] FCA 1570, [36].

350 See, eg, *Commonwealth Bank of Australia v McConnell*, Rolfe J, unreported, Supreme Court of NSW, 24 July 1997; *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252; *State Bank of NSW v Freeman*, Badgery-Parker J, unreported, Supreme Court of NSW, 31 January 1996; *ANZ Bank v Ciavarella* [2002] NSW Supreme Court 1186 (Acting Justice Macready); *Wentworth v Rodgers* [2004] NSWSCA 109 (Hodgson JA); *Johnston v ANZ Banking Group Ltd*; *Johnston v Richardson* [2004] NSWSC 363 (Grove J). See also *Cassegrain v Commonwealth Development Bank of Australia Ltd* [2003] NSWSC 260 (Sheller, Ipp and McColl JJA).

351 *Hurworth Nominees Pty Ltd v ANZ Banking Group Limited* [2006] NSWSC 1278 at [33]–[34].

352 *Supreme Court Act 1986* s 24A; *Supreme Court (General Civil Procedure) Rules 2005* r 50.07(6); *County Court Act 1958* s 47B; *County Court Rules of Procedure in Civil Proceedings 1999* r 50.07(7); *Magistrates' Court Act 1989* s 108(2); *Magistrates' Court Civil Procedure Rules 1999* rr 22.02, 22A.08; see also *Evidence Act 1958* ss 21K–21M, referred to above.

353 For instance, for negligence as in *Tapoohi v Lewenberg* (No 2) [2003] VSC 410. In court-referred mediations s 27A of the *Supreme Court Act 1986* confers immunity from suit on mediators.

354 See *Civil Procedure Act 2005* (NSW) ss 29, 30, 31. See the discussion by Gzell J in *Owners Corporation Strata Plan 62285 v Betona Corporation (NSW) Pty Ltd* [2006] NSWSC 216.



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Contractual confidentiality

Commonly, parties to private mediations (that is, mediations other than those ordered by the court) attempt to bind all participants to contractual confidentiality provisions to prevent use and disclosure of communications and information obtained during a mediation.

5.1.2 Current exceptions to confidentiality obligation

As noted above, some statutory provisions provide for limitations on confidentiality and/or exceptions to inadmissibility where there is consent of the parties.³⁵⁵ Other statutory exceptions to confidentiality relate to allegations of fraud, information about criminal offences and competing disclosure obligations under Commonwealth or state legislation.

5.1.3 Proposed 'overriding obligations' and obstacles to establishing breach

In the context of negotiations and mediations, the proposed statutory overriding obligations—to act honestly, to cooperate and not to engage in conduct which would mislead or deceive—in large measure restate obligations found to some extent in various existing sources such as ethical rules, statutes and rules of court.

The imposition of standards of behaviour specific to mediations is not entirely novel. There are already a number of statutory provisions that require parties to participate in 'good faith' in a mediation.³⁵⁶ For example, section 27 of the *Civil Procedure Act 2005* (NSW) provides that it is the duty of each party to proceedings that have been referred to mediation to participate, in good faith, in the mediation. Section 11 of the *Farm Debt Mediation Act 1994* (NSW) also provides that the parties are required to 'mediate in good faith' or take part in 'mediation in good faith'.

Although neither of these Acts imposes sanctions for breach of the duty of good faith, provisions in other legislation do.³⁵⁷ Where such legislation prohibits admission of anything said or done or any admission made at a mediation, there would appear to be considerable difficulties in establishing breach of the duty. This obstacle was noted in *Rajski v Tectran Corp Pty Ltd*³⁵⁸ by Justice Palmer, in considering provisions of the *Supreme Court Act 1970* (NSW):³⁵⁹

There is a problem, I concede, with applying s 110(4) and s 110(5) so as to exclude evidence as to what transpired at a mediation in all proceedings other than as provided in subs (6). S 110L provides that it is the duty of each party to proceedings referred to mediation under s 110K to participate in good faith in the mediation. Pt 7B of the Act does not prescribe what remedy is afforded either to the Court or to a party where another party to the mediation deliberately disobeys the statutory injunction to participate in good faith. Is the Court to be powerless to enforce the section? If not, by what evidentiary means is the Court to ascertain whether there has been deliberate disobedience? Is the Court to regard s 110L as having no consequences, punitive or otherwise, if it is flouted?

*These are questions which, according to the argument which has taken place before me today, are not yet decided by authority. Nothing is said about these questions in Pt 7B of the Act or in the Supreme Court Rules which throws any light upon possible answers.*³⁶⁰

A similar problem could arise in relation to the proposed 'overriding obligation' provisions. It may be necessary to rely on evidence of what had been said or done in negotiations or at mediation for the purpose of establishing breach.

5.1.4 Alternative options

The issue of confidentiality in ADR processes may be dealt with in a number of different ways. Different considerations may arise depending on whether the mediation is ordered by the court or is conducted privately pursuant to an agreement between the parties.

One alternative is to make no change to the existing confidentiality and admissibility provisions. In the event of proceedings for alleged breach of the overriding obligations, attempts to adduce evidence of what had transpired in settlement negotiations or at a mediation would be subject to the constraints and exceptions that currently exist at common law or pursuant to statute, including the provisions of the Uniform Evidence Act which are soon to come into force in Victoria. Court-ordered mediations would be subject to the terms of the relevant statutory provisions and court rules. Private mediations would also be subject to the terms of any confidentiality agreement.

A second alternative would be to provide for a list of exceptions to the general rules governing admissibility for the purpose of proceedings for alleged breach of the overriding obligations.

A third alternative would be to confer on the court discretion to allow evidence for the purpose of proceedings for alleged contraventions of the overriding obligations, to overcome any legal constraints on the admissibility of evidence in such proceedings.

The commission is of the view that evidence of alleged contraventions of the overriding obligations in the context of ADR processes, including mediation and negotiation, should be admissible in any proceedings arising out of such alleged contraventions. Similarly, evidence should be admissible of conduct in breach of the overriding obligations where this is relevant to orders for costs in the proceedings where the matter proceeds to judgment because of a failure of the parties to reach agreement.

There would appear to be little purpose in providing for standards of conduct and remedies for breach if evidence to establish the contravention is not admissible. The fact that leave of the court would be required before proceedings for sanctions or other remedies could be instituted in connection with alleged contravention of the overriding obligations provides one safeguard.

6. RESPONSES TO THE COMMISSION'S PROPOSALS

The commission's draft proposals in relation to overriding obligations were incorporated in Exposure Draft 1. Individuals and organisations were divided in their responses. Divergent views were also expressed in consultations with judicial officers, members of the profession and consumer and business organisations. This divergence of viewpoint was reflected in both general views about the desirability of introducing such overriding obligations and in comments on particular elements of the draft proposals.

Following further consideration, and in light of the responses received through submissions and consultations, the draft proposals were significantly modified, as noted in various parts of this chapter. The test for determining legal merit has been changed; a duty to 'cooperate' has been substituted for the duty to act in good faith; applications for sanctions for alleged breach of the overriding obligations have been made subject to obtaining leave of the court and it is presently proposed that the sanctions should not come into force until 12 months after the overriding provisions become operative. The provisions are not intended to apply to fact witnesses and only a limited number of the obligations would be applicable to expert witnesses.

The views of various stakeholders on aspects of the commission's proposals, as reflected in submissions and consultations, are referred to above. Additional views are summarised below. Views on the general desirability of introducing overriding obligations are considered before comments on particular aspects of the proposals.

6.1 SUPPORT FOR THE PROPOSALS

General support for the proposed overriding obligations was based on a number of arguments, including those summarised below.

- The provision clarifies duties and provides a statement of their overriding effect. This will reduce the potential for conflict between existing obligations, including duties to clients and to the court.
- At present, codes of conduct, practice rules and responsibilities and obligations are diffuse. The other obligations on participants in litigation are ad hoc and located in various sources. It is desirable to bring the obligations of fundamental importance together in a single statement and to give it prominence.
- It is desirable to create a statutory statement of the paramount duty to the court. A statement of this type in statutory form does not currently exist in Victoria. The proposed provision would restate the duty (which already exists for some participants, such as lawyers and expert witnesses) and would also clarify the meaning of the duty, give it renewed emphasis and reinforce its fundamental importance. It would also extend the duty to other participants in the civil justice system who would then have a clear duty to the administration of justice and, in particular, to conduct litigation according to high standards.
- A number of the proposed duties do not currently exist, certainly not in statutory form.

355 See, eg, *Supreme Court Act 1986* s 24A (referred to above).

356 See eg, *Land and Environment Court Act 1979* (NSW) s 61E (now repealed); *Dust Diseases Tribunal Regulation 2001* (NSW) regs 35(2), 35(3); *Water Act 1912* (NSW) s 170B(5); *District Court Rules 2005* (WA) r 40(3); *Uniform Civil Procedure Rules 1999* (Qld) r 325; *Workers Rehabilitation and Compensation Act 1988* (Tas) s 42K; *Family Law Act 1975* (Cth) s 60; *Family Law Rules 2004* (Cth) sch 1, pt 1, r 1(1); *Administrative Appeals Tribunal Act 1975* (Cth) s 34A(5); *Workplace Relations Act 1996* (Cth) s 696(6).

357 See, eg, *Dust Diseases Tribunal Regulation 2001* (NSW) reg 46(3)—the Tribunal may decline to include costs of mediation in an award of costs if the Tribunal is satisfied that the party in whose favour the award is to be made did not participate in good faith in the mediation; *Uniform Civil Procedure Rules 1999* (Qld) r 331(3)—the mediator's certificate may indicate that a party did not attend the mediation; *Rules of the Supreme Court 1971* (WA) O 29A r 11(5)(b), O 29 r 3(2)(b)—a mediator may report to the court on failure by a party to cooperate in a mediation conference, but the report is not disclosed to the trial judge except for the purposes of determining costs; *District Court of Queensland Act 1967* (Qld) s 98(2)—if a party impedes the ADR process, the court may impose sanctions including, for example—(a) ordering that any claim for relief by the defaulting party is stayed until further order; and (b) taking the party's action into account when awarding costs in the proceeding or in another related proceeding; *Family Law Rules 2004* (Cth) sch 1 pt 1 r 1(3)—failure to make a genuine effort to resolve disputes at ADR may attract cost penalties or other sanctions, and r 2(3) provides that the court can consider parties' participation in ADR when making general orders as to costs and case management.

358 [2003] NSWSC 476.

359 Which preceded relevant provisions of the *Civil Procedure Act 2005* (NSW).

360 [2003] NSWSC 476, [20]–[21].



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- A code of conduct alone will not necessarily improve standards of behaviour, but it may provide a normative framework that will underpin conduct. For instance, in its submission the Supreme Court suggested:

*The moral force of defined standards and obligations serves a useful purpose in and of itself. The current obligations, even when not accompanied by sanctions for breach, guide participants in their behaviour and provide a concrete basis for argument by parties and action by the Court. For example, Rule 1.14 has operated to guide the Court in making orders for the conduct of trials.*³⁶¹

- Using the government model litigant guidelines as a template, it is desirable to expand such a concept to all participants in the civil justice system. At present the Victorian model litigant guidelines do not have the force of law and there is no clearly defined mechanism for enforcement. The proposed provisions would address both the expansion of a code of conduct and the introduction of a regime of sanctions to ensure effectiveness.
- A statement of obligations may be useful as an educative tool. For instance, it may help participants understand what is expected of them. It may also assist the court in the management of the behaviour of those involved in litigation. Lawyers may rely on it to provide an explanation to clients of acceptable and unacceptable conduct.
- Because lawyers' duties are legal and ethical, the enforcement system is spread between the courts and professional and regulatory bodies. Where breach of an obligation relates to a particular matter before the court, enforcement by the court would be more direct and less expensive than other methods of imposing sanctions.
- The application of a single statement of overriding obligations would also provide consistency across all Victorian courts. The overriding obligations provision would apply across the board—whatever the court or list, whatever the level of case management. It would address issues of lack of uniformity across courts, providing one statement of general application and fundamental importance that would apply to all experts, as well as other participants.
- The proposal will help to combat persistent complaints about conduct in litigation.

In general terms, there was significant support for the proposed overriding obligations from judicial officers, numerous law firms, Australia's largest commercial litigation funder, and representatives of various organisations, including consumer bodies, community legal centres and public interest organisations.

6.2 OPPOSITION TO THE PROPOSALS

General arguments against the adoption of overriding obligations include those summarised below. A number of these arguments were directed at aspects of the draft proposals, which have subsequently been modified by the commission in the light of submissions and consultations.

- It is unworkable and inappropriate to have a single set of obligations which are owed between each of the participants. Rather it is preferable to have a smaller number of obligations imposed on all participants, for example a paramount duty to the court, a duty to act cooperatively and a duty not to mislead or deceive. The remaining duties could be imposed on the parties and the lawyers.
- Imposing duties which would be owed to the opposing side in litigation would be a controversial step.
- The obligations are potentially in conflict with existing obligations. For instance, there could be inconsistency between the obligation to make full and early disclosure and lawyers' duty to act in accordance with the instructions of their clients.
- A 'one size fits all' approach is inappropriate. It imposes obligations with serious consequences on everyone, including participants who may have little experience of the civil justice system or who may be unrepresented and have little opportunity for education about the process.

- The provision may lead to collateral litigation, with time spent debating the meaning of the obligations. Similar problems have arisen with Rule 11 of the *US Federal Rules of Civil Procedure*.
- The provision may pose problems for practical implementation. For instance, how is it proposed that enforcement proceedings would be brought? Would it be a summary procedure or would a separate proceeding be required? Who would 'prosecute'? How would evidence be gathered?
- It is not clear how these obligations sit with the adversarial nature of litigation and with the obligations to look after interests of the client. If everyone has an overriding obligation to the court, is required to act truthfully and reasonably, to draw the court's attention to all relevant factual information, legal authorities and statutes and to make no attempt to mislead the court, would this still allow for the presentation of a case in the most favourable light?

There was a general lack of support for the proposed overriding obligations from several business groups or organisations, a number of law firms and the Law Institute of Victoria. Some submissions raised issues about particular aspects of the proposal.

- The Law Institute of Victoria was of the view that 'existing legal obligations as well as commercial realities and ethical duties to ensure costs and delays are minimised are sufficient'.³⁶² A number of other commentators contended that the proposals were unnecessary because of the existence of present standards of honesty, overriding duties to the court, regulatory regimes applicable to practitioners and the existing powers of the court to manage litigation and to deal with frivolous or vexatious proceedings.
- Victoria Legal Aid was not convinced of the necessity for the proposal and raised concerns about the potential to add to the 'administrative burden of litigation and increase costs of justice'.³⁶³
- The Victorian Bar raised concern about various aspects of the earlier draft proposals and was of the view that there was no need to go beyond the NSW approach of introducing a statutory overriding purpose 'to remind parties of their duties in the conduct of litigation'.³⁶⁴
- In a number of submissions community legal centres and public interest bodies raised concerns at the prospect of abuse of the sanctions provisions. Some submissions addressed particular problems that might be experienced by self-represented litigants, those from disadvantaged and marginalised communities and from culturally and linguistically diverse backgrounds. This was said to give rise to the potential for abuse by more powerful parties.
- Although supporting the proposal, law firm Maurice Blackburn suggested that the 'proposals should provide, and the courts must be vigilant to ensure, that [the proposed changes] do not increase the ability of large, determined litigants to obfuscate, delay and increase expense'.³⁶⁵
- While generally supportive of a proposal that imposes obligations on participants in litigation, the Supreme Court of Victoria noted that:

*Imposing a regime of sanctions for breach of obligations in addition to those which already exist within legislation and Court rules, introduces a number of difficulties, such as investigation in order to attribute fault, satellite litigation, conflicts of interest, interpretation and interaction with existing powers and professional conduct regimes.*³⁶⁶

- Law firm Clayton Utz expressed the view that the imposition of overriding obligations represents a *statement of principle with which few responsible persons would take issue but which ... presents serious challenges in terms of both (a) the law's ability to control human behaviour ... while still maintaining individual personal responsibility for outcomes; and (b) preserving the inherently adversarial nature of the common law dispute resolution process.*³⁶⁷

361 Submission CP 58 (Supreme Court of Victoria) citing *Popovic v Herald and Weekly Times* [2002] VSC 174, [72]-[73]; *Herald and Weekly Times v Popovic* [2003] VSCA 161, [178]-[181] and [490]-[494]; *Kennedy Taylor Pty Ltd v Grocon* [2002] VSC 32, [19]; *Altmann v Dunning* [1995] 2 VR 1, 17.

362 Submission CP 18 (Law Institute of Victoria).

363 Submission ED1 25 (Victoria Legal Aid).

364 Submission ED1 24 (Victorian Bar).

365 Submission ED2 19 (Maurice Blackburn).

366 Submission CP 58 (Supreme Court of Victoria).

367 Submission ED1 18 (Clayton Utz).



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6.3 SPECIFIC ASPECTS OF THE OVERRIDING OBLIGATIONS

In a number of submissions, and in the course of consultations, discussion focused on particular aspects of the proposed overriding obligations. A number of the issues raised are discussed below.

6.3.1 Witness immunity

Concern was expressed that if the imposition of obligations by participants in civil litigation to each other carries with it the right of participants to take private action for breach of those obligations, witness immunity (and the substantial public policy reasons underlying it) will be imperilled. As noted above, the commission has decided that the overriding obligations would not apply to fact witnesses and that only some of the obligations should be applicable to expert witnesses.

6.3.2 Regulatory burden

A number of submissions raised concern about the additional regulatory burden that the overriding obligations would impose on participants in civil litigation. The commission is of the view that having a set of clearly defined high standards uniformly applicable to key participants in the civil litigation process in publicly funded courts is a more desirable policy objective than the current patchwork of statutory, common law, ethical and other provisions, which are of restricted application and which provide for only limited if any enforcement mechanisms by the courts themselves.

It is accepted that some of the obligations sought to be imposed by the overriding obligations overlap with or duplicate other legal or ethical duties imposed on some participants. However, the regulatory regime proposed by the commission seeks to resolve existing tensions between duties, particularly those imposed on the legal profession, by providing for overriding obligations to the administration of justice which seek to give greater force to what is currently generally accepted as a paramount duty to the court.

6.3.3 Satellite litigation and sanctions

The commission is very mindful of concerns raised about the undesirability of satellite litigation, ie, litigation arising out of the conduct of litigation, and about the potential scope for abuse of the remedies and sanctions. Accordingly, the final proposals were modified to introduce a requirement to obtain leave of the court before applications for sanctions can be pursued and to introduce a gap of 12 months between the date of the obligations coming into force and the availability of mechanisms for enforcement.

6.3.4 Existing regulation of lawyers

Some commentators raised issues about the relationship between the proposed overriding obligations and existing provisions regulating the conduct of legal practitioners. For example, the Legal Services Commissioner raised concerns that the reform proposals 'may result in systems which overlap and hence ... create confusion for consumers and lawyers alike'.³⁶⁸ These and other concerns gives rise to various issues, which are addressed below and in other parts of this chapter.

As already noted, a number of the proposed overriding obligations are in fact based on legislative provisions applicable to the legal profession in various Australian jurisdictions. However, some of these provisions (eg, obligations to be satisfied about merit) are limited to particular types of litigation or particular types of fee arrangements. The commission is of the view that there is little policy justification for confining such obligations to particular types of fee arrangements (eg, where it is proposed to charge a success fee) or to limited categories of litigation (eg, damages actions or migration cases). The commission considers that a set of uniform standards applicable to all types of litigation is more desirable and less confusing than the existing patchwork of provisions.

Many recent civil procedural reforms in Australia and elsewhere have sought to have an impact on the conduct and practices of the legal profession and parties to litigation. Unlike some other reforms, which seek to impose direct obligations on the courts and corresponding but indirect obligations on lawyers and parties to assist the court, the commission is of the view that it is preferable to impose such obligations directly on the key participants.

The commission's proposals are also directed at conduct which is at present not the subject of high normative standards, and at key participants who are outside the ambit of obligations which are limited to lawyers. It is considered that the articulation of high standards will have important behavioural and cultural consequences for the conduct of civil litigation.

As noted in various parts of this report, the existing regulatory provisions applicable to lawyers are problematic in a number of respects. There is tension between the obligation to act in a client's best interest³⁶⁹ and the obligation to the court. In the case of incorporated legal practices listed on the stock exchange there is potential for conflict between the obligations of lawyers conducting the legal practice and the obligations owed by the business to shareholders. In-house lawyers employed by organisations or entities which may themselves be litigants may be subject to competing demands in their roles as litigators and as employees. Moreover, the desire of most private legal practices to maximise profitability, including in the conduct of litigation, gives rise to potential incompatibility with the desires of clients and the demands of professional obligations owed as officers of the court. The overriding obligations proposed by the commission seek, at least in proceedings in publicly funded courts, to unequivocally give primacy to the administration of justice and to require high standards of conduct by all key participants in the civil litigation process.

State and federal governments have seen fit to superimpose similar 'model conduct' obligations on both government and private lawyers engaged in the conduct of civil litigation on behalf of governments and their instrumentalities and agencies.

It is to be hoped that there will not be a proliferation of satellite proceedings and professional conduct complaints arising out of alleged contraventions of the overriding obligations. Satellite proceedings should be curtailed by the imposition of a leave requirement, but the commission has not considered it appropriate to incorporate a provision dealing with whether noncompliance on the part of lawyers may amount to either unsatisfactory professional conduct or professional misconduct.³⁷⁰ This would be a matter for determination by relevant regulatory bodies, principally the Legal Services Commissioner. However, in its submission the commercial litigation funder, IMF Australia, contended that compliance with the overriding obligations by lawyers ought to be considered as a professional conduct obligation and that any breach should be professional misconduct. According to IMF, '[t]o do otherwise would seriously limit the benefits available from the reform'.³⁷¹

6.3.5 Impact on those exercising control or influence over litigation

A number of submissions raised particular issues about the application of the proposed statutory obligations to insurers, litigation funders and others exercising control or influence over the conduct of parties to civil litigation.

Australia's largest commercial litigation funder, IMF Australia, supported the application of the overriding obligations to litigation funders, insurers and other persons who have influence over the conduct of parties in litigation. IMF contended that in order to make funders and insurers accountable to the court for their overriding obligations they should be obliged to inform the court, at the commencement of the proceedings, of their identity, the fact that they will be funding the litigation and the terms of that funding.³⁷² The issue of disclosure is dealt with further in Chapter 6 of this report.

Law firm Clayton Utz raised the question of whether the overriding obligations (and in particular the previously proposed obligation to act in good faith) may conflict with the implied contractual duty of good faith which insurers have to their policyholders.³⁷³ It contended that insurers, like litigation funders, are 'effectively professional litigants who generally have a detailed understanding of the process and have no economic incentive to protract it, or to take points which lack merit and are ultimately likely to be determined against them'.³⁷⁴ It suggested that disputes are likely to arise between the insurer and the insured in areas such as product liability and professional negligence, given the insurer's desire to adopt a pragmatic approach to litigation and settle cases rather than allow the insured to have their day in court. In contrast, the insured may have an 'economic and reputational interest invested in the outcome of the litigation, over and above damages or costs exposure', which would be met by the insurer.³⁷⁵ The submission suggested that in product liability class actions in particular the intransigent defendant is more likely to be a corporation, which may or may not have insurance to call on, but which 'faces a substantial risk over and above what may be covered by its policies and which also has an interest, which may or may not ultimately be justified, in vindicating its product'.³⁷⁶

The explicit recognition of such divergent economic and commercial interests among corporate and other litigants and their insurers, and the fact that such interests have a bearing on the conduct of litigation, may support the commission's view that a uniform set of high standards should apply to all

368 Submission ED1 10 (Legal Services Commissioner).

369 See, eg, Law Institute (2005) above n 89.

370 By way of contrast section 347 of the *Legal Profession Act 2004* (NSW) provides that the provision of legal services by a law practice without reasonable prospects of success is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice. This is limited to the provision of legal services on a claim or defence of a claim for damages pursuant to section 345 of the same Act.

371 Submission ED1 8 (IMF Australia Ltd).

372 Submission CP 57 (IMF Australia Ltd).

373 Submission ED1 18 (Clayton Utz). See also Submission ED1 21 (Insurance Council of Australia), which raised concern that the creation of a statutory duty of good faith may create a 'US style situation where the tort of good faith is used not as a tool to ensure participants adhere to standards of conduct, but rather as a[n] additional cause of action creating more litigation and cost'.

374 Submission ED1 18 (Clayton Utz).

375 Ibid.

376 Ibid.



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key participants in civil litigation. Concern about potential conflict between competing duties of 'good faith' is no longer directly an issue as the commission has proposed that an obligation to cooperate should replace the previously proposed good faith provision. The proposed obligations are likely to support rather than hinder those who wish to pursue a 'pragmatic' approach and settle rather than litigate cases to their conclusion. The provisions incorporate explicit obligations to use reasonable endeavours to resolve the dispute by agreement between the parties and to limit the issues in dispute.

A further issue in relation to insurance was raised by Clayton Utz. A substantial amount of Australia's liability insurance is obtained offshore. The firm suggested that (despite the application of the *Insurance Contracts Act 1984* (Cth) and the *Insurance Act 1973* (Cth) to certain insurers) if the Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007 became law, insurers 'will not have a presence in the Australian jurisdiction and their actual decisions may not be amenable to scrutiny by the court'.³⁷⁷ The proposed application of sanctions to such insurers 'would be likely to provoke the involvement of foreign lawyers and, if anything, diminish rather than enhance the prospects of cases being [settled]'.³⁷⁸ In the longer term this may 'lead to a reduction in the amount of overseas insurance and reinsurance capacity available in respect of Victorian risks'.³⁷⁹

The Bill has since been passed, receiving royal assent on 24 September 2007. The legislation provides, inter alia, that all direct offshore foreign insurers seeking to carry on business in Australia will be required to become authorised under the *Insurance Act 1973* (Cth). Limited exceptions³⁸⁰ would apply to insurance risks that cannot be appropriately placed with an authorised general insurer.

Currently, direct offshore foreign insurers are not considered to be carrying on insurance business under the *Insurance Act*, are not authorised by the Australian Prudential Regulatory Authority or required to comply with Australia's general insurance prudential requirements. To the extent that they are carrying on a financial services business in Australia, as defined under the *Corporations Act*, they are subject to consumer protection legislation in Australia. They are required to hold an Australian financial services licence and to comply with the conditions of that licence.

Discretionary mutual funds will not be prudentially regulated under the *Insurance Act* but information will be collected by the regulatory authority to determine the nature and scope of their operations. The question of whether to prudentially regulate discretionary mutual funds and direct offshore foreign insurers arose in part out of the collapse of HIH Insurance Limited. The report of the Royal Commission into the collapse recommended that prudential regulation be extended to all discretionary like insurance products, to the extent possible within constitutional limits.

In light of the submissions received and the process of consultation the commission has modified the proposals and, in particular, has substituted the obligation to cooperate for the previously proposed duty to act in good faith.

The commission is not persuaded that the abovementioned and other issues raised in submissions and consultations should preclude the application of the amended overriding obligations to litigation funders, insurers and others who influence or control the conduct of parties to civil litigation.

6.3.6 Impact on self-represented and disadvantaged litigants

A number of submissions raised concerns that the proposed statutory obligations might be particularly detrimental to self-represented litigants and other litigants who are disadvantaged. For example, the Law Institute and PILCH expressed the view that the draft proposed obligation to act in 'good faith' was nebulous and that it was unrealistic to expect litigants without legal training or legal assistance to understand the proposed obligations.³⁸¹ It was also suggested that the proposals have the potential to result in 'unfair orders for costs or compensation against self-represented litigants who may have no means of understanding [the statutory] obligations'.³⁸²

A number of such concerns have been addressed by modifications to the proposals. In particular, the obligation to act in good faith has been replaced by an obligation to cooperate. It is also proposed that leave of the court should be required before an application for sanctions can be pursued. Any costs orders or sanctions can only be imposed in the exercise of judicial discretion.

The commission is of the view that judicial officers will take into account all relevant considerations, including the circumstances of self-represented litigants, and those who may be disadvantaged, in determining whether costs or other sanctions are appropriate. The application of the overriding

obligations to parties acting against self-represented or disadvantaged litigants is intended to redress the present imbalance of power and resources in the adversarial system. Additional reform recommendations in respect of self-represented litigants are discussed in Chapter 9.

6.3.7 Early disclosure of information

The Dibbs Abbott Stillman submission supported the availability of preliminary discovery so as to provide parties with an early opportunity to particularise their cases and fully understand the claims before they are required to respond. It argued that early discovery (ie, before a defence is filed) puts the parties on a level playing field in that both are able to see each other's documents before affidavit material is prepared. The submission suggested a timetable for the provision of preliminary discovery as well as a new regime for the issuing and management of proceedings.³⁸³ The commission's proposals in respect of discovery are dealt with in Chapter 6.

6.3.8 Expansion of model litigant guidelines

Mallesons Stephen Jaques acknowledged that some of the existing model litigant guidelines may be capable of application to all parties to civil litigation, but noted that other guidelines have no potential application to private parties.

Guidelines that the firm considered as being capable of application (wholly or partially) to all parties to civil litigation include the requirements to:

- deal with claims promptly
- not cause unnecessary delay
- endeavour to avoid, prevent and limit the scope of legal proceedings
- consider ADR
- keep the costs of litigation to a minimum.

As an example of model litigant guidelines that should *not* be applicable to private parties, the firm cited

*acting consistently in handling claims and litigation, not relying on technical defences and not pursuing appeals unless there is a belief of reasonable prospect of success, or that the appeal is otherwise justified in the public interest.*³⁸⁴

Mallesons also submitted that it would be inappropriate to impose an obligation on private parties to apologise 'where there is a belief that the party or its lawyers have acted wrongfully or improperly'.³⁸⁵

6.4 CERTIFICATION REQUIREMENTS

Submissions which addressed the issue were divided on the desirability of the proposed certification requirements. Some commentators raised concerns about the extent to which such requirements may cause problems for self-represented litigants³⁸⁶ or disadvantaged litigants.³⁸⁷ Several submissions suggested that vulnerable litigants would need to be provided with advice and support.³⁸⁸ The commission's proposals for additional support for self-represented and vulnerable litigants are set out in Chapter 9.

Other submissions supported the proposals but raised issues about how the merits test might be satisfied. To some extent such concerns have been addressed by the amendment to the merits test in the commission's present proposals. Several submissions suggested that the merits certification should only be given by lawyers and not parties. Telstra raised questions about whether in-house corporate lawyers or external lawyers would be required to provide the certification.³⁸⁹

6.5 OVERRIDING PURPOSE AND DUTIES OF THE COURT

Opinions on the desirability of the proposed overriding purpose and duties of the court were divided, although many submissions did not expressly deal with this issue. In part those opposed to the proposal contended that courts already have sufficient powers.

Support for the proposals came from a number of judicial officers and law firms, community legal centres, and the large commercial litigation funder, IMF Australia. IMF suggested that the obligations proposed to be imposed on lawyers and parties to assist the court to achieve the overriding purpose should be extended to litigation funders and insurers. It also suggested that the courts should collect additional data to facilitate more informed policy decisions.³⁹⁰

377Ibid.

378Ibid.

379Ibid.

380The limited exceptions encompass high value insureds exemption; atypical risks exemption; and customised exemption. See generally: Commonwealth of Australia, *Regulation of Direct Offshore Insurers—Exemption Discussion Paper*, 20 September 2007. See also *Report of the HIH Royal Commission* (2003); *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers* (2004); *Regulation of Discretionary Mutual Funds and Direct Offshore Foreign Insurers* (2005).

381 Submissions ED1 31 (Law Institute of Victoria), ED1 20 (Public Interest Law Clearing House),

382Ibid. See also Submission ED1 20 (Public Interest Law Clearing House).

383Submission CP 11 (Dibbs Abbott Stillman).

384Submission CP 49 (Mallesons Stephen Jaques).

385Ibid.

386Submission ED1 19 (Human Rights Law Resource Centre).

387Submission ED1 25 (Victoria Legal Aid).

388Submissions ED1 11 (Mental Health Legal Centre), ED1 20 (Public Interest Law Clearing House), ED1 19 (Human Rights Law Resource Centre).

389Submission ED1 17 (Telstra Corporation).

390Submission ED1 8 (IMF Australia Ltd).



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7. BEHAVIOURAL AND CULTURAL CHANGE

Civil procedural reforms may often facilitate cultural and behavioural change. In some circumstances, the objectives sought to be achieved by such reform may be frustrated by the failure to bring about necessary changes in attitude and conduct.

The importance of behavioural and cultural change has been recently reiterated by the Victorian Bar. Its submission noted that:

The success of the Woolf reforms owed much to the success of the cultural shifts made by the judiciary and the legal profession. For example, barristers and solicitors had to learn that it is no longer acceptable to expect to use civil processes to gain tactical advantages in litigation. This type of change represented a fundamental shift in deeply ingrained mindsets. We suggest that a similar willingness to make radical changes to philosophies and practices will also be required to successfully embed Victorian reform efforts.³⁹¹

The Bar stated that it recognised that a shift is now necessary, and confirmed that it is committed to working with its members and other professionals to begin the process of change.

Although there have been important changes in civil procedure, the judicial management of proceedings and the conduct of civil litigation in Victorian courts in recent years, the commission is of the view that further reform is required and that this process needs to be accelerated.

The imposition of overriding obligations on key participants in civil proceedings in Victorian courts, the introduction of overriding purpose provisions to assist the courts, and the introduction of more onerous merit certification requirements for both lawyers and litigants, are all means by which the processes for resolving disputes, and the judicial management of such processes, will be improved.

RECOMMENDATIONS

16. New provisions should be enacted in respect of (a) standards of conduct in civil proceedings (b) verification of the allegations made in pleadings and (c) the overriding purpose of relevant statutory provisions and procedural rules.
 - 16.1 New provisions should be enacted to prescribe standards of conduct in civil proceedings, and to facilitate cooperation between the participants in a civil proceeding, candour and early disclosure of relevant information, and early resolution of the dispute - including by agreement of the parties or through alternative dispute resolution processes at minimal cost to the parties. There should be sanctions and penalties for non-compliance with these overriding obligations. Such sanctions should only come into force 12 months after the obligations take effect and any application should require leave of the court.
 - 16.2 There should be new requirements for parties and lawyers to certify or verify that allegations in pleadings have merit.
 - 16.3 There should be an overriding provision to the effect that relevant legislation and procedural rules are to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.

Such provisions should be along the lines of the following draft:

Section /Rule A: overriding obligation

- (1) *These provisions apply to the conduct or defence of any aspect of a civil proceeding, including any interlocutory proceeding, and any appeal from any order or judgment in a proceeding ('a civil proceeding') where such civil proceeding is in the Magistrates' Court, the County Court, the Supreme Court or the Court of Appeal (a 'Victorian court'), and to any alternative dispute resolution process undertaken in relation to any civil proceeding pending in a Victorian court.*
- (2) *These provisions apply to:*
 - (a) *any person who is a party to a civil proceeding*
 - (b) *any legal practitioner or other representative acting on behalf of a party to a civil proceeding*
 - (c) *any law practice acting on behalf of a party to a civil proceeding*

- (d) *any person providing any financial or other assistance to any party to a civil proceeding, including an insurer or a provider of funding or financial support, insofar as such person exercises any direct or indirect control or influence over the conduct of any party in a civil proceeding ('the participants').*
- (3) *These provisions:*
- (a) *do not apply to witnesses as to fact*
- (b) *(other than subsections 4(b), (c), (f)) apply to expert witnesses.*
- (4) *Each of the persons to whom this part applies has a paramount duty to the court to further the administration of justice. Without limiting the generality of this obligation, in all aspects of the proceeding (including any ancillary processes such as negotiation and mediation), each of the participants:*
- (a) *shall at all times act honestly*
- (b) *shall not make any claim or respond to any claim in the proceeding, or assist in the making of any claim or response to any claim in the proceeding, where a reasonable person would believe that the claim or response to claim is frivolous, vexatious, for a collateral purpose or does not have merit*
- (c) *shall not take any step in the proceeding in connection with a claim or response to a claim, or assist in the taking of any step or response to any step, unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding*
- (d) *has a duty to cooperate with the parties and the court in connection with the conduct of a civil proceeding*
- (e) *has a duty not to engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive, or knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive*
- (f) *shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes*
- (g) *where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute*
- (h) *shall use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute*
- (i) *shall use reasonable endeavours to act promptly and to minimise delay*
- (j) *has a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.*
- (5) *Subsections 4(b) and (c) do not apply to preliminary steps, preliminary legal work or preliminary financial or other assistance for the purpose of a proper and reasonable consideration of whether a claim, proceeding or defence of a claim or proceeding or a step in a proceeding has merit.*
- (6) *The obligations imposed by this part shall override any legal, ethical, contractual or other obligation which the person may have insofar as they are inconsistent with such obligations. The obligations in this part apply to any legal practitioner engaged on behalf of a client in connection with a civil proceeding, despite any*



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obligation that the legal practitioner or law practice may have to act in accordance with the instructions or wishes of a client.

Penalty Provisions

- (7) *Provisions for penalties for breach of the overriding obligations will come into effect 12 months after the obligations take effect. Such penalties will only apply to breaches arising after that date. The delay in implementation of the penalty provisions shall not prevent the court from exercising any power it already has, including in relation to costs.*
- (8) *Where the court is satisfied that, on the balance of probabilities, a person to whom this part applies has failed to act in accordance with the obligations imposed by this part the court may, of its own motion or on the application of any party or person with a sufficient interest, in addition to any other order that the court has power to make, make such order as the court considers in the interests of justice, including:*
 - (a) *an order that the person pay some or all of the legal or other costs or expenses of any person arising out of the failure to act in accordance with the obligations imposed by this section*
 - (b) *an order that the person compensate any person for any financial or other loss which was materially contributed to by the failure to act in accordance with the obligations imposed by this section, including an order for penalty interest in respect of any delay in the payment of any amount claimed in a civil proceeding or an order that there be no interest, or reduced interest, where there has been a failure on the part of any participant involved in the bringing of the claim*
 - (c) *an order that the person take such steps in a civil proceeding as may be reasonably necessary to remedy any problem arising out of the failure to act in accordance with the obligations imposed by this section*
 - (d) *an order that the person not be permitted to take specified steps in a civil proceeding*
 - (e) *such order as the court considers to be in the interest of any person who has been prejudiced by the failure to act in accordance with the obligations imposed by this section*
 - (f) *an order that the person pay into the Justice Fund such amount as the court considers reasonable having regard to the time spent by the court as a result of:*
 - (i) *the failure to act in accordance with the obligations imposed by this section, or*
 - (ii) *any civil claim or civil proceeding arising out of the failure to act in accordance with the obligations imposed by this section, including an application for an order under this section.*
- (9) *Any application under section 8 by a party or person with sufficient interest may only be made with leave of the court.*
- (10) *An application under section 8 shall be made in the court in which the proceeding is being heard or was heard and, where practicable and without limiting the discretion of the court to decide how and by whom such application should be determined, such application may be dealt with initially by the judicial officer who is most familiar with the proceeding which gave rise to the application.*
- (11) *An application under section 8 shall be made not later than 28 days from the date of final determination of the proceeding. Where an order in respect of costs is made after the date of judgment or final determination of the proceeding the date of the making of the last of any such order shall be the date of final determination of the proceeding for the purposes of this section.*

Comment 1: It may be necessary to include a provision to the effect that a person against whom sanctions are sought after the adjudication of the dispute cannot seek to disqualify, on the grounds of reasonable apprehension of bias, the judicial officer who heard the proceedings from dealing with the application for sanctions.

Comment 2: There should be provision to the effect that where application is made in connection with an interlocutory step or an ADR process prior to the likely trial of the matter, the judicial officer to whom such application is made may refer the application to another judicial officer so as to avoid (a) becoming aware of information or (b) being required to make a determination that might provide a basis for a subsequent application that the judicial officer be disqualified from conducting the trial.

Comment 3: There may need to be provision for extensions of time to deal with situations where the knowledge of the breach arises after the deadline for making an application.

Certification Provisions

(12) Each party to a proceeding is required:

- (a) to personally certify that they have read and understood the overriding obligations. Such certification must be filed when the party files its first document in the proceeding*
- (b) when filing any pleading (including any amendment of the pleading), to certify on the pleading, or verify on affidavit or by statutory declaration, that:*
 - (i) as to any allegations of fact in the pleading, the deponent believes that the allegations have merit*
 - (ii) as to any allegations of fact that the pleading denies, the deponent believes that the allegations do not have merit*
 - (iii) as to any allegations of fact that the pleading does not admit, after reasonable inquiry the deponent does not know whether or not the allegations have merit.*

Comment 4: 'Court documentation' may be preferable to the term 'pleading'. See, eg, Legal Profession Act 2004 (NSW) s 347(4).

(13) A determination of whether any allegation of fact has merit shall, in the case of a party, be based on a reasonable belief as to the truth of the allegation.

(14) Legal practitioners are required, when filing any statement of claim or other originating process, defence or further pleading on behalf of a party, to certify on the document that:

- (a) each allegation in the document has merit*
- (b) each denial in the document has merit*
- (c) each nonadmission in the document arises out of an inability to determine the merit of the allegation.*

Comment 5: 'Court documentation' may be preferable to the term 'pleading'. See, e.g, Legal Profession Act 2004 (NSW) s 347(4).

(15) A determination as to whether an allegation has merit shall, in the case of a legal practitioner, be based on the available factual material and evidence and a reasonable view of the law.

Overriding Purpose and the Duties of the Court

(16). The overriding purpose of this Act and the rules of court, in their application to civil proceedings, is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute by (i) the just determination of the proceeding by the court or (ii) the agreement of the parties or (iii) an alternative dispute resolution process agreed to by the parties or ordered by the court.

(17). The court must seek to give effect to the overriding purpose when it interprets or exercises any of its powers, whether derived from procedural rules or as part of its inherent, implied or statutory jurisdiction.



Improving the Standards of Conduct of Participants in Civil Litigation

- (18). Parties to a civil proceeding are subject to the overriding obligations in section 4 and are under a duty to the court to assist the court to further the overriding purpose.
- (19). Legal practitioners or any other representatives acting on behalf of a party are subject to the overriding obligations contained in section 4 and are under a duty to the court to assist the court to further the overriding purpose and shall not by their conduct cause their clients to be put in breach of section 5 or the overriding obligations contained in section 4.
- (20). The court may take into account any failure to comply with sections 18 or 19 in exercising any power, including its discretion with respect to costs.
- (21). To further the overriding purpose, the court in making any order or giving any direction in a civil proceeding—
- (a) shall have regard to the following objects:
 - (i) the just determination of the proceeding
 - (ii) the public interest in the early settlement of disputes by agreement between the parties
 - (iii) the efficient disposal of the business of the court
 - (iv) the efficient use of available judicial and administrative resources
 - (v) the timely disposal of the proceeding
 - (vi) dealing with the case in ways which are proportionate to:
 - the amount of money involved
 - the importance and complexity of the issues
 - the financial position of each party.
 - (b) may, in addition to any other matter, have regard to the following considerations to the extent that the court thinks relevant:
 - (i) the extent to which the parties have complied with any pre-action procedural obligations or protocol applicable to the dispute
 - (ii) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute
 - (iii) the degree of expedition with which the respective parties have approached the proceeding, including the degree to which they have been timely in their interlocutory steps
 - (iv) the degree to which any lack of expedition in approaching the proceeding has arisen from circumstances beyond the control of the respective parties
 - (v) the degree to which there has been compliance with the overriding obligations contained in sections 4, 18 and 19
 - (vi) the degree of injustice that may be suffered by any party as a consequence of any order or direction under consideration and
 - (c) should, in addition to any other matter, have regard to the objective of minimising any delay between the commencement of the civil proceeding and its listing for trial beyond that reasonably required for such interlocutory steps as are necessary for the fair and just determination of the real issues in dispute and the preparation of the case for trial.

Chapter 4
**Improving Alternative
Dispute Resolution**



Chapter 4



Improving Alternative Dispute Resolution

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Improving Alternative Dispute Resolution

Scottish proverb: 'Law's costly ... tak' a pint and 'gree'

1. INTRODUCTION

Relatively few civil disputes are resolved by judicial decision. Various other methods are used to resolve most disputes, including those which have led to litigation in Victoria. Improving alternative dispute resolution (ADR) is part of government policy at both state and federal levels. Many of the proposals in this report aim to facilitate greater and earlier use of ADR in the civil justice system generally and in Victorian courts in particular.

Our review has revealed:

- a range of ADR initiatives that can and should be introduced and expanded to enhance the court system, including new ADR options, compulsory referral, court-conducted mediation and
- a need for additional resources, education and research.

1.1 WHAT IS ADR?

ADR is defined in various ways. The National Alternative Dispute Resolution Advisory Council (NADRAC) has defined ADR as an 'umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them'.¹ Some methods, such as mediation, involve seeking resolution by agreement reached between the parties. Other methods for resolving disputes, such as arbitration, may involve binding determination by a third party. There are also a variety of 'alternative' means by which judicial officers may involve independent third parties to assist in the resolution of cases that are being litigated. ADR techniques may be used to determine some or all of the legal and factual issues in dispute. Some 'hybrid' ADR methodologies may involve a combination of different techniques or processes. In cases which are the subject of litigation in courts, ADR may be employed by agreement between the parties, at the suggestion of the court or by direction or order of the court. Sometimes the term ADR includes approaches that enable parties to manage and resolve their own disputes without outside assistance.²

Although there is widespread support of the use of ADR there is controversy about a number of issues, including whether litigants should be compelled to participate in ADR, particularly in processes which may have a non-consensual binding outcome. There are also divergent views about both the policy question of whether judicial officers should directly participate in ADR processes and the practical issue of the resources required to facilitate this.

ADR is increasingly referred to as 'appropriate dispute resolution', in recognition of the fact that such approaches are often not just an alternative to litigation, but may be the most appropriate way to resolve a dispute'.³

NADRAC has classified dispute resolution processes as facilitative, advisory, determinative or hybrid.⁴

Facilitative processes: the dispute resolution practitioner assists the parties to a dispute to identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole of the dispute.⁵ Facilitative processes include negotiation, facilitation, conferencing and mediation.⁶

Advisory processes: the dispute resolution practitioner

considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.⁷

Determinative processes: the dispute resolution practitioner

evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative dispute resolution processes are arbitration, expert determination and private judging.⁸

Hybrid processes:

*the dispute resolution practitioner plays multiple roles. For example, in conciliation and in conferencing, the dispute resolution practitioner may facilitate discussions as well as provide advice on the merits of the dispute. In hybrid processes, such as med-arb, the practitioner first uses one process (mediation) and then a different one (arbitration).*⁹

1.2 POSITION IN VICTORIA

The Victorian courts refer cases to mediation, pre-hearing conferences, conciliation and arbitration;¹⁰ however, mediation is the main form of ADR used. Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role concerning the issues in dispute or the outcome. The mediator will, however, usually advise on or determine the process of mediation. Mediation may be undertaken voluntarily, by a court order, or under an existing contractual agreement.¹¹

The Supreme, County and Magistrates' Courts have the power to order a proceeding or any part of a proceeding to mediation, with or without the consent of the parties.¹²

1.3 THE OUTCOME OF ADR

Settlement or agreement rates are a widely used performance measure for ADR processes.¹³ Settlement rates for ADR are often very high, usually between 50% and 85%.¹⁴ Settlement rates are not the only performance measure used. Other measures include, for example, agreement quality, participant satisfaction, participant empowerment, and time and cost savings.

The Supreme Court

The Court's 2005/2006 Annual Report noted that:

*Mediation has been another feature of the case management process with the consequence that the parties in upwards of 70% of mediated cases were able to achieve settlement and thereby to relieve the parties and the court of the burden of trial.*¹⁵

The County Court

According to the Court's 2006/2007 Annual Report:

- of the Building Division cases, 20% settled at mediation
- of the Defamation Division cases, 10% settled after mediation and
- of the Medical Division cases, approximately 60% settled at mediation.¹⁶

The Magistrates' Court

The court's 2005/2006 Annual Report states that of the 9360 defended civil claims, 3687 were finalised at a pre-hearing conference or mediation (about 39%); 2488 cases were finalised at arbitration (about 26%); and the remaining 3185 cases (about 34%) were finalised at hearing.¹⁷

The resolution rate for pre-hearing conferences held at the Court in Melbourne from the start of the year to 31 October 2007 was 68.35%. The resolution rate for mediations at the Court in Melbourne was 64.42% from the start of the year to 22 November 2007.¹⁸

The Magistrates' Court 2005/2006 Annual Report notes that in approximately 70% of mediated cases, the matter is finalised at mediation.¹⁹ Judicial registrars of the court regularly mediate cases in the industrial division and over 50% of such cases were resolved at mediation in 2006–07.²⁰

Other studies

Various studies have shown significant benefits in using ADR. The Dispute Settlement Centre of Victoria reported a settlement rate of 84% for mediations conducted.²¹ An evaluation of the NSW Settlement Scheme, where appropriate matters in the District Court were referred to mediation, reported a 69% settlement rate.²²

The Federal Court in its 2006/2007 Annual Report noted that the settlement rates of cases referred to mediation since the commencement of the program in 1987 has averaged 55%.²³

- 1 National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution—A Guide for Government Policy-makers and Legal Drafters* (2006) 100.
- 2 *Ibid.*
- 3 Department of Justice, Victoria, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 33.
- 4 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003), 5.
- 5 *Ibid.* 7.
- 6 Tania Sourdin, *Alternative Dispute Resolution* (2nd ed, 2005) 21–30.
- 7 NADRAC (2003) above n 4, 8 (emphasis in original).
- 8 *Ibid.* 6 (emphasis in original).
- 9 *Ibid.* 5 (emphasis in original).
- 10 There is some controversy regarding whether or not arbitration is ADR. For instance, the Administrative Appeals Tribunal specifically excludes arbitration as an 'alternative dispute resolution process': *Administrative Appeals Tribunal Act 1975* (Cth) s 3(1).
- 11 NADRAC (2006) above n 1, 104.
- 12 *Supreme Court (General Civil Procedure) Rules 2005* r 50.07(1), *County Court Act 1958* s 47A, *Magistrates' Court Act 1989* s 108 (1), *Magistrates' Court Civil Procedure Rules 1999* r 22A.01.
- 13 Kathy Mack, *Court Referral to ADR: Criteria and Research*, National Alternative Dispute Resolution Advisory Council and Australian Institute of Judicial Administration (2003), 2.
- 14 NADRAC, *ADR Research: A Resource Paper* (2004) 32 [120].
- 15 Supreme Court of Victoria, *Annual Report 2004/2005* (2006) 20. On 4 March 2008 the Supreme Court opened a Mediation Centre.
- 16 County Court of Victoria, *Annual Report 2005/2006* (2006) 12–13.
- 17 Magistrates' Court of Victoria, *Annual Report 2005/2006* (2006), 13.
- 18 Magistrates' Court of Victoria submission to the Parliament of Victoria, Law Reform Committee, 30 November 2007, 3.
- 19 Magistrates' Court of Victoria, *Annual Report 2005/2006* (2006), 28.
- 20 Magistrates' Court of Victoria, *Annual Report 2006/2007* (2006) 33.
- 21 Department of Justice, Victoria, *Dispute Settlement Centre of Victoria: Information Kit* (2006), 20.
- 22 Tania Sourdin and Tania Matruglio, *Evaluating Mediation—New South Wales Settlement Scheme 2002* (2004) iii.
- 23 Federal Court of Australia, *Annual Report 2006/2007* (2007) 26.



Improving Alternative Dispute Resolution

Another study undertaken by the Centre for Effective Dispute Resolution (CEDR) in the United Kingdom found that mediators in commercial mediations claimed approximately 73% of their cases settled on the day, with another 20% settling shortly afterwards, an aggregate settlement rate of 93%.²⁴

NADRAC produced a compendium of statistics on ADR in Australia in 2003; however, the statistics are of limited use for this review because the Supreme Court and Magistrates' Court statistics were not published.²⁵

1.4 BENEFITS AND DISADVANTAGES OF ADR

Benefits

Some of the benefits of ADR include:

- **ADR can allow access to justice.** For example, as there can be cost and time savings in ADR, it can be more accessible to those of limited financial means.²⁶
- **ADR can be faster.** A dispute can often be resolved in a matter of months, even weeks, through ADR, while a legal proceeding can take years.
- **ADR can save time and money.** Court costs, lawyers' fees and experts' fees can be saved. There can also be savings for the courts and government.²⁷
- **ADR can permit more participation.** The parties may have more chances to tell their side of the story than in court and may have more control over the outcome.
- **ADR can be flexible and creative.** The parties can choose the ADR process that is best for them. For example, in mediation the parties may decide how to resolve their dispute. This may include remedies not available in litigation (e.g. a change in the policy or practice of a business).
- **ADR can be cooperative.** The parties may work together with the dispute resolution practitioner to resolve the dispute and agree to a settlement that makes sense to them, rather than work against each other in an adversarial manner. This can help preserve relationships.
- **ADR can reduce stress.** There are fewer court appearances. In addition, because ADR can be speedier and save money, and because the parties are normally cooperative, ADR is less stressful.
- **ADR can remain confidential.** Unlike the court system where everything is on the public record, ADR can remain confidential. This can be particularly useful, for example, for disputes over intellectual property which may demand confidentiality.
- **ADR can produce good results.** Settlement rates for ADR processes are often very high, generally between 50% and 85%.²⁸
- **ADR can be more satisfying.** For the above reasons, many people have reported a high degree of satisfaction with ADR.²⁹

Disadvantages

Some of the disadvantages of ADR include:

- **Suitability.** ADR may not be suitable for every dispute—for example, if a party wishes to have a legal precedent or it is a public interest case, judicial determination may be more appropriate.³⁰
- **Lack of court protections.** If ADR is binding, the parties normally give up most court protections, including the right to a decision by a judge or jury, based on admissible evidence, and appeal rights; also, in the case of judicial decisions, the right to reasons for the decision.
- **Lack of enforceability.** The durability of ADR agreements can be an issue if they lack enforceability.³¹
- **Disclosure of information.** There is generally less opportunity to find out about the other side's case with ADR than with litigation. ADR may not be effective if it takes place before the parties have sufficient information about the strengths and weaknesses of their respective cases.

- **Cost of ADR.** Dispute resolution practitioners may charge a fee for their services. If a dispute is not resolved through ADR, the parties may have to put time and money into both ADR and a court hearing.
- **Delay.** ADR adds an extra step, which may increase delay.
- **Fairness.** ADR processes may not be as fair as court proceedings. Procedural rules and other laws governing the conduct of court proceedings contain many safeguards to ensure the fairness of the process and the outcome. These are not necessarily included in ADR.³² In addition, there may be power imbalances if a party is not represented.
- **Delaying tactics.** ADR processes can be used as a delaying tactic or to obtain useful intelligence on an opponent before proceeding with litigation.
- **Inequality.** Effective ADR requires that parties have the capacity to bargain effectively for their own needs and interests. A party may be vulnerable where there is an unequal power relationship, particularly if the party is not represented.

1.5 GOVERNMENT COMMITMENT TO ADR

Victorian Government policy aims to reduce litigation where possible. Government agencies are seeking to incorporate ADR into the conduct of their everyday business. Both Commonwealth and state legislation increasingly provide for ADR to be used by various agencies.³³

One obvious method of enhancing use of ADR would be for the Victorian Government to utilise ADR for all disputes, including those resulting in litigation, and to require the insertion of ADR clauses in all government contracts.

ADR is one of a number of strategic priorities for the Victorian Department of Justice.³⁴ In the Justice Statement, the Attorney-General identified the following principles for ADR: fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability.³⁵ The Justice Statement notes that:

- *ADR techniques have developed to minimise the costs of disputing, to provide faster dispute resolution, and to provide non-adversarial processes and remedies that are adaptable to the needs of the disputants; and*
- *ADR is often used in industry-specific complaints schemes, such as the various ombudsman schemes, which have expanded dramatically in the last 10 years ...*³⁶

The Attorney-General also noted in the Justice Statement that:

Despite their growth, ADR services are poorly coordinated and resourced, and the development of each new initiative has usually occurred in the absence of a strategic view of where services are

24 Karl Mackie, 'Are Lawyers Falling Short in Mediation?' (2006) Centre for Effective Dispute Resolution <www.cedr.com/index.php?location=?/library/articles/20060111_166.htm> at 12 March 2008.

25 NADRAC, *ADR Statistics – Published Statistics on Alternative Dispute Resolution in Australia* (2003), 16.

26 See Parliament of Victoria, Law Reform Committee, *Alternative Dispute Resolution Discussion Paper* (2007) ch 4 for a good discussion on ADR and access to justice.

27 For further discussion of ADR and cost savings see *ibid* 58–9. The discussion refers to an evaluation of the Woolf reforms, the results of the Magistrates' Court intervention order diversion project and results of the diversion of small claims to mediation review by the Civil Justice Council in the United Kingdom—all of which show that ADR can lead to time and cost savings.

28 Mack (2003) above n 13, 2; Department of Justice (2006) above n 21, 25.

29 This summary was largely based on the information on the Amador County Superior Court of California's website: <www.amadorcourt.org/adr/adr.html> at 14 December 2007. However, this section, and the chapter generally, has been revised in light of the helpful comments made by Professor Hilary Astor of the Faculty of Law, University of Sydney.

30 See parts 6.1.3 and 9 of this Chapter for discussion of when ADR may not be appropriate.

31 NADRAC has noted that the legal enforcement of ADR agreements can involve separate and time-consuming contract litigation: NADRAC (2006) above n 1, 13.

32 For example, even where procedural fairness is maintained in ADR, there is no third party decision maker who ensures any agreement made between parties constitutes a substantively just outcome; and where either party is dissatisfied with an element of the process, there is no fundamental right of judicial review. See the discussion in NADRAC, 'Issues of Fairness and Justice in Alternative Dispute Resolution' (a discussion paper, Canberra, November 1997) 16–17.

33 See, for example, the compendium of Victorian Acts prepared by the Department of Justice in 2006 regarding the different types of ADR legislated for in Victoria. The compendium lists 73 separate pieces of Victorian legislation that refer to ADR. This is not an exhaustive list.

34 Chris Field Consulting Pty Ltd., *Alternative Dispute Resolution in Victoria: Supply Side Research Project Report*, Department of Justice, Victoria (2007) i.

35 Department of Justice (2004) above n 3, 35.

36 *Ibid* 34.



Improving Alternative Dispute Resolution

*most needed. If ADR is to become accepted as the most appropriate form of resolving some disputes, the Government must assist it to move to a new level of organisation and coordination.*³⁷

According to the Department of Justice Strategic Priorities 2006:

*There has been a growth in demand for alternative dispute resolution, which offers a cost-effective and non-adversarial environment for resolving disputes. Better coordination and integration of alternative dispute resolution across the justice system will ensure disputes are resolved at the most appropriate stage.*³⁸

The Department of Justice established an ADR strategy team in 2006 to achieve one of the outcomes identified in the department's Strategic Priorities 2006; that is, 'fair and efficient dispute resolution'. The ADR strategy team conducts research and formulates policy proposals and initiatives to achieve the department's priority outcome. The work of the ADR strategy team is overseen by a project board comprising the executive directors of Consumer Affairs, Courts, Legal & Equity and Corporate Services, and is chaired by the Executive Director of Consumer Affairs.³⁹

The Department of Justice has recently produced the following reports:

- *Alternative Dispute Resolution in Victoria—Community Survey Report*
- *Alternative Dispute Resolution in Victoria—Small Business Survey Report*
- *Alternative Dispute Resolution in Victoria—Supplier Survey Report*
- *Alternative Dispute Resolution in Victoria—Supply Side Research Report*
- *Online Alternative Dispute Resolution Research*

The Community Survey found that:

- In the previous year, 35% of Victorians were involved in at least one dispute, with the total number of disputes in Victoria estimated at 3.3 million.
- The cost to Victorians of attempts to resolve these disputes was \$2.7 billion, in expenses such as legal and expert advice and personal time.
- The top three factors that encourage people to use ADR are perceptions that it is cheaper, easier and quicker than going to court.
- The success of ADR in recent times has meant that ADR processes are now accepted as being an important part of the court system.⁴⁰

The Attorney-General commissioned the Victorian Crown Counsel review of the Office of Master and Costs Office in the Supreme Court, which included an assessment of mediation by masters.⁴¹

The Victorian Parliamentary Law Reform Committee is currently undertaking a review of ADR. This will address:

- the reach and use of ADR mechanisms so as to improve access to justice and outcomes in civil and criminal court jurisdictions and to reduce the need, where possible, for contact with the court system, particularly in marginalised communities;
- whether a form of government regulation of ADR providers is appropriate or feasible to ensure greater consistency and accountability for Victorians wishing to access ADR.⁴²

This review covers criminal and civil court jurisdictions and deals with more than just the court system.⁴³

1.6 ADR AND THE COMMISSION'S RECOMMENDATIONS

ADR is an important element of many of the commission's recommendations in this report. In particular, ADR is an integral part of the proposals on:

- pre-action protocols
- the overriding obligations on participants
- the overriding purpose proposed for the courts and
- case management.

These matters are dealt with in Chapters 2, 3, and 5 of this report.

ADR and pre-action protocols

In Chapter 2, the commission recommends that pre-action protocols be introduced for to set codes of sensible conduct which persons in dispute are expected to follow when there is a prospect of litigation. Through a variety of procedural requirements and costs and other sanctions, such pre-action procedures seek to encourage (a) early and full disclosure of relevant information and documents; (b) settlement; and (c) where settlement is not achieved, identification and narrowing of the real issues in dispute with a consequential reduction in the costs and delays arising out of subsequent litigation. As noted in Chapter 2, pre-action protocols in England and Wales have been associated with a substantial decrease in the number of civil proceedings commenced in recent years.

ADR and the overriding purpose

The commission's proposed overriding purpose places emphasis on ADR:

The overriding purpose of this Act and the rules of court, in their application to civil proceedings, is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute by (i) the just determination of the proceeding or (ii) the agreement of the parties.

The overriding purpose also provides:

To further the overriding purpose, the court in making any order or giving any direction in a civil proceeding—

(b) may, in addition to any other matter, have regard to the following considerations to the extent that the court thinks relevant: ...

(ii) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute; ...

The proposed overriding purpose is based to some extent on recent civil procedure reforms in other jurisdictions, including England and Wales. The decision of the English Court of Appeal in *Dunnett v Railtrack* emphasised that the parties' obligation to promote 'the Overriding Objective' imports a duty for them to consider pursuing ADR, where appropriate.⁴⁴

ADR and the overriding obligations

ADR is also an important component of the proposed overriding obligations, which provide:

Each of the persons to whom this part applies has a paramount duty to the Court to further the administration of justice. Without limiting the generality of this obligation, in respect of all aspects of the proceeding (including any ancillary dispute resolution processes such as negotiation and mediation), each of the participants: ...

(d) has a duty to cooperate with the parties and the court in connection with the conduct of a civil proceeding;

(e) has a duty not to engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive or knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive;

(f) shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes;

(g) where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute; ...

The commission proposes that overriding obligations should apply to negotiations and ADR processes undertaken in relation to proceedings which are pending in a Victorian court. The commission also proposes that various sanctions should be available for failure to comply with these obligations. This matter is dealt with in detail in Chapter 3.

37 Ibid 19.

38 Department of Justice, Victoria, *Department of Justice Strategic Priorities 2006* (2006) 1.

39 Field (2007) above n 34, i.

40 Ipsos Australia Pty Ltd, *Dispute Resolution in Victoria: Community Survey Report*, Department of Justice, Victoria (2007) i–iii.

41 Crown Counsel, Victoria, *Review of the Office of Master and Costs Office: Report to the Attorney General* (2007).

42 See the Parliament of Victoria's website for details regarding the terms of reference for their ADR review: <www.parliament.vic.gov.au/lawreform>.

43 Ibid.

44 [2002]1 WLR 2434.



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ADR and case management

ADR is increasingly being viewed as a valuable and integral part of the case management process. In case management, one of the functions of the judge or registrar is to promote settlement. One way to achieve this is by referring cases to some form of ADR.⁴⁵ This is discussed in Chapter 5. The Federal Court noted in its 2006–07 Annual Report that:

Since the introduction of the Court's Individual Docket System, there has been a greater emphasis on the early identification of cases suitable for ADR and court-ordered mediation is increasingly viewed by the Court and by the profession as an integral and valuable part of the judicial case management process. The Court continues to encourage the parties to any litigation to adopt more efficient ways of managing a case and reducing the costs associated with litigating and mediation is one response to this issue.⁴⁶

Similarly, all civil courts in Victoria now actively encourage and facilitate ADR, at both trial and appellate levels. In the Supreme Court, a new Mediation Centre was launched by Rob Hulls, Deputy Premier and Attorney-General, on 4 March 2008.

1.7 DISCUSSION

In response to the criticisms of the length and cost of legal proceedings, there has been an emphasis on ADR, particularly in the past decade. Initially, the focus was on processes outside the court system, including arbitration, conciliation and mediation. Over time, a number of these approaches have been integrated into the court system or developed as an adjunct to court processes.⁴⁷

Victoria is well advanced in its adoption of ADR approaches to civil dispute resolution. The importance of ADR in the modern civil justice system is generally accepted. Much of the current discussion focuses on what sort of ADR processes should be developed and on what role traditional dispute resolution bodies such as courts should play.⁴⁸

The commission's view is that the appropriate role of the courts is more than simply providing an adjudication service based on the traditional adversarial process. Courts should (and do) accommodate various means of resolving civil disputes. The commission's ADR recommendations reflect this view, as do many of its other recommendations.

Major issues at present include (a) the desirability of judicial facilitation of ADR processes and (b) the appropriateness of, and resources required for, direct judicial participation in ADR. Another controversial issue is whether parties should be compulsorily referred to ADR. These issues are addressed in this chapter.

This chapter also addresses the desirability of new ADR initiatives and options, including:

- early neutral evaluation
- case appraisal
- mini-trial/case presentation
- the appointment of special masters
- court-annexed arbitration
- greater use of special referees
- conciliation
- conferencing
- hybrid ADR processes
- collaborative law
- industry dispute resolution schemes.

This chapter also examines the need for court assistance with ADR, the need for education about ADR and the need for better data and further research on ADR.

2. THE NEED FOR ADDITIONAL ADR OPTIONS

In Victoria, historically the means by which disputes in the court system have been resolved other than by trial have been somewhat limited. Many disputes are of course resolved between the parties without the necessity for third-party involvement. The costs, delays, uncertainties about the likely judicial outcome, the prospect of appeals and a range of other factors contribute to the settlement of disputes by litigants. Some disputes are referred to conciliation or arbitration, including pursuant to court rules. However, mediation is the most common ADR method used. There is a variety of other ADR options available. The commission considers that additional ADR options would assist the courts to more efficiently and effectively manage the diverse types of disputes in the court system. In other words, the existing limited menu of ADR options should be expanded to a more comprehensive smorgasbord.

However, the commission appreciates that the challenge is to facilitate greater use of such options, by the courts and by the profession. The more effective use of such options is likely where parties, professionals, referral agents and judicial officers have a proper understanding, and preferably experience, of the various processes. This requires confidence in such processes and a detailed knowledge of their comparative strengths and weaknesses. For example, early neutral evaluation was introduced in NSW but was little utilised and eventually abandoned.

In the submissions there was considerable support for additional ADR options. For example, the Law Institute stated:

The LIV would also support a widening of the range of ADR options available to litigants and allow greater individual targeting of the range of processes. In reality, the present system requires disputes of widely differing types to follow the same track to an ultimate trial often with mediation the only process available to virtually all disputants.⁴⁹

The additional processes the commission believes should be available are:

- early neutral evaluation
- case appraisal
- mini-trial/case presentation
- the appointment of special masters
- court-annexed arbitration
- greater use of special referees to assist the court in the determination of issues or proceedings
- conciliation
- conferencing
- hybrid ADR processes.

The commission also considers there is a need for greater use of 'collaborative law' and industry dispute schemes. Each of these options is described in detail in this chapter.

The commission supports more use of ADR for a number of reasons. ADR offers a range of benefits to people when compared with litigation in the courts. ADR is usually cheaper than litigation. The non-adversarial nature of ADR processes may be more likely than litigation to promote and preserve long-term relationships and goodwill. The process of ADR 'can also be successful in establishing dialogue between parties who have become estranged or non-communicative'. It can enable the parties to have a better understanding of each other's position and underlying interests.⁵⁰ In most ADR processes the parties have control over the timing and can usually choose the identity of the person to assist in the resolution of the dispute. Externally induced delay is less than in courts, which are required simultaneously to process a large volume of cases

The report *Going to Court* identified the benefits of expanding the range of ADR options. The authors of the report felt that a modern, responsive court system should be able to offer the community a number of forms of assistance for resolving disputes. They suggested that if the courts' public function is, in significant part, to help people resolve disputes, then in performing that function the courts should provide people with access to whatever processes are appropriate to the case. This may be a trial, an early ruling on a legal issue, an early neutral evaluation and so on.⁵¹ They also suggested that there is a practical reason for doing so:

45 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) 242.

46 Federal Court (2007) above n 23, 26.

47 Peter Sallmann and Richard Wright, *Going to Court* (2000) 56.

48 Ibid.

49 Submission CP 18 (Law Institute of Victoria).

50 Justice B J Preston, 'Conciliation in the Land and Environment Court of NSW: History, nature and Benefits' (Paper presented to ACDC Training Program for members of the Land and Environment court of NSW on 34 conferences in the Land and Environment Court, Sydney, 3 August 2007) 23.

51 Sallmann and Wright 9200) above n 47, 59-60..



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The authority, prestige and sheer 'clout' of courts and judicial officers are still regarded in the community as very important and influential in persuading and assisting people to resolve their differences.⁵²

The report's authors considered that the use of other means of ADR is likely to assist in the early definition of issues and thus eliminate some cases from the courts and clear the path for others.⁵³ The commission agrees.

Chapter 1 discusses the challenges courts currently face, including growing caseloads, increasing complexity of issues to be tried and demand for the speedier disposal of matters. The provision of additional ADR options, and the greater use of current options, are important means by which more disputes may be resolved with greater expedition, at less cost to the parties, and with greater mutual satisfaction in the outcome.

2.1 EARLY NON-BINDING NEUTRAL EVALUATION

Early non-binding neutral evaluation is a process in which the parties, at an early stage, present arguments and evidence to a dispute resolution practitioner, who evaluates the key elements in dispute and the most effective means of resolving it, without a binding determination of the dispute.⁵⁴

Neutral evaluation was pioneered in the United States and has been adapted in Australia, the United Kingdom⁵⁵ and other jurisdictions.

In submissions to the commission, the Supreme Court considered that there is scope to explore other types of ADR, including early neutral evaluation. In its 'new approach' to building cases, the Supreme Court has outlined that the court may give a variety of directions to address the future progress of the proceeding, including that, with the consent of the parties, the case or any questions in issue be referred for non-binding evaluation.⁵⁶

The Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators also supported the use of neutral evaluation.

2.1.1 Position in Victoria

There are currently no Victorian provisions expressly empowering the courts to refer parties to neutral evaluation.

2.1.2 Other models

The Administrative Appeals Tribunal

Some Australian courts and tribunals have express power to refer parties to neutral evaluation.⁵⁷ One example is the Administrative Appeals Tribunal (AAT). The *Administrative Appeals Tribunal Amendment Act 2005* commenced on 16 May 2005, broadening the AAT's ADR powers. The AAT then developed 'process models' for different forms of ADR including neutral evaluation. The AAT defines neutral evaluation as

An advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their expert knowledge of the subject matter, investigates the dispute and provides a non-binding opinion on the likely outcomes. Neutral evaluation is used when the resolution of the conflict requires an evaluation of both the facts and the law. The opinion may be the subject of a written report which may be admissible at the hearing.⁵⁸

Where there is a direction to attend neutral evaluation and it is conducted by a tribunal member or officer, there is no charge to the parties.⁵⁹

'In other models, the views expressed by the evaluator may bind the parties if they are adopted by the parties or the court'.⁶⁰

California

'Early neutral evaluation has been used in the United States for some time'.⁶¹ While some neutral evaluation programs use judicial officers as the neutral evaluator, others use experienced attorneys. For instance, under the Northern District of California program, the court appoints evaluators with expertise in the substantive legal area of the lawsuit from a panel of practitioners admitted for at

least 15 years. Written submissions are provided to the evaluator in advance of the session. Evaluators volunteer their preparation time and the first four hours of the session, with a fixed hourly rate of \$150 after that.⁶²

The RAND Institute for Civil Justice evaluated the neutral evaluation program in the Southern District of California as part of a study of mediation and neutral evaluation programs introduced under the *Civil Justice Reform Act 1990*. Under this program, magistrates conducted early neutral evaluations about four months after filing. It was estimated that 36% of cases reaching the neutral evaluation stage were settled as a result.⁶³ The study also found high levels of satisfaction with the neutral evaluation program (about two thirds) and that most dissatisfaction related to the particular lawyer acting as the evaluator. Further, most participants surveyed believed it reduced the time to disposition.⁶⁴

2.2 CASE APPRAISAL

Case appraisal is also known as expert appraisal. Case appraisal provides for an objective, independent and impartial assessment of disputed facts or issues by an expert appointed by the parties. Parties may agree for the appraisal to be binding.⁶⁵ 'The National Alternative Dispute Resolution Advisory Council (NADRAC) has identified a number of ways in which disputants may use the services of a third party expert'.⁶⁶

In its submission, the Supreme Court considered that there was scope to explore other types of ADR including case appraisal.⁶⁷ The Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators also supported the use of case appraisal.

2.2.1 Position in Victoria

There are currently no provisions that expressly provide for court referral of parties to case appraisal in the Magistrates', County or Supreme Courts.

2.2.2 Other models

Queensland

Some Australian courts and tribunals have the power to refer parties to case appraisal.⁶⁸ For example, case appraisal is widely used in Queensland.⁶⁹ The *Uniform Civil Procedure Rules 1999* (Qld) provide a procedure for court referral to a case appraiser. The case appraiser's decision is deemed to be final unless a party elects to go to trial. If a party elects to go to trial, they will incur costs penalties if they do not achieve a more favourable outcome.⁷⁰ This process differs from the informal nature of other neutral evaluation schemes.⁷¹

The Administrative Appeals Tribunal

The Administrative Appeals Tribunal has developed a process model for case appraisal. Case appraisal is defined by the Tribunal as

an advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their knowledge of the subject matter, assists the parties to resolve the dispute by providing a

52 Ibid.

53 Ibid.

54 NADRAC (2006) above n 1,102.

55 Astor and Chinkin (2002) above n 45, 91.

56 Supreme Court of Victoria, *Practice Note 1 of 2008—A New Approach to Building Litigation*, 21 February 2008, 4–5.

57 See for instance *Court Procedures Rules 2006* (ACT) ss 1179, 1180; *Administrative Decisions Tribunal Act 1997* (NSW) ss 99(1), 101; *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 59(1); *Administrative Appeals Tribunal Act 2005* (Cth) ss 34A, 34B.

58 Administrative Appeals Tribunal, *Neutral Evaluation Process Model*, <www.aat.gov.au/ADR/NeutralEvaluationProcessModel.pdf> at 28 April, 2008.

59 AAT, *Alternative Dispute Resolution (ADR) Guidelines*, <www.aat.gov.au/ADR/ADRGuidelines.pdf> at 28 May 2007.

60 See Sourdin (2005) above n 6, 33, citing the *Supreme Court of Queensland Act 1991* s 111, which provides for orders to give effect to a 'case appraiser's decision'.

61 Astor and Chinkin (2002) above n 45, 247.

62 For a summary of the Northern District Program see <www.fjc.gov/public/home.nsf/pages/707> as at 31 March, 2008.

63 See James Kakalik et al, *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* (1996).

64 Ibid.

65 Astor and Chinkin (2002) above n 45, 89. See also, for example, IAMA's Expert Determination Rule 3, which stipulates that the parties agree to be bound by the expert's determination.

66 Ibid, 89.

67 Submission CP 58 (Supreme Court of Victoria).

68 See, eg, *Administrative Appeals Tribunal Act 2005* (Cth) s 34A; *Uniform Civil Procedure Rules 1999* (Qld) rr 319, 320, 334; *District Court of Queensland Act 1967* (Qld) s 97(3); *Supreme Court of Queensland Act 1991* (Qld) s 102(3).

69 Sourdin (2005) above n 6, 33. The procedure at a case appraisal is set out in s 104 *Supreme Court of Queensland Act 1991* (Qld).

70 Rule 334.

71 Submission CP 58 (Supreme Court of Victoria).



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non-binding opinion on the facts and the likely outcomes. The opinion is an assessment of facts in dispute. The opinion may be the subject of a written report which may be admissible at the hearing.⁷²

Where there is a direction to attend a case appraisal and it is conducted by a tribunal member or officer, there is no charge to the parties. However, they are responsible for their own costs of participating in the case appraisal. Where the parties request an external appraiser, they are responsible for any associated costs.⁷³

2.3 MINI-TRIAL

Mini-trial is a process in which the parties present arguments and evidence to a dispute resolution practitioner or a judge, who provides advice as to the facts of the dispute and regarding possible, probable and desirable outcomes and the means whereby these may be achieved.⁷⁴ A judicial mini-trial is conducted by a judge or retired judge and is similar to early neutral evaluation but is more formal. After an abbreviated presentation of the respective case of each party a non-binding determination is given, rather than an evaluation.⁷⁵ A mini-trial may be conducted in respect of the case as a whole or may be limited to one or more factual or legal issues. The mini-trial can also be used to 'test' whether a person should commence litigation.⁷⁶

In its submission, the Supreme Court considered that there was scope to explore other types of ADR including mini-trials but that judicial non-binding determinations (judicial mini-trials) are problematic and not appropriate.⁷⁷

2.3.1 Position in Victoria

There are currently no provisions expressly enabling court referral of parties to a mini-trial or case presentation in the Magistrates', County or Supreme Courts.

2.3.2 Other models

The judicial mini-trial is more common in Canada and the United States than in Australia.⁷⁸

Canada

Rule 35 of the British Columbia *Supreme Court Rules* provides for judicial mini-trial before a judge or master, who gives a non-binding opinion on the probable outcome of a trial without hearing witnesses. If the matter does not resolve, the judge or master is precluded from presiding at trial. Alberta also offers litigants a judicial mini-trial procedure.⁷⁹

United States

Rule 16(c)(7) of the US *Federal Rules of Civil Procedure* permits a judge to direct or suggest that the parties arrange a private mini-trial.

2.4 SPECIAL MASTERS

In the United States, rule 53 of the *Federal Rules of Civil Procedure* authorises judges to appoint special masters. Unless a statute provides otherwise, a court may appoint a master only to:

- (A) perform duties consented to by the parties;
- (B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
 - (i) some exceptional condition, or
 - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
- (C) address pre-trial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Reference to a special master is the exception and not the rule.⁸⁰

The decision to appoint a special master involves a consideration of whether it will impose extra expense on the parties and whether the special master is neutral.⁸¹ Rule 53(a)(2) requires that a master

not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 445 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

The clerk and deputy clerks of court may not be appointed as special masters 'unless there are special reasons requiring such appointment which are recited in the order of appointment'.⁸²

An order of reference to a special master must specify the scope of the reference, the issues to be investigated, the circumstances under which *ex parte* communication with the court or a party will be appropriate, the time and format for delivering the master's record of activities, the fees payable to the special master, and the delegated powers.⁸³

Subject to the terms of that order, a special master may take all appropriate measures to perform the special master's duties,⁸⁴ including requiring production of tangible evidence and examining witnesses under oath. The special master may, unless the appointing court otherwise directs, exercise the power of the appointing court to compel, take and record evidence⁸⁵ and other witnesses may be subpoenaed by the parties.⁸⁶ Under rule 53(b), the order of reference may direct a special master to make findings of fact, but due process requires that the findings be based on evidence presented at an adversarial hearing. Unless otherwise directed by the order of reference, the special master may evaluate and rule on the admissibility of evidence. Unlike a court-appointed expert, however, a special master is not authorised to conduct a private investigation into the matter referred.

The order should also provide arrangements to ensure that the special master's fees will be paid. The fees payable to the special master must be paid either (a) by a party or parties; or (b) from a fund or subject matter of the action within the court's control. In determining who should pay the fees of the special master the court is required to allocate payment of the master's fees after considering (a) the nature and amount of the controversy, (b) the means of the parties and (c) the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.⁸⁷

Ordinarily, the special master must produce a report on the matters submitted by the order of reference, including any findings of fact or conclusions of law.⁸⁸

In acting on a master's order, report or recommendation the court must afford the parties an opportunity to be heard and may receive evidence. The court may adopt or affirm, modify, wholly or partly reject or reverse the master's conclusions, or resubmit a matter to the master with instructions.⁸⁹

The court must decide *de novo* all objections to findings of fact made or recommended by a master unless the parties agree, with the court's consent, that:

- (A) *the [master's] findings will be reviewed for clear error; or*
- (B) *the findings of a master appointed under rule 53(a)(1)(A); or*
- (C) *will be final.*⁹⁰

The court must decide *de novo* all objections to conclusions of law made or recommended by the master.⁹¹

Unless the court appointing the master nominates a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.⁹²

Special masters have increasingly been appointed for their expertise in particular fields, such as accounting, finance, science and technology.⁹³

2.4.1 Position in Victoria

There is no direct equivalent of special masters in Australia. There are provisions for evidence to be taken before an appointed examiner and for the referral of questions to a special referee. Also, in complex litigation there has been some use of independent facilitators or mediators in connection with pre-trial issues including discovery.

2.5 CONCILIATION

Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may advise on the content of the dispute or the outcome of its resolution, but not determine the dispute. 'The conciliator may advise on or determine the process of conciliation... may make suggestions for terms of settlement, give expert advice on likely settlement terms and actively encourage the participants to reach an agreement'.⁹⁴

- 72 AAT, *Case Appraisal Process Model*, <www.aat.gov.au/CaseAppraisalProcessModel.pdf> at 28 April, 2008 (emphasis omitted).
- 73 AAT, *ADR Guidelines*, above n 59.
- 74 Department of Justice, Canada, *Dispute Resolution Services — Dispute Resolution Guide June 1995 updated November 2003*, <www.justice.gc.ca/en/ps/drs/ref/ref-06.html> at 31 May 2007.
- 75 Submission CP 58 (Supreme Court of Victoria).
- 76 Sourdin (2005) above n 6, 33.
- 77 Submission CP 58 (Supreme Court of Victoria).
- 78 Sourdin (2005) above n 6, 33 citing *Commonwealth Law Bulletin* (October 1994), 1476.
- 79 The process in Alberta is described in detail in Alberta Law Reform Institute's Discussion Paper, *Civil Litigation: The Judicial Mini-Trial* (1993) <www.law.ualberta.ca/alri/docs/dp001.pdf> at 13 March 2008.
- 80 Federal Judicial Center, *Manual for Complex Litigation, Fourth* (2004) <www.fjc.gov/library/fjc_catalog.nsf> at 14 March 2008.
- 81 *Ibid.*
- 82 *Ibid.*
- 83 *Federal Rules of Civil Procedure* [US] (Fed. R. Civ. P.) r 53(b).
- 84 Fed. R. Civ. P. r 53(c).
- 85 See Fed. R. Civ. P. r 53(d).
- 86 Fed. R. Civ. P. r 53(c) & (d).
- 87 Fed. R. Civ. P. r 53(f)(3).
- 88 Fed. R. Civ. P. r 53(f).
- 89 Fed. R. Civ. P. r 53(g)(1).
- 90 Fed. R. Civ. P. r 53(f)(3).
- 91 Fed. R. Civ. P. r 53(f)(4).
- 92 Fed. R. Civ. P. r 53(f)(5).
- 93 For a discussion of the roles played by special masters and magistrate judges, see Linda Silberman, 'Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure', (1989) 137 *University of Pennsylvania Law Review* 2131.
- 94 NADRAC (2006) above n 1, 101.



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There are different types of conciliation, including:

- *informal discussions held between the parties in dispute and a third party to resolve or manage a dispute*
- *processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the issues in dispute, makes proposals for settlement or participates in the drafting of terms of agreement.*⁹⁵

2.5.1 Position in Victoria

Certain proceedings cannot be commenced in the County Court or the Magistrates' Court unless the dispute between the parties has been referred for conciliation and the conciliation officer has issued a certificate.⁹⁶ The conciliation officer will issue a certificate when satisfied that all reasonable steps have been taken by the claimant to settle the dispute.⁹⁷

2.5.2 Other models

Many courts and tribunals have provision for a conciliation conference as part of their legislative framework.⁹⁸ Conciliation has had a long history in the industrial area.⁹⁹ There is considerable variability in the nature and form of the processes so described.¹⁰⁰ Conciliation was once used widely in the Family Court and is still used in matters where financial issues are in dispute.¹⁰¹ Conciliation is also used in the Land and Environment Court of NSW for merits review appeals.¹⁰² Consumer Affairs Victoria offers specialised conciliation services for disputes involving estate agents or building contracts, and credit disputes are conciliated within Consumer Affairs Victoria's general conciliation service.¹⁰³

The Administrative Appeals Tribunal

In the AAT, conciliation is defined as

*a process in which the parties to a dispute, with the assistance of a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with the requirements of the statute.*¹⁰⁴

In the AAT, where there is a direction to attend conciliation and it is conducted by a tribunal member or officer, there is no charge to the parties. However, they are responsible for bearing their own costs of participating in the conciliation. Where the parties request an external conciliator, they are responsible for any associated costs.¹⁰⁵

2.6 CONFERENCING

NADRAC has described conferencing as follows:

*Conference/conferencing is a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.*¹⁰⁶

In the AAT, the President is empowered to refer matters to a conference.¹⁰⁷

Some regard conferencing as a mediation process. Others distinguish it from mediation on the basis that the major focus is on resolving conflict rather than single-issue disputes.¹⁰⁸

2.7 ONLINE ADR

Online dispute resolution (ODR), eADR and cyber-ADR are processes whereby a substantial part, or all, of the communication in the dispute resolution process takes place electronically. This is usually via email. There are also 'automated dispute resolution processes', which are processes conducted with the assistance of a computer program rather than a 'human' practitioner.¹⁰⁹

Consumer Affairs Victoria, the Dispute Settlement Centre Victoria, the Victorian Equal Opportunity and Human Rights Commission and the Victorian Civil and Administrative Tribunal recently launched an online dispute resolution site, which provides information regarding the different options for resolving disputes such as neighbourhood and tenant disputes.¹¹⁰

The Law Council of Australia has established an online mediation platform. The system provides separate 'rooms' for which password-protected access is available to various combinations of parties and lawyers. The system is currently running as a pilot program during which it is free for all users, with no registration or training charges required for participation. A basic case room fee per party (administrative cost) is payable by the legal representative when opening a case. The pilot began in February 2007; after a short trial, the Law Council will evaluate the feedback and make a decision as to whether to continue with online dispute resolution.

There has been an increase in use of technology to provide a broad range of services, including ADR. Chapter 5 of this report deals with case management and technology. The Victorian Parliamentary Law Reform Committee is reviewing online ADR as part of its current review of alternative dispute resolution. The commission has not made any recommendations regarding online ADR. However, it notes that online ADR is an important development with considerable potential for wider use, including by parties who may be distant from each other and the court.

2.8 COURT-ANNEXED ARBITRATION

'Arbitration is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination'.¹¹¹ 'Arbitration has a long history in Australia and overseas, and many different dispute resolution frameworks have been developed with arbitration as a central element'.¹¹²

*Court-annexed arbitration has a close connection with a particular court. It may be either consensual or compulsory. Court-annexed arbitration may be used by courts as a method of reducing caseload by diverting appropriate cases to arbitration. The court may have the power to determine which cases are sent to arbitration and may be able to refer particular aspects of a case ... to arbitration. The court may also be given power to review arbitrators' awards, and there may be a provision that an award may be enforced as if it were an order of the court. By contrast, many private arbitrations have no particular connection with a court, except where interaction with a court is ancillary to the arbitration.*¹¹³

2.8.1 Position in Victoria

The Supreme Court, the County Court and the Magistrates' Court all have the power to make rules for referral of civil proceedings to arbitration.¹¹⁴

The County Court has an express power to order arbitration either with or without the consent of the parties.¹¹⁵ The Supreme Court rules provide for arbitration only with the consent of the parties.¹¹⁶ In the Supreme Court and the County

95 Ibid.

96 For example, WorkCover matters.

97 *Accident Compensation Act 1985* s 49(1)(b).

98 See, eg, *The Administrative Appeals Tribunal Act 1975* (Cth) ss 34A(1)(a), 3(1); *Federal Magistrates Act 1999* (Cth) s 26; *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 54(1); *Health Care Complaints Act 1993* (NSW) ss 12(1), 13(3); *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 27; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ss 78, 306; *Local Court Rules 1998* (NT) r 7.12 and O 32; *Magistrates Court (Civil Division) Rules 1998* (Tas) ss 80(2), 87.

99 Sourdin (2005) above n 6, 31.

100 Ibid 31; Astor and Chinkin (2002) above n 45, 242.

101 Family Court of Australia, *The Conciliation Conference* <www.familycourt.gov.au/presence/connect/www/home/directions/case_management_directions/fcoa_form_conciliation> at 28 May 2007.

102 See for information Preston (2007) above n 50.

103 Consumer Affairs Victoria's power to conciliate disputes is found in s 104 of the *Fair Trading Act 1999*. This power is subject to certain provisos, including a requirement that the dispute is 'reasonably likely to be settled': s 104(1). See, for a good discussion of the Credit Dispute Conciliation Service: Conflict Resolution Research Centre, La Trobe University, *The Dispute Resolution Processes for Credit Consumers*, Background Paper (2005) 8–9.

104 Administrative Appeals Tribunal, *Conciliation Process Model* <www.aat.gov.au/ConciliationProcessModel.pdf> at 28 April, 2008.

105 AAT, *ADR Guidelines*, above n 59.

106 NADRAC (2003) above n 4, 6.

107 *Administrative Appeals Tribunal Act 1975* (Cth) ss 34A, 3.

108 Sourdin (2005) above n 6, 26–28.

109 NADRAC (2006) above n 1, 100.

110 Department of Justice, Victoria, *Dispute Info* <www.justice.vic.gov.au/disputeinfo> at 22 January 2008.

111 NADRAC (2006) above n 1, 100.

112 Family Law Council, *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters*, Discussion Paper (2007) 18.

113 Ibid 16.

114 *Supreme Court Act 1986* s 25(1)(ea), *County Court Act 1958* s 78(1)(hca), *Magistrates Court Act 1989* s 16(1)(fb).

115 *County Court Act 1958* s 47A; *County Court Rules of Procedure in Civil Proceedings 1999* r 34A.21 provides that at a directions hearing the court may, with or without the consent of any party, refer the whole or any part of the proceeding to arbitration in accordance with r 50.08.

116 *Supreme Court (General Civil Procedure Rules) 2005* r 50.08(1).

Chapter 4



Improving Alternative Dispute Resolution

Court, provision is made for arbitrations to be conducted in accordance with the *Commercial Arbitration Act 1984*.¹¹⁷ There is no formal scheme of court-annexed arbitration in either the Supreme or County Court.

Under the *Commercial Arbitration Act 1984*, arbitrators are required to give a statement of reasons for their award.¹¹⁸ Depending on the circumstances of the matter, reasons may be required of a judicial standard and 'as with reasons which a judge is required to give, the extent to which an arbitrator needs to go in explaining his or her decision depends on the nature of the decision'.¹¹⁹

The Magistrates' Court offers a form of court-annexed arbitration. The *Magistrates Court Act 1989* sets out a scheme for mandatory arbitration of small claims. Section 102(1) of the Act provides that all complaints for amounts of monetary relief of less than \$10 000 must be referred to arbitration, subject to a number of exclusions found in section 102(3), such as where the complaint involves complex questions of law or fact. A magistrate conducts hearings, or a judicial registrar for matters under \$5000.¹²⁰ They are not bound by the rules of evidence¹²¹ and proceedings are not conducted in a formal manner.¹²² However, arbitrators are still bound by the rules of natural justice,¹²³ must determine the matter in accordance with law,¹²⁴ and may still exercise any powers that the court may exercise in hearing and determining a complaint.¹²⁵

The parties are not permitted by the rules to serve a request for further and better particulars, a reply, a notice to admit, a notice for discovery, interrogatories or an expert witness statement.¹²⁶

Awards must be in writing, but the reasons for the award need not be in writing. If a statement of reasons was not included in the award, one must be furnished on request within a reasonable period.¹²⁷

Arbitrations are conducted at the court premises by magistrates or registrars and are financed out of court funds.¹²⁸ In the 2005–06 financial year, 3680 matters were finalised at arbitration.¹²⁹

*The scheme provides for simple, flexible, and cheap resolution of uncomplicated matters with a relatively small monetary value. In doing so, it helps the Magistrates' Court to deal with large volumes of cases in an expeditious and efficient manner.*¹³⁰

2.8.2 Other models

The Family Court

The current provisions for court-annexed arbitration are set out in Division 4 of the *Family Law Act 1975* (Cth), in particular section 13E (financial matters).¹³¹ Section 13E arbitration can only be ordered where there are proceedings on foot and a court is exercising jurisdiction under Part VIII of the Act, and is limited to issues arising under that part.¹³² The scheme provides for consensual arbitration by appropriately qualified legal practitioners. The decision of the arbitrator, once registered in the court, is binding and an appeal from the decision is only available on points of law. Part 5 Division 2 of the *Family Law Regulations 1984* sets out how the arbitration must be conducted.

New South Wales

*Arbitration was adopted as a preferred form of alternative dispute resolution by the Supreme, District and Local Courts of New South Wales from the late 1980s. The form of the process was said to follow a 'Philadelphia' style arbitration, [described below]. The process is informal and appeal and review rights are fairly wide. Referral to arbitration is by a court official or judicial officer and the arbitration is conducted by appointed expert lawyers who ordinarily carry out the arbitration on court premises.*¹³³

Under the *Civil Procedure Act 2005* (NSW), the jurisdiction conferred on an arbitrator in referred proceedings is part of the jurisdiction of the court.¹³⁴ The functions conferred on an arbitrator may be exercised only for: a) the purpose of determining the issues in dispute in referred proceedings, b) for the purpose of making an award in referred proceedings and c) for related purposes.¹³⁵ Before making an order referring the proceeding (or question) to arbitration, the referring court is to give such directions for the conduct of the proceedings before the arbitrator as appear best adapted for the just, quick and cheap disposal of the proceedings.¹³⁶

The arbitrator must record the determination, and reasons, by an award in writing signed by the arbitrator, and must immediately send that award to the referring court.¹³⁷ Subject to certain exceptions,¹³⁸ an award is final and conclusive, and is taken to be a judgment of the referring court.¹³⁹

Sections 42–47 of the *Civil Procedure Act 2005* (NSW) specifically provide for rehearing of proceedings determined by an arbitrator. In particular, section 42 provides that a person aggrieved by an award may apply to the referring court for a rehearing of the proceedings.¹⁴⁰ The award is suspended from the time the application is made until an order for rehearing is made. The referring court must order a rehearing if an application for rehearing is made before the award takes effect.¹⁴¹

If an order is made for a full rehearing, the award ceases to have effect and the proceedings are to be heard and determined in the referring court as if they had never been referred to an arbitrator.¹⁴² The court has power to order costs in respect of the rehearing.¹⁴³

Specific rules complementing Part 5 of the Civil Procedure Act are contained in rules 20.8–20.12 of the Uniform Civil Procedure Rules. The main features of the rules are that proceedings in which there is an allegation of fraud may not be referred to arbitration,¹⁴⁴ and on an application for rehearing the court must make a determination as to whether the proceedings are to be a full rehearing or a limited rehearing.¹⁴⁵

In NSW, the rules relating to court-annexed arbitration under the Uniform Civil Procedure Act appear to co-exist with the *Commercial Arbitration Act 1980* (NSW).

The experience in the NSW District Court has been to refer cases out to Philadelphia-style arbitration once the interlocutory steps in a proceeding have been completed. In this way, the parties are assured of a hearing date (usually 1–2 days) well in advance of the hearing date that they would otherwise expect to receive in court. The court provides the venue for the arbitration and some administrative support services.

The Institute of Arbitrators and Mediators and Chartered Institute of Arbitrators supported court-annexed arbitration in their response to the Consultation Paper. According to their submission, since about 1989 more than 20 000 cases have been referred to arbitration in the District Court alone in NSW. The majority of these cases were personal injury cases. However, the submission contended that there is no reason why relatively straightforward commercial cases could not also be referred out to arbitration.¹⁴⁶

United States

'Court-annexed arbitration has become widely accepted since its inception in 1952 and has been implemented by state and federal legislation and court rules'.¹⁴⁷ For instance, Philadelphia has a sophisticated system of compulsory arbitration for civil claims, other than real estate or equitable actions, which are less than \$US50 000. A panel of three court-certified arbitrators who are legal practitioners within the Philadelphia region hears the case. The proceedings are held in a permanent arbitration centre. An award must be made 'promptly' and is usually made on the day of the hearing.¹⁴⁸ If

- 117 *Supreme Court (General Civil Procedure Rules) 2005* r 50.08(2), *County Court Rules of Procedure in Civil Proceedings 1999* r 50.08(3).
- 118 *Commercial Arbitration Act 1984* s 29(1)(c).
- 119 *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255 [54] (Buchanan, Nettle and Dodds-Streeton JJA).
- 120 *Magistrates Court Act 1989* s 103(1).
- 121 *Magistrates Court Act 1989* s 103(2) (a).
- 122 *Magistrates Court Act 1989* s 103(2) (c).
- 123 *Magistrates Court Act 1989* s 103(2) (b).
- 124 *Magistrates Court Act 1989* s 103(4).
- 125 *Magistrates Court Act 1989* s 103(2) (d).
- 126 *Magistrates' Court Civil Procedure Rules 1999* r 21.05 provides that if the amount of the claim or counterclaim in a proceeding referred to arbitration is \$5000 or more, each party must serve a list of documents at least 14 days before the pre-hearing conference or 14 days before the date fixed for the arbitration.
- 127 *Magistrates Court Act 1989* s 104.
- 128 Family Law Council (2007) above n 112, 26.
- 129 Magistrates Court of Victoria, *Annual Report 2005–2006* (2006) 13.
- 130 Family Law Council (2007) above n 112, 25.
- 131 See in particular s 10L(2)(a).
- 132 Part VIII proceedings include periodic and lump sum spousal maintenance, modification of spousal maintenance, declarations of property interests, adjustment of property interests, setting aside orders altering property interests, ante-nuptial and post-nuptial settlements and (to the extent that they arise in Part VIII proceedings) bankruptcy issues.
- 133 Family Law Council (2007) above n 112, 25.
- 134 Section 37(1).
- 135 Section 37(4).
- 136 Section 38(2)(c).
- 137 Sections 39(2) and (3).
- 138 Section 41 and Division 3 of the *Civil Procedure Act 2005* (NSW).
- 139 Section 40.
- 140 A rehearing may also be sought for part of the matter, which is a limited rehearing.
- 141 Section 43(1).
- 142 Section 44(1).
- 143 Section 46.
- 144 Rule 20.8.
- 145 Rule 20.12(2).
- 146 Submission CP 35 (Institute of Arbitrators and Mediators Australia and Institute of Chartered Arbitrators).

147 Astor and Chinkin (2002) above n 45, 252 citing Deborah Hensler, 'What We Know and Don't Know About Court-administered Arbitration' (1986) 69 *Judicature* 270.

148 *Pennsylvania Rules of Civil Procedure* r 1306; Philadelphia Court of County Pleas, *Civil Administration at a Glance 2005–2006* 11 <<http://courts.phila.gov/pdf/manuals/civil-trial/compulsory-arbitration-center.pdf>> at 14 August 2007.



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neither party has appealed the award after 30 days, judgment on the award is entered.¹⁴⁹ The appeal is by way of a new hearing. The compulsory arbitration program in Philadelphia County conducts more than 20 000 arbitrations each year.¹⁵⁰

2.8.3 Arguments for and against court-annexed arbitration

The advantages of court-annexed arbitration are similar to the advantages of ADR generally. For example, court-annexed arbitration may provide a cheaper, faster alternative to the court system.¹⁵¹ The parties are more likely to have a positive experience of arbitration in circumstances where a high-quality arbitrator conducts the arbitration.

In *The Access to Justice: an Action Plan* report, Justice Sackville supported the use of court-annexed ADR. The report noted:

*There are strong arguments in favour of court-annexed ADR. They include the reduction of costs associated with the early resolution of a dispute and the increased capacity of a court to cope with its caseload. In short, it is argued court-annexed ADR provides an opportunity to make better use of existing services, to speed decision-making and to enhance the acceptability and quality of decisions, all in a forum where disputes are traditionally resolved.*¹⁵²

As well as benefits for the court and the parties, there are benefits for the government in providing a reliable system of arbitration, such as savings in judicial and court costs where suitable matters can be resolved by arbitration.

The Victorian Bar, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators were supportive of court-annexed arbitration.¹⁵³ The latter considered that court-annexed arbitration should be implemented in Victoria in the same way as it has been in New South Wales because:

- the numbers of cases disposed of have increased
- there have been more expeditious determinations
- an available pool of expert arbitrators has been fostered
- even when the arbitrator's award is not accepted, it has led to further negotiations between the parties resulting in pre-trial settlement.¹⁵⁴

In their submission, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators argued that given the County Court now has unlimited civil jurisdiction, this may result in an increase in the number of civil cases and court-annexed arbitration may assist the court in better managing its caseload.¹⁵⁵

Common concerns regarding court-annexed arbitration are similar to the concerns expressed about ADR more generally. Of particular concern is that the rehearing rates in the NSW District Court appear to be relatively high. 'An examination of the rehearing rates in the NSW jurisdiction (apart from 2004 in the District Court) shows that in civil cases the rehearing rate for court-ordered arbitration was typically in the range of 12–15% of cases referred to arbitration'.¹⁵⁶ In such cases, court-annexed arbitration may simply be adding a further layer to the process, resulting in increased costs and delay.

Astor and Chinkin argue that:

*the evidence does not suggest that the use of court-connected ADR produces significant overall savings for courts and tribunals. Reducing costs to courts by case management and ADR may have the effect of increasing costs to parties. And yet, the effects of early case management and ADR do appear to have beneficial effects in allowing courts to settle efficiently those cases that are going to settle, allowing resources to be focused on those cases that go to trial.*¹⁵⁷

The Family Law Council in its report recommended that:

*To reduce ill founded applications to review the arbitrator's decision, there should be some cost implications for applicants who are not successful in bettering their position on review ... The filing fee for an application for a rehearing could also be set at a level that would give a party reason to pause before deciding to seek a review of the award.*¹⁵⁸

2.8.4 Conclusions and recommendation

The commission believes it would be appropriate to implement court-annexed arbitration by way of court rules in the Victorian County and Supreme Courts. The NSW District Court experience demonstrates that arbitration can be flexibly used when workload varies. Similarly, arbitration could be of benefit to the County Court and Supreme Court in suitable cases, such as personal injury cases¹⁵⁹ and less complex commercial cases. Many cases could be determined expeditiously. Court-annexed arbitration may allow the courts to process cases more efficiently, thereby reducing delay and saving costs, particularly in cases that settle.¹⁶⁰ Further, the inclusion of new rules would highlight court-annexed arbitration as an option. This may facilitate greater use of this alternative.

As in the Victorian Magistrates' Court and the NSW District Court, the court could provide the venue for the arbitration and some administrative support services. Such services would improve access to services by limiting the cost to the parties of a suitable venue and administrative expenses.

2.9 GREATER USE OF SPECIAL REFEREES

The commission is of the view that there should be a variety of methods available to courts and litigants to resolve disputes. One method available is to appoint a special referee. Although there is presently provision for this, the commission is of the view that there is scope for greater use of special referees and that the traditional view of the role of a special referee should be broadened.

Historically, provisions for the appointment of special referees were incorporated in arbitration legislation.¹⁶¹

Conventionally, special referees have been appointed to investigate and report to the court on technical questions in dispute; for example, in building cases or patent cases. In appropriate circumstances, the commission considers that it may be desirable for a person who would otherwise conduct an ADR process (for example as mediator or arbitrator) to be appointed as a special referee, even without the parties' consent. The issue of compulsory referral to various ADR processes is discussed further below. The commission believes there is scope for greater use of special referees to assist the court in the determination of issues or proceedings.

2.9.1 Position in Victoria

The *County Court Act 1958* expressly empowers the court to refer some or all of a proceeding to a special referee for inquiry and report.¹⁶² The court may direct how such reference shall be conducted and may remit any report for further inquiry and report.¹⁶³ The Act provides that on consideration of any report the court may give judgment or make any order in the proceeding 'as may be just without prejudice to any right of appeal'.¹⁶⁴

The Supreme Court and the County Court have the power to make rules for reference of any question to a special referee or court officer for decision.¹⁶⁵ The Magistrates' Court does not have the express power to refer a proceeding or question to a special referee. However, the court is currently updating the rules to bring them more into line with the Supreme and County Court Rules. Thus the Magistrates' Court Rules may provide for special referees in the near future.

The rules of the Supreme and County Courts authorise the courts to appoint special referees.¹⁶⁶ Rule 50.01 of the Supreme and County Court Rules provides for referral of questions to a special referee either to decide the question or to give an opinion on it. The court must state the question referred and direct that the special referee report in writing to the court, and may also direct that the special referee give further information in the report.¹⁶⁷

The court may give directions as to the procedure for the reference including for discovery, interrogatories, attendance of witnesses and production of documents.¹⁶⁸ The court is also empowered to determine how much and how the special referee is to be paid.¹⁶⁹ A special referee has the same protection and immunity as a judge of that court.¹⁷⁰

The referee's powers are provided for by court rules.¹⁷¹ A referee has similar powers to those vested in an arbitrator by the *Commercial Arbitration Act 1984*. For instance, a referee has the power to enforce the attendance of any witness at any investigation.¹⁷² The parties to the reference have some say in defining the procedure to be followed during the inquiry.¹⁷³

- 149 Philadelphia Court of County Pleas, above n 148, 5.
- 150 Ibid, 1.
- 151 See, eg, Frank Costigan, 'Arbitrate or Perish in a Pile of Paper', *The Australian Financial Review* (Sydney), 10 August 2007, 59.
- 152 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), 277.
- 153 Submissions CP 33 (Victorian Bar), CP 35 (Institute of Arbitrators and Mediators and Institute of Chartered Arbitrators).
- 154 Submission CP 35 (Institute of Arbitrators and Mediators and Institute of Chartered Arbitrators).
- 155 Submission CP 35 (Institute of Arbitrators and Mediators and Institute of Chartered Arbitrators).
- 156 Family Law Council, (2007) above n 112, 62.
- 157 Astor and Chinkin (2002) above n 45, 262 see also ch 2.
- 158 Family Law Council (2007) above n 112, 62.
- 159 Except those that have not already been to conciliation under the WorkCover scheme.
- 160 Submission CP 35 (Institute of Arbitrators and Mediators and Institute of Chartered Arbitrators); Astor and Chinkin (2002) above n 45, 262.
- 161 The history is set out in some detail by Brooking J in *Nicholls v Stamer* [1980] VR 479.
- 162 *County Court Act 1958* s 48(1).
- 163 *County Court Act 1958* s 48(1).
- 164 *County Court Act 1958* s 48(1).
- 165 *Supreme Court Act 1986* s 25(1)(e), *County Court Act 1999* s 78(1)(hc).
- 166 *Supreme Court (General Civil Procedure) Rules 2005* r 50.02; *County Court Rules of Procedure in Civil Proceedings 1999* rr 50.02, 34A.22.
- 167 *Supreme Court (General Civil Procedure) Rules 2005* r 50.08; *County Court Rules of Procedure in Civil Proceedings 1999* r 50.01.
- 168 *Supreme Court (General Civil Procedure) Rules 2005* and *County Court Rules of Procedure in Civil Proceedings 1999* rr 50.02, 40.12.
- 169 *Supreme Court (General Civil Procedure) Rules 2005* and *County Court Rules of Procedure in Civil Proceedings 1999* r 50.06.
- 170 *Supreme Court Act 1986* s 27A, *County Court Act 1958* s 48C.
- 171 *Supreme Court (General Civil Procedure) Rules 2005* and *County Court Rules of Procedure in Civil Proceedings 1999* rr 50.02, 50.04.
- 172 *Supreme Court (General Civil Procedure) Rules 2005* rr 50.02, 50.04; *County Court Rules of Procedure in Civil Proceedings 1999* rr 50.02, 40.12. See also Justice Bruce DeBelle, 'Power of the Courts' in Vicky Waye (ed.), *A Guide to Arbitration Practice in Australia*, (2nd ed, 2006) 449, 453.
- 173 Geoffrey Cohen and Leigh Duthie, 'The Role of the Special Referee' (1993) 67 *Law Institute Journal* 1056.



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In the course of the inquiry, the referee may submit a question to the court or state facts to the court, asking the court to draw such inference as it thinks fit.¹⁷⁴ This enables the referee to obtain assistance on a question of law.¹⁷⁵

Once the investigation is complete, the referee must prepare a report to submit to the court. Once the referee's report is submitted, the court must give notice to the parties and can:

- vary the report
- require the special referee to provide a further report explaining any matter mentioned or not mentioned in the report
- remit the reference or any part of it for rehearing or further consideration to the same or another referee.¹⁷⁶

'The court may as the interests of justice require adopt the report or decline to adopt the report in whole or in part, and make such order or give such judgment as it thinks fit'.¹⁷⁷ In practice, however, *a court will be reluctant to set aside the referee's report if the parties have had sufficient opportunity to present their respective cases and if the report demonstrates a thorough and well-reasoned approach to the reference. If it appears that the referee has made a major error, has reported perversely or acted beyond the terms of reference, the court will reject the report.*¹⁷⁸

Special referees must comply with the requirements of procedural fairness.¹⁷⁹ Procedural fairness requires 'fairness between the parties'¹⁸⁰ but its content will vary with the circumstances. It includes an opportunity to respond to new material. Reasons are required to be given. The referee must be impartial and not receive material from one party in the absence of the other. Procedural fairness is required even though the special referee does not make a determinative decision:

*[T]he referee makes no decision: he [or she] expresses an opinion to the court. But if it appears to the court that the parties have had a fair opportunity to place their evidence and arguments before the referee, and if his opinion discloses the application of reason to the material before him, even if the court may have been disposed to come to a contrary conclusion, there will be a disposition in the court to adopt and rely upon the report. In this manner, the referee is, although himself not making any decision, potentially caught up in the decision-making processes of the court. It follows that he must observe concepts of natural justice in preparing his opinion. For if he does not do so, the court, being obliged to apply concepts of natural justice, must reject his report.*¹⁸¹

Appellate courts in recent years have considered (a) the standards to be applied by the trial judge in the exercise of discretion in determining whether to adopt the report of a special referee and (b) the nature of an appeal from a decision of the judge to accept or reject a referee's report.

According to the Victorian Court of Appeal:

*It may be accepted that a judge ought not to adopt and act upon a special referee's decision on a question of law unless it appears to be correct. On the other hand, a decision as to a matter of fact is not to be reconsidered afresh, and in general should only be rejected if it is patently unreasonable or contrary to or against the weight of the evidence. Otherwise, the reference will be no more than a rehearsal for the trial of the same issue before the Court.*¹⁸²

The court stated that it did not intend to catalogue the grounds on which a court may refuse to adopt a special referee's report and noted that the court's discretion is confined only by the 'interests of justice', which will depend on the circumstances of each case.¹⁸³

As Gleeson CJ (then) of the NSW Court of Appeal has observed:

*The purpose of [the rule providing for the appointment of a special referee] is to provide, where the interests of justice so dictate, a form of partial resolution of disputes alternative to orthodox litigation, and it would frustrate that purpose to allow the reference to be treated as some kind of warm-up for the real contest. On the other hand, if the referee's report reveals some error of principle, some absence or excess of jurisdiction, or some patent misapprehension of the evidence, that would ordinarily be a reason for rejecting it ... So also would perversity or manifest unreasonableness in fact-finding.*¹⁸⁴

An appeal from a decision on adoption of a report of a special referee is an appeal from the decision of the trial judge, not an appeal from the referee's determination. The approach to be adopted by appellate courts in an appeal from a decision of a trial judge to adopt, or not adopt, the findings of a special referee has received recent appellate consideration.¹⁸⁵

Referees are required to give reasons for their determinations and the principles governing whether such reasons are adequate do not differ significantly from those applicable to judicial officers. Where there is competing expert evidence the referee is required to examine and analyse this in resolving the issue in dispute. Where experts are in dispute on questions of methodology, it is necessary for the referee to apply an 'intellectual process of examination and analysis' to resolve the matter.¹⁸⁶

The appointment of a special referee is distinct from other options available to the court:

1. **Court appointed experts**—are appointed by the court to report on an issue. The expert is appointed to provide the judge with neutral specialist advice.¹⁸⁷ The power to appoint such an expert is contained within different court rules.¹⁸⁸ The commission has proposed various changes to the rules concerning court appointed experts. Chapter 7 deals with expert witnesses.
2. **An expert determination**—'is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen on the basis of specialist qualifications or experience in the subject matter of the dispute (the expert) and who makes a determination'.¹⁸⁹ Unlike an arbitrator, the person making the expert determination is not required to conduct a quasi-judicial hearing.¹⁹⁰ 'Construction contracts often contain dispute resolution clauses that provide for expert determination as an alternative or precursor to litigation or arbitration'.¹⁹¹
3. **Court appointed arbitrators**—although the County Court Rules provide that an arbitration must be conducted in accordance with the *Commercial Arbitration Act 1984*, the *County Court Act 1958* confers on the court the power to facilitate arbitration by agreement as well as arbitration that is conducted by the court 'if it thinks it is fit to act as arbitrator'.¹⁹²
4. **Assessors**—The Supreme Court and the County Court can call in the assistance of one or more specially qualified assessors. The court can hear the proceeding with their assistance, either in whole or in part, but is not bound by their opinion or findings.¹⁹³ The Magistrates' Court does not have an equivalent express power to call in the assistance of an assessor.

174 *Supreme Court (General Civil Procedure) Rules 2005* r 50.03; *County Court Rules of Procedure in Civil Proceedings 1999* Rule 50.03.

175 Debele (2006) above n 172, 449, 454.

176 *Supreme Court (General Civil Procedure) Rules 2005* and *County Court Rules of Procedure in Civil Proceedings 1999* rule 50.03(2)(b). The parties can also apply to the court requesting an order as to one of the three options above: r 50.03(3).

177 *Supreme Court (General Civil Procedure) Rules 2005* and *County Court Rules of Procedure in Civil Proceedings 1999* Rule 50.04.

178 Debele above n 172, 456 citing *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549; *Banabelle Electrical Pty Ltd v State of New South Wales* [2005] NSWSC 714.

179 *Xuereb v Viola* (1989) 18 NSWLR 453. For details on the accepted principles for referrals to special referees in NSW, see *Seven Sydney Pty Ltd v Fuji Xerox Australia Pty Ltd* [2004] NSWSC 902.

180 *Xuereb v Viola* (1989) 18 NSWLR 453, 468 (Cole J).

181 *Xuereb v Viola* (1989) 18 NSWLR 453, 472 (Cole J).

182 *Plumley v Adgauge Pty Ltd* [1998] VSCA 70 (Buchanan JA, with whom Brooking JA and Phillips JA agreed). Other appeals to the Court of Appeal from decisions of judges to adopt or not adopt some or all of the findings of a special referee include *Fry v Oddy* [1998] VSCA 26 (Brooking, Ormiston and Callaway JJ) and *Aqua-Max Pty Ltd v MT Associates Pty Ltd* [2001] VSCA 104 (Brooking, Charles and Chernov JJA).

183 *Plumley v Adgauge Pty Ltd* [1998] VSCA 70 Buchanan JA[13].

184 *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549, 563, with reference to Pt 72 *Supreme Court Rules 1970* (NSW); now see *Uniform Civil Procedure Rules 2005* (NSW) r 20.24. See also *Ryde City Council v Tourtouras* [2007] NSWCA 218.

185 See *Ryde City Council v Tourtouras* [2007] NSWCA 218 (Santow, McColl and Basten JJA) [24]–[26]. See also *Etlis v New Age Constructions (NSW) Pty Ltd* [2005] NSWCA 165 (Handley, Hodgson and Brownie JJA).

186 See *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)* [2006] NSWCA 282 [140] (Beazley, Ipp and Tobias JJA).

187 Debele (2006) above n 172, 449, 456.

188 See for instance *Supreme Court (Intellectual Property) Rules 1996* O 10.

189 NADRAC (2006) above n 1,103.

190 Submission CP 35 (Institute of Arbitrators and Mediators Australia and Institute of Chartered Arbitrators).

191 Nick Rudge and Nicholas Gallina, Allens Arthur Robinson, 'When is an Expert Determination Process not an Arbitration?' (2007) 1 <www.aar.com.au/pubs/pdf/const/foconstsep07.pdf> at 18 March 2008.

192 *County Court Act 1958* ss 46, 47. The *Commercial Arbitration Act 1984* s 3(6)(a) also provides that the Act does not apply to an arbitration under the *County Court Act 1958*, unless provided otherwise by that Act.

193 *Supreme Court Act 1986* s 77, *County Court Act 1958* s 48A.



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There was support for the use of special referees in the submissions. The Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators considered that there should be more use of the 'reference out' procedure.¹⁹⁴ The Supreme Court submission in response to the Consultation Paper suggested that the court should adopt the approach of the NSW Supreme Court and refer parties to a special referee, even without their consent.

The rules also make provision for the Supreme Court or County Court to make an order for the taking of any account or the making of any inquiry.¹⁹⁵ However, this is a more limited power and according to the Supreme Court, the rule is rarely used.¹⁹⁶ The Magistrates' Court does not have an equivalent express power to refer a question for an inquiry and report.

2.9.2 Other models

Australia

All state and territory jurisdictions make provision for questions to be referred to special referees, except where parties have a right to jury trial.¹⁹⁷

In the Northern Territory, Queensland, Tasmania and Western Australia, the reference may take either of the following two forms:

1. the proceeding, or a question of fact arising in the proceeding, may be tried by the referee¹⁹⁸ or
2. the referee is to inquire into and report on any question arising in the proceeding.¹⁹⁹

In the ACT, the court may, on application of a party or of its own motion, make an order for a referee to inquire into and report on, or to hear and determine, the whole of the proceeding or any question arising therein.²⁰⁰

In NSW, the court may at any stage of a proceeding refer the proceeding or any question in the proceeding to a referee for inquiry and report.²⁰¹ In South Australia, there are provisions for reference of any question in a proceeding to a referee for inquiry and report.²⁰²

California

The California Code of Civil Procedure sets out extensive provisions regarding the appointment of a referee, including when and how a referee is appointed and how referees are paid.

When the parties to a contract have voluntarily agreed that any dispute between them will be resolved by judicial reference, the court will appoint a referee '[t]o hear and determine any or all of the issues in an action or proceeding, whether of fact or of law' and to issue a decision.²⁰³ A referee may also be appointed by agreement between the parties or, if they cannot agree, by the court.²⁰⁴ A referee may be chosen by the parties. If chosen by the parties, the referee can be any person mutually acceptable to them and does not need to be a judge or a lawyer. If the court is required to select a referee, it must obtain up to three nominees from each party and then choose from among those nominees one that a party has not objected to.²⁰⁵

When the parties do not consent, the court may appoint a referee, either by application of any party or on the court's own motion, in the following circumstances:

- (1) *When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein*
- (2) *When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect*
- (3) *When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action*
- (4) *When it is necessary for the information of the court in a special proceeding*
- (5) *When the court ... determines that it is necessary to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.*²⁰⁶

All appointments of referees are by written order and include:

- 1) a statement of the reason the referee is being appointed²⁰⁷
- 2) the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case²⁰⁸
- 3) the subject matter or matters included in the reference
- 4) the name, business address and telephone number of the referee
- 5) the maximum hourly rate the referee may charge and, at the request of any party, the maximum number of hours for which the referee may charge. The court can modify the maximum number of hours. The parties share the cost of the referee unless they can show an 'economic inability' to pay.²⁰⁹

The referee's fees are paid as agreed by the parties to the contract.

*If the parties do not agree on the payment of fees and request that the matter be resolved by the court, the court may order the parties to pay the referee's fees ... in any manner determined by the court to be fair and reasonable including an apportionment of the fees among the parties.*²¹⁰

The appointed referee is required to disclose to the parties any personal or professional relationships with any of the parties. The parties then have the opportunity to object to the appointment of the referee on certain specified grounds.²¹¹

Once a referee is appointed, the rules provide that the referee oversees the resolution of the case including, if necessary, conducting a trial on all the issues of fact and law. The rules of evidence apply in a referee's hearing and the referee must conduct the trial in the same way a court would. The trial takes place at private facilities away from the courthouse.²¹²

After all testimony and evidence have been taken, the referee must issue a written statement of decision. The court may adopt the referee's decision, just as if the action had been tried by the court itself.²¹³ Review of the referee's decision can be obtained through a motion for a new trial or by appeal to the court of appeal.

For all matters pending before privately remunerated referees, the litigants must provide to the clerk of the court inter alia a notice indicating the case name and number as well as the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse.²¹⁴ The judge, on request of any person or on the judge's own motion, may order that a case before a privately remunerated referee must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings.²¹⁵

194 Submission CP 35 (Institute of Arbitrators and Mediators Australia and Institute of Chartered Arbitrators).

195 *Supreme Court (General Civil Procedure) Rules 2005* O 52.

196 Submission CP 58 (Supreme Court of Victoria).

197 *Supreme Court Rules* (ACT) O 89, *Supreme Court Act 1979* (NT) ss 26–28; *Supreme Court Rules* (NT) O 50, *Civil Procedure Act 2005* (NSW) s 26, *Uniform Civil Procedure Rules 2005* (NSW) rr 20.13–20.24, *Uniform Civil Procedure Rules 1999* (Qld) r 501 (the power to refer questions of fact to a referee is conferred by *Supreme Court Act 1995* (Qld) s 255, any question may be referred for inquiry and report), s 256 (with the parties' consent, and without their consent in certain cases, question of fact may be referred to referee for trial), *Supreme Court Act 1935* (SA) s 67, *Supreme Court Rules 2000* (Tas) rr 561(1)(d), 574–580.

198 *Supreme Court Act 1979* (NT) s 27(1) (also provides that if the parties cannot agree on a referee, the court may appoint one); *Supreme Court Act 1995* (Qld) s 256(1); *Uniform Civil Procedure Rules 1999* (Qld) r 501 (referral of question of fact to referee for trial or opinion); *Supreme Court Rules 2000* (Tas) r 561(1)(d); *Supreme Court Civil Procedure Act 1932* (Tas) s 26(3) (power to make rules relating to referees); *Supreme Court Act 1935* (WA) s 51. See also *Rules of the Supreme Court 1971* (WA) O 35 r 11 (in expedited list, judge may refer any question of fact to a referee).

199 *Supreme Court Act 1979* (NT) s 26; *Supreme Court Rules* (NT) r 50.01; *Supreme Court Act 1995* (Qld) s 255(1); *Supreme Court Act 1935* (WA) s 50(1) (may report on entire proceeding or a particular question); *Rules of the Supreme Court 1971* (WA) O 35 r 2.

200 *Supreme Court Rules* (ACT) O 89 r 2 (the referee may be a judge, master, registrar or other officer of the court, or any other person agreed on by the parties, specified by the court, or specified by a person nominated by the court).

201 *Uniform Civil Procedure Rules 2005* (NSW) r 20.14.

202 *Supreme Court Act 1935* (SA) s 67.

203 California Code of Civil Procedure (Cal. Code of Civ. Proc.) § 638.

204 Cal. Code of Civ. Proc. § 638.

205 Cal. Code of Civ. Proc. § 640.

206 Cal. Code of Civ. Proc. § 639.

207 When the referee is appointed pursuant to paragraph (1), (2), (3), or (4) of subdivision (a) of Cal. Code of Civ. Proc. § 639.

208 When the referee is appointed pursuant to paragraph (5) of subdivision (a) of Cal. Code of Civ. Proc. § 639.

209 Cal. Code of Civ. Proc. § 639.

210 Cal. Code of Civ. Proc. § 645.1.

211 Including that the referee has an 'interest in the event of the action, or in the main question involved in the action', has 'formed or expressed an unqualified opinion or belief as to the merits of the action', or has 'a state of mind ... evincing enmity against or bias toward either party': Cal. Code of Civ. Proc. § 641.

212 Cal. Code of Civ. Proc. § 638.

213 Cal. Code of Civ. Proc. § 644(a).

214 Cal. Rules of Court r 3.902.

215 Cal. Rules of Court r 3.910.



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The California Code of Civil Procedure also provides that: 'The Judicial Council shall, by rule, collect information on the use of these referees [and] shall also collect information on fees paid by the parties for the use of referees to the extent that information regarding those fees is reported to the court. The Judicial Council shall report thereon to the Legislature.'²¹⁶

Parties who are referred out to a referee under the California Code of Civil Procedure retain their place in the court queue and retain the right of appeal.²¹⁷

2.9.3 Arguments for and against the use of special referees

Commentators and submissions have identified various benefits in using special referees:

- It is not cost-effective for a judge to investigate and inquire into technical factual matters.²¹⁸ A person with expertise in the subject can produce a report more quickly and at less cost.²¹⁹
- A reference can be heard in private while court proceedings generally take place in public, which is particularly advantageous where the matters raised are commercially sensitive.²²⁰
- Proceedings before a special referee are less formal than court proceedings. This means relevant issues can be isolated and addressed more quickly than in court.²²¹
- The parties to the reference, as a matter of practice, have some say in the procedure used during the inquiry, which gives them some control over the process.²²²

The power to refer matters to a referee may facilitate the resolution of an issue expeditiously by persons with appropriate expertise.

Justice Byrne identified some of the benefits of the Victorian special referee procedure in *Abigroup v BPB*²²³

A special referee in Victoria is not necessarily required to conduct the reference 'in the same manner as nearly as circumstances will admit, as trials conducted before a judge'.²²⁴ Indeed, the particular value of the procedure in Victoria is often that the special referee may not be so constrained. From the point of view of efficient trial management, it is very difficult to justify referring a question to a special referee where the investigation is to be conducted in the same manner as a trial in court, with the one difference that it is to be conducted before a lay person who may lack the authority and standing, and experience of a judge.²²⁵

One concern is that the hearing before a referee may be more expensive because the parties pay the referee, the transcription costs and room hire. However, as noted by Justice Smart in *Park Rail Developments v RJ Pearce Assocs Pty Ltd*²²⁶

In the overall context of the legal fees, those of the expert consultants, and the costs of the lost executive time, this extra expense is usually not significant. It is often offset by the factors mentioned earlier, and if, as is often the case, the amount at issue is large, it loses any importance ...

As arbitrations and references usually take place promptly the parties are not encumbered with the costs of proceedings extending over several years awaiting a hearing. Because of the technical knowledge of the arbitrators or referees, the hearing may be quicker.²²⁷

2.9.4 Conclusions and recommendation

The commission is of the view that there will be benefits from greater use of special referees to assist the court in the determination of issues or proceedings. The power to refer questions to a referee can clearly be exercised more frequently than has been the case to date. Use should not be confined to 'technical' questions requiring 'specialist' expertise. Although it is clearly desirable for parties to consent to the proposed use of a special referee the commission's view is that the exercise of the power should not be constrained by any requirement that the parties consent. The compulsory use of ADR processes is discussed further below.

2.10 HYBRID DISPUTE RESOLUTION PROCESSES

The commission believes 'hybrid' dispute resolution processes should be included in the list of ADR options available to the parties. The US experience suggests that hybrid processes can be very effective in the right circumstances and offer parties another alternative to conventional dispute-resolution approaches.

Med-Arb is an abbreviation for mediation-arbitration. It is in use in two distinct forms in the United States. In the first, the mediator, by agreement, acts as both the mediator and the arbitrator pursuant to a binding arbitration agreement. If there are still unresolved issues after the mediation, the matter goes to arbitration. The second and more standard process is the pre-selection of a separate arbitrator, who deals with the unresolved dispute if mediation is not successful.²²⁸

Areas where Med-Arb has developed in the United States include labour disputes, international arbitration and corporate disputes.²²⁹ According to one commentator, it can be particularly useful where the parties have a desire to continue a relationship or resolve the matter in a timely fashion.²³⁰

Arb-Med is an abbreviation for arbitration mediation. It commences by the conduct of an arbitration hearing. The neutral person prepares an award on the issues with reasons, which is not issued to the parties. The parties then conduct a mediation. If the dispute does not resolve, the arbitrator then issues the award and the parties are bound by the decision.²³¹ In larger cases, the parties may select an arbitration panel consisting of three arbitrators.²³²

Arb-Med has been used in various types of matters, including police and fire fighter disputes in the United States, and in union management relations in the auto and steel industries in South Africa and the United States.²³³

MEDALOA is sometimes referred to as 'baseball arbitration' because it is used to resolve salaries of major league baseball players.²³⁴ MEDALOA is an abbreviation for 'mediation and last offer arbitration'. At the conclusion of an unsuccessful mediation, the mediator considers each party's 'last offer' then makes a decision as to which offer is the most reasonable and should be accepted as the settlement.²³⁵ The mediator is not able to split the difference or propose a different result.²³⁶ MEDALOA is a useful technique for resolving an impasse in a variety of circumstances.²³⁷

'Night time baseball mediation' is a variation of 'baseball arbitration' where the parties do not disclose their final offers to the mediator but seal them in an envelope. The mediator makes a decision regarding how the dispute should be resolved and the offer closest to the mediator's decision is the offer that prevails. This process can best be used in financial disputes where there will usually be little difficulty in determining which party's offer is closest to the mediator's determination.²³⁸

216 Cal. Code of Civ. Proc. § 638.

217 Consultation with Professor Deborah Hensler (US academic) (21 August 2007).

218 Cohen and Duthie (1993) above n 173, 1056 citing Rogers CJ; *Telecomputing PCS Pty Ltd & Ors v Bridge Wholesale Acceptance Corporation (Aust.) Ltd ('Telecomputing')* (1991) 24 NSWLR 513, 517 F-G; Debelle (2006) above n 172, 451–2.

219 Cohen and Duthie (1993) above n 173 1056 citing Rogers CJ; *Telecomputing* (1991) 24 NSWLR 513, 517 F-G.

220 Ibid.

221 Ibid 1056.

222 Ibid.

223 *Abigroup Contractors Pty Ltd v BPB Pty Ltd* [2000] VSC 261.

224 See *Bold Park Senior Citizens Centre & Homes Inc v Bollig Abott & Partners (Gulf) Pty Ltd* (1998) 19 WAR 281, 284 (lpp J) referring to O 35 r 3 of the WA Rules. See, also, *Uniform Civil Procedure Rules 1999* (Qld) r 502(3).

225 *Abigroup Contractors Pty Ltd v BPB Pty Ltd* [2000] VSC 261, 14 (Byrne J).

226 (1987) 8 NSWLR 123.

227 Ibid at 126.

228 See generally the discussion by Derek Minus, *Innovative Hybrid Processes—Mediation-Arbitration*, (Paper presented at the Victorian Bar Continuing Legal Education Program, Melbourne, 25 September 2007) 4.

229 Megan Telford, 'Med-Arb: A Viable Dispute Resolution Alternative', (paper included in Industrial Relations Centre—Queen's University Current Issues Series, Ontario, 2000) 4–5.

230 Ross Williams, 'Practical Aspects of Conducting an Arbitration' (Paper presented at the Institute of Arbitrators and Mediators Australia National Conference, Adelaide, 2 June 2007) 8.

231 George Golvan QC, 'Innovative Hybrid Dispute Resolution Processes' (draft paper presented for the Victorian Bar Continuing Legal Education Program, Melbourne, 25 September 2007); John Blankenship, 'Developing Your ADR Attitude—Med-Arb, a Template for Adaptive ADR', (2006) 42(11) *Tennessee Bar Journal* <www.tba.org/Journal_TBArchives/200611/TBJ-200611-medArb.html> at 18 March 2008.

232 Carolina Dispute Settlement Services, *Mediation-Arbitration: Med-Arb*, Construction Dispute Resolution Services <www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm> at 18 March 2008.

233 Arnold Zack, 'Quest for Finality in Airline Disputes: A Case for Arb-Med', (2004) 58 (4) *Dispute Resolution Journal* 34 <http://findarticles.com/p/articles/mi_qa3923/is_200311/ai_n9463704> at 18 March 2008.

234 American Arbitration Association, *Sports Arbitration including Olympic Athlete Disputes*, AAA Online Library, <www.adr.org/sp.asp?id=29154> at 26 September 2007.

235 Golvan (2007) above n 231; Blankenship (2006) above n 231.

236 For instance, if one party offers to settle by paying \$200 000 and the other party offers to settle by accepting a sum of \$1 million, the mediator may only choose between the two competing offers: Golvan (2007) above n 231.

237 See, eg, Zack (2003–04) above n 233.

238 Golvan (2007) above n 231; Alan Limbury, 'Med-Arb, Arb-Med, Neg-Arb and ODR' (Paper presented to the NSW Chapter of the Institute of Arbitrators and Mediators Australia, Sydney, 3 August 2005) 5; Charles Rumbaugh, *Baseball Arbitration I* (2000) Superior Court of California, County of Santa Barbara, Court Administered Dispute Resolution, <www.sbcadre.org/articles/0010.htm> at 18 March 2008.



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2.10.1 Position in Victoria

Currently, Victorian courts do not refer parties to 'hybrid' processes. The courts' legislation and rules do not confer express power to refer parties to hybrid processes.

2.10.2 Other models

Australia

Commercial Arbitration Acts

There are instances of hybrid processes in Australia.²³⁹ Legislative provisions and court rules often make provision for various forms of ADR. Sometimes these are identified as separate alternatives; in other instances they may be used in combination. For example, section 27 of the *Commercial Arbitration Act 1984* provides that the parties to an arbitration agreement may seek settlement of a dispute by mediation, conciliation or other means. There are similar provisions in Queensland and NSW.²⁴⁰

The Land and Environment Court of NSW

Combined conciliation and adjudication hearings can be conducted in the Land and Environment Court of NSW.²⁴¹ The dispute resolution practitioner first uses conciliation and then, by agreement of the parties, adjudication.²⁴²

NSW Workers Compensation Commission

Conciliation and arbitration are used in the workers compensation jurisdiction in NSW. The arbitrator can conduct combined conciliation and arbitration hearings. The arbitrator first attempts conciliation and, if that fails to settle all outstanding issues, proceeds to arbitrate the matter.²⁴³

The compensation commission's annual review for 2005 shows that only 2% of determinations were overturned on appeal. This appeal rate and percentage settlement rate is different to that experienced in the arbitration system conducted in the NSW Supreme, District and Local Courts. Although there are difficulties in comparing different types of disputes, the difference is said to primarily relate to the combined use of conciliation and arbitration.²⁴⁴

Family Court

The Law Council launched a mediation and arbitration project in November 2007 aimed at helping the Family Court cut its backlog of cases. The scheme, known as the Melbourne Project, involves family law arbitrators using innovative techniques, including a combination of mediation and arbitration, 'to cut down the costs, time and emotional strain associated with resolving disputes'.²⁴⁵ When matters are referred by the court to arbitration, the arbitrator may also use mediation during the arbitration, with the consent of all parties.²⁴⁶

Overseas

The use of multifaceted ADR techniques is common in some overseas jurisdictions. For instance, in the United States, various state statutes contemplate arbitration and conciliation. Forms of Med-Arb exist in Germany, in Switzerland and in the context of international arbitrations.²⁴⁷ Brazil, China and Hong Kong have enacted arbitration laws that contain hybrid provisions.²⁴⁸ In Japan, the *Arbitration Act 2004* allows all parties to consent, in writing, to the arbitral tribunal attempting settlement of civil disputes submitted to arbitration.²⁴⁹ Canada and Singapore also use hybrid processes. The rules of the World Intellectual Property Organisation (WIPO) 'encourage a mediator to promote settlement of the dispute and if unsuccessful, to propose procedures including arbitration by the mediator'.²⁵⁰

2.10.3 Arguments for and against the use of hybrid processes

Med-Arb

The following advantages of Med-Arb have been identified:

- 1) Finality: the dispute will be resolved by either mediation or arbitration.
- 2) Flexibility: the process offers the opportunity to move from mediation to arbitration and back to mediation (even in the arbitration phase the arbitrator can step back to his or her mediator's role to mediate a discrete part of the award).²⁵¹
- 3) Med-Arb can result in cost and time efficiencies, compared to separate mediation and arbitration proceedings.²⁵²

- 4) There is an incentive to settle: the presence of the neutral party and the threat of an arbitrated decision creates an incentive for the parties to successfully mediate their dispute.²⁵³
- 5) Med-Arb creates an incentive for the parties to participate in the mediation phase genuinely and in good faith because they know that if they fail to reach agreement, they lose control over the outcome.²⁵⁴
- 6) There is a good success rate: relatively few cases in Med-Arb actually proceed to arbitration.²⁵⁵
- 7) The neutral party can gain insights during mediation that may contribute to a more appropriate arbitration award (if the same person is used).

Studies conducted overseas regarding hybrid processes have shown positive results. Research conducted in Canada into the use of Med-Arb in Crown employee grievances in Ontario concluded that:

- Med-Arb seemed to reduce costs and increase efficiency. Med-Arb is more likely to be used when the hearing is extremely long and when there are many interrelated issues.²⁵⁶
- The success of Med-Arb is evident in the fact that only a small percentage of cases progressed to the arbitration stage.
- The research failed to support the usual criticisms of Med-Arb.²⁵⁷

The following disadvantages of Med-Arb have been identified:

- 1) A neutral party who mediates and then arbitrates may be perceived as biased and may be aware of information conveyed informally and confidentially in mediation.²⁵⁸
- 2) Private sessions, which are confidential, may violate due process because the other party may not have the opportunity to challenge what is said to the neutral person.²⁵⁹
- 3) The fear of arbitration could make mediators too forceful, resulting in a decision that unduly represents the position of the mediator.²⁶⁰
- 4) The neutral party may not have the skills to function effectively as both a mediator and arbitrator.²⁶¹
- 5) The parties may be inhibited in their discussions with the mediator and reveal less if they know that the mediator might be called on to act as arbitrator in the same dispute.²⁶²
- 6) 'A party to Med-Arb can force the transition from mediation to arbitration to occur by simply refusing to participate or negotiate'.²⁶³
- 7) The mediation phase could be used as preparation for a possible arbitration, making it more likely the dispute will go to arbitration.²⁶⁴

239 See, eg, *Workplace Injury Management and Workers Compensation Act 1988* (NSW) ss 354–355, which provides for conciliation and arbitration; *Administrative Appeals Tribunal Act 1975* (Cth), which expands the use of ADR processes and allows a member who has conducted an ADR process to subsequently sit on a hearing in the same matter; *Land and Environment Court Act 1975* (NSW) s 34, which provides for conciliation followed by adjudication.

240 *Commercial Arbitration Act 1990* (Qld) s 27; *Commercial Arbitration Act 1984* (NSW) s 27.

241 *Land and Environment Court Act 1979* (NSW) s 34.

242 Preston (2007) above n 50, 23.

243 Workers Compensation Commission, 'The Practice of the Conciliation/ Arbitration Process', *Workers Compensation Commission Guidelines* (2007) 10–11.

244 Family Law Council (2007) above n 112, 29.

245 Law Council of Australia, 'Law Council Project to Encourage Family Law Dispute Resolution', (Press Release, 14 November 2007); Law Council of Australia and the Australia Institute of Family Law Arbitrators and Mediators, *Family Law Arbitration—The Melbourne Project*, Family Law Section www.familylawsection.org.au/resource/finalMelbProjectwebflyer16Oct07.pdf; Family Court website <www.familycourt.gov.au/presence/connect/www/home/publications/papers_and_reports/presentations/presentation_FAMILY_LAW_ARBITRATION> at 28 November 2007.

246 Consultation with Maureen Schull, Director Family Law Section, Law Council of Australia (5 December 2007).

247 See, eg, Hong Kong Arbitration Ordinance, 1996, c 341, art 2B(3) (HK). For further information see Michael Schneider, *Combining Arbitration with Conciliation* (2004) 1 (1) *Transnational Dispute Management* <www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_55.htm> at 26 September 2007; Yasunobu Sato, 'The New Arbitration Law in Japan: Will It Cause Changes in Japanese Conciliatory Arbitration Practices?' (2005) 22(2) *Journal of International Arbitration* 141, 144.

248 Schneider (2004) above n 247; Wang Wenyong, 'Distinct Features of Arbitration in China: An Historical Perspective' (2006) 23(1) *Journal of International Arbitration*, 49; Lijun Cao, 'Combining Conciliation and Arbitration in China: Overview and Latest Developments' (2006) 3 *International Arbitration Law Review*,

84–93.

249 Article 38(4)(5). See, for more information on the Japanese *Arbitration Act 2004*: Luke Nottage, 'Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?' (2004) 2 *International Arbitration Law Review* 54–60.

250 Claude Thomson, *Med-Arb: A Fresh Look* (2005) 5 <www.claudethomson.com/docs/Med-Arb_A_Fresh_Look.pdf> at 18 March 2008.

251 Blankenship (2006) above n 231.

252 Ibid; Thomson (2005) above n 250.

253 Blankenship (2006) above n 231.

254 Ibid.

255 Telford (2000) above n 229, 2.

256 Arbitrators referred to cases they mediated in 3 days or less that would have taken 15 days to hear in arbitration.

257 Telford (2000) above n 229, 13–14. However, a significant limitation of this study is that only med-arbiters were surveyed, not parties or their lawyers.

258 As only one neutral is involved, when the dispute proceeds to mediation, the neutral is already familiar with the issues and argument: Blankenship (2006) above n 231. Limbury (2005) above n 238, 11 citing D Jones, *Chartered Institute of Arbitrators (Australian Branch) Entry Course Materials on Australian Domestic Commercial Arbitration* (2002) 32. William Ross, Cheryl Brantmeier and Tina Ciriacks, 'The Impact of Hybrid Dispute-Resolution Procedures on Constituent Fairness Judgments' (2002) 32 *Journal of Applied Psychology* 1151.

259 Blankenship (2006) above n 231.

260 Ibid.

261 Thomson (2005) above n 250, 3.

262 Blankenship (2006) above n 231; Limbury (2005) above n 238, 11 citing Jones D, *Chartered Institute of Arbitrators (Australian Branch) Entry Course Materials on Australian Domestic Commercial Arbitration*, 2002 32. Blankenship notes that there is little research indicating that parties are more reluctant to be open in med-arb; there appears to be research indicating that the parties are more likely to be honest and open.

263 Blankenship (2006) above n 231.

264 Telford (2000) above n 229, 4.



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Arb-Med

The following advantages of Arb-Med have been identified:

- 1) Finality: the dispute will be resolved by either mediation or arbitration.
- 2) It has 'superior cost and time efficiency over separate mediation and arbitration proceedings'.²⁶⁵
- 3) The impending threat of an imposed decision can have a positive impact in helping disputants reach their own negotiated agreement.²⁶⁶
- 4) The parties have good reason to disclose all pertinent information to the arbitrator as the arbitrator's decision may ultimately decide the dispute.

A 2002 US study found that parties in the Arb-Med procedure settled in the mediation phase more frequently and achieved settlements of higher joint benefit than did parties in the Med-Arb procedure.²⁶⁷

The following disadvantages of Arb-Med have been identified:

- 1) The cost and time of participating in the arbitration may be unnecessary if the dispute settles at mediation.²⁶⁸
- 2) Compared to Med-Arb, it is likely to be a less expedited process because it always involves both an arbitration phase and a mediation phase.²⁶⁹
- 3) A neutral person who participates in both arbitration and mediation may be perceived as biased when information in one process has been conveyed confidentially.²⁷⁰
- 4) Suggestions by the mediator at mediation may be interpreted as hints regarding the sealed arbitral award, inappropriately coercing or pressuring the parties into settlement.²⁷¹

MEDALOA

The following advantages of MEDALOA have been identified:

- 1) It is informal, quick and low cost.
- 2) The competing offers can incorporate lateral and interest based features.²⁷²
- 3) Finality: the dispute will be resolved once and for all.²⁷³
- 4) The incentive is on parties to put a reasonable offer (to attract the mediator) rather than rely on an offer which is unreasonable (because the mediator is unlikely to select that offer).²⁷⁴
- 5) The mediator's discretion is significantly reduced.²⁷⁵

The following disadvantages of MEDALOA have been identified:

- 1) There is no ability to split the difference between the offers.²⁷⁶
- 2) The mediator might decide that neither offer is acceptable—the matter would then proceed and there would be no finality.²⁷⁷
- 3) It is not suited to disputes with multiple issues.²⁷⁸

Concerns about hybrid processes and procedural fairness

One of the primary concerns raised with respect to Med-Arb is procedural fairness.²⁷⁹ The arbitrator may appear to be and may actually be biased if the arbitrator received private representations from the parties when acting as mediator. Procedural fairness in the arbitration may require full disclosure to the parties of any such private representations.²⁸⁰

In the UK, the requirement of procedural fairness has given rise to some difficulties. One issue is whether the *Human Rights Act 1998* may preclude waiver of the right to procedural fairness.²⁸¹ The *Charter of Human Rights and Responsibilities 2006* may raise similar issues in Victoria.

As the *Duke Group*²⁸² case illustrates, the mere holding of private sessions in the mediation phase may create the appearance of bias. In that case, some 10 years earlier in a related action a Supreme Court judge had been appointed as mediator for certain pre-trial issues. Despite the fact that Justice DeBelle had no memory of the details, he disqualified himself on the basis that:

*A reasonable bystander might apprehend that, in the course of meeting the directors separately, I might have received information which would cause me to have a view about the merits of the claim against the directors which might affect the exercise of my discretion.*²⁸³

At common law an objection on that ground may be waived by the parties.²⁸⁴ If the mediator does not hold private sessions issues of procedural fairness may not arise but the disclosure of confidential or 'without prejudice' information may give rise to problems. Such difficulties may result in parties not being as open as may be desirable. One way around the problem is to appoint a different arbitrator who was not privy to the information disclosed in a private session. However, this would reduce the efficiency of the process and add to costs.

One commentator suggests that confidential information acquired in a Med-Arb process creates no more a problem than when an arbitrator or a judge has to consider the admissibility of evidence. Even if the evidence has already been heard, if it is deemed inadmissible, a competent judge or arbitrator knows how to disregard it. Similarly, a competent med-arbiter will be able to disregard what was learned in a failed mediation when deciding a case.²⁸⁵

Other methods suggested to reduce potential problems include:

- appointing a professional body such as the Institute of Arbitrators and Mediators to administer the processes and if requested, nominate a different person to conduct the second stage²⁸⁶
- introducing a code of ethics for neutral parties to assist them in handling confidential information obtained in private sessions²⁸⁷
- training neutral parties to ensure that any confidential information is only considered in the context of mediation and that any arbitration decision is based directly on the evidence presented.²⁸⁸

2.10.4 Conclusions and recommendation

The commission is of the view that despite the concerns raised, hybrid processes should be included in the 'shopping list' of ADR options. Using a hybrid process provides parties with flexibility and finality in the resolution of their dispute. The processes may involve less time, expense, aggravation and inconvenience compared with litigating a dispute in court.

Given the concerns about hybrid processes, particularly in relation to procedural fairness, it is desirable to obtain the fully informed consent of the parties before referrals are made. The issue of compulsory referral to ADR processes is discussed further below.

The proposed Civil Justice Council should have responsibility for the ongoing review of ADR processes, in conjunction with the courts, lawyers, litigants and ADR providers.

265 Blankenship (2006) above n 231.

266 Telford (2000) above n 229, 4; Blankenship (2006) above n 231.

267 Donald Conlon, Henry Moon, K Yee Ng, 'Putting the Cart Before the Horse: The Benefits of Arbitrating Before Mediating' (2002) 87(5) *Journal of Applied Psychology*, 982.

268 Golvan (2007) above n 231; Limbury (2005) above n 238, 10.

269 To the extent a neutral party is paid on an hourly basis, it is likely to be more costly than Med-Arb: Conlon et al (2002) above n 267, 979.

270 Limbury (2005) above n 238, 11 citing Jones (2002) above n 258, 32.

271 Limbury (2005) above n 238, 12.

272 Golvan (2007) above n 231.

273 Ibid.

274 Ibid.

275 The process removes many of the concerns about the mediator having the power to make a decision: *ibid.*

276 But in reality, the neutral party could, in consultation with the parties, go back to the parties and request further reasonable offers: *ibid.*

277 Ibid.

278 Ibid.

279 See below under compulsory referral to ADR for a discussion of the meaning of procedural fairness.

280 Alan Limbury, 'Making Med-Arb work' (2007) July *ADR Reporter*, 14.

281 Ibid.

282 *The Duke Group Ltd (In Liq.) v Alamain Investments Ltd & Ors* [2003] SASC 272 ('*Duke Group*'). See the discussion below under court-conducted mediation for more information on this case.

283 *Duke Group* [2003] SASC 272.

284 Limbury (2007) above n 280 14–15.

285 A more controversial position is that Med-Arb fosters better arbitrated decisions. The view is that understanding all the merits of the case, including confidential information obtained in private sessions, helps the neutral person fashion a decision which meets the real needs and interest of the party: Telford (2000) above n 229, 4-5.

286 The drawback with this approach is that the parties lose the benefit of having both the arbitration and mediation conducted by the same neutral person, who is already familiar with the issues and argument. An example of a hybrid process using a different person is the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, which allow for the parties to conduct a mediation conference under the Commercial Mediation Procedures to facilitate settlement. The mediator must not be an arbitrator in the case: r 8.

287 Minus (2007) above n 228, 14.

288 Telford (2000) above n 229, 5.



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2.11 SUBMISSIONS

In their submissions in response to the Consultation Paper, the Law Institute, the Supreme Court, State Trustees, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators were supportive of increased ADR options for courts and litigants.²⁸⁹

In consultations, members of the Supreme Court expressed the view that there is a need to maximise the resources of the courts to assist ADR and that ADR should be encouraged and supported.²⁹⁰

The Human Rights Law Resource Centre and the Law Institute supported the introduction of further ADR options and contended that further options would assist the courts to more efficiently and effectively manage civil disputes.²⁹¹

The Mental Health Legal Centre contended that outcomes from ADR processes 'would not be fair for disempowered parties who cannot participate in ADR processes from an equal position'. It suggested that self-represented litigants should have access to legal advisers for ADR processes.²⁹² The commission's recommendations on additional assistance for self-represented persons are discussed in Chapter 9.

2.12 CONCLUSIONS AND RECOMMENDATIONS

As noted in Chapter 1, the civil courts in Victoria deal with an enormous range of matters. Although there are many different types of ADR, the method most commonly proposed by courts is mediation. Other forms of ADR might be more appropriate than mediation for a particular dispute. While referral to various types of ADR may be within the existing powers of judicial officers, the commission believes there should be express provision for different forms of ADR. The availability of different ADR options will better enable the courts to 'fit the forum to the fuss'.²⁹³ Different dispute resolution mechanisms may be suitable for different matters, depending on their size, complexity and importance. The enhanced use of ADR and the more widespread availability of different options will enable the courts to manage certain litigious disputes more efficiently and effectively.

Further ADR options should include:

- early neutral evaluation
- case appraisal
- mini-trial
- the appointment of special masters
- court-annexed arbitration
- special referees, with or without the consent of the parties
- conciliation
- conferencing
- hybrid ADR processes.

Some of these options, such as special masters or court-annexed arbitration, may be more appropriate in the higher courts. The proposed Civil Justice Council should have responsibility for the ongoing review of ADR processes, in conjunction with the courts, lawyers, litigants and ADR providers.

Court rules should make more detailed provision for referral to various ADR alternatives and for the conduct of ADR by judicial officers. The issue of whether there may need to be legislative amendments to give the courts additional express powers to make rules is discussed in Chapter 12. Practice notes could be used to provide further information for litigants and lawyers.

In light of the concerns expressed about judicial 'mini-trials', the commission considers that each court should decide whether judicial mini-trials are appropriate.

The commission is of the view that there should be additional education for participants in the civil justice system regarding the different ADR options available. This is further discussed below.

3. MORE EFFECTIVE USE OF INDUSTRY DISPUTE RESOLUTION SCHEMES

Although industry ADR schemes were not expressly included in the commission's terms of reference, such dispute schemes are an important alternative to the court system. They facilitate the resolution of large numbers of disputes.

In many cases, complainants have a choice about whether to commence legal proceedings or to seek resolution of their complaint through an industry scheme. Dispute schemes have fulfilled a need for cost-free, accessible, expeditious and effective resolution of disputes.²⁹⁴ A further advantage of such schemes is that they are specialised.

3.1 HOW SCHEMES OPERATE

Industry specific dispute resolution schemes deal with complaints and disputes between consumers (including some small business consumers) and a particular industry. Member institutions fund the schemes²⁹⁵ and industry and consumer representatives govern them.

*Some schemes are required to meet standards established by ASIC [the Australian Securities and Investments Commission]. If the industry member and consumer do not reach agreement, most schemes have the power to make a determination. The determination is binding on the industry member, but not on the consumer who can choose to accept or reject the determination. Depending on the scheme, the power to make the determination lies with an Ombudsman, panel or referee.*²⁹⁶

Since 1990, various schemes have been set up by industries seeking to provide a cost-free, effective and relatively quick means of resolving complaints about the products or services provided by them. Schemes of this type play a vital role as an alternative to expensive legal action for both consumers and industry.²⁹⁷

In order to encourage and support the development of schemes, the Federal Government helped develop a set of benchmarks to guide industry in developing and improving such schemes, called 'Benchmarks for Industry-Based Customer Dispute Resolution Schemes'. Most schemes operate in accordance with these benchmarks. The benchmarks set out key ADR practices, that are intended to give effect to the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness.²⁹⁸

There are a number of schemes currently operating in Australia at a national or state level. These include the Financial Industry Complaints Service (FICS), the Insurance Ombudsman Service (IOS), the Banking and Financial Services Ombudsman (BFSO), the Energy and Water Ombudsman (Victoria) (EWOV), the Telecommunications Industry Ombudsman (TIO) and the Credit Union Dispute Centre (CUDC).

Scheme members agree to submit their consumer disputes to the applicable industry scheme for resolution. Scheme membership may be voluntary or mandatory. Membership of a scheme may also be a legislative requirement or a requirement for licensing.²⁹⁹

The schemes can be large. For example, the BFSO has a membership of 33 banks that represent all of the major banking institutions in Australia, and 54 'non-bank' members.³⁰⁰ FICS has 2562 members.³⁰¹ The schemes handle many thousands of consumer complaints each year. For example, last year the BFSO opened 6326 new cases; the IOS had 1870 cases referred for determination; and FICS dealt with 13 204 telephone contacts and received 1165 new complaints that resulted in 689 investigations.³⁰² The monetary values of the disputes handled by these services are not trivial. Both the BFSO and IOS can determine disputes where the amount claimed is up to \$280 000.³⁰³ FICS can determine disputes for life insurance complaints up to \$250 000, and up to \$100 000 for other complaints.³⁰⁴

Some of the schemes publish reasons for their determinations. These are not binding precedents but the effect of such publication on industry and on the scheme decision makers is to develop consistent patterns of decision making which influence industry conduct. The schemes that do not publish reasons (such as the BFSO) produce detailed and comprehensive guidelines, which are drawn from previous decisions and indicate the likely course of future decisions, as well as selected summarised case studies.³⁰⁵

The use of lawyers is restricted in some of the schemes.³⁰⁶

289 Submissions CP 18 (Law Institute of Victoria), CP 58 (Supreme Court of Victoria), CP 23 (State Trustees); CP 35 (Institute of Arbitrators and Mediators and Chartered Institute of Arbitrators).

290 Consultation with the Supreme Court of Victoria (2 August 2007).

291 Submissions ED1 19 (Human Rights Law Resource Centre), ED1 31 (Law Institute of Victoria).

292 Submission ED1 11 (Mental Health Legal Centre).

293 Preston (2007) above n 50, 24 citing L Ray, 'Emerging Options in Dispute Resolution (1989, June) *American Bar Association Journal* 66 at 67 and F Sandler and S Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10 *Negotiation Journal* 49.

294 Commonwealth Department of Industry, Science and Tourism, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* (1997) 4.

295 Normally members pay fees to the scheme based on the percentage of total complaints against them: Anita Stuhmcke, 'Resolving Consumer Disputes: Out of the Courts and Into Private Industry' (2003) 31 *Australian Business Law Review* 48, 50.

296 NADRAC (2006) above n 1, 104.

297 Commonwealth Department of Industry, Science and Tourism (1997) above n 294, 4.

298 Telecommunications Industry Ombudsman, *Annual Report 2004/2005* (2005) 77.

299 Chris Field, *Current Issues in Consumer Law and Policy* (2006) 93. For example, under the Australian and Securities Investments Commission, *Policy Statement 139—Approval of External Complaints Resolution* (1999).

300 Banking and Financial Services Ombudsman, *Annual Review 2005/2006* (2006) Appendix B.

301 As at the end of 2005: Financial Industry Complaints Service, *Annual Review 2005/2006* (2006) 9.

302 BFSO (2006) above n 300, 33, FICS (2006) above n 301, 53.

303 BFSO, *Banking and Financial Services Ombudsman Terms of Reference* (as from 1 December 2004) cl 5.1(e); IOS, *Insurance Ombudsman Service Terms of Reference* (as at 1 June 2007) cl 1.2 (see definition of 'determination').

304 *Financial Industry Complaints Service Rules* r 12.2 (as at 1 June 2007).

305 Submission ED1 23 (Banking and Financial Services Ombudsman).

306 See, for instance, IOS (2007) above n 303, cl 11.14.



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Generally, before most schemes will investigate a complaint, it is necessary for the consumer to have attempted to resolve the complaint directly with the scheme member. Many businesses have developed their own private internal dispute resolution arrangements to deal with complaints. Consumers who are unable to resolve their complaints directly may lodge a complaint with the scheme.³⁰⁷

The scheme will facilitate investigation of the complaint. The complaints that the schemes investigate almost always involve issues to do with contracts between the industry members and their consumer customers.³⁰⁸ The schemes use various forms of ADR, including mediation and conciliation, to resolve disputes prior to exercising their determinative powers. Where resolution cannot be reached using ADR processes, most schemes provide for a determination to be made.³⁰⁹

The binding nature of decisions on industry participants is an important feature of the schemes. The consumer is able to accept or reject a decision of a scheme.³¹⁰ Consumers who reject the decision can pursue court action.³¹¹ Although consumers are free to reject a scheme determination and take the matter up with the courts, it seems that few do so.³¹² Enforcement of scheme decisions is by a combination of regulatory and industry self-regulation mechanisms. Failure to comply with a scheme decision can lead to industry based sanctions such as expulsion from the relevant industry association.³¹³

3.2 ARGUMENTS FOR AND AGAINST REFERRING DISPUTES TO SCHEMES

Arguments for referring disputes to schemes

A clear advantage to consumers is that the schemes offer quick and cheap justice. While they do not offer any guarantee that the consumer will win, they allow consumers the opportunity to have their complaint resolved independently and fairly. Further, the schemes do not leave the consumer open to costs if the complaint proves unsuccessful.³¹⁴

The specialised nature of schemes offers benefits to customers seeking redress. As decision-makers are already familiar with how the industry operates, there is less need for the consumer to provide extensive background material to accompany the complaint.³¹⁵

Schemes also offer a more flexible approach to dispute resolution than the courts. They are able to consider a broader range of factors, including the law, applicable industry codes or guidelines, good industry practice and what is 'fair and reasonable' in the circumstances. Unlike a court, decision makers are generally not bound by the rules of evidence or previous decisions.³¹⁶

Schemes also have the capacity to improve business practices and standards of scheme members and industry.³¹⁷ Although decisions by schemes are not binding precedents, the specific industry focus of the scheme facilitates communication between scheme members, industry and the decision maker. Decisions generate rules that may guide industry behaviour and assist in preventing further disputes.³¹⁸

Research conducted into FICS found that disputants were often satisfied with the services offered by the scheme.³¹⁹

Submissions to the commission identified the following advantages of industry schemes:

- The Public Interest Law Clearing House (PILCH), the Consumer Action Law Centre, IOS and BFSO contended that industry schemes are more accessible, more user-friendly, use more flexible procedures, are more efficient and less formal, less intimidating and less costly for litigants than courts, particularly for self-represented litigants.³²⁰
- IOS noted that the decision-making criteria are broader than for courts.³²¹
- IOS also noted that schemes have a 'level playing field' philosophy—they can assist consumers in ways courts cannot; for example, by being able to conduct 'inquisitorial' style oral examinations.³²²
- IOS pointed out that oral examinations are very effective for clarifying issues and resolving disputes.³²³
- IOS noted that scheme members are required to disclose documents. Sharing information leads to the quicker resolution of disputes.³²⁴
- BFSO advised that schemes can consider disputes that are outside their jurisdiction.³²⁵

Arguments against referring disputes to schemes

One criticism, raised by the Mental Health Legal Centre and other commentators, is that because the schemes are industry funded they lack independence from industry.³²⁶ Other disadvantages identified are that schemes may not be effective in ensuring consumers know where to lodge a complaint, and the scheme may not have the jurisdiction to resolve it.³²⁷

Another concern is that the schemes are limited in their ability to impose sanctions. Stuhmcke contends that 'an adverse court finding against an industry member will influence industry behaviour through its precedent value; however, an adverse finding by a scheme does not have the same legal force'.³²⁸

Some schemes may be neither well known nor accessible. For example, research conducted into public awareness of the FICS found that it was not particularly well known as an ADR body.³²⁹ Another study conducted by Ipsos found a significant gap in public awareness of the functions (and to a smaller extent the existence) of ADR service providers.³³⁰ Other studies have found that 'vulnerable consumers'³³¹ experience barriers to accessing ADR schemes.³³² Sourdin suggests that financial services dispute resolution schemes may not be equitable because consumers with certain demographic backgrounds appear to be unlikely ever to lodge complaints or pursue disputes.³³³

3.3 INITIAL PROPOSAL

In submissions and consultations there was considerable support for industry schemes provided they operated fairly. FICS and IOS identified that scheme services, if used more by the legal industry, would leave the courts with more time and resources to deal with other cases.³³⁴ The Victorian WorkCover Authority noted that such schemes are less formal than the court system and are generally cost and time efficient as well as user-friendly.³³⁵ The Consumer Action Law Centre suggested that there should be a policy of referring appropriate matters, including matters involving self-represented litigants, to industry schemes for resolution outside the court system.³³⁶ The centre noted that this would require changes within the schemes because their terms of reference provide that they cannot deal with disputes once proceedings are issued.

The commission considered whether in some circumstances it might be appropriate for a court to stay legal proceedings and refer a dispute to an industry scheme. The commission also considered whether or not there is a need to remove the existing restriction on access to the schemes where litigation has been commenced and whether the schemes might be an appropriate venue where the complainant is a self-represented litigant.³³⁷

As noted above, in some circumstances, if legal proceedings have commenced, a complainant may be prevented from making a complaint to a scheme. For example, under clause 5.1(c) of the BFSO's Terms of Reference, the Ombudsman cannot consider a dispute

307 Field (2006) above n 299, 92.

308 Paul O'Shea, 'The Lion's Question Applied to Industry-Based Consumer Dispute Resolution Schemes' (2006) 25 (April) *The Arbitrator & Mediator* 63, 67.

309 Field (2007) above n 34, 30.

310 Field (2006) above n 299, 121.

311 Ibid.

312 O'Shea (2006) above n 308, 71. Also, apparently most cases settle before court with over 90% of their cases resolved within 4 months: Consultation with IOS (5 September 2007).

313 IOS (2007) above n 303, cl 11.14.

314 Stuhmcke (2003) above n 295.

315 Field (2006) above n 299, 97.

316 Ibid.

317 In a consultation with the commission on 5 September 2007, IOS identified that scheme members get the advantage of schemes' decisions and that the decisions are used for training purposes, which leads to improved industry behaviour.

318 Field (2006) above n 299, 97.

319 Jane Elix and Tania Sourdin, Community Solutions, Latrobe University, University of Western Sydney, *Review of the Financial Industry Complaints Service 2002—What are the Issues?* Issues Paper (2002) 34–35.

320 Submission ED1 20 (The Public Interest Law Clearing House), Consultation with IOS (5 September 2007), Submissions ED2 12 (Consumer Action Law Centre), ED1 23 (Banking and Financial Services Ombudsman).

321 The schemes' decision-making criteria usually refer to the law, the relevant industry code and what is fair and reasonable in the circumstances. See for instance IOS' Terms of Reference 1 June 2007, cl 11.15: 'In arriving at a determination a Panel ... shall have regard to what is fair and reasonable in all the circumstances; regard must also be had to good insurance practice, the terms of the policy, and established legal principle' (consultation with IOS, September 2007).

322 Consultation with IOS (5 September 2007).

323 Consultation with IOS (5 September 2007).

324 Consultation with IOS (5 September 2007). See also: ASIC's PS 139.105; IOS' Terms of Reference 1 June 2007 cls 7.1, 8.2, 8.3, 8.5 and 8.15.

325 Submission ED1 23 (Banking and Financial Services Ombudsman).

326 Submission ED1 11 (Mental Health Legal Centre); Stuhmcke (2003) above n 295, 50.

327 Stuhmcke (2003) above n 295, 50.

328 Ibid.

329 Tania Sourdin, 'An Alternative for Who? Access to ADR Processes' (2007) 10 (2) *ADR Bulletin* 26, 26.

330 Ipsos Pty Ltd (2007) above n 40, 10–14.

331 Consumers who live in typically low socioeconomic, geographical regions or rural areas: Sourdin (2007) above n 329, 27.

332 Tania Sourdin, *Dispute Resolution Processes for Credit Consumers* (2007); Sourdin and Matruglio (2004) above n 22.

333 Sourdin (2007) above n 329, 27.

334 Submission CP 54 (Financial Industry Complaints Service and Insurance Ombudsman Service).

335 Submission CP 48 (Victorian WorkCover Authority).

336 Submission CP 43 (Consumer Action Law Centre).

337 See for example BFSO Terms of Reference from 1 December 2004 cl 5.1(c); IOS Terms of Reference as at 1 June 2007 cls 6.2, 8.7(e); FICS' Rules as at 1 June 2007 r 23; EWOV's Charter as at 30 May 2006, cl 4.2(d).



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if a dispute is based on the same event and facts and with the same disputant as any matter which is, was, or becomes, the subject of any proceedings in any court ... unless the parties consent.

Thus, the BFSO can consider a dispute where legal proceedings have commenced, provided both parties consent. Often this may require a stay of court proceedings until the dispute is determined. However, the BFSO noted in its submission that the current guidelines to the terms of reference provide that where it appears that legal proceedings have commenced, the BFSO will only ask the financial services provider whether it will consent to stay the proceedings if the proceedings have not been served.³³⁸

Clause 6.2 of the IOS Terms of Reference provides:

IOS or a member need not respond to a dispute if court proceedings have been commenced in respect of the same subject matter.

In addition, clause 8.7(e) provides:

A Chair, Referee or Adjudicator may decide that a dispute referred to the Service shall not be determined on any of the following grounds: the dispute is, or is likely to be, the subject of proceedings before any court, tribunal, board ... or any other judicial or administrative enquiry.

Clause 4.2(d) of EWOV's Charter is in similar terms.

Submissions in response to initial proposal

Telstra, the Australian Corporate Lawyers Association, IOS and the Victorian Bar expressed concerns about courts staying proceedings and referring a dispute to an industry scheme. It was contended that a defendant should not be required to deal with the matter through two mechanisms which may lead to a waste of time and money.³³⁹ It was argued that if a civil action has commenced, a party should not be able to have the matter referred to a scheme, unless all parties agree to stay the action.³⁴⁰ The BFSO considered that staying court proceedings would lead to delays in the resolution of disputes and confusion for consumers.³⁴¹ The BFSO saw it as inappropriate and inefficient to refer self-represented litigants to a scheme if their claim had no merit: 'They will exhaust the scheme's resources only to be referred back to court when the decision of the scheme is not in their favour.'³⁴² Telstra and the Australian Corporate Lawyers Association and IOS argued that court intervention is required to bring certainty and finality to the dispute and to put in place court orders.³⁴³

The BFSO contended that some disputes might not be appropriate for referral from the court to an industry scheme in certain circumstances: for example, where it is solely on an issue of credit;³⁴⁴ if there is a question of fraud or criminal conduct;³⁴⁵ or where legal proceedings were commenced to foreclose on a property.³⁴⁶ The banking ombudsman also submitted that courts should only be able to refer disputes to schemes in appropriate circumstances: for example, where a self-represented litigant is one of the parties; the case has merit; or the dispute is within the scheme's jurisdiction. In addition, schemes should be able to refuse a court referral if they consider the dispute is not appropriate: for example, if it is not within the scheme's jurisdiction. The banking ombudsman felt that participants in the civil justice system should be educated regarding how industry schemes operate, including their jurisdictions and limitations.³⁴⁷

The Consumer Action Law Centre contended that where the plaintiff is a member of an industry scheme, attempting to conciliate the claim through the scheme process should be made a precondition to filing a complaint.³⁴⁸

An anonymous submission drew attention to the fact that each scheme's jurisdiction is limited and noted that 'when the claim amount is higher than the relevant scheme's jurisdiction, the only avenue to achieve a resolution of the dispute is to take the matter to court'.³⁴⁹

The Australian Bankers' Association expressed the view that given the current regulatory and self-regulatory requirements for banks to provide ADR services to customers, further obligations from within the civil justice system would not be consistent with sound regulatory policy.³⁵⁰

3.4 AMENDED PROPOSAL

Industry schemes offer many advantages. However, the commission is persuaded that referring parties from court to such a scheme may be problematic. It may give consumers an unfair advantage

if they are able to pursue the dispute through two venues concurrently. In some circumstances, both parties might desire a referral from the court to an industry scheme, and in such cases the court may stay proceedings and refer the dispute to a scheme. At present complainants are required to elect between court proceedings and an industry scheme if the dispute is within the parameters of such a scheme. This is intended to prevent complainants from pursuing two options simultaneously. They are presently able to pursue court proceedings if they elect to reject the determination made through the scheme.

3.5 CONCLUSIONS AND RECOMMENDATIONS

Industry dispute schemes are an important alternative to the court system. Costs and delays have reduced access to the court system for many consumers. The commission considers that industry dispute schemes help fulfil a need for cost-free, accessible and effective resolution of disputes. They can produce resolutions more quickly and flexibly than the courts. The schemes serve as an alternative to expensive legal action for both consumers and industry.³⁵¹ Diversion from the formal court system also offers financial benefits to the government-funded justice system.³⁵²

The commission agrees with the view expressed in the submissions that the schemes, if utilised more by the legal industry, would leave the courts with additional time and resources to deal with other cases, thereby reducing delay.³⁵³

The commission considers that more widespread use should be made of industry dispute resolution schemes. If proceedings have commenced, the dispute should not be able to be referred to an industry scheme unless the parties agree to stay the proceedings. This would appear to be the present position under most, if not all, industry schemes.

The submissions also addressed the need for judicial officers, registry staff and lawyers to be educated on how industry schemes operate, including their jurisdictions and limitations.³⁵⁴ The commission considers that there should be further education programs for lawyers, judicial officers and administrators regarding the existence of the various industry schemes and how they operate.

4. EXTENSION OF COLLABORATIVE LAW

'Collaborative law' is a relatively recent development in the ADR field. Collaborative law is a non-adversarial dispute resolution process, usually facilitated by lawyers, which aims to achieve a settlement in cases that may otherwise result in litigation. It also 'aims to assist in developing [and] maintaining an ongoing relationship between the parties. It started in the US in 1990 and is widely used there and in Canada and the UK'.³⁵⁵ In Australia, it is principally being used in the resolution of family law disputes. It has been described variously as:

- a diplomatic process of joint problem solving³⁵⁶
- an interest-based negotiation model³⁵⁷

- 338 Submission ED1 23 (Banking and Financial Services Ombudsman).
- 339 Submissions ED1 16 (the Australian Corporate Lawyers Association), ED1 17 (Telstra), ED1 24 (Victorian Bar); Consultation with IOS (5 September 2007).
- 340 Submissions ED1 16 (the Australian Corporate Lawyers Association), ED1 17 (Telstra); Consultation with IOS (5 September 2007).
- 341 Submission ED1 23 (Banking and Financial Services Ombudsman).
- 342 Submission ED1 23 (Banking and Financial Services Ombudsman).
- 343 Submission ED1 17 (Telstra) and Consultation with IOS (5 September 2007).
- 344 The BFSO argued that the evidence should be given by oath and tested by cross-examination in court.
- 345 The BFSO submitted that the matter should be considered by a court or tribunal.
- 346 Deferring the proceedings could mean that the equity in the property reduces and the disputant's debt increases, the BFSO argued.
- 347 Submission ED1 23 (Banking and Financial Services Ombudsman).
- 348 Submission ED2 12 (Consumer Action Law Centre).
- 349 Confidential Submission ED1 5 (permission to quote granted 17 January, 2008).
- 350 Submission ED1 29 (Australian Bankers' Association).
- 351 Consumer Affairs Division (1997), above n 294, 4.
- 352 Field (2006) above n 299, 97. Also, as industry schemes are funded by industry they offer cost savings to the taxpayer-funded court system: Field (2007) above n 34, 48.
- 353 See for example Submission CP 54 (Financial Industry Complaints Service and Insurance Ombudsman Service).
- 354 For example, the BFSO cannot make decisions that are binding on consumers or compel evidence from third parties: Submissions ED1 23 (Banking and Financial Services Ombudsman), CP 54 (Financial Industry Complaints Service and Insurance Ombudsman Service).
- 355 The Law Institute of Victoria, *Collaborative Law* <www.liv.asn.au/public/finda/collaborative/collaborative.html> at 16 May 2007; Commonwealth Attorney-General's Department [Australia], *Federal Civil Justice System Strategy Paper* (2003) 130; Family Law Council, *Collaborative Practice in Family Law*, report to the Attorney-General (2006) 15–22; Anne Ardagh and Guy Cumes, 'The Legal Profession Post-ADR: From Mediation to Collaborative Law' (2007) 18 *Australasian Dispute Resolution Journal* 205, 209–11.

356 J H Wade, 'Collaborative Lawyering—Some Preliminary Thoughts for Australia' (2004) 16 *Bond Dispute Resolution News*, 6.

357 Collaborative Law in Australia, *Collaborative Law in Australia*, <www.collaborativelaw.asn.au> at 19 March 2008.



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- emphasising 'client empowerment'³⁵⁸
- a non-adversarial dispute resolution process facilitated by lawyers with the objective of achieving an ethical and enduring settlement for the clients.³⁵⁹

Collaborative law has a number of key features:

- the clients and lawyers sign a contract agreeing to negotiate in 'good faith' to resolve a dispute without resort to litigation
- if the dispute is unable to be resolved by negotiation the lawyers acting for all parties will withdraw and not act for their clients in any court proceedings
- the negotiation process consists of a number of four-way meetings involving the parties and their lawyers together
- advice is to be given with the aim of achieving a fair process and just outcomes for both parties
- the parties and lawyers commit to ongoing communication and full disclosure
- the parties and lawyers aim to ensure costs are not incurred unreasonably.³⁶⁰

*The collaborative contract will usually impose obligations on lawyers to withdraw from the collaborative process if they become aware that their client has acted contrary to the agreement. It may also require that the negotiations take place within a particular time and in a certain way.*³⁶¹

Lawyers participating in the process are required to be trained. In particular, the process relies on trust and cooperation between lawyers, as disclosure of all documents and information is not subject to the control of court processes.

'Lawyers other than family law specialists are showing an interest in the collaborative process. New South Wales has established a working group to look at the use of collaborative law in areas of legal dispute other than family law'.³⁶² The Law Institute has established a committee that is currently examining appropriate protocols for collaborative law practitioners and is running both introductory and advanced collaborate law training sessions.³⁶³

A number of studies have been conducted on collaborative law. In 2005, Dr Julie Macfarlane published the results of a three-year, qualitative study of collaborative family law cases in Canada and the United States.³⁶⁴ Dr Macfarlane drew the following conclusions about collaborative law:

- Lawyers and clients engage in collaborative law for different reasons. Lawyers offer collaborative practices because the principles of collaborative law match their personal values and ideals more closely than litigation. Clients, on the other hand, are generally attracted by the prospect that collaborative law is faster and less costly than litigation.³⁶⁵
- Collaborative law reduces the posturing and competitiveness that characterises traditional lawyer-to-lawyer negotiations, as well as the tendency to make highly inflated or unrealistically low opening proposals.³⁶⁶
- Collaborative law maintains a strong ideological commitment to cooperative negotiation, which encourages open communication and information sharing between the parties and which has a significant impact on the bargaining environment. Like other consensus-building processes, it requires lawyers to pay attention to meeting the interests of all parties.³⁶⁷

*In 2004, William Schwab surveyed approximately 100 collaborative lawyers and clients.³⁶⁸ In 2006, Canadian researchers ... released the preliminary results of their study into the emergence of collaborative law in Saskatchewan. The conclusions of both of these studies are generally favourable to the practice of collaborative family law.*³⁶⁹

4.1 ARGUMENTS FOR AND AGAINST THE EXTENSION OF COLLABORATIVE LAW

Arguments in favour of expanding the use of collaborative law

Collaborative law not only provides:

an alternative to traditional litigation but also a different approach to negotiation, mediation and settlement. Out-of-court negotiations in family law matters can easily be influenced by adversarial attitudes due to the highly emotional context of the dispute

and the entrenched positions of the parties. Collaborative law encourages the parties to communicate more effectively to arrive at a mutually acceptable long-term solution that will not polarise the parties even further.³⁷⁰

While the use of collaborative law in Victoria has largely been in family law matters, it is a process that could be used to resolve all kinds of civil disputes.³⁷¹

The Law Institute supported a widening of the range of ADR options available to litigants, including collaborative law.³⁷² The Institute endorsed the use of collaborative law in all kinds of civil disputes, such as wills and property.³⁷³

A recent report prepared by the Family Law Council for the Federal Attorney-General found that a great deal of anecdotal evidence suggests collaborative practice is both quicker and cheaper than litigation.³⁷⁴ The report also concluded that in cases where the collaborative process works well it provides significant advantages:

*In common with other dispute resolution models such as mediation, it offers parties the opportunity to manage both the process and outcome of dispute resolution. It also offers parties the support of traditional legal advocacy, with the difference that legal advisers focus exclusively on a negotiated outcome.*³⁷⁵

The report concluded that collaborative practice is a 'valuable addition to the range of dispute resolution options available, particularly in relation to property matters'.³⁷⁶

The former Commonwealth Attorney-General, Phillip Ruddock, is reported as having expressed support for collaborative practice in family law: 'the government hopes to change the culture of separation—away from adversarialism, towards respect and, so far as it is possible, cooperation'.³⁷⁷ The Chief Justice of the Family Court has also reportedly endorsed collaborative law.³⁷⁸

Arguments against expanding the use of collaborative law

Some concerns have been raised about collaborative law:

- Collaborative law may not be suitable for all disputes, particularly in cases:
 - where the parties 'feel extreme hostility towards one another or have particularly poor communication skills'; or
 - which involve 'incidents of family violence, mental illness, extreme power imbalances or substance abuse'.³⁷⁹
- 'The collaborative process is not subject to normal judicial time limits since it is based on the collaborative contract between the parties', therefore there may be delays.³⁸⁰
- If there are many sessions, this could have a 'substantial effect on the costs of the process and may undermine the goals of speedy, inexpensive and informal resolution'.³⁸¹
- 'There is no empirical evidence that collaborative practice is less costly or time consuming than litigation'.³⁸²
- Collaborative law may be undermined if lawyers are not trained properly.
- Practitioners and litigants may be confused and not understand the process and as a result, the whole collaborative law process could fail.
- In their submissions, Telstra, the Australian Corporate Lawyers Association and Clayton Utz expressed concern that in a commercial setting, if the matter does not resolve by negotiation, there are distinct cost disadvantages associated with retaining new legal advisers for court proceedings.³⁸³

4.2 CONCLUSIONS AND RECOMMENDATIONS

Notwithstanding the concerns raised above, the commission believes that collaborative law is a valuable addition to the range of dispute resolution options available. Although collaborative law in Victoria has largely been confined to family law matters, it is a process that could be applied to other kinds of civil disputes, including wills and probate disputes, property and construction disputes and other types of disputes. It could be particularly useful for disputes where the parties have a relationship that they wish to continue. It is a less adversarial option that may assist parties to resolve their

358 Collaborative Professionals Victoria, *Collaborative Law* <www.liv.asn.au/collablaw> at 19 March 2008.

359 Ibid.

360 Ibid.

361 Family Law Council (2006) above n 355, 11.

362 Ibid.

363 Submission CP 18 (Law Institute of Victoria).

364 Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases*, research report presented to the Family, Children and Youth Section, Department of Justice, Canada, (2005). A total of 150 standard-form interviews were conducted with the lawyers, clients and independent experts involved in the 16 cases. The interviews sought reflective data about interviewees' attitudes towards and practical experiences of collaborative law.

365 Ibid viii.

366 Ibid ix.

367 Ibid.

368 See William Schwab, 'Collaborative Lawyering: A Closer Look at an Emerging Practice' (2004) *Pepperdine Dispute Resolution Law Journal* 351.

369 Family Law Council (2006) above n 355, 24 (footnote 73).

370 Commonwealth Attorney-General's Department [Australia] (2003) above n 355, 130.

371 Collaborative Professionals Victoria (n.d.) above n 358.

372 Submission CP 18 (Law Institute of Victoria).

373 Submission CP 31 (Law Institute of Victoria).

374 Family Law Council (2006) above n 355, 55.

375 Ibid 59.

376 Ibid.

377 Law Institute of Victoria, 'Collaboratively Speaking' (2007) 81(4) *Law Institute Journal* 22.

378 Anne Ardagh and Guy Cumes, *Lawyers post-ADR: mediation and collaborative law* (2007) 10 (2) *ADR Bulletin* 30, 31.

379 Family Law Council (2006) above n 355, 55.

380 Ibid, 56.

381 Ardagh and Cumes (2007) above n 378, 31

382 Family Law Council (2006) above n 355, 55.

383 Submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra), CP 18 (Clayton Utz).



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disputes in a more satisfactory and cost-effective manner. Clearly, training and education are critical for ensuring the success of collaborative law in resolving civil disputes. The commission therefore commends and encourages the initiatives undertaken by the Law Institute in this regard.

5. THE DESIRABILITY OF COURT-CONDUCTED MEDIATION

5.1 INTRODUCTION

Chodosh has described judicial mediation as

a confidential, consensual form of dispute resolution facilitated by a sitting or retired judge who is trained in conflict resolution ... They may proceed with private meetings between the mediator and each party. The judicial mediator or the 'neutral', attempts to narrow the disagreements between the parties and to encourage final agreement on settlement. The neutral also explores aspects of the dispute beyond the legal positions of the parties or the permissible scope of judicial relief. Mediation allows the neutral to examine the parties on aspects of the dispute that most litigation systems must ignore ... Judicial mediation may be voluntary or compulsory.³⁸⁴

From the conventional perspective of most modern legal cultures, judicial mediation is a contradiction in terms.³⁸⁵ Judges are supposed to judge (not mediate), to apply law (not consider interests), to evaluate (not facilitate), to order (not accommodate) and to decide (not settle).³⁸⁶

Some commentators suggest this view of judicial mediation falsely assumes that the functions of judging and mediation are mutually exclusive and that it is out of touch with the modern realities of national court systems, which are characterised by increased caseloads, delays and higher costs.³⁸⁷ They suggest that judicial or court-conducted mediation is one of several remedies for this problem and that the judicial promotion of settlement is vital to the functioning of the court system.³⁸⁸

Judge-led mediation is already a government priority in Victoria. The Victorian Attorney-General has studied a Canadian model whereby Supreme Court judges not engaged in a hearing are asked to mediate.³⁸⁹ The Attorney-General has endorsed judicial mediation and is reported to have said:

Well over 80% of matters that go before judge mediators are resolved and resolved very quickly. Why? Because you have the imprimatur of a judge resolving these matters.³⁹⁰

With active case management already occurring in Canada, the United States, the United Kingdom, Australia and in other jurisdictions, the use of judicial mediators can be seen as merely the next logical step in a process that charges the courts to find just, quick and cheap resolutions to disputes.³⁹¹ In this respect, judicial or court-conducted mediation is consistent with the overriding purpose proposed by the commission.³⁹² Court officers in Victorian courts can and do play an important role in facilitating the resolution of pre-trial issues and the early settlement of cases, including through court-conducted mediation and conferences. This presently occurs at both the trial and appellate levels.

5.2 POSITION IN VICTORIA

Judicial mediators are appointed judges or other court officers assigned the task of mediating instead of adjudicating cases before the court. Judicial mediations are rare in the County and Supreme Courts but more common in the Magistrates' Court, where magistrates can and do conduct mediations. In the Supreme Court, masters and retired judges may conduct mediations. In the County Court, case conferences are conducted by judges. In the Magistrates' Court, pre-hearing conferences are conducted by registrars, deputy registrars or judicial registrars. A better description for all of these activities is 'court-conducted mediation' because it recognises the important contribution made by persons other than judges.

The Supreme Court

In 2005, the Supreme Court introduced a pilot program of mediation by court masters pursuant to a new rule.³⁹³ Under the rule, at any stage of a proceeding a master may, with or without the consent of any party, order that a master mediate the whole or any part of the proceeding.³⁹⁴

The new rule appears to complement the court's power to order a proceeding, at any stage, to be referred to mediation with or without the parties' consent.³⁹⁵ Masters undertaking mediations are required to assist the parties to reach a settlement of the proceeding, or that part of the proceeding referred, and are otherwise subject to the general mediation rules, including reporting to the court.

Masters undertaking mediations are protected by the general immunity from suit contained in section 27A of the *Supreme Court Act 1986*. Conduct and statements by parties at mediation are not permitted to be the subject of evidence unless all the parties who attended the mediation agree.³⁹⁶

The types of cases in which masters conduct mediations are limited to:

- cases where there is financial hardship for one or more of the parties
- urgent cases
- cases where there has already been an unsuccessful external mediation and a further mediation is considered necessary
- cases where there is the potential for issues to be narrowed or resolved by mediation.³⁹⁷

In early 2007, the Court of Appeal implemented a pilot program of ‘front-end’ management of civil appeals.³⁹⁸ The objectives of the pilot program were:

- a) to ensure early identification of the scope and nature of appeals, so that they can be appropriately managed
- b) to encourage mediation of and earlier settlement of appeals and
- c) to increase flexibility and reduce delay in listing.³⁹⁹

As part of the program, the parties must consider the applicability of mediation to the appeal. In appropriate cases, the master may order the parties to attend mediation including, in some cases, by a master.⁴⁰⁰

Court-conducted mediation in the Supreme Court is also consistent with the requirement that the court, in exercising any power under the rules, endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined.⁴⁰¹ As discussed in Chapter 3 regarding the overriding objective, the Supreme Court is considering whether rule 1.14(a) might be expanded and strengthened to make explicit aspects of the court’s inherent power to control its own proceedings; to encourage proportionality; and to foster a culture of just and efficient dispute resolution.⁴⁰²

Mediation by masters is additional to the pre-trial conferences which for many years have been conducted in personal injury cases by the prothonotary and senior members of that office and are much valued by practitioners in that area.⁴⁰³

As noted earlier, the Supreme Court opened a Mediation Centre on 4 March 2008.

The County Court

In certain circumstances, the County Court may order a case conference.⁴⁰⁴ Judicial officers conduct case conferences in the court. This is further discussed in Chapter 5. County Court registrars and judges do not conduct mediations.

384 H E Chodosh, ‘Judicial Mediation and Legal Culture’ (1999) 4(3) *Issues of Democracy* 1, US Department of State Electronic Journal, <<http://usinfo.state.gov/journals/itdhr/1299/ijde/chodosh.htm>> at 6 June 2007.

385 *Ibid.*

386 *Ibid.*

387 *Ibid.*; David Spencer, ‘Judicial Mediators: Is the Time Right? Part I’ (2006) 17 *Australian Dispute Resolution Journal* 130, 134.

388 Spencer (2006) above n 387, 130.

389 See the discussion below for more information on the Canadian model.

390 Matthew Drummond, ‘Vic push to use judges more in mediation’, *The Australian Financial Review* (Sydney), 1 February 2008, 71.

391 Spencer (2006) above n 387, 134.

392 See Chapter 3 for more information.

393 *Supreme Court (General Civil Procedure) Rules 2005* r 50.07.1; Submission CP 58 (Supreme Court of Victoria).

394 *Supreme Court (General Civil Procedure) Rules 2005* r 50.07.1(1).

395 *Supreme Court (General Civil Procedure) Rules 2005* r 50.07(1).

396 *Supreme Court Act 1986* s 24A; *Supreme Court (General Civil Procedure) Rules 2005* r 50.07(7).

397 Submission CP 58 (Supreme Court of Victoria).

398 Supreme Court of Victoria Court of Appeal Practice Statement No. 1 of 2006.

399 *Ibid.*

400 *Ibid.*

401 *Supreme Court (General Civil Procedure) Rules 2005* r 1.14(a).

402 Submission CP 58 (Supreme Court of Victoria). According to the submission, the court is considering how an expanded rule could be drafted and is using sections of the *Civil Procedure Act 2005* (NSW) as a model. See the discussion in Chapter 3 of the court’s comments on the overriding objective.

403 Supreme Court (2006) above n 15, 15.

404 County Court of Victoria, *Operation & Management of the Business, Commercial & Miscellaneous Divisions—(Melbourne Registry) Practice Note PNCl 5-2007* (2007) 3; County Court of Victoria, *Damages List—Applications Division, General Division and Serious Injury Division Practice Note PNCl 4-2007* (2007) 5–6.



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The Magistrates' Court

The Magistrates' Court offers two forms of alternative dispute resolution: pre-hearing conferences and mediation. The former are conducted almost exclusively by registrars and deputy registrars. They are offered without additional cost to the parties at the court's premises.⁴⁰⁵

Under the court rules, a magistrate or a registrar may refer a civil proceeding or part of a civil proceeding for a pre-hearing conference.⁴⁰⁶ A magistrate or registrar must conduct the pre-hearing conference.⁴⁰⁷ Pre-hearing conferences can be conducted by telephone where it is inconvenient for parties to attend in person.⁴⁰⁸

If the proceeding is not resolved, the matter is referred back to court or, with the consent of the parties, to arbitration.⁴⁰⁹ If the proceeding is resolved, it may be referred back to the court for orders formalising the settlement.⁴¹⁰

Pre-hearing conferences are confidential and answers given or admissions made at a conference cannot be used or referred to at the hearing without the consent of all parties.⁴¹¹

For mediation, the court selects which proceedings are suitable.⁴¹² It contacts the parties and invites them to choose an acceptable mediator, who may be a registrar or deputy registrar. The parties usually prefer mediations conducted by registrars or deputy registrars, in part because they are cost free. However, the court is unable to satisfy the demand for mediation because of the limited number of registrars available. Services are offered on a 'first come, first served' basis.⁴¹³

Registrars and deputy registrars are trained to conduct pre-hearing conferences and mediations. The court considers this an important part of its function, and reported that the practice is well established and has a good success rate.⁴¹⁴

The court's role in conducting pre-hearing conferences in mediations is supported by its overriding objective and case management rules, which are substantially the same as the *Civil Procedure Rules* in England and Wales.⁴¹⁵ The overriding objective is expressed as a paramount concern for the conduct of the court's business. The rules also provide that the court must further the overriding objective by actively managing cases.⁴¹⁶ This is discussed further in Chapters 3 and 5.

5.3 OTHER MODELS

Australia

There are many examples of court-conducted mediation in Australian courts and tribunals.

The Victorian Civil and Administrative Tribunal

In the Victorian Civil and Administrative Tribunal (VCAT), members and principal registrars can conduct compulsory conferences in more complex matters.⁴¹⁷ Section 83 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that the functions of a compulsory conference are to:

- identify and clarify the nature of the issues in dispute in the proceeding
- promote a settlement of the proceeding
- identify the questions of fact and law to be decided by the Tribunal and
- allow directions to be given concerning the conduct of the proceeding.

Evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing, except in certain circumstances.⁴¹⁸

If a member conducts the compulsory conference, a party may object to that member presiding over the hearing. If an objection is made, the member must take no further part in the hearing.⁴¹⁹ Attendance at the conference is compulsory and there can be serious consequences for failure to attend.⁴²⁰

Members also can and do conduct mediations. However, private mediators also conduct mediations. A member who conducts a mediation cannot preside over the hearing of the matter.⁴²¹ Evidence of anything said or done in the course of mediation is not admissible in a hearing, unless all parties agree.⁴²²

There are other examples from around Australia of court-conducted mediation and other forms of court-conducted ADR:

- In the Federal Court, usually mediations are conducted by registrars, although judges also conduct mediation conferences.⁴²³ Federal Court judges have also acted as evaluators.⁴²⁴ Judges and registrars can also conduct case conferences.⁴²⁵ Independent mediators are also frequently used in Federal Court matters.
- In the Administrative Appeals Tribunal (AAT), generally only members conduct directions hearings and mediations. Where a matter fails to resolve at mediation, if a party objects to the member hearing the matter, the member is not permitted to hear the matter.⁴²⁶ In the AAT, registrars may also conduct conference hearings and conciliation conferences.⁴²⁷
- In the Family Court, registrars may conduct conciliation conferences.⁴²⁸
- In the NSW Consumer Trader and Tenancy Tribunal and in the Native Title Tribunal, members may conduct mediations, conciliations, case conferences, neutral evaluations and hearings.⁴²⁹
- In the Western Australia Supreme Court, registrars may act as mediators.⁴³⁰
- In South Australia, court registrars conduct mediation and there are court expert appraisals.⁴³¹ Independent evaluation by a magistrate is available as a pre-trial process in the South Australian Magistrates Court.⁴³² Rule 3 of the *Supreme Court Civil Rules 2006 (SA)* provides that one of the objects of the Rules is to 'facilitate and encourage the resolution of civil disputes by agreement between the parties'.
- Retired judges are also used to conduct mediations and can be very effective.⁴³³

The United States

In the United States, judicial involvement in the settlement process is widespread. Litigation and negotiation are often viewed as continuous interrelated processes.⁴³⁴ One commentator notes:

*Most American judges participate to some extent in the settlement of some cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work.*⁴³⁵

There are legislative imperatives for American judges to settle matters that do not require a trial.⁴³⁶ Judges have also been involved in facilitating settlements in mass tort litigation in the US.⁴³⁷ The *Code of Conduct for United States Judges* also provides that judges may confer separately with the parties and their counsel in an effort to mediate or settle pending matters, with the parties' consent.⁴³⁸

405 According to the Magistrates' Court submission, a pre-hearing conference will usually be listed within 2 months of a defence being filed: Submission CP 55.

406 *Magistrates' Court Act 1989* s 107(1).

407 *Magistrates' Court Act 1989* s 107(2).

408 Magistrates' Court of Victoria, *Practice Note No 2 of 2005* (2005).

409 *Magistrates' Court Act 1989* s 107(2) (a), (b).

410 *Magistrates' Court Act 1989* s 107(2) (c).

411 *Magistrates' Court Civil Procedure Rules 1999* r 22.02.

412 For instance, if it is a claim for debt for over \$30 000: see Magistrates' Court Submission CP 55.

413 Submission CP 55 (Magistrates' Court of Victoria).

414 Submission CP 55 (Magistrates' Court of Victoria).

415 *Magistrates' Court Civil Procedure Rules 1999* r 1.19–1.22.

416 *Magistrates' Court Civil Procedure Rules 1999* r 1.22(1).

417 *Victorian Civil and Administrative Tribunal Act 1998* s 83; VCAT, *Compulsory Conferences – Credit List* <[www.vcat.vic.gov.au/CA256902000FE154/lookup/credit_list/\\$file/compulsory_conferences-credit_list.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/lookup/credit_list/$file/compulsory_conferences-credit_list.pdf)> at 19 March 2008, VCAT, *Practice Note – Domestic Building List PNDB1* (2007), <[www.vcat.vic.gov.au/CA256902000FE154/lookup/VCAT_Practice_Notes/\\$file/practice_note_domestic_building_1.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/lookup/VCAT_Practice_Notes/$file/practice_note_domestic_building_1.pdf)> at 19 March 2008.

418 *Victorian Civil and Administrative Tribunal Act 1998* s 85.

419 *Victorian Civil and Administrative Tribunal Act 1998* s 86.

420 *Victorian Civil and Administrative Tribunal Act 1998* s 87(b) provides that the Tribunal member may determine the proceeding adversely to the absent party and make any appropriate orders; or direct that the absent party be struck out of the proceeding.

421 *Victorian Civil and Administrative Tribunal Act 1998* s 88(6).

422 *Victorian Civil and Administrative Tribunal Act 1998* s 92.

423 *Federal Court Rules 1979* r 72; Federal Court of Australia, *Mediation* <www.fedcourt.gov.au/litigants/mediation/mediation.html> at 16 July 2007.

424 Tania Sourdin, 'Legislative Referral to Alternative Dispute Resolution Processes' (2001) 12 *Australasian Dispute Resolution Journal* 180, 190.

425 *Federal Court Rules 1979 Order 10* r 1(2) (h) and (i) provide for directions that a party attend a conference before a Registrar or a case management conference.

426 *Administrative Appeals Tribunal Act 1975* s 34F.

427 Sourdin (2001) above n 424, 192.

428 Ibid.

429 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 54.

430 *Rules of the Supreme Court 1971* (WA) O 29 r 2(r).

431 Andrew Cannon, 'What is the Proper Role of Judicial Officers in ADR?' (2002) 13 (4) *Australasian Dispute Resolution Journal* 253, 254.

432 *Magistrates Court (Civil) Rules 1992* (SA) r 106(9) provides that the court may give an intimation of the result of a case at any time and if it does so that intimation must not be available to the trial magistrate until after judgment, when the trial magistrate may take it into account in relation to costs.

433 See for example retired High Court judge Michael McHugh's mediation in the dispute between Richard Pratt and Visy and the Australian Competition and Consumer Commission in 2007. It was reported that had McHugh not succeeded in brokering the settlement between Pratt and the ACCC, Justice Heery's three-hour penalty hearing might have been a six-month trial: Matthew Drummond, 'Mediator spares the courts a Pratt saga', *The Australian Financial Review* (Sydney), 19 October 2007, 53.

434 Sourdin (2001) above n 424, 191.

435 Ibid.

436 *Federal Rules of Civil Procedure* (US) r 16(a).

437 Astor and Chinkin (2002) above n 45, 265.

438 Code of Conduct for United States' Judges, Canon 3 A (4) <www.uscourts.gov/guide/vol2/ch1.html#3> at 13 March 2008.

Chapter 4



Improving Alternative Dispute Resolution

A study conducted in the United States found that of 1900 litigators practising in US federal courts, 85% believed that judicial involvement was likely to improve the chances of settlement, with 72% believing that settlement conferences before judges should be mandatory.⁴³⁹

Canada

Judicial mediators have been operating in the Canadian provinces of British Columbia and Ontario for at least 10 years. Quebec's Court of Appeal has a conciliation service program.⁴⁴⁰ If a dispute does not resolve at mediation, the mediating judge is automatically barred from the bench that subsequently hears the appeal.⁴⁴¹ Mediation has been embraced by the judiciary in other provinces of Canada for some time and is generally referred to as 'judicial dispute resolution' (JDR).⁴⁴²

A study of the Ontario judicial dispute resolution model found that its advantages included savings in time and money because it avoids the complex procedural and evidentiary provisions that make litigation so lengthy and therefore expensive.⁴⁴³

Another study conducted in Canada found 82.5% of the lawyers surveyed thought that judicial involvement in settlement conferences was likely to significantly improve the prospects of success and 58.5% thought that settlement conferences should be mandatory.⁴⁴⁴

The United Kingdom

Judicial mediation is not a feature in the United Kingdom. However, judges are involved in case management conferences.⁴⁴⁵ Case management conferences are discussed in Chapter 5.

Europe

Under various European civil code procedures, it is typical for the judge managing the case to explore options for settlement. For example, the German code of civil procedure 'obligates the court to attempt to negotiate a settlement'.⁴⁴⁶ In the Netherlands, 'a preliminary injunction procedure has been adapted to allow parties to obtain a judicial assessment of the likely outcome of the case on what can be described as affidavit evidence'.⁴⁴⁷ In Finland, as part of the pre-trial procedure, preliminary hearings are presided over by judges, who have a duty to promote settlement between the parties. The judge may also make a proposal for conciliation.⁴⁴⁸

In Norway, judicial mediation has been operating for more than 10 years. It initially began as a pilot project and expanded. All courts have participated from 2006. Judges usually conduct the mediations. There are no formalised skills and training requirements. A facilitative approach is used with some evaluative elements. If the case does not settle, it is assigned to a different judge.⁴⁴⁹ Norway is introducing a new Disputes Act, which is expected to come into force in 2008 and under which judicial mediation will continue.⁴⁵⁰ According to a consultation with Norwegian judges, the vast majority of disputes are resolved by judicial mediation.⁴⁵¹

5.4 ARGUMENTS FOR AND AGAINST COURT-CONDUCTED MEDIATION

Arguments for court-conducted mediation

Some of the perceived benefits of court-conducted mediation include:

- the involvement of court officers in mediation being likely to improve the chances of settlement⁴⁵²
- judges being able to assist lawyers to handle difficult clients with unreasonable expectations⁴⁵³
- the opportunity for parties to arrive at their own settlement and to 'fashion a more creative resolution than a judge could do at trial'⁴⁵⁴
- the opportunity to obtain advice on a range of issues such as the likely trial date, the possible costs of trial and what further directions might be needed for trial preparation⁴⁵⁵
- court officers conducting mediations being able to clarify and resolve preliminary issues⁴⁵⁶
- judicial skills including observation, patience and legal knowledge making judicial officers well equipped for settlement discussions as well as determinations.⁴⁵⁷

Support for judicial mediation also comes from the courts. The Supreme Court identified that the masters' mediation program has been very successful and that 80% of the 50 mediations conducted by masters have resolved the proceeding completely or in part.⁴⁵⁸ The court expressed the view that masters are the appropriate officers to conduct mediations because 'they are court officials who have

the authority of the court but are not the people who will ultimately decide cases at trial'.⁴⁵⁹ The Magistrates' Court made a similar comment and suggested that judicial officers can bring an 'additional advantage to the task'—

*the ability to disabuse parties of unrealistic expectations—a 'reality check'. If a judicial officer states that a particular issue seems weak or lacks merit, that statement impacts significantly upon the parties. After all, the judicial officer is the person who can decide the case if it is unresolved, they ought to know. A suitable judicial officer undertaking either conferences or mediations will be more successful in obtaining a resolution than any other person.*⁴⁶⁰

The Supreme Court also noted in its submission that another positive outcome of master mediation is that issues in dispute are narrowed.⁴⁶¹ The Federal Court has made similar comments, as have other commentators.⁴⁶²

The Supreme Court and TurksLegal and AXA submissions identified that judicial mediation can reduce costs and delay.⁴⁶³ Norwegian judges we consulted indicated that in their experience judicial mediation reduces costs and delay. Crown Counsel similarly identified that mediations conducted by masters may mean reduced costs to the parties as the service is provided free.⁴⁶⁴ Commentators suggest that judicial mediation can save time and money because the complex procedural and evidentiary provisions that make litigation so lengthy and therefore expensive are avoided.⁴⁶⁵

The Mental Health Legal Centre and Federation of Community Legal Centres submissions argued that judicial mediation would assist 'less powerful' parties. Their view is that court officers can help ensure mediation is conducted fairly and that this is particularly relevant where one of the parties is self-represented.⁴⁶⁶ The Victorian Bar, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators also considered that in a case involving a self-represented litigant it would be appropriate for a judicial officer to mediate.⁴⁶⁷

The Australian Institute of Judicial Administration has noted that the success of judicial mediation in the Australian jurisdictions where it is in use appears to justify the practice. The Institute's view is that:

*the statutory obligation of confidentiality binding upon a mediator, and the withdrawal of a judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary.*⁴⁶⁸

Arguments against court-conducted mediation

Some current and former judicial officers and legal commentators have expressed concern about the move away from the traditional role of the judiciary.⁴⁶⁹ Submissions also raised concerns regarding judicial mediation.

- 439 David Spencer, 'Judicial Mediators: Is the Time Right? Part II' (2006) 17 *Australasian Dispute Resolution Journal* 189, 196 referring to Epp's discussion of Wayne Brazil's study of US litigators in JA Epp 'The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers' (1996) *Windsor Yearbook of Access to Justice* 82, 87.
- 440 Court of Appeal of Quebec, *The Conciliation Service Program of the Court of Appeal of Quebec* <www.tribunaux.qc.ca/mjq_en/c-appel/about/conciliation.html> at 25 July 2007.
- 441 Ibid.
- 442 Spencer (2006) above n 387, 131; The Peace and Conflict Studies Division, Royal Roads University, 'Whose Court is it Anyway? Judicial Dispute Resolution in Canadian Courts—Summary Report' (symposium for judges 24–26 April 2003, British Columbia) 2.
- 443 P Bowal, 'The New Ontario Judicial Alternative Dispute Resolution Model' (1995) 34 *Alberta Law Review* 206, 209, referred to in Spencer, Part II (2006) above n 439, 196–7.
- 444 Spencer citing Epp above n 439, 196.
- 445 Professor John Peysner and Professor Mary Seneviratne, *The Management of Civil Cases: The Courts and Post-Woolf Landscape*, Department of Constitutional Affairs, London (2005) 25.
- 446 Cannon (2002) above n 431, 258.
- 447 Ibid 258–9.
- 448 Laura Ervo, 'Scandinavian Trends in Civil Pre-trial Proceedings' (2007) 26 *Civil Justice Quarterly* 466, 471–4.
- 449 Ibid.
- 450 Consultation with Norwegian judges (17 October 2007); *Draft Disputes Act 2007* (Norway) <www.regjeringen.no/en/dep/jd/Documents-and-publications/NOUer/2001/NOU-2001-32/65.html?id=379351> at 13 March 2008; Camilla Bernt-Hamre, 'Mediation in Norwegian Courts—Status Report at the Ten-Year Anniversary of Modern Judicial Mediation in Norway' (overheads) <www.norcous.it/download.php/fileid/208> at 13 March 2008.
- 451 Consultation with Norwegian judges (17 October 2007). This view is supported by statistics quoted on the Courts of Norway website, which states that 70–80% of cases are settled at or shortly after judicial mediation: <www.domstol.no/DAtemplates/Article____3090.aspx?epslanguage=EN> at 17 October 2007.
- 452 Spencer, Part II (2006) above n 439, 196.
- 453 Consultation with Norwegian judges (17 October 2007); Spencer, Part II (2006) citing Epp above n 439, 196.
- 454 Submission CP 33 (Victorian Bar); Bowal (1995) above n 443, 210, referred to in Spencer Part II (2006) above n 439, 196–7.
- 455 Crown Counsel, Review of Office of Master and Costs Office Issues Paper, Department of Justice, Victoria (2006) 19–20.
- 456 Submission CP 22 (Mental Health Legal Centre).
- 457 Cannon (2002) above n 431, 261.
- 458 Submission CP 58 (Supreme Court of Victoria); Consultation with the Supreme Court of Victoria (2 August 2007).
- 459 Consultation with the Supreme Court of Victoria (2 August 2007). Crown Counsel considered the use of masters for mediations an 'appropriate mechanism to assist in the resolution of civil disputes': Crown Counsel (2006) above n 455, 18.
- 460 Submission CP 55 (Magistrates' Court of Victoria).
- 461 Submission CP 58 (Supreme Court of Victoria).
- 462 Federal Court of Australia (2007) above n 23, 26. Crown Counsel identified that masters conducting mediations are able to give binding directions and to finally resolve aspects of the dispute so that if the matter proceeds to trial, the issues in dispute are narrowed: Crown Counsel (2006) above n 455, 17. See also Justice DeBelle, 'Should Judges Act as Mediators?' (Paper presented at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1–3 June 2007) 15.
- 463 Submission CP 58 (Supreme Court of Victoria); Submission CP 41 (TurksLegal and AXA).
- 464 Crown Counsel (2007) above n 41, 18; Crown Counsel (2006) above n 455, 22–23.
- 465 Spencer, Part II (2006) above n 439, 196–7, citing Bowal (1995) above n 443, 210.
- 466 Submissions CP 22 (Mental Health Legal Centre), CP 9 (Federation of Community Legal Centres).
- 467 Submissions CP 33 (The Victorian Bar), CP 35 (Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators).
- 468 Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007) 19.
- 469 See, eg, Sir Laurence Street, 'The Courts and Mediation—A Warning' (1991) 2 *Australasian Dispute Resolution Journal* 203, Sir Laurence Street, 'Mediation and the Judicial Institution' (1997) 71 *ALJ* 794; Hugh Landerkin QC, 'Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada' (2003) 82 *Canadian Bar Review* 249; P Tucker, 'Judges as Mediators: A Chapter III Prohibition or Accommodation?' (2000) 14 *Australasian Dispute Resolution Journal* 84.

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One major concern is that the role of a mediator is so different from that of a judge that it is undesirable for a serving judge to act as a mediator. Sir Laurence Street has argued that the use of judges and court officials as mediators threatens public confidence in the integrity and impartiality of the court, and compromises the role of the judge whose primary responsibility is to judge and not to promote settlement between parties.⁴⁷⁰ The Law Institute, State Trustees and the Legal Practitioners' Liability Committee expressed similar views in their submissions.

Judge Wodak pointed out that there are issues associated with a judge mediating a dispute and then proceeding to hear that matter or a related dispute:

*I have reservations about a judge, having been a judicial mediator, hearing the case, even with the consent of the parties. The unsuccessful party may leave the court confused, and with a feeling that the legal system was unsatisfactory.*⁴⁷¹

Parties could find the process intimidating and may not be able to distinguish mediation from other processes conducted with the authority of the court.⁴⁷² Sourdin notes that this is an untested assumption but it may be correct given the low level of understanding in the general population about mediation and the confusion of ordinary people confronted with litigation.⁴⁷³

The Bar and State Trustees also expressed concern that there may be a perception among parties that information conveyed to a judicial mediator may be passed on to other members of the court if the dispute is not resolved. The Legal Practitioners' Liability Committee considered that it is inappropriate for masters or judges who may later be called on to determine interlocutory applications, or preside at a trial of the dispute, to be involved in the mediation process.

The Bar, the Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators were also concerned that a dispute could arise between the parties as to what occurred at the mediation and the mediator could be called later as a witness in the proceeding, or even sued. The Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators felt that this would be highly undesirable if the mediator was a judicial officer.⁴⁷⁴

Another consideration is that judicial determinations following trials serve an important purpose in developing the common law.

A further argument is that public funds should not be diverted into keeping private matters of public interest.⁴⁷⁵

Another concern identified is that judicial mediation is time-consuming and resource-intensive and that the valuable and expensive time of judges should be spent undertaking judicial adjudication.⁴⁷⁶ The Victorian WorkCover Authority, the Bar, the Institute of Arbitrators and Mediators, the Chartered Institute of Arbitrators and the Law Institute argued that there are private mediators who can provide the same service.⁴⁷⁷

Judge Wodak contended that courts should not mediate disputes where one party is self-represented because it is not possible for court officers to provide them with legal advice.⁴⁷⁸

The Bar commented that: 'mediation is a unique skill that is not necessarily possessed by Judges and Masters'.⁴⁷⁹ Other commentators have expressed a similar view.⁴⁸⁰

Another concern is that parties may be pressured to settle by judges who have formed an impression of the case based on incomplete evidence.⁴⁸¹

The Law Institute noted that choosing an ADR practitioner adds to the parties' confidence in the process. However, this is not the case where judicial officers are assigned to conduct ADR.⁴⁸²

Chodosh argues that judges may see judicial mediation as 'a threat to their authority to make public judgments and normative pronouncements. He also notes that judges may perceive the risk of a 'brain drain' from the bench because of incentives for judges to retire early in search of a more lucrative career in private ADR.⁴⁸³

Some constitutional impediments to judges operating as mediators have also been identified.⁴⁸⁴ Such arguments have centred on the nature of mediation and the constraints on judges that arise because of Chapter III of the Australian Constitution. Essentially, it is claimed that the 'incompatibility principle' may arise 'in the performance of non-judicial functions of such a nature that the capacity of a judge to perform his or her judicial functions with integrity is compromised or impaired'.⁴⁸⁵ The purpose of the incompatibility doctrine is to ensure that the fundamental basis of the separation of powers doctrine is not undermined. In response to this argument, Justice Michael Moore has suggested that the purpose

of Chapter III has to be considered in conjunction with the objectives of the court system. He concludes that the judicial role may not be undermined by judges acting as mediators because: 'At the heart of the judicial function is the resolution of disputes or controversies.'⁴⁸⁶ Sourdin has also commented that the issue of the role of the decision maker in mediation has not been viewed with such concern in the context of tribunals.⁴⁸⁷ This is discussed further in Chapter 1.

5.5 SUGGESTIONS AND SAFEGUARDS

The concerns raised above regarding judicial mediation and the risk that public confidence in the judiciary will be impaired as a result are clearly important considerations. However, many jurisdictions in Australia, including in Victoria, promote the just, quick and cheap resolution of the real issues in the proceedings.⁴⁸⁸ If courts are perceived by the community to deal with disputes in a way that is efficient in terms of time and cost yet still provide for just outcomes that include the use of ADR and adjudication, public confidence in the courts can still be maintained.⁴⁸⁹

Spencer suggests that Chief Justice Spigelman has indicated there can be 'no loss of confidence' in the judicial institution should courts support judicial mediation, providing that 'the judicial and non-judicial roles of the court are kept separate and the public are educated in accepting the emerging role of the court in providing a just, cheap and quick resolution of the real issues in the proceedings'.⁴⁹⁰ Similar views have been expressed by others.⁴⁹¹

Settlement conferences that involve all parties where private sessions do not take place do not raise the same concerns,⁴⁹² although there may be difficulties where privileged or otherwise confidential information is disclosed on a without-prejudice basis. In this event, and in the case of mediations where private sessions do take place, the statutory requirements of confidentiality should ensure that judicial mediators do not disclose what took place at mediation.⁴⁹³ Confidentiality requirements could be reinforced with appropriate court practices and additional education measures. Commentators also note that the same confidentiality concerns are not raised where judges excuse themselves from hearing a case based on apprehended bias.⁴⁹⁴

The commission is of the view that parties and lawyers are likely to benefit from additional education programs about how judicial mediation operates and the importance of mediation as an integral part of the court's process of resolving disputes.

The commission recognises that it is important to ensure that the adjudication of proceedings and the processes of mediation are independent of each other. The mediator should not adjudicate the case if it goes to trial, unless the parties consent. This is in line with the position in other courts'.⁴⁹⁵

Judicial officers and others involved in mediation are protected by the general immunity from suit contained in legislation⁴⁹⁶ and would presumably be immune from suit in any event.

470 Sir Laurence Street 'Note on the Detachment of Judges to Mediation' (2006) 17 *Australasian Dispute Resolution Journal*, 188. See the discussion in Chapter 1 regarding impartiality.

471 Submission ED1 7 (Judge Wodak).

472 Cannon (2002) above n 431, 259.

473 Sourdin (2005) above n 6, 268.

474 Submission CP 35 (Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators). There are however various statutory and other legal constraints on actions against mediators generally and judges in particular.

475 Chodosh (1999) above n 384.

476 Submissions CP 48 (Victorian WorkCover Authority), CP 33 (Victorian Bar), CP 35 (Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators), CP 18 (Law Institute of Victoria). Crown Counsel (2006) above n 455, 17.

477 Submissions CP 48 (Victorian WorkCover Authority), CP 33 (Victorian Bar), CP 35 (Institute of Arbitrators and Mediators and the Chartered Institute of Arbitrators), CP 18 (Law Institute of Victoria).

478 Submission ED1 7 (Judge Wodak).

479 Submission CP 33 (Victorian Bar). See also Astor and Chinkin (2002) above n 45, 268.

480 Ervo (2007) above n 448, 474.

481 Sourdin notes that in the US, the combining of judicial and mediator functions has led to unease as a result of the style of mediation adopted by some judges: Sourdin (2005) above n 6, 112. Sir Laurence Street has made similar observations: Street (1997) above n 469, 796.

482 Submission ED1 31 (Law Institute of Victoria).

483 Chodosh (1999) above n 384.

484 See the following articles for a good discussion of the arguments regarding the constitutional validity of judicial mediators: Spencer, Part I (2006) above n 387, 135–9; Spencer, Part II (2006) above n 439, 189–99; Spencer, 'Judicial Mediators: Are They Constitutionally Valid?' (2006) 9(4) *Alternative Dispute Resolution Bulletin* 61; Justice Michael Moore, 'Judges as Mediators: A Chapter III Prohibition or Accommodation?' (2003) 14 *Australasian Dispute Resolution Journal* 188; Tucker (2000) above n 469, 84 (referring to *Grollo v Palmer* (1995) 184 CLR 348).

485 Moore above n 484; see also Sourdin (2005) above n 6, 113.

486 *Ibid.*, 90.

487 Tania Sourdin, 'Facilitating the Resolution of Disputes Before Tribunals' (Paper presented at the 8th Annual Australian Institute of Judicial Administration (AIJA) Tribunals Conference, Sydney, 9–10 June 2005).

488 It is within the overriding objective of the Victorian Magistrates' Court to help parties resolve their disputes. The Supreme Court is considering a similar provision. We are recommending an overriding purpose be introduced across all three courts: see Chapter 3 for more information.

489 Spencer, Part II (2006) above n 439, 192.

490 *Ibid.* 195, citing The Hon. James Spigelman, 'Mediation and the Court' (2001) 39 *Law Society Journal* 63, 64.

491 *Ibid.*, citing Landerkin (2003) above n 469, 282.

492 Sourdin (2005) above n 6, 111.

493 Spencer, Part I (2006) above n 387, 139. For Victorian statutory requirements, see *Supreme Court Act 1986* s 24A and *Supreme Court (General Civil Procedure) Rules 2005* rr 50.07(6), 50.07.1(4); *County Court Act 1958* s 47B and *County Court Rules of Procedure in Civil Proceedings 1999* r 50.07(7); *Magistrates' Court Act 1989* s 108(2) and *Magistrates' Court Civil Procedure Rules 1999* rr 22.02, 22A.08.

494 Under these circumstances, it has not been suggested that confidential information could pass between judges: Sourdin (2005) above n 6, 114; See also Astor and Chinkin (2002) above n 45, 26–8.

495 See for example the position in the Federal Court and Quebec's Court of Appeal's Conciliation Service: if a dispute does not resolve at mediation, the mediating judge is automatically barred from the bench that subsequently hears the appeal. See the discussion earlier in this chapter regarding Canada for more information.

496 See for instance *Supreme Court Act 1986* s 27A, *County Court Act 1958* s 48C; *Magistrates' Court Act 1989* s 108A; essentially, these provide that where the court refers the parties to mediation or arbitration, a mediator and arbitrator has the same protection and immunity as judges of the court have in the performance of their duties as a judge.



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Judicial mediation, like other forms of mediation, may be time-consuming and resource-intensive. However, a reduction in the number of cases required to be tried, the curtailment of interlocutory applications and the more expeditious resolution of disputes may justify the allocation of judicial resources to mediation and other forms of ADR.

Although there are variations in experience, aptitude and skills the commission does not have any reason to consider that judicial officers do not have the requisite ability to successfully conduct mediations or ADR processes generally. If there are doubts about a judge's mediation skills or style, additional education and training will no doubt assist in the development of mediation skills.⁴⁹⁷

As to the concern that parties do not get to choose their mediator, at least with judicial mediation there are no arguments over the choice of mediator. Alternatively, parties may opt to engage an external mediator of their choice, at their expense.

Although the commission favours the increased use of judicial (and other forms) of mediation and ADR there are important resource issues to be considered. The Supreme Court and Magistrates' Court indicated in their submissions that they would prefer to undertake more court-conducted mediation but that this was not possible due to a lack of resources.⁴⁹⁸ The Supreme Court said:

Restrictions ... have targeted the scarce resources of Masters at cases of most need. Many cases that could have benefited from Master Mediation have not received that attention.

In these circumstances, the commission considers that suitable matters for direct involvement of judicial officers in ADR might include those cases where private mediation is unsuitable or unavailable, such as where:

- one of the parties is in financial hardship⁴⁹⁹ and/or self-represented
- the parties are unable to agree on a choice of mediator
- there has already been an unsuccessful external mediation
- the case is of public interest or is highly complex and could benefit from a mediator with court authority.⁵⁰⁰

Given the resource issues, the commission agrees with the views expressed in the submissions that persons other than judges should also be involved in the conduct of mediations, as is the case at present. Telstra and the Australian Corporate Lawyers Association suggested in their submission that judicial mediation should not be limited to judges.⁵⁰¹ They felt that thought should be given to ensuring the various court personnel are used in the most effective manner:

[T]here seems to be scope to reengineer the court processes and reallocate work from judges to associates, registrars and masters, which would enable judges to focus their time more effectively on trials and writing judgments.

The Transport Accident Commission, Michael Redfern, the Mental Health Legal Centre, Hollows Lawyers, the Law Institute, State Trustees and Judge Anderson were all supportive of court-conducted mediation where such mediations are conducted by persons other than judges.⁵⁰² Court-conducted mediation by such persons is also appropriate because they will not be presiding over any hearing should the mediation or other form of ADR fail. This also allows judges to focus on adjudicating. However, it is a matter for the courts to decide who should conduct court ADR processes.⁵⁰³

5.6 CONCLUSIONS AND RECOMMENDATIONS

There is no consensus on whether the judicial role should encompass mediation in Australia.⁵⁰⁴ There are strong views for and against judicial mediation. The case for the deployment of judicial officers as mediators arises in part out of increasing support for the use of ADR and out of changing perceptions of the role of courts. Courts are now more proactively involved in seeking to expedite the resolution of disputes using a variety of adjudicatory and non-adjudicatory methods.⁵⁰⁵

One commentator suggests that the appointment of judicial mediators should assist the process of removing matters on the 'trial trail' that have the potential to settle.⁵⁰⁶ Others suggest that preventing the use of judicial mediation may be counter-productive—it presents a barrier to the adoption of more flexible and facilitative processes in litigation.⁵⁰⁷ Despite such divergences of viewpoint, judicial officers are becoming more involved in both facilitating and conducting mediation in courts in Victoria and in other jurisdictions.

The commission supports judicial mediation. There are however, a number of practical, legal and resource issues that need to be addressed. Relevant skills and training are of obvious importance and are discussed further below. Judicial officers should not be involved in both mediation and adjudication in the same matter, unless the parties consent. The demands of adjudication are likely to continue to place constraints on the deployment of judges as mediators. It remains to be seen whether the commission's proposals on various matters dealt with in this report will, if implemented, have a significant impact on the number court proceedings, on the management and conduct of cases and on the incidence of settlement between the parties without third party involvement. If the proposed reform measures achieve the intended effect of significantly reducing the volume of litigation and increasing the 'natural' incidence of settlement in matters that proceed to litigation, then this will reduce the burden on the civil courts. In the absence of either a decrease in the adjudicative demands placed on the courts, or an increase in resources, court-conducted mediation in the higher courts is likely to continue to be conducted by masters, registrars and judicial registrars rather than judges.⁵⁰⁸

The commission agrees with the view of the Australian Institute of Judicial Administration that the statutory obligation of confidentiality binding on a mediator, and the withdrawal of the judge from the trial or appeal if the mediation fails, should enable judges to act as mediators without detriment to the public's expectations of the judiciary.⁵⁰⁹ Many litigants are likely to support more proactive judicial involvement in ADR.

High-quality mediation training for judges and all court staff involved in mediation or referral to mediation is necessary. Mediation training can usefully complement judicial skills.⁵¹⁰ As NADRAC notes, most judicial officers would have received their training and experience within an adversarial litigation culture. NADRAC considers that there is value in judicial officers undertaking training and education in non-adversarial approaches.⁵¹¹ Michael Redfern suggests that judicial officers should be encouraged to undertake courses in the philosophy and culture of ADR.⁵¹² With proper education and training, judicial officers can improve their skills in ADR, including mediation. Regular updating of skills and knowledge is also important.

The commission notes that from 1 January 2008 new voluntary National Mediator Accreditation Standards came into existence. This new scheme is an industry based scheme which relies on voluntary compliance by mediator organisations (Recognised Mediator Accreditation Bodies) that agree to accredit mediators in accordance with the standards.

Lawyers would also benefit from additional education about ADR, including judicial mediation.

Consideration should be given to the monitoring and evaluation of court-conducted mediation. As the Transport Accident Commission pointed out, there is relatively little empirical research about the effectiveness of mediation in the Victorian court system and its success in resolving matters earlier.⁵¹³ Conclusions may be difficult to draw in the absence of well-designed and methodologically sound studies. This may require the randomised allocation of similar cases to 'ADR' and 'non ADR' tracks dealt with by the same judicial officers. The proposed Civil Justice Council should conduct an ongoing review of ADR processes in the Victorian courts, including court-conducted mediation.

6. THE NEED FOR COMPULSORY REFERRAL TO ADR

'Most jurisdictions in Australia now have provision for the mandatory referral of parties in legal proceedings to ADR processes'.⁵¹⁴ At present there are a number of such provisions in Victoria. However, there is still considerable controversy over whether matters should be referred, in the absence of the consent of the parties, to processes such as arbitration and other forms of ADR where the outcome may be binding without a settlement agreement between the parties. Some provisions already facilitate compulsory referral to arbitration.

A number of legal and other constraints may restrict or prevent compulsory referral of litigants to binding arbitration. First, arbitration and other ADR processes that may result in a binding outcome (other than by settlement agreement between the parties) are usually only considered appropriate where the parties consent. However, as has been noted with compulsory referral to mediation in NSW, parties who may be 'reluctant starters' often become 'willing participants'.⁵¹⁵

Curtailement of the 'right' of litigants to a judicial adjudication of legal proceedings may be open to challenge on human rights grounds, including under the Victorian Charter. Such provisions are not applicable to corporations. In addition, there may be impediments derived from Chapter III of the

497 See also Michael Redfern's submission to the Consultation Paper: he suggests that judicial officers should be encouraged to undertake courses in respect of the philosophy and culture of ADR: Submission CP 53.

498 Submissions CP 58 (Supreme Court of Victoria), CP 55 (Magistrates' Court of Victoria).

499 The Mental Health Legal Centre suggested that this should be amended to include 'financial or other hardship': Submission ED1 11. The commission does not consider that such an amendment is necessary.

500 This is a similar approach to the Supreme Court's referral practice, as described above.

501 Submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra).

502 Submissions CP 37 (Transport Accident Commission), CP 53 (Michael Redfern), CP 22 (Mental Health Legal Centre), CP 52 (Hollows Lawyers), ED1 31 (Law Institute of Victoria), ED1 6 (State Trustees); Confidential Submission ED1 4 (permission to quote granted 4 February, 2008).

503 For example, the courts could and already do appoint masters, special masters, registrars, judicial registrars, magistrates, retired judges or acting judges as appropriate, rather than judges.

504 Sourdin (2005) above n 6, 113.

505 Spencer, Part II (2006) above n 439, 197.

506 Ibid 198.

507 Sourdin suggests that such views have been overtaken by practice: Sourdin (2005) above n 6, 113.

508 This is a view shared by Telstra and the Australian Corporate Lawyers Association. They suggested thought should be given to ensuring court personnel are used effectively: '[T] here seems to be scope to reengineer the court processes and reallocate work from judges to associates, registrars and masters, which would enable judges to focus their time more effectively on trials and writing judgements.' See Submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra).

509 See discussion above.

510 As suggested by Cannon (2002) above n 431, 261.

511 NADRAC, *Submission on Federal Civil Justice System Strategy Paper*, (2004) 4 <www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Federal_Civil_Justice_System_Strategy_Paper_Comments> at 30 July 2007.

512 Submission CP 53 (Michael Redfern).

513 Submission CP 37 (Transport Accident Commission). See discussion later in this chapter on the need for research on the effectiveness of ADR.

514 Sourdin (2005) above n 6, 115.

515 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 [30] (Einstein J).

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Constitution. A further complication is the impact that any such mandatory referral to arbitration would have on litigants' appeal rights. Each of these matters is considered further below.

The commission believes courts should have express power to compulsorily refer parties to a wide range of ADR options, including processes such as arbitration, which may have a binding outcome. However, in view of possible legal constraints, the preferable course is for the court to (a) retain jurisdiction over any matter referred to any ADR process, including arbitration and (b) retain responsibility for the final adjudication of the matter if it is not resolved in a manner consented to by the parties. This could be done using existing powers for the referral of matters or issues to a special referee (or through the proposed power to appoint special masters, referred to above). In other words, we envisage a 'hybrid' model whereby an independent person would be appointed to 'arbitrate' (or use other ADR techniques) in their capacity as referee (or special master). If a consensual settlement does not eventuate then the referee (or special master) would make findings of fact and conclusions of law, on such matters as are within the terms of the reference from the court, and provide detailed reasons. These would be incorporated in a report to the court. The court, after providing the parties with an opportunity to be heard, would then determine the matter and deliver a judgment. Existing appeal rights would apply to the judgment.

This approach would presumably overcome any legal constraints that may otherwise prevent compulsory referral to 'binding' ADR processes and incorporate safeguards for the reluctant litigants. Any final decision would be made by the court after the parties have had an opportunity to be heard before judgment is entered.

Traditionally, referees and arbitrators have had very distinct roles.⁵¹⁶ However, there have been cases where an arbitrator previously agreed between the parties was subsequently appointed by the court as a referee.⁵¹⁷

6.1 SUPPORT FOR COMPULSORY REFERRAL TO MEDIATION

Mediation is defined by NADRAC as:

*a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role concerning the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.*⁵¹⁸

It is already possible for courts to refer parties to mediation, even without their consent. However, as noted above, there are divided views over the desirability of making such compulsory referrals.

There is considerable support for judicial referral of parties to mediation without consent. In *Remuneration Planning Corporation Pty Limited v Fitton* (2001), Justice Hamilton of the NSW Supreme Court noted that mediations ordered over the objection of the parties might often be successful:

*Since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered.*⁵¹⁹

More recently, Justice Spigelman, Chief Justice of NSW, commented:

One matter that appears somewhat counter intuitive is the conferral upon courts of a power to order mediation. This was once thought to be pointless because it appeared unlikely that a party who was ordered to mediate would be prepared to enter such negotiations in a co-operative manner. That has proven to be false. Reluctant starters have often proved to be willing participants in the negotiation process. It appears that many litigants have either not understood, or not been advised by their lawyers about, the weakness in their case, or have adopted a negotiating posture from the outset that they could not possibly lose. A formal order of the court requiring mediation has overcome

such inhibitions and has proven particularly successful in a number of spheres of jurisdiction.⁵²⁰

NADRAC's view is that:

*[T]he potential benefits, both in providing parties with a further opportunity to resolve their dispute and in ensuring publicly funded and scarce judicial resources are used only in determining intractable disputes, justify the continued use of court-ordered ADR.*⁵²¹

In *Going to Court*, the authors stated that they did 'not see a great problem with compulsory systems', nor did most of the people to whom they spoke to about it. In their view, compulsory systems bring worthwhile practical benefits.⁵²²

There was considerable support for compulsory referral to mediation in the submissions. The Victorian Bar and David Forster expressed support for compulsory referral in response to the Consultation Paper.⁵²³ Michael Redfern thought there should be very early compulsory mediation procedures.⁵²⁴ The Magistrates' Court and the Dispute Settlement Centre of Victoria felt that compulsory court-ordered mediation provided a forum for settlement and a range of possible solutions.⁵²⁵ One submission in response to the Consultation Paper contended that compulsory dispute resolution processes with sanctions 'are the only route to take'.⁵²⁶

6.1.1 Position in Victoria

In Victoria, all three courts have the power to order a proceeding or any part of a proceeding to mediation,⁵²⁷ even without party consent.⁵²⁸ The Supreme Court is also empowered to refer proceedings to mediation by a master, with or without the parties' consent.⁵²⁹ In practice, all three courts encourage parties to agree to mediation. Where the claim is for more than \$30 000, the Magistrates' Court will encourage mediation (rather than a pre-hearing conference).⁵³⁰ Any of the courts may order a further mediation if appropriate.

As noted at the beginning of this chapter, the commission's proposals in relation to pre-action protocols are intended to facilitate the resolution of many disputes, including through ADR, without the necessity to commence legal proceedings.⁵³¹ In addition, the proposed overriding obligations would impose on all key participants in civil litigation, from its inception, an obligation to use reasonable endeavours to resolve the dispute by agreement, including, in appropriate cases, using ADR processes.⁵³²

6.1.2 Other models

Australia

Mediation

Many Australian courts and tribunals have powers to refer matters to mediation with or without the consent of parties. This includes the Federal Court,⁵³³ the Federal Magistrates Court,⁵³⁴ the New South Wales state courts,⁵³⁵ the South

516 See the discussion of these roles in *Buckley v Bennell Design and Construction Pty Ltd* (1978) 140 CLR 1; *Leighton Contractors (SA) Pty Ltd v Hazama Corp (Aust) Pty Ltd* (1991) 56 SASR 47; *Nallar v Haines* (1991) 25 NSWLR 224, referred to by Neil Williams, *Civil Procedure—Victoria*, vol 1 (at January 2008) (LexisNexis Butterworths) [50.01.30].

517 See, eg, *Aerospatiale Holdings Australia Pty Ltd v Elspan International Ltd* (1992) 28 NSWLR 321.

518 NADRAC (2006) above n 1, 104.

519 *Remuneration Planning Corporation Pty Ltd v Fitton; Fitton v Costello* [2001] NSWSC 1208, at [3].

520 The Hon. James J Spigelman, Chief Justice of New South Wales, 'Commercial Litigation and Arbitration: New Challenges' (paper presented at the First Indo Australian Legal Forum, New Delhi, 9 October 2007). The commission is also aware that in recent years a number of Federal Court cases have been successfully resolved after referral to mediation over the objection of one or more of the parties.

521 NADRAC (2006) above n 1, 44.

522 Sallmann and Wright (2000) above n 47, 125.

523 Submissions CP 33 (Victorian Bar), CP 52 (Hollows Lawyers).

524 Submission ED2 11 (Michael Redfern).

525 Submissions ED1 30 (Magistrates' Court and Dispute Settlement Centre of Victoria), ED1 31 (Law Institute of Victoria).

526 Confidential Submission CP 1 (permission to quote 17 January, 2008).

527 Mediation is defined below.

528 *Supreme Court (General Civil Procedure) Rules 2005* r 50.07, *County Court Act 1958* s 47A, *Magistrates' Court Act 1989* s 108, *Magistrates' Court Civil Procedure Rules 1999* r 22A.01. See also *County Court Rules of Procedure in Civil Proceedings 1999* r 34.17: at a directions hearing in the County Court the court may, even without party consent, refer the whole or any part of the proceeding to mediation.

529 Supreme Court of Victoria, *Court of Appeal Practice Statement No. 1 of 2006* (2006).

530 Magistrates Court of Victoria, above n 20, 30. See discussion above of pre-hearing conferences in the Magistrates' Court.

531 See Chapter 2.

532 See Chapter 3.

533 *Federal Court of Australia Act 1976* (Cth) s 53A.

534 *Federal Magistrates Act 1999* (Cth) s 34.

535 *Civil Procedure Act 2005* (NSW) s 26. parties to consent to the referral.

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Australian state courts,⁵³⁶ the Tasmanian Supreme Court,⁵³⁷ the Australian Capital Territory state courts,⁵³⁸ VCAT,⁵³⁹ the Consumer, Trader and Tenancy Tribunal⁵⁴⁰ and the AAT.⁵⁴¹

Neutral evaluation

Some Australian courts and tribunals also have powers to refer matters to neutral evaluation with or without the consent of parties. This includes the Federal Magistrates Court,⁵⁴² and the Consumer, Trader and Tenancy Tribunal.⁵⁴³

Other forms of non-binding ADR

Some Australian courts and tribunals have the power to refer matters to other forms of non-binding ADR, without party consent. For example, in the Queensland District and Supreme Courts, the courts may refer parties to case appraisal,⁵⁴⁴ the Western Australian District Court can require parties to attend a pre-trial conference,⁵⁴⁵ and the AAT president is empowered to refer matters to conferencing, case appraisal and conciliation and procedures or services specified in the regulations.⁵⁴⁶

Pre-action ADR

Participation in mediation or another form of non-binding ADR may also be a prerequisite for commencing proceedings. For example, in disputes about retail leases, proceedings cannot be commenced until mediation has been attempted under legislation in Victoria⁵⁴⁷ and NSW.⁵⁴⁸ Pre-action obligations are discussed in detail in Chapter 2.

United States

In the United States, compulsory ADR has been introduced in some jurisdictions. The *Alternative Dispute Resolution Act 1998* authorises the use of ADR in US federal courts and imposes a number of requirements.⁵⁴⁹ The Act authorises mandatory ADR. District courts are explicitly given authority to require parties to 'consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration...' A district court that elects to require the use of ADR in certain cases may only do so with respect to mediation, early neutral evaluation and if the parties consent mediation.⁵⁵⁰

Canada

Since January 1999, as part of the courts' case management program, mandatory mediation⁵⁵¹ has become a permanent feature of the rules of court in Ontario.⁵⁵² Rule 24.1 essentially requires that:

- Within 30 days of the filing of a statement of defence, the parties to litigation must choose a mediator.
- The choice of mediator may be from the court-approved list of mediators (the 'roster'), or as agreed between the parties.
- If the parties fail to notify the court's mediation coordinator of their mediator within the required time, a mediator from the roster will be assigned by the coordinator.

One study in Ontario of a two-year mandatory mediation pilot analysed more than 3000 cases and found there were positive impacts on the speed, costs and outcomes of litigation when ADR processes were used.⁵⁵³

Norway

In Norway, conciliation boards have been established to facilitate resolution of disputes without the necessity for litigation.⁵⁵⁴ Each municipality in Norway is required by law to have a conciliation board.⁵⁵⁵ Mediation before the conciliation board is mandatory for all civil claims, before proceedings can be commenced.⁵⁵⁶ If the mediation does not result in an agreement, the conciliation boards have jurisdiction to make a ruling that resolves the dispute in favour of one of the parties.⁵⁵⁷ The conciliation boards must apply the relevant law if they want to resolve the dispute by making a ruling.⁵⁵⁸ Such rulings have the same effect as a decision made by a regular court, and can be appealed to the municipal courts.⁵⁵⁹ The conciliation boards play a significant role in the Norwegian legal system—226 575 civil cases were addressed to the conciliation boards in Norway in 2002.⁵⁶⁰ The annual number of cases dealt with by Conciliation Boards appears to have remained relatively constant. In 2004 218 157 disputes were dealt with by such boards.

The compulsory nature of proceedings before the conciliation board has given rise to concerns that this may not be compatible with Article 6 of the *European Charter of Human Rights*.⁵⁶¹

Notwithstanding this concern, the Ministry of Justice has adhered to the obligatory procedure because of the possibility of bringing the claim before a court later and because the conciliation procedures are cheaper and simpler than court proceedings and 'more decentralised than the court system'.⁵⁶²

United Kingdom

The position in England and Wales is that courts should encourage, but not compel, parties to participate in dispute resolution. In the Court of Appeal case *Halsey v Milton Keynes General NHS Trust and Steel v Joy*⁵⁶³ ('Halsey') the court considered human rights constraints on the power to order parties to submit their disputes to mediation against their will:

It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court ... it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 [of the Human Rights Act 1998]. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.

The court in *Halsey* also took the view that nothing would be achieved by compulsorily referring parties to mediation

*except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process.*⁵⁶⁴

Some commentators view the decision in *Halsey* as representing a radical departure from the direction in which recent court judgments about ADR had been moving.⁵⁶⁵ The UK Ministry of Justice in a May 2007 report asserted that it was arguable whether, in fact, a direction to attempt mediation prior to a hearing would infringe Article 6:

*Referral to mediation is a procedural step along the way to a court hearing if the case does not settle at mediation. It does not exclude access to the courts and to require parties to attend a three-hour low-cost mediation session does not order them to compromise their claim. Having attended the mediation meeting, the parties are free to terminate and leave at any point and to continue with the litigation.*⁵⁶⁶

- 536 *Magistrates Court Act 1991* (SA) s 27(1); *District Court Act 1991* (SA) s 32(1); *Supreme Court Act 1935* (SA) s 65.
- 537 *Supreme Court Rules 2000* (Tas) r 518.
- 538 *Court Procedures Rules 2006* (ACT) r 1179—there is no mention of whether the parties' consent is required.
- 539 *Victorian Civil and Administrative Tribunal Act 1998* s 88.
- 540 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 59(1)—there is no mention of a need for the parties to consent to the referral.
- 541 *Administrative Appeals Tribunal Act 1975* (Cth) ss 34A, 3—there is no mention of a need for parties to consent to the referral.
- 542 *Federal Magistrates Act 1999* (Cth) s 26.
- 543 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 59(1)—there is no mention of the need for parties to consent to the referral.
- 544 *District Court of Queensland Act 1967* (Qld) ss 97–98; *Supreme Court of Queensland Act 1991* ss 102–103—there is no specific reference to party consent.
- 545 *District Court Rules 2005* (WA) rr 39–40.
- 546 *Administrative Appeals Tribunal Act 1975* (Cth) ss 34A, 3—there is no mention of the need for parties to consent to the referral.
- 547 *Retail Leases Act 2003* Pt 10 (Dispute Resolution) and s 87(1).
- 548 *Retail Leases Act 1994* (NSW) Pt 8, Div 2 (Mediation) and s 68(1).
- 549 § 651(b).
- 550 § 652(a).
- 551 *Rules of Civil Procedure 1990 R.R.O* (Ontario) r 24.1
- 552 Paul Jacobs, 'A Recent Comparative History of Mandatory Mediation vs Voluntary Mediation in Ontario, Canada', *International Bar Association Mediation Newsletter* (2005) 1 <www.msmlaw.ca/Resources/Mandatory_vs.Voluntary.Media.pdf> at 19 March 2008.
- 553 Robert Hann and Carl Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report—The First 23 Months* (2001) 3.
- 554 See generally, Ervo (2007) above n 448, 479.
- 555 *Ibid.*
- 556 *Ibid.*
- 557 Lars-Jørgen Kihlberg Olsen, *The Conciliation Boards in Norway—A Brief Overview and Assessment of Pros and Cons*, <<http://folk.uio.no/larsjol/conciliation.doc>> at 19 March 2008.
- 558 *Ibid.*
- 559 *Ibid.*
- 560 Statistics Norway, *Disputes Dealt with by the Conciliation Boards, by Decision and County 2002*, <www.ssb.no/english/subjects/03/05/forlik_en> at 19 March 2008.

561 Ervo (2007) above n 448, 480.

562 *Ibid.*

563 [2004] EWCA Civ 576.

564 Dyson J in *Halsey* (2004) EWCA Civ 576.

565 Dame Hazel Genn et al, *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure*, Ministry of Justice Research Series 1/07 (2007) 8.

566 *Ibid* 15 (original emphasis).

Chapter 4



Improving Alternative Dispute Resolution

The Woolf Report considered that ADR should be encouraged but that compulsory ADR should not be recommended either as an alternative to litigation in the courts or as a preliminary step to litigation.⁵⁶⁷

6.1.3 Concerns about compulsory referral to mediation

The voluntariness of ADR

Even though it is already possible to refer parties to mediation and other forms of ADR, without the parties' consent, submissions to the commission raised various concerns about compulsory referral. One of the primary arguments is that the hallmark of ADR procedures and the key to their effectiveness is that they are voluntarily entered into by the parties in dispute without binding outcomes except where the parties have reached agreement. Consequently, some contend the court should not direct that such methods be used.⁵⁶⁸ One rationale is that 'settlement at an ADR process is more likely to occur if the parties are naturally ready to settle, rather than obliged to participate'.⁵⁶⁹

Similar concerns were raised in some submissions. Telstra, the Australian Corporate Lawyers Association, Victoria Legal Aid and the Insurance Council of Australia all argued that ADR should only be ordered when the parties participate voluntarily.⁵⁷⁰ The Springvale Monash Legal Service's response to the Consultation Paper expressed general concern about compulsory referral to ADR.⁵⁷¹ State Trustees suggested that rather than compulsorily referring parties to ADR, there should be incentives for voluntarily engaging in ADR 'to reduce the cost and formalities involved'.⁵⁷² The Law Institute contended that pre-issue ADR processes should be voluntary and not a compulsory precondition to issuing proceedings in court.⁵⁷³

The inappropriateness of referral

PILCH contended that ADR would not be appropriate in public interest cases that require a formal publicly binding determination.⁵⁷⁴ Other commentators have a similar view.⁵⁷⁵ The Federation of Community Legal Centres argued that ADR should not be used compulsorily where there is a power imbalance between parties.⁵⁷⁶ Some commentators have also suggested that compulsory referral to ADR is not appropriate if there is a risk of violence to one of the parties or if previous settlement attempts have failed and the matter is unlikely to settle. If a party is compulsorily referred to ADR but does not participate in good faith, this will render the process unsuccessful and increase costs and delay.⁵⁷⁷ An anonymous submission in response to the Consultation Paper was not supportive of compulsion and contended that mediation should only occur where both parties agree to act in good faith.⁵⁷⁸

The Charter

Another main concern is the contention that mandatory mediation deprives litigants of their right to a trial, or delays their exercise of that right. Chapter 1 discusses the right to a fair hearing. Section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a *fair and public hearing*. Section 24(3) provides that 'all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits'. In addition, a court (or tribunal) is a 'public authority' subject to the Charter when 'it is acting in an administrative capacity'. A court (or tribunal) is said to be acting in an administrative capacity when, for example, listing cases or adopting practices and procedures.⁵⁷⁹ The Charter also applies to courts (and tribunals) to the extent that they have functions under Part 2 and Division 3 of Part 3 of the Act.⁵⁸⁰ The charter also provides that '[s]o far as it is possible to do so consistently with their purpose, all statutes must be interpreted in a way that is compatible with human rights'.⁵⁸¹ Moreover, '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'.⁵⁸²

To exercise the right to a fair hearing requires access to the courts. Equal access to the courts is not attainable if people are excluded from the court process.⁵⁸³ The fact that litigants who are referred to mediation retain the right to a judicial adjudication of their dispute if they are unable to resolve it by agreement tends to negate the contention that non-binding ADR options such as mediation are incompatible with human rights guarantees and other legal or constitutional principles protecting rights of access to the courts. As noted above, different considerations may arise where litigants are compulsorily referred to ADR processes, such as arbitration, that have a binding outcome.

Whether the same approach as the English Court of Appeal took in *Halsey* will be taken in Victoria in light of the right to a fair hearing under the Charter remains to be seen. Astor and Chinkin argue that:

*On the face of it, parties are not denied trial as they may choose to settle in mediation. However for some litigants mandatory mediation may effectively deprive them of trial if they do not have the financial or emotional resources to pursue their dispute through both processes.*⁵⁸⁴

6.1.4 Research on compulsory mediation

Research on the effectiveness of compulsory mediation has produced mixed results.⁵⁸⁵ NADRAC has commented that

*Some research suggests that court-annexed ADR does not lead to overall savings for courts and tribunals, and ancillary costs such as ADR practitioners' fees, extensive preparation resulting in increased lawyers' fees, and unanticipated effects of ADR can all increase the net costs involved.*⁵⁸⁶

However, research conducted in Canada found that mandatory mediation had led to significant reductions in the time taken to dispose of cases; decreased costs to the litigants; and high proportions of cases being completely settled earlier in the litigation process. Moreover, litigants and lawyers were very satisfied with the mandatory mediation process.⁵⁸⁷ There are mixed findings on whether mandatory mediation has improved settlement rates in the United States.⁵⁸⁸ Evidence from two pilot schemes, both in the Central London County Court, one voluntary⁵⁸⁹ and one quasi-compulsory,⁵⁹⁰ suggested that facilitation and encouragement, together with selective and appropriate pressure, were likely to be more effective and possibly more efficient than blanket coercion to mediate.⁵⁹¹ There is also empirical research in Australia showing that those referred compulsorily to ADR do not generally express objections after the fact, nor do they opt out if given the choice.⁵⁹²

Despite the mixed results, NADRAC maintains that the empirical research does not support the conclusion that voluntary participation is essential: 'Parties who have been compelled to participate in ADR may still achieve outcomes they regard as satisfactory through a process they find fair.'⁵⁹³ NADRAC also contends that there is little evidence that those who are compulsorily referred to ADR opt out of the process if given a choice.⁵⁹⁴

6.1.5 Conclusion

Many Australian courts have powers to refer matters to *mediation* with or without the consent of parties. Courts will often refer a dispute to mediation even over the strong objection of one (or more) parties.⁵⁹⁵ Some issues were identified concerning the Charter; however, we are of the view that a compulsory referral to mediation does not exclude access to the courts, as long as the mediation does not cause any undue delay or expense.

567 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

568 Dyson J in *Halsey* (2004) EWCA Civ 576.

569 NADRAC (2006) above n 1, 43.

570 Submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra), ED1 25 (Victoria Legal Aid), ED1 21 (Insurance Council of Australia).

571 Submission ED1 26 (Springvale Monash Legal Service).

572 Submission ED1 6 (State Trustees).

573 Submission ED1 31 (Law Institute of Victoria).

574 Submission ED1 20 (Public Interest Law Clearing House).

575 See Mack (2003) above n 13, 60.

576 Submission ED1 9 (Federation of Community Legal Centres).

577 NADRAC (2006) above n 1, 44.

578 Confidential Submission CP 1 (permission to quote granted 17 January, 2008).

579 See note to *Charter of Human Rights and Responsibilities Act 2006* s 4(1)(j).

580 *Charter of Human Rights and Responsibilities Act 2006* s 6(2)(b).

581 *Charter of Human Rights and Responsibilities Act 2006* s 32(1).

582 *Charter of Human Rights and Responsibilities Act 2006* s 32(2).

583 Submission CP 36 (Human Rights Law Resource Centre) citing Department for Constitutional Affairs, *Human Rights: Human Lives* (2006) <www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf> at 21 December 2006.

584 Astor and Chinkin (2002) above n 45, 273.

585 See the discussion by Kathy Mack regarding the Ontario and Florida mandatory mediation programs, the ADR program in Minnesota and the research conducted in Australia: Mack (2003) above n 13, 30–31, 76.

586 NADRAC (2006) above n 1, 44.

587 Hann and Baar (2001) above n 553.

588 Mack (2003) above n 13, 47–8.

589 The Voluntary Mediation Scheme (VOL) had been operating since 1996: Genn et al (2007) above n 565, 20.

590 The Automatic Referral to Mediation (ARM) pilot in the Central London County Court was devised as an experiment in quasi-compulsory mediation. The pilot involved early random allocation by the court of 100 defended cases per month to mediation, with an opportunity to opt out. The pilot ran from April 2004 to January 2006: *ibid* 22–3.

591 The report also notes that evidence from recent evaluations of court-based mediation schemes in Exeter, Guildford and Birmingham support this conclusion: *ibid* 202.

592 Mack (2003) above n 13, 4, 50.

593 *Ibid* 54.

594 *Ibid* 4, 50.

595 *Ibid* 75.



Improving Alternative Dispute Resolution

If the commission's other recommendation to introduce further ADR processes is adopted, we believe that the courts should be empowered to compulsorily refer parties to non-binding ADR including:

- early neutral evaluation
- case appraisal
- conciliation and
- conferencing

6.2 THE NEED FOR COMPULSORY REFERRAL TO ARBITRATION

Compulsory referral to mediation is already an option in Victorian courts and has considerable support. Moreover, in the aftermath of the recent C7 case,⁵⁹⁶ there have been further suggestions that courts should have increased powers, or should make more use of existing powers, to require large companies involved in 'mega' commercial litigation with other large companies to resolve their disputes outside publicly funded courts through private binding arbitration⁵⁹⁷ or mediation.⁵⁹⁸

Judges of the Supreme Court have indicated support for an express power to order parties to arbitration, with or without their consent.⁵⁹⁹ The Victorian Bar shares this view.⁶⁰⁰ The Magistrates' Court and the Dispute Settlement Centre of Victoria supported compulsory arbitration, when exercised by a magistrate with expertise in the area and if there continued to be no merits appeal.⁶⁰¹

However, compulsory referral is controversial in relation to arbitration and other forms of ADR that have a binding outcome. The problems identified with mandatory arbitration are discussed in detail later in this chapter.

6.2.1 Position in Victoria

The Supreme Court does not have the express power in the rules to compulsorily refer parties to arbitration, but the County Court does. The County Court rule is derived from statute. The Magistrates' Court has a compulsory arbitration scheme for civil debt claims of less than \$10 000.

6.2.2 Other models

There are many statutes around Australia that provide for the resolution of disputes by arbitration.⁶⁰² The consent of the parties is usually required before a matter may be referred to arbitration. The concept of compulsory arbitration is, however, one which has gained some acceptance both within Australia and internationally.⁶⁰³

NSW Workers Compensation Scheme

The NSW Workers Compensation Commission makes arbitration a mandatory step for all matters except disputes simply about the existence or severity of an injury, which are referred to a medical expert for a report. The first stage after filing is a teleconference conducted by an arbitrator, who aims to assist the parties to resolve the dispute. If at the end of the teleconference there are still issues outstanding, the arbitrator decides whether the matter will be determined by an arbitrator on the papers or proceed to a full conciliation/arbitration hearing and/or whether it is to be referred to an Approved Medical Specialist for an assessment in relation to the worker's condition or fitness for employment.⁶⁰⁴

If a matter proceeds to conciliation/arbitration, the arbitrator will conduct a combined conciliation and arbitration hearing. The arbitrator first attempts conciliation and, if that fails to settle all outstanding issues, proceeds to arbitrate the matter.⁶⁰⁵ The arbitration occurs with an inquisitorial procedure and relaxed rules of evidence. If the arbitrator decides there is a need for oral evidence, the arbitrator may question the parties or witnesses, take evidence on oath or affirmation, and permit parties or their representatives to question witnesses. Questioning and cross-examination of witnesses will be permitted in very limited circumstances. Before making a final determination, the arbitrator may receive oral or written submissions.⁶⁰⁶

If a 'novel or complex' legal question arises, the arbitrator may refer a question of law to a presidential member of the compensation commission at the request of a party or at the election of the arbitrator.

The arbitrator will then make a decision, which may be either delivered orally (*ex tempore*) or reserved for written decision, usually within 14 days. Reasons for the decision must include findings on the material questions of fact, reference to the evidence or other material on which those findings are based, the arbitrator's understanding of the applicable law, and the reasoning process that led the arbitrator to the conclusions reached.⁶⁰⁷

Appeals against arbitral decisions may be lodged within 28 days of the award, with leave.⁶⁰⁸ No application for leave to appeal will be accepted where the amount in issue is less than \$5000 or 20% of the value of the award.⁶⁰⁹ Once an application for leave to appeal has been submitted, the other parties to the appeal may respond with a notice of opposition to appeal against decision of arbitrator.⁶¹⁰ Once leave to appeal is granted, the presidential member can determine the appeal without holding any conference or formal hearing, on the papers.⁶¹¹ Appeals from the decision of a presidential member of the compensation commission may be made to the Court of Appeal, on matters of law only.⁶¹²

Philadelphia

Philadelphia has a system of compulsory arbitration for civil claims, other than real estate or equitable actions, which are less than \$50 000 (USD).⁶¹³ A panel of three court-certified arbitrators who are legal practitioners hears the case. Once an award is made, if neither party has appealed the award after 30 days, judgment on the award is entered and enforced in the same manner as any other court judgment.⁶¹⁴ Any appeal is by way of a hearing de novo.

6.2.3 Problems with compulsory referral to arbitration

Conferral or exercise of a power to refer litigants to arbitration or other binding forms of ADR, without the parties' consent, may be open to objection or legal challenge on a number of grounds. The use of compulsion and/or the denial of the right to a judicial adjudication of the dispute may be open to objection on grounds derived from the Charter and/or Chapter III of the Constitution.

Lack of voluntariness

One of the hallmarks of arbitration and the key to its effectiveness is that, generally, it is voluntarily entered into by agreement between the parties. Arbitration is normally based on an agreement between the parties to refer a dispute to an arbitrator. Such agreement may be entered into at the time a dispute arises or may be part of a pre-existing contract. It will usually include an agreement to be bound by the outcome of the arbitration process.⁶¹⁵ The form and manner of the arbitration may be regulated by legislation.⁶¹⁶

Compulsory arbitration arises independently of the agreement of the disputing parties. Courts may have a discretionary power to order arbitration in particular cases. Compulsory arbitration sits uncomfortably with traditional conceptions of arbitration based on the parties consenting to the process.⁶¹⁷ In consultations, some Supreme Court judges suggested that there is a problem with compulsory referral to arbitration under the *Commercial Arbitration Act 1984* because it 'is built on consensus'.

Access to justice and the Charter

As with compulsory mediation, compulsory referral to binding ADR may be incompatible with the right to a fair hearing incorporated in section 24 of the Charter.⁶¹⁸

596 *Seven Network Ltd v News Ltd* [2007] FCA 1062 (The 'C7' case).

597 As reported by Chris Merritt, the then Federal Attorney-General, Philip Ruddock, the Labor Party, peak legal bodies, the Australian Lawyers Alliance and Albert Monichino of IAMA were all purportedly in fervent agreement that judges should be given greater powers: Merritt, 'Black comedy of Seven saga cues calls for private battles to quit public courts', *The Australian Financial Review* (Sydney), 3 August 2007, 29.

598 The National President of the Institute of Arbitrators and Mediators, Laurie James, was quoted in *The Australian* as suggesting that commercial disputes could be sent to non-binding mediation, and if that were unsuccessful, then be sent to binding private arbitration or 'referees': '[S]uch moves would save taxpayers millions of dollars'. See Merritt (2007) above n 597, and Chris Merritt and Susannah Moran, 'Ruddock backs calls to force firms to mediate', *The Australian*, 28 July 2007.

599 Consultation with the Supreme Court of Victoria (9 October 2007); Submission CP 58 (Supreme Court of Victoria).

600 Submission CP 33 (Victorian Bar).

601 Submission ED1 30 (Magistrates' Court and Dispute Settlement Centre of Victoria). They also recommended that as an alternative to compulsory arbitration, the court could make more use of sessional retired magistrates with expertise in an area for certain cases.

602 *Supreme Court Act (NSW) 1970* s 76B; *Civil Procedure Act 2005 (NSW)* s 38; *Uniform Civil Procedure Rules 2005 (NSW)* r 20.8; *Uniform Civil Procedure Rules 1999 (Qld)* r 334; *Supreme Court Act 1935 (SA)* s 66; *Supreme Court Civil Procedure Act 1932 (Tas)* s 37A; *Local Court Act 1989 (NT)* s 16(1)(e).

603 See below where mandatory systems and the Philadelphia system are discussed.

604 The Practice of the Conciliation and Arbitration Process in the Worker's Compensation Commission April, 2007, 7 <<http://www.wcc.nsw.gov.au/NR/rdonlyres/F62FC9E9-0E1C-4E35-9B87-BF3086CC85DE/0/DELINEPracticeofConArbintheWCCApril2007.pdf>> at 4 April, 2007.

605 *Ibid* 8–10.

606 *Ibid* 11.

607 *Ibid* 12.

608 *Workers Compensation Commission Rules 2006 (NSW)* r 16.2(1).

609 *Workplace Injury Management and Workers Compensation Act 1998 (NSW)* s 352(2).

610 *Workers Compensation Commission, Practice Direction no. 6 Appeal against a decision of the commission constituted by an arbitrator 1 November 2006* (2006), p 5.

611 *Ibid* 6–8

612 *Ibid*.

613 Philadelphia Court of County Pleas (n.d.) above n 148, 1.

614 *Ibid* 5.

615 Family Law Council (2007) above n 112, 16.

616 See, eg, the *Commercial Arbitration Act 1984*, *Commercial Arbitration Act 1984 (NSW)*.

617 Family Law Council (2007) above n 112, 16.

618 *Charter of Human Rights and Responsibilities Act 2006* s 24.

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However, compulsory power to refer to arbitration is more problematic than referral to mediation or other forms of ADR which will only result in a binding outcome if the parties reach agreement.

Under the County and Supreme Court Rules, parties may be referred to arbitration conducted in accordance with the *Commercial Arbitration Act 1984*. Under the Commercial Arbitration Act, the arbitrator makes an award that determines the dispute. The arbitrator's award is, subject to the Act, final and binding and may, with leave of the court, be enforced as a court judgment. An appeal from an arbitrator's award may be brought by consent or with the leave of the court but only on a question of law.⁶¹⁹ Appeal rights are therefore restricted. A dispute referred to arbitration under the *Commercial Arbitration Act* is therefore not determined by a competent, independent and impartial court, as required under section 24 of the Charter. Thus, referral to arbitration other than with the consent of the parties may be open to challenge.

However, the Charter itself provides that 'human rights' may be subject to such reasonable limits as can be demonstrably justified taking into account all relevant factors, including the nature of the right and the importance of the purpose of the limitation.⁶²⁰

The Charter also makes provision for an override declaration to be made by Parliament.⁶²¹

Compulsory referral of corporations, as opposed to individuals, to binding forms of arbitration may not be incompatible with the Charter unless individual litigants are also joined as parties to the proceedings. Corporations do not have human rights.⁶²² However, the commission is mindful that there may still be legal and policy objections if the power to compulsorily refer cases to arbitration or other binding forms of ADR is confined to matters involving corporate litigants. This may give rise to arguments that corporations are being treated 'differently' to individuals. Leaving aside the legal merits of any such objection, there are clearly policy arguments against limiting certain powers to cases involving only corporations. Moreover, it would be relatively easy to avoid the application of any such power by the joinder of individuals to the proceeding.

Legal or constitutional constraints

There may be legal or constitutional constraints (other than the problem under the Charter identified above) on the conferral of power on, or the exercise of power by, state courts to effectively decline to adjudicate disputes by compulsorily referring them to arbitration or other forms of ADR which may have a binding outcome other than with the consent of the parties.

One constraint may arise out of Chapter III of the Constitution. Insofar as any legislation seeks to confer functions on a court which exercises federal jurisdiction, such legislation may be invalid if the functions are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power.⁶²³ This issue is discussed in detail in Chapter 1.

6.3 SUBMISSIONS

There were divided opinions in the submissions and consultations concerning compulsory referral to arbitration. Some of the Supreme Court judges were concerned about compulsory referral to arbitration under the Commercial Arbitration Act. Other judges were concerned that, even if appeal rights were preserved for questions of law, this would still diminish present appeal rights.⁶²⁴ Law firm Clayton Utz contended that compulsory referral to ADR is appropriate as long as there is no denial of justice, the Charter is not offended and the parties ultimately retain the right to have the court determine their dispute.⁶²⁵

6.4 CONCLUSIONS AND RECOMMENDATIONS

6.4.1 Compulsory referral to special referees—a hybrid approach

The commission is of the view that it is desirable for courts to have the express power to compulsorily refer parties to binding ADR, such as arbitration. Although such an express statutory power may be compatible with the provisions of the Victorian Charter, and valid on constitutional grounds, the commission has concluded that a 'hybrid' model is preferable. Under this model, the court would retain jurisdiction over the dispute and remain responsible for the final adjudication. The power to refer some or all aspects of the dispute to a referee could be used in a more flexible manner than has been the case in the past. Thus a person who might otherwise be appointed as an arbitrator could be appointed as a special referee (or special master if the commission's proposals in respect of special masters are implemented). The special referee would make a provisional determination, in the form of

a report to the court, if a settlement agreement is not reached between the parties. The court would retain the responsibility for determining the outcome of the case (in the absence of a resolution agreed to by the parties) without being required to conduct an evidentiary hearing before the court on all issues in dispute.

The reference could be limited to particular questions of fact or law. The special referee could seek to resolve, on a provisional basis, all or part of the dispute, using such processes as are (a) determined by the court, or (b) agreed between the parties. This could include procedures analogous to arbitration, even in the absence of consent of the parties. Appeal rights would be preserved.

The Supreme Court in its response to the Consultation Paper referred to the following passage in *Williams* that describes the position regarding referral of questions to special referees:

The court will not generally refer a question to a special referee on the application of a party where the opposing party opposes the reference. It will have regard to the desire of the other party that the question be determined by the court in the ordinary way, and will only order a reference if satisfied that this would better achieve the effective, complete, prompt and economical determination of the proceeding than would a conventional trial: Abigroup Contractors Pty Ltd v BPB Pty Ltd [2000] VSC 261; BC200003305. See also AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd [1982] VR 762 at 765. Abigroup, above, was a case in the Building List, where the rules (Ch II r 3.04(3)) authorise the court to give directions considered conducive to the effective, complete, prompt and economical determination of a proceeding. See also Ch I r 1.14(1)(a).⁶²⁶

In *Abigroup*, Justice Byrne described the court's position on referral to special referees:

[A]n order for reference out will not be made over the opposition of a party unless the case for this is demonstrated by the applicant. The applicant must show that the question or questions to be referred are appropriate to be enquired into before the other questions in issue in the proceeding. It must, further, demonstrate that the proceeding is of such an exceptional nature that the genuine wishes of the respondent for a judicial determination should be disregarded. This is not the case for me to attempt to enlarge upon this requirement and I will not do so. It is sufficient that I emphasise that the applicant will not succeed unless it is able to demonstrate at least that the procedure which it would have the court adopt rather than a conventional trial is more likely to achieve the objectives of the Building Cases List, namely, the effective, complete, prompt and economical determination of the proceeding.⁶²⁷

Although the commission believes there is scope for greater use of the power to appoint special referees, this would remain a matter of judicial discretion. No doubt, such power would only be exercised where the court is of the view that this is likely to facilitate 'the effective, complete and prompt determination of the proceeding'.

6.4.2 Other models

New South Wales

The Supreme Court in its submission noted the New South Wales approach to the use of referees.

Justice Smart of the NSW Supreme Court held in *Park Rail Developments* that the court has no predisposition to making or refusing an order for a reference depending on the wishes of one party.⁶²⁸

Each opposed application for the appointment of an arbitrator or referee is considered on its merits.

The court found that relevant considerations include:

- (a) *the suitability of the issues for determination by a referee and the availability of a suitable referee;*
- (b) *the delay before the court can hear and determine the matter and how quickly a suitable referee can do so...;*
- (c) *the prejudice the parties will suffer by any delay;*
- (d) *whether the reference will occasion additional costs of significance or is likely to save costs; and*
- (e) *the terms of any reference including the issues and whether they should be referred for determination or inquiry or report.⁶²⁹*

619 *Commercial Arbitration Act 1984* s 38.

620 See *Charter of Human Rights and Responsibilities Act 2006* s 7(2).

621 See *Charter of Human Rights and Responsibilities Act 2006* s 31.

622 Section 6(1) and the note to this section provide that only persons have human rights and corporations do not have human rights. Under s 3 of the Charter, 'persons' are defined as 'human beings'. 'Human rights' are defined under s 3(1) as meaning the civil and political rights set out in Part 2 of the Charter.

623 *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575, 592 [19] (Gleeson CJ). See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

624 Consultation with the Supreme Court of Victoria (9 October 2007).

625 Submission ED1 18 (Clayton Utz).

626 Neil Williams, *Civil Procedure—Victoria*, vol 1 (at January 2008) (LexisNexis Butterworths) I 50.01.05.

627 *Abigroup Contractors Pty Ltd v BPB Pty Ltd* [2000] VSC 261 [15].

628 *Park Rail Developments Pty Ltd v RJ Pearce Assocs Pty Ltd* (1987) ('*Park Rail Developments*') 8 NSWLR 123, 129G (Smart J).

629 *Park Rail Developments* (1987) 8 NSWLR 123, 130.



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In *Park Rail Developments*, Justice Smart was satisfied that the issues were suitable for determination by a referee and that there were suitable referees to hear and determine the matter. He also noted that the delay in the court being able to hear the matter was too long and that the plaintiffs would suffer serious financial prejudice by such a delay. Although the extra expense was likely to be significant overall, it would be offset '[b]y the matter being resolved promptly rather than in two years time. Witnesses' memories and their availability are likely to be better now than after the lapse of another two years'. Justice Smart also commented on the increasing complexity of construction cases and the length of hearings:

With the heavy loads on the court lists it has often not been possible, despite the best will of the courts in organising lists and trying to streamline the hearing and the profession in preparing matters, to provide for the early hearing desired, especially when the increasing complexity of construction cases often results in a two to four weeks hearing and sometimes longer.

Justice Andrew Rogers (as he then was) has also drawn attention to the issue of the public and private costs incurred in the conduct of trials:

*It is all very well for a judge, or the lawyers concerned, to accept with equanimity the additional length of time the trial will take before a judge but what about the State and therefore the taxpayers who have to provide the courts and support facilities and the parties who have to pay for the lawyers and the experts whilst the judge is taught the technical information?*⁶³⁰

The Supreme Court in its submission also referred to *Najjar v Haines*,⁶³¹ a decision of the NSW Court of Appeal. Justice Kirby made the following comments in that case:

What the Supreme Court Rules, Pt 72, does is set in place a procedure whereby the Court is able to delegate to a referee, with or without the consent of the parties, a number of its functions in a given case. This power is an important one for many reasons. For example, it facilitates the determination of complex scientific issues by persons with appropriate scientific knowledge who should, therefore, be able to provide answers to the problems thrown up more quickly and conveniently than judges. In addition, in times when there are enormous demands upon the courts in the State, it provides a means whereby delay problems may be alleviated.

The Federal Court

The Federal Court is proposing amendments to the *Federal Court Act 1976* to empower the court to refer all or part of a proceeding to a referee for report to the court.⁶³²

The Family Court

In a recent discussion paper, the Family Law Council (FLC) contended that:

*simply to offer consensual arbitration, as is currently the case under the Family Law Act 1975, has not been sufficient to establish it as a viable option ... compulsory arbitration, ordered by the court in appropriate cases, supported by a clear structure and by measures designed to give the profession, the courts and the litigants confidence in the system, is a necessary first step to creating a climate in which voluntary arbitration can develop.*⁶³³

The FLC identified a number of constitutional issues surrounding compulsory arbitration in the family law context. Taking into account such constitutional issues, the FLC considered four possible models for a court-ordered arbitration scheme:

- model 1: arbitration as early neutral evaluation
- model 2: registration of award without judicial review
- model 3: due process award
- model 4: just and equitable award.⁶³⁴

All of the models provide for a rehearing de novo by the court.⁶³⁵

6.4.3 Why compulsory referral to special referees is desirable

In appropriate circumstances, referral of matters to special referees may reduce costs, accelerate resolution of the matter and facilitate the involvement of persons with expertise relevant to the subject matter of the dispute.

Historically, matters of a technical nature have been occasionally referred out to special referees. The commission is of the view that references to referees under Order 50 could be used more extensively, and that the power should be used to compulsorily refer out complex cases, including, for example, commercial or building matters.

The advantage of this approach is that the referee is subject to the supervision of the court, which retains control over the inquiry. Given that a referee simply reports to the court, the report is neither final nor binding. On adoption, the report may be the basis of a court judgment. However, it is the judge who ultimately decides the controversy, not the special referee.

General appeal rights are reserved and parties' right of access to the courts under the Charter is not impeded.

There are no procedural fairness issues as procedural fairness is required in a referee's inquiry. If there is a concern about the need for a public hearing under the Charter, provisions that allow for a case before a referee to be heard in public—as found in the California Rules of Civil Procedure—could be used as a model.⁶³⁶

The commission believes the legal, constitutional and human rights obstacles that may arise if litigants are compulsorily referred to binding arbitration do not arise, or are much less likely to arise, with Order 50 special referees.

Some courts, including in Victoria, appear to be moving towards recognition of the need for and utility of special referees. According to a recent practice note in the County Court, practitioners are expected to 'consider the appropriateness of the appointment of a special referee pursuant to rules 34A.22 and 50.01 to 50.06, and be prepared to discuss this at directions hearings. A special referee can be appointed without the consent of the parties.⁶³⁷ Similarly, in its 'new approach' to building cases, the Supreme Court's practice note stipulates that at a directions hearing, the parties must explain to the court what interlocutory steps are to be taken, including 'whether there are any questions which might be referred to a special referee or arbitration pursuant to Order 50'.⁶³⁸

Justice Spigelman, Chief Justice of NSW, made the following comments at a forum in July 2007 regarding arbitration and referees:

One well-established technique of particular significance in building and construction disputes, but also used in general commercial cases, has been a formal mechanism for reference of all or part of a proceeding to independent referees. These referees are sometimes experts, eg engineers who are asked to determine a particular technical matter for purposes of proceedings. Increasingly, however, the referees are retired judges to whom the whole of a matter, including legal issues, is referred.

Such a reference is conducted under the general supervision of the Court and culminates in a report by the referee to the Court, which the Court must adopt before it is effective. The principles applied are that such reports will be adopted save for very good reasons. This mechanism is of particular significance in cases where technical expertise is required.⁶³⁹

Justice McClelland of the NSW Supreme Court made the following comments at a conference in October 2007:

The latter part of the 20th century has seen a questioning of the assumptions we have made about the advantages of the adversarial system. In some significant areas, that questioning has resulted in fundamental change with the adversarial approach being abandoned. Both when injuries are sustained as a result of a motor vehicle accident and where a person is injured at work, the NSW government has legislated to define the entitlement to damages. Where there is a dispute the conventional courts have been either partly or wholly abandoned. In many cases the decision-maker will not be a lawyer. The use of persons with expertise related to the injured person's problem is more likely.

In other areas it is no longer the case that 'justice' is administered only by judges. It is commonly provided or facilitated by commissioners, referees, tribunal members, arbitrators, mediators or experts whom the parties choose to resolve their problems. The creation of these alternate resolution processes are a response to the cost, formality and perceived unsuitability of the conventional system. They have often been created out of

630 Cohen and Duthie (1993) above n 173, 1059, citing Justice Andrew Rogers 'Alternative Dispute Resolution in Construction Disputes: The Experience in Australasia', *Building and Construction Journal* (1992) 8 BCL 168, 174.

631 *Najjar v Haines and Ors* (1991) 25 NSWLR 224, 246.

632 Federal Court (2007) above n 23, 15; Matthew Drummond 'Expert referee to help federal judges' *The Australian Financial Review* (Sydney), 3 August 2007, 58.

633 Family Law Council (2007) above n 112, 12.

634 *Ibid.*

635 As the discussion paper notes, if judicial power in federal matters is delegated to arbitrators, the decision of the High Court in *Harris v Caladine* (1991) 172 CLR 84 must be observed: *ibid.*

636 See discussion above.

637 County Court of Victoria, *Practice Note 2008—County Court Building Cases Division*, 10 December 2007, 3.

638 Supreme Court of Victoria, *Practice Note 1 of 2008—A New Approach to Building Litigation*, 21 February 2008, 4.

639 Justice Spigelman also identified that the referee procedure is of particular use where only some parties, or only some issues, in a wider dispute are subject to an arbitration clause: 'A person can be nominated as both an arbitrator and as a referee and, therefore, resolve the whole of the dispute. Many of the referees are in fact retired commercial judges who also act as commercial arbitrators': 'Commercial Litigation and Arbitration: New Challenges' (Paper presented to the First Indo Australian Legal Forum, New Delhi, 9 October 2007).



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a recognition that it is preferable to have the dispute resolved by a person with expertise relevant to that dispute rather than by a court which lacks that expertise. An expert in the field comes to the dispute with the learning and experience lacked by a judge. Although the application of the rules may still be supervised by judges, primary decision-making is commonly given to a person who may not be a judge but who, the community accepts, is best suited to carry out the task.⁶⁴⁰

The proposition that every person is entitled to have his or her civil dispute tried and determined in a court of law, at public expense (and at considerable private cost to the other parties to the dispute), may no longer be tenable, if it ever was. As noted by Sir Peter Middleton in his report to the Lord Chancellor in the UK prior to the implementation of the Woolf reforms:

I do not accept the argument that limitations on the procedures that parties can currently adopt would reduce the quality of justice. Justice does not depend solely on an exhaustive decision-making process. Timeliness and affordability are equally aspects of justice. It is no justice, if a decision can only be reached after excessive delay or at a cost that is unaffordable to the parties or disproportionate to the issues at stake. A change in the balance from excessive thoroughness to increased speed and less cost is likely to result in a net improvement in a world where resources are limited.⁶⁴¹

Justice Byrne in *Abigroup* summarised the matters that give rise to judicial reluctance to order a reference to a referee against the parties' wishes:

They are the duty to the court to provide a judicial forum for the determination of issues for litigants who seek this; considerations which depend upon the terms of the rule under which the order for reference is made; and those of a practical nature including the relative cost, expedition and efficiency of the special referee procedure.

As Justice Byrne noted, the reference of a question to a special referee involves no abrogation of the responsibility of the court itself to determine cases brought before it; the reference is merely one of the tools available to the judge in the discharge of that function.⁶⁴² He also observed:

While it may be true that this is the usual outcome of the filing of a writ and that the plaintiff may desire such a determination, the decision to do so is not always a statement of preference for a judicial forum. Absent cooperation from a defendant, a plaintiff usually has no alternative forum available unless there be a binding and enforceable arbitration agreement. Even less so can it be said that a defendant who is sued in court has voluntarily chosen a judicial forum.⁶⁴³

Compulsory referral to special referees may be particularly appropriate for certain types of 'mega-litigation'. The recent Federal Court C7 case⁶⁴⁴ is discussed in Chapter 1. In the aftermath of that case, it has been proposed that courts should have increased powers to order large corporations out of publicly funded courts and into private, binding arbitration.⁶⁴⁵

Perhaps another consideration is balancing the rights of corporations and the rights of other parties to access the courts. If mega-litigation is taking up a disproportionate amount of court resources, as Justice Sackville suggested in the C7 case, such cases may be contributing to court delays. In submissions, and consultations, judges of the Supreme Court indicated support for the power to order parties to a special referee, even without the parties' consent.⁶⁴⁶ They were supportive of referral to referees under Order 50. They noted that even though there is no requirement under the rules to obtain the parties' consent, the rules could be amended to clarify that a referral to a referee may be made, with or without the consent of the parties. The judges noted that it was not a frequently used procedure but that it could be used more often. It is a useful procedure because parties have access to competent referees, retain the right of access to the court and have broader appeal rights than under arbitration.⁶⁴⁷

The judges also supported compulsory referral to special referees because they considered it would be a useful tool to relieve some of the 'court's burden'. Some felt that large corporations should pay more for the use of the courts for resolution of commercial disputes. At present substantial public costs are incurred both in the provision of court services and through tax deductibility of litigation costs.⁶⁴⁸

Other judges felt that if corporations wished to litigate commercial matters in the courts, they should be able to do so because 'judges are the best decision-makers in the state'. If corporations want access to judges, then they should have the same rights as anyone else.⁶⁴⁹

Other suggestions made in submissions and consultations include:

- The referee could sit with the judge in the court to save time and money and should provide the report to all parties so that they have access to the same information as the judge to ensure fairness. It would not be appropriate for the parties to cross-examine the referee, as they are not experts.⁶⁵⁰
- There should be a special list for mega-litigation.⁶⁵¹
- The procedures used in the Small Business Commissioner's compulsory mediation scheme should be adopted.⁶⁵²
- Any new compulsory conciliation matters in the Magistrates' Court (where parties are bound by a recommendation) should continue to be heard by judicial officers (magistrates or judicial registrars).⁶⁵³
- There should be research on the practice of compulsory referral to ADR and its impact on self-represented litigants.⁶⁵⁴

Earlier in this chapter, we recommended that the courts be given the power to refer parties to 'Philadelphia-style' arbitration or court-annexed arbitration. Such arbitration allows for a rehearing, hence there are extensive appeal rights. We consider that court-annexed arbitration may be appropriate for referral of shorter personal injury or commercial cases. We do not envisage court-annexed arbitration as being suitable for dealing with mega-litigation. Cases that can be heard in one or two days may be appropriate for referral to court-annexed arbitration. Large, complex cases that will take up weeks or months in court may, in appropriate circumstances, be referred to a special referee.

6.4.4 When should a matter be referred to a special referee?

At present, there is no provision in either legislation or court rules prescribing the stage of the proceedings at which referral to special referees may occur. Such flexibility should be maintained.

6.5 BINDING MANDATORY ARBITRATION AS A TERM OF CONTRACT

In the context of arbitration, the commission has also considered whether the right of access to the courts could be constrained or negated by contract. In the United States and other jurisdictions, in recent years there appears to have been a proliferation of mandatory arbitration clauses in consumer contracts of various types. Courts have upheld the validity of such clauses but they may be vulnerable to attack, including in Victoria, under consumer protection laws.⁶⁵⁵

In the aftermath of decisions by courts in the United States and Canada upholding mandatory arbitration clauses in consumer contracts, there has been a move in recent years for legislative reform. For example, when courts in Ontario upheld a mandatory arbitration clause in a consumer Internet service provider contract, the Ontario Government implemented consumer protection legislation to overcome the decision.⁶⁵⁶

640 Justice Peter McClellan, 'Contemporary Challenges for the Justice System—Expert Evidence' (Paper presented to the Alliance Medical Law Conference, 20 July 2007).

641 P Middleton, *Review of Civil Justice: Report to the Lord Chancellor by Sir Peter Middleton* (September 1997) as cited in Ian Scott, 'Keynote Address' (Paper presented at the 22nd AIA Annual Conference, Sydney, 2004) 32.

642 *Abigroup Contractors Pty Ltd v BPB Pty Ltd* [2000] VSC 261, [12] citing *Super Pty Ltd v SJP Formwork (Australia) Pty Ltd* (1992) 29 NSWLR 549, 558–62 (Gleeson CJ; Mahoney and Clarke JJA concurring).

643 *Abigroup* [2000] VSC 261, [12].

644 *Seven Network Ltd v News Ltd* [2007] FCA 1062 ('C7 case').

645 See Merrit (2007) above n 597. See also Merrit and Moran (2007) above n 598.

646 Submission CP 58 (Supreme Court of Victoria).

647 Consultation with the Supreme Court of Victoria (9 October 2007).

648 Consultation with the Supreme Court of Victoria (9 October 2007).

649 Consultation with the Supreme Court of Victoria (9 October 2007).

650 Consultation with the Supreme Court of Victoria (9 October 2007).

651 Consultation with the Supreme Court of Victoria (9 October 2007).

652 Submission ED2 11 (Michael Redfern).

653 Submission ED1 30 (Magistrates' Court of Victoria and Dispute Settlement Centre of Victoria).

654 Submission ED1 26 (Springvale Monash Legal Service).

655 See for example the *Fair Trading Act 1999* s 32W, where a term in a consumer contract may be unfair if, 'contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer'. The *Trade Practices Act 1975* (Cth) contains a number of provisions that may be used to circumvent or nullify the effects of arbitration clauses: ss. 44Y, 51AB, 51AC. See also the *Fair Trading Act* ss 8, 8A, which mirror ss 51AB & 51AC.

656 Public Interest Advocacy Centre and Options Consommateurs, *Mandatory Arbitration and Consumer Contracts* (2004) 3 and 48 citing the Ontario *Consumer Protection Act*. In the United States the Supreme Court has broadly construed the reach of the *Federal Arbitration Act*: see *Citizen's Bank v Alafabco, Inc* 123 S Ct 2037 (2003).

Chapter 4



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In Victoria, the *Domestic Building Contracts Act 1995* provides that any term in a domestic building contract or agreement that requires a dispute to be referred to arbitration is void. The legislative concern was that arbitrations would become 'overly legalistic, time consuming and expensive'.⁶⁵⁷ The commission is mindful of section 55(3) of the *Commercial Arbitration Act 1984* and its impact on *Scott v Avery* clauses.⁶⁵⁸

In the United States, the *Arbitration Fairness Bill* was introduced into the House of Representatives and the Senate in 2007. The Bill seeks to prohibit the use of pre-dispute mandatory arbitration in consumer, employment and franchise agreements.⁶⁵⁹ This arose out of the increasingly widespread use by large corporations of mandatory arbitration clauses in various types of consumer contracts. Supporters of the proposed legislation point to how consumers are disadvantaged by such clauses in view of, for example:

- the large filing fees
- the alleged bias of industry appointed arbitrators (with empirical research showing that they usually find in favour of the business appointing them)
- the limited discovery available
- the prohibition of class actions
- the inconvenience of the venues
- the one-sided obligation whereby consumers are bound but businesses can elect to litigate in court
- the absence of any public record of proceedings
- the lack of a requirement for arbitrators to issue written findings or conclusions
- the limited scope for judicial review
- the limited range of remedies available to consumers (eg, the absence of injunctive relief and no entitlement to punitive damages).⁶⁶⁰

Although the commission is supportive of the use of ADR, these developments give cause for concern. It is not clear whether there has been or is likely to be more extensive use of such mandatory arbitration clauses in Australian, particularly Victorian, consumer contracts. It may be that the relatively widespread voluntary industry dispute resolution schemes in many areas of mass service delivery—including financial services, essential services, banking and insurance—have developed as a more benign alternative to such contractual provisions.⁶⁶¹

The Productivity Commission is currently reviewing Australia's consumer policy framework and may comment on this issue as part of its review.⁶⁶²

7. PROVISION OF ADEQUATE COURT RESOURCES

7.1 THE NEED FOR A DESIGNATED COURT OFFICER REFERRING PARTIES TO ADR

Despite the growth of ADR, the court system is still largely focused on traditional adjudication based on adversarial procedures. Over recent years a variety of ADR techniques, including mediation, arbitration and the use of special referees, have been gradually deployed to speed up the process, to relieve the burden on the courts, to reduce the cost of dispute resolution and to provide litigants and judges with additional options. The use of such options is likely to be enhanced if courts are able to provide additional personnel dedicated to the task of referring parties to ADR and providing assistance in arranging ADR providers and facilities.

The commission has recommended that an increased variety of ADR options should be available and that the courts and parties should make greater use of these options.⁶⁶³ The commission is also of the view that the courts should have the express power to refer cases to ADR processes without the consent of the parties.⁶⁶⁴

There are likely to be savings in time and money if parties are referred to the most appropriate method of dispute resolution from the beginning. Litigants are less likely to become frustrated and dissatisfied with the litigation process if a court provides information and appropriate referral advice about available ADR processes.⁶⁶⁵

The commission considers that courts are well placed to ensure that appropriate cases are resolved using ADR rather than litigation. As noted in the *Federal Civil Justice System Strategy Paper*: 'given that litigants may not be aware of the alternatives to litigation, the courts can play an important role in encouraging, and providing information, on ADR methods'.⁶⁶⁶ Justice Stein has suggested that the role of 'a 21st century court' is

*to provide citizens with a forum for dispute resolution which should not be confined to traditional judicial adjudication. When a litigant comes through the door of the Court she or he should be informed of the alternative mechanisms available for dispute resolution. These should be provided by the Court and should not be 'out-sourced'. Litigants should be entitled to choose the means best suited to the particular nature and subject matter of the suit.*⁶⁶⁷

The commission does not agree that dispute resolution should not be 'out sourced' by the courts but is of the view that courts should be actively involved in providing a range of alternative dispute resolution options. The use of both internal and external ADR options is likely to be increased if courts appoint designated persons with responsibility to recommend suitable forms of ADR and to assist parties in arranging ADR providers and facilities.

7.2 POSITION IN VICTORIA

Currently, the County and Supreme Courts do not have a designated person who is responsible for recommending suitable forms of ADR and assisting parties in arranging ADR providers and facilities.

The Magistrates' Court assists parties in arranging ADR providers and facilities for pre-hearing conferences and mediation conducted by the court. The Magistrates' Court Rules provide that parties may be referred to an 'acceptable mediator' for mediation under section 108(1) of the Act.⁶⁶⁸ 'Acceptable mediator' is defined to include, for example, a registrar or a mediator accredited by the Law Institute, the Victorian Bar or the Institute of Arbitrators and Mediators.⁶⁶⁹

7.3 OTHER MODELS

Australia

South Australia

The South Australian Magistrates Court offers in-house mediation services that are coordinated by the court and are conducted by private mediators at no cost to the parties.

New South Wales

In New South Wales, court-annexed arbitration schemes receive some administrative assistance from the courts.⁶⁷⁰

Intervention order program

In 2002, the Magistrates' Court introduced a pilot program to refer appropriate intervention order applications to mediation at the Dispute Settlement Centre. An independent evaluation of the pilot found that the program had been successful because:

- 657 Victoria, *Parliamentary Debates*, Legislative Council, 15 November 1995, 541 (R I Knowles, Minister for Housing).
- 658 A *Scott v Avery* clause provides that the parties must refer specified disputes to arbitration before commencing court proceedings. At common law, the courts required an arbitration clause to be in *Scott v Avery* form in order to be enforceable. However, the *Commercial Arbitration Act 1984*, in effect, treats the clause as a simple agreement to arbitrate giving rise only to the right to seek a stay of the court proceeding (s 55(1)). A *Scott v Avery* clause is therefore effective only where the arbitration is not conducted under the Act or, if it is so conducted, where one or more of the parties is not domiciled or resident in Australia at the time the arbitration agreement is entered into (s 55(2)), or where the arbitration is a statutory arbitration (s 55(3)).
- 659 The Arbitration Fairness Act 2007, see Bill S. 1782 and Bill H.R. 3010, <www.govtrack.us/congress/bills/110/1782> at 25 March 2008.
- 660 See, for a good discussion of arguments for and against binding mandatory arbitration: Deborah Hensler and Linda Demaine, 'Mandatory Arbitration 'Volunteering' to Arbitrate through Predispute Arbitration Clauses: The Average Consumer's Experience', (2004) 67 *Law & Contemporary Problems* 55; John O'Donnell, Public Citizen Publications, 'The Arbitration Trap—How Credit Card Companies Ensnare Consumers' (2007) <www.citizen.org/documents/Final_wcover.pdf> at 13 March 2008; Jean Sternlight, 'Is the U.S. Out on a Limb—Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World' (2002) 56 *University of Miami Law Review* 831; Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, The National Workrights Institute, <www.workrights.org/issue_dispute/adr_columbia_article.html> at 25 March 2008.
- 661 See discussion in Public Interest Advocacy Centre (2004) above n 656, 3.
- 662 See Productivity Commission, *Review of Australia's Consumer Policy Framework*, Terms of Reference, <www.pc.gov.au/inquiry/consumer/information/tor> at 8 October 2007.
- 663 See Recommendation 17 below.
- 664 See Recommendation 23 below.
- 665 Sourdin (2005) above n 6, 121 citing ALRC, *Review of the Adversarial System of Litigation, ADR—Its Role in Federal Dispute Resolution*, Issues Paper 25 (ALRC, Sydney, June 1998).
- 666 Attorney-General's Department [Australia] (2003) above n 355, 145.

- 667 Justice Stein, 'Down Under Perspective of the Environmental Court Project' (Paper presented to the United Kingdom Environmental Law Association Seminar on the Final Report on the Environmental Court Project, London, 27 June 2000) 5.
- 668 *Magistrates Court Civil Procedure Rules 1999* r 22A.01.
- 669 *Magistrates Court Civil Procedure Rules 1999* r 22A.02.
- 670 See discussion of this scheme in paragraph 2.8.



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- there was a comprehensive promotion strategy which raised awareness of the project among magistrates, key staff and other relevant stakeholders
- clear guidelines and procedures for referral had been developed
- it provided senior court staff with reports on the outcomes of mediation.⁶⁷¹

The Administrative Appeals Tribunal

In the Administrative Appeals Tribunal (AAT), a person is not entitled to conduct an ADR process unless the person is a member, an officer of the tribunal or a person engaged under section 34H.⁶⁷² Section 34H provides that the registrar may engage persons to conduct one or more kinds of alternative dispute resolution processes and must not engage a person unless satisfied that the person has suitable qualifications and experience to conduct the relevant kind of ADR processes. The AAT also publishes information about its dispute resolution processes on its website.⁶⁷³

The Family Court

In the Family Court, the 'Integrated Client Service' scheme has a central intake and screening mechanism located at a 'one-stop shop' desk. A multi-disciplinary team of service providers is involved in assessment of the dispute and, in conjunction with the disputing parties, will refer them to appropriate dispute resolution processes.⁶⁷⁴

The Land and Environment Court

The Land and Environment Court offers a variety of dispute resolution processes. Chief Justice Preston has commented that: 'The availability within the one courthouse of a variety of dispute resolution processes is a necessary feature of a multi-door courthouse programme.'⁶⁷⁵ The Chief Justice has also identified that while the court may be moving towards becoming a multi-door courthouse, it will be necessary to develop adequate:

- *financial resources, including for programme development, new court personnel, training of existing personnel, better ... courthouse space and equipment, and preparation and publication of programme literature and information;*
- *human resources, including intake staff and dispute resolution practitioners ...; [and]*
- *facilities, both in terms of having the appropriate facilities such as ... rooms for intake interviewing and ... settlement rooms.*⁶⁷⁶

Overseas

The United Kingdom

In the United Kingdom, evaluations of court-based mediation schemes have identified the importance of efficient and dedicated administrative support to the success of court-based mediation schemes.⁶⁷⁷

The Netherlands

In the Netherlands, a court-connected mediation office was established following a pilot scheme of court-annexed mediation. The office is responsible for helping courts implement the ADR referral facility. The office also has the task of gathering, describing and informing the courts on 'best practices'. In order to be able to have adequate information about the number of referrals and the success rate, a monitoring system has been built and implemented in the court administration.⁶⁷⁸

The United States

In 1998 in the United States, the *Alternative Dispute Resolution Act 1998* was introduced which authorised the use of ADR in federal courts and imposed a number of requirements on the courts. Stienstra explains the operation of the Act as follows:

*To help ensure that court ADR programs are well managed and of high quality, the Act requires each district court to designate an employee or judicial officer who is knowledgeable about ADR to implement, administer, oversee, and evaluate the program. Among this individual's duties may be recruiting, screening, and training attorneys to serve as neutral [third parties] (§ 651(d)).*⁶⁷⁹

7.4 A MULTI-DOOR SYSTEM?

The multi-door courthouse approach was first outlined in 1976 by Harvard Professor Frank Sander. Professor Sander envisaged one courthouse with multiple dispute resolution doors or programs. Cases could be 'diagnosed' and referred to the appropriate door for resolution.⁶⁸⁰ These programs could be located inside or outside the actual court complex. A large number of United States courts have adopted this approach.⁶⁸¹

Elements of the multi-door approach operate in Australian jurisdictions, as identified above.

7.5 WHAT TYPE OF ADR PROCESS?

The AAT has developed a referral policy and process models for the different forms of ADR, including the factors favouring referral for different types of ADR, to assist members, officers and parties to understand how the new processes will be implemented.⁶⁸² The Supreme Court of NSW recommended developing positive criteria for referral to ADR processes. Factors favouring referral to mediation, evaluation and arbitration were identified.⁶⁸³

The Victorian courts may wish to consider developing broad referral criteria and process models to assist judges, court officers, parties and lawyers to understand how the different ADR processes operate and when one process might be more suitable than another. It should be up to each of the courts to decide on a referral policy depending on the types of cases heard in the court. Having guidelines for referral of cases to ADR could help ensure consistency.

While recognising the importance of each court developing its own referral criteria, NADRAC states that factors that influence whether a matter should be referred to ADR include:

- the parties' ability to participate
- the relative costs and benefits of ADR and litigation
- cultural factors
- the need for flexible processes and outcomes
- the public interest, which may require a public, authoritative determination.⁶⁸⁴

A designated court officer, when considering a case for referral to ADR, could take into account such considerations.

7.6 TIMING OF THE REFERRAL

'The timing of any referral process is usually acknowledged as an important factor in the eventual resolution of any dispute'.⁶⁸⁵ It seems to be accepted that there is no right or wrong time for referral.⁶⁸⁶ On one view, it is better to refer parties to ADR as early as possible. The greatest savings occur when cases are mediated early. The parties avoid the costs of discovery and of filing and defending applications.⁶⁸⁷ On the other hand, many litigants may not be prepared to consider settlement until they have sufficient information, including through discovery, to assess the strengths and weaknesses of the case of each party. Others may not be prepared to consider ADR or settlement until they are faced with the prospect of trial.⁶⁸⁸

671 Melissa Conley Tyler and Jackie Bornstein, 'Court Referral to ADR: Lessons from an Intervention Order Mediation Pilot' (2006) 16 *Journal of Judicial Administration* 48, 54.

672 *Administrative Appeals Tribunal Act 1975* s 34C(5).

673 See <www.aat.gov.au/ApplyingToTheAAT/AlternativeDisputeResolution.htm> at 25 March 2008.

674 Sourdin (2005) above n 6, 122–3. See also <www.ano.gov.au/director/publications/auditreports/2003-2004.cfm?item_id=1E0AFBFB96197ADC021BE5AD537E4E1> at 25 March 2008 and the Family Court's 2006/2007 Annual Report for more information.

675 Chief Justice Brian Preston, 'The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse', (Paper presented to LEADR NSW Chapter Annual Dinner, Sydney, 15 November 2007) 13.

676 *Ibid* 24.

677 Genn et al (2007) above n 565, v, 121, 204 citing Hazel Genn (1998), *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Series 5/98; Hazel Genn (2002) *Court Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, LCD Research Series 1/02; Lisa Webley, Pamela Abrams and Sylvie Bacquet, *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme, Report to Department for Constitutional Affairs*, September 2006, <www.dca.gov.uk/civil/adr/fast-track-mediation-birmingham.pdf> at 24 April 2008; Sue Prince and Sophie Belcher, *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts* <www.dca.gov.uk/civil/adr/fast-track-mediation-guildford-exeter.pdf>.

678 Bert Niemeijer and Macteld Pel, *Court-based Mediation in the Netherlands: Research, Evaluation and Future Expectations*, <www.mediationnaastrechtspraak.nl> at 28 September 2007.

679 Donna Stienstra, *The Alternative Dispute Resolution Act of 1998: Seeds of Change in the Federal District Courts*, Report on Trends in the State Courts (1999–2000).

680 Sallmann and Wright (2000) above n 47, 58 citing Frank Sander, 'Varieties of Dispute Resolution Processing', *Federal Rules Decision* (1976) vol. 70, 111; L Ray and A Clarke, 'The Multi-Door Courthouse Idea: Building the Courthouse of the Future... Today', (1985) *Ohio State Journal of Dispute Resolution* 7, 17. See also, for a good discussion of the history and development of the multi-door system: Preston (2007) above n 675.

681 See for example the District Court of Columbia, which has operated a multi-door court system since 1985: <www.dcb.org/for_lawyers/sections/litigation/multidoor.cfm> at 25 March 2007.

682 See the AAT website: <www.aat.gov.au/ApplyingToTheAAT/AlternativeDisputeResolution.htm> at 24 April 2008.

683 Sourdin (2005) above n 6, 127.

684 Mack (2003) above n 13, 6.

685 Sourdin (2005) above n 6, 129.

686 *Ibid*.

687 District Court of Columbia (n.d.) above n 699.

688 *Ibid*.



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The submissions in response to the Consultation Paper contained different views regarding the timing of referral to ADR. The Law Institute felt that mediation should occur earlier in the litigation process than is currently the case, but not before discovery. The Legal Practitioners' Liability Committee (LPLC) considered that early mediation is desirable, but is not appropriate until the claim and defence to the claim have been properly articulated and issues in contention identified. The LPLC considered that if the parties' respective positions are not sufficiently articulated prior to mediation it could result in further expenses being incurred. The Construction & Infrastructure Law Committee (Victorian Group) of the Law Council of Australia recognised the benefit of early mediation, 'before significant expenses have been incurred in litigation, such as extensive discovery'.⁶⁸⁹

The Transport Accident Commission suggested that if there has been no pre-litigation involvement, consideration should be given to listing compulsory mediations much earlier in the court timetables to achieve better disclosure of information and to narrow the issues as early as possible. The Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators suggested that there should be express provision in rules of court requiring judges (or masters) or registrars conducting a case management conference or directions hearing in a civil proceeding to consider whether the proceeding, or any question in the proceeding, should be referred out to any form of ADR (and not merely mediation). Judge Wodak considered that compulsory referral to ADR should occur only when all real issues have been defined and all relevant facts and materials disclosed.⁶⁹⁰

The commission is of the view that it should be left to each court to decide the timing of the referral to ADR depending on the type of case. Having designated court staff to assist with referrals, including the timing, would assist the courts in managing the ADR processes.

7.7 THE DESIRABILITY OF ADDITIONAL COURT RESOURCES

In *Going to Court*, Sallmann and Wright suggested that, at the most basic level, courts should provide information and assistance for people, which could include a trained court officer who could deal with inquiries and provide information brochures on the available means of dispute resolution.⁶⁹¹ Their view was that additional funding may be required for such services but 'it would save substantial resources overall if such a scheme succeeded in assisting people to resolve their disputes without recourse to the full-blown litigation process'.⁶⁹²

Having a designated officer at the court will enable an assessment to be made of a dispute's suitability for ADR. If disputes are referred to an appropriate form of ADR at the appropriate time, the chances of settlement are increased and there will be savings in terms of time and money.

Astor and Chinkin suggest that:

*If parties and lawyers are referred to a carefully chosen and appropriate method of dispute resolution carried out by a high quality practitioner, they are more likely to have an experience of ADR that is positive and they are more likely to use it again.*⁶⁹³

The evaluation of the Magistrates' Court intervention order pilot program⁶⁹⁴ found that the major barrier faced by court staff referring matters to mediation was the difficulty in convincing clients with suitable cases to consider mediation.⁶⁹⁵

NADRAC suggests that 'if there is a dedicated staff member or members referring parties to ADR, scheduling is easier, which can contribute to ADR success'.⁶⁹⁶ NADRAC also notes that legislation or rules provide only minimal guidance to courts about appropriate referral to ADR. This puts a significant responsibility on courts to make 'wise referral decisions'. To ensure wise referral decisions are made and inappropriate cases are not referred, NADRAC suggests that each case should be independently assessed by the courts to determine:

- whether an ADR process would assist the parties to resolve the dispute and/or narrow the issues in dispute; and
- which ADR process would be appropriate in the circumstances.

NADRAC suggests that the key is for the courts to ensure there is well-targeted direction to ADR processes in individual and appropriate cases by trained judiciary involving some assessment of the factors likely to result in a positive outcome. The commission agrees with this view and also notes that trained court officers, who may not be judicial officers, could also undertake an assessment of cases and recommend suitable forms of ADR.

It could also be part of the court officer's role to track the outcome of cases in which courts have

made a referral to ADR over sometimes strenuous objections. Such information would be useful information to help assess and monitor the success of compulsory referral to ADR.⁶⁹⁷

Some suggest that a multi-door approach is at the opposite end of the spectrum of dispute resolution to that of the traditional adjudication role of courts. However, as identified by Sallmann and Wright in *Going to Court*, 'a version of the multi-door approach makes sense if one takes a broad view of the primary purpose of courts as resolvers of civil disputes'.⁶⁹⁸

Another concern is that resources will be required to employ court officers to these positions. The commission considers that the benefits of having court staff employed to provide assistance with ADR referrals and facilities may outweigh the cost of employing them. Costs may in fact be saved for both the parties and courts in circumstances where, following an appropriate and timely referral by the designated officer, the parties settle the dispute much earlier than would otherwise have been the case. Astor and Chinkin note that putting resources into ADR, including into assessing cases to support appropriate referral to ADR, may determine the quality of the ADR services provided. They note that indicators of quality conflict in the short term with cost-savings objectives. However, as they note, 'in the long term ... they may constitute a wise investment'.⁶⁹⁹

Another concern is that there may be a lack of confidence in the quality of the ADR service to which parties are referred. This is a valid concern. Some issues around the quality of service provision by ADR practitioners are that:

- there are currently no uniform standards for ADR service providers or practitioners in Victoria or Australia
- there is no single national organisation that trains ADR practitioners⁷⁰⁰
- there is no national, single accreditation body for ADR providers and new standards for mediator accreditation have only just been introduced⁷⁰¹
- there is no peak Victorian or Australian body that regulates ADR practitioners.⁷⁰²

These and other matters are currently the subject of a detailed review by the Victorian Parliamentary Law Reform Committee, which is due to report at the end of June 2008.⁷⁰³ However, the commission notes that despite the issues regarding accreditation and training of ADR providers and ADR practice standards, and the desirability of having highly trained ADR providers, there are very experienced dispute resolution practitioners and schemes operating in Victoria and the issues identified should not prevent courts referring parties to ADR.

Currently, the resources and services include:

- Law Institute of Victoria (LIV): Mediators Directory⁷⁰⁴
- Victorian Bar: Dispute Resolution Scheme⁷⁰⁵
- The Institute of Arbitrators and Mediators Australia (IAMA) and Chartered Institute of Arbitrators (CIArb)⁷⁰⁶

689 Submission CP 12 (Construction & Infrastructure Law Committee (Victorian Group)).

690 Submission ED 1 7 (Judge Wodak).

691 Sallmann and Wright, *Going to Court* (2000) above n 47, 91.

692 *Ibid* 93.

693 Astor and Chinkin (2002) above n 45, 263.

694 See the description above under paragraph 7.3.

695 Tyler and Bornstein (2006) above n 671, 54.

696 Mack (2003) above n 13, 43.

697 See paragraph 6 for more information regarding compulsory referral to ADR.

698 Sallmann and Wright (2000) above n 47, 59.

699 Astor and Chinkin (2002) above n 45, 263.

700 A number of bodies provide training including LEADR, the Institute of Arbitrators and Mediators, and the Australian Commercial Disputes Centre (ACDC).

701 Bodies such as ombudsmen and the Victorian Bar use their own accreditation methods and standards. NADRAC recommended the development of a national accreditation system for mediators: NADRAC, *Who Says You're a Mediator? Towards a National System for Accrediting Mediators* (2004). This has been recently introduced, as noted above in the text. From 1 January 2008 new voluntary Mediator Accreditation Standards came into existence. This is an industry based scheme which relies upon voluntary compliance by mediator organisations (Recognised Mediator Accreditation Bodies) that agree to accredit mediators in accordance with these standards. The Commission is grateful to Malcolm Holmes QC of the Sydney Bar for supplying this information.

702 There are self-regulating bodies, such as the National Mediation Conference, whose draft Australian Mediator Practice Standards include a description of the mediation process and requirements for ethical practice, confidentiality and procedural fairness. The Victorian Parliamentary Law Reform Committee suggested there may be benefit in such a standard applying to all ADR providers rather than just to mediators: Parliament of Victoria, Law Reform Committee *Alternative Dispute Resolution Discussion Paper* (2007) 109.

703 *Ibid*.

704 The directory contains more than 80 arbitrators and approved solicitor mediators with a diverse range of training and experience. There are also approximately 20 accredited specialist mediators. The lists of approved solicitor mediators and accredited specialist mediators are promoted to the courts. The lists are also published on the LIV website and in the LIV Directory and Diary. The online Directory facilitates searches by region, area of practice, mediator name or firm name: Law Institute of Victoria *Friday Facts* No. 471, <www.liv.asn.au/members/news/fridayfacts/20070511_471.html> at 11 May 2007.

705 The Victorian Bar scheme provides ADR services through barristers at the Bar's Mediation Centre. The Bar accredits mediators who are professionally trained in mediation and who usually have expertise in specialised areas of law and practice. Accredited mediators with the requisite skills and experience may apply to become advanced mediators. The Bar mediators directory lists member barristers who are accredited by the Bar as mediators and who wish to be included. The Bar offers the following dispute resolutions: conciliation, expert appraisal, arbitration, assisted negotiation and case presentation: Victorian Bar <www.vicbar.com.au> at 11 May 2007.

706 Both IAMA and the CIArb are involved in the grading and accreditation of persons as arbitrators, mediators and adjudicators. The members of CIArb and IAMA comprise barristers and solicitors, engineers, architects and accountants, as well as other professionals: Submission CP 35 (Institute of Arbitrators and Mediators Australia and the Chartered Institute of Arbitrators).



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- LEADR⁷⁰⁷
- The Dispute Settlement Centre for Victoria,⁷⁰⁸ the Neighbourhood Justice Centre,⁷⁰⁹ the Moorabbin Justice Centre⁷¹⁰ and the Office of Small Business Commissioner: all offer dispute resolution services.⁷¹¹

The commission also recognises that it is important that the panel of practitioners include suitably qualified and experienced dispute resolution practitioners. This will help ensure that the ADR service is of a high quality.

In addition, there should be further education and training in mediation and other forms of ADR for court staff and the judiciary.⁷¹² This will help ensure that appropriate referrals are made.

Where referrals to ADR are not backed with the authority of a judicial officer there may be some resistance. This may be the case where parties are unfamiliar with the proposed ADR process or where they may perceive that a willingness to participate in ADR will be seen as an indication that they have a weak case.

There are also issues of safety as well as suitability that need to be taken into account in referral decisions. Aggressive or violent parties may give rise to difficulties, particularly if they are not independently represented.

7.8 SUBMISSIONS

The submissions were supportive of this proposal.⁷¹³ PILCH felt that court-assisted ADR would provide much-needed support and assistance to self-represented litigants to identify the issues and negotiate suitable resolutions. PILCH also considered that assistance for cases involving self-represented litigants could be provided from a panel of experienced barristers on a pro bono basis or through funding by the Justice Fund.⁷¹⁴

The Law Institute and the Victorian Bar both considered that they are well placed to provide qualified practitioners for the panel. Victoria Legal Aid considered that its dispute resolution services in family law matters could be extended to civil disputes.

The Magistrates' Court and the Dispute Settlement Centre of Victoria in their joint submission envisaged an intake process, screening and streaming of cases to suitable forms of resolution by making use of the Dispute Settlement Centre's extensive panel of mediators.⁷¹⁵

7.9 CONCLUSIONS AND RECOMMENDATIONS

The courts should be adequately resourced to appoint or designate persons with responsibility to recommend suitable forms of ADR and to assist parties in arranging ADR providers and facilities. The courts should also have panels of suitably qualified and experienced dispute resolution practitioners available to undertake ADR processes. Such assistance will ensure that disputes are referred to the most suitable form of ADR, that court ADR programs are well managed and of a high quality, and that participants' confidence in ADR and the courts is enhanced.

8. DATA AND RESEARCH, INCLUDING MEDIATORS' REPORTS

8.1 THE LACK OF EMPIRICAL RESEARCH AND ACCURATE DATA

There is a lack of empirical data on the effectiveness of court-ordered ADR in Victoria, including its cost effectiveness. There is a need for more research to improve knowledge of the role of mediation in Victoria and, more specifically, to obtain more data regarding how effective ADR is in relation to:

- narrowing issues and settling disputes
- bringing about an earlier resolution of disputes
- reducing the length and cost of proceedings
- assisting the courts to manage their caseloads
- providing fair outcomes.

Measuring the outcomes of ADR in Victoria is important for identifying whether ADR programs are meeting their aims and fulfilling their potential. The commission proposes that the Civil Justice Council should conduct an ongoing review of ADR processes in Victorian courts.

Data collection regarding ADR is also important. The courts have been using mediation reports for some time. The problem is that the reports are not always filed with the court, even where the court has ordered that the mediator or parties report to the court. Performance outcomes of ADR such as participation and settlement rates are not difficult to measure. However, accurate data are required. The requirement to file mediation reports will assist the courts in gathering accurate data regarding mediation. Performance outcomes can then be measured. Such data would also be of use in terms of identifying potential improvements and increased efficiencies for ADR providers and the courts.

The reports should also provide an assessment of the person conducting the ADR process. This should assist the courts to monitor and assess dispute resolution practitioners to maintain quality ADR services. Quality ADR services are important to ensure participants have confidence in the ADR service provided and in court processes.

8.2 RESEARCH TO DATE

There is a 'substantial amount of valuable research, mainly in the United States, involving court-based ADR programs, especially family mediation and mediation in general civil cases'.⁷¹⁶ There is also valuable research coming out of the United Kingdom as a result of evaluations by the Civil Justice Council.⁷¹⁷ There are various evaluations of ADR and court-based ADR programs in Australia, particularly by NADRAC.⁷¹⁸

In Victoria, there have been various reviews of ADR and the courts, including:

- a review, commissioned by the Department of Justice in 1996, that assessed the cost and effectiveness of courts and tribunals for Victorian businesses
- *Going to Court*, a review by Professor Sallmann and Ted Wright of the civil justice system for the Department of Justice in 2000
- the Department of Justice: ADR reports and surveys referred to in the introduction to this chapter
- the Victorian Crown Counsel review of the Office of Master and Costs Office in the Supreme Court, which included an assessment of master mediation⁷¹⁹
- the evaluation of the intervention order mediation program in the Magistrates' Court,⁷²⁰ a review undertaken in the criminal justice system
- the present Victorian Parliamentary Law Reform Committee's review (also referred to in the introduction to this chapter)

707 LEADR is an Australasian, non-profit organisation formed to promote consensual dispute resolution. LEADR's services include access to panels of independent mediators, and facilitation of mediations and conciliations. LEADR also provides ADR training including training in mediation, negotiation, facilitation and conciliation: LEADR, <www.leadr.com.au/training> at 28 May 2007.

708 The Dispute Settlement Centre of Victoria (DSCV) offers mediation services and deals with a wide range of disputes: Dispute Settlement Centre of Victoria, *Information Kit 2006*, <[www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/JUSTICE+-+Dispute+Settlement+Centre+of+Victoria+Information+Kit+\(PDF\)](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/JUSTICE+-+Dispute+Settlement+Centre+of+Victoria+Information+Kit+(PDF))> at 20 April 2007.

709 The Neighbourhood Justice Centre deals with a range of civil and criminal cases arising in the City of Yarra. Mediation at the centre is available to residents, government departments, agencies and community organisations within the Yarra municipality. These services are provided by the DSCV: Department of Justice, <www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Neighbourhood+Justice> at 11 May 2007.

710 For information on the Moorabbin Justice Centre see the Deputy Premier and Attorney-General, 'Hulls launches \$28.2 million Justice Centre in Moorabbin' (Press Release, 15 November 2007).

711 The Victorian Small Business Commissioner (VSMC) offers preliminary assistance in dispute resolution. VSBC staff assist in resolving matters before submitting to formal mediation: Office of Small Business Commissioner <www.sbc.vic.gov.au/content.asp?subPageID=31> at 23 April 2007.

712 See Recommendation 28 on education of the judiciary and court staff.

713 Submissions ED1 16 (Telstra), ED1 17 (Australian Corporate Lawyers Association), ED1 9 (Federation of Community Legal Centres), ED1 31 (Law Institute of Victoria), ED1 30 (Magistrates' Court of Victoria and Dispute Settlement Centre of Victoria), ED1 24 (Victorian Bar), ED1 26 (Springvale Monash Legal Centre), ED1 25 (Victoria Legal Aid).

714 Submission ED1 20 (Public Interest Law Clearing House).

715 Submission ED1 30 (Magistrates' Court of Victoria and Dispute Settlement Centre of Victoria). The court and the settlement centre also felt that penalty provisions attracting costs for failure to comply with court rules were a major part of the powers that support the effectiveness of mediation conducted 'in the shadow of the court'. They considered that additional enforcement provisions were needed. They proposed that the Dispute Settlement Centre, subject to approval and funding, should undertake a pilot program to provide mediation services at the Magistrates' Court for defended civil proceedings for amounts up to \$10 000. The commission notes that Broadmeadows Magistrates' Court is currently piloting such a program—see Magistrates' Court of Victoria *Practice Direction No. 6 of 2007* (2007).

716 Mack (2003) above n 13, 21.

717 Civil Justice Council (UK), *Court-based Mediation: A Preliminary Analysis of the Small Claims Mediation Scheme at Exeter County Court*, <www.civiljusticecouncil.gov.uk/publications/mediation_0304.htm> at 21 January 2008.

718 See, for example, NADRAC (2006) above n 1; Mack (2003) above n 13. See also NADRAC's website: <www.nadrac.gov.au/agd/WWW/disputeresolutionhome.nsf/Page/Publications> at 24 April 2008.

719 Crown Counsel (2007) above n 41.

720 Tyler and Bornstein (2006) above n 671, 48.



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- the current examination by NADRAC of the development of performance measurements for ADR⁷²¹
- the Law Council's current collation of information and statistics from the different Australian jurisdictions regarding mediation.⁷²²

The Department of Justice has recently undertaken considerable research, including empirical research, regarding ADR throughout Victoria.⁷²³ One of the current projects is a review of the role of mediation in the Victorian Supreme and County Courts. The project will assess the effectiveness of mediation in settling disputes, reducing the length and cost of proceedings and assisting the courts to manage their caseloads.⁷²⁴ The commission considers that a similar review in the Magistrates' Court would be beneficial.

8.3 THE EFFECTIVENESS OF ADR

Despite the research identified above, there is little empirical data on the effectiveness of court-ordered mediation in Victoria. NADRAC notes that there are many possible aspects or dimensions in determining whether an ADR process could be called effective or successful. It suggests that the starting point for any discussion must depend on the goal or goals the referral to ADR seeks to achieve, so that outcomes can be measured against those goals. Astor and Chinkin provide a list of goals which a court-connected ADR referral might include— for example, reducing delay, clearing lists, reducing the backlogs, assisting in management of cases, reducing cost (to parties, courts, government, taxpayers).⁷²⁵

NADRAC notes that:

*In spite of the potential for more sophisticated measures of success, the actual measures used in evaluative research tend to be quite limited. The most frequently used are settlement rates [and] satisfaction (both for its own sake and as a proxy for quality of outcome).*⁷²⁶

*This limited choice of outcome reflects, in part, the difficulty of empirical research in this area, including the difficulty of undertaking research over long periods of time. This difficulty is equally true of research into civil litigation generally, which has not generally been subjected to the same degree of evaluation.*⁷²⁷

NADRAC notes that there are no agreed standards for measuring the outcomes of ADR in civil disputes. Without agreed performance measurements and data assessing the outcomes of ADR, it is difficult to assess the performance of ADR providers and the outcomes for participants in the civil justice system.⁷²⁸

Mack has suggested that 'the development of nationally agreed conventions for measuring and reporting ADR referrals and outcomes should become an urgent part of the larger task of civil justice statistical measurement'.⁷²⁹ Mack also notes that there is very little empirical research that 'investigates whether satisfaction or settlement is affected by whether the ADR is provided by a judge, court staff or an outside third party, whether voluntary or paid'.⁷³⁰

The Victorian Parliamentary Law Reform Committee in its Discussion Paper discussed in detail some of the common performance indicators used to measure the success of ADR, including agreement rate and quality, participant satisfaction, participant empowerment and time and cost savings.⁷³¹ The committee identified surveys, evaluations and data regarding these performance indicators. It also identified areas where there is limited research and data, including into why some cases reach agreement through mediation or other ADR processes while others do not,⁷³² and the extent to which the use of ADR processes reduces the time taken to resolve civil disputes.⁷³³

8.4 THE COST EFFECTIVENESS OF ADR

Based on the submissions and consultations to this review, participants view mediation favourably and perceive it to have potential cost savings. There is evidence that the general community recognises potential cost savings as a feature of ADR services.⁷³⁴ However, another view is that ADR can create an extra step in the proceeding and if the matter does not settle, parties incur additional costs.

The Law Reform Committee's Discussion Paper identifies some of the issues surrounding the cost savings of ADR, including that:

- The earlier a dispute is settled, the greater the cost savings will be for the litigants and the courts (and government).
- Most cases settle rather than progress to a hearing stage, therefore the cost savings are not necessarily savings associated with avoiding a hearing but rather savings resulting from an earlier settlement.
- ADR will generally only be cheaper for the individual if a lasting agreement is reached.
- Even where ADR is unsuccessful, the process may narrow the issues in dispute, reducing the time taken to resolve the dispute at a hearing, resulting in cost and time savings for litigants and the courts.⁷³⁵

ADR processes have the potential to save costs for litigants, courts and government. However, there is little data or research in Victoria regarding the cost effectiveness of ADR. There is a need for empirical research regarding the cost effectiveness of court-ordered mediation. The Department of Justice is currently reviewing the cost effectiveness of mediation in the Victorian Supreme and County Courts. A similar review would be of benefit in the Magistrates' Court.

8.5 DATA, INCLUDING MEDIATORS' REPORTS

The courts have some data on mediation and other forms of ADR.⁷³⁶ As discussed above, if mediators' reports are filed with the court, the court will have access to accurate data on ADR.

8.5.1 Position in Victoria

In the Magistrates' Court, pursuant to rule 22A.07, within seven days of a mediation having been completed, the mediator must file a mediation report in a specified form⁷³⁷ and provide a copy of the report to each party who attended the mediation.

Under the Supreme and County Court Rules:

*The mediator may and shall if so ordered report to the Court whether the mediation is finished.*⁷³⁸

8.5.2 Other models

New South Wales

The New South Wales provisions are similar to the Victorian Magistrates' Court approach. Section 20.7 of the *Civil Procedure Act 2005* (NSW) provides:

Within 7 days after the conclusion of the mediation, the mediator must advise the court of the fact that the mediation has been concluded.

A Practice Note of the NSW Supreme Court requires the following information from the plaintiff following mediation:

Evaluation of referral of proceedings to mediation and entry of any consent orders

Within 14 days after the conclusion of the mediation, the plaintiff in writing informs the Principal Registrar of the following ('Joint Protocol Evaluation Information'):

- *the name and file number of the proceedings;*
- *the name of the mediator;*
- *the date(s) of the mediation;*
- *the number of hours occupied by the mediation;*
- *whether the parties were represented at the mediation by solicitors;*
- *whether the parties were represented at the mediation by counsel;*
- *whether the parties agreed to settle, or partly settle, the proceedings or whether no resolution of any issues was achieved;*

721 NADRAC, *Submission on Federal Civil Justice System Strategy Paper*, (2004) 4 <www.nadrac.gov.au/agd/www/Disputeresolutionhome.nsf/HeadingPagesDisplay/Publications?OpenDocument> at 13 March 2008.

722 Consultation with the Law Council of Australia (15 August 2007).

723 Consultation with the Department of Justice (15 August 2007).

724 Parliament of Victoria, Law Reform Committee (2007) above n 702, 59.

725 Astor and Chinkin (2002) above n 45, 262.

726 Mack (2003) above n 13, 18.

727 *Ibid* 18–19.

728 NADRAC (2004) above n 14, 12–13.

729 Mack (2003) above n 13, 87.

730 *Ibid* 5.

731 Parliament of Victoria, Law Reform Committee (2007) above n 702, 54–7.

732 *Ibid* 54.

733 *Ibid* 57.

734 Ipsos Australia (2007) above n 40, 20.

735 Parliament of Victoria, Law Reform Committee (2007) above n 702, 58.

736 See discussion in the introduction to this chapter.

737 Form 22AA.

738 *Supreme Court (General Civil Procedure) Rules 2005* r 50.07(4), *County Court Rules of Procedure in Civil Proceedings 1999* r 50.07(5).



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- to the extent that any terms of settlement are not confidential to the parties, the terms of settlement; and
- if the parties agreed to the Court making orders, a signed consent order in a form suitable for entry by the Registry.

On receipt of the Joint Protocol Evaluation Information, the Principal Registrar will forward a copy of that information to the relevant nominating entity.⁷³⁹

California

The California Code of Civil Procedure provides, with respect to referees, that:

*The Judicial Council shall, by rule, collect information on the use of these references and the reference fees charged to litigants, and shall report thereon to the Legislature.*⁷⁴⁰

Netherlands

In the discussion above there is reference to the monitoring system that has been developed and implemented in the court administration.⁷⁴¹

8.5.3 Discussion

At present, mediation reports are not always filed with the court, even in circumstances where the court has ordered that the mediator report to the court. The courts collect some data about the number of mediations conducted.⁷⁴² However, if mediation reports are not always filed, it is difficult for the courts to obtain accurate data and information about mediation. If all of the parties who attended mediation were required to file mediation reports with the court within a specified period, say seven days, and to provide a copy of the report to each party who attended the mediation, it would assist the courts in gathering accurate data about mediation. Such data could then be used to measure participation and settlement rates. The benefit of this is that the courts would then be in a position to assess the overall effectiveness of mediation. Such changes will also be of benefit because they will harmonise court rules and procedures. Accurate data would be useful for comparing data across jurisdictions.

See also the discussion in Chapter 5 regarding the need for additional data collection in the courts and for court forms and documents, including mediator's reports, to be designed to facilitate the collection of data as a by-product of administrative processes.

8.6 SUBMISSIONS

The Law Institute agreed with the commission's proposal in Exposure Draft 1 that there was insufficient information or data on the effectiveness of court-ordered mediation in Victoria. The institute also supported the commission's draft recommendation that a review of the Magistrates' Court mediation program would be beneficial. Its submission agreed that parties should be required to submit reports at the conclusion of any ADR process as 'such a report could provide a useful evaluation of both the mediation process and mediator'.⁷⁴³ The Law Institute also considered that if parties were required to submit these reports, it was important that courts release ongoing summaries and analysis of the information, which would benefit all participants in the process.⁷⁴⁴

Telstra and the Australian Corporate Lawyers Association suggested the gathering of empirical data should be voluntary. They suggested that there might be good reasons for parties wishing to maintain confidentiality over the fact of any dispute and its resolution. They considered the only issue that should be reported is the resolution or lack of resolution of the dispute. This is done in any event when orders are made either disposing of a proceeding or seeking orders for the further conduct of the proceeding.⁷⁴⁵

The Magistrates' Court and Dispute Settlement Centre suggested that the existing mediator's report in the Magistrates' Court could be supplemented by the parties indicating whether the other party had made a genuine attempt to resolve the matter (as shown by the state of preparedness), with cost implications.⁷⁴⁶

The Mental Health Legal Centre suggested that there should be a system whereby anonymous information about settlements could be made publicly available, for example, on a database. Their view was that: 'The benefit would be to provide realistic guidance to potential litigants and to facilitate earlier resolution.'⁷⁴⁷

8.7 CONCLUSIONS AND RECOMMENDATIONS

There is a need for more empirical research regarding the effectiveness of court-ordered ADR, particularly the cost effectiveness. Further empirical research will provide valuable input into understanding the benefits of ADR for participants. Once-off reviews such as those identified above have contributed significantly to the knowledge base regarding ADR in Victoria. However, further research will enable the courts to better assess the outcomes for participants in the civil justice system and evaluate the performance of ADR programs.

The Department of Justice's Civil Law Policy Unit is currently considering the overall effectiveness and cost effectiveness of mediation in the County and Supreme Courts. A review of the effectiveness of the Victorian Magistrates' Court pre-hearing conference and mediation service should also be carried out. This could be a responsibility of the Civil Justice Council.

The commission considers that parties should be required to file a mediation report with court at the conclusion of any ADR process. Such reports should also provide an assessment of the person conducting the ADR process. This will assist the courts in gathering accurate data about mediation. The courts will then be in a better position to measure the performance of mediation, including participation and settlement rates. This information could also be used to identify potential improvements and increased efficiencies in the courts. Including a requirement that the parties assess the ADR practitioner in the report filed with the court will allow the court to monitor the quality of the ADR practitioners providing services.

The proposed Civil Justice Council should be responsible for conducting and coordinating empirical research into the role of ADR and the effectiveness of ADR. This will be particularly important if our other ADR recommendations, including expanding the ADR options available, introducing more court-conducted mediation and compulsory referral to special referees are implemented.

9. EDUCATION: FACILITATING AN UNDERSTANDING OF ADR PROCESSES

There would appear to be general acceptance of the utility and benefits of ADR within the community. However, we believe there is scope for greater education of the legal profession, judiciary, court personnel and consumers about the full range of available ADR options, with particular focus on:

- the need for different types of ADR in a modern court
- the different ADR processes that are available and how they operate
- in what circumstances the different ADR options might be appropriate and
- at what stage of the proceeding a dispute should be referred to ADR.

If participants' understanding of ADR processes is improved, more informed decisions would be made regarding which ADR process is appropriate for the particular dispute, the parties are more likely to have a positive experience of ADR, the dispute is more likely to be resolved and the parties are more likely to use ADR again if they have confidence in the process. It is also important in increasing participants' awareness of when ADR may not be appropriate.⁷⁴⁸

Education about ADR options was supported in submissions and consultations. Telstra and the Australian Corporate Lawyers Association said that education about the range of ADR options would be useful.⁷⁴⁹ The Law Institute and PILCH supported greater education regarding the different types of ADR because it will assist litigants to make informed decisions about participation in ADR processes.⁷⁵⁰ The Legal Services Commissioner submitted that as part of her function of educating the profession, she should be involved in the provision of such programs.⁷⁵¹ The Springvale Monash Legal Service also suggested that lawyers, judicial officers and court officers should be educated about when ADR is and is not appropriate, especially if one of the parties is self-represented.⁷⁵² In a consultation with the Supreme Court, it was noted that a lot of law reform is about cultural change and education. It was also suggested that it was desirable to provide additional education through various means, including the Council of Legal Education, the Board of Examiners, the Bar readers' course and the continuing legal education programs for the profession.⁷⁵³

The Judicial College of Victoria, National Judicial College and Australian Institute of Judicial Administration (AIJA) could coordinate programs for the judiciary and court officers. The Law Institute, Victorian Bar and Legal Services Commissioner could provide training programs for the legal profession. Materials would also need to be developed for litigants, including in particular those who are self-represented.

- 739 Supreme Court of New South Wales, *Practice Note SC Gen 6: Supreme Court—Mediation* (17 August 2005) [34]–[35].
- 740 Cal. Code of Civ. Proc. § 638.
- 741 Niemeijer and Pel (2004) above n 678, 25.
- 742 See the statistics referred to in the introduction to this chapter.
- 743 Submission ED1 31 (Law Institute of Victoria).
- 744 Submission ED1 31 (Law Institute of Victoria).
- 745 Submissions ED1 16 (Telstra), ED1 17 (Australian Corporate Lawyers Association).
- 746 Submission ED1 30 (Magistrates' Court of Victorian and Dispute Settlement Centre of Victoria).
- 747 Submission ED1 11 (Mental Health Legal Centre).
- 748 See the discussion above in paragraph 6 about when ADR may not be appropriate.
- 749 Submissions ED1 16 (Telstra), ED1 17 (Australian Corporate Lawyers Association).
- 750 Submission ED1 20 (Public Interest Law Clearing House).
- 751 Submission ED1 10 (Legal Services Commissioner). See *Legal Profession Act 2004* s 6.3.2(b).
- 752 Submission ED1 26 (Springvale Monash Legal Service).
- 753 Consultation with the Supreme Court of Victoria (2 August 2007).



Improving Alternative Dispute Resolution

RECOMMENDATIONS

Chapter 4: Improving Alternative Dispute Resolution

17. A wider range of ADR options should be available to the courts, including:
- early neutral evaluation
 - case appraisal
 - mini trial/case presentation
 - the appointment of special masters
 - court-annexed arbitration
 - greater use of special referees to assist the court in the determination of issues or proceedings
 - conciliation
 - conferencing and
 - hybrid ADR processes.

Some of these options will be more appropriate in the higher courts; for example, special masters and court annexed arbitration.

18. More effective use should be made of industry dispute resolution schemes. If proceedings have commenced, the dispute should not be able to be referred to an industry scheme, unless the parties agree to stay the proceedings. This would appear to be the present position under most if not all industry dispute resolution schemes.
19. While the use of collaborative law in Victoria has largely been confined to family law matters, it is a process that could be applied to all kinds of civil disputes. Collaborative law could be used in wills disputes, property disputes and other types of disputes, particularly where the parties have a relationship that they wish to continue.
20. Court conducted mediation is to be encouraged but in view of limited court and judicial resources it might be preferable for courts to deal mainly with cases where private mediation is unsuitable or unavailable, such as where:
- one of the parties is in financial hardship and/or self-represented
 - the parties are unable to agree on a choice of mediator
 - there has already been an unsuccessful external mediation
 - the case is of public interest or is highly complex and could benefit from a mediator with court authority.
21. If a judge has conducted a mediation that fails to resolve the matter there should be a presumption against that judge presiding over the hearing of the matter. However, if the parties consent, the judge should be able to hear the matter.
22. There should be educational programs and training for the judiciary and legal profession about court-conducted mediation.

Binding and Non-Binding ADR

23. The courts should have power to order non-binding ADR, with or without the parties' consent.
24. In appropriate circumstances, it may be desirable for a person who would otherwise conduct an ADR process to be appointed as a special referee. The reference might be limited to particular questions of fact or law. The special referee could seek to resolve, albeit on a provisional basis, all or part of the dispute, using such processes as are (a) determined by the court, or (b) agreed between the parties. This could include procedures analogous to arbitration even in the absence of consent of the parties. The court should have the power to control the procedures governing the reference.

The special referee would make a provisional determination, in the form of a report to the court, if a settlement agreement is not reached between the parties. The court would retain

responsibility for determining the outcome of the case (in the absence of a resolution agreed to by the parties) without being required to conduct an evidentiary hearing before the court on all issues in dispute. The parties would retain the right to argue before the court against adoption of the referee's findings. Existing appeal rights from the final orders of the court would be retained.

Resources

25. The courts should be adequately resourced to appoint or designate persons with responsibility to recommend suitable forms of ADR and to assist parties in arranging ADR providers and facilities. There should also be a panel of suitably qualified and experienced dispute resolution practitioners available to undertake ADR processes.

Empirical data

26. There is a lack of empirical data on the effectiveness of court-ordered mediation in Victoria, including the cost effectiveness. There is a need for more research on the effectiveness, including the cost effectiveness, of mediation/ADR in Victoria. The Department of Justice's Civil Law Policy Unit is undertaking a review of the effectiveness, including the cost effectiveness, of mediation in the higher courts. A review of the Magistrates' Court mediation program would also be useful. The Civil Justice Council should be responsible for the ongoing review of ADR processes in all three courts.
27. Reports should be required to be submitted by the parties to the court at the conclusion of any ADR process. Such reports should also provide an assessment of the person conducting the ADR process.

Education

28. There should be more education of lawyers, judicial officers and court officers about the different types of ADR and in what circumstances different ADR processes will be appropriate. The Judicial College of Victoria and the Legal Services Commissioner could provide education programs regarding the ADR processes.

Chapter 4

Improving Alternative Dispute Resolution



Chapter 5
Case Management





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The objective of case management is to reduce delays and minimise the costs of litigation ... Litigants who are dilatory in their preparation, or who otherwise take up too much of the court's time, waste public resources and exacerbate the delays which other litigants have to suffer. It is perfectly appropriate for judges to take steps to ensure that litigation is conducted efficiently and expeditiously.¹

I do not accept the argument that limitations on the procedures that parties can currently adopt would reduce the quality of justice. Justice does not depend solely on an exhaustive decision-making process. Timeliness and affordability are equally aspects of justice. It is no justice, if a decision can only be reached after excessive delay, or at a cost that is unaffordable to the parties or disproportionate to the issues at stake. A change in the balance from excessive thoroughness to increased speed and less cost is likely to result in a net improvement in the quality of justice in a world where resources are limited.²

1. INTRODUCTION

The commission's terms of reference for this review ask the commission to have regard to the Attorney-General's Justice Statement. According to the Attorney-General's Justice Statement:

Civil litigation continues to be an important feature of the justice system, the option for the final adjudication of rights and obligations. The courts have made significant changes over the past decade to gain control of their caseloads and streamline their processes, but more improvement is needed if they are to become more readily accessible. Victorian courts have been at the forefront in introducing case management and using ADR to resolve cases, but must be assisted to remain in that position through further reforms such as the revision of their rules of civil procedure.³

Case management is part of a broader government focus. In the Department of Justice Strategic Priorities 2006, it was noted that: 'There is scope for improving access to justice by reducing court backlogs and improving court procedure.' The government intends to continue jurisdictional and procedural reform to maximise the efficiency of the courts and tribunals, and introduce new and improved technology in courtrooms.⁴

The Courts Strategic Directions Project recognised that

Modern case flow management initiatives have given rise to 'managerial' or 'interventionist' judging where judicial officers and registrars have become directly involved in the pre-hearing management of civil cases in the Court list. It has also given rise to other approaches by which the Courts attempt to ensure the efficient conduct of the proceedings.⁵

The Victorian courts have over the past decade introduced a series of reforms to assist with the just and efficient disposition of cases.⁶ As the Chief Justice has observed,⁷ the most precious commodity any court has is judge time. One of the components of judge time is time in court:

Generally judges, as former busy barristers, are skilled at moving things along. They do not receive training on courtroom time and motion, but based on experience and instinct most judges are pretty good at it, certainly so far as the Supreme Court is concerned, and I would expect other courts. Judges do not like to see public money wasted because parties are unprepared, not ready or technology lets us down. When that happens, judges, in my experience, will usually move things along and not stand for any prevarication, procrastination, obfuscation or incompetence. However, there are constraints imposed on judges by rulings of the High Court and appellate courts. Ultimately, a judge must see that justice is done.

... there is much more intensive judicial intervention and management of both criminal and civil appeals. A new master has been appointed to manage and direct civil appeals. A new practice direction has been applied to civil appeals essentially to strip appeals down to their bare issues and to identify matters that warrant a fast track approach.⁸

Case management has evolved over the past decade in Australia in response to concerns about excessive costs and delay. Since 2000, the Victorian Civil Justice Review Project, the Australian Law Reform Commission and the Western Australian Law Reform Commission have all commented on developments in case management.⁹

A broad theme which has emerged from these reviews is that the court system is moving towards a 'second generation' of case management development. Generally there is a sense that court-developed case management systems have to date produced cost effective and timely resolution of cases through judicial supervision of cases. However, there appears to be general recognition of the need to more widely introduce reforms such as individual docketing systems, similar to those implemented in the Federal Court and elsewhere. The fact that the civil courts (and VCAT) in Victoria each deal with a large volume of cases not only highlights the need for effective case management and control systems but also gives rise to resource implications. In the course of submissions and consultations it was suggested that a comprehensive docket system could not be implemented throughout the Victorian courts without additional resources.¹⁰ In Chapter 1 of this report we note that the implementation of effective judicial management of cases requires more than the mere commitment to this objective, and outline a number of the factors, identified by Professor Scott, which need to be taken into account.

A number of submissions in response to the Consultation Paper suggested that more active 'management' is needed to reduce delay and unnecessary costs. It was also contended that the emphasis should be more on *planning* for the most effective way to resolve the dispute, rather than simply managing proceedings 'where it is largely left to the parties to determine the process'. The commission is, however, mindful that proactive case management is a difficult task, both for the parties and for the court. There is a risk that cases may be 'over' managed, leading to unnecessary interlocutory hearings and additional costs. As with many areas of civil procedural reform, there is a need to achieve an appropriate balance between competing considerations.

The commission is also aware that the courts under review are actively managing cases and have been doing so for some time. However, the commission is of the view, no doubt shared by judicial officers and others, that there is both scope for improvement and a need for additional reforms.

2. GENERAL POWERS

2.1 JUDICIAL POWER

At present courts have very wide powers to manage proceedings and to make rules governing the conduct of proceedings. However, the commission is of the view that there would be utility in having a broad general statutory provision to explicitly provide for judicial power/discretion to make appropriate orders and impose reasonable limits, restrictions or conditions in respect of the conduct of any aspect of a proceeding as the court considers necessary or appropriate in the interests of the administration of justice, and in the public interest, having regard to the overriding purpose. Such provision should make it clear that the overriding purpose is to prevail, to the extent of any inconsistency, over certain principles of procedural fairness derived from the common law.

2.2 RULE-MAKING POWER

The commission suggests that the courts should consider utilising the full extent of their rule making powers to implement the reforms recommended by the commission and to encourage cultural change. There may be a need to amend the rule-making powers of the courts so as to make it clear that the courts have clear and express power to make such rules as may be necessary or appropriate (a) to further the overriding purpose and (b) to implement, by way of rules, a number of the reform recommendations of the commission and in particular many of those relating to: (a) pre-action protocols (b) case management, (c) alternative dispute resolution, (d) pre-trial oral examinations, (e) self represented and vexatious litigants, (f) disclosure and discovery, (g) expert evidence, and (h) costs. However, a number of the commission's recommendations may need to be implemented by statute, particularly those that propose changes in the substantive law rather than changes in practice and procedure.

2.3 POSSIBLE CONSTRAINTS

Legislation seeking to confer certain powers and functions on the courts, including in respect of case management, is potentially open to challenge on at least two grounds.

First, the *Charter of Human Rights and Responsibilities Act 2006* (The Charter) incorporates a right to a fair hearing. Section 24 provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a *fair* and public *hearing*.

- 1 James Spigelman, 'Case Management in New South Wales' (Speech delivered to the Annual Judges Conference, Kuala Lumpur, 22 August 2006).
- 2 Sir Peter Middleton, *Review of Civil Justice: Report to the Lord Chancellor* (1997) [2.20].
- 3 Department of Justice, Attorney-General's Justice Statement, *New Directions for the Victorian Justice System 2004–2014* (2004) 19.
- 4 Department of Justice, *Department of Justice Strategic Priorities 2006* (2006) 1.
- 5 Supreme Court of Victoria, *Courts Strategic Directions Project* (2004) 107.
- 6 Submission CP 58 (Supreme Court of Victoria).
- 7 Chief Justice Marilyn Warren, 'Inaugural State of the Judicature Address' (Paper presented at the Banco Court, Melbourne, 22 May 2007).
- 8 *Ibid.*
- 9 Peter Sallmann and Richard Wright, *Going to Court: A Discussion Paper on Civil Justice in Victoria* (2000) 66–84; Australian Law Reform Commission, *Managing Justice*, Report No 89 (2000) Chapter 6 <www.austlii.edu.au/au/other/alrc/publication/reports/89/ch6.html> at 12 February 2008; Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System of Western Australia Final Report*, Report No 92, (1999) 97–102.
- 10 For a recent review of the Federal Court system see Caroline Sage, Ted Wright and Carolyn Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (2002).



Section 24(3) provides that ‘all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits’. Questions may arise as to whether certain legislative provisions are incompatible with this ‘right’. Also, a court (or tribunal) is a ‘public authority’ subject to the Charter when ‘it is acting in an administrative capacity’. A court (or tribunal) is said to be acting in an administrative capacity when, for example, listing cases or adopting practices and procedures.¹¹ The Charter also applies to courts (and tribunals) to the extent that they have functions under Part 2 and Division 3 of Part 3 of the Act.¹²

Second, insofar as any legislation seeks to confer functions on a court which exercises federal jurisdiction, such legislation may be invalid if such functions are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power.¹³

3. EXPANSION OF INDIVIDUAL DOCKET SYSTEMS

The problem

The individual docket system in the Federal Court was developed in a context of dissatisfaction with cost and delay in the courts. The view was that the root cause of the problems was ‘excessive adversarialism’ where the problems had more to do with the actors in the system than its processes or capacity.¹⁴ A similar view has been expressed in submissions to and consultations with the commission in this review. The drive for the expansion or extension of the individual docket system comes from various sources both within the courts and the profession. There is also support for a similar approach to that taken in the Federal Court’s Fast Track List (‘Rocket Docket’).

The commission understands that the Supreme and County Courts have previously considered expanding the individual docket system. However, there are obvious problems given that:

- judges move across the civil and criminal jurisdictions
- there is the potential for inconsistent workloads and work practices
- the Supreme Court and the County Court appear to have a higher caseload than the Federal Court and much more diverse jurisdictions.

Despite these problems, the commission considers that there is merit in further extending the individual docket system in the Supreme and County Courts. Despite the benefits, the commission recognises that a docket system is not necessarily easily implemented. It is, however, one method that may assist the courts to reduce cost and delay.

In considering the extension of the individual docket system it is necessary to bear in mind a number of the other recommendations in this report. For example, if the experience in England and Wales is any guide, the introduction of the proposed pre-action protocols is likely to reduce the number of civil proceedings commenced. The more proactive use of alternative dispute resolution is likely to reduce the number of cases proceeding to trial and requiring judicial management. The introduction of the proposed overriding obligations, together with other reform proposals in this chapter, may reduce the number of interlocutory hearings required in individual cases. The ‘package’ of reforms proposed in this report is likely to have a significant cumulative effect on the incidence, velocity, method of disposition and cost of civil litigation. There are likely to be beneficial changes which have both quantitative and qualitative dimensions. Such considerations need to be borne in mind in considering both the desirability of, and the possible constraints on, the extension of the individual docket system, particularly in the County and Supreme Courts.

3.1 WHAT IS AN INDIVIDUAL DOCKET SYSTEM?

A recent example of an individual docket system is the Federal Court docket system, which was introduced in 1997.¹⁵ The essence of the system is that each case commenced in the court is allocated to a judge, who is then responsible for managing the case until final disposition.¹⁶ Commentators suggest that a docket system aims to encourage the just, orderly and expeditious resolution of disputes.¹⁷ The Federal Court states that it seeks to enhance the transparency of the processes of the court.¹⁸

The key elements of the docket system are described by the Federal Court as follows:

- Cases are randomly allocated to judges. A case ordinarily stays with the same judge from commencement until disposition.
- Cases in some areas of law requiring particular expertise (including intellectual property, taxation and admiralty) are allocated to a judge who is a member of a specialist panel.¹⁹ Such cases are randomly allocated to members of the particular panel. This system replaces the former specialist lists.
- The docket judge makes orders about the way in which the case should be managed or prepared for hearing. The court may direct that special procedures be used, including case management conferences and referrals to mediation.
- The docket judge monitors compliance with directions, deals with interlocutory issues and ensures that hearing dates are maintained.²⁰

3.2 POSITION IN VICTORIA

In the Supreme Court, there are a number of specialist lists and most are judge-managed lists.²¹ However, the majority of *civil* proceedings in the Supreme Court are not in specialist lists.²² For proceedings not in specialist lists, the majority of cases are managed by masters in the Civil Management List.²³ When cases are ready for trial, they enter the General Civil List.

The Commercial List in the Supreme Court is one list that operates on a docket system²⁴ and other lists appear to be following suit. For example, the Building List has had cases docketed to individual judges from February 2008.²⁵ Additionally, some lists that have not adopted a formal docket-system effectively operate one.²⁶

Pursuant to rule 34A.14, judge-managed lists have existed in the County Court since 1996. Rule 34A.14 provides:

*The Judge in charge of a list or division of a list must have control of every proceeding in the list or the division, and subject to any direction of the Chief Judge, any directions hearing or application in a proceeding must be held by or made to the Judge.*²⁷

Judges are expected to manage the cases in their lists or divisions from first directions hearing until trial, and, where available, will hear interlocutory disputes concerning those cases.²⁸

However, in the Supreme Court and County Court, the lists operate differently and the processes for each of the lists vary.²⁹ Practitioners need to be aware of the varying processes adopted in each list, and this can lead to confusion. County Court judges are not always available to hear interlocutory disputes in their own lists. Masters hear interlocutory disputes in some lists in the Supreme Court.

11 *Charter of Human Rights and Responsibilities Act 2006* s 4(1)(j) (note).

12 *Charter of Human Rights and Responsibilities Act 2006* s 6(2)(b).

13 *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575, 592 [19] (Gleeson CJ); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

14 Sage et al (2002) above n 10, 1.

15 Federal Court, *Individual Docket System* <www.fedcourt.gov.au/how/ids.html> at 12 February 2008.

16 *Ibid.*

17 Sage et al (2002) above n 10, 1.

18 Federal Court, *Individual Docket System*, above n 15.

19 The NSW, Victorian and Queensland registries have established panels of judges to hear and determine particular types of matters. A proceeding involving a panel matter will be allocated to a judge who is a member of the relevant panel. The panels are: admiralty and maritime, corporations, human rights, industrial, intellectual property and taxation: see Federal Court, *Information for Practitioners* <www.fedcourt.gov.au/how/how.html> at 12 February 2008.

20 Federal Court, *Individual Docket System*, above n 15.

21 Submission CP 58 (Supreme Court of Victoria).

22 Where a proceeding commenced by writ is not in a specialist list, it receives directions from a master, and when these proceedings are ready for trial directions they are referred to the Listing Master: submission CP 58 (Supreme Court of Victoria).

23 The directions hearings are held before masters and masters hear most interlocutory applications including summary judgment and strike out applications, discovery applications and applications arising out of non-compliance with previous orders. The Listing Master fixes trial date. When the proceeding is ready to be heard it enters the General Civil List: submission CP 58 (Supreme Court of Victoria).

24 The Commercial List is designed for commercial matters requiring intensive management and trial by specialist judges: submission CP 58 (Supreme Court of Victoria).

25 Supreme Court of Victoria, *Practice Note 1 of 2008* (2008) 1 <www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb4dd90b9d27806/No%201%20of%202008%20-%20Building%20Cases%20List%20-%20new%20approach.pdf> at 15 February 2008.

26 For example, the admiralty list, the intellectual property list and the valuation, compensation and planning list, where the judges manage directions hearings, interlocutory applications and hear trials.

27 That is, subject to any direction of the Chief Judge, any directions hearing or application in a proceeding shall be held by or made to the judge, or another judge if requested by the judge in charge, or a master or registrar if requested by the judge in charge (for directions or applications only).

28 County Court of Victoria, *Practice Note PNCI 3* (2007) <www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Practice+and+ProcedurePractice+Notes?OpenDocument&1=20-Practice+and+Procedure~&2=0-Practice+Notes~&3=~#CIVIL> at 12 February 2008.

29 Submission CP 58 (Supreme Court of Victoria). For example, in the Supreme Court's admiralty list, intellectual property list and valuation, compensation and planning list the judges manage directions hearings, interlocutory applications and hear trials. In the corporations list, most applications are heard by a master. In the Building Cases List, the judge manages directions hearing and interlocutory applications and hears trials wherever possible; however, not all trials are heard by the judge in charge because some of the cases are long cases. In the Victorian taxation appeals list, the judge generally manages directions hearing and interlocutory applications and hears appeals. In the major torts list, the list is managed by a judge and master and due to the number of proceedings, the cases are not necessarily tried by the judge in charge of the list. Exceptions include the long cases list, which is managed by the listing master, the major torts list, where the judge in charge only gives directions until the proceedings are ready for trial then these proceedings are referred to the listing master for trial directions. Overall, there appears to be some variations between lists.



The Magistrates' Court rarely adopts a docket system because its cases are less complex.³⁰

3.3 OTHER MODELS

Federal Court

The docket system implemented in the Federal Court is described above.

Family Court

The Family Court is introducing a new docket listing system in 2008.³¹ A committee has been formed to develop a new case management pathway and docket model.³² The model has been designed and consultation with the profession is underway. It is expected that during the 2007–8 financial year, the new case management system will commence. The court already has a series of judicial dockets, which is likely to expand given the substantial increase in the number of children's cases in recent years.³³

Federal Magistrates Court

The Federal Magistrates Court operates a docket system.³⁴

3.4 ARGUMENTS FOR AND AGAINST A DOCKET SYSTEM

The Federal Court has identified the following benefits of an individual docket system:

- savings in time and cost resulting from the docket judge's familiarity with the case: in particular, the system seeks to eliminate the necessity to explain the case afresh each time it comes before a judge
- consistency of approach throughout the case's history
- fewer management events with greater results: in particular, the system aims at reducing the number of directions hearings and other events requiring appearances before the court
- discouragement of interlocutory disputes or, alternatively, swift resolution of those disputes
- better identification of cases suitable for alternative dispute resolution
- earlier settlement of disputes or, failing that, a narrowing of the issues and a consequent saving of court time
- early fixing of trial dates and maintenance of those dates.³⁵

Justice Byrne of the Supreme Court has commented on the new docket system in the Building List as follows:

*This will have the consequence that the judge will commence the trial having had an intimate knowledge of the progress of the litigation and a consequent ability to identify the positions of the parties before the trial commences.*³⁶

The Family Court has identified similar benefits,³⁷ as did TurksLegal and AXA in their submission.³⁸

Sallmann and Wright proposed that individual calendaring may have some important advantages over the systems then operated by the Supreme and County Courts of Victoria. They suggested that careful consideration be given to its adoption and, in this regard, referred to two studies which found that individual docket systems disposed of court cases substantially faster than 'master calendar' systems. Sallman and Wright were also impressed with the enthusiasm of the Federal Court judges for their docket system. Also, numerous litigation lawyers urged them to support adoption of the scheme.³⁹

Other commentators have raised concerns regarding docket systems. They suggest that individual case management by judges, such as in an individual docket system, may be very labour intensive and consequently costly.⁴⁰ An empirical survey of the individual docket system in the United States Federal Court, conducted by the Rand Institute for Civil Justice, found that while it appeared to reduce delay, it did not reduce costs. In fact it seemed to have increased costs.⁴¹ Davies suggests that most individual docket systems are administered in a way that makes them too labour intensive for the early stages of most cases and for other than complex cases. In his view:

*Case management must be proportionate to the size and complexity, and consequently to the cost, otherwise, of a resolution of a dispute.*⁴²

Justice Sackville has raised similar concerns and commented that there has not yet been any systematic research designed to ascertain whether the Federal Court's docket system has materially reduced the costs and improved disposition rates in the court.⁴³

Despite these concerns, Davies has suggested that it is wrong to delay reform until it is justified by empirical research. If we did that, he says, 'I think that there would never be any worthwhile reform'.⁴⁴

3.5 SUBMISSIONS

A number of the submissions, particularly from the profession, were supportive of a docket system.⁴⁵ For example, in response to the Consultation Paper, TurksLegal, AXA, the Bar Council of Victoria, Slater & Gordon, Victoria Legal Aid, the Transport Accident Commission, the Law Institute of Victoria, the Group submission and Travis Mitchell all expressed support for a docket system. General support was also expressed by Clayton Utz and QBE Insurance Group in their responses to the Exposure Drafts released by the commission.

The Legal Practitioners' Liability Committee considered that in particularly complex cases, a 'docket judge' should be appointed.⁴⁶

The Bar contended that the docket system should be expanded and that sufficient judicial resources should be made available for the Supreme and County Courts to administer such a system.⁴⁷ The Bar, Mallesons Stephen Jaques and Maurice Blackburn considered that if there were resource issues, more complex cases would be suited to a docket system.⁴⁸ Slater & Gordon's view was that while additional resources may be required initially, there is clear evidence from the Federal Court that a docket system has the potential to reduce costs.⁴⁹

Corrs Chambers Westgarth commented:

*Docket judge management of interlocutory processes will result in positive behaviour changes by opposing litigants. The real sanction that underpins the success of the docket judge system is the effect it has on the litigant's behaviours because of the sanction that the docket judge will ordinarily preside at trial and streamlining the pre-trial process.*⁵⁰

The Law Institute supported a docket system similar to that in the Federal Court—noting, however, that it may not be appropriate in jury trials.⁵¹

There was some resistance to the proposal from the courts. Some of the Supreme Court judges felt that all cases are already appropriately managed. With difficult cases, it was suggested that masters ensure the matter goes back to the same judge to avoid parties 'shopping around' for a favourable result in interlocutory disputes.⁵² However, other judges recognised that not all cases go back before the same judge and that this could be a problem.⁵³ Some judges also considered that a docket system may be good for practitioners 'but it is not good for the courts'. Apart from the need for judicial resources to manage cases there may be difficulties in re-allocating work where matters settle close to a trial date.⁵⁴

30 The court's view is that a docket system only works in courts that have small numbers of complex cases: submission CP 55 (Magistrates' Court).

31 Law Council of Australia 'Law Council Project to Encourage Family Law Dispute Resolution' (Press Release 14 November 2007); and consultation with Maureen Schull, Director Family Law Section, Law Council of Australia (5 December 2007).

32 The committee is the Case Management Policy and Procedure Committee. See for details: Family Court of Australia, *Annual Report 2006–2007 (2007) 7*; and Chief Justice Diana Bryant, 'State of the Nation' (Paper presented to the 12th National Family Law Conference, Perth, 23 October 2006).

33 Bryant (2006) above n 32.

34 Federal Magistrates' Court, *About the Court* <www.fmc.gov.au/html/rules.htm> at 12 February 2008; and consultation with Maureen Schull, Director Family Law Section, Law Council of Australia (5 December 2007).

35 Federal Court, *Individual Docket System*, above n 15.

36 David Byrne, 'Building Cases—A New Approach' (2008 forthcoming) *Victorian Bar News* 5.

37 See for details: Bryant (2006) above n 32.

38 Submission ED1 22 (TurksLegal and AXA).

39 Sallmann and Wright (2000) above n 9, 82 citing Barry Mahoney, *Changing Times in Trial Court* (1988) and Thomas Church, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (1978).

40 Geoffrey L Davies, 'Civil Justice Reform: Why we need to Question some Basic Assumptions' (2006) 25 *Civil Justice Quarterly* 32, 48.

41 *Ibid*; see also Davies, 'Managing the Work of the Courts' (Paper presented at the Australian Institute for Judicial Administration Asia-Pacific Courts Conference 'Managing Change', Sydney, 22–24 August 1997) 8–9 in which Davies also suggests that, given that Australia's case management schemes are largely derived from the United States, Rand's research should not be ignored.

42 Davies (2006) above n 40.

43 Justice Sackville, 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' (Paper presented at the Australian Institute for Judicial Administration Annual Conference, Brisbane, 12–14 July 2002) 16.

44 Davies (1997) above n 41, 7. His view is that 'we do not have the time or the money to delay implementation of what appear to be worthwhile reforms until adequate research and analysis have been done'. On the other hand, he says, it is important to monitor and evaluate reforms as they are being implemented.

45 Submissions CP 41 (TurksLegal and AXA); CP 33 (Victorian Bar); CP 20 (Slater & Gordon); ED2 10 (Victoria Legal Aid); submission CP 37 (Transport Accident Commission); submission CP 18 (Law Institute of Victoria); CP 47 (the Group Submission); CP 4 (Travis Mitchell); CP 21 (Legal Practitioners' Liability Committee); ED1 18 (Clayton Utz); and ED2 17 (QBE Insurance Group).

46 Submission CP 21 (Legal Practitioners' Liability Committee). Submission ED2 19 (Maurice Blackburn) considered that the lack of and individual docket system 'is one of the main reasons why most class action litigation is conducted in the Federal Court rather than the Victorian Supreme Court'.

47 Submission CP 33 (Victorian Bar).

48 Submissions CP 33 (Victorian Bar); CP 49 (Mallesons Stephens Jaques); CP 7 (Maurice Blackburn).

49 Submission CP 20 (Slater & Gordon).

50 Submission CP 42 (Confidential submission, Corrs Chambers Westgarth, permission to quote granted 14 January 2008).

51 Submission CP 18 (Law Institute of Victoria).

52 Consultation with the Supreme Court of Victoria (9 October 2007).

53 Consultation with the Supreme Court (9 October 2007).

54 Consultation with the Supreme Court (9 October 2007).



Judge Wodak of the County Court considered that the use of individual dockets is unlikely to be compatible with the current system of rostering.⁵⁵ He also advised that many judges are unfamiliar with and have little or no experience of case or list management. 'Such Judges, and their Associates would need to acquire skills in these areas.'⁵⁶

The Magistrates' Court considered that a docket system would not be suitable in that court because it has a large number of less complex cases and it would be too demanding on the resources of the court.⁵⁷

The Institute and TurksLegal and AXA noted the potential need for additional resources to implement a docket system.⁵⁸ Although this is a valid concern, as noted above, the commission's view is that the cumulative impact of the other recommendations in this report will result in a significant decrease in the existing volume of cases.⁵⁹

Crown Counsel noted in his review that the Supreme Court has effectively used masters in specialist case management roles and that this has facilitated the efficient disposition of cases within the various specialist court lists.⁶⁰ We are of the view that any expansion of the individual docket system should encompass the involvement of masters. Additional judicial resources may not be required.

In the course of considering the desirability of an expansion of the individual docket system a number of additional problems were identified. These include the following:

- There is a need to achieve equity in the distribution of workload among judges in a system in which each case is counted as a single unit.
- If some judges are inefficient at managing their dockets, more efficient judges may have to compensate by taking over cases from less efficient judges.
- Integrated Court Management System (ICMS) may require modification to support a docket system.⁶¹

3.6 CONCLUSIONS AND RECOMMENDATIONS

Despite the concerns raised, the commission considers that an expanded docket system, similar to the Federal Court's system, would have many benefits, including savings in time and costs resulting from greater judicial familiarity with cases before trial.⁶² In our view, the docket system should be expanded in the Supreme and County Courts and possibly used in more complex, higher value claims in the Magistrates' Court.

Any such system will obviously need to take into account the variability in the size and complexity of cases. In smaller, less complex cases, the aim should be to ensure that there are not excessive case management hearings.⁶³

The commission is of the view that the method of implementing a docket system should be determined by the courts. The Chief Justice in the Supreme Court, the Chief Judge in the County Court and the (proposed) Civil Justice Council should monitor and evaluate any changes. Insofar as there is any change in the Magistrates' Court the Chief Magistrate should be involved in the process of review and evaluation.

However, we note that there is a large number of resource and practical issues which need to be taken into account in implementing a docket system in the courts under review. Accordingly, we consider that a consultant or consultants could be engaged to assist the courts in determining how a docket system could be implemented in the County and Supreme Courts. When considering a docket system, the Federal Court engaged a United States expert, Maureen Solomon, to review case listing, processing and management in the court.⁶⁴

The proposed Civil Justice Council should be responsible for ongoing monitoring and evaluation of an individual docket system, if implemented. This should encompass an examination of the impact of any changes on, inter alia: (a) the resources required to be allocated by the courts, (b) the rate at which cases are disposed of and (c) the costs incurred by the parties.

4. ACTIVE JUDICIAL CASE MANAGEMENT

4.1 ACTIVE CASE MANAGEMENT

4.1.1 The problem

One objective of active case management is to encourage and require the parties, their lawyers and those funding the litigation to limit the issues in dispute. The courts have an obligation to control proceedings but it is also up to the parties to not take unnecessary steps or burden the court with superfluous documents or applications. The courts are and have been actively managing cases for many years. The courts have inherent jurisdiction to manage cases and do not necessarily need court rules to do so. Notwithstanding this, we consider there is a case for more clearly delineated, explicit powers to actively case manage. This will assist the courts and the lawyers, parties and funders to turn their minds to the real issues in dispute and the most efficient means of resolving those issues.

4.1.2 Position in Victoria

Active judicial case management is also referred to as 'managerial judging'. The proactive judicial management by individual judges of individual cases is one aspect of this process. Another equally important aspect is the systems used by the courts for the control of the overall caseload of the court. Such systems encompass not only the mechanisms for the assignment and control of cases by judges, but also computerised and other methods of tracking the status and progress of cases. Managerial judging and case management seek to shift the balance towards judicial rather than lawyer or party control of litigation. Apart from controlling interlocutory steps necessary to prepare the matter for trial, judges can also act in a 'facilitative' rather than an adjudicative manner, by encouraging the parties to settle their dispute or to narrow the issues required to be tried.⁶⁵

As noted above, the Supreme Court and the County Court have been actively managing cases for many years. One of the features of the recently announced 'new approach' in the Building Cases List in the Supreme Court is that: 'Judges will be more active and pro-active in exercising their powers in order to seek to achieve a just resolution of building disputes in a speedy and efficient manner.'⁶⁶

According to the Magistrates' Court, until the recent advent of judicial registrars, the Magistrates' Court lacked the resources to engage in active case management.⁶⁷ The Magistrates' Court Rules were amended in 2005 to include a new Part 5: 'Overriding Objectives and Case Management'.⁶⁸ Part 5 incorporates:

- an overriding objective
- an obligation on the parties to 'help the court to further the overriding objective'
- a requirement that the court further the overriding objective by active case management.

Pursuant to rule 1.22(2), active case management includes—

- (a) encouraging the parties to cooperate with each other in the conduct of proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and a hearing, and accordingly disposing summarily of the others;
- (d) deciding the order in which the issues are to be resolved;
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) dealing with as many aspects of the case as it can on the same occasion;
- (j) dealing with the case without the parties needing to attend court;
- (k) making use of technology;
- (l) giving directions to ensure that the hearing of a case proceeds quickly and efficiently;
- (m) limiting the time for the hearing or other part of a case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness.

- 55 Submission ED2 5 (Judge Tom Wodak). This is a valid point; however, we consider there may be ways around this problem: for instance, the court could contact the solicitors involved in other matters and determine whether their matter might be ready for trial or able to be made ready for trial quickly.
- 56 Submission ED2 5 (Judge Tom Wodak).
- 57 Submission CP 55 (Magistrates' Court of Victoria). The court's view is that a docket system will only work in courts that have small numbers of complex cases.
- 58 Submissions CP 41 (TurksLegal and AXA) and ED2 16 (Law Institute of Victoria).
- 59 See, in particular, recommendations as to pre-action protocols, alternative dispute resolution, overriding obligations and overriding purpose, and summary judgment.
- 60 Crown Counsel Victoria, *Office of Master and Costs Office Report to the Attorney General* (2007) 9.
- 61 Submission ED2 5 (Judge Tom Wodak). This is a valid point. The commission notes, however, that CourtView, which is part of the ICMS, allows for the integration of major court systems and requirements, including case management and docketing. The ICMS may be capable of supporting a docket system. The ICMS is discussed further below.
- 62 Sage et al (2002) above n 10, 21–3.
- 63 An 'administrative mention notice' as currently used in the County Court, or something similar, could be adopted to limit the number of hearings required: See discussion of telephone directions hearings later in this chapter.
- 64 Following Maureen Solomon's review (which recommended the adoption of a docket system), the Federal Court set up various committees to develop court procedures to enable the introduction of a docket system. A pilot was subsequently established in the Melbourne Registry, after which the docket system was introduced across all registries: Sage et al (2002) above n 10, 3 and 8. See also Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999), [9.1].
- 65 See the Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, Issues Paper No 22 (1997) 241–66.
- 66 Supreme Court (2008) above n 25, 1.
- 67 Submission CP 30 (Magistrates' Court).
- 68 *Magistrates' Court Civil Procedure Rules 1999* rr 1.19–1.22.



This rule is based on rule 1.4 of the UK *Civil Procedure Rules* (1998).⁶⁹ There is no equivalent provision to this rule in the Supreme or County Court Rules.

4.1.3 Other models

Australia

The Federal Court

The Federal Court is seen to be actively managing cases as part of its docket system. Active judicial case management is a fundamental part of the docket system.

New South Wales

As discussed in Chapter 3, in NSW provisions relating to case management are now embodied in the *Civil Procedure Act 2005* (NSW).⁷⁰ According to Justice Hamilton:

*This is both to mark their central importance in modern procedure and to ensure that no argument can be raised that a case management procedure or sanction is beyond rule maker power.*⁷¹

The Family Court

Division 12A of the *Family Law Act 1975* came into effect in 2006. It gives three clear directives to judges. They are to actively control, direct and manage court proceedings; those proceedings are to be conducted in a way that promotes cooperation between the parties (specifically, child-focused, shared parenting); and they are to be conducted without undue delay, with as little formality, and with as little legal technicality, as possible. Judges may also speak directly to children during proceedings, though not as witnesses.⁷²

This approach was developed for a number of reasons, one of which was the pressure caused by the increase in the number of self-represented litigants in the past decade.⁷³ The pilot model was initially intended to introduce benefits such as the saving of time and cost.⁷⁴ Of particular note is section 69ZN of the *Family Law Act 1975*, which sets out the principles for conducting child-related proceedings. The second principle provides that:

*The court is to actively direct, control and manage the conduct of the proceedings.*⁷⁵

Court-conducted mediation and case conferences

Court-conducted mediation and case conferences conducted by court officers are also seen as part of active case management. Chapter 4 of this report deals in detail with alternative dispute resolution, including court-conducted mediation in Australia. Case conferences are discussed further below.

Overseas

United Kingdom

As discussed in Chapter 1, in his review of the civil justice system in England and Wales, Lord Woolf concluded that an unacceptable situation had arisen out of 'unmanaged adversarial procedure'.⁷⁶ In his view, active judicial management of cases was necessary in order to assist in achieving the stated objectives of improved access to justice through the reduction of inequalities, cost, delay and complexity and to introduce greater certainty as to timescales and costs. The *Civil Procedure Rules* (UK) emphasise active case management.⁷⁷

United States

Commentators suggest that the United States has been leading the way in active judicial management.⁷⁸ The *Civil Justice Reform Act 1990* introduced mandatory case management and ADR in the Federal Court.

Continental Europe and Japan

There is a culture of managerial judging in continental Europe and Japan is also moving in this direction.⁷⁹ Obviously in systems where courts take a more 'inquisitorial' approach to investigation and fact finding, this will result in more proactive judicial control of the proceedings. Professor Zuckerman's comparative review of common law and civil code countries is discussed below.

4.1.4 Arguments for and against active case management

Arguments for active case management

One benefit of active case management is that the court and the parties share the responsibility for managing cases efficiently. One fundamental difference between the continental European models of civil litigation and the Anglo-Australian model is that in some European models judges are more involved in investigating and ascertaining the facts. The commission is not presently considering the substitution of an 'inquisitorial' alternative for the 'adversarial' model of conducting civil litigation. However, as a number of commentators have observed, there appears to be an ongoing evolutionary convergence of these models.⁸⁰

In the introduction to his comparative review of civil justice systems in both civil code and common law jurisdictions, Professor Zuckerman identified that:

*The clearest trend emerging from the different national accounts is a general tendency towards judicial control of the civil process. Both common law countries and civil law countries display a shift towards the imposition of a stronger control by judges over the progress of civil litigation. In virtually all the systems reviewed here there is a perception that, when the process of litigation is left to the parties and their lawyers, its progress is impeded by narrow self-interest ... the disruptive self-interest of parties and their lawyers can only be kept at bay by an active judiciary that directs the litigation process and is able to prevent disruptive tactics.*⁸¹

Other commentators have noted that if left to their own devices, parties will behave in inefficient ways.⁸² One study found that litigant costs were contained in the Victorian County Court due to the active involvement of the judge in the development of cases, particularly in controlling the use of discovery and interrogatories:⁸³

*Active judicial management techniques are seen to reduce case preparation time by enabling judges to control the progress of cases, curb abuses of court processes and encourage both settlement and alternative modes of dispute resolution.*⁸⁴

Sir Anthony Mason has commented on the future role of judges as follows:

*The likelihood is that the trial judge will become more of a manager of the trial, while he or she continues to be the umpire.*⁸⁵

Sir Laurence Street has commented:

*Should we not recognise the justification for extending the authority of judges in the actual course of the conduct of litigation? Waste of time on irrelevancies and repetition—whether flowing from incompetent advocacy or deliberate tactical manoeuvring—is by no means uncommon. Our resources simply cannot afford that. Why should judges not be given express power to control length and subject matter of the various aspects of the hearing both in addresses and in evidence?*⁸⁶

Justice Ipp has written:

*Litigation has grown both in complexity and in quantity of cases. The load on judges has increased unreasonably. Governments have failed to provide resources to deal with this major accretion of demand for court services. Judges have to cope with these changed circumstances. Accordingly, there is a need to shorten trial time, save costs and maximise earlier settlements. The concentration of effort from the judiciary has been to examine the economics of litigation and improve efficiency in despatching cases through the system. The justification for this is the real injustice to those would be litigants waiting in the wings.*⁸⁷

Other arguments in favour of active case management include the following:

- It addresses the economic reality that court resources are limited. More judicial rather than party control of litigation is required in the interests of the administration of justice as a whole, that is, those litigants queuing outside, as well as those litigating inside the door of the courtroom.⁸⁸

69 See also discussion in Chapter 3 of *Civil Procedure Act 2005* (NSW) ss 56–57.

70 *Civil Procedure Act 2005* (NSW) pt 6.

71 Justice John P Hamilton, 'The New Procedure: Nuts and Bolts for Judicial Officers' (Paper presented at the Supreme Court of New South Wales, Sydney, 16 August 2005) <www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_hamilton160805> at 13 February 2008.

72 Family Court of Australia, *Less Adversarial Trials* <www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/> at 18 July 2007. The website states that the trial starts when the parties first meet the judge. It may finish on the first day or further meetings to continue the trial may be scheduled between the judge and all other parties. The same judge and the same family consultant deal with the matter throughout the trial. Most of the evidence comes from each of the parents. The judge concentrates on getting the best information from everyone about the specific needs of the child. The judge considers the evidence and may discuss it with the parents or witnesses. Meetings with the judge may be by telephone conference.

73 Paul Lewis, 'Views from the Lighthouse' (2005) 16 *Australasian Dispute Resolution Journal* 288, 291.

74 Stephen O'Ryan, 'The Less Adversarial Trial: the Lighter, More Contemporary and More Fuel Efficient Vehicle' (Paper presented to the 24th Australian Institute for Judicial Administration Annual Conference, Adelaide, 15–17 September 2006).

75 *Family Law Act 1975* s 69ZN(4).

76 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 13.

77 *Civil Procedure Rules 1998* (UK) r 1.4; as mentioned above, the *Magistrates' Court Civil Procedure Rules*, r 1.22 is modelled on the UK equivalent.

78 Adrian Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in Adrian Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (1999) 3, 47.

79 *Ibid* 48.

80 See the ALRC's comments in ALRC (2000) above n 9.

81 Zuckerman (1999) above n 78, 3, 47.

82 Sage et al (2002) above n 10, 17.

83 Ann Eyland et al, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms* (2003) 75.

84 Sage et al (2002) above n 10, 16–17.

85 David Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365, 376 quoting Sir Anthony Mason 'The Role of the Courts at the Turn of the Century' (1993) 3 *Journal of Judicial Administration* 156, 166.

86 Ipp (1995) above n 85, 368.

87 *Ibid*.

88 ALRC (1997) above n 65, 248 [9.21].



- Judges have always made discretionary decisions that are not based on clearly defined standards or rules but are made ‘in the interests of justice’. The novel aspect of managerial judging is simply that these decisions may also take court resources into account.⁸⁹
- It takes place in open court with a complete transcript and there are adequate appellate procedures; these constitute reasonable safeguards against judicial error or misconduct.⁹⁰

Arguments against active case management

The ALRC in its Issues Paper identified the following arguments against active case management:

- It increases the power of judges and expands the opportunities for judges to use or abuse their powers, particularly in a context where standards and rules are still being devised.
- It threatens the impartiality of judges. Judicial intervention is said to increase the opportunities for judges to be unduly influenced for or against a party through frequent close contact between judges and lawyers and the extensive information provided to judges during pre-trial hearings.
- There can be a lack of accountability for decisions made during pre-trial case management. Judicial intervention may have the effect of forcing parties to abandon lines of argument before they have had the opportunity to fully explore their merits and the scope for these decisions to be reviewed is limited.⁹¹
- It may result in the existing system of justice being replaced with a lower quality system of justice, albeit one that is cheaper and quicker. The concern is that case processing may become an end in itself, rather than the means of achieving justice, with the managerial focus on speeding up the process rather than on improving the quality of decisions.⁹²

The courts’ powers to make orders to control proceedings are not in dispute. However, there are arguments over the weight which court efficiency and case management factors should be given in making these decisions. Case management may be undermined by appeal courts which overturn lower court rulings. In *State of Queensland and Another v J L Holdings Pty Ltd*,⁹³ the High Court said:

*Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.*⁹⁴

Although the High Court rejected the idea that case management considerations can be a sole or pre-eminent consideration, the court recognised case management as an established feature of contemporary court practice.⁹⁵ The weight given to case management considerations, however, has been limited by the High Court in *J L Holdings*. In consultation with the commission Chief Justice Warren commented that parties all too often attempt to exploit this authority and judges and masters often feel their hands are tied. The Chief Justice recommended that legislative recognition of case management considerations would allow this factor to be given due weight and allow judicial officers to make difficult case decisions with greater confidence.

The commission considered these issues in some detail. To address this problem, the commission has made various recommendations which are discussed above in paragraphs 2.1 ‘judicial power’ and paragraph 2.2 ‘rule-making power’

There is also some evidence that the courts are beginning to take a different view of the High Court’s decision in *J L Holdings*. In a recent decision in the Federal Court, Justice Finkelstein said of *J L Holdings*:

The High Court ruled that case management, while a relevant consideration, does not trump justice to the parties. A close reading of J L Holdings shows that the High Court was confining its comments to the case where costs would provide full compensation to the opposite party. However, J L Holdings has been applied in many cases where a simple costs order will not do justice between the parties. The case has, in my view, unfairly hamstrung courts. Almost every day a defaulting party seeks the court’s indulgence to extend time, amend documents or obtain some other allowance (often not for the first, second or third time) and successfully relies on J L Holdings to obtain relief.

It is time that this approach is revisited, especially when the case involves significant commercial litigation. One of the primary objects of a commercial court is to bring the litigants' dispute on for trial as soon as can reasonably and fairly be done. If, in some instances, the preparation of the case is not perfect so be it. A case that is reasonably well prepared is just as likely to be decided correctly as a perfectly prepared case.

I am of the firm view that parties should not be treated as leniently as they have been in the past. Commercial parties expect this approach from the courts and their expectation should be met. A useful rule to adopt is to allow an extension only if the failure to meet the existing timetable is the result of excusable non-compliance. In deciding whether there is excusable non-compliance the court should take into account, among other factors: (a) the direct and indirect prejudice to the opposing party; (b) the impact of the delay on the proceedings; (c) the reasons for the delay; (d) good faith or lack of good faith on the part of the party seeking to be excused; and (e) the effect of putting off a trial both on other litigants and generally on the court's ability to efficiently manage its cases.⁹⁶

Some concerns have been raised about the extent to which certain provisions, procedures and orders in respect of 'case management', including active case management, may impact on the right to a fair trial at common law and under the Charter.

Other concerns relate to increased costs due to increased judicial involvement.

4.1.5 Submissions

There was significant support for active judicial case management and the docket system in the submissions.⁹⁷ According to the Group submission:

[E]xperience suggests that those proceedings which are more actively case managed by judicial officers tend to proceed through the court system more quickly and to have the issues in dispute distilled more effectively and efficiently.⁹⁸

Mallesons Stephen Jaques' view was that judicial case management is useful because the judge retains discretion to impose sanctions in appropriate circumstances.⁹⁹ Judge Wodak, State Trustees, QBE Insurance and Victoria Legal Aid expressed general support for the proposal. State Trustees considered that active case management promotes the faster disposition of matters.¹⁰⁰ The Law Institute held a similar view and endorsed the County Court's Medical List.¹⁰¹

Commercial litigation funder IMF supported the introduction and extension of all the case management activities noted in the English context, including active case management.¹⁰² Maurice Blackburn considered that stronger case management is vital particularly in large complex cases such as class actions:

Causing delay and cost has become an art form for many large defendants that would prefer to try to exhaust their opponent rather than deal with the merits of a claim. The courts must be more vigilant to protect claimants through active judicial management.¹⁰³

The Magistrates' Court submission identified that its active case management provision gives the court power, amongst other things, to limit the time for the hearing or other part of the case. However, it was noted that this may be *ultra vires*.¹⁰⁴ The court stated that 'if the power to set such limits is considered appropriate, the ability of the Court to make such orders should be put beyond doubt by legislation'.¹⁰⁵

A further confidential submission supported the approach to active case management reflected in the Civil Procedure Rules in force in England and Wales.¹⁰⁶

The Bar was particularly critical of delay in the current civil justice system and contended that inefficiency is leading to the loss of significant commercial work to other jurisdictions, in particular to NSW and the Federal Court. It argued that delay impacts on individuals and corporations who are unable to enforce their private rights and reduces legal expertise, which impairs the quality of justice.¹⁰⁷

89 Ibid.

90 Ibid.

91 Ibid.

92 Ibid.

93 (1997) 141 ALR 353.

94 *State of Queensland and Another v J L Holdings Pty Ltd* (1997) 141 ALR 353, 356–7.

95 See *Haset Sali v SPC Ltd* (1993) 116 ALR 625 and *The State of Queensland and Another v J L Holdings Pty Ltd* (1997) 189 CLR 146 ('J L Holdings').

96 *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* [2007] FCA 1623 [5].

97 Submissions CP 41 (TurksLegal and AXA); CP 33 (Victorian Bar); CP 20 (Slater & Gordon); ED2 10 (Victoria Legal Aid); CP 37 (Transport Accident Commission); CP 18 (Law Institute of Victoria); CP 4 (Travis Mitchell); CP 21 (Legal Practitioners' Liability Committee); CP 39 (Building Dispute Practitioners' Society); CP 49 (Mallesons Stephen Jaques); CP 42 (Corrs Chambers Westgarth, permission to quote 14 January, 2008).

98 Submission CP 47 (the Group Submission).

99 Submission CP 49 (Mallesons Stephen Jaques). In their submission, Mallesons expressed the view that 'there is a place for sanctions in case management, but only as a range of options available to the court to apply in particular cases, without being imposed automatically on the defaulting party'.

100 Submission ED2 7 (State Trustees Limited).

101 Submission CP 18 (Law Institute of Victoria).

102 Submission CP 57 (IMF (Australia) Ltd).

103 Submission ED2 19 (Maurice Blackburn).

104 See discussion of *Magistrates' Court Civil Procedure Rules 1999* rr 1.19–1.22 above.

105 Submission CP 55 (Magistrates' Court).

106 Confidential submission ED2 2 (permission to quote granted 17 January 2008).

107 Submission CP 62 (Victorian Bar).



The Bar called for robust and effective case management reforms. It recommended ‘end-to-end’ case management comprising:

1. The streaming of work between and within courts

The Bar referred to the Woolf approach of assigning cases to ‘tracks’ according to the nature of the case and the amount in dispute. It acknowledged the Supreme Court’s move to specialised lists and suggested that further reform should incorporate a streaming model with three elements:

- a) the allocation of cases to an appropriate court. Due to the expansion of the County Court’s jurisdiction, the Bar contended that ‘an opportunity exists for the Supreme and County Courts to develop differentiated specialisations and case-management offerings to enable a “streaming of cases” between courts’. It suggested that this approach would require the courts in conjunction with the government to adopt an integrated strategic view of the ‘types of matters and case management processes they feel best deliver justice given their respective roles in the court system’.
- b) highly complex matters should be managed using high-contact processes that are active and intensive (eg a docket system) whereas cases of medium complexity could be managed with a ‘front-end’ case management judge and cases of less complexity could be managed through simpler lower-contact case management processes.
- c) the streaming of cases to judges expert in the area of the dispute. The Bar noted that there was room to improve the effectiveness of this process in the Supreme Court by reducing the rotation of judges between Divisions and developing panels with expertise in specialist areas within the Divisions.

2. The front loading of issue definition and resolution

The Bar observed that an effective case management system must include mechanisms for getting to an early understanding of a case. By way of example it referred to the ‘scheduling conferences’ in the Federal Court’s Fast Track list. Where a scheduling conference mechanism was not appropriate or effective the Bar suggested that a pre-trial case manager should actively encourage the parties to resolve non-contentious issues prior to trial.

3. Active management of core issues and processes at trial

The Bar advocated judicial control over proceedings to focus parties on core issues and to intervene where parties lost that focus. The Bar provided examples of intervention to refuse an adjournment on the grounds of further discovery or non-essential witness unavailability, limiting the use of witness statements to non-contentious issues, or controlling the length of submissions made in court. Importantly, the Bar called for a single judge or teams of judges to be accountable for the entire end-to-end management of a case.

The Bar also called for the urgent implementation of processes to track and analyse the throughput of cases under a reformed process.¹⁰⁸

Other comments made in the submissions include the following:

- Judge Wodak considered that Order 34A.19 and Order 47.06 of the County Court Rules¹⁰⁹ could be improved, but that they still offer a significant degree of judicial case management before and at trial.¹¹⁰
- IMF suggested that the identification and assessment of the litigation risks should be conducted at the earliest possible stage of the process and judges should be actively involved in this process.¹¹¹

There were no submissions in opposition to the proposed expansion of the docketing system. However, the commission notes the comments of Justice Hayne, who recently expressed concern regarding the dangers of over-management of the litigation process: 'If cases are settling because they are managed to the point of the parties' exhaustion, the system has failed them.'¹¹²

4.1.6 Conclusions and recommendation

Despite the concerns raised by commentators, the commission is of the view that more active judicial case management is desirable. This will help ensure that the courts and the parties share control of the proceedings. The court has a legitimate interest in ensuring that a proceeding, including the trial itself, is not left in the parties' hands, but is conducted efficiently and expeditiously in the interests of justice. We therefore support the introduction of an explicit 'active case management' statutory provision. Inclusion of an active case management provision in Victorian legislation (and/or rules) will 'mark their central importance in modern procedure' and help 'to ensure that no argument can be raised that a case management procedure or sanction is beyond rule maker power'.¹¹³

4.2 POWER TO CALL WITNESSES

4.2.1 The problem

The proposal to give the court explicit power to call witnesses, without the parties' consent, is controversial. There appear to be divisions in judicial opinion as to whether such power exists for civil proceedings at present. There are also divided judicial views about whether and when to exercise any such power. The commission sought submissions and comments on the draft proposal. Strong arguments for and against were received. The commission is also mindful that if such a power is considered appropriate, there are ancillary issues to be considered, including the mechanisms by which any additional witnesses would be called to give evidence.

On balance, the commission is of the view that there should be an express provision for judges to be able to require certain persons to be called to give evidence whether or not the parties consent. Any such power might be exercised in respect of parties, witnesses as to events and experts on matters relevant to the proceedings. However, the exercise of judicial discretion to call a person to give evidence when the parties have chosen not to call that person gives rise to quite distinct policy and practical considerations.

Such a power would only be likely to be used when there is no other reasonably practicable alternative means of achieving justice between the parties. We consider the conferral of such an express power would not necessarily involve any major shift from the court's role as independent arbiter in an 'adversarial' dispute (where it can draw adverse inferences from the failure of a party to call a witness) to one of an 'inquisitorial' nature. In the vast majority of cases the parties are likely to remain primarily if not exclusively responsible for determining who will be called to give evidence, subject to the overriding management powers of the court to limit unnecessary or repetitive evidence.

4.2.2 Position in Victoria

There is no express statutory provision empowering Victorian courts to call witnesses in a civil proceeding, without the parties' consent.

Common law

There seems little scope for doubt that courts presently have the power to call witnesses in civil proceedings, with the parties' consent. More controversial is the calling of witnesses by the court without the parties' consent or over the objection of one party.

Judicial opinion appears to be divided on whether in a civil trial the presiding judge may call a witness without the consent of the parties.¹¹⁴ There is authority that in civil cases a judge may not call a witness without the consent of both parties.¹¹⁵ It has been said that a judge may direct a party to call additional evidence (though this is to be doubted, or limited to the particular instance of an official

108 Submission CP 62 (Victorian Bar).

109 *County Court Rules of Procedure in Civil Proceedings 1999*.

110 Submission ED2 5 (Judge Tom Wodak). Order 34A.19 provides that at a directions hearing held pursuant to this order, the court may give any direction for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination; Order 47.06 provides that a judge may place certain specified limits on the conduct of a hearing; these include, for example, the number of witnesses a party may call and the time taken for oral submissions and examination of witnesses.

111 Submission CP 57 (IMF (Australia) Ltd). IMF identified that a number of jurisdictions, in Australia and abroad, have introduced 'pre-action protocols' and 'pre-trial conferences' to attempt to facilitate early resolution of matters before extensive costs are incurred. IMF's view was that despite significant reform of pre-trial case management techniques in recent years, not enough effort has been made to identify and dispose of preliminary issues. 'Many direction hearings and pre-trial conferences are still essentially about timetabling and setting milestone dates.'

112 Justice Kenneth Hayne, 'The Vanishing Trial' (Paper presented to the Supreme and Federal Courts Judges Conference, Sydney, 23 January 2008) 6.

113 Hamilton (2005) above n 71.

114 Neil Williams (LexisNexis Butterworths), *Civil Procedure—Victoria*, vol 1 (at January 2008) 4857 [49.01.110].

115 *Re Enoch and Zaretsky, Bock & Co's Arbitration* [1910] 1 KB 327; [1908–10] All ER Rep 625 (CA), cited approvingly in *Titheradge v R* (1917) 24 CLR 107; 24 ALR 77; *Re Williams* (1926) 26 SR (NSW) 383; *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552 at 567–8; cf *Coulson v Disborough* [1894] 2 QB 316 at 318 (CA); *Peters v Owners of SS Argol* (1912) 5 BWCC 414 at 415 (CA). In *R v Damic* [1982] 2 NSWLR 750 at 755–6 (CCA) Street CJ questioned *Enoch's* case. He said that in principle a judge should have power to call a witness in civil cases, and that (contrary to *Coulson v Disborough*) the parties should be able to cross-examine as of right. There are dicta in *Bassett v Host* [1982] 1 NSWLR 206 (CA), on the practical inconveniences that flow from the parties not calling available witnesses. Hope JA appears to accept the position stated in *Enoch's* case while deploring it (at 207). Mahoney JA (at 213) appears to go beyond it. See also *R v Jenkins; Ex parte Morrison* [1949] VLR 277; [1949] ALR 468. The Court of Appeal gave directions for the calling by it of an expert in foreign law in *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou* (1932) 107 LKB 386 at 389–91.



assignee in bankruptcy), but that the preferable course is to suggest to the appropriate party that they apply for leave to reopen their case.¹¹⁶ Under some rules of court, judges are given power to call witnesses of their own motion.¹¹⁷

In the Federal Court case of *Obacelo Pty Ltd v Tavercraft Pty Ltd*¹¹⁸ (*Obacelo*), Justice Wilcox considered that the judge in a civil case, similar to the judge in a criminal case, had the power to call a witness without the consent of all parties. He said, however, that the discretion to use this power should be exercised sparingly and with great care.¹¹⁹ Justice Wilcox also noted judicial concerns that the power should not be exercised to call a witness that neither party wished to give evidence because the court would be assuming the conduct of the case.¹²⁰ He also said that counsel could cross-examine as of right if a judge called a witness to give evidence.¹²¹ In that case, one of the parties asked the court to call a witness. As Justice Wilcox noted:

*It not uncommonly happens that a person is in a position to give a Court material evidence yet no party wishes to call that witness. A party calling a witness suffers the disadvantage of being burdened, without the opportunity to challenge it by cross-examination, with such part of the evidence of that witness as assists the opponent's case while being forced to suffer cross-examination by the opponent on that part of the evidence which assists his or her own case. A dilemma whether or not to call a particular witness may arise in a variety of situations.*¹²²

As Justice Wilcox proceeded to note, many of the cases dealing with the power of the court to call witnesses are criminal cases where the observations in respect of civil trials were obiter.¹²³ In the case before him, although holding that he had power to call a witness, in the exercise of his discretion he declined to do so.

In a Victorian custody case Justice Barry doubted whether earlier decisions were binding authority that a judge has no power to call a witness where this was necessary for the attainment of justice, and suggested that such decisions may turn, not on the existence of the power, but on the occasion and manner of its exercise.¹²⁴

In *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd*,¹²⁵ Justice Powell concluded that until a higher court decides otherwise or the position is changed by statute, a trial judge in a civil trial may not call or examine a witness on their own motion except by consent of the parties or in the absence of objection.¹²⁶

In the criminal law context the High Court has determined that there is judicial discretion to call a witness not called by the parties but that this should only be exercised in exceptional circumstances.¹²⁷

The potential impact of the Uniform Evidence Act

The Uniform Evidence Act is not yet in operation in Victoria. However, it is anticipated that it will be in force from 2009. It may impact on this proposal. Section 11 of the uniform evidence legislation preserves the common law powers the judge holds in respect of the examination of witnesses. Section 11 relevantly provides:

The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

There is longstanding recognition of judges' power to control the conduct of proceedings in their own court. Section 11 entrenches this power (and duty).¹²⁸ Commentators suggest that the court 'may call a witness in appropriate circumstances given the court's general power to control proceedings pursuant to this section'.¹²⁹

Section 26 may also be relevant. It gives a very general power to the court to make orders concerning the way witnesses are to be questioned. Section 26 provides:

The court may make such orders as it considers just in relation to:

- (a) *the way in which witnesses are to be questioned; and*
- (b) *the production and use of documents and things in connection with the questioning of witnesses; and*
- (c) *the order in which parties may question a witness; and*
- (d) *the presence and behaviour of any person in connection with the questioning of witnesses.*

There is some indication that section 26 may enable a judge in civil proceedings to call a person as the court's own witness.¹³⁰ However, this is a very broad interpretation of the provision, which seems to be limited in its application as to what is to happen in respect of witnesses after they have been called.¹³¹

Commentators have noted that there is a traditional presumption that only parties call evidence, though challenges to adversarial precepts and an increase in judicial activism suggest this may change.¹³²

4.2.3 Other models

Family Court

As discussed above, Section 69ZN of the *Family Law Act 1975* sets out the principles for conducting child-related proceedings.¹³³ The court's general duties and powers relating to evidence are listed. Pursuant to section 69ZX(1), in giving effect to the principles in section 69ZN, the court may:

(e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.

Section 69ZP provides that the court may exercise a power under Division 12A on the court's own initiative or at the request of one or more of the parties to the proceedings. Rule 15.71 of the Family Law Rules also relevantly provides:

Court may call evidence

(1) *The court may, on its own initiative:*

(a) *call any person as a witness; and*

(b) *make any orders relating to examination and cross-examination of that witness.*

Queensland

Under the *Uniform Civil Procedure Rules 1999*, the court may call evidence of its own motion. Section 391 relevantly provides:

Court may call evidence

(1) *The court may, by order and on its own initiative, call a person before it as a witness in a proceeding.*

(2) *The court may give the directions about examination, cross-examination and re-examination of the person the court considers appropriate.*

Similar provisions are found in legislation governing the Administrative Appeals Tribunal¹³⁴ and the NSW Administrative Decisions Tribunal.¹³⁵

4.2.4 Arguments for and against the power to call witnesses

Arguments in favour of judicial discretion to call witnesses

Justice Ipp has suggested that although the right of a trial judge to call a witness of their own motion is highly qualified, it exists in civil cases.¹³⁶ Justice Ipp notes that:

*Some countries take the view that it is morally necessary that the State should concern itself not only with the decision of a case according to the evidence, but with arriving at a right decision even if the parties themselves do not choose to place the relevant material before the court. It is of course not possible to find the truth if the investigation is left to the parties themselves.*¹³⁷

Another commentator has suggested that:

*There should be a general enactment to the effect that it is the responsibility of the judge to take steps to ensure that cases are correctly decided and accordingly that the judge is entitled to intervene if [he or she] thinks the case is being conducted in such a way as to lead to an unjust decision; to require a particular witness to be called; or to ask questions of the witnesses beyond his present restricted role of clearing up ambiguities in evidence.*¹³⁸

116 *Re Hayes Williams* (1926) 26 SR (NSW) 383, 389.

117 For example, Family Court: *Family Law Rules 2004* (Cth) r 15.71(1); *Uniform Civil Procedure Rules 1999* (Qld) r 391. See below under part 4.2 for further discussion.

118 (1986) 66 ALR 371.

119 *Obacelo Pty Ltd v Taveraft Pty Ltd* (1986) 66 ALR 371, 376.

120 *Obacelo* (1986) 66 ALR 371, 375–6.

121 *Obacelo* (1986) 66 ALR 371, 376.

122 *Obacelo* (1986) 66 ALR 371, [65]. See, generally, Justice Sheppard, 'Court Witnesses—A Desirable or Undesirable Encroachment on the Adversary System' 56 *Australian Law Journal* 234.

123 See eg *R v Damic* (1982) 2 NSWLR 750 (Street CJ with whom Slattery and Miles JJ agreed); *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Apostilides* (1984) 154 CLR 563.

124 *The King v Jenkins; Ex parte Morrison* (1949) VLR 277 at 284.

125 (1988) 14 NSWLR 552, 567.

126 *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552, 567.

127 *R v Apostilides* (1984) 154 CLR 563. See also *DPP v Jensen* [2007] VSC 77 (Osborn J).

128 Jill Anderson, Jill Hunter, Neil Williams, *The New Evidence Law* (2002) 30.

129 Stephen Odgers, *Uniform Evidence Law* (6th ed, 2004) 83 [1.2.1860]; Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2004) 56.

130 Anderson et al (2002) above n 128, 61 citing *Milano Investments Pty Ltd v Group Developers Pty Ltd* (Unreported, Supreme Court of New South Wales, Young J, 13 May 1997). This power may have existed at common law (*Obacelo Pty Ltd v Taveraft Pty Ltd* (1986) 10 FCR 518), but according to Young J, s 26 placed the matter beyond doubt. Cf *R v Too (Moses Bo)* (Unreported, Supreme Court of New South Wales, Badgery-Parker J, 26 July 1996).

131 Odgers, above n 129, 83 [1.2.1880].

132 Anderson et al (2002) above n 128 61.

133 *Family Law Act 1975* (Cth) s 69ZN(4).

134 *Administrative Appeals Tribunal Act 1975* (Cth) s 39A(14).

135 *Administrative Decisions Tribunal Act 1997* (NSW) s 83.

136 Ipp (1995) above n 85, 375.

137 *Ibid* 373–4.

138 *Ibid* 374 citing Sir Richard Eggleston, 'What is Wrong with the Adversary System' (1975) 49 *Australian Law Journal* 428, 437.



In *Bassett v Host*¹³⁹ Justice Hope echoed these views. Justice Mahoney concluded that a trial judge had the right and duty 'to use [his or her] influence to see that the court has before it the evidence for the proper determination of the issues'.¹⁴⁰

On the one hand, the adversarial system is based on the neutrality of the trial judge and this necessarily limits the degree to which a judge can intervene to help parties, including unrepresented litigants. However, as a number of commentators have pointed out, the judiciary also has an obligation to ensure that proceedings are conducted fairly and may be required to intervene to aid an unrepresented party.¹⁴¹

The ARLC has pointed out that a judge has a responsibility to ensure that proceedings are fair, and suggested that this responsibility means that, in some circumstances, there is a judicial right and obligation to intervene, both for the benefit of an unrepresented party and more generally.¹⁴²

Justice Ipp suggests that the power to call witnesses of the court's own motion is part of the movement towards increased powers of judicial intervention.¹⁴³ The benefits of active judicial case management are outlined above. The court has a legitimate interest in ensuring that a proceeding, including the trial itself, is not left in the parties' hands, but is conducted efficiently and expeditiously in the interests of justice.

A further consideration is that there may be circumstances where a party may desire a witness to be called but may not wish to call the witness because doing so would deprive that party of the opportunity for cross-examination but enable the other party to do so.

Arguments against judicial discretion to call witnesses

Some commentators suggest that 'the essential feature of the adversary or accusatorial system of justice is the questioning of witnesses by the parties or their representatives, summoned for the most part by them, and called mainly in the order of their choice before a judge acting as umpire rather than as inquisitor'.¹⁴⁴ Justice Dawson in *Whitehorn v The Queen*¹⁴⁵ said of judges calling witnesses:

*The reality is that to assert the power of a judge to call a witness [themselves] is to raise considerations which, in our adversary system, have serious implications. That is why an assertion of the existence of such a power is invariably qualified by such a reference to the rarity of the occasions upon which its exercise will be justified and the extreme caution which should be observed in its use ... The adversary system is the means adopted and the trial judge's role in that system is to hold the balance between the contending parties without himself [or herself] taking part in their disputations. It is not an inquisitorial role in which he [or she] seeks to remedy the deficiencies in the case on either side.*¹⁴⁶

In *The Queen v Apostilides* the High Court set out a number of general propositions applicable to the conduct of criminal trials. These include the proposition that: 'Save in most exceptional circumstances, the trial judge should not himself [or herself] call a person to give evidence.'¹⁴⁷ The court, in referring to the need for the extreme reluctance with which the trial judge should even consider 'usurping the responsibility of the parties with respect to the calling of witnesses', referred with approval to the judgment of Justice Dawson in *Whitehorn*:

*A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself [or herself] taking part in their disputations. It is not an inquisitorial role in which he [or she] seeks himself [or herself] to remedy the deficiencies in the case on either side.*¹⁴⁸

4.2.5 Submissions

Submissions were divided on this issue. Some of the Supreme Court judges were strongly in favour of the power to call witnesses of the court's own motion. One view was that 'the power may only be used once in 10 years', but the judge would really require it in that instance. Other judges considered that adopting more inquisitorial powers was important and this power was consistent with that approach.¹⁴⁹

Other judges were strongly opposed to the proposal. Judge Wodak felt that judicial officers did not have the resources or the ability to confer with and prepare witnesses, nor in adversarial litigation should they do so.¹⁵⁰ Some Supreme Court judges did not support the power because 'it is the burden of proof that determines a case' and the proposed power would undermine that position.

They were also concerned with what would happen in an appeal if a judge made a mistake when calling a witness. Another judge considered that it was more effective to put pressure on one party to call the witness than give the court express power to call the witness of its own motion.¹⁵¹

Victoria Legal Aid contended that it would undermine the independence of the judiciary and represent interference with the right and/or responsibility of parties to prepare their own case. It further contended that there may be an inconsistency between proposals to limit the ability of parties to call their own witnesses while simultaneously allowing judges to call witnesses themselves.¹⁵²

Maurice Blackburn contended that the system remains adversarial and the court cannot know the many reasons that go into a decision not to call a particular witness. In the firm's opinion: 'for the Court to presume to call these witnesses itself is fraught with risk'.¹⁵³

4.2.6 Conclusions and recommendation

The commission is, on balance, persuaded that the courts should have an express power to call witnesses in civil proceedings without the parties' consent. Such a power would enable the courts to have greater control over the proceedings and has been the case in the Family Court. In some cases this may result in savings in time and cost. In other instances, it may increase the duration of the trial but improve the quality of the outcome. In appropriate cases, the power would also enable the courts to assist self-represented parties. There may also be a need for an express power given that the proposed Uniform Evidence Act provisions are broad and may not be able to be relied on.

The commission does not envisage that the power to call witnesses of the court's own motion would be a commonly used power. Rather this power could be used when there is *no other reasonably practicable alternative means of achieving justice between the parties*. An express statutory provision would put beyond doubt a judge's power to call a witness of his or her own initiative in a civil case.

The commission considers that the conferral of an explicit power to call witnesses would not necessarily involve any major shift from the court's role as independent arbiter in an 'adversarial' dispute (where it can draw adverse inferences from the failure of a party to call a witness) to one of an 'inquisitorial' nature. Such a power is only likely to be used in exceptional circumstances although it would be a matter for the court to determine when the exercise of such power may be appropriate.

A draft provision is as follows:

The court may, at the request of a party or of its own initiative, order a person to appear to give evidence as a witness in a proceeding if the court is of the view that (a) such evidence is necessary or desirable in relation to a matter in dispute and (b) there is no reasonably practicable alternative means of determining such matter in dispute.

This provision gives the courts a discretionary power only.

5. IMPOSITION OF LIMITS ON THE CONDUCT OF PRE-TRIAL PROCEDURES AND TRIAL

Rationale for the recommendation

As discussed in the context of the previous two recommendations, there is a need for additional express powers for the courts to 'actively' manage cases. In the wake of the C7 litigation, there have been calls for greater powers for the courts to better manage proceedings and the conduct of the parties. As mentioned in Chapter 1, Justice Sackville identified that:

- The role of the judiciary needs to change further—to adopt even more rigorous and interventionist pre-trial case management strategies and greater control over the parties in the conduct of the trial itself.
- Courts need not only a greater panoply of case management tools but also a greater willingness to use them.
- Traditional adversary procedures, even within a case management system, must be modified.
- Judges must be given explicit statutory powers and protection to curtail the scope, duration and expense of [mega] litigation even over the express opposition of the parties.¹⁵⁴

139 [1982] 1 NSWLR 206, 207.

140 Ipp (1995) above n 85, 374 citing *Bassett v Host*. [1982] 1 NSWLR 206, 213 (Mahoney JA).

141 ALRC (1997) above n 65 citing Family Court of Australia, *Submission of the Family Court of Australia to the Inquiry of the Legal and Constitutional References Committee on Matters Pertaining to the Australian Legal Aid System* December 1996; Ipp (1995) above n 85, 369 citing *Macpherson v R* (1987) 147 CLR 512 and *R v Gidley* (1984) 3 NSWLR 168.

142 Australian Law Reform Commission, *The Unrepresented Party*, Background Paper 4, citing Ipp (1995) above n 85.

143 Ipp (1995) above n 85, 375.

144 J D Heydon, *Cross on Evidence* (6th ed 2000).

145 (1983) 152 CLR 657.

146 Ipp (1995) above n 85, 375.

147 *The Queen v Apostilides* (1984) 154 CLR 563 at [13].

148 *The Queen v Apostilides* (1984) 154 CLR 563 at [15]. See also *DPP v Jensen* [2007] VSC 77 (Osborn J).

149 Supreme Court consultation, 9 October 2007.

150 Submissions ED1 7 and ED2 5 (Judge Wodak).

151 Consultation with the Supreme Court of Victoria (9 October 2007).

152 Submission ED2 10 (Victoria Legal Aid).

153 Submission ED2 19 (Maurice Blackburn).

154 Justice Ronald Sackville, 'Mega-litigation: Towards a New Approach' (Paper presented at the Annual Conference of the Supreme Court of NSW, Central Coast, New South Wales, 17–19 August 2007).



Other judges have recently made similar comments. For example, Chief Justice Murray Gleeson was recently reported as saying that Australian judges should take their lead from the High Court and ration the time lawyers have to argue their case.¹⁵⁵

In a recent judgment, Justice David Harper of the Victorian Supreme Court was reportedly very concerned about ‘tardy behaviour’ of two parties in preparing for trial and considered striking out the defence and hearing the case as though undefended.¹⁵⁶ The decision followed comments from some Federal Court judges about the need to speed up disputes that become mired in pre-trial disputation.¹⁵⁷

The commission is of the view that there would be utility in having more clearly delineated and specific powers to impose limits on the conduct of proceedings. Such powers will enable directions and orders to be made to confine a case to issues genuinely in dispute and to ensure compliance with court orders, directions, rules and practices. Such powers should include more clearly defined and specific powers with respect to:

1. *pre-trial procedures* including, for example, the power to direct parties to take specified steps and to conduct proceedings as directed with respect to discovery, admissions, inspection of documents, pleadings, particulars, cross-claims, affidavits or statements, time, place and mode of hearing
2. *trial procedures*, including, for example, powers limiting the time that may be taken in cross-examination, limiting the number of witnesses, limiting the number of documents that may be tendered, limiting the time that may be taken by a party in presenting its case or in making submissions and limiting the duration of oral submissions and the length of written submissions.

Although the existing general powers of the court, and existing procedural rules, may be sufficient to achieve these ends, a comprehensive statutory provision may have greater impact, may resolve any argument about the limits of existing rule-making powers and may overcome existing constraints on the exercise of case management powers.

5.1 Clearer powers to limit the conduct of pre-trial procedures

First, the commission has considered whether there should be more clearly delineated and specific powers to impose limits on the conduct of *pre-trial procedures*.

5.1.1 Position in Victoria

As discussed in Chapter 2, various provisions presently provide that the courts under review must endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined. To this end the court may give any direction or impose any term or condition it thinks fit.¹⁵⁸

5.1.2 Other models

NSW

In NSW, there are clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures.

Section 61 of the *NSW Civil Procedure Act 2005* relevantly provides:

- (1) *The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings.*
- (2) *In particular, the court may, by order, do any one or more of the following:*
 - (a) *it may direct any party to proceedings to take specified steps in relation to the proceedings,*
 - (b) *it may direct the parties to proceedings as to the time within which specified steps in the proceedings must be completed,*
 - (c) *it may give such other directions with respect to the conduct of proceedings as it considers appropriate.*

- (3) *If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:*
- (a) *it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,*
 - (b) *it may strike out or limit any claim made by a plaintiff,*
 - (c) *it may strike out any defence filed by a defendant, and give judgment accordingly,*
 - (d) *it may strike out or amend any document filed by the party, either in whole or in part,*
 - (e) *it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,*
 - (f) *it may direct the party to pay the whole or part of the costs of another party,*
 - (g) *it may make such other order or give such other direction as it considers appropriate.*
- (4) *Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court.*

Federal Court

In the Federal Court, there are clearly delineated and specific powers to impose limits on the conduct of pre-trial and trial procedures. Order 10.1 of the *Federal Court Rules* relevantly provides:

- (1) *On a directions hearing the Court shall give such directions with respect to the conduct of the proceeding as it thinks proper.*
- (1A) *In any proceeding which is to be heard by a Full Court, whether in the original or appellate jurisdiction, such directions as is thought proper with respect to the conduct of the proceeding may be given by the Court constituted by a single Judge.*
- (2) *Without prejudice to the generality of subrule (1) or (1A) the Court may:*
- (a) *make orders with respect to:*
 - (i) *discovery and inspection of documents;*
 - (ii) *interrogatories;*
 - (iii) *inspections of real or personal property;*
 - (iv) *admissions of fact or of documents;*
 - (v) *the defining of the issues by pleadings or otherwise;*
 - (vi) *the standing of affidavits as pleadings;*
 - (vii) *the joinder of parties;*
 - (viii) *the mode and sufficiency of service;*
 - (ix) *amendments;*
 - (x) *cross-claims;*
 - (xi) *the filing of affidavits;*
 - (xii) *the giving of particulars;*
 - (xiii) *the place, time and mode of hearing;*
 - (xiv) *the giving of evidence at the hearing, including whether evidence of witnesses in chief shall be given orally or by affidavit, or both;*
 - (xv) *the disclosure of reports of experts;*
 - (xvi) *costs;*
 - (xvii) *the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing;*

155 Michael Pelly, 'Gleeson calls for court time limits', *The Australian* (Sydney), 1 February 2008, 29.

156 Susannah Moran, 'Judge Blasts Slow Pace of Pre-Trial Jockeying', *The Australian* (Sydney), 1 February 2008, 29.

157 *Ibid.*

158 *Supreme Court (General Civil Procedure) Rules 2005* r 1.14(1); *Country Court Rules of Procedure in Civil Proceedings 1999* rr 34A.19, 34.01; *Magistrates' Court Civil Procedure Rules 1999* r 1.21(2); *Magistrates' Court Act 1989* s 136.



- (xviii) the taking of evidence and receipt of submission by video link, or audio link, or electronic communication, or such other means as the Court considers appropriate;
 - (xix) the proportion in which the parties are to bear the costs (if any) of taking evidence or making submission in accordance with a direction under subparagraph (xviii); and
 - (xx) the use of assisted dispute resolution (including mediation) to assist in the conduct and resolution of all or part of the proceeding.
- (aa) where, in any proceeding commenced in respect of any alleged or threatened breach of a provision of Part IV of the Trade Practices Act 1974, an order pursuant to section 80 of that Act is sought, direct that notice be given of the order sought by public advertisement or in such other form as the Court directs;
- (b) notwithstanding that the application is supported by a statement of claim, order that the proceeding continue on affidavits;
 - (c) order that evidence of a particular fact or facts be given at the hearing:
 - (i) by statement on oath upon information and belief;
 - (ii) by production of documents or entries in books;
 - (iii) by copies of documents or entries; or
 - (iv) otherwise as the Court directs;
 - (ca) order that an agreed bundle of documents be prepared by the parties;
 - (cab) direct that the parties give consideration to jointly instructing an expert to provide to the parties a report of the expert's opinion in relation to a particular issue or issues in the proceeding, on the basis that the parties concerned will be jointly responsible to pay the expert's fees and expenses;
 - (d) order that no more than a specified number of expert witnesses may be called;
 - (da) order that the reports of experts be exchanged;
 - (e) appoint a court expert in accordance with Order 34, rule 2;
 - (f) direct that the proceeding be transferred to a place at which there is a Registry other than the then proper place. Where the proceeding is so transferred, the Registrar at the proper place from which the proceeding is transferred shall transmit all documents in his charge relating to the proceeding to the Registrar at the proper place to which the proceeding is transferred;
 - (g) order, under Order 72¹⁵⁹, that proceedings, part of proceedings or a matter arising out of proceedings be referred to a mediator or arbitrator;
 - (h) order that the parties attend before a Registrar for a conference with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in preparation for and at the trial;
 - (i) in a case in which the Court considers it appropriate, direct the parties to attend a case management conference with a Judge or Registrar to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial, at which conference the Judge or Registrar may give further directions;
 - (j) in proceedings in which a party seeks to rely on the opinion of a person involving a subject in which the person has specialist qualifications, direct that all or part of such opinion be received by way of submission in such manner and form as the Court may think fit, whether or not the opinion would be admissible as evidence.

(3) *The Court may revoke or vary any order made under (1), (1A) or (2).*

(4) *Paragraph (aa) of subrule (2) does not limit the power of the Court to direct at any stage of the proceeding that such notice be given.*

Overseas

In the United States and in England and Wales, there are clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures.¹⁶⁰

Submissions

Submissions in response to the Consultation Paper

In the Consultation Paper there were a number of questions concerning judicial management of proceedings generally and pre-trial procedures in particular. Submissions dealing with these issues are discussed in other parts of this chapter.

Question 28 of the Consultation Paper asked:

Are there any time limits for taking procedural steps which should be introduced or varied?

The submissions in response were varied. The Victorian Aboriginal Legal Service argued that all time limits should be examined and restructured.¹⁶¹ The Police Association submitted that time limits should be standardised or more consistently applied in line with other jurisdictions.¹⁶² The Victorian WorkCover Authority contended that as far as possible, time limits should be consistent between cases in a particular jurisdiction, and between jurisdictions, and should be imposed on the parties by way of court rules or practice directions (rather than by individual court order). WorkCover considered that mandatory timeframes are a positive step in supporting timely litigation and resolution in both the pre-litigation and litigation processes.¹⁶³ The TAC supported mandatory timeframes in both pre-litigation and litigation processes.¹⁶⁴

The Mental Health Legal Centre submitted that time limits should be flexible enough to recognise the relative resources and ability of parties to comprehend and prepare their cases. In addition, the Centre argued that there should be capacity to extend time limits or reinstate matters where missed time limits have led to the matter being struck out in certain circumstances.¹⁶⁵

Travis Mitchell and the Bar contended that a tight set of deadlines in other courts, similar to those in the Commercial List of the Supreme Court, with greater costs consequences, would increase the speed of litigation.¹⁶⁶

The State Trustees highlighted the need to take into account the special circumstances of persons under a disability when the commission examines time limits, including a possible extension of the time limitation under Part IV of the *Administration and Probate Act 1958*.¹⁶⁷

The Magistrates' Court considered that time limits were adequately covered under the court's rules.¹⁶⁸

Submissions in response to Exposure Draft 2

Maurice Blackburn was generally supportive of the draft provision (see below), which specifies the types of directions orders the court could make in respect of pre-trial procedures. However, the firm contended that the pre-trial directions powers were necessary only in large or complex litigation.

5.2 CLEARER POWERS TO LIMIT TRIAL PROCEDURES

In addition to limits on *pre-trial procedures*, the commission has considered whether there should be more clearly delineated and specific powers to impose limits in respect of the conduct of the *trial*.

5.2.1 Position in Victoria

County Court

Pursuant to rule 47.06(1), a judge may at any stage of a proceeding by direction limit—

- (a) *the time to be taken in examining, cross-examining or re-examining a witness;*
- (b) *the number of witnesses (including expert witnesses) that a party may call;*
- (c) *the time to be taken in making any oral submission;*
- (d) *the time to be taken by a party in presenting his or her case;*
- (e) *the time to be taken by a trial.*

159 Order 72 pertains to the procedure for court ordered mediation and arbitration. 160

160 See for example: Fed R Civ P r 6, *Civil Procedure Rules 1998* (UK) rr 2.1–2.3.

161 Submission CP 27 (Victorian Aboriginal Legal Service).

162 Submission CP 6 (Police Association).

163 Submission CP 48 (Victorian WorkCover Authority).

164 Submission CP 37 (Transport Accident Commission).

165 Submission CP 22 (Mental Health Legal Centre).

166 Submissions CP 4 (Travis Mitchell); CP 33 (Victorian Bar).

167 Submission CP 23 (State Trustees Ltd).

168 Submission CP 55 (Magistrates' Court of Victoria).



Pursuant to rule 47.06(3), the discretion of a judge to give these directions must be exercised having regard to the following matters in addition to any other relevant matter—

- (a) *the time or number limited must be reasonable;*
- (b) *the direction must not prejudice the right of each party to a fair trial, and in particular, to a reasonable opportunity to adduce evidence and cross-examine witnesses;*
- (c) *whether the case is complex or simple;*
- (d) *the number of witnesses a party intends or seeks to call;*
- (e) *the volume and character of the evidence a party intends or seeks to adduce;*
- (f) *the interests of other litigants in the Court;*
- (g) *the time expected to be taken for the trial;*
- (h) *the importance of the proceeding as a whole or of any question in the proceeding.*

Supreme Court

There is no equivalent in the Supreme Court Rules to rule 47.06 of the County Court Rules.

Magistrates' Court

As outlined above, rule 1.22(2)(m) enables the court to actively manage a case by limiting the time for the hearing or other part of the case, including the number of witnesses and the time for the examination or cross-examination of a witness.

5.2.2 Other models

NSW position

An example of a legislative approach is section 62 of the *Civil Procedure Act 2005* (NSW), which provides:

Directions as to conduct of hearing

- (1) *The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.*
- (2) *The court may, by order, give directions as to the order in which questions of fact are to be tried.*
- (3) *Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:*
 - (a) *a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,*
 - (b) *a direction limiting the number of witnesses (including expert witnesses) that a party may call,*
 - (c) *a direction limiting the number of documents that a party may tender in evidence,*
 - (d) *a direction limiting the time that may be taken in making any oral submissions,*
 - (e) *a direction that all or any part of any submissions be in writing,*
 - (f) *a direction limiting the time that may be taken by a party in presenting his or her case,*
 - (g) *a direction limiting the time that may be taken by the hearing.*
- (4) *A direction under this section must not detract from the principle that each party is entitled to a fair hearing, and must be given a reasonable opportunity:*
 - (a) *to lead evidence, and*
 - (b) *to make submissions, and*
 - (c) *to present a case, and*
 - (d) *at trial, other than a trial before a Local Court sitting in its Small Claims Division, to cross-examine witnesses.*

- (5) *In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any other matters that the court considers relevant:*
- (a) *the subject-matter, and the complexity or simplicity, of the case,*
 - (b) *the number of witnesses to be called,*
 - (c) *the volume and character of the evidence to be led,*
 - (d) *the need to place a reasonable limit on the time allowed for any hearing,*
 - (e) *the efficient administration of the court lists,*
 - (f) *the interests of parties to other proceedings before the court,*
 - (g) *the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,*
 - (h) *the court's estimate of the length of the hearing.*
- (6) *At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party a memorandum stating:*
- (a) *the estimated length of the trial, and the estimated costs and disbursements of the solicitor or barrister, and*
 - (b) *the estimated costs that, if the party were unsuccessful at trial, would be payable by the party to any other party.*

Federal Court

Rule 10.1(1) is referred to above. Some of the provisions relate to the conduct of a trial. Furthermore, Order 32 Rule 4A 'Limitation on time etc to be taken for trial' provides:

- (1) *At any time before or during a trial, the Court or a Judge may make a direction limiting:*
 - (a) *the time for examining, cross-examining or re-examining a witness; or*
 - (b) *the number of witnesses (including expert witnesses) that a party may call; or*
 - (c) *the time for making any oral submissions; or*
 - (d) *the time for a party to present the party's case; or*
 - (e) *the time to hear the trial.*
- (2) *The Court or Judge may amend a direction made under this rule.*

Supreme Court of Western Australia

Order 34 Rule 5A of the *Rules of the Supreme Court 1971 (WA)* is similar to County Court Rule 47.06 and section 62 of the *Civil Procedure Act 2005 (NSW)* in that it gives the court power to limit the number of witnesses etc. This provision also gives the court power to limit the time for oral submissions.¹⁶⁹

Family Court

In the Family Court, there are clearly delineated and specific powers to impose limits on the conduct of trial pursuant to Section 69ZX(2) of the *Family Law Act 1975*. This section gives the power to direct that evidence regarding a particular matter and of a particular kind *not be presented* (ss (g) and (h)).

Ontario

The Ontario 2007 Report noted that at the Advocates' Society Policy Forum in March 2006, there was widespread consensus that all too frequently trials greatly exceed their estimated length due to poor trial management by both the bench and the bar and that greater discipline is required. Accordingly, considerable support was expressed for having the judiciary exercise more aggressive trial management before and during the trial.¹⁷⁰ The report recommended that:

- Pre-trial judges should make any necessary trial management orders that promote the most efficient use of trial time and, in particular, should be vested with the authority to impose time limits on the presentation of each side's case, subject to a residual discretion in the trial judge to alter such orders where unanticipated circumstances arise or in otherwise clear cases where the overall interests of justice require that they be amended.

¹⁶⁹ *Rules of the Supreme Court 1971 (WA)* r 34.5A(c).

¹⁷⁰ Coulter A Osborne, *Civil Justice Reform Project—Summary of Findings & Recommendations*, A Report for the Attorney-General, Ontario (2007) xvi.



- The judiciary should be encouraged to use their inherent authority to better regulate the conduct of trials so that trials proceed in an orderly and efficient manner.¹⁷¹

Limits on length

Section 69ZX(2) of the *Family Law Act 1975* also provides that the *length of written submissions* may be *limited*.¹⁷² In the Western Australian Supreme Court, for interlocutory hearings, an outline of submissions can be *limited* to five pages in length.¹⁷³ The Victorian Court of Appeal now requires a party's outline of submissions not to exceed 20 pages in length.¹⁷⁴

5.2.3 Arguments for and against powers to limit trial procedures

Arguments for powers to limit trial procedures

As discussed above, there is increasing acceptance of the need for judicial intervention in the conduct of proceedings. The proposition that litigation is a pure 'affair of the parties' is no longer generally accepted. The traditional view that the judge is a passive referee who either has no power, or should be extremely reluctant to exercise any power, to control the conduct of the litigation has little support.¹⁷⁵ Greater judicial intervention is considered not only desirable, but necessary, in order to increase efficiency and to reduce costs and delay.

The Victorian courts clearly have power to control proceedings. However, there continues to be tension between the requirements of effective case management and the interests of justice. Although there are various statutory provisions and rules which confer on the courts express authority to exercise control and impose limits on parties, on one view such provisions are not as comprehensive as provisions which have been introduced in other jurisdictions. Accordingly, there is utility in having uniform, more clearly delineated, comprehensive and specific powers to control the conduct of pre-trial and trial procedures.

As part of the 'new approach' to building cases in the Supreme Court, the court can give directions including for the conduct of trial, and this may encompass time limits for the trial.¹⁷⁶ Justice Byrne of the Supreme Court recently made the following comments on this new approach:

*The judges will be ready to fix times for the performance of various procedural steps and to determine preliminary issues for trial where this will assist the resolution of the whole dispute. At trial, judges will be more ready to exercise the powers of the Court to direct the way the trial is presented and, where appropriate, to impose time limits for the performance of various aspects of the trial. To the extent that this might seem novel, or even unpalatable, it will be one of the factors which will weigh in the decision to select the appropriate court for the litigation.*¹⁷⁷

The Final Report of the Hong Kong Chief Justice's Working Party on Civil Justice Reform endorsed clearly defined directions for the conduct of trials and considered it would be desirable to have a rule specifically setting out such powers, commenting that:

*Knowing what periods of time have been allocated for each task, counsel would be able to plan their submissions and examination and cross-examination accordingly. This would promote fairness in the distribution of trial time between the parties.*¹⁷⁸

There is value in clearly identifying the types of orders the courts can make for the conduct of pre-trial procedures and at the hearing. The courts may be more likely to use the powers if they are clearly listed.¹⁷⁹ Also, if parties or lawyers fail to comply with directions and orders, clearly identified powers will no doubt make it easier when considering sanctions for non-compliance.

Arguments against powers to limit trial procedures

There is a variety of considerations which weigh against greater judicial control over the conduct of trials and proceedings, generally.

It may be contended, as a matter of principle, that under our adversarial system parties should retain control over the conduct of proceedings.

As a matter of law, it may be that in some situations greater judicial control may run counter to principles of procedural fairness, human rights protections, restraints imposed by appellate courts, or, in the cases of courts able to exercise federal jurisdiction, may be incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power.¹⁸⁰

As a matter of practicality, judicial officers suffer from what Justice Sackville has described as an 'information deficit'. They cannot be expected to have the same knowledge as the parties or their legal representatives have about the strengths and weaknesses of the case or the forensic rationale for adopting a particular course of action.

Also, proactive judicial intervention may result in further interlocutory disputation and may give rise to additional appeals from interlocutory decisions and appeals from final judgments. The power to control the conduct of the trial might arguably undermine the ability of parties to put forward their case, and may provide appeal grounds in the event that the party prohibited from certain forensic conduct is unsuccessful.

Furthermore, excessive judicial management of litigation may increase costs through the need for additional directions hearings.

5.2.4 Submissions

Submissions in response to Consultation Paper

Questions 30 and 31 concerned the conduct of trials and hearings and asked:

30. *Is there need for reform of practices, procedures or rules relating to the conduct of trials or hearings? If so, what are the problems and what changes should be implemented?*
31. *In some jurisdictions, courts have conducted shortened hearings with strict limits on:*
- *the time allocated*
 - *the evidence permitted*
 - *the issues to be determined*

with a view to the dispute being resolved without the necessity for a final trial on all issues. Do the rules of procedure need to be amended to facilitate shortened hearings? If so, what specific changes should be implemented?

The Bar supported an amendment of the Rules of Court in the Supreme Court to incorporate a rule equivalent to rule 47.06 of the County Court Rules, which would enable a judge in an appropriate case to require that the trial be conducted on a 'chess clock' basis. The Bar noted:

*Imposition of time limits during trial has the advantage of focussing the minds of the advocates.*¹⁸¹

The Police Association supported the notion of shortened hearings with strict limits: 'it goes some way to standardising the process' with other jurisdictions.¹⁸²

WorkCover and the Traffic Accident Commission were not supportive of the notion of shortened hearings with strict time limits. They contended that previous experience of pro forma court orders, which sought to impose mandatory timelines and restrictions on the calling of oral evidence and hearing times, resulted in perceptions of judicial imbalance in the treatment of parties to the litigation.¹⁸³

Submissions in response to Exposure Draft 2

Judge Wodak supported the proposal and identified that the mere mention of the provision in the County Court Rules (rule 47.06) 'has usually provided an incentive to the parties to agree to some modification in the number of expert witnesses to be called, and in shortening the evidence'.¹⁸⁴

The Supreme Court judges were supportive of the proposed case management powers and considered that it was a matter for each judge to decide whether he or she wanted to exercise the powers.¹⁸⁵

Maurice Blackburn also contended that imposing limitations on the trial time, on interlocutory hearings and on the length of both oral and written submissions was an important part of active case management and should reduce expense. The firm said:

*In large complex litigation, hearing times and the length of submissions have expanded dramatically in the last 15 years, with an associated explosion in cost. It is difficult to see a corresponding increase in the quality of the justice provided to the litigants.*¹⁸⁶

In a consultation with the Supreme Court, it was noted that putting case management powers in legislation may pose difficulties as they may not easily be amended.¹⁸⁷

171 *Ibid* xvii.

172 *Family Law Act 1975* (Cth) s 69ZX(2).

173 According to Practice Direction 9 of 2007, which applies to all interlocutory hearings in civil cases, an outline of submissions must be submitted to the court and should not normally exceed five pages in length: Supreme Court of Western Australia, *Practice Direction No 9 of 2007 – Outlines of Submissions and Lists of Authorities for use in Interlocutory Hearings* (2007) <decisions.justice.wa.gov.au/Supreme/SCPracdr.nsf/redirect?OpenFrameSet&UNID=0c002ced303b620fc82574100029a1d5> at 15 April 2008.

174 Supreme Court of Victoria, *Court of Appeal Practice Statement 1 of 2006* (2006) <www.supremecourt.vic.gov.au/wps/wcm/myconnect/Supreme+Court/resources/file/ebdc0e031c9d635/CA_No_1_of_2006.pdf> at 15 April 2008.

175 See, eg, *Ipp* (1995) above n 85, 367.

176 Supreme Court (2008) above n 25, 4–5.

177 *Byrne* (2008) above n 36, 5.

178 Hong Kong Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform—Final Report* (2004) 338.

179 For example, in *Rich v Harrington* [2007] FCA 1987, Branson J considered whether the parties should be ordered to give oral discovery or, alternatively, whether the parties should be ordered to give evidence in advance of the trial, so both sides could decide whether they really wanted to continue with the case.

180 *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575, 592 [19] (Gleeson CJ). *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

181 Submission CP 33 (Victorian Bar).

182 Submission CP 6 (Police Association).

183 Submissions CP 48 (Victorian WorkCover Authority); CP 37 (Transport Accident Commission).

184 Submission ED2 5 (Judge Wodak).

185 Consultation with Supreme Court of Victoria (9 October 2007).

186 Submission ED2 19 (Maurice Blackburn).

187 Consultation with the Supreme Court of Victoria (9 October 2007).



5.3 OTHER RECENT REFORMS

The Federal Court's Fast Track List—'Rocket Docket'

The Federal Court's Fast Track List—the 'Rocket Docket', was introduced in May 2007 to address the issues of costs and delay.¹⁸⁸ The Victoria Registry is currently piloting the new procedure. It may be extended to other states. It applies to commercial cases and some intellectual property cases. The new procedures are significantly streamlined. Tight time constraints are imposed on the parties as well as on the court. In broad terms, the changes include:

- the abolition of pleadings, which are replaced with an outline of a party's case
- a scheduling conference approximately six weeks after filing at which the case will be set down for hearing not later than six months after the filing date
- in all but urgent cases, interlocutory hearings being replaced by interlocutory applications to be dealt with on the papers; oral hearings being allowed in limited circumstances
- interrogatories not being permitted except in exceptional circumstances
- a substantial reduction in the obligations to make discovery¹⁸⁹
- In place of witness statements (other than expert witnesses) the parties being encouraged to file agreed statements of fact
- a pre-trial conference at which both the parties and their lawyers must attend¹⁹⁰
- a trial that will be a 'chess-clock' style following the current fashion of arbitrations, especially international arbitrations¹⁹¹
- the judge delivering judgment quickly, usually within six weeks¹⁹²
- proceedings being excluded from the list if the trial is likely to exceed eight days.¹⁹³

As at 14 December 2007, 14 cases were reportedly in the Fast Track List.¹⁹⁴

The introduction of the rocket docket is representative of broader trends, in Australia and overseas, directed at reforming procedural rules to improve the efficient resolution of commercial disputes and civil litigation more generally. One commentator endorsing the Fast Track List said: 'There are many major corporations that are litigation averse. These changes, if implemented, should lead to a reduction of costs and improved access to justice.'¹⁹⁵

In the submission in response to the Consultation Paper, the TAC contended that in the context of personal injury litigation, where there has usually been an extensive pre-litigation process (in accordance with agreed pre-action protocols), the parties, and especially the injured person, would be well served by being included in such a fast track docket system.

The Institute of Arbitrators and Mediators (IAMA) Fast Track Arbitration Procedure

The IAMA Fast Track Arbitration Procedure was also introduced in 2007.¹⁹⁶ Schedule 2 in the *IAMA Arbitration Rules 2007* provides for the fast track arbitration procedure. Parties can agree to submit a dispute between them to arbitration in accordance with the rules, but the rules are not compulsory. The rules contain an overriding objective, which is to conduct the arbitration fairly, expeditiously, cost-effectively and proportionate to the amount of money, the complexity of issues and any other relevant matter.¹⁹⁷ Parties must conduct the arbitration in accordance with the overriding objective.¹⁹⁸

Under the rules, a 150-day limit is suggested for the entire process.¹⁹⁹ Another feature of the rules is a 20-day limit within which the claimant is to provide documents, including a written statement and evidence to be presented.²⁰⁰ Hearings can be conducted as a 'stop clock' arbitration if directed by the arbitrator or agreed on by the parties.²⁰¹ The awards given by arbitrators are expected to provide detailed written reasons which are proportionate to the time available.²⁰²

5.3.1 Conclusions and recommendations

The commission is persuaded that there should be more clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures and trial proceedings.

The commission has drafted a provision (set out below) that incorporates various elements of rules and legislation from Australian jurisdictions, in particular, Order 10.1 of the *Federal Court Rules*, section 61 of the *Uniform Civil Procedure Act 2005* (NSW) and rule 2.1 of the *Uniform Civil Procedure Rules 2005* (NSW).

The commission has also drafted a provision (set out below) that incorporates various elements of rules and legislation from other Australian jurisdictions, in particular, section 62 of the *Civil Procedure Act 2005* (NSW) and Order 10.1 of the *Federal Court Rules*.

Draft provisions

Set out below is a draft provision that specifies the types of directions orders the court could make as to *pre-trial procedures*:

Section/Rule Y: 'Directions as to practice and procedure generally'

- (1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.
- (2) The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
- (3) Without prejudice to the generality of subsection (1) the Court may give such directions or make such orders as it considers appropriate with respect to:
 - (a) discovery and inspection of documents, including the filing of lists of documents; either generally or with respect to specific matters;
 - (b) interrogatories;
 - (c) inspections of real or personal property;
 - (d) admissions of fact or admissibility of documents;
 - (e) the filing of pleadings and the standing of affidavits as pleadings;
 - (f) the defining of the issues by pleadings or otherwise; including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions;
 - (g) the provision of any essential particulars;
 - (h) the joinder of parties;
 - (i) the mode and sufficiency of service;
 - (j) amendments;
 - (k) counterclaims;
 - (l) the filing of affidavits;
 - (m) the provision of evidence in support of any application;
 - (n) a timetable for any matters to be dealt with, including a timetable for the conduct of any hearing;
 - (o) the filing of written submissions;
 - (p) costs;
 - (q) the use of assisted dispute resolution (including mediation) to assist in the conduct and resolution of all or part of the proceeding;
 - (r) the attendance of parties and/or legal practitioners before a registrar/master for a conference with a view to satisfying the registrar/master that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in preparation for and at the trial;
 - (s) the attendance of parties and/or legal practitioners at a case management conference with a judge or registrar/master to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial, at which conference the judge or registrar/master may give further directions;

188 Federal Court of Australia, *Notice to Practitioners* <www.fedcourt.gov.au/how/ids.html> at 2 July 2007.

189 For details on changes to discovery obligations see: Federal Court of Australia, *Notice to Practitioners—Directions for the Fast Track List*, <www.fedcourt.gov.au/how/ids.html> at 14 February 2008.

190 See discussion under case conferences for more information.

191 That is, the parties are on strict time limits in the presentation of every aspect of the case.

192 Federal Court of Australia, *Notice to Practitioners*, above n 188; Law Institute of Victoria, Litigation Lawyers Section, <www.liv.asn.au/members/sections/litigation/about/litigation-latest.html#Heading5> at 16 July 2007.

193 Damian Grave and Helen Mould, 'Rocket Docket Hits the Target to Reduce Delays', *Australian Financial Review* (Sydney), 14 December 2007, 59.

194 *Ibid.*

195 Matthew Drummond, 'Court Puts Rocket Under Commercial Litigation', *Australian Financial Review* (Sydney), 11 May 2007, 57.

196 See the Institute of Arbitrators and Mediators Australia (IAMA), *Practice Note—Fast Track Arbitration*, 11 September 2007 for more information about the procedure.

197 IAMA, *Arbitration Rules 2007* r 1.

198 IAMA, *Arbitration Rules 2007* r 15(1)(a) & (b).

199 IAMA, *Arbitration Rules 2007* sch 2 r 1.

200 IAMA, *Arbitration Rules 2007* sch 2 r 3.

201 IAMA, *Arbitration Rules 2007* sch 2 r 11.

202 IAMA, *Arbitration Rules 2007* sch 2 r 12.



- (t) the taking of specified steps in relation to the proceedings;
 - (u) the time within which specified steps in the proceedings must be completed;
 - (v) the conduct of proceedings.
- (4) If a party to whom such a direction has been given or against whom an order is made under subsection (1) or (2) fails to comply with the direction or order, the court may, by order, do any one or more of the following:
- (a) dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,
 - (b) strike out or limit any claim made by a plaintiff,
 - (c) strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly,
 - (d) strike out or amend any document filed by the party, either in whole or in part,
 - (e) strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
 - (f) direct the party to pay the whole or part of the costs of another party,
 - (g) make such other order or give such other direction as it considers appropriate.
- (5) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given or order made by the court.
- (6) The court may revoke or vary any direction or order made under subsection (1) or (3).

Set out below is a draft provision that specifies the types of directions orders the court could make as to *trial procedures*:

Section/Rule X: 'Directions as to conduct of hearing'

- (1) The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.
- (2) The court may, by order, give directions as to the order in which questions of fact are to be tried.
- (3) The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
- (4) Without limiting subsections (1) and (2), the court may, by order, at any time before or during a hearing, give directions:
 - (a) limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,
 - (b) not allowing cross-examination of a particular witness,
 - (c) limiting the number of witnesses (including expert witnesses) that a party may call,
 - (d) limiting the number of documents that a party may tender in evidence,
 - (e) limiting the time that may be taken in making any oral submissions,
 - (f) that all or any part of any submissions be in writing,
 - (g) limiting the length of written submissions,
 - (h) limiting the time that may be taken by a party in presenting his or her case,
 - (i) limiting the time that may be taken by the hearing,
 - (j) with respect to the place, time and mode of trial,
 - (k) with respect to the giving of evidence at the hearing including whether evidence of witnesses in chief shall be given orally or by affidavit, or both,

- (l) with respect to costs, including the proportions in which the parties are to bear any costs,
 - (m) with respect to the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing,
 - (n) with respect to the taking of evidence and receipt of submissions by video link, or audio link, or electronic communication, or such other means as the Court considers appropriate,
 - (o) that evidence of a particular fact or facts be given at the hearing:
 - I. by statement on oath upon information and belief,
 - II. by production of documents or entries in books,
 - III. by copies of documents or entries; or
 - IV. otherwise as the court directs,
 - (p) that an agreed bundle of documents be prepared by the parties,
 - (q) that evidence in relation to a particular matter not be presented by a party, or
 - (r) that evidence of a particular kind not be presented by a party.
- (5) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party and/or the court a memorandum stating:
- (a) the estimated length of the trial, and the estimated costs and disbursements, and
 - (b) the estimated costs that the party would have to pay to any other party if they were unsuccessful at trial.

6. ENHANCING COMPLIANCE WITH PROCEDURAL REQUIREMENTS AND DIRECTIONS

6.1 THE PROBLEM

The benefits of clearly delineated and specific powers for the conduct of proceedings have been identified above. The threat of sanctions is important for encouraging compliance with court directions and orders. A number of submissions contended that there is a need for greater explicit powers to enable the courts to deal with recalcitrant parties or practitioners.

The commission considers that there should be more clearly delineated express powers to order sanctions, including costs sanctions, for non-compliance with court directions and orders, unless there is a valid reason for non-compliance.

6.2 DIRECTIONS

Victorian position

At present there are general provisions dealing with non-compliance with court rules, which are set out below. The commission notes, however, the 'new approach' of the Supreme Court Building Cases List. The trial judge may, if the occasion warrants, make orders that costs be awarded on an issues basis. The costs of (a) an unsuccessful issue, (b) unnecessary discovery, (c) the unnecessary inclusion of documents in the court book or (d) the unnecessary use of resources, may not be allowed to the successful party or may be awarded against a successful party.²⁰³

NSW position

Section 61 of the *Civil Procedure Act 2005* (NSW) is set out above. Subsection (3) specifies the applicable sanctions. Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court.

²⁰³ Supreme Court (2008) above n 25, 5.



6.3 SANCTIONS FOR FAILURE TO COMPLY WITH RULES AND COURT ORDERS

There are various provisions in the rules of the courts under review that provide for sanctions or other procedural consequences where there is non-compliance with the rules or court orders. A number of these provisions are referred to below.

Non-compliance with the rules

In the Supreme, County and Magistrates' Courts, where there has been a failure to comply with the rules, the court may—

- (a) set aside the proceeding, completely or in part
- (b) set aside any step taken in the proceeding, or any document, judgment or order
- (c) exercise its powers under the rules to allow amendments and to make orders dealing with the proceeding generally.²⁰⁴

The court must not set aside any proceeding on the ground that the proceeding was commenced by the wrong process.²⁰⁵

The court must not set aside any proceeding or any step taken in any proceeding or any document, judgment or order therein on the ground of a failure to which rule 2.01 applies on the application of any party unless the application is made within a reasonable time and before the applicant has taken any fresh step after becoming aware of the irregularity.²⁰⁶

The court may dispense with compliance with any of the requirements of the rules, either before or after the occasion for compliance arises.²⁰⁷

Judgment on failure to prosecute or obey order for particulars or discovery

In the Supreme and County Court Rules, Order 24 deals with the disposition of a proceeding without a trial:

- (1) Dismissal for want of prosecution—where the plaintiff fails to serve a statement of claim within the time limited or does not set the proceeding down for trial within 28 days after it was set down for hearing.²⁰⁸
- (2) Failure to obey order for particulars or discovery, or inspection of documents or for answers to interrogatories, the Court may order that the proceeding be dismissed (for plaintiffs) or that the defence be struck out (for defendants).²⁰⁹
- (3) Stay on non-payment of costs after dismissal for want of prosecution.²¹⁰

Pursuant to the rules, the court has power to dismiss any proceeding for want of prosecution. Where a party fails to do an act or take a step in compliance with the rules, the proceeding may be dismissed or the defence struck out and judgment may be entered.²¹¹

In the Supreme and County Courts, if a party fails to answer interrogatories within the time specified by the rules²¹² or set by the court the interrogating party may serve a notice on the defaulting party. If the interrogatories are not answered within seven days of service of the default notice, the court may order that the proceedings be dismissed (if the party interrogated is a plaintiff) or that the defence be struck out (if the party interrogated is a defendant).²¹³

Pursuant to the *Magistrates' Court Civil Procedure Rules 1999*, the court may order that a complaint be dismissed or a defence be struck out (amongst other orders²¹⁴) where—

- 1) a party fails to comply with a notice for further particulars²¹⁵
- 2) a party fails to comply with a notice of discovery²¹⁶
- 3) a party fails to answer interrogatories.²¹⁷

6.4 COSTS ORDERS

There are also various statutory provisions, rules and inherent powers providing for the award of costs. The governing statutes and rules of each of the courts provides for the exercise of broad discretion with respect to costs orders.²¹⁸ The *Magistrates' Court Act 1989* incorporates some limitations on the exercise of discretion. Various provisions in relation to costs are considered in further detail in Chapter 11.

NSW position

In NSW, rule 42.10 of the *Uniform Civil Procedure Rules 2005* provides that if a party fails to comply with a requirement of the rules, or of any judgment or order of the court, the court may order the party to pay such of the other parties' costs as are occasioned by the failure.

Federal Court

Various provisions in the *Federal Court Rules* make provision for orders in respect of costs. Order 62 provides for costs orders generally and makes specific provision for costs orders against legal practitioners (rule 9), for the disallowance of costs in respect of improper, vexatious or other unnecessary matters in documents or proceedings (rule 36) and unnecessary appearances (rule 37). Orders for costs may also be made at directions hearings (Order 10, rule 1(2)(xvi)).

United Kingdom

In his final report, Lord Woolf stressed four important principles:

- (a) *The primary object of sanctions is prevention, not punishment.*
- (b) *It should be for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach, for example that a party may not use evidence which he [or she] has not disclosed.*
- (c) *All directions orders should in any event include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively.*
- (d) *The onus should be on the defaulter to apply for relief, not on the other party to seek a penalty.*²¹⁹

The Hong Kong Chief Justice's Working Party on Civil Justice Reform commented: 'It was emphasised that the sanction should be relevant to the non-compliance and tailored to be proportionate to the importance of the breach in the context of the action as a whole'.²²⁰ It was noted that 'in implementing this approach, if practicable, rules, practice directions and court orders should specify the consequences of non-compliance'.²²¹ Thus, in relation to the court's general powers of case management, the UK Civil Procedure Rules provide that:

When the court makes an order, it may –

- (a) *make it subject to conditions, including a condition to pay a sum of money into court; and*
- (b) *specify the consequence of failure to comply with the order or a condition.*²²²

If such an order is made, then the consequence takes effect without need for a further order, placing the onus on the party guilty of non-compliance to seek relief:

- 204 *Supreme Court (General Civil Procedure) Rules 2005* r 2.01; *County Court Rules of Procedure in Civil Proceedings 1999* r 2.01; *Magistrates' Court Civil Procedure Rules 1999* r 2.01.
- 205 *Supreme Court (General Civil Procedure) Rules 2005* r 2.02; *County Court Rules of Procedure in Civil Proceedings 1999* r 2.02; *Magistrates' Court Civil Procedure Rules 1999* r 2.02.
- 206 *Supreme Court (General Civil Procedure) Rules 2005* r 2.03; *County Court Rules of Procedure in Civil Proceedings 1999* r 2.03; *Magistrates' Court Civil Procedure Rules 1999* r 2.03.
- 207 *Supreme Court (General Civil Procedure) Rules 2005* r 2.04; *County Court Rules of Procedure in Civil Proceedings 1999* r 2.04; *Magistrates' Court Civil Procedure Rules 1999* r 2.04.
- 208 *Supreme Court (General Civil Procedure) Rules 2005* r 24.01; *County Court Rules of Procedure in Civil Proceedings 1999* r 24.01.
- 209 *Supreme Court (General Civil Procedure) Rules 2005* r 24.02; *County Court Rules of Procedure in Civil Proceedings 1999* r 2.02.
- 210 *Supreme Court (General Civil Procedure) Rules 2005* r 24.03; *County Court Rules of Procedure in Civil Proceedings 1999* r 2.03.
- 211 *Supreme Court (General Civil Procedure) Rules 2005* r 24.03; *County Court Rules of Procedure in Civil Proceedings 1999* r 2.03.
- 212 42 days after service: *Supreme Court (General Civil Procedure) Rules 2005* r 30.04.
- 213 *Supreme Court (General Civil Procedure) Rules 2005* r 30.09.1. The Order also applies to counterclaims and third party notices pursuant to *Supreme Court (General Civil Procedure) Rules 2005* r 30.09.1(4).
- 214 These rules also apply to counterclaims and third party notices. The court may also order that a party comply with a notice of discovery, or a request for particulars and interrogatories within a time specified by the court. Alternatively, the court may order a party to comply with a request within a specified time and also set out the consequences for failure to do so (ie dismissal or strike out).
- 215 *Magistrates' Court Civil Procedure Rules 1999* r 9.08.
- 216 *Magistrates' Court Civil Procedure Rules 1999* r 11.07.
- 217 *Magistrates' Court Civil Procedure Rules 1999* r 12.07. A defendant whose notice of defence is struck out pursuant to Rules 9.08, 11.07 and 12.07 is taken to be a defendant who does not give a notice of defence.
- 218 See in particular paragraphs 2.1, 2.2 and 2.3 of Chapter 11 of this report'.

219 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 72.

220 Hong Kong Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform Interim Report and Consultative Paper* (2001) 166, <www.civiljustice.gov.hk/ir/index.html> at 14 February 2008, citing Woolf (1996) above n 219, 74 [10].

221 *Ibid* [439].

222 *Civil Procedure Rules 1998* (UK) r 3.1(3).



Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.²²³

The party who has failed to comply cannot count on being granted relief. The court is required by rule 3.9 to consider all the circumstances including the following:

- (a) the interests of the administration of justice;
- (b) whether the application for relief has been made promptly;
- (c) whether the failure to comply was intentional;
- (d) *whether there is a good explanation for the failure;*
- (e) *the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;*
- (f) *whether the failure to comply was caused by the party or his [or her] legal representative;*
- (g) *whether the trial date or the likely trial date can still be met if relief is granted;*
- (h) *the effect which the failure to comply had on each party; and*
- (i) *the effect which the granting of relief would have on each party.²²⁴*

6.5 ARGUMENTS FOR AND AGAINST CLEARER POWERS TO IMPOSE SANCTIONS FOR FAILURE TO COMPLY WITH COURT DIRECTIONS AND ORDERS

Arguments in favour of clearer powers

The benefits of clearly delineated case management powers have been identified. There is also a need for sanctions for non-compliance to encourage party and lawyer compliance with case management directions.

Non-compliance with directions may also constitute a breach of the proposed overriding obligations. For example, one obligation is that participants must use reasonable endeavours to act promptly and minimise delay.²²⁵ However, the overriding obligations are not confined to case management directions.

Explicit and specific powers to order sanctions for non-compliance with case management directions may be of greater utility than a broad power. An explicit power to order sanctions should encourage parties to comply with case management directions.

The ALRC examined the way costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction. In one report, the ALRC recommended replacing the current broad discretion to award costs with a clear, systematic framework of costs rules incorporating express provision for a range of disciplinary and case management costs orders.²²⁶ The ALRC recognised that the ability to make costs orders is an important mechanism for encouraging party and lawyer compliance with case management guidelines.²²⁷

Clearly identifying the range of sanctions for non-compliance with case management directions is likely to enhance the effectiveness of case management.

Arguments against clearer powers

Courts already have extensive powers under statutory provisions, court rules, and/or pursuant to their general jurisdiction to impose sanctions including costs orders. Accordingly, on one view, further rules are not required.

Another concern is that sanctions will be overused, and may be automatically imposed for procedural default, without proper regard for the reasons for non-compliance and extenuating circumstances.

Those who give primacy to party control of adversarial civil proceedings would contend that courts should not be unduly interventionist.

Even if the arguments in favour of proactive judicial intervention are accepted, there remains the risk that sanctions will become a forensic tool for more resourceful parties. Moreover, applications and hearings in respect of sanctions may add to costs and delays and give rise to undesirable 'satellite' litigation and appeals.

6.6 SUBMISSIONS

Submissions in response to the Consultation Paper

Question 28 of the Consultation Paper asked: 'Are there any sanctions for failure to comply with time limits which should be introduced or varied?'

There were varied responses. The TAC and the WorkCover suggested that once orders are made, the courts must ensure that there is subsequent compliance and management and sanctions for non-compliance. In their view, where a time limit is not complied with, the legal presumption should be that any costs occasioned by reason of the default are payable by the defaulting party.²²⁸

The Magistrate's Court contended that the court rules adequately provide for possible sanctions for non-compliance, including dismissal of a claim and striking out a notice of defence.²²⁹ Similarly it was noted that:

*Problems experienced with recalcitrant parties or practitioners can be dealt with by the greater and more frequent exercise by judges, masters and registrars of these powers.*²³⁰

Mallesons suggested that there is a place for sanctions in case management, but only as part of a range of options available to the court to apply in particular cases, and they should not automatically be imposed on the defaulting party.²³¹

Another submission contended that the courts should be charged with the obligation to oversee strict compliance with the directions timetable, which could be supported by the introduction of costs penalties if deadlines are not met.²³²

Submissions in response to Exposure Draft 2

Maurice Blackburn was supportive of the introduction and use of greater sanctions for non-compliance. In particular, the firm contended that failure to comply with the proposed overriding obligations by tactics of delay and attrition should be 'the subject of sanction'.²³³

Judge Wodak expressed the view that the powers in proposed section Y(4) are sensible. He also contended that legislation may be needed in order to provide a proper basis for such orders or directions to be made. In his view, sub-paragraph (c) of section Y(4) could be modified by adopting the approach in sub-paragraph (a), to enable a defence or part of it to be struck out, for example where a defendant should be precluded from contesting liability, but should still be able to contest damages. The commission adopted this approach.²³⁴

6.7 CONCLUSIONS AND RECOMMENDATION

Despite the fact that courts presently have extensive general and specific powers to impose sanctions, including costs orders, the commission is of the view there is benefit in having a clear(er) framework of rules incorporating *express* provision for a range of 'disciplinary' and case management orders. Draft provisions are set out in proposed section Y(4).

A range of disciplinary and case management orders that include but are not limited to costs sanctions would be useful. Sometimes costs may not be the most appropriate sanction, particularly where a party has substantial resources. The proposed draft provides for a range of orders and sanctions. Their application would be a matter for judicial discretion.

The commission agrees with the view of Lord Woolf that the primary object of sanctions is prevention, not punishment. The commission also agrees in principle that it is desirable for the rules themselves, in the first instance, to provide an effective debarment order where there has been a breach; for example that a party may not use evidence that has not been disclosed. It is also desirable, where practicable, for all directions orders to include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively. In principle, the commission agrees with the position taken by Lord Woolf that the onus should be on the defaulter to apply for relief, not on the other party to seek a penalty.

However, the commission is also mindful that there are many understandable reasons why parties, particularly those that may be less experienced or lacking in resources, may not always be able to comply with orders and directions within the required time. Where procedural steps need to be taken, large law firms acting for affluent clients or large corporations or insurers are usually able to mobilise resources to ensure that the required tasks are completed within time limits. Not all litigants are in the same position. Accordingly, although there is considerable scope for the use of presumptive sanctions

223 *Civil Procedure Rules 1998* (UK) 3.8(1). The rule permitting the parties to vary time limits by agreement does not apply in such cases: r 3.8(3); and where the sanction is an order as to costs, relief can only be sought by way of appeal against such order: r 3.8(2).

224 *Civil Procedure Rules 1998* (UK) 3.9 (1)

225 See the discussion in Chapter 2 for details.

226 Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation*, Final Report No 75 (1995)

227 ALRC (1997) above n 65, [9.18.].

228 Submissions CP 48 (Victorian Workcover Authority); CP 37 (Transport Accident Commission).

229 Submission CP 55 (Magistrates' Court of Victoria).

230 Confidential submission CP 42 (Corrs Chambers Westgarth, permission to quote granted 14 January 2008).

231 Submission CP 49 (Mallesons Stephen Jaques).

232 Submissions CP 41 and ED 1 22 (TurksLegal and AXA).

233 Submission ED 2 19 (Maurice Blackburn). Support was also expressed in submission ED 2 2 (confidential submission, permission to quote granted 17 January 2008).

234 Submissions ED 1 7 and ED 2 5 (Judge Tom Wodak).



to apply in the case of default, in large measure sanctions will need to be applied in light of the relevant factual circumstances and the conduct of litigants and lawyers. This will usually require the exercise of judicial discretion.

The commission considers that overuse or inappropriate use of sanctions is unlikely to occur. Courts are likely to only impose sanctions when there is an unacceptable failure to comply, and should not do so if there is a valid reason for noncompliance.

It is also to be hoped that compliance by parties and lawyers with the proposed overriding obligations will result in increased cooperation between litigants and a reduced incidence of procedural default.

7. GREATER USE OF TELEPHONE DIRECTIONS HEARINGS AND TECHNOLOGY

7.1 THE ISSUE

The commission's terms of reference ask us to have regard to the impact of current policy initiatives on the operation of the civil justice system, including investments in information technology such as an Integrated Courts Management System. A number of the challenges facing the civil justice system are identified in Chapter 1. The increased use of technology should enable time and cost savings for the courts and the parties and increase access to justice. The commission's recommendations regarding case management and technology are outlined below.

One of the Victorian Government's key initiatives is to develop new systems to improve service, efficiency and coordination between court jurisdictions: 'A new technology platform will expand the opportunities for on-line service, improved case management, in-court services, and information.'²³⁵ The Government has also identified that:

*There are a number of key building blocks that need to be put in place if the courts are to successfully deliver justice in the 21st century, including ... Information Technology.*²³⁶

In his final report, Lord Wolf expressed the view that appropriate technology was 'fundamental to the future of our civil justice system'. He said that technology would 'not only assist in streamlining and improving existing systems and processes; it is also likely, in due course, itself to be a catalyst for radical change as well'.²³⁷ He went on to assert that: 'IT will be the foundation of the court system in the near future and now is the time that it should be seen to be receiving attention at the highest levels.'²³⁸

The commission considers that the Victorian Government and the courts have identified the importance of technology in the courts and undertaken various reforms, which are aimed at improving case management systems and document control. For example, an Integrated Courts Management System (ICMS) is currently being developed. This is discussed below. The E-litigation practice note was recently implemented in the Supreme Court (see discussion below). The commission considers that further helpful reforms would be the greater use of telephone directions hearings and the greater use of technology generally, including email and Internet online instant messaging systems in the management and conduct of civil proceedings.

7.2 TELEPHONE DIRECTIONS HEARINGS

Telephone directions hearings are held by the courts, but the practice appears to be ad hoc and dependent on the individual judge or master.

Supreme Court

In the Supreme Court, for cases not managed in a list, directions may be given without requiring a hearing or written submissions. However, sometimes the court may require the parties to attend a directions hearing for complex matters. Directions hearings may be conducted by conference telephone call.²³⁹ For cases managed in lists, the procedures with respect to directions hearings vary.²⁴⁰

County Court

In the County Court, the procedures vary between lists. Directions hearings are not held, at least initially, in certain lists in the County Court.²⁴¹ Instead, an administrative mention notice is sent to the parties and the parties submit consent orders.²⁴² The notice invites the parties, by a date approximately 49 days after the filing of the notice of appearance, to submit draft consent orders in a standard form to the court for the management of any interlocutory processes as well as the timetabling of the proceeding to trial. No appearance is required or expected on the date in the notice—the orders

are made in chambers without the need for an appearance. The court then nominates a trial date. Failure to respond to an administrative mention notice can have serious consequences including the proceeding being struck out.²⁴³

The procedure is different in the Building Cases Division,²⁴⁴ the Commercial List Pilot in the County Court,²⁴⁵ the Damages (Medical) Division,²⁴⁶ the WorkCover List,²⁴⁷ and the WorkCover (General) Division.²⁴⁸

Magistrates' Court

Directions hearings are not used in the Magistrates' Court. However, for pre-hearing conferences, where a party cannot attend a conference personally they may request that the pre-hearing conference be conducted by telephone.²⁴⁹

Other models

Australia

In the Supreme Court of New South Wales, there is a dedicated telephone conference call facility used principally for common law directions hearings before the Registrar. Telephone callovers commenced in the Court in March 2007. Matters considered suitable for telephone directions hearings include consent matters and matters where parties or their legal representatives are located outside the Sydney CBD. A telephone conference can still proceed even if one or more parties choose to appear in person. Directions and orders that may be obtained by telephone callover include adjournments, directions and allocation of hearing dates. Parties are expected to fax any proposed directions to the Registrar by 5pm on the day before any scheduled telephone directions hearing. The conference is taped and a copy of the tape sent to the court by the conference call provider. Copies of the tape can be purchased from the court. The charges are billed to the parties' nominated Australian fixed telephone number.²⁵⁰

In the Administrative Appeals Tribunal, directions hearings and conferences are also conducted by telephone.²⁵¹

Overseas

United Kingdom

According to two UK reports, there has been a widespread take-up of case management conferences being conducted by telephone conferencing.²⁵² Under amended procedures which were implemented in April 2007, the presumption is for certain types of cases (largely procedural hearings and interim applications with a time estimate of less than one hour) to be conducted by telephone unless the court orders otherwise.²⁵³ In other cases, the court may order that an application or part of an application be dealt with by telephone hearing, either of its own initiative or at the request of the parties. Normally such orders will not be made unless all parties consent. However, on very urgent applications (such as for an urgent injunction) the court may even agree to conduct the hearing of an ex-parte application by telephone.²⁵⁴

In addition to the use of telephone conferences, directions are often made following an exchange of emails.

235 Attorney-General's Justice Statement (2004) above n 3, 24.

236 Ibid 44.

237 Woolf (1996) above n 219, 284.

238 Ibid 293.

239 Supreme Court of Victoria, *Practice Note 1 of 1996: Civil Case Management* (1996) <www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/ebb65307d11f512/PracticeNote-No1-1996.pdf> at 14 February 2008.

240 See the Practice Notes on the website of the Victorian Supreme Court: <www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Practice+and+Procedure/Practice+Notes+%26+Statements> at 14 February 2008.

241 In the Business List, Commercial and Miscellaneous Divisions and in the Damages List Applications Division, General Division and Serious Injury Division.

242 County Court of Victoria, *Civil Practice Notes, Applications Division, General Division & Serious Injury Division PNCI 4-2007* (2007) <www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Practice+and+Procedure/Practice+Notes?OpenDocument&1=20-Practice+and+Procedure-&2=0-Practice+Notes-&3=~#CIVIL> at 14 February 2008; and County Court of Victoria, *Civil Practice Notes, Operation & Management of the Business, Commercial & Miscellaneous Divisions (Melbourne Registry) (PNCI 5-2007)* (2007) <www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Practice+and+Procedure/Practice+Notes?OpenDocument&1=20-Practice+and+Procedure-&2=0-Practice+and+Procedure-&3=~#CIVIL> at 14 February 2008.

243 Ibid.

244 Judge Shelton, County Court of Victoria, *County Court Building Cases Division—Notice to Practitioners* (2007). <www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Practice+and+Procedure/Practice+Notes?OpenDocument&1=20-Practice+and+Procedure-&2=0-Practice+and+Procedure-&3=~#SPECIALIST> at 14 February 2008.

245 Judge Anderson County Court of Victoria, *Specialist List Practice Notes, Commercial List Pilot – Practice Note* (2006) <www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Practice+and+Procedure/Practice+Notes?OpenDocument&1=20-Practice+and+Procedure-&2=0-Practice+Notes-&3=~#SPECIALIST> at 14 February 2008

246 Judge Tom Wodak County Court of Victoria, *Specialist List Practice Notes, Damages (Medical Division) Consolidated Practice Note* (2003) <www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Practice+and+Procedure-Practice+Notes?OpenDocument&1=20-Practice+and+Procedure-&2=0-Practice+Notes-&3=~#SPECIALIST> at 14 February 2008.

247 Judge G D Lewis County Court of Victoria, *Specialist List Practice Notes, Workcover List Practice Note* (2001) <www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Practice+and+Procedure-Practice+Notes?OpenDocument&1=20-Practice+and+Procedure-&2=0-Practice+Notes-&3=~#SPECIALIST> at 14 February 2008.

248 Judge Coish and Judge Hicks County Court of Victoria, *Specialist List Practice Notes, Workcover (General Division) Practice Note* (2006) <www.countycourt.vic.gov.au/CA256D8E0005C96F/page/Practice+and+Procedure-Practice+Notes?OpenDocument&1=20-Practice+and+Procedure-&2=0-Practice+Notes-&3=~#SPECIALIST> at 14 February 2008.

249 Chief Magistrate Ian L Gray, *Practice Direction No. 2 of 2005—Pre-Hearing Conferences and Attendances by Telephone*, (2005) <www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Chief_Magistrates_Directions_2/file/pd205.pdf> at 14 February 2008.

250 Supreme Court of NSW, *Announcements: Introduction of Telephone Directions Hearings in the Common Law Registrar's list each Wednesday*, (2007) <www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/387> at 14 February 2008.

251 See the daily list for the telephone directions.

252 John Peysner and Mary Seneviratne, *The Management of Civil Cases: the Courts and Post-Woolf Landscape* (2005) Department for Constitutional Affairs, Justice, Rights and Democracy (UK) <www.dca.gov.uk/research/2005/9_2005_full.pdf> at 14 February 2008; Adam Johnson and Maura McIntosh, *New Technologies and the Civil Litigation Process: Report for England and Wales* (2007) 5 <research.osgoode.yorku.ca/lapl2007/documents/England_and_Wales.pdf> at 15 February 2008.

253 The procedures apply in county courts and district registries of the High Court (not the High Court in London) in which telephone conference facilities are available: Johnson and McIntosh (2007) above n 252, 6.

254 Ibid.



Norway

Under the proposed Disputes Act (expected to commence in 2008), court sittings may be held as distance meetings by telephone or televised communication if the parties consent or if authorised by the Act.²⁵⁵ The initial court sitting at the directions stage may be held as a distance meeting, as may the examination of parties, witnesses and experts if direct examination is not feasible or would be particularly expensive or onerous.²⁵⁶

Finland

Oral preparation for the pre-trial stage can be organised by telephone or by some other technique. The requirements are that it should be reasonable in light of the purpose of the preparatory stage and that there should not be numerous or complex questions to resolve. Sessions where the telephone or other media are used will be public hearings. This means that the general public and press may be present and will have the possibility of hearing all the discussions.²⁵⁷

Canada

There is widespread use of conference calls for more routine procedural matters in Canada.²⁵⁸

7.3 E-LITIGATION

Supreme Court

The Supreme Court introduced guidelines for the use of technology in civil proceedings in 2007. The practice note provides guidance to parties and lawyers concerning the use of technology for the preparation and management of civil litigation in the court. It also incorporates a court-approved framework and default standard for managing both hard copy and electronic documents.²⁵⁹

The court's practice note identifies that e-litigation should be considered in the following types of cases:²⁶⁰

- where a substantial portion of the discoverable documents consist of electronic material;
- where the potential total number of discoverable documents is more than 1000;
- where there are more than three parties to the proceeding;
- where the proceedings are multi-jurisdictional or cross-border.

In general, the rules governing discovery of electronic documents are the same as those for hard-copy material (Order 29).

The court can make a variety of orders, including, for example, that the proceeding be conducted using technology, that parties or their lawyers meet to discuss how best to use technology in the proceeding, that the parties retain an IT consultant to assist them and that there be an *electronic trial*. An order for an electronic trial of the proceeding may include orders for electronic court documents, an electronic court book, and that discovery be electronic.

A subset of the court book documents should form the basis of a *hard-copy core bundle*. The bundle will contain the principal documents which the parties expect will be used frequently during the trial. It is a tool which will avoid time-consuming resort to the court book for reference to documents requiring intense or frequent scrutiny in evidence or argument. It has the added advantage of being in hard copy.

The reasonable costs incurred in complying with the practice note are treated by the court as being 'necessary and proper for the attainment of justice or for enforcing or defending the rights of a party' within the meaning of rule 63.69 of the court rules.²⁶¹

Federal Court

According to the court's annual report:

*The Court has adopted a more proactive approach to the conduct of electronic trials in the Court and has held wide discussions with legal firms on a new document management protocol and a new Practice Note to facilitate more of these trials. Following the drafting of these documents, discussions will be held with legal representative organisations for their input.*²⁶²

7.4 ELECTRONIC FILING OF DOCUMENTS ('E-FILING')

The Victorian Government has identified that:

*The courts' challenge is to provide a service that assists [participants] to navigate the court processes as smoothly as possible. Information technology has provided many new options for the courts to meet this range of needs. The courts are beginning to exploit these opportunities by, for example, developing the capacity to lodge documents electronically over the Internet. Information about court services, both of a general and case-specific nature, is also becoming more available over the Internet.*²⁶³

In the Supreme, County and Magistrates' Courts, legal practitioners and parties are able to lodge documents with the court electronically.²⁶⁴ Most documents can be electronically filed, with some exceptions.²⁶⁵ E-filing in Victoria is voluntary—there is no requirement to use e-filing.

The Magistrates' Court of Victoria's Civil EDI (Electronic Data Interchange) program was introduced in late 1993 and was the first of its kind in the world. The facility enables authorised solicitors to electronically lodge civil complaints; enter judgment in default of a defence and issue warrants to seize property and summonses for oral examination. The advantages of EDI include:

- attendance at the registry is not required
- no postage or document exchange facility is required
- court documents are issued without delay
- the process eliminates the need for payment by cheque or stamp duty as court fees and transaction costs are electronically withdrawn from an account nominated by the solicitor using the service
- the process is largely paperless.²⁶⁶

Certain requests will not be processed by EDI. If an order has been made by a magistrate, an application for default judgment cannot be obtained electronically. According to the court, this is to protect the integrity of the process. Given that no attendance at court is required, the advantages of EDI are that time and costs are reduced and there is increased access to justice for litigants.²⁶⁷

Other models

Electronic filing has not yet had a major impact on civil litigation in Australia, although most jurisdictions have begun to introduce it or plan to do so. Despite its availability in most courts, the take-up rate has been slow.²⁶⁸ Developments in NSW, including e-filing in the NSW courts under JusticeLink, are discussed below.

E-filing is available and mandatory in Singapore, it is widely available but voluntary in the United States and Israel and only available in some courts in England, Canada and Australia.²⁶⁹

One example of its widespread use is in US federal courts. Electronic filing has become standard practice involving more than 27 million cases on the federal filing system. More than 250 000 lawyers and others have filed documents in the federal court alone.²⁷⁰

7.5 VIDEOLINK/VIDEO CONFERENCING

The Government has recognised that:

*The power of videoconferencing technology allows some court services to be delivered remotely, either for parties and witnesses who live some distance from the venue, or for vulnerable witnesses such as sexual assault victims. Victoria has led the world in rolling out videoconferencing technology to its courthouses.*²⁷¹

In the Supreme, County and Magistrates' Courts, applications in proceedings are able to be made, and are made, via videolink.²⁷²

- 255 Inge Lorange Backer, 'The Norwegian Reform of Civil Procedure' (2007) 51 *Scandinavian Studies in Law* 41, 65 <www.domstol.no/upload/DA/Internet/domstol.no/Aktuelt/Backer.pdf> at 15 February 2008. See also the proposed Norwegian Disputes Act available at <www.regjeringen.no/nb/dep/jd/dok/NOUser/2001/NOU-2001-32/65.html?id=379351> § 13-1
- 256 Backer (2007) above n 255. See also the proposed Norwegian Disputes Act, above n 254, § 21-10.
- 257 Laura Ervo, 'Scandinavian Trends in Civil Pre-trial Proceedings' (2007) 26 *Civil Justice Quarterly* 466, 473.
- 258 Janet Walker and Garry D Watson, *New Technologies and the Civil Litigation Process: Common Law General Report* (2007) 10 <research.osgoode.yorku.ca/apl2007/documents/WalkerWatsonNewTechnologies.pdf> at 15 February 2008.
- 259 Supreme Court of Victoria, *Practice Note 1 of 2007* (2007) 1 <www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/eb913b0785d01df/PracticeNote-No1-2007_GuidelinesForUseTechnology.pdf> at 15 February 2008.
- 260 Supreme Court of Victoria information session, Supreme Court of Victoria, Melbourne, 15 March 2007.
- 261 Supreme Court of Victoria (2007) above n 259, 5.
- 262 Federal Court of Australia, *Annual Report 2006-2007* (2007) 39.
- 263 Attorney-General's Justice Statement (2004) above n 3, 40.
- 264 *Supreme Court (General Civil Procedure) Rules 2005* O 28; *County Court Rules of Procedure in Civil Proceedings* O 28; *Magistrates' Court Civil Procedure Rules 1999* O 1.18.
- 265 For example subpoenas, court books and exhibits to affidavits: *Supreme Court Rules* O 28.13; *County Court Rules* O 28.13.
- 266 Magistrates' Court of Victoria, *Electronic Data Interchange*, <[www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Listing-Home+Page+News-Electronic+Filing+\(EDI\)?OpenDocument&1=Home-&2=~&3=~&REFUNID=~>](http://www.magistratescourt.vic.gov.au/CA256CD30010D864/page/Listing-Home+Page+News-Electronic+Filing+(EDI)?OpenDocument&1=Home-&2=~&3=~&REFUNID=~>) at 15 February 2008.
- 267 *Ibid.*
- 268 Walker and Watson (2007) above n 258, 7.
- 269 *Ibid* 4-5.
- 270 *Ibid* 5.
- 271 Attorney-General's Justice Statement (2004) above n 3, 40.
- 272 *Supreme Court (General Civil Procedure) Rules 2005* O 41A; *County Court Rules of Procedure in Civil Proceedings* O 41A; *Magistrates' Court Civil Procedure Rules 1999* O 16A.



7.6 THE INTERNET AND EMAIL

Court Connect is a free Internet search facility for cases in the County Court.²⁷³ The service is designed to provide selected information concerning cases in the court's civil and criminal jurisdiction, including the case number, parties' names, a list of documents filed in a case including the date of filing, a list of any judgment made by a judge or any order made by a judge or registrar, dates of hearing for events listed, whether jury or hearing fees have been paid, and subpoenas filed from 1 January 2005.²⁷⁴

Email alerts

The County Court has a free email alerts service to practitioners that can be accessed via the County Court website. Practitioners receive an email alert that advises them when the monthly and daily civil trial lists have been placed on the website. This eliminates the need to regularly check the website.

Email correspondence with the courts

In the County Court, email correspondence is encouraged. The court accepts email requests for standard timetabling orders where consent orders are not attached, as long as the text of the email includes certain information, including, for example, the proceeding number, names of parties and their legal representatives and an assurance that all parties have conferred and agreed to the timetable sought.²⁷⁵ Some of the Supreme Court judges encourage the use of email for consent orders.²⁷⁶

Around Australia, courts are amending their rules or issuing practice directions to provide for email communication between litigants and the courts more generally. For example, the Queensland Supreme Court has issued a protocol for this.²⁷⁷ Some courts are experimenting with email communications for pre-hearing conferences and case-preparation.²⁷⁸

Overseas

Electronic communication with the court is authorised in Norway and Finland.²⁷⁹ In Norway, submissions may be sent electronically as well as on paper.²⁸⁰ (section 13-3) A proposal that advocates should be obliged to send their written submissions electronically was not enacted, but apparently a pilot project has been foreshadowed regarding electronic communication between courts and advocates.²⁸¹

In Canada, some courts and judges use email to communicate with counsel directly or through court staff, and court staff use email in some jurisdictions to schedule cases.²⁸² A Canadian report identified that email between counsel and the courts has eliminated correspondence and document delivery time and reduced costs.²⁸³

There is a pilot scheme in England in the Preston county court allowing court applications to be made and dealt with by email. This facility may be used where parties are represented and where the court considers that the application is suitable to be dealt with without a hearing.²⁸⁴ It is also quite common for parties to exchange electronic copies of documents such as pleadings and witness statements and to provide these to the judge if requested, for ease of referencing and searching.²⁸⁵

Other online resources

There are other online resources available on the courts' websites, for example, there are links to the courts' practice notes and practice directions. Daily lists are also available. In addition, judgments and court rules are available free of charge on the Internet, for example, via the Australian Legal Information Institute (AustLII).²⁸⁶

7.7 INTEGRATED COURTS MANAGEMENT SYSTEM (ICMS)

ICMS is a program established by the Department of Justice to implement a single, integrated technology platform and set of applications for all Victorian courts and tribunals. ICMS includes the provision or development of information systems covering:

- case management (including the replacement for Courtlink)
- registry management (including document management)
- interfaces to existing special purpose applications within individual jurisdictions
- the Smart Court Program (videoconference and in court technologies)
- performance reporting
- online information services (Internet) and
- knowledge management (intranet).

ICMS is a major government initiative to modernise and upgrade the technology of all Victorian courts and tribunals. In the 2005–6 Victorian budget, the state allocated \$45 million to ICMS: \$32.3 million in capital and \$12.7 million over four years.

The government has recognised that existing court technology systems are often incompatible with each other. For example, 10 different case management systems currently operate in Victorian courts and tribunals. ICMS was established to implement a single, integrated technology platform and set of computer applications for all Victorian courts and tribunals. Once the ICMS is fully operational, it has been suggested, this will have the capacity to increase cases heard by the Supreme and County Courts by around 150 per year.²⁸⁷

The benefits of ICMS are said to include:

- a modern, flexible technology platform which can support the courts' business needs well into the 21st century
- a highly integrated, court management system which brings together case management functionality, online resources used by officers and staff of the court, and a seamless web interface with the legal profession and the community
- facilities that encourage and facilitate end-to-end processing of a case, filing or inquiry throughout Victoria's courts and tribunals without the need for re-keying or re-lodgement
- a high level of consistency in look and feel between systems so that users don't have to master multiple user interfaces
- simplified login and security access for users
- the technology to improve the efficiency in handling of major cases and
- enabling technology for timely and comprehensive reporting and analysis.

As part of ICMS, CourtView allows for the integration of major court systems and requirements, including case and financial management, imaging, docketing, scheduling, forms and notices, and reporting of cases at all stages of the judicial process. CourtView also facilitates online public access to non-restricted case information, e-filing of court documents, online inquiries by lawyers and online payments.

Also as part of ICMS, the 'Smart Court Program' is upgrading in-court technology to enable courts to meet the increasing demand for presenting evidence electronically in cases and receiving evidence remotely from 'at-risk' or 'vulnerable' witnesses at a number of courts across the state. The technology package includes large format plasma display screens and updated video-conferencing facilities. Smart Court's facilities also provide significant advantages for people from regional areas appearing as witnesses in court cases in Melbourne or elsewhere, who may be able to give their evidence from their local courthouse instead of having to travel to another city.²⁸⁸

The importance of an ICMS is recognised in the Justice Statement.²⁸⁹ The government has recognised that comprehensive and accurate data have not always been available to support the courts in their work. Information about resources and caseloads has sometimes been difficult to collect and analyse. Absence of basic trend data also hampers the development of effective policies for the criminal and civil justice systems. Recognising the current deficiencies, the government is expanding the courts' statistical services provided through the Department of Justice so that the courts and the government are equipped to develop policies and measure performance on the basis of consistent, comprehensive and reliable data. The development of the ICMS will greatly assist the achievement of this goal. The Courts Strategic Directions working party has also recognised the need for improved research and analysis to enable better planning for future demand.²⁹⁰

Additional data collection

At present there is a need for additional data collection to assist in case management and judicial and court administration generally. The Victorian Bar has recognised the importance of a comprehensive, computerised system of monitoring litigation across the courts to monitor the progress of litigation, the causes of delay and the effectiveness of measures to address it.²⁹¹ The Courts Strategic Directions Statement 2004 recommended that a properly funded Courts Statistics and Information Resource

273 Information regarding Court Connect is obtained from the website of the County Court of Victoria: <www.countycourt.vic.gov.au> at 16 November 2006.

274 Court Connect does not include the contents of documents or full details of orders or judgments. If such information is required, attendance at the relevant registry office and payment of the prescribed fee is necessary. Also, where a suppression order has been made either of a case or of a particular document filed in that case, no details of that case or of the particular document will be available for searching.

275 As of 1 June 2007, the parties are able to email their requests for standard timetabling orders to Judge Davis' associates: County Court of Victoria, Damages List Applications Division, General Division and Serious Injury Division, *Practice Note PNCI 4—2007* (2007) above n 242.

276 Consultation with the Supreme Court of Victoria (9 October 2007).

277 Walker and Watson (2007) above n 258, 15.

278 *Ibid* 7.

279 Insofar as provided for in regulations issued under the Courts of Justice Act, s 197a: Backer (2007) above n 255, 51.

280 *Ibid* 65.

281 *Ibid*.

282 Timothy Pinos, *New Technologies and the Civil Litigation Process: Report for Canada* (2007) 4.

283 *Ibid*.

284 Johnson and McIntosh (2007) above n 252, 3.

285 *Ibid* 5.

286 A free Internet facility jointly provided by the University of Technology Sydney and the University of New South Wales faculties of law.

287 Department of Justice Victoria, <www.justice.vic.gov.au> at 12 July 2007.

288 *Ibid*.

289 Attorney-General's Justice Statement (2004) above n 3, 44–5.

290 Department of Justice Victoria, above n 287.

291 The Victorian Bar, 'Chairman's Cupboard' (2007) 141 *Victorian Bar News* 3–4.



Centre or other appropriate system should be established. Chief Justice Warren in her State of the Judicature Address 2007 stated that the courts must be accountable to the community. That includes, she said,

courts collecting detailed data as to what they do, how long things take, how many things and types of things they do and then making that data publicly available.

Judge Anderson in his submission in response to Exposure Draft 2 commented that although statistics are kept by the court and distributed monthly to court staff, there is a poor understanding of the collecting of information and its use in formulating appropriate responses.

As discussed in Chapter 4, there is a need for additional data and research. We consider that court forms and documents should be designed to facilitate the collection of data as a by-product of administrative processes. At virtually every stage of civil proceedings documents are required to be completed by the parties and filed with the court. In re-designing the form of such documents provision could be made for the supply of relevant information by the party completing the document. Alternatively, a 'statistical' information form could be required to be completed in addition to the normal court document.

There are various technological means by which data could be captured electronically, as a by-product of the completion and processing of such documents, without the need for manual transcription. Such means encompass the use of 'machine readable' forms; optical character recognition technology and other methods of extracting data from documents that are filed electronically or scanned. However, documents need to be re-designed after the data sought to be captured have been identified. Such documents need to facilitate not only the recording of relevant data by the person completing the document(s) but the electronic retrieval of such data from the document(s) without the need for 'manual' data extraction or further data entry by the recipient of the document. In this manner information could be readily collected and input for computer analysis at minimal cost. This could be an additional agenda item for those implementing the ICMS system. Alternatively, this matter could be taken up by (a) the courts themselves, (b) the commission in stage 2 of the present inquiry or (c) the proposed Civil Justice Council.

7.8 OTHER REFORMS

JusticeLink

In NSW various electronic services are being introduced through JusticeLink.

JusticeLink (formerly CourtLink) is a single case management system for courts and tribunals being developed by the Attorney General's Department of NSW. It will provide centralised processing and information retrieval and enable interchange of information between NSW Supreme, District and Local Courts, as well as the Sheriff's Office, Coroner's Court and Children's Court. JusticeLink will be available to legal practitioners and, in due course, to the general public.

JusticeLink aims to reduce duplication of data across courts, allow faster and easier access to information, and improve case management, case registration, in-court processing of judgment orders and outcomes, fines and payments, lodging of documents, court listings, statistical reporting, Internet based access for courts and the public, legal practitioner access to court diaries, online access to court transcripts and online procedural hearings.

JusticeLink has been successfully trialed in the NSW Supreme Court and is currently being introduced in the District Court. In the NSW Supreme Court 167 electronic hearings have been held in civil matters as at the beginning of February 2008. Within 12 months, the computer system is expected to be operating in every criminal and civil court in NSW, including 160 Local Courts. JusticeLink will eliminate or reduce the need for attendance of the parties in court on simple procedural matters.

JusticeLink will also be used by law firms to 'e-file' motions and evidence, enabling all the parties to proceedings to retrieve information electronically. As at the beginning of February 2008, nine law firms are using e-filing and have electronically filed 11 500 documents.²⁹²

eCourt

The eCourt is a virtual court designed to replace the need for physical court attendance for case management. The eCourt is only available for relatively straightforward matters where all parties are represented. It is not available for self-represented litigants or non-parties.²⁹³

Federal Court

The Federal Court has to date introduced a number of online services. These include:

- *eSearch*, which allows the public to search for information on individual cases
- *eFiling & eLodgment*, which enables litigants or lawyers to file court documents electronically and to pay filing fees using a credit card facility
- *eCourtroom*, which allows directions and other pre-trial orders to be made online. The court uses email for 'pre-hearing correspondence and case-preparation, and with conducting directions hearings and supervising case management through secure electronic bulletin-boards'.²⁹⁴ It provides interactive collaborative forums for interlocutory proceedings.²⁹⁵
- *eCase Administration*, which allows parties and lawyers to communicate with chambers staff on case-related matters.

A complete electronic trial was recently completed in a native title proceeding.

Other Federal Court initiatives include the implementation of a new case management system, the development of electronic documents for the conduct of appeals, an improved document management system and a national video conferencing system.

Another development is the new Commonwealth Courts Portal—the ordering of transcripts, submitting and settling of court orders, lodgement of documents and searching of court files online. It will commence in early 2008 and the e-lodgement system is expected to follow in July. The system has been developed by the Federal Court, Family Court and the Federal Magistrates Court. All of the courts' e-services will be provided through a single web-based interface, which will integrate the electronic provision and management of information and services. Lawyers will be able to establish a line of credit, payable at the end of each month, for court fees. The firms may limit who may view documents on the court file; for example, the solicitors and barristers working on the case. Lawyers will also be able to directly submit information and documentation and search for information without assistance from counter staff. The court has reportedly said that the new system will move court staff away from process work to assisting people in how they might proceed.²⁹⁶

NSW Land and Environment Court

eCourt

The Land and Environment Court of NSW established an eCourt more than five years ago. eCourt can be used to lodge an appeal online, conduct ecallowers, communicate with the court about administrative aspects of a matter, lodge specified documents online and check online the latest activity generated in the matter.

The security and authentication policy states that eCourt's security has been designed 'to balance ease of use and accessibility with appropriate levels of privacy and data security.' eCourt uses high-level encryption technology to protect the security of all data in transit. Information stored on the system is protected by several layers of security, reflecting current best practice. Security provisions are regularly reviewed. Participants must be a party or be given access by a party to view any eCourt matter. The system has two levels of access security for external users:

- 1 access to the system via an account (login and password)
- 2 access to individual matters before the court.

The privacy policy provides a clear framework for 'how and when the Land and Environment eCourt collects, stores, uses and discloses the information' provided to it by those accessing eCourt facilities.²⁹⁷

Supreme Court of Queensland

The Supreme Court of Queensland also has an electronic court. The technology used allows most cases in the Supreme and District Courts in Brisbane to proceed as electronic trials, even those with relatively few documents. Parties must implement consistent document management and classification procedures prior to disclosure to ensure that electronic trials are managed cost effectively.²⁹⁸

292 The Supreme Court of New South Wales' *Practice Note SC Gen 12 'Online Court Protocol'* (2007) provides more information: <www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/e6574f94250a14d6ca2572ed000cecad?OpenDocument> at 16 October 2007; Attorney General of New South Wales, 'Online Court Hearings Save Time and Money' (Press release, 3 February 2008).

293 Supreme Court of NSW (2007) above n 292.

294 Walker and Watson (2007) above n 258, 7.

295 Marcus Priest, 'Court documents at your fingertips' *Financial Review* (Sydney) 23 November 2007, 55.

296 *Ibid.*

297 Land and Environment Court, *Land and Environment eCourt—User's Manual* (2002) 23–5.

298 The following documents provide further information about electronic trial procedures: 'Practice Direction 8/2004', 'Form 19, Form 19—Guidelines', 'Sample document protocol' available at <www.courts.qld.gov.au/3891.htm> at 22 January 2008.



7.9 SUBMISSIONS

Arguments for greater use of technology

In the submissions there was significant support for the greater use of technology. Judge Wodak felt that the use of technology is something that ‘must be provided for in any review of the civil justice system’.²⁹⁹ Hollows Lawyers contended that directions hearings are ‘often better resolved by telephone directions’.³⁰⁰ There was general support for the adoption of the practices currently used by the Administrative Appeals Tribunal to actively manage cases including the greater use of telephone directions hearings and technology.

There was overall support for the greater use of technology in the Supreme Court. Some Supreme Court judges already conduct telephone directions hearing and were positive about their experience of such hearings. Other comments were that telephone directions hearings save time and money.³⁰¹ The Supreme Court advised that there should be an option for directions hearings to be held by email or Internet online instant messaging systems. One Supreme Court judge considered that electronic directions hearings could be very useful, once the technology was available to the courts and possibly when ICMS is implemented. Another Supreme Court judge referred to the email system used in the UK where directions hearings are held by consent.³⁰²

The Consumer Action Law Centre stated that:

*Allowing litigants to participate in directions hearings by telephone will significantly reduce legal costs as solicitors will not need to devote an entire day or morning to the directions hearing. Court rules should establish telephone directions hearings as the default hearing type, and in-person directions hearings should be required only where personal attendance in the court is needed for a particular reason.*³⁰³

The Victorian WorkCover Authority supported the electronic court filing of all documents.³⁰⁴

The TAC commented that ‘facilitated pre-trial interlocutory processes electronically, using a secure court portal, would reduce the need for pre-trial appearances’.³⁰⁵

eLaw endorsed the use of online forums for ‘non-contentious interlocutory matters’, as used in the Federal Court.³⁰⁶

The Magistrates’ Court noted that: ‘The telephone is not used to conduct a conference where the desire is to address seriously the question of resolving the dispute. The personal contact is found to be far more effective.’³⁰⁷

Arguments against greater use of technology

There was some opposition to the greater use of technology. One view expressed in the Supreme Court was that telephone directions hearings and video-conferencing were time-consuming and hard for the court to coordinate. In addition, it was felt that orders on the papers are far easier to deal with.³⁰⁸

Judge Wodak, although supporting the greater use of technology in principle, noted that a limiting factor could be the comparative access of parties to the use of technology. He queried whether one party would be disadvantaged by another party being able to use technology which the first party was unable (as opposed to unwilling) to use.³⁰⁹ This is a valid concern. In circumstances where a party does not have access to the requisite technology, it may be more appropriate for a judicial officer to require the matter to be heard in court.

Various other comments were made in the submissions:

- The Police Association suggested that ‘security features should be established that are designed to specifically protect electronically stored material against potential breaches of privacy and secrecy provisions’.³¹⁰
- The Consumer Action Law Centre considered that VCAT should be ‘required to more actively use telephone and video conferencing’.³¹¹

7.10 RATIONALE FOR THE RECOMMENDATIONS

Telephone directions

The ALRC has identified that ‘new technology is expensive for courts and tribunals’, but that:

Technology should also produce cost savings from:

- *videoconferencing of proceedings*
- *simultaneous access to court files*
- *electronic delivery of court files—reducing the need to physically transport files to other courts or from registry to judge*
- *less photocopying and file handling*
- *reduced time spent on data entry and storing and retrieving documents*
- *simplified archival and retrieval of files and space saving with fewer paper records*
- *improved accuracy in record maintenance*
- *improved electronic report creation and file searching and*
- *potential to reduce staff numbers or make them available for other services.*³¹²

The greater use of telephones for the conduct of directions hearings is one means by which pre trial matters may be determined more efficiently and at less cost to the parties. According to a UK report, the ‘widespread take-up’ of telephone directions conferences ‘reflects both financial disincentives to waiting at court, but also the fact that the legal market is changing ... so that it is commonplace for solicitors to conduct litigation for clients in distant courts’.³¹³

Another UK report noted that:

*The use of telephone hearings and video conferencing seems likely to have increased the accessibility of the civil justice system, particularly for individuals or smaller corporates ... where the time and cost that could otherwise have been spent travelling to hearings might be significant.*³¹⁴

The report also identified that ‘the increased use of telephone hearings and video conferencing has undoubtedly led to cost savings in many cases’.³¹⁵ The report went on to note that experience with the use of new technologies, including telephone directions, has largely been positive in the UK and that judges and litigators should remain open to the introduction of new technologies that ‘can further improve the efficiency and effectiveness of the civil litigation system’.³¹⁶

A report on civil justice reform in Norway commented that: ‘The use of modern information and communication technologies will be of considerable help in providing swift justice.’³¹⁷

The Ontario Ministry of the Attorney-General recently released a report on civil justice reform. One of the recommendations identified the need to

*allow for speedy mechanisms to obtain direction and orders on procedural matters from the managing judge, master or case management master for cases that are governed by rule 37.15. These mechanisms may include a telephone or in-person case conference.*³¹⁸

Another Canadian report stated:

*It is telling that the technology with the most day-to-day impact on communications with the court is the humble telephone conference call. The current ease and low cost of conference calls with the court and their widespread acceptance by the court, which avoids the time involved in scheduling and attending a physical hearing, has made telephone conferences fairly ubiquitous in more routine procedural matters.*³¹⁹

In many if not most instances, telephone directions are more time efficient and cost effective for the courts and the parties than traditional court hearings requiring personal attendance. They also facilitate participation by parties and lawyers who are not located close to a court. Lawyers who may be located far from a court in Victoria either have to travel to court for a directions hearing or arrange for another lawyer to act as their agent and attend on their behalf. In both situations, time and expense is incurred at a cost to the parties.

- 299 Submission ED2 5 (Judge Wodak).
- 300 Submission CP 52 (Hollows Lawyers).
- 301 Consultation with the Supreme Court of Victoria (9 October 2007).
- 302 Consultation with the Supreme Court of Victoria (9 October 2007).
- 303 Submission ED2 12 (Consumer Action Law Centre).
- 304 Submission CP 48 (Victorian WorkCover Authority).
- 305 Submission CP 37 (Transport Accident Commission).
- 306 Submission CP 19 (<e.law> Australia Pty Ltd).
- 307 Submission CP 55 (Magistrates’ Court of Victoria).
- 308 Consultation with the Supreme Court of Victoria (9 October 2007).
- 309 Submission ED2 5 (Judge Wodak).
- 310 Submission ED2 15 (Police Association).
- 311 Submission ED2 12 (Consumer Action Law Centre).
- 312 ALRC (1999) above n 64, [9.58].
- 313 Peysner and Seneviratne (2005) above n 252, 26–7.
- 314 Johnson and McIntosh (2007) above n 252, 9.
- 315 Ibid.
- 316 Ibid 10.
- 317 Backer (2007) above n 255, 65.
- 318 Coulter Osborne, above n 170, xv
- 319 Pinos (2007) above n 282, 2.



At present a considerable amount of time is often spent both travelling to the court and waiting for matters to be called. If there are delays in court, a five-minute hearing may actually take up an entire morning as lawyers wait for their case to be reached in the list. However, in many instances, consent orders or adjournments may be obtained with minimal court waiting time or without necessarily requiring court attendance.

Greater use of telephones and other technology may give rise to tension with one aspect of civil procedural reform. As noted by Lord Woolf, there are advantages in clients personally participating in the civil litigation process. For example, their presence at case management conferences may enable them to be informed of the harsh realities of the process, including the costs consequences, and face-to-face communication may facilitate settlement.³²⁰ There is also a 'risk that the court may be at a disadvantage in assessing evidence or submissions delivered through telephone directions or video conferencing rather than seen and heard face-to-face'.³²¹

Also, section 24(1) of the Charter provides that a party to a civil [or criminal] proceeding 'has the right to have the ... proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.³²² Section 24(3) provides that 'all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits'. Presumably in this context, 'hearing' and 'judgments or decisions' mean the final adjudication of the matter rather than interlocutory hearings at which procedural matters are determined. In any event, telephone directions hearings can be conducted in open court, as often happens in other jurisdictions (eg the United States and Finland).

E-litigation

The problems associated with e-discovery of documents are well documented.

*The production of computer records, and particularly e-mail, has enabled ordinary, informal, candid conversation to become part of the record of civil litigation. This has given rise to a staggering increase in the magnitude of relevant documents.*³²³

This has been challenging for the parties and the courts because they have to manage significant volumes of documents—both at the discovery stage and at trial. The Supreme Court has identified that there are inefficiencies and costs associated with the exchange and management of parties' incompatible electronic data. The Supreme Court's practice note encourages parties to consider the use of technology at the outset and thereby avoid problems at trial. The court's aim is to decrease document management problems through technology, thereby reducing costs and delay; and to encourage lawyers to consider the ways in which the use of technology might lead to the more efficient conduct of litigation.³²⁴

The commission supports the Supreme Court's approach to e-litigation. Given the County Court now has unlimited jurisdiction, that court may wish to consider adopting the Supreme Court's approach. The Magistrates' Court deals with less complex disputes and therefore this approach to e-litigation may not be as suitable in that court. However, as the Magistrates' Court jurisdiction is now \$100 000, the court may wish to consider adopting the Supreme Court's approach to e-litigation for higher value claims where there is a substantial volume of discoverable material in electronic form.

E-filing

At present, courts in Victoria, and in other jurisdictions, are taking various steps to facilitate the electronic filing and retrieval of court documents. The commission believes that these are desirable developments which should be accelerated if resources permit. However, we recognise that this could disadvantage self-represented litigants who may not have access to the technology required to electronically file and retrieve documents. Those who have access to the relevant technology should be encouraged to use e-filing. One means of encouragement would be for the courts to offer incentives to use e-filing, including reduced filing fees.

Use of the Internet and email

A number of the arguments for and against telephone directions hearings, which are referred to above, are applicable to the use of email by courts. However, email has the added advantage that it does not require the parties and the court to be in communication at the same time. This of course may have corresponding disadvantages.

The NSW Land and Environment Court is an interesting model as it provides privacy and data security.³²⁵ A similar approach could be adopted by the Victorian courts. The commission supports the use of email and Internet messaging systems for directions hearings. In a number of jurisdictions extensive use of email is currently made by courts for the purpose of giving directions for the conduct of civil litigation. Although it may be necessary to ensure that there are appropriate security arrangements to ensure confidentiality, where this is required, and to prevent electronic communications being accessed by unauthorised people, in most instances such communications are likely to only contain information which is presently disclosed in open court.

To date, the Internet has no doubt improved access to the civil justice system. Information published on the courts' websites provides participants with easy access to information regarding the courts' procedures and practices. The publication of judgments and statutory and other material on databases accessible through the Internet has done much to improve access to legal information and to reduce the cost of such access. However, as others have suggested, 'the ease with which a lay person can navigate the law and civil procedure remains limited'.³²⁶

7.11 CONCLUSIONS AND RECOMMENDATIONS

The use of telephone for directions hearings seems likely to increase access to the civil justice system and to reduce costs, particularly for individuals and small businesses where the time and cost spent travelling to courts may be significant. Therefore, we consider there should be greater use of telephone directions hearings to save the parties the time and the cost involved of physical attendance at court.

Communication technologies, particularly email, eliminate correspondence and document delivery time and reduce costs. Email directions hearings and Internet messaging systems should also be considered, subject to appropriate electronic security arrangements. Although the content of such 'procedural' communications may comprise only information presently communicated in open court, the computers used for the purpose of such communications may contain other sensitive or confidential information which may be able to be accessed by computer 'hackers'. For example, computer systems used by parties or lawyers may contain privileged documents. Computers used by courts may also contain sensitive documents such as draft judgments. The more extensive use of electronic communication technology, including email, is only feasible if appropriate data security arrangements are in place. The problem is not unique to the judicial system and is already being addressed with existing email services available to the courts and the profession.

We also support greater use of electronic filing and retrieval of court documents.

The existing e-litigation protocol in the Supreme Court should help ensure that the electronic assembly and management of documents, particularly for discovery and trial, will be much faster and less expensive where there are large numbers of documents. The County Court could consider adopting the Supreme Court's approach to e-litigation. The Magistrates' Court may wish to consider adopting the Supreme Court's approach to e-litigation in more complex cases, including where a significant portion of the discoverable material is in electronic form.

In proposing that the courts should generally make greater use of technology in the management and conduct of civil litigation the commission is mindful that the courts and the Victorian Government are already committed to this course and that many innovations have already been introduced or are in the process of implementation. However, in the course of consultations and through submissions it was frequently suggested that this process should be accelerated. To do so will no doubt require the commitment of appropriate resources.

320 The *Civil Procedure Rules 1998* (UK) r 3.1(c) gives courts the power to order a client to attend. However, in practice clients rarely attend case management conferences and are rarely ordered to do so.

321 Johnson and McIntosh (2007) above n 252, 9.

322 This echoes other provisions on human rights. Article 14(1) of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) provides that everyone has the right to 'a fair and public hearing by a competent, independent and impartial tribunal established by law'. Article 6(1) of the *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) provides, inter alia, that: 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

323 Walker and Watson (2007) above n 258, 11.

324 Supreme Court (2007) above n 259, 1.

325 This is discussed in more detail under 'Other reforms' above).

326 Johnson and McIntosh (2007) above n 252, 9.



8. CASE CONFERENCES AND LISTING CONFERENCES AS AN ALTERNATIVE TO DIRECTIONS HEARINGS

8.1 THE PROBLEM

A number of the recommendations in this report seek to facilitate the early resolution of disputes.³²⁷ At present many interlocutory steps, including directions hearings, focus primarily on procedural steps directed towards the ultimate trial of the action. Although parties participating in directions hearings may discuss settlement, such hearings are usually formal and adversarial.

Less adversarial 'case conferences' are an alternative method by which the parties may endeavour to reach agreement on the steps required for the conduct of the action. They can provide an early opportunity for the parties to reach a settlement agreement or narrow the issues in dispute.

The desirability of more proactive judicial case management is discussed in detail in this chapter and in other parts of this report. Case conferences are a further means by which judicial officers can assist the parties to narrow or resolve the issues in dispute.

Case conferences (or listing conferences) are often convened by other courts or tribunals, eg the Federal Court, Family Court and AAT. The commission considers that informal case conferences may be a preferable alternative to formal directions hearings, or may supplement them. Preferably such case conferences should be held in mediation/conference rooms at court instead of in a courtroom, if facilities are available.

When case management conferences are conducted, a case management information sheet, similar to the one used in the Technology and Construction Court in London, could be sent to the parties by the courts prior to the conference.

8.2 POSITION IN VICTORIA

Supreme Court

In the Court of Appeal, a directions hearing/case conference is now held to discuss the issues in the appeal, the estimated length of hearing, any reason why the appeal should be given priority, any reason why the appeal is unsuitable for mediation and, if a hearing date is to be fixed, the availability of counsel for the relevant period(s).³²⁸ The representatives of the parties who appear at this hearing must be fully conversant with the details of the proceeding. After hearing from the parties, the master determines the degree of urgency, the length of the hearing, directions as to the contents of the appeal book and the time for filing of submissions, and where possible fixes the hearing date and orders mediation where appropriate.³²⁹

The recently announced 'new approach' in the Building Cases List involves holding a resources conference. It is conducted by a master and is held after the close of pleadings when the issues in dispute have been identified. It is conducted on an informal and, where necessary, confidential basis. It is expected that the conference will be attended by lawyers who have the requisite knowledge of the issues in the proceeding. The person responsible for the litigation within the parties' organisation is also expected to attend. The rationale is as follows:

The purpose of the conference is to identify what resources should be applied to the litigation by the litigants, by the lawyers and also by the Court. At this conference the general framework for the conduct of the interlocutory and trial process will be laid down and consideration given to procedures, including information technology procedures, which may advance the resolution of the litigation. The parties will be required to address the financial outcome of the litigation on all likely outcomes. Parts of this conference may, with the approval of the Master, be conducted on a without prejudice basis. Communications at such times will be confidential. Following this conference, the Master will prepare a report (not including privileged matters) which may be used by the Court and the parties for the purposes of charting the progress of the litigation and for costs purposes.³³⁰

The Building Cases List in the Supreme Court has also adopted from the Technology and Construction Court in London a requirement that the lawyers for the parties complete a detailed questionnaire (called a case management information sheet) regarding the dispute and the litigation.³³¹

County Court

In the County Court, in the Medical Division of the Damages List, 'orders may be made for a Case Conference prior to or instead of a Mediation where the parties seek that course, and satisfy the Judge that it is appropriate to proceed that way'.³³² In certain circumstances, the County Court may order a case conference in the Business List, Commercial and Miscellaneous Divisions and the Damages List Applications Division, General Division and Serious Injury Division.³³³ Practice Note PNCI 5-2007 of the County Court states that where a case conference has been ordered:

22. *The parties themselves, or a representative of a corporate party with authority to settle the proceeding, must attend. The parties may be ordered, in advance of the conference, to file and serve a position paper of 2 or 3 pages discussing the issues of fact and law raised in the case, or to detail in an affidavit the circumstances relevant to a disputed transaction, or a party may be required to produce copies of relevant documents relating to issues of liability and/or quantum.*

23. *The case conference will be conducted by a judge in open court. The judge will expect counsel to be familiar with the case and to be able to discuss the issues of fact and law which arise. There will be the opportunity for the parties to retire to conduct private meetings.*

24. *The objectives of the case conference are to settle the action, or if this is not possible, to refine the issues and to determine the most appropriate interlocutory steps to bring the matter quickly to trial.*³³⁴

Magistrates' Court

The Magistrates' Court does not routinely hold case conferences.

8.3 OTHER MODELS

Federal Court

Court-conducted mediation is discussed in detail in Chapter 4. The Federal Court holds case conferences and scheduling conferences. In the Fast Track List, parties are encouraged to attend a scheduling conference³³⁵ within 45 days of the filing of the proceedings. This conference must be attended by the parties' lawyers.³³⁶ The judge leads the conference while sitting with the parties' representatives at the bar table.³³⁷ The Federal Court of Australia's 'Notice to Practitioners—Directions for the Fast Track List' outlines the process as follows:

6.4 *Initial Witness List—Each party must bring to the Scheduling Conference an initial witness list with the name of each witness the party intends to call at trial [and] a very brief summary of each witness's expected testimony and, unless it is otherwise obvious, state the relevance of the witness's evidence ...*

6.5 *Narrowing of Issues - At the Scheduling Conference the parties will be asked to outline the issues and facts that appear to be in dispute.*

6.6 *Fixed Trial Date—At the Scheduling Conference the presiding judge will set a trial date for the case ...*

6.7 *Pre-trial Schedule—With the assistance of the lawyers, the presiding judge will establish a pre-trial schedule for all interlocutory steps needed to bring the proceeding to trial, including (when appropriate) a time by which mediation will occur.*³³⁸

Together with the case summary process, the scheduling conference requires more detailed analysis to be undertaken at an earlier stage than might otherwise be the case.³³⁹ As noted by Grave and Mould: 'This is likely to mean that the parties have a more realistic understanding early on as to the merits of their respective cases, and may provide an incentive to settlement.'³⁴⁰

Family Court

In the Family Court, the case assessment conference is the first major event for most people who are seeking court orders. It may be conducted by either a registrar, a mediator or, in appropriate cases, both a registrar and a mediator.³⁴¹

327 This is also discussed in Chapters 1, 3 and 6 of this report.

328 Supreme Court of Victoria, *Court of Appeal Practice Statement No. 1 of 2006* (2006) <[www.supremecourt.vic.gov.au/wps/Home/Practice+and+Procedure/Practice+Notes+%26+Statements/SUPREME++Practice+Statement+No.1+of+2006+%28PDF%29](http://www.supremecourt.vic.gov.au/wps/ Home/Practice+and+Procedure/ Practice+Notes+%26+Statements/ SUPREME++Practice+Statement+No.1+of+2006+%28PDF%29)> at 15 February 2008.

329 Ibid.

330 Byrne (2008) above n 36, 4; Supreme Court (2008) above n 25, 2–3.

331 Byrne (2008) above n 36, 4.

332 Wodak (2003) above n 246.

333 County Court of Victoria, *Practice Note PNCI 5—2007 Operation and Management of the Business List, Commercial and Miscellaneous Divisions (Melbourne Registry)* (2007) <[www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/\\$file/PNCI%205-2007%20Business%20List,%20Commercial%20&%20Miscellaneous%20Divisions%20\(Melbourne%20Registry\).pdf](http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/PNCI%205-2007%20Business%20List,%20Commercial%20&%20Miscellaneous%20Divisions%20(Melbourne%20Registry).pdf)> at 26 February 2008; and County Court of Victoria, *Practice Note PNCI 4—2007* above n 242.

334 County Court of Victoria, *Practice Note PNCI 5—2007* above n 242; and *Practice Note PNCI 4—2007* above n 242 [37]–[39].

335 Grave and Mould (2007) above n 193, 59.

336 Federal Court, *Notice to Practitioners—Directions for the Fast Track List* (2007) above n 189, [6.1].

337 Grave and Mould (2007) above n 193, 59.

338 Federal Court, *Notice to Practitioners—Directions for the Fast Track List* (2007) above n 189.

339 Grave and Mould (2007) above n 193, 59.

340 Ibid.

341 Family Court of Australia, *Case Management Directions* (2004) 13 <www.familycourt.gov.au/presence/resources/file/eb00004e27a3253/cmd01.pdf> at 18 February 2008.



The case assessment conference provides an opportunity for the parties to reach an agreement, with the help of the registrar and/or dispute resolution practitioner. If the parties cannot agree, the court will assess the main issues and facts of the case and, where appropriate, recommend other services that might help resolve the dispute (for example, further family dispute resolution or progression to a hearing).³⁴²

A procedural hearing is held either straight after the case assessment conference or later in the day. A registrar conducts the procedural hearing, with a family consultant usually involved if there are children's issues. At the procedural hearing, the following may happen:

- any agreement reached during the case assessment conference may be made into legally binding orders of the court, and/or
- orders are made setting out the next step and what must be done to prepare for this.³⁴³

Queensland

Under the *Personal Injuries Proceedings Act 2002*, compulsory conferences are a prerequisite to the commencement of legal proceedings, although the requirement may be dispensed with 'for good reason' by the court or by agreement of the parties.³⁴⁴ The Act provides little guidance on the process to be followed at conferences.

The Act provides for each party to be informed of the cases that they must meet by requiring them to disclose, at least seven days prior to the conference, any information that is required to be disclosed by the Act.³⁴⁵ At this time also, the parties are required to certify that they are ready for the conference, and failing settlement, any litigation.³⁴⁶ Attendance at the conference is compulsory and 'active participation' by each party is required.³⁴⁷ However, parties may be represented by persons with authority to settle on their behalf. Although the Act provides no other guidance on the conference, it is clear that the process itself and any settlement is to be consensual.

As noted in Chapter 4 with reference to court-conducted mediation:

- Conference hearings are held in the AAT, which are conducted by registrars.
- In the Native Title Tribunal, members conduct case conference hearings.³⁴⁸

England and Wales

Case management conferences are conducted in various types of civil cases in England and Wales.

8.4 RATIONALE FOR THE RECOMMENDATION

Many of the arguments for and against court-conducted mediation are relevant to judicially managed case conferences. In some instances the parties or their legal representatives may agree to meet and confer in relation to the conduct of the case and possible settlement. However, this process is likely to be more effective if an independent third party is present. Moreover, judicial officers, with their added authority, may be more influential in such processes than other dispute resolution practitioners such as mediators.

The proposal for greater use of judicially managed case conferences gives rise to some obvious problems. First, there are resource implications if such conferences require more judicial officer time than the current customary methods for giving directions for the conduct of proceedings. Second, judicial officers may require additional training. Third, given that some parts of the conference may be conducted on a 'without prejudice' basis, it will be necessary to use judicial officers other than those who may preside at the ultimate trial of the matter. Fourth, in this as in other areas, it is important to ensure that cases are not over managed. The introduction of further procedural steps may add to the costs borne by the parties.

Despite these problem areas there appears to be considerable support for the greater use of case conferences. For example, the Law Council of Australia (LCA) endorsed case conferences in a recent report. Relevantly, the LCA recommended that:

- 3.2 *The [case management conference] should be conducted by a judge or registrar familiar with the file, in as informal a manner as possible.*³⁴⁹
- 3.3 *The Court should require the lead counsel retained on behalf of the parties to appear at the conference and be sufficiently familiar with the matter to be able to identify the basis upon which each of the issues will be run by that party at trial.*
- 3.4 *The conference should aim to identify the real issues in the case; the scope of discovery;*

*the way in which evidence is to be adduced at trial; and determine the sequence of interlocutory steps.*³⁵⁰

A study was undertaken in the UK which assessed the impact of the Woolf case management reforms in the Multi-Track and Fast-Track Lists of the District Court.³⁵¹ According to the report: 'Case management conferences represent the practical and philosophical expression of court control in the case managed track.'³⁵² A benefit of case management conferences was described by a circuit judge in the report as follows:

*Its main impact has been upon ensuring that cases reach court ready for trial and within a reasonable time.*³⁵³

According to the report, 'case management conferences are one of the major successes of the CPR'.³⁵⁴ It identified that 'case management under the CPR can be directive but in many respects it is employed subtly'.³⁵⁵ For example, 'in many cases case management conferences had been preceded by discussions between the parties and the filing at court of proposed agreed directions. Whilst this was not unknown prior to the CPR, the CPR has encouraged this practice.'³⁵⁶

The report also found that:

When case management conferences are attended by representatives, these are normally the person in charge of the file ... counsel were quite often instructed [which was useful]. The overwhelming view of case managing judges was that the vast majority of representatives, whether solicitor or counsel, attended case management conferences well prepared, appropriately instructed and with sufficient authority to constructively engage with the case managing judge ...

*This represents a gratifying advance from the pre-CPR position when a consistent complaint was that representatives at directions hearings were often inadequately instructed or too junior to make decisions.*³⁵⁷

Submissions

Submissions in response to the Consultation Paper

There was considerable support for case management conferences in the submissions. The Magistrates' Court considered that:

*Case management conferences must be conducted by someone who has extensive experience in litigation if they are to avoid being just another hurdle to be negotiated prior to the hearing of the proceeding. He or she must be able to ensure that the issues between the parties are identified with precision and that proper particulars are given so as to avoid surprise. In practice, those matters are not easy and require skill, born of experience, to tease them out. The judicial officer must be able to look at the proceeding and see what is superfluous and what is missing. This process would determine the nature of discovery between the parties.*³⁵⁸

In a detailed submission, the Victorian Bar expressed a similar view. The Bar considered that not all judicial officers were suited to 'managerial judging' (as different skills are involved). However, it suggested that:

*If additional judges could be appointed, it would be desirable for the case management conference to be undertaken by a Judge of the Court ... Absent the appointment of additional Judges, the Bar recognizes the invaluable assistance that Masters can provide to the Court in this area.*³⁵⁹

The Bar identified some of the benefits of case management conferences:

*The early involvement, direction and supervision of the litigation process by the Court is generally recognised as being highly desirable ... well-directed case management will be instrumental in reducing overall delay and costs in the civil justice system in Victoria.*³⁶⁰

The Bar also suggested that either at, or shortly after, the first directions hearing a case management conference should be held.³⁶¹ It was proposed that the objectives of that conference should be, inter alia, to:

342 Ibid.

343 Ibid.

344 *Personal Injuries Proceedings Act 2002* (Qld) s 36(4) and (5). This is also discussed in Chapter 2.

345 *Personal Injuries Proceedings Act 2002* (Qld) s 37(1).

346 *Personal Injuries Proceedings Act 2002* (Qld) s 37(1), (2).

347 *Personal Injuries Proceedings Act 2002* (Qld) s 38(6).

348 Tania Sourdin, 'Legislative Referral to Alternative Dispute Resolution Processes' (2001) 12 *Australasian Dispute Resolution Journal* 180, 192.

349 Federal Court Liaison Committee, Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006) 5 <www.lawcouncil.asn.au/sublist.html?section=FedLS&year=2006> at 27 February 2008.

350 Ibid.

351 Peysner and Seneviratne (2005) above n 252.

352 Ibid.

353 Ibid.

354 Ibid.

355 Ibid.

356 Ibid.

357 Ibid.

358 Submission CP 55 (Magistrates' Court of Victoria).

359 Submission CP 33 (Victorian Bar).

360 Submission CP 33 (Victorian Bar).

361 Federal Court Liaison Committee (2006) above n 349, 16–19.



- (a) identify the issues to be determined;
- (b) lay down the parameters for discovery and evidence;
- (c) resolve how expert evidence (if any) is to be managed;
- (d) identify whether any questions in the proceedings should be determined as a separate question ahead of the determination of other questions;
- (e) [decide] whether alternative dispute resolution or reference out under Order 50, is appropriate;
- (f) [determine] whether admissions of uncontroversial facts should be encouraged.³⁶²

In its submission, the Bar referred to the Technology and Construction Court in London (the 'TCC') and the second edition of the 'Technology and Construction Court Guide' (the 'TCC Guide'):³⁶³

*Section 5 of the TCC Guide emphasises the importance of case management and provides for a case management conference which it describes as 'the first case management conference'. All parties are expected to complete a detailed response to a questionnaire, known as the case management information sheet, sent out by the registry of the Court prior to the first case management conference.*³⁶⁴

The Bar recommended that consideration might be given to adopting a similar procedure in the Supreme and County Courts.³⁶⁵

Peter Mair suggested that there should be 'provisions for an independent reviewer (not necessarily a lawyer) to convene a meeting of the litigants with prior access to their statements, giving both the substantial basis for any allegations made and the essence of the defence to those allegations'.³⁶⁶

Submissions in response to Exposure Draft 2

There was significant support for case management conferences in the submissions. There were no submissions in opposition to the idea. In support of the proposal, Judge Wodak of the County Court supported greater involvement of judicial officers in case conferences provided that 'the resource and cost implications involved in moving from the present culture to that proposed are acknowledged and proper provision is made to allow judicial officers to take part'.³⁶⁷

Another County Court judge was similarly supportive of case conferences presided over by judges:

*The discussion of the issues in open court with the parties present facilitates the settlement process. The fact that a judge is presiding seems to be important.*³⁶⁸

A Supreme Court judge considered it was good to formalise case management conferences and as long as they were not pseudo-mediation, he supported them as an alternative to directions hearings.³⁶⁹

IMF supported the introduction and extension of all the case management activities developed in the English context, including case conferences.³⁷⁰

Steve White contended that the key advantage is that those able to settle the matter can hear what an independent person (the judge) has to say about their dispute on a preliminary basis.³⁷¹

Victoria Legal Aid expressed general support for the adoption of the practices currently used by the AAT to actively manage cases, including the use of case conferences and listing conferences as an alternative to directions, as long as Charter issues are considered.³⁷²

State Trustees, QBE Insurance, and the Supreme Court expressed general support for the proposal.³⁷³

The submissions included a number of other comments and suggestions:

- Judge Anderson and Steve White considered that if a judge was 'compromised' by participating in the case conference process, the trial could, and should, be fixed before another judge.³⁷⁴
- Judge Anderson also contended that: 'The preparation the parties do for the conference is important so that counsel are familiar with the case.'³⁷⁵
- Judge Anderson also suggested that a case monitoring officer would be useful.³⁷⁶
- Steve White submitted that it would be helpful 'to be able to use without prejudice material in these conferences which would involve the conference not being held in open Court'.³⁷⁷

- A Supreme Court judge proposed that senior people should be present at the conference—either solicitor or barrister—to sort out and narrow issues. He also noted that there were issues of confidentiality regarding what is said at a case conference when parties are trying to narrow issues or settle disputes.³⁷⁸
- One Supreme Court master felt that the court was already conducting case conferences in an informal way. It was also suggested that there is a general reluctance by parties to discuss issues at an early stage.³⁷⁹

8.5 CONCLUSIONS AND RECOMMENDATIONS

Case conferences and listing conferences should be considered as an alternative to directions hearings in all types of disputes both for the purpose of managing the proceeding and as a means for resolving disputes at an early stage of the proceeding. Having the ability to obtain orders from the court following a case conference is useful and should be considered as an option.³⁸⁰

In addition, it would be useful to be able to hold case management conferences in mediation or conference rooms at court instead of in a courtroom, if possible, to ensure the confidentiality of the process is maintained, where appropriate, and to encourage greater candour in an informal setting.

Case conferences and listing conferences by telephone may also be appropriate, to save the parties the time and expense of their lawyer attending in person but this may not be as conducive to settlement as face-to-face interaction.

The commission considers that it is up to the court to decide when a case management conference is appropriate. At any stage, the parties could request a case conference.

A case management sheet as used in the UK's Technology and Construction Court should be adopted by the courts. Adopting the information sheet would be of benefit because it assists the parties in preparing thoroughly for the conference and provides the court with a significant amount of information about the case prior to the conference. The information sheet would also be useful for the court's own data collection purposes.

9. EARLIER AND MORE DETERMINATE TRIAL DATES

9.1 THE PROBLEM

This review was prompted in part by widespread concern about the costs and delays associated with litigation. The Bar contended in its submission that delay itself can lead to significantly higher costs of litigation as the additional time allows parties to become involved in protracted interlocutory disputes.³⁸¹ As Chief Justice Gleeson observed in his State of the Australian Judicature Address:

Litigation is a perfect example of Parkinson's law: work expands to fill the available time.

At present, particularly in the higher courts, there are significant delays before trial dates are fixed. Moreover, in many cases, trials do not proceed on the dates fixed. There may be many reasons for this, including the unavailability of a judge to hear the matter.

The commission considers that setting trial dates early is one method by which costs and delay may be better managed. Earlier and more determinate trial dates are obviously in the interests of all participants in the civil justice process. It is, however, appreciated that there are many logistical and resource issues that need to be taken into account in fixing trial dates. These difficulties are compounded by the fact that the court does not have control over many of the relevant variables. To a large extent, fixing earlier and more determinate trial dates will be more feasible if a number of the other recommendations in the present report are implemented.

In the submissions there was significant support for the early setting of trial dates.

9.2 POSITION IN VICTORIA

Different courts have different strategies in this regard. The Supreme Court recently decided that in cases that are not managed, trial dates will be set after mediation and after witness statements and court books have been filed with the court.³⁸²

- 362 Submission CP 33 (Victorian Bar).
- 363 Effective 3 October 2005, available at <www.hmcourts-service.gov.au/docs/tcc_guide.htm/section5> at 1 July 2007.
- 364 Submission CP 33 (Victorian Bar). The case management information sheet is Appendix A to the Technology and Construction Court Guide.
- 365 Submission CP 33 (Victorian Bar).
- 366 Submission CP 10 (Peter Mair).
- 367 Submission ED2 5 (Judge Wodak).
- 368 Submission ED2 4 (Judge Graham Anderson).
- 369 Consultation with the Supreme Court of Victoria (9 October 2007).
- 370 Submission ED1 8 (IMF (Australia) Ltd).
- 371 Submission ED2 3 (Steve White).
- 372 Submission ED2 10 (Victoria Legal Aid).
- 373 Submissions ED2 7 (State Trustees); ED2 17 (QBE Insurance Group); ED2 2 (Confidential submission, permission to quote granted 17 January 2008); consultation with the Supreme Court of Victoria (9 October 2007).
- 374 Submissions ED2 4 (Judge Graham Anderson) and ED2 3 (Steve White).
- 375 Submission ED2 4 (Judge Graham Anderson).
- 376 Submission ED2 4 (Judge Graham Anderson).
- 377 Submission ED2 3 (Steve White).
- 378 Consultation with the Supreme Court of Victoria (9 October 2007).
- 379 Consultation with the Supreme Court of Victoria (9 October 2007).
- 380 Similar to what occurs at and following a pre-hearing conference in the Magistrates' Court.
- 381 Submission CP 33 (Victorian Bar).
- 382 Supreme Court of Victoria, *Practice Note 4 of 2006* (2006) [5] <www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Practice+and+Procedure/Practice+Notes+%26+Statements/SUPREME++Practice+Note+No.4+of+2006+%28PDF%29> at 15 February 2008.



The majority of cases in the Commercial List

*are offered a fixed listing within three to four months (unless the parties desired otherwise), and the opportunity to be heard even earlier where the parties agreed to prepare in advance and to be placed on a 'standby listing'. Parties to cases on 'standby' are warned their case will be listed on a specified day if time becomes available due to the settlement or adjournment of other cases.*³⁸³

The County Court sets trial dates early, as does the Magistrates' Court.

9.3 OTHER MODELS

Federal Court Fast Track List

The recently introduced Federal Court Fast Track List aims to offer trial dates within six months from the commencement of the proceeding. At the initial directions hearing, known as a scheduling conference,

*the presiding judge will set a trial date for the case which, except in urgent cases, will be between two and five months from the date of the Scheduling Conference, depending on the relative complexity of the case. Urgent cases will be heard on shorter notice.*³⁸⁴

The scheduling conference occurs not less than 45 days from the date the application was filed.³⁸⁵

Ontario

A report by The Hon. Coulter A Osborne, QC to the Ontario Attorney-General ('the Ontario report') in November 2007 recommended that the Office of the Chief Justice of the Superior Court and the Regional Senior Justices of each region consider options to:

- (a) *Eliminate the requirement of personal attendance at Assignment Court and replace it with a new practice for setting trial dates (e.g., vest trial coordinators with the authority to set trial dates; use of an administrative form, jointly submitted by the parties, to permit trial dates to be set; use of teleconference hearings for Assignment Court; use of the Internet for fixing tentative trial dates).*
- (b) *Direct and enforce time limits on trials, to ensure greater certainty in trial duration and improved trial scheduling.*
- (c) *Adopt and consistently enforce a policy with respect to adjournments.*
- (d) *Establish outside time standards within which trials ought to be heard, to be considered when scheduling trials and to provide a benchmark for litigants to know when a trial date is likely to be available upon the case being set down for trial.*³⁸⁶

9.4 RATIONALE FOR THE RECOMMENDATION

Various studies over the past few decades have found that the early setting of trial dates leads to the early settlement of cases, which reduces delay. For example, an inquiry by a Delay Reduction Committee comprising representatives from the NSW Supreme Court, the profession and the Attorney-General's Department revealed problems of delay in the Common Law Division of the Court. The committee recognised that firm trial dates lead to more effective preparation and settlement.³⁸⁷

Justice Marks, writing about the Victorian Supreme Court's Commercial List in 1992, identified that the 'best lever to settlement' is the fixture of a firm trial date.³⁸⁸

United States studies have produced similar results. The results from a Rand study were that an early trial date tends to save money and time.³⁸⁹ A National Center for State Courts (NCSC) study in the United States found that when firm trial dates were set there was a greater than normal number of settlements just before trial, as a result of increased activity by attorneys.³⁹⁰ Another study found that the single most effective stimulant to settlement was the scheduling of a firm and unavoidable trial date.³⁹¹

As discussed in Chapter 1, Professor Scott identified 10 'concerns' which he contends need to be taken into consideration in connection with the judicial management of litigation. As he notes, proactive judicial case management imposes discipline on the courts and the courts must have the capacity to respond to the demands for their services in accordance with the standards and goals of the case management system. One important element is a firm date for hearings.³⁹²

The commission considers that further consideration should be given to means by which trial dates could be set earlier than at present. It is recognised that there are many ‘variables’ over which the court does not have control and we are mindful that the overwhelming majority of cases do not proceed to trial. It is also appreciated that the courts are very aware of these difficulties and have taken and are continuing to take various initiatives to achieve earlier and more determinate trial dates.³⁹³

The commission understands that there is a tension between the desirability of setting early trial dates and the necessity to take account of the largely unpredictable factors that influence the availability of judicial officers to hear matters on a designated date. In the higher courts in Victoria this problem is compounded by the fact that judicial officers deal with both civil and criminal cases. In recent years, the increased demands of long criminal trials appear to have had a significant impact on the judicial resources available to deal with civil matters.

To some extent these difficulties would be reduced if the length of civil trials is reduced and more determinate. Again, this is an area where a number of the recommendations in the present report, if implemented, may assist.

One of the practice notes in the Supreme Court provides that ‘at the conclusion of the time estimated for the trial, the trial judge will stop the trial and make arrangements for the resumption of the trial at a later date’.³⁹⁴ The commission supports this approach as it endeavours to make the parties responsible for trial estimates and it helps ensure that judges are available to hear trials on the date set in circumstances where the immediately preceding trial is likely to exceed the time initially allocated.

The commission also notes that although the County Court sets dates early, it still encounters problems. Once the trial date is set proceedings need careful supervision to ensure that they are ready for trial. It is sensible to have the trial commence as soon as possible after the procedural steps have been completed. However, there may be problems with compliance where there has not been supervision of the interlocutory steps before trial.

Submissions

Submissions in response to the Consultation Paper

There was significant support in the submission in response to the Consultation Paper for setting earlier trial dates. For example, the Law Institute ‘believes that matters should have trial dates set from the outset, which would encourage greater adherence to timetables for the completion of interlocutory steps’. In addition, the Institute noted that ‘the advantage of setting the trial date early in the process means that when parties attend mediation, they already know when the trial will be and, therefore, prospects of settlement are maximised’.³⁹⁵

Slater & Gordon and Hollows Lawyers suggested that the best way to facilitate the early settlement of claims is to fix a trial date at the earliest possible stage. The Building Practitioner’s Society also supported the early allocation of a trial date.³⁹⁶

Corrs Chambers Westgarth submitted that to improve the efficiency of the case flow management of matters, particularly in the Supreme Court, it is important to fix a trial date early in the proceeding, or at least as early as circumstances may permit. It further contended that:

*Currently there is great uncertainty and considerable delay in obtaining a date for trial and that when the dates are eventually fixed they extend into periods that often sit uncomfortably with clients’ expectations. Such delay and uncertainty could be removed by fixing a trial date early in the proceeding and giving the parties sufficient time to prepare. Once fixed, a trial date should not be vacated by the court without extraordinary grounds or irreparable prejudice.*³⁹⁷

The Supreme Court noted in its submission that it has decided that in certain cases trial dates will be set after mediation and after witness statements and court books have been filed with the court.³⁹⁸

State Trustees commented that:

*It is often the case that even though parties may have prepared for trial and engaged counsel, they are unable to have the matter heard by a judge on the scheduled day due to a variety of reasons including the unavailability of judges or another matter having exceeded its allocated court hearing days. As a consequence, litigants unnecessarily incur substantial costs. Reform of the court’s listing or case management practices may alleviate this problem.*³⁹⁹

383 Supreme Court of Victoria, *Annual Report 04/05* (2005) 21.

384 Federal Court, *Notice to Practitioners—Directions for the Fast Track List* (2007) above n 189, [6.6].

385 *Ibid.*

386 Osborne (2007) above n 170, xviii-xix.

387 James R T Wood, ‘Case Management in the Common Law Division of the Supreme Court of New South Wales’ (1991) 1 *Journal of Judicial Administration* 71–87.

388 This is something Marks J believes can be achieved only in a managed system: Kenneth Marks, ‘The Interventionist Court and Procedure’ (1992) 18 *Monash University Law Review* 1, 10.

389 James Kakalik et al, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (2000) xxiii.

390 Larry Sipes et al, *Managing to Reduce Delay* (1980) National Center for State Courts (USA).

391 *Ibid.*

392 Ian Scott, ‘Caseflow Management in the Trial Court’ in Adrian Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure: Essays on ‘Access to Justice’* (1995) 1, 17–29.

393 As identified above, the Supreme Court decided that in certain cases, trial dates should be set after mediation and after witness statements and court books have been filed with the Court: Supreme Court, Practice Note 4 of 2006 (2006) above n 382.

394 *Ibid.* [9].

395 Submission CP 18 (Law Institute of Victoria).

396 Submissions CP 20 (Slater & Gordon); CP 52 (Hollows Lawyers).

397 Confidential submission CP 42 (Corrs Chambers Westgarth, permission to quote granted 14 January 2008).

398 Supreme Court, Practice Note 4 of 2006 (2006) above n 382. The procedures set out in the Practice Note apply to all cases other than: a. cases in those lists where the managing judge is also the trial judge; b. cases which have been set down early by or at the direction of the managing judge; and c. cases which are in the nature of appeals or reviews.

399 Submission CP 23 (State Trustees Ltd).



WorkCover expressed the view that:

*A lack of certainty of court hearing dates can cause problems with witness availability or issues of 'stale' evidence, particularly in a medico-legal setting ... the closer a date can be given once readiness for trial is confirmed the better with regard to both delivery of timely outcomes and cost effectiveness.*⁴⁰⁰

The Magistrates' Court noted that it has considered the certificate of readiness process. However, it was felt that the present arrangement of rule-imposed time limits for the taking of steps together with the fixing for trial following the completion of a pre-hearing conference or mediation was considered preferable. It enabled the court to exert greater control over the proceeding by fixing the times for steps and fixing the time of the conference or mediation.⁴⁰¹

Submissions in response to Exposure Draft 2

A number of submissions expressed support for the draft recommendation incorporated in the second exposure draft. Clayton Utz contended that earlier and more determinate trial dates were of 'critical importance'.⁴⁰² Another submission discussed experiences in the Supreme Court:

*At our abortive trial date, the Master said that the matter was likely to settle in a day or two not the 8-10 days allocated and she can't have Judges sitting around doing nothing. We were bitterly disappointed at this attitude plus that the Court couldn't organize itself one year in advance for our trial, knowing our dire circumstances, and then hitting us with another 9 month wait.*⁴⁰³

Maurice Blackburn submitted that:

*It is the prospect of trial and the certainty of getting started on or near that trial date that promotes resolution, which in turn clears court lists. If an insurer considers that a case has reasonable prospects of not getting a start, either because of a clogged court list or lack of judges, there is a good chance that less of an effort will be made by the insurer to resolve the case.*⁴⁰⁴

Judge Wodak contended that early trial dates should be provided, as is the case in his list. However, as he noted, there are many impediments to the successful maintenance of trial dates allocated. In his view, some of these difficulties may be overcome by judicial management, but not always.⁴⁰⁵

Justice Whelan suggested that practitioners may want early trial dates but that they come at a cost to the court where there is large-scale vacation of trial dates. He stated that 'there is no half-way house'.⁴⁰⁶ Master Kings of the Supreme Court said that the practice at the moment is to give late trial dates 'because so many cases settle'.⁴⁰⁷

9.5 RECOMMENDATIONS AND CONCLUSIONS

Despite the concerns raised, the commission considers that further consideration should be given to means by which trial dates could be set earlier than at present to help bring about earlier settlements and reduce delay. We are persuaded that it would be better to set trial dates at the earliest possible opportunity to ensure that there is some certainty in the proceeding for the parties and lawyers. Setting trial dates early places pressure on the parties and lawyers to prepare for trial. In doing so, parties' and lawyers' minds are focused on the proceeding, including on the costs of the hearing and potential adverse costs orders. This pressure can lead to parties settling before trial. Also, anecdotally, legal practitioners prepare court books close to trial. Without a set trial date, court books may not be a priority for legal practitioners, which could cause delay.

Once a trial date is set, it is obviously important that the courts should take steps to ensure that there are sufficient judicial resources available to conduct the trial on the designated date(s). It is at this point that problems arise, given the largely unpredictable factors that influence the availability of judges to hear matters on any date. No doubt the expansion of the docket system would help ensure that the trial date is not vacated if the designated docket judge fixed matters for trial on dates when he or she is available.

The commission is not in possession of reliable data on the frequency with which trial dates are vacated because of the unavailability of judges to hear the matter. However, in the course of consultations, this was said to be a matter of significant concern. The costs incurred, the delays

experienced and the inconvenience and frustration caused when parties prepare for a trial and are informed on the day of the trial that there are no judges available to hear the trial are significant. The consequence can be that the parties receive a trial date many months after the first trial date.

Setting trial dates early and ensuring judges are available on the day will ensure that proceedings move through the court process quickly. Early trial dates also place pressure on the parties to settle early, which should reduce delay. There are various means by which judicial resources may be re-deployed where cases settle on or before the date fixed for trial. The approach in the Commercial List could be considered.⁴⁰⁸

In part, earlier trial dates may be more achievable if the periods allocated for the hearing of trials were fixed and if parties were required to adhere to stricter time limits in conducting the trial. Many parties and lawyers would no doubt more readily accept such limitations on the conduct of trials if they were able to obtain earlier and more determinate (albeit shorter) trial dates. Such greater 'certainty' would also be advantageous to the legal profession (and witnesses).

The goal of earlier and more determinate trial dates is likely to be more achievable if a number of the other recommendations in this report are implemented. For example, the proposals in respect of pre-action protocols and ADR are likely to substantially reduce the number of disputes resulting in litigation and proceeding to trial. The proposed overriding obligations may facilitate a narrowing of the issues and a change from the combative 'adversarial' conduct which is characteristic of many proceedings. The proposals in relation to case management, expert witnesses and discovery are also likely to have a significant impact on the duration and conduct of trials. The expansion of the docket system may help ensure that the designated docket judge is available to hear the matter on the date which he or she fixes for trial. The commission appreciates that to simply propose earlier and more determinate trial dates in the absence of other procedural and systemic changes would be unrealistic (at least in the absence of an increase in judicial resources).

10 EARLIER DETERMINATION OF DISPUTES

10.1 THE PROBLEM

Claims or defences which are without merit create obvious problems for the parties and the administration of justice. Claims without merit subject defendants to the inconvenience and expense of litigation. Costs may not be recoverable from claimants of limited means. Defendants may choose to pay an amount to settle the claim in order to avoid the expense of litigation. Claimants themselves experience the trauma and cost of losing. Lawyers acting for claimants on a no win, no fee basis will be unremunerated and not recover the expenses advanced to support the litigation. Where lawyers acting for claimants are being paid regardless of the outcome they do not have any financial incentive to resolve the claim expeditiously or economically.

Defences without merit subject claimants to the cost and inconvenience of litigation. Even if successful, claimants may not recover all of the costs incurred by them. The defence of the claim may induce claimants with meritorious claims to give up or to settle for less than the value of the claim because of a financial inability to pursue the matter or fear of an adverse costs order. Lawyers acting on a no win, no fee basis may advise or pressure clients to settle for less than the claim is worth in circumstances where they have an understandable commercial interest in being paid or in recovering money outlaid to finance the litigation. Where lawyers acting for defendants or insurers are being paid regardless of the outcome they do not have any financial incentive to resolve the case expeditiously or economically.

Apart from the cost and inconvenience to the parties, the pursuit of unmeritorious claims or defences has adverse consequences for the administration of justice. Judicial and other publicly funded resources are expended and diverted from dealing with other cases. Witnesses may be required to expend considerable time and effort, which may not be adequately remunerated. Jurors may be compelled to take time off work or be diverted from other activities. Insofar as legal costs may be tax deductible, there will be a loss of tax revenue. If legal aid is granted, this will also incur public expense.

It is clearly in the interests of the parties to disputes, and in the public interest, that there be appropriate procedural protections designed to ensure that civil claims or defences are only pursued where they have sufficient merit.

400 Submission CP 48 (Victorian WorkCover Authority).

401 Submission CP 55 (Magistrates' Court of Victoria).

402 Submission ED1 18 (Clayton Utz).

403 Confidential submission ED2 2 (permission to quote granted 17 January 2008).

404 Submission ED2 19 (Maurice Blackburn).

405 Submission ED2 5 (Judge Wodak).

406 Consultation with the Supreme Court of Victoria (9 October 2007).

407 Consultation with the Supreme Court of Victoria (9 October 2007).

408 See the discussion above regarding the 'standby' procedure in the Commercial list.



Where unmeritorious claims or defences are commenced and pursued existing procedural rules and powers of the court provide a variety of means for dismissal, judgment or a stay. Procedures for summary judgment, summary stay or dismissal of claims, the striking out of pleadings, security for costs and other powers conferred on the court may be utilised to prevent unmeritorious claims or defences from being litigated. These are often augmented by the power to impose costs sanctions on the parties and lawyers. The focus of this part of the chapter is on summary disposal.

10.2 SUMMARY DISPOSAL

Procedure

A summary judgment application is an application, usually brought by a plaintiff, for judgment to be entered 'summarily' (that is, without trial) on the grounds that there is no real defence to the claim, and therefore there is no triable question of fact or law.⁴⁰⁹

In some jurisdictions it is also possible for summary judgment to be obtained by a defendant against a plaintiff.

10.3 POSITION IN VICTORIA

In Victoria, a court's power to order summary judgment is found in the rules of court.⁴¹⁰ Rules in the same terms apply in the Supreme Court and the County Court. There are some variations between the relevant rules in the Supreme Court and in the Magistrates' Court.

Supreme Court and County Court

In the Supreme Court summary judgment may be obtained against either a defendant or a plaintiff. However, this is not immediately obvious as different rules apply depending on which party makes application. In respect of an application by the plaintiff rule 22.02 of the *Supreme Court (General Civil Procedure) Rules 2005* relevantly provides:

- (1) *Where the defendant has filed an appearance, the plaintiff may at any time apply to the Court for judgment against that defendant on the ground that the defendant has no defence to the whole or part of a claim included in the writ or statement of claim, or no defence except as to the amount of a claim.*
- (2) *Paragraph (1) shall not apply to a claim for libel, slander, malicious prosecution, false imprisonment or seduction or to a claim based on an allegation of fraud.*

As can be seen from subsection (2), certain categories of cases are specifically excluded from the procedure. The rationale for the exclusion is that such cases raise serious questions (for example, fraud) which are more appropriately dealt with at trial.

In respect of an application by the defendant rule 23.03 provides:

On application by a defendant who has filed an appearance, the Court at any time may give judgment for that defendant against the plaintiff if the defendant has a good defence on the merits.

That is, on a summary judgment application brought by a defendant, he or she must show by evidence that he or she has a complete defence on the merits to the claim brought by the plaintiff.

Magistrates' Court

In the Magistrates' Court the procedure is only available for a plaintiff to obtain judgment against a defendant.⁴¹¹ There is no corresponding procedure for application by a defendant. The Magistrates' Court procedure applies only where the claim is for a debt or liquidated demand.

On a summary judgment application there are a number of options available to the court. In particular, it may:

- give summary judgment;
- give unconditional leave to defend (that is, dismiss the application); or
- give conditional leave to defend.

Conditional leave to defend involves the defendant being given leave to defend provided he or she pays money into court.⁴¹² It is an effective way of screening out unmeritorious claims. That is, a defendant with a dubious defence will have to provide security as a condition of obtaining leave to defend an amount of money. In the event that the defence is unsuccessful, there will be a ready pool of funds that the plaintiff can execute against.

The current test

As a general principle, defendants who show that they have reasonable grounds for setting up a bona fide defence ought to be given unconditional leave to defend. In the Supreme and County Courts the court may on application by the plaintiff give judgment 'unless the defendant satisfies the Court that in respect of that claim ... a question ought to be tried or that there ought for some other reason be a trial of that claim'.⁴¹³ The rule in the Magistrates' Court is in similar terms.⁴¹⁴

Where a defendant can establish that he or she has a good defence on the merits the Supreme and County Court may give summary judgment for the defendant against the plaintiff.⁴¹⁵ In the Magistrates' Court a defendant may obtain summary judgment against the plaintiff on a counter claim.

Apart from the specific rules governing summary judgment for the plaintiff or the summary stay, dismissal or striking out of claims or defences, courts have inherent or implied jurisdiction to prevent the abuse of their processes.

The various formulations of the summary powers to terminate actions were summarised by Chief Justice Barwick in *General Steel Industries Inc v Commissioner for Railways (NSW)* as follows:

*The test to be applied has been variously expressed: 'so obviously untenable that it cannot possible succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them (the pleadings) to stand would be useless expense'.*⁴¹⁶

The alternative basis on which a defendant may be given unconditional leave to defend is that 'there ought for some other reason be a trial of [the] claim'.⁴¹⁷ The burden is on the defendant to establish this. Thus where there are circumstances which require the matter to be closely investigated—for example, by allowing defendants to avail themselves of the compulsory processes of the court (such as discovery, interrogation, subpoena), the defendants may be given unconditional leave to defend notwithstanding that they are not able to pinpoint any precise question which ought to be tried.⁴¹⁸

The High Court has held that the summary judgment procedure should be reserved for 'actions that are absolutely hopeless'.⁴¹⁹ The court has also stated that:

*The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear there is no real question to be tried.*⁴²⁰

Consistently with this approach, the Supreme Court submitted that the 'classic approach is that summary judgment should be awarded sparingly'.⁴²¹

Numbers of applications

In its submission in response to the Consultation Paper, the Supreme Court noted that:

*No statistics are kept of applications for summary judgment, but the collective experience of the Masters is that applications by plaintiffs are frequent, in the order of 15–20 per week, and principally in relation to applications for possession of land and recovery of capital and interest by mortgagees.*⁴²²

The court undertook a small sample study of summary judgment applications in the course of preparing its submission in response to the Consultation Paper. It reported:

*The study found that, of applications for summary judgement listed in March 2004, approximately half were successful before Masters. All of the remaining matters settled before trial. A larger study would be necessary to establish if this settlement pattern was influenced by the summary judgment application.*⁴²³

409 See, eg, *Fancourt v Mercantile Credits* (1983) 154 CLR 87, 99.

410 *Supreme Court (General Civil Procedure) Rules 2005* O 22 and r 23.03; *Magistrates' Court Civil Procedure Rules 1999* rr 10.07–10.18.

411 *Magistrates' Court Civil Procedure Rules 1999* rr 10.07–10.18.

412 *Yorke (MV) Motors v Edwards* [1982] 1 All ER 1024; 1 WLR 444, 328.

413 *Supreme Court (General Civil Procedure) Rules 2005* r 22.06(1)(b).

414 *Magistrates' Court Civil Procedure Rules 1999* r 10.13(1)(b).

415 *Supreme Court (General Civil Procedure) Rules 2005* r 23.03.

416 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129 (Barwick CJ).

417 *Supreme Court (General Civil Procedure) Rules 2005* r 22.06(1)(b); *Magistrates' Court Civil Procedure Rules 1999* r 10.13(1)(b).

418 See, eg, *Hills v Sklivas* [1995] 1 VR 599, 606–607 (Tadgell J), 607 (Ormiston J), 611 (Batt J); and *Miles v Bull* [1969] 1 QB 258; *Chasfield v Taranto* (Unreported, Supreme Court of Victoria, Murphy J, 9 June 1988) reproduced in Williams (2008) above n 114, [22.06.30].

419 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 90–91 (Dixon J).

420 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 89; 48 ALR 1, 2.

421 Submission CP 58 (Supreme Court of Victoria).

422 Submission CP 58 (Supreme Court of Victoria).

423 Submission CP 58 (Supreme Court of Victoria).



Some of the particular questions which the commission considered were:

- whether the classic test should be liberalised. For instance, should there be a move away from a requirement that ‘there is no real question to be tried’?
- whether there should be an obligation on the court or judicial discretion to initiate the summary judgment procedure where early disposal of a proceeding appears desirable
- whether there should be a restatement and simplification of the rule so that it is made clear that summary judgment may be obtained by both plaintiffs and defendants. In particular, in the Magistrates’ Court should the rule be extended so as to allow a defendant to apply for summary dismissal of the proceeding?
- whether the limitations on categories of cases that are excluded from the procedure should be removed
- whether there should be a residual discretion to allow a matter to proceed to trial even if the applicable test for summary disposal is satisfied.

10.4 OTHER MODELS

England and Wales

In England and Wales, the *Civil Procedure Rules 1998* impose an obligation on the court to further the overriding objective by active case management.⁴²⁴ Rule 1.4 contains a list of 12 matters which ‘active case management includes’. Among these 12 matters is ‘deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others’ (rule 1.4(2)(c)).

The rules provide that the court’s powers of summary disposal of issues which do not need full investigation and trial include:

- (a) under rule 3.4, striking out a statement of case, or part of a statement of case (see further below),⁴²⁵ and
- (b) under Part 24, giving summary judgment where a claimant or a defendant has no reasonable prospect of success.

Rule 24.2 sets out the grounds for summary judgment. It provides:

The court may give summary judgment against a claimant or defendant on the whole of the claim or on a particular issue if:

- (a) *it considers that—*
 - (i) *the claimant has no real prospect of succeeding on the claim or issue; or*
 - (ii) *the defendant has no real prospect of successfully defending the claim or issue;*

and
- (b) *there is no other compelling reason why the case or issue should be disposed of at a trial.*

According to the relevant Ministry of Justice (UK) practice direction, an application for summary judgment under rule 24.2 may be based on:

- (1) *a point of law (including a question of construction of a document),*
- (2) *the evidence which can reasonably be expected to be available at trial or the lack of it, or*
- (3) *a combination of these.*⁴²⁶

This approach to summary judgment reflects the procedure recommended by the Woolf Report, namely to replace a number of existing separate procedures, such as summary judgment and summary determination on a point of law, with a single procedure.

The new procedure incorporates a liberalised test, so that the party making the application has to show, in respect of the defendant, that he or she has no real prospect of successfully defending the claim, or in respect of a plaintiff, that he or she has no real prospect of succeeding on the claim. The party resisting summary disposition has to show more than that its case is merely arguable. Instead, the party has to show that it has a ‘realistic, as opposed to fanciful, prospect of success’.⁴²⁷ Where a case is ‘entirely without substance’ or completely contradicted by documentary evidence, it is ‘fanciful’.⁴²⁸ In exceptional circumstances the court can allow a case or an issue to continue although it does not satisfy this test, namely, if it is considered that there is a public interest in the matter being tried.⁴²⁹

It is also envisaged that the application for summary judgment may be brought by any party or of the court's own initiative.⁴³⁰ It may also be brought at any stage of the proceedings.⁴³¹

In their discussion of the Victorian civil justice system, the authors of *Going to Court* were in favour of the English approach to the summary judgment rules:

*We suggest that the current Victorian approach is too cautious and that Victoria would do well to consider adopting the test recommended by Lord Woolf in the United Kingdom. That would give the courts a stronger basis for sorting out at an earlier stage than usual the unmeritorious cases which would otherwise clog up the case processing system.*⁴³²

However, the test applied in England and Wales has recently been the subject of considerable controversy in light of two large commercial cases, including a 'mega case' against the Bank of England (the 'BCCI case'). That case was ultimately discontinued after years of pre-trial procedures and months of trial during which time enormous costs had been incurred. In the BCCI case an application to strike out the claim had been successful before the Commercial Court judge who heard the application. That decision was upheld in the Court of Appeal but overturned in the House of Lords (by majority).

The case proceeded to trial but was eventually aborted after a lengthy hearing. This led to considerable public and professional controversy, including as to the adequacy of the legal standard relating to striking out and summary judgment. This led to a symposium in October 2006 and in January 2007 the Commercial Court Users Committee set up a working party comprising Commercial Court judges, barristers and solicitors who practise regularly in the court and two clients with wide experience who had been involved in large cases in the court.

In December 2007 the working party produced its report and recommendations.⁴³³ The working party, after considering the present law on the test for granting summary judgment or a strike out, concluded 'without hesitation' that the test should remain as set out in the Civil Procedure Rules.⁴³⁴ However, it was proposed that the views of Lord Hobhouse⁴³⁵ (in dissent in the House of Lords in the BCCI case) should guide Commercial Court judges in their approach to applications for summary judgment or a strike out. The view of the working party was that the existing powers to consider the grant of summary judgment or to strike out a case or defence are not exercised enough in large cases. As the working party noted:

*It is in none of the litigants' interests unnecessarily to prolong proceedings that are either bound to fail or bound to succeed.*⁴³⁶

The working party also considered whether there was a need for a change in the law or procedure relating to appeals from decisions of trial judges on an application for summary judgment or to strike out a claim or defence. Although it did not recommend any change in the legal principles, two recommendations were made in respect of 'practical ways that the Court of Appeal can assist in dealing with appeals'. It was proposed that there should be a procedure for the allocation of a particular Lord Justice (preferably with a Commercial Court background) to deal with applications in the Court of Appeal and that interim appeals, particularly those concerning summary judgment and/or strike out, should be determined very expeditiously.

The working party also considered problems arising out of a submission of 'no case to answer' at the conclusion of the claimant's case.⁴³⁷

Other recommendations of the working party are discussed in relevant parts of this chapter.

Federal Court

Under the Order 20 (of the Federal Court Rules) procedure an application for summary judgment can only be brought by the applicant. The summary judgment procedure is not available for a respondent against an applicant.

The application of this rule in the Federal Court has evolved in a different direction to the procedure in Victorian courts. In a number of decisions, the Federal Court has taken a robust approach, particularly in the context of its case management regime. In *Lenjimar Pty Ltd v AGC (Advances) Ltd* it was said:

In this Court, there is just such a [case management] system. From that circumstance we extract two propositions. First, the fundamental differences in procedure render inapplicable most, if not all, of the principles evolved by the English courts in relation to their own procedures. Secondly, the existence of a case management system within this

424 *Civil Procedure Rules 1998* (UK) r 1.4.

425 Note 'statement of case' replaces 'statement of claim' under the *Civil Procedure Rules 1998* (UK).

426 Ministry of Justice (UK), *Practice Direction 24: The Summary Disposal of Claims* [1.3] <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part24.htm> at 18 February 2008.

427 *Swain v Hillman* [2001] All ER 91.

428 *Three Rivers District Council v Bank of England* [2001] 2 All ER 513, 542. The test was further considered in *Celandor Productions Ltd v Melville* [2004] EWHC 2362 (CH) [6]–[7] and in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceuticals Company 100 Ltd* [2006] EWCA Civ 661; *Merchantbridge & Co Ltd v Safron General Partner Ltd* [2005] EWCA Civ 158 cautions against summary judgment where there is a dispute about an oral agreement.

429 Woolf (1996) above n 219, 123.

430 *Ibid* 310; see also Ministry of Justice (UK), *Practice Direction 26: Case Management – Preliminary Stage: Allocation and Re-Allocation* [5.4] <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part26.htm> at 18 February 2008.

431 Woolf (1996) above n 219, 123.

432 Sallmann and Wright (2000) above n 9, 120.

433 Judiciary of England and Wales, *Report and Recommendations of the Commercial Court Long Trials Working Party* (2007) at [87]–[88].

434 CPR 24.2 and 24PD for summary judgment and CPR 3-4(2) for striking out. As the report of the working party notes: striking out a claim is not in breach of Art 6(1) of the ECHR if an essential element of the cause of action for a claim under domestic law is missing from the statement of case: *Z v United Kingdom* (2002) 34 EHRR 3. See Judiciary of England and Wales (2007) above n 433, 33 note 24.

435 *Three Rivers DC v The Governor and Company of the Bank of England* (No 3) [2003] 2 AC 1 HL at [156].

436 Judiciary of England and Wales (2007) above n 433, [88].

437 *Ibid* [93]–[97].



*Court is the backdrop against which the relevant rules must be considered and applied. That the Court follows the case management approach is well known in the legal profession.*⁴³⁸

In the subsequent case of *Caterpillar Inc & Anor v Sun Forward Pty Ltd* Justice Drummond referred to *Lenjimar* with approval:

*It follows that, from the existence within the procedures of this Court of the case management system, that it is the text of O[order]20 r1 which must govern the outcome of the present application: there is no justification for importing into the Federal Court rule all the detailed restrictions that the cases identify as applicable to the traditional summary judgment rules. But O[order] 20 is not intended to provide an alternative to trial as the ordinary method of resolving litigation in the Court: see Bell v Clare (1989) 23 FCR 274 at 280. Its function is limited to providing an expeditious means of resolving litigation where the applicant can clearly demonstrate that there is no real defence to particular claims made by it.*⁴³⁹

These cases suggest that where there is a case management system in place, the summary judgment procedure is to be applied more readily, in order to screen out unmeritorious cases.

However, even with the Federal Court's stated case management approach to summary judgment, there has been debate in different contexts about potential reform of the Federal Court Rules in relation to summary judgment, in particular, about the relaxation of the relevant test.

In *Managing Justice* the ALRC recommended that the *Federal Court of Australia Act 1976* or the Federal Court Rules be amended to allow the test for entering summary judgment against a party to be applied more flexibly and in respect of either party. The ALRC recommended a test similar to that used in England and Wales, where the court may give summary judgment if it considers that the applicant or the respondent has no real prospect of success and there is no other reason why the case should be disposed of at trial.⁴⁴⁰ A similar recommendation was made in the Federal Civil Justice System Strategy Paper.⁴⁴¹

This debate was given impetus with the growth in the volume of unmeritorious litigation in the Federal Court and the Federal Magistrates Court, particularly in migration matters. In that context, in 2005 the *Migration Litigation Reform Act 2005* was enacted. By section 7 of that Act a new section 31A was inserted in the *Federal Court of Australia Act 1976*. It provides as follows:

- (1) *The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:*
 - (a) *the first party is prosecuting the proceeding or that part of the proceeding; and*
 - (b) *the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.*
- (2) *The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:*
 - (a) *the first party is defending the proceeding or that part of the proceeding; and*
 - (b) *the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.*
- (3) *For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:*
 - (a) *hopeless; or*
 - (b) *bound to fail;*

for it to have no reasonable prospect of success.
- (4) *This section does not limit any powers that the Court has apart from this section.*

Section 31A was introduced as part of the package of reforms designed to deter unmeritorious migration proceedings, although it has general application. The provision imposes a lower requirement to dismiss an action by way of summary judgment than that imposed in *General Steel Industries Inc v Commissioner of Railways (NSW)*⁴⁴² In that case, the requirement was expressed in terms of 'manifestly groundless' or 'obviously untenable'. In contrast, the new test in section 31A

provides that a court may dispose of a matter summarily if it has no reasonable prospects of success. In this respect the test is focused on the prospect of the success of the claim or defence, rather than whether it is merely arguable. It is akin to the test in the Civil Procedure Rules in England and Wales. Although made in the context of migration litigation, a number of submissions to the Senate Legal and Constitutional Affairs Committee were apparently concerned as a matter of general principle about a shift away from the traditional common law test, which requires that a case be manifestly groundless or hopeless or bound to fail.

Ultimately, the Senate committee concluded that:

Extended powers of summary dismissal under the Bill represent a significant departure from the existing common law test. While the committee notes the comments of the ARC [Administrative Review Council] in particular that the courts would in all likelihood exercise caution in relation to the extended power, the committee expresses its serious concerns in relation to such an extension. The committee also notes evidence that the courts' existing extensive powers of summary dismissal are rarely used. Therefore, the committee concludes that the broadened powers of summary dismissal must be subject to review by Parliament after an initial period of operation.⁴⁴³

The committee recommended that to ensure that this occurs, the Bill should be amended to provide that the relevant provisions of the Bill shall cease to have effect after 18 months of operation.

Queensland

In Queensland, the *Uniform Civil Procedure Rules 1999* also allow for a procedure for summary judgment for the plaintiff and for the defendant based on a test of 'no real prospect' of defending or succeeding on the claim and where there is no need for trial of the claim or part of the claim.⁴⁴⁴

The rules in Queensland appear to have much in common with the relevant rules in England and Wales. The plaintiff can obtain summary judgment if the plaintiff can show that the defendant has no real prospect of successfully defending the claim.⁴⁴⁵ The defendant can obtain summary judgment if the defendant can show that the plaintiff has no real prospect of succeeding on the claim.⁴⁴⁶

South Australia

In South Australia, rule 232 of the *Rules of the Supreme Court 2006* provides slightly differently as follows:

- (1) *The Court may, on application by a party, give summary judgment for that party.*
- (2) *Summary judgment may only be given if the Court is satisfied that—*
 - (a) *if the applicant is a plaintiff—there is no reasonable basis for defending the applicant's claim; or*
 - (b) *if the applicant is a defendant—there is no reasonable basis for the claim against the applicant.*

New South Wales

In New South Wales, rule 13.1 of the *Uniform Civil Procedure Rules* provides a more traditional approach to summary judgment as follows:

- (1) *If, on application by the plaintiff in relation to the plaintiff's claim for relief or any part of the plaintiff's claim for relief:*
 - (a) *there is evidence of the facts on which the claim or part of the claim is based, and*
 - (b) *there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed,*

the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires.

438 *Lenjimar Pty Ltd v AGC (Advances) Ltd* (1990) 98 ALR 200, 207 (Gummow and Wilcox JJ).

439 *Caterpillar Inc & Anor v Sun Forward Pty Ltd* [1996] FCA 983 (8 November 1996).

440 ALRC (2000) above n 9, [7.212].

441 Commonwealth Attorney-General's Department, *Federal Civil Justice System Strategy Paper* (2003) 228–9.

442 (1964) 112 CLR 125

443 Legal and Constitutional Affairs Committee, Senate, *Provisions of the Migration Litigation Reform Bill 2005* (2005) 11 [3.23].

444 *Uniform Civil Procedure Rules 1999* (Qld) see r 292 and 293.

445 *Uniform Civil Procedure Rules 1999* (Qld) r 292.

446 *Uniform Civil Procedure Rules 1999* (Qld) r 293.



Western Australia

Similarly, in Western Australia, Order 14 of the *Rules of the Supreme Court 1971* provides:

- (1) *Where in an action to which this Order applies a statement of claim has been served on a defendant and that defendant has entered an appearance, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, within 21 days after appearance or at any later time by leave of the Court, apply to the Court for judgment against that defendant.*

This Rule does not reflect proposals for change of the summary judgment rule made by the Law Reform Commission of Western Australia in 1999.⁴⁴⁷ In particular, the WA commission recommended that the test for summary judgment should be reformulated so that it could be used against a party unless that party can show that his or her case has a reasonable prospect of success.⁴⁴⁸

In most jurisdictions there is implied or inherent power, or express provision in the rules, for allegations to be struck out, or for judgment to be given, where the court is satisfied that the pleaded claim does not disclose a cause of action or where a defence does not disclose an answer.

10.5 SUBMISSIONS

Submissions in response to the Consultation Paper

Submissions were divided on the issue of reform.

In its submission in response to the Consultation Paper the Supreme Court of Victoria presented three reasons why it does not favour a reformulation of the rules (that is, a liberalisation of the summary judgment test) in accordance with the position in England and Wales:

1. *Injustice may result if a lower threshold encouraged the Master or Judge to be too robust in condemning a claim or defence when he/she may not be in a position to form a definitive view of the merits without trial. Cases that look weak on the pleadings may take on a very different complexion after discovery and cross examination. A recent civil justice review in Hong Kong rejected the English model for this and other reasons.*
2. *The present test requires the Court to identify whether there is a prima facie or arguable case. There are dangers involved in requiring judicial officers to go further and speculate as to the prospects of success at trial without the benefit of a trial, including the likelihood of more appeals.*
3. *The House of Lords in the United Kingdom in effect read down the United Kingdom reformulation for precisely these reasons.⁴⁴⁹*

The last of these three factors has been the subject of considerable controversy, as noted above, given that in the BCCI litigation the trial was eventually aborted, after significant further costs had been incurred. Moreover, again as noted above, in its recent report the working party appointed by the Commercial Court in England has endorsed the observations made, in dissent, by Lord Hobhouse in the House of Lords:

The volume of documentation and the complexity of the issues raised on the pleadings [in complex litigation] should be the subject of critical scrutiny and should not without more deter the judge from considering whether it is really necessary to commit the parties and the court to a lengthy trial and all the preparatory steps which that will involve. Indeed it can be submitted with force that those are just the sort of cases which most strongly cry out for the exclusion of anything that is unnecessary for the achievement of a just outcome for the parties.⁴⁵⁰

Following the release of the commission's proposals in Exposure Draft 2, in a consultation with the Supreme Court, some judges expressed the view that a change in the test might change the culture and that this would be a good outcome.⁴⁵¹

The recent report of the Commercial Court Long Trials Working Party concluded that a number of problems in relation to the management and conduct of complex litigation arose not out of deficiencies in the rules but a lack of enforcement. Accordingly, the working party

*concluded, sadly, that in some cases either the parties or judges or both were not enforcing provisions in the CPR or the Guide with sufficient rigour. We concluded that there needs to be a re-education programme for both practitioners and the Commercial Court, to remind them of the procedures and powers that are already in place and those that we hope might be adopted as a result of this report and to show how they might be used.*⁴⁵²

The Magistrates' Court in its response to the Consultation Paper submitted that it had examined the operation of the Queensland and English models and concluded that there had been 'no perceptible change in the way decisions over summary judgment applications were made'. Accordingly it concluded that there should be no change to the Magistrates' Court Rules.⁴⁵³

The Victorian Bar noted alternative views held among its members. It submitted:

The current test has a long [sic] and considerable jurisprudential merit. The Bar notes that even a small relaxation of the test could have significant consequences in terms of access to justice.

On the whole, the Bar is in favour of the maintenance of the current test. Suspected unmeritorious cases can be dealt with by the imposition of conditional leave to defend. There is general support amongst the Bar for the view that the courts should be more inclined to order payment into court as a condition of the grant of leave to defend.

An alternative view held by some members of the Bar is that the threshold for obtaining leave to defend should be raised such that a defendant would need to show that the defence raised has 'some reasonable prospect of success'.⁴⁵⁴

The Law Institute of Victoria pointed to a reluctance to bring summary judgment applications in some courts. It commented:

While it is noted the courts only grant summary judgment applications in clear cases (as is appropriate), the LIV submits that the summary disposal option could be promoted more as an option to litigants in the appropriate circumstances.⁴⁵⁵

The Mental Health Legal Centre addressed the issue from the perspective of disadvantaged or vulnerable litigants. They contended that:

It would be concerning for our clients if the rules of summary dismissal were relaxed. Especially for disadvantaged groups who struggle to prepare for proceedings or access the legal or expert assistance they need, summary dismissal has a dangerous potential to deny redress for legitimate claims.⁴⁵⁶

Submissions in response to Exposure Draft 2

In later submissions there was some support for the proposal that procedures should be reformed to facilitate the earlier determination of disputes, including the summary disposal of unmeritorious claims and defences.

Steve White considered that the test should be changed so that 'summary judgment applications have better prospects of success and operate more on an US style basis of summary judgment'. He also contended that 'there would need to be legislation and not Court rules to revise the test'.⁴⁵⁷

Victoria Legal Aid supported the commission's draft proposal and argued that the procedure should be used more often. However, it also suggested that:

Where these orders are made, care needs to be taken to adequately explain to the unsuccessful party why the order was made. This would limit their dissatisfaction and may reduce the likelihood of them taking further action ...

VLA strongly supports the retention of residual discretion, allowing a judge to continue a trial even where there is no real prospect of success, such as for public interest cases.⁴⁵⁸

Other submissions were not in favour of reform. The Federation of Community Legal Centres referred to the finding by the Australian Law Reform Commission that 'justice is equated in most people's minds with "fair, open, dignified and careful processes" and that a justice system that

447 LRCWA (1999) above n 9.

448 Ibid 111.

449 *Three Rivers DC v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16; [2001] 2 All ER 513.

450 *Three Rivers DC v The Governor and Company of the Bank of England (No 3)* 2 AC 1, HL at [156], quoted in *Judiciary of England and Wales* (2007) above n 433, [85].

451 Consultation with the Supreme Court of Victoria (9 October 2007).

452 *Judiciary of England and Wales* (2007) above n 433, [34].

453 Submission CP 55 (Magistrates' Court of Victoria).

454 Submission CP 33 (Victorian Bar).

455 Submission CP 18 (Law Institute of Victoria).

456 Submission CP 22 (Mental Health Legal Centre).

457 Submission ED2 3 (Steve White).

458 Submission ED2 10 (Victoria Legal Aid).



over-emphasises matters of cost, speed and “efficiency” may not succeed in delivering “true justice”. The submission also noted that the ALRC report goes on to suggest that it is those litigants who feel that they have been unfairly dealt with at the early stages that come back to court with repeat applications:

*Today’s summary disposal is tomorrow’s vexatious litigant.*⁴⁵⁹

Maurice Blackburn submitted that:

In large complex cases a liberalisation of the summary dismissal test is likely to become another weapon for a large and determined defendant to run interlocutory skirmishes to exhaust the resources of a meritorious claimant. There is little to lose for a large defendant in making such an application and much to gain. The plaintiff will be required to lay out much of its existing evidentiary basis exposing the claims to greater risk of strike out, and enabling early preparation to defeat the claim. Even if unsuccessful the strategy will cause the plaintiff to spend a lot of money and delay other interlocutory processes by a significant period.

*Conversely, there is little point in a plaintiff wasting his or her time trying to have a defence struck out in large complex proceedings even if the defence is unmeritorious. Further the plaintiff obtains no collateral advantage from forcing the defendant to spend its money defending the application.*⁴⁶⁰

Judge Wodak expressed a different view:

*One matter that calls out for attention is early identification of frivolous or unmeritorious proceedings or defences. For too long, courts have been reluctant, even timid to summarily stay or dismiss or strike out proceedings or pleadings which do not disclose an arguable case or defence.*⁴⁶¹

Judge Wodak gave in-principle support to judicial intervention to eliminate claims or defences which lack merit. However, he was not confident that the proposed change in the formulation of the test would make an appreciable difference. He suggested instead that there should be more use of procedures for isolating an issue and trying it ahead of a trial where to do so may dispose of the trial. ‘Greater use of that approach, often resisted by one or more of the parties, can be an effective way of distinguishing those matters which should be litigated from those which should not.’⁴⁶²

10.6 THE RIGHT TO A FAIR HEARING

There may be human rights implications, under section 24 of the Charter (right to a fair trial), where proceedings are disposed of without a final hearing on the merits. Issues include whether the summary disposal of proceedings constitutes a denial of the ‘right’ of access to the courts or the ‘right’ to a fair trial. However, as noted elsewhere in this report, the ‘rights’ conferred by the Charter are not absolute. Even if there is a prima facie incompatibility with certain provisions of the Charter, the Charter itself provides that a ‘human right’ may be subject under law to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors, including’, amongst others ‘(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation’.⁴⁶³

Section 24 of the Charter is based on article 6 of the *European Convention on Human Rights* (ECHR). Professor Zuckerman has commented on this issue in the context of article 6 of the Convention:

*It is plainly wrong to suggest that a party who has had the benefit of a hearing on the merits in a court of competent jurisdiction has been denied access to court adjudication. The fact that one of the parties is denied access to a more extensive adjudicative process cannot be considered a denial of access. Every modern system has a variety of procedures for disposing of different types of cases depending on their value, complexity, importance and so on. Provided that the procedural requirements are not otherwise unreasonable, unfair or unequal, there cannot be a complaint of denial of access because a claim or defence is decided summarily.*⁴⁶⁴

As the report of the English Commercial Court Long Trials Working Party has recently noted: the striking out of a claim is not in breach of article 6(1) of the ECHR if an essential element of the cause of action for a claim under domestic law is missing from the statement of case.⁴⁶⁵

10.7 ARGUMENTS FOR AND AGAINST REFORMING THE TEST

In this as in many other areas of civil justice reform there are competing policy and practical considerations.

It is clearly desirable for unmeritorious claims or defences to be summarily disposed of without subjecting the parties and the court to the cost and inconvenience of protracted interlocutory steps and final adjudication. On the other hand, it may not always be readily apparent, particularly at an early stage of proceedings, whether a claim or defence has merit or whether it is likely to succeed at trial. Many cases involve disputed questions of fact and law which may not be appropriate for summary determination.

There are arguments that the summary judgment procedure is too restrictive, that the applicable test should be liberalised and that the procedure should be used more frequently and flexibly to dispose of claims or defences that are unmeritorious. It has also been noted that the common law standard for 'a court to grant summary judgment was set in the days before the importance of caseflow management was established in Australian courts'.⁴⁶⁶ Case-flow management involves the court taking proactive steps before trial to identify the real issues in dispute and to determine the appropriate interlocutory procedures. Arguably effective case management should require the screening out of unmeritorious cases prior to trial.

Constraints on the summary disposal of proceedings may facilitate unmeritorious claims or defences, including for non-legitimate tactical or commercial advantage. On the other hand, the process of seeking to determine whether a claim or defence has sufficient merit to be allowed to be maintained may itself give rise to expense, delay and possible appeal. A party whose claim or defence is summarily disposed of may have a justified feeling of resentment in not being permitted to proceed to trial. If the claim or defence in fact has merit then injustice will result. It may also be argued that more frequent use of the summary disposal of cases may stifle developments in the law. One can only speculate on what may have happened in the development of tort law if the plaintiff's claim in *Donoghue v Stevenson*⁴⁶⁷ had been summarily dismissed. At the time, the prospects of success, at least at first instance, were remote.

A further complication is that unmeritorious claims or defences may be permitted to proceed, not because of inadequacies in the rules or principles governing summary disposition, but because of the reluctance of parties or courts to invoke or apply them. Liberalisation of the test for summary disposition will not necessarily mean either that the procedure will be utilised more frequently or that it will result in the summary disposal of more cases. At present it would appear that summary disposition is seldom sought and that summary judgment or other orders for summary disposal are seldom made.

The threshold issue is whether there should be a liberalisation of the criteria for summary disposal of a claim or defence. On balance, the commission has concluded that the present requirements to show that there is no defence, or no cause of action, or no real question to be tried are unduly restrictive. Summary disposition should be available where a claim or defence has 'no real prospect of success'. This is arguably a more liberal test, is consistent with the rules applicable in some other jurisdictions, and a change in the formulation may encourage a more robust approach to be adopted by parties and courts.

As can be seen from the above, a liberalised test applies in the United Kingdom, the Federal Court and Queensland. It was also the formulation of the test supported in *Going to Court* and in the *Federal Civil Justice Strategy Paper* and by the ALRC and the Law Reform Commission of Western Australia.

In *Going to Court* it was noted:

*The present law and judicial approaches towards the issue often combine to dissuade parties from pursuing the remedy except in rare circumstances. Summary judgment is seen as a primary tool of caseflow management in the United States courts but in Australia it is rarely used and seldom successful. Indeed, in contrast to the United Kingdom and Australian court practice, the United States courts use summary judgment as a primary tool, available to both plaintiffs and defendants, to regulate court lists. Reformers in the civil procedure area such as Lord Woolf and commentators like Adrian Zuckerman have brought attention to summary judgment procedures as a fertile area for change in the way our courts operate.*⁴⁶⁸

459 Submission ED2 9 (Federation of Community Legal Centres).

460 Submission ED2 19 (Maurice Blackburn).

461 Submission ED1 7 (Judge Wodak).

462 Submission ED2 5 (Judge Wodak).

463 Section 7(2) *Charter of Human Rights and Responsibilities Act 2006*.

464 Adrian Zuckerman, *Civil Procedure—Principles of Practice* (2nd ed, 2006) 281.

465 *Z v United Kingdom* (2002) 34 EHRR 3. See Judiciary of England and Wales (2007) above n 433, 33 note 24.

466 Sallmann and Wright (2000) above n 9, 115.

467 *Donoghue v Stevenson* [1932] AC 562.

468 Sallmann and Wright (2000) above n 9, 114.



One consideration is whether there is a real practical difference between the traditional test and the liberalised test. In *Three Rivers District Council v Bank of England*, which considered the rule in England and Wales, Lord Hope said:

*The difference between a test which asks the question ‘is the claim bound to fail?’ and one which asks ‘does the claim have real prospect of success?’ is not easy to determine ... While the difference between the two tests is elusive, in many cases the practical effect will be the same.*⁴⁶⁹

A similar attitude has been taken to the rule in Queensland by the Court of Appeal in *Gray v Morris*. In that case, Justice Chesterman concluded:

*In my opinion summary judgment is not to be given either to the defendant or plaintiff, except where it is just to do so and it will not be just to deprive a party of a trial unless it can be seen that their case is hopeless, or bound to fail. Unless that can be said of it, the conclusion cannot be reached that a claim or defence has no ‘real’ prospect of success.*⁴⁷⁰

As can be seen from these judgments, all statutory provisions are subject to judicial interpretation and a change in language does not necessarily give rise to a change in approach. Even with a change in formulation, courts would still be likely to exercise a cautious approach, given concerns about access to justice issues and right to a hearing. This is reinforced by the submission by the Supreme Court of Victoria in response to the Consultation Paper.

Also, in public interest or test case litigation, there may be an event greater disinclination to exercise powers of summary disposal.

This perhaps highlights that the more important consideration is whether a change in the test would bring about a change in attitude and make parties more inclined to seek summary disposition and courts more prepared to grant it than is presently the case.

We are of the view that changing the threshold may serve as a catalyst to a change in attitude, particularly where it is coupled with explicit case management objectives.

Other reforms

To reinforce a change of attitude to the summary judgment process, we propose that there should be in the rules of court a statement of an explicit case management objective along the lines of the objective stated in rule 1.4(2)(c) of the UK Civil Procedure Rules. The objective should provide that the court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.

In keeping with this case management objective there should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding, or an issue in a proceeding, appears desirable.

We also propose that there should be a restatement and simplification of the rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants based on the same principle. In particular, in the Magistrates’ Court the rule should be extended to allow a defendant to apply for summary dismissal of the proceeding or summary judgment (and not merely summary judgment on a counter claim).

Further, the limitations on categories of cases that are excluded from the procedure in the Supreme and County Courts⁴⁷¹ should be removed. The current list of exceptions appears to have an historical basis. The exceptions are not part of the Federal Court, Queensland rules or the rules in England and Wales. Also, the Magistrates’ Court rule should not be limited in its application to where the claim is for a debt or liquidated demand.

In relation to the types of cases presently exempted from the rule in the County and Supreme Courts, the undesirability of excluding from the ambit of powers of summary disposal claims based on fraud is perhaps illustrated by the recent BCCI litigation referred to above. In that case, proceedings against the Bank of England and 22 of its present and former staff were brought by the liquidators of the Bank of Credit and Commerce International (BCCI). The claim, for misfeasance in public office required proof of bad faith amounting to dishonesty or fraud on the part of the defendant bank and individual officials. Other allegations of dishonesty were made. BCCI had been closed by the Bank of England in 1991 after major frauds became known.

The action was announced in 1993 and the trial commenced in the High Court in London in January 2004. The proceedings had been struck out by the trial judge but reinstated following a decision of the House of Lords (3:2) in March 2001. The trial continued until November 2005 although no witnesses were called by the plaintiff. Senior counsel for the plaintiff addressed the court for 86 days. Senior counsel for the Bank of England addressed the court for 119 days between July 2004 and June 2005. In November 2005, the action was discontinued, without notice. In January 2006 the judge ordered the liquidators to pay the Bank of England's costs on an indemnity basis. Interlocutory appeals also went to the Court of Appeal on two occasions in respect of issues of privilege. In the course of the proceedings, the trial judge, Justice Tomlinson, had consulted and warned the then Lord Chief Justice, Lord Woolf, that 'the case was a farce'. It would also appear that the trial had proceeded on grounds different from those which the House of Lords had considered fit to allow to proceed.

Residual discretion

As referred to above, in Victoria a court may be satisfied not to give summary judgment where 'there ought for some other reason be a trial'.⁴⁷²

There is also residual discretion in Queensland where the court must be satisfied that 'there is no need for a trial of the proceeding' or the part of the proceeding.⁴⁷³

The Woolf Report proposed a residual discretion in the court to allow a case to continue if there is a reason for the matter to proceed to trial. This would allow for a full hearing of the matter, for example, in cases of public interest. The discretion has been retained in rule 24.02(c) of the UK Civil Procedure Rules.

On the other hand the retention of this discretion was not supported by the Law Reform Commission of Western Australia.⁴⁷⁴

On balance, we think it should be retained. There may be many situations where there may be utility in allowing a matter to proceed to trial, even though it may not appear, at that time, that a claim or defence has sufficient merit. For example, in test cases or public interest litigation or in other situations an adjudication of the issue(s) may provide guidance to other persons with similar claims or defences.

We are, however, mindful that retaining a discretion to allow matters to proceed in circumstances where they do not appear to have merit may subvert the objective of liberalising the threshold criterion for summary disposition.

However, as we are proposing that the limitation on categories of cases that are excluded from the procedure be removed, the retention of this discretion provides an important safeguard. It is also an important safeguard for use in matters where one party may be unrepresented and the process may be used in an oppressive way by a more resourceful or powerful party.

10.8 CONCLUSIONS AND RECOMMENDATIONS

A more liberal test applies in the United Kingdom, the Federal Court and Queensland. It was also supported in *Going to Court* and in the *Federal Civil Justice Strategy Paper* and by the ALRC and the Law Reform Commission of Western Australia. Although submissions were divided on the issue of reform, there was support for the commission's draft proposal.

One important consideration is whether a change in the test would bring about a change in attitude and make parties more inclined to seek summary judgment and courts more prepared to grant it than is presently the case. The commission is of the view that changing the test may facilitate a change in attitude and may bring about a change in practice, particularly where it is coupled with explicit case management objectives.

In considering the proposed criterion for summary disposal of unmeritorious claims or defences it should be borne in mind that one of the elements of the proposed overriding obligations (outlined in Chapter 3) provides that all relevant participants in the civil litigation process shall not make any claim or respond to any claim in the proceeding, or assist in the making of any claim or response to any claim in the proceeding, where a reasonable person would believe that the claim or response to the claim (as appropriate) is frivolous, vexatious, for a collateral purpose, or does not have merit.

It is to be hoped that the imposition of such a requirement will filter out many unmeritorious claims and defences rather than require them to be disposed of through procedures for summary disposition. The proposed certification requirements outlined in Chapter 3, together with the proposed sanctions for breach of the overriding obligations, should serve to increase the threshold of merit and decrease the necessity for more proactive use of summary disposal powers.

469 *Three Rivers District Council v Bank of England* [2001] 2 All ER 513, 541. See also other English cases *Celandor Productions Ltd v Melville* [2004] EWHC 2362 and *The Bolton Pharmaceuticals Company 100 Ltd v Doncaster Pharmaceuticals Group Ltd* [2006] EWCA Civ 661.

470 *Gray v Morris* [2004] QCA 5, [23] (Chesterman J).

471 Libel, slander, malicious prosecution, false imprisonment, seduction or a claim based on an allegation of fraud: *Supreme Court (General Civil Procedure) Rules 2005* r 22.02(3).

472 *Supreme Court (General Civil Procedure) Rules 2005* r 22.06(1)(b); *Magistrates' Court Civil Procedure Rules 1999* r 10.13(1)(b).

473 See *Uniform Civil Procedure Rules 1999* (Qld) rr 292(2)(b), 293(2)(b).

474 LRCWA(1999) above n 9, 113 [14.13].



The commission proposes that:

1. The test for summary judgment in Victoria should be changed to provide that summary judgment can be obtained if the other party has 'no real prospect of success'.
 Comment: It may be that this provision, and the provisions below, should not be limited to summary judgment but should extend to other methods of summary disposal, including a stay, dismissal or striking out of proceedings.
2. There should be in the rules of court a statement of an explicit case management objective that the court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.
3. There should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding appears desirable.
4. There should be a restatement and simplification of the rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants and the rules should be based on the same test. The Magistrates' Court rule should be extended to permit a defendant to apply for summary dismissal of the proceeding or summary judgment.
 Comment: Also, the rule in the Magistrates' Court should not be confined in its application to cases where the claim is for a debt or liquidated demand. The present rule permits a defendant to seek summary judgment against a plaintiff on a cross claim.
5. The categories of cases that are excluded from the procedure in the Supreme Court and the County Court should be removed.
6. The court should retain a residual discretion to allow a matter to proceed to trial even if the applicable test for summary disposition is satisfied.

11. CONTROLLING INTERLOCUTORY DISPUTES

11.1 THE PROBLEM

Interlocutory applications add to the duration and cost of litigation. There are a number of measures which can be utilised to limit interlocutory applications. They fall into two broad categories:

1. measures restricting interlocutory steps in a proceeding and
2. measures to reduce unnecessary interlocutory applications.

Interlocutory proceedings may also add to cost and delay when procedural decisions are the subject of appeals or applications for leave to appeal.

There are a number of complex considerations which will have an impact on the incidence of interlocutory applications. Such applications may arise out of disputes, or procedural requirements, in relation to any aspect of pre-trial procedures, including pleadings, discovery, subpoenas, compliance with timetables and arrangements for disclosure of witness statements or affidavits.

In part, the incidence of interlocutory applications will be influenced by whether parties are entitled to take procedural steps, or require leave of the court in the exercise of discretion; the attitude and conduct of other parties and the procedural rules governing pre-trial steps in the proceedings. More proactive judicial management of litigation is also likely to increase the number of procedural hearings.

11.2 REDUCING INTERLOCUTORY STEPS IN PROCEEDINGS

There are a number of means by which interlocutory applications may be reduced or restricted.

11.2.1 Removing interlocutory steps in certain proceedings

This approach is currently employed in small claims disputes in the Magistrates' Court for claims under \$10 000, and seems quite effective. Where factual issues are confined there is less need for discovery processes, and because the final hearing can occur within a relatively short time from the commencement of proceedings and will consume only a small amount of time, strike-out or summary judgment applications are not necessary.

This approach is also a feature of the Small Claims Track cases in England and Wales under the Woolf reforms.⁴⁷⁵

While this option works well for certain cases, its usefulness is limited to situations in which factual issues are narrow and relatively uncomplicated and where proceedings can be brought to hearing swiftly. Where cases are more factually complex, depriving parties of early discovery is likely to both prejudice the just resolution of cases and unduly lengthen trials as previously unseen material emerges. It may also increase the courts' workload by reducing early settlements and summary disposition of cases.

Another model is the recently introduced 'rocket docket' introduced in the Federal Court, which is discussed earlier in this chapter. This involves a significant reduction in the number of procedural steps and interlocutory hearings before trial.

11.2.2 Requiring leave for certain procedural steps

Requiring leave of the court before certain interlocutory steps can be taken may reduce the incidence of such steps. However, this may result in an increase in the number of interlocutory hearings. The introduction of a leave requirement for procedural options which the parties may presently pursue as of right is likely to increase the incidence of interlocutory applications and hearings. However, litigation, like life, is infinitely variable. Where interlocutory steps may be taken as of right, without leave, there still may be interlocutory applications by another party seeking to limit such steps or in the event of non-compliance, eg with a request for discovery of documents or for answers to interrogatories, etc.

As discussed above, the greater regulation of discovery processes is a feature of modern case management. At present, rule 34A.17 of the County Court Rules provides for discovery and interrogatories only by leave. There may be no additional cost incurred in seeking leave where this is done at a scheduled directions hearing. The leave requirement forces parties to justify the need for the interlocutory processes, facilitates greater judicial control over such processes and enables the procedural steps to be tailored to the requirements of the individual case.

11.2.3 Altering the costs arrangements for such processes

The costs consequences of taking procedural steps may have an important influence on the frequency with which such steps are taken.

Rule 26.05 of the Magistrates' Court Rules provides that unless the Court otherwise orders, the party requiring discovery, interrogatories or particulars must bear the costs of and incidental to those processes. No doubt this operates as a disincentive to unnecessary interlocutory processes. However, this may also be a practical impediment to invoking those processes, in appropriate circumstances, where a party does not have the resources to bear such costs. This may be overcome by the exercise of judicial discretion to 'otherwise order' but this may necessitate a hearing which may be contested.

11.2.4 More proactive judicial case management

In England and Wales the aim of reducing the need for interlocutory applications is part of the overriding objective of the Civil Procedure Rules. Rule 1.4(2) requires the court actively to manage a case by, among other things:

- (i) *dealing with as many aspects of the case as it can on the same occasion; [and]*
- (j) *dealing with the case without the parties needing to attend at court.*

As discussed above under active case management, the Magistrates' Court has adopted a substantially similar rule.

If the commission's active case management recommendations are implemented this may facilitate more proactive judicial control and management of interlocutory proceedings.

11.3 REDUCING UNNECESSARY INTERLOCUTORY APPLICATIONS

11.3.1 Mandatory requirements that parties seek to resolve a dispute before issuing an interlocutory process

Prudent practice dictates that practitioners make attempts to resolve interlocutory disputes prior to making application to the court. At present, whether attempts have been made is a relevant matter in the exercise of judicial discretion in relation to costs (see below).

475 See *Civil Procedure Rules 1998* (UK) part 27.



The commission's proposals in respect of overriding obligations (discussed in Chapter 3) include an obligation on relevant participants in civil litigation to not take any step in the proceeding unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding. Also, relevant participants would also be under an obligation to resolve such issues as may be resolved by agreement and to narrow the issues remaining in dispute. Furthermore, participants would have a duty to cooperate with the parties and the court in connection with the conduct of the proceedings. These obligations are broad enough to encompass both the substantive matters in dispute in the proceedings and ancillary procedural or interlocutory issues.

The problem of interlocutory disputation may also be addressed by amendment to court rules governing certain procedural steps.

Order 59.09 of the *Rules of the Supreme Court 1971* (WA) provides that:

No order shall be made ... in chambers unless the application was filed with a memorandum stating—

- (a) *that the parties have conferred to try to resolve the matters giving rise to the application; and*
- (b) *the matters that remain in issue between the parties.*

The US *Federal Rules of Civil Procedure* take this a step further by not only requiring, in certain situations, certification of the applicant's good faith conferral or attempt to confer in an effort to resolve the issue without court action, but also backing this up by explicit costs consequences for both lawyer and client.

Requiring formal confirmation of conferral prior to making application for interlocutory orders, as a precondition for obtaining relief, will help ensure that the practice is followed and will reinforce a culture of cooperation, with application to the court becoming a matter of final resort.

In addition to the proposed overriding obligations, the commission is of the view that there should be a separate requirement that the parties confer prior to the issuing of any interlocutory application to determine whether the dispute can be resolved or whether the issues in dispute can be narrowed.

In England and Wales, '[a]voiding applications by encouraging the parties to agree to sensible procedural arrangements' is part of the overriding objective. Thus, rule 1.4(2)(a) includes in the court's case management duties encouragement of the parties 'to co-operate with each other in the conduct of the proceedings'. Rule 1.3 places an obligation on the parties to 'help the court to further the overriding objective'. Thus, as noted elsewhere, 'unreasonableness which leads to an interlocutory application puts the unreasonable party at risk as to the costs of that application'.⁴⁷⁶

11.3.2 Costs consequences for unnecessary as well as unsuccessful applications

In Victoria, an applicant may be deprived of the costs of a successful application if there has been a failure to attempt to resolve the issue prior to bringing the application.⁴⁷⁷ However, this is not explicit in the rules.

Under rule 37 of the US *Federal Rules of Civil Procedure*, where a successful application has been made for discovery, costs may be awarded against the unsuccessful party and/or his or her lawyer.⁴⁷⁸ However costs will not be awarded where the court finds that there was no good-faith effort by the applicant to obtain discovery without court action.⁴⁷⁹ Where an application is unsuccessful, there may be costs consequences (against client and/or lawyer). The court may also make 'protective orders' to protect a party or non-party from annoyance, embarrassment, oppression or undue burden or expense including orders limiting disclosure requirements (rule 26(c)).⁴⁸⁰ The incorporation into US civil procedural rules of explicit costs sanctions is of interest given that the costs indemnity rule does not generally apply in civil litigation before US courts. However, the absence of the costs indemnity rule may be the rationale for the adoption of such costs sanctions.

The commission is of the view that making the potential costs consequences explicit in the rules is likely to provide greater incentive for the parties and lawyers to reach agreement on interlocutory issues and reduce the need for judicial adjudication of such issues. Although this may reduce the incidence of contested interlocutory hearings it will not necessarily reduce costs. In some instances, endeavours to reach agreement may be as time consuming, and expensive, as applications to the court for orders.

11.3.3 Certification of merits and bona fides of applications

Rule 11 of the US *Federal Rules of Civil Procedure* requires lawyers to sign both pleadings and motions and provides that in signing the motion or later advocating for it they certify that to the best of their knowledge, after reasonable inquiry, it is not being presented for an improper purpose (such as causing unnecessary delay or needlessly increasing the costs of litigation), and that the claim has the requisite degree of merit.⁴⁸¹ Sanctions can be imposed on both lawyers and parties if there is false certification.⁴⁸²

Lawyers are made directly responsible for inquiring into both the merits of an application and the bona fides of their client in bringing it, balancing their duty to the client with the duty to the court and the administration of justice.

Although it would seem that these provisions have improved standards in the conduct of civil litigation, and reduced the incidence of unnecessary or inappropriate interlocutory motions, there have been expressions of concern that on occasions such sanctions have been sought inappropriately and for collateral forensic reasons. Also, the use of economic sanctions will have a different impact on litigants depending on their financial circumstances.

In Chapter 3 we have proposed that each party to a proceeding and each lawyer acting for a party should be required to 'certify' as to the merits of allegations made in any 'pleading'. It is also suggested that 'court documentation'⁴⁸³ may be preferable to the term 'pleading'. Although these recommendations relate to the primary allegations made in respect of the causes of action in the proceedings (including claims and defences to claims), a similar certification requirement could be adopted for 'court documentation' filed in connection with applications for interlocutory orders.

11.4 SUBMISSIONS

Submissions in response to the Consultation Paper

IMF identified recent developments in Western Australia that aim to focus the parties' attention on the real issues.⁴⁸⁴ In 2006, Chief Justice Martin introduced a new list called the Commercial and Managed Cases List. In the relevant practice direction there is reference to the goals of quickly narrowing issues in dispute, encouraging mediation and reducing time-consuming interlocutory disputes. Chief Justice Martin, in explaining his motivation for introducing such a list, said:

*Prior to my appointment as Chief Justice, I had come to the view from long experience that perhaps the most effective way of improving access to justice in the longer term is by improving the processes and procedures of the Courts so that the real issues are identified and resolved earlier and with an absolute minimum of interlocutory processes.*⁴⁸⁵

To date there have been a number of similar developments in Victorian courts, which are referred to in this chapter.

Submissions in response to Exposure Draft 2

Support for the commission's draft proposal was expressed in a confidential submission.⁴⁸⁶ However, Maurice Blackburn contended that the additional measure proposed to reduce interlocutory disputation did not go far enough. The firm expressed the view that although forcing the parties to confer may slightly reduce interlocutory skirmishes, the reality in large complex class actions is that the disputation is often a device to exhaust the plaintiff's resources. It also argued that conferences will not resolve this problem but strong judicial management, and sanctions, may do so.⁴⁸⁷

By way of contrast, Steve White did not support additional control of interlocutory disputes. He argued that, in his experience, interlocutory disputes lead to the resolution of matters sooner rather than later. In his view, the alternative is to deal with all issues unsatisfactorily and expensively at trial and hope that cross-examination will extract some relevant information or concessions.⁴⁸⁸

Victoria Legal Aid did not support requiring certification of the merits of applications.⁴⁸⁹

476 Hong Kong Chief Justice's Working Party on Civil Justice Reform (2001) above n 220, [431].

477 Williams (2008) above n 114, [63.02.95–63.02.100].

478 Fed R Civ P 27(a)(5).

479 Fed R Civ P 27(a)(5)(A).

480 Fed R Civ P 27(a)(5)(B).

481 Fed R Civ P 11(a) and (b).

482 Fed R Civ P 11(c).

483 See, eg, s 347(4) *Legal Profession Act 2004* (NSW).

484 Submission CP 57 (IMF (Australia) Ltd).

485 Wayne Martin, 'Access to Justice: A Human Right in Principle and Practice in Western Australia' (Paper presented at the John Huelin Memorial Human Rights Day Lecture, Perth Cultural Centre, 10 December 2006) 19.

486 Submission ED1 5 (Confidential submission, permission to quote granted 17 January 2008).

487 Submission ED2 19 (Maurice Blackburn).

488 Submission ED2 3 (Steve White).

489 Submission ED2 10 (Victoria Legal Aid).



11.5 CONCLUSIONS AND RECOMMENDATIONS

The proposed overriding obligations seek to limit and control interlocutory disputation. The commission considers that despite the concerns raised, the following proposals have merit and should be implemented by the courts to help limit interlocutory applications:

- parties should be required to confer and encouraged to reach agreement on an issue before making an interlocutory application
- there should be more determinate costs consequences for unnecessary as well as unsuccessful applications and
- there should be a requirement for certification of the merits of applications.

The commission also considers that the proposed Civil Justice Council could develop guidelines and education programs on appropriate ways of dealing with interlocutory disputes.

12. POWER TO MAKE DECISIONS WITHOUT GIVING REASONS

12.1 THE PROBLEM

From time to time various concerns have been expressed about the nature and extent of the obligation on judges to give reasons for decisions, particularly in interlocutory matters.

As noted in Chapter 1 this is an important element of judicial accountability and a safeguard against capriciousness. However, like all safeguards, it comes at a price. Particularly in complex matters, the task may be onerous and time consuming. This almost inevitably increases delays in many if not most cases. As noted elsewhere in this report, there are obligations not only on judges to give adequate reasons, but also on arbitrators and referees.

This issue was raised with the commission during the review by Justice Maxwell of the Court of Appeal. Other Australian judges in recent times have expressed concern about what they perceive to be the increasing length of written reasons for judicial decisions.⁴⁹⁰ As noted in Chapter 1, in the aftermath of the C7 'mega case', Justice Sackville has suggested that judges should be required to provide summary reasons only in determining any contested interlocutory issue. The problem is compounded in many appellate court decisions where different judges may give lengthy recitations of the same facts and legal principles.

Other concerns relate to the 'amount of time which can be involved in preparation of reasons for judgment, outside the hours spent in open court or hearing applications in chambers. The time taken in the writing of reasons for judgment [can] affect the capacity of judges to deal with their overall caseloads within reasonable time'.⁴⁹¹ There is also an expectation that judgments be delivered 'within a reasonable time'.⁴⁹²

Victoria Legal Aid suggested in its submission that there should be time limits on the delivery of judgment.⁴⁹³ Further concerns relate to the time spent by legal advisors in reading reasons and the consequent costs.⁴⁹⁴ One commentator noted that '[n]ot all litigants ... wish to read the reasons for judgment which have been given in their cases'.⁴⁹⁵

We have identified two possible methods to address some of the concerns raised above—firstly, giving the courts the power to make (some) decisions without giving reasons and second, giving the courts power to provide short-form reasons.

12.2 POSITION IN VICTORIA

There are 'few statutes which deal with judges' duties to give reasons for their judgments'.⁴⁹⁶ As Campbell notes, '[t]heir duties in this regard are ... left to be defined by the judges themselves and principally by courts of appeal and superior courts having supervisory jurisdiction over lower courts'.⁴⁹⁷

In practice, in the County and Supreme Courts, the courts give reasons when finally deciding a matter. In contrast, in interlocutory applications, the Supreme and County Courts often do not give reasons for judgments in interlocutory applications. Also, reasons are generally not given in leave to appeal decisions in the Court or Appeal. Further, the Court of Appeal has advised that it is delivering *ex tempore* judgments as often as possible.⁴⁹⁸

In the Magistrates' Court, reasons for decisions are normally given in open court and are recorded on the transcript. Parties need to apply to the court for a record of the transcript. For small-claim arbitrations in the Magistrates' Court,⁴⁹⁹ awards are in writing, but the reasons for the award may not

be in writing.⁵⁰⁰ If a statement of reasons was not included in the award, one must be furnished on request within a reasonable period.⁵⁰¹

The common law duty to give reasons and the relevant provisions of the Charter are discussed in detail below.

12.3 THE INITIAL PROPOSAL

The commission raised for consideration whether, in certain circumstances, the courts should have the power to make decisions without giving reasons, unless the parties request reasons. The commission also noted that:

- It is necessary to specify what types of decisions should be able to be delivered without reasons. Should this encompass interlocutory decisions, final judgments, decisions on applications for leave? Different considerations apply to decisions that finally determine a matter compared with those that are interlocutory.
- In some situations, it may be appropriate to require only 'limited' or 'short' reasons.
- If there is no requirement to give reasons unless the parties require it, it may be contended that this will impede the development of new law.
- In some jurisdictions, for certain matters, reasons are not required.⁵⁰²

Submissions in response to the initial proposal

There was some support among judges of the Supreme Court for the view that courts should be permitted to make decisions without being required to give reasons, with the consent of the parties. Presumably at present parties may waive any rights they have to obtain reasons.

Some of the judges indicated that they already give decisions without reasons in the Practice Court. It was noted that if any party requests reasons in the Practice Court they will be provided. However, it would appear that parties do not often request reasons. One judge stated that the power would be useful where the judge knows the answer 'but it takes 2 months to write the decision'.⁵⁰³

Maurice Blackburn contended that in some cases 'reasons are unnecessary'. The firm suggested that the 'default position should be that no reasons be given for interlocutory matters unless reasons are sought within 14 days'.⁵⁰⁴

However, many submissions were not supportive of the proposal. Judge Wodak contended that the 'absence of reasons creates a risk of decisions to be given arbitrarily and without a proper basis'. Further, he suggested that '[w]hat reasons are needed varies according to what has to be determined, but reasons need to be adequate'.⁵⁰⁵

The Federation of Community Legal Centres contended that the legal process must be seen to be 'fair, open and transparent'. It asserted that a fair, open, dignified and careful justice system is preferable to a justice system that over-emphasises quick, cheap 'case management', summary disposals and decisions without reasons. It also noted that

490 These concerns have sometimes been associated with the time which can elapse between the conclusion of a hearing and the giving of a judgment which has been reserved. It has also been suggested that the increasing length of judgments stems in part from 'excessive citation of previous cases', from wordiness in argument, 'from presentation of several separate opinions in cases [where] a single opinion would ... have been sufficient' and 'from excessive reporting of judgments': Enid Campbell, 'Reasons for Judgment: Some Consumer Perspectives' (2003) 77(1) *The Australian Law Journal* 62, 63. See also John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73 *The Australian Law Journal* 738; and Harry Gibbs, 'Judgment Writing' (1993) 67 *The Australian Law Journal* 494. Research has found that the length of reasons of the High Court has increased from the beginning of the 1990s: Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32 *Federal Law Review* 255.

491 Campbell (2003) above n 490, 64.

492 Ibid. What is reasonable will vary depending on the circumstances but the time taken for a judgment to be delivered may be unnecessarily prolonged if judges insist on writing separate opinions.

493 Submission CP 31 (Victoria Legal Aid).

494 Campbell (2003) above n 490, 64. The concern being that the longer the reasons and the more number of separate reasons to be considered, the greater the overall cost to the client.

495 Ibid. Campbell suggests that '[s]ome may be interested only in the outcome of the case and its effects. Some may expect no more than that the gist of the reasons be explained to them by their legal adviser. Some may seek legal advice on whether the judgment is appealable, and, if so, whether an appeal should be lodged and with what prospects of success'.

496 Ibid, 62. The only reference to reasons for judgment in the *Supreme Court (General Civil Procedure) Rules 2005* and the *County Court Rules of Procedure in Civil Proceedings 1999* is in r 59.04, which provides that where the court gives any judgment or makes any order and the reasons are written, 'it is sufficient to state the result orally without reasons, but the written reasons shall then and there be published by delivery to the Associate'. The commentary on this rule by Williams is that if the court 'gives oral reasons for judgment, it is permissible for the court to revise the reasons to reflect what the court intended to say or to correct any infelicity of expression. However the court cannot alter the substance of its reasons': Williams (2008) above n 114, 159.04.5.

497 Campbell (2003) above n 490, 62.

498 Justice Chris Maxwell, 'A New Approach to Civil Appeals' (Paper presented at the Law Institute of Victoria, Melbourne, 13 November 2006) 2.

499 The *Magistrates Court Act 1989* sets out a scheme for mandatory arbitration of small claims under \$10 000—see discussion in Chapter 3 under mandatory arbitration.

500 *Magistrates Court Act 1989* s 104(1)–(2).

501 *Magistrates Court Act 1989* s 104(4).

502 For example in the Victorian Supreme Court and County Court Practice Courts in interlocutory applications reasons are not always given.

503 Consultation with the Supreme Court of Victoria (9 October 2007).

504 Submission ED2 19 (Maurice Blackburn).

505 Submission ED2 5 (Judge Wodak).



'[r]easons safeguard the rule of law and guarantee participants that their submissions have been given due consideration'. The Federation felt that '[d]ecisions made without stated reasons are inconsistent with the ... right to a fair trial' under the Charter.⁵⁰⁶

Similar concerns were raised by Steve White and Legal Aid, who argued that providing reasons is an 'important part of ensuring the administration of civil justice is both fair and transparent'.⁵⁰⁷

One Supreme Court judge suggested that it was a 'big step' to permit decisions without reasons. His concern was that if the practice went outside the area of party consent, it would be difficult to specify the circumstances where reasons may not be required. Although a judge in a lower court might consider a certain case to be hopeless and therefore not require reasons, a higher court may not agree that it was a hopeless case and this may leave the parties and the court in a difficult position. It was also suggested that reasons were particularly necessary for the purpose of appeals. Accordingly, it was suggested that if there is a right to appeal, reasons should be required to be given. In his view, what amounts to sufficient reasons will depend on the issues litigated.⁵⁰⁸

Another Supreme Court judge questioned whether there would be any real advantage in changing the requirement to give reasons. In his view, the briefest reasons can be prepared quickly and it was noted that masters tend to give reasons, even short ones. In the submissions, there was some support for permitting short reasons in certain situations.⁵⁰⁹

Submissions in response to the Consultation Paper

Question 44 of the Consultation Paper asked:

Are there reforms which would reduce the time taken for the delivery of judgment after a trial?

The TAC considered that '[e]xpedition in the delivery of a judgment carries risks which would need to be carefully balanced against the potential for appeal and re-hearing if the delivered judgement is deficient in the scope and adequacy of its reasoning'. The TAC noted that the 'Court of Appeal has, in the last 2 years, allowed a series of appeals from County Court judges (... beyond the personal injury context) because trial judges' reasons have been inadequate'.⁵¹⁰

WorkCover noted that its experience is that 'the absence of written judgments or ... easy access to authorised transcripts ... significantly impedes decision making with regard to appeal issues and may necessitate [the lodgement of appeals] based on verbal advice'. WorkCover regarded 'timely access to written judgments in civil litigation as an 'access to justice' issue for all parties'. It also noted that it would 'encourage an expectation ... that judgments be delivered within four weeks of trial (excluding any period of leave taken by a judge)'.⁵¹¹

The Magistrates' Court advised that it expects that 'no decision should be reserved for longer than three months'.⁵¹² Hollows Lawyers similarly considered that decisions should to be handed down within three months, 'other than in exceptional circumstances'.⁵¹³ Victoria Legal Aid suggested that 'there should be time limits on the delivery of judgement' and that '[t]his strategy could be supplemented by judicial education and performance standards for judicial officers'.⁵¹⁴

eLaw suggested that '[a]lthough this would not detract from the time necessary for the judge to adequately reflect upon the evidence and make a decision ... having all the material in a case available electronically would enable easier location and retrieval of information, especially from transcripts (which the judge could mark up with notes) and the tendered exhibits'.⁵¹⁵

12.4 DISCUSSION

The common law duty to give reasons

It is well established in Australia that reasons are required to be given by courts.⁵¹⁶ As Chief Justice Gleeson has observed:

*This form of accountability is not to be taken lightly. The requirement of giving a fully reasoned explanation for all decisions has profound importance in the performance of the judicial function. Apart from judges, how many other decision makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions? Most decisions, other than those by judges, are made by people who may choose whether or not to give their reasons.*⁵¹⁷

Reasons are important for a variety of reasons. They focus the mind of the person making the decision. They provide an explanation to the losing (and winning) party of the rationale for the outcome. They enable the decision to be considered by an appellate court to determine whether an error has been made. However, in some cases, a judge may come to what is in fact the correct conclusion, but may give incorrect or inadequate reasons. In some instances this may be taken into consideration by appellate courts, without necessarily requiring a retrial.

Another important principle is that judicial proceedings must be conducted in public.⁵¹⁸ There are exceptions to this principle but they are few and are strictly defined.⁵¹⁹ This principle requires that a court should do nothing to ‘discourage the making of fair and accurate reports of what occurs in the courtroom’.⁵²⁰ The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties.⁵²¹ Justice McHugh has noted that this has as its ‘foundation’ the principle that ‘justice must not only be done but it must be seen to be done’.⁵²² Chief Justice Gleeson has observed that the requirement to conduct judicial proceedings in public promotes ‘good decision making and the acceptability of the outcome of the judicial process, and they are consistent with the idea that democratic institutions should conduct their affairs in a responsible manner’.⁵²³

The Charter

The Charter may impact on the judicial duty to give reasons. As discussed in Chapter 1 and above, section 24(1) provides that a party to a civil [or criminal] proceeding ‘has the right to have the ... proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing’.⁵²⁴ Section 24(3) provides that ‘all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits’. The charter also provides that ‘[s]o far as it is possible to do so consistently with their purpose, all statutes must be interpreted in a way that is compatible with human rights’.⁵²⁵ Moreover, ‘[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision’.⁵²⁶ The right to a fair trial under section 24 may include *the duty to give reasons*.

The right to a fair trial under section 24 of the Charter is based on article 6 of the *European Convention on Human Rights*.⁵²⁷ As Professor Zuckerman has noted, ‘[t]he right to a reasoned decision is recognised as part of the right to fair trial under ECHR, Art 6’.⁵²⁸ Referring to the duty to give reasons, the English Court of Appeal has explained:

The duty [to provide reasons] is a function of due process, and therefore of justice. Its rationale has two principle aspects. The first is that fairness surely requires that the parties—especially the losing party—should be left in no doubt why they have won or lost. This is especially so since

506 Submission ED2 9 (Federation of Community Legal Centres).

507 Submission ED2 10 (Victoria Legal Aid). See also submission ED2 3 (Steve White).

508 Consultation with the Supreme Court of Victoria (9 October 2007).

509 Consultation with the Supreme Court of Victoria (9 October 2007).

510 Submission CP 37 (Transport Accident Commission) citing *Fletcher Construction Australia v Lines Macfarlane & Marshall (No 2)* (2002) 6VR 1, [31]–[34].

511 Submission CP 48 (Victorian Workcover Authority).

512 Submission CP 55 (Magistrates’ Court of Victoria).

513 Submission CP 52 (Hollows Lawyers).

514 Submission CP 31 (Victoria Legal Aid).

515 Submission CP 19 (<law> Australia Pty Ltd).

516 *Donovan v Edwards* [1922] VLR 87, 88; *De Iacovo v Lacanale* [1957] VR 553, 558–9; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Hill v Arnold* (1976) 9 ALR 350, 357.

517 The Hon. Murray Gleeson, ‘Judicial Accountability’ (1996) 2 *The Judicial Review* 117, 123–4, quoted by The Hon. J J Spigelman, ‘Seen to be Done: The Principle of Open Justice’ (Paper presented to the 31st Australian Legal Convention, Canberra, October 1999) 7.

518 *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50, 51; *Russell v Russell* (1976) 134 CLR 495, 520; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 41, 50–3. A court may not even agree to hear a case in camera by consent (*Scott v Scott* [1913] AC 417, 436 and 481).

519 See, eg, *McPherson v McPherson* [1936] AC 177, 200; *R v Tait* (1979) 46 FLR 386, 402.

520 *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–7 (see also 478–9). See in addition *Attorney-General v Leveller Magazine* [1979] AC 440, 449–50; *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056, 1068–73; *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335.

521 Frank W Kitto, ‘Why Write Judgments?’ (1992) 66 *The Australian Law Journal* 787; *Pettitt v Dunkley* (1971) 1 NSWLR 377, 382; *Housing Commission of NSW v Tatmar Pastoral Co. Pty Ltd* (1983) 3 NSWLR 378, 385–6; *Public Service Board v Osmond* (1986) 159 CLR 656, 666–7; *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 273, 277–81.

522 *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278 (see also 279B–C). Samuels J made similar comments in *Mifsud v Campbell* (1991) 21 NSWLR 725, 728.

523 Gleeson (1996), above n 517, 123. See also, for a good discussion of the obligation to give reasons: Gibbs (1993) above n 490, 494–502.

524 This echoes other provisions on human rights. Article 14(1) of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), provides that everyone has the right to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law’. Article 6(1) of the *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) provides, inter alia, that: ‘In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

525 *Charter of Human Rights and Responsibilities Act 2006* s 32(1).

526 *Charter of Human Rights and Responsibilities Act 2006* s 32(2).

527 *Charter of Human Rights and Responsibilities Act 2006* s 24(2) provides that ‘[d]espite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter’. The note to subsection (2) provides: ‘For example, section 19 of the *Supreme Court Act 1986* sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also *County Court Act 1958* s 80AA and *Magistrates’ Court Act 1989* s 126.’

528 Zuckerman (2006) above n 464, 123 citing *Hiro Balani v Spain* (1994) EHRR 566, ECtHR; *Garcia Ruiz v Spain* (1999) 31 EHRR 589, ECtHR.



*without reasons the losing party will not know ... whether the court has misdirected itself, and thus whether he [or she] may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*⁵²⁹

However, the European Court of Human Rights and English law has 'accepted that the extent of the court's duty to give reasons varies according to the nature of the decision and the circumstances of the case'.⁵³⁰

Professor Zuckerman notes that '[a]ccording to the European Court of Human Rights, the court need only address specifically those points raised by a party which would be decisive if accepted ... [Under English law, full reasons] must be given for a decision on the merits, although it is not necessary to address ... every point made by the parties'.⁵³¹

The right to a public hearing is part of the section 24 right to a fair trial under the Charter.

As mentioned above, the section 24 right to a fair trial is, in part, based on article 6 of the European Convention on Human Rights. The European Court of Human Rights has articulated the reasons for the right to a public hearing:

*The public nature of the proceeding helps to ensure a fair trial by protecting the litigant against arbitrary decisions and enabling society to control the administration of justice. This possibility of supervision by the public, even if frequently theoretical or potential, is a guarantee to the parties to a dispute that a real endeavour will be made to establish the truth through hearings conducted by a judge whose independence and impartiality can be verified by the way in which he [or she] conducts the hearing, summons and questions witnesses and experts, considers the relevance of proposed evidence, and respects the right to be heard.*⁵³²

There are limits on the right to a public hearing, however. The European Court of Human Rights has found that article 6 'requires that judgments should be pronounced publicly, but it is not necessary that a judgment should be read out in public, it is enough that it is made public'.⁵³³

Section 24 is also, in part, modelled on article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR General Comment No. 32 'Article 14: Right to equality before courts and tribunals and to a fair trial' provides as follows:

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing. The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities.

Professor Zuckerman argues that considerations of time and resources are relevant to shaping the extent of the requirement for public proceedings just as they are relevant to other aspects of procedure. He notes as an example that '[I]f Jack of publicity at one stage is acceptable if there was ample publicity at a different stage in the same case'.⁵³⁴

The nature and extent of the duty

The extent to which the court must account for the reasons depends on the nature of the proceedings. The Full Federal Court in *Fry v McGufficke*⁵³⁵ observed:

*The failure to explain the basis of a crucial finding of fact involves a breach of the principle that justice must not only be done but must be seen to be done ... The extent of the obligation to give reasons based on particular findings of fact will depend upon the circumstances of each case. It is, however, only the critical or crucial reasoning that must be exposed: ... It is in that sense that what is sufficient will depend upon all the circumstances of the particular case.*⁵³⁶

The Victorian Court of Appeal recognised in *Kapiris Bros (Vic) v Zausa & Giummarra* that:

*While justice must be seen to be done, that necessary goal must be achieved without the unnecessary expenditure of the limited time judges have available, and with an appreciation of the interests of those who have occasion to read reasons for judicial decisions ... The judge has the often difficult task of finding the correct balance, which of course will vary according to the circumstances, including the place which the court occupies in the judicial hierarchy.*⁵³⁷

In considering the obligation to give reasons it is necessary to distinguish different types of judicial decisions.

Dismissal of appeals

There is a case for a less onerous obligation where an appeal is dismissed. For example, the *Uniform Civil Procedure Rules 2005* (NSW) provide that the court may, when dismissing an appeal, exercise its power⁵³⁸ to give reasons for its decision in short form.⁵³⁹

In a number of contexts, legislative provisions enable courts to give short reasons, in dismissing an appeal, where no important question of law is involved.⁵⁴⁰

Applications for leave to appeal

Applications for leave to appeal give rise to different considerations. As Professor Zuckerman has observed, such applications

*involve a different type of decision-making process than a decision on the merits (not least because the right to a fair trial does not guarantee a right to appeal) ... All the court needs to do is indicate in broad terms the grounds on which the decision was reached which may involve no more than an endorsement of the lower court's decision.*⁵⁴¹

The High Court does not usually provide reasons when deciding leave to appeal applications.

Where there are novel questions of law

Justice Beaumont has suggested that for trial and appellate purposes, extended treatment should be reserved for those cases only where what is involved is 'novel law'.⁵⁴²

Leave to commence proceedings

In the TAC context, applications for leave to commence proceedings are interlocutory.⁵⁴³ The TAC noted in its submission that Justice Brooking was critical of this process contemplated by section 93 *Transport Accident Act 1986* in *Petkovski v Galetti*⁵⁴⁴ to the extent that

if there is no oral evidence on the hearing of the application and there are conflicts of expert opinion or other conflicts of fact, the judge hearing the application is left to resolve them on the affidavits as best he can.

Interlocutory decisions

There may be a distinction between decisions that finally determine a matter (which may require reasons as a matter of course) and those that are interlocutory. As noted above, in the Victorian Supreme Court and County Court Practice Courts reasons are not always given in interlocutory applications. In some instances, there may be difficulties in determining whether a decision is interlocutory or final. This issue is discussed in Chapter 12.

Costs decisions

Although questions relating to costs are usually within the discretion of the court such decisions are often of considerable significance to the parties and may be the subject of appeal. Reasons are usually given.

However, as Professor Zuckerman has observed in the English context:

*[The English] Court of Appeal has recognised that European Court of Human Rights jurisprudence requires the court to provide reasons for cost decisions. But the Court of Appeal did not regard the need for an explanation for a costs decision to be as important as an explanation for a decision on the merits.*⁵⁴⁵

529 *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, 377, as cited in Zuckerman (2006) above n 464, 123.

530 *Ibid* 124.

531 *Ibid*.

532 *Axen v Germany* B/57 December 14, 1981 Com Rep (European Commission Report) (EComHR) [76]–[77], cited in Zuckerman (2006) above n 464, 92. See also *Pretto v Italy* A/71, (1983) 6 EHRR 182, ECtHR; *Axen v Germany* A/72, (1983) 6 EHRR 195, ECtHR; *B v UK, P v UK (Applications 36337/97, 35974/97)* [2001] FCR 221, [2001] 2 FLR 261, ECtHR.

533 Zuckerman (2006) above n 464, 92. See also *Pretto v Italy* A/71, (1983) 6 EHRR 182, ECtHR.

534 Zuckerman (2006) above n 464, 93.

535 [1998] FCA 1499.

536 *Robyn Lee Fry v Jan McGufficke* [1998] FCA 1499 (Unreported, Black CJ, Foster, Madgwick, Finklestein and Dowsett JJ, 26 November 1998).

537 *Kapiris Bros (Vic) v Zausa & Giummarra* [2006] VSCA 15 [25] (Warren, CJ, Ormiston, JA and Harper, AJA) citing with approval Campbell (1988) [(2003) in n 490 and elsewhere] 77 *The Australian Law Journal* 62. For an example of manifestly inadequate reasons leading to an order for a retrial on appeal, see *Moylan v The Nutrasweet Company* [2000] NSWCA 337.

538 Under s 45(4) of the *Supreme Court Act 1970* (NSW).

539 *Uniform Civil Procedure Rules 2005* (NSW) r 51.55.

540 See, eg, *Child Support (Registration and Collection) Act 1988* (Cth) s 107(A)(6); *Family Law Act 1975* (Cth) s 94(2A).

541 Zuckerman (2006) above n 464, 125.

542 See Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743, 746–7 for a good description of 'novel law'.

543 See *Dodoro v Knightling* [2004] 10 VR 277.

544 [1994] 1 VR 436, 438.

545 Zuckerman (2006) above n 464, 125.



Arbitrator's decisions

Two important decisions of the Victorian Supreme Court recently dealt with the issue of the duty to give reasons in arbitration.⁵⁴⁶ The statutory obligation of an arbitrator to provide 'a *statement of reasons for making the award*' is found in section 29(1) of the *Commercial Arbitration Act 1984*. In *Oil Basins Ltd v BHP Billiton Ltd*⁵⁴⁷ the Victorian Court of Appeal upheld a decision of Justice Hargrave, who found that the arbitrators in the arbitration, one of whom was a retired Supreme Court judge, were under a duty to give reasons of a standard equivalent to the reasons expected from a superior court judge deciding a commercial case.⁵⁴⁸

Justice Hargrave followed previous authorities in finding that the effect of an arbitrator's failure to include an adequate statement of reasons could constitute a manifest error of law and hence render an award susceptible to being set aside. However, commentators have noted that the *BHP Billiton v Oil Basins* decisions represent a departure from previous authorities regarding the standard to be applied when assessing the adequacy of the reasons and that some were surprised, even disappointed, by the decisions.⁵⁴⁹ According to one commentator:

*If the parties choose to resolve their dispute by arbitration (as opposed to litigation), why should they be taken to require the same standard of reasoning as that which they could expect from a superior court judge simply because they have chosen as their arbitrator a retired Supreme Court Judge or they have agreed (or the arbitrator has determined) to adopt the same sorts of procedures as would have applied if they had chosen litigation? ... The better view is that as a matter of statutory construction section 29(1) of the CAA requires a standard of reasoning which is less than the standard of reasoning required by a superior court judge. After all, a much prized advantage of arbitration is the speed of the process. The requirement of lengthy reasons is inimical to a speedy dispute resolution process.*⁵⁵⁰

Other models

The President of the Institute of IAMA, Laurie James, has said that the approach taken in IAMA Fast Track arbitrations is that (as mentioned above):

*[With respect to] the awards given by arbitrators, [arbitrators] are expected to provide detailed written reasons which are proportionate to the time available.*⁵⁵¹

*Where for example judges in court write voluminous reasons, it usually takes them many months, and the Fast Track can't allow for that ... The parties [should] acknowledge that in 30 days an arbitrator would probably give a fairly comprehensive award. But if the parties reduce that to 14 days, then obviously they would still have to get an outline, but [not every] detail about what was said in the case.*⁵⁵²

The Federal Court Fast Track List allows for judgments to be delivered quickly in urgent matters, with reasons to follow.⁵⁵³

12.5 RECOMMENDATIONS

The commission is not presently persuaded that any general modification of the requirement to give reasons for decisions, particularly final decisions determining the rights of parties, is in the interests of the administration of justice, although it would no doubt expedite judgments. However, there are undoubtedly many situations where parties could be encouraged to consent to dispensing with reasons, particularly in relation to interlocutory decisions. Also, there is a strong case for allowing short-form reasons in some circumstances, such as interlocutory matters, including leave-to-appeal applications.

In light of the opposition to our initial draft proposal in submissions and given the issues concerning the impact of the Charter on the duty to give reasons, we are of the view that this matter requires further detailed consideration. This should be a matter for review by the proposed Civil Justice Council.

13. MAKING DECISIONS ON THE PAPERS

13.1 RATIONALE FOR THE PROPOSAL

At present, in a number of instances, decisions may be made 'on the papers' without the necessity for oral argument. Giving decisions on the papers could reduce costs and delay. Alternatively, it may be appropriate to only allow the parties a very limited time to expound orally on submissions made in writing. It would appear that US courts, in hearings before judges (ie without a jury), including at an appellate level, rely more on written 'briefs' than oral argument.

13.2 POSITION IN VICTORIA

It would appear that the only provision *expressly* empowering the courts under review to make decisions on the papers is rule 65.10 of the *Supreme Court (General Civil Procedure) Rules 2005*. Rule 65.10 provides that an application may be determined by the Court of Appeal without the attendance of the parties, and without a hearing, provided that the parties are given more than three days notice that they are not required to attend.⁵⁵⁴ Where an application is determined on the papers, the parties can apply to the court to set aside the decision or vary the decision.⁵⁵⁵ There may be serious cost consequences, however, if such an application is dismissed.⁵⁵⁶ The President of the Court of Appeal, Justice Chris Maxwell, has endorsed the use of this rule:

*The preparation for and hearing of civil applications is very time-consuming. I am convinced that we can use judges' time more effectively. To that end, I am looking ... to facilitate applications being dealt with on the papers (a procedure which is currently available under rule 65.10(2), but rarely used).*⁵⁵⁷

The commission also notes that the 'new approach' in the Supreme Court Building Cases List provides that interlocutory applications, where possible, will be determined on the papers.⁵⁵⁸

13.3 OTHER MODELS

Australia

Some Australian courts and tribunals have express power to make decisions on the papers. For example, the *Administrative Appeals Tribunal Act 1975* (Cth) was amended in 1995 to make provision for decisions on the papers. The Act now provides that if the Administrative Appeals Tribunal (AAT) is satisfied that the issues can be adequately determined without an oral hearing and the parties consent, the AAT may review the decision by considering the documents before it and without conducting a hearing.⁵⁵⁹

Similarly, in Victoria, VCAT may conduct all or part of a proceeding entirely on the basis of documents, without requiring the presence of parties, their representatives or witnesses, if the parties agree.⁵⁶⁰

In NSW, the Administrative Decisions Tribunal may make decisions on the papers. Section 76 of the *Administrative Decisions Tribunal Act 1997* (NSW) provides that the tribunal may determine proceedings by considering the documents or other material lodged with or provided to it and without holding a hearing if it appears to the tribunal that the issues for determination can be adequately determined in the absence of the parties.

Similarly, the Migration Review Tribunal may make decisions on the papers. Under the *Migration Act 1958* (Cth), applicants are required to appear before the tribunal to give evidence or present arguments, except in the following circumstances:

- a) where the tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
- b) where the applicant consents to the tribunal deciding the review without the applicant appearing before it; or
- c) where the applicant has been invited to give additional information and has failed to do so and in these circumstances, the tribunal has made a decision.⁵⁶¹

The *Child Support (Registration and Collection) Act 1988* (Cth) allows for applications for leave to appeal decisions from the Federal Magistrates Court to the Family Court to be dealt with, subject to the standard rules of court, without an oral hearing.⁵⁶²

546 *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402; *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255.

547 [2007] VSCA 255.

548 *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402.

549 Nicola Nygh and Anna Brown, *Inadequate Reasons as a Ground for Setting Aside an Arbitral Awards* (2007) Allens Arthur Robison <www.aar.com.au/pubs/ldr/foadec07.htm> at 29 February 2008; Albert Monichino, 'Recent Developments in Expert Evidence: Lessons for Victoria' (Paper presented at the Litigation and Dispute Resolution Conference, Melbourne, 27–29 March 2007).

550 Monichino (2007) above n 549.

551 Institute of Arbitrators and Mediators Australia, *Arbitration Rules 2007* sch 2 r 12.

552 Alex Boxsell, 'Arbitration Moves into the Fast Lane', *Lawyers Weekly Online* (30 November 2006), reproduced by IAMA, <www.iama.org.au/media/print/2007Q11.htm> at 29 February 2008.

553 Federal Court, *Notice to Practitioners—Directions for the Fast Track List* (2007) above n 189.

554 *Supreme Court (General Civil Procedure) Rules 2005* r 65.10(2).

555 *Supreme Court (General Civil Procedure) Rules 2005* r 65.10(3).

556 *Supreme Court (General Civil Procedure) Rules 2005* r 65.10(4).

557 Chris Maxwell, 'A New Approach to Civil Appeals' (Paper presented at the Law Institute of Victoria, Melbourne, 13 November 2006) 9–10.

558 Supreme Court (2008) above n 25, 1.

559 *Administrative Appeals Tribunal Act 1975* (Cth) s 341.

560 Section 100(2) *Victorian Civil and Administrative Tribunal Act 1998*.

561 *Migration Act 1958* (Cth) ss 359–360 (Review of Decisions) and ss 424–425 (Review of Visa Protection Visas).

562 *Child Support (Registration and Collection) Act 1988* No 3 (Cth) s 107A(8) and (10).



Under the Legal Aid Scheme of Queensland, arbitration hearings are conducted on the papers. As the Family Law Council of Australia has noted, '[w]hile there is no right of physical attendance the parties do have the opportunity to make oral submissions by telephone. The arbitrator will issue an arbitral award within 28 days of oral submission or tendering of final documents'.⁵⁶³

The Workers Compensation Scheme (NSW) also allows for 'a simple arbitration on the papers. Arbitration ... is conducted in the absence of the parties, and is based on written information submitted by each of the parties prior to the arbitration. The information the arbitrator relies on will come either from forms such as a Form 13 financial statement, or the conciliation conference document, or documents of a similar nature'.⁵⁶⁴

As described in this chapter under the individual docket system, in all but urgent cases in the Federal Court's Fast Track List, interlocutory hearings are substituted by interlocutory applications to be dealt with on the papers. Oral hearings are allowed in limited circumstances.⁵⁶⁵

Finland

In numerous countries, various types of judicial decisions may be made without the requirement of a formal hearing. It is beyond the scope of the present report to consider each of these in detail. However, in Finland, Ervo comments that:

*From 2003 onwards, it has been possible in Finland for a court to decide cases during the preparatory stage on the basis of documentary merits. The purpose of the rule is to make it possible to decide disputed matters on the papers without an oral hearing or any substantive hearing at all. The requirements are that the parties give their consent, or that, having regard to the nature of the case, there is no use to be derived from a substantive hearing.*⁵⁶⁶

England and Wales

Another measure aimed at reducing the number of interlocutory applications is the power given to the court to deal with matters of its own initiative. In England and Wales:

*Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.*⁵⁶⁷

Where it decides to do so, the court is specifically absolved from any duty to hear the parties.⁵⁶⁸

However, after an order is made, a party affected may, within a specified time, apply for the order to be set aside, varied or stayed.⁵⁶⁹

Ontario

One of the recommendations made in a recent report on the Ontario Civil Justice System was to

*allow for speedy mechanisms to obtain direction and orders on procedural matters from the managing judge, master or case management master for cases that are governed by rule 37.15. These mechanisms may include a telephone or in-person case conference or a simplified process for motions to be made in writing with or without affidavits.*⁵⁷⁰

13.4 DISCUSSION

ALRC review of the adversarial system of litigation

As part of its review of the adversarial system, the ALRC considered decisions on the papers with respect to tribunals. The ALRC proposed that '[d]ecisions on the papers should be more widely available in review tribunal proceedings, but only following appropriate consideration, investigation and after procedurally fair opportunities have been afforded to the parties to respond'.⁵⁷¹ The ALRC also considered that '[m]embers should be encouraged to use decisions on the papers more often to resolve review applications'.⁵⁷² Several submissions to the ALRC review were supportive of expanding the practice of making decisions on the papers.⁵⁷³

The Administrative Review Council in its submission to the ALRC's review recommended that 'review tribunals should not convene an oral hearing of a matter if they consider that the issue may be determined adequately without an oral hearing, and provided that the applicant gives informed consent'.⁵⁷⁴

In its submission to the ALRC's review, the AAT observed that decisions on the papers 'can offer significant savings', however, it was contended that oral hearings may be necessary where:

- the application raises an issue of general importance to Commonwealth administration
- the application involves complex questions of law or fact
- the outcome of the application is likely to have significant financial or other repercussions for the applicant
- there are questions as to the credit of the applicant or a witness
- there is significant conflict as to the facts or the correct interpretation of the law, or
- an unrepresented applicant, by reason of cultural or linguistic background or for other reasons, cannot present a cogent argument in writing or does not understand the tribunal's role.⁵⁷⁵

The AAT also submitted to the ALRC that the informed consent of the parties should be obtained before a review tribunal makes a final determination without an oral hearing.⁵⁷⁶

The Family Law Council's review of arbitration in family law matters

The Family Law Council has endorsed decisions on the papers. In its view, the Legal Aid Queensland approach to decisions on the papers (described above) offers a good service to rural and remote areas of the state 'because neither the parties nor the arbitrator are required to travel'.⁵⁷⁷

The Family Law Council also noted that the main disadvantage of arbitration on the papers is that there may be circumstances in which an arbitrator 'does not have enough information on the papers to make a decision'.⁵⁷⁸ In addition, it was noted that although the arbitrator may be able to 'request further evidence if necessary, this still poses a significant practical problem'.⁵⁷⁹ It suggested, therefore, that arbitration on the papers should be 'limited only to matters of the least complexity'.⁵⁸⁰ It was further noted that: 'Such a system would have obvious efficiency advantages, and would conform with the principle of proportionality with respect to allocation of court resources between more and less complex cases.'⁵⁸¹ However, according to the Family Law Council, even if arbitration on the papers is allowed for, 'it should not be the normal litigation pathway'.⁵⁸²

Hong Kong civil justice review

In its Interim Report and Consultative Paper, the Working Party of the Chief Justice of Hong Kong commented that the power to determine matters on the papers was useful and, if used wisely in cases where the order is plainly needed and unlikely to lead to a contentious hearing, could avoid interlocutory hearings and save the parties costs.⁵⁸³

The right to a public hearing

The discussion above about common law and Charter considerations in respect of decisions without reasons⁵⁸⁴ is also relevant to decisions on the papers.

The ALRC noted in its Issues Paper⁵⁸⁵ that 'common law rules of procedural fairness do not require that in all cases an oral hearing be offered'.⁵⁸⁶ However, requirements of procedural fairness may require an oral hearing where, for example, 'real issues of credibility are involved or it is otherwise apparent that an applicant is disadvantaged by being limited to [written] submissions or responses to the decision maker'.⁵⁸⁷

When are decisions on the papers appropriate?

Different approaches have been taken by various bodies as to when decisions on the papers may be appropriate:

- **ALRC approach:** if there has been appropriate consideration, investigation and after procedurally fair opportunities have been afforded to the parties to respond and there are no credibility issues
- **AAT approach:** if the court is satisfied that the issues can be adequately determined without an oral hearing and the parties consent and there are no credibility issues
- **ADT approach:** if it appears to the court that the issues for determination can be adequately determined in the absence of the parties and there are no credibility issues.

563 Family Law Council, *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters*, Discussion Paper (2007) 22 (see more generally 19–23).

564 *Ibid* 70.

565 See Federal Court, *Notice to Practitioners—Individual Docket System*, above n 15 for more information about the Individual Docket System; and Law Institute of Victoria Litigation Lawyers Section, *The Fast Track List*, above n 192.

566 Ervo (2007) above n 257, 472.

567 *Civil Procedure Rules 1998* (SI 1998/3132) r 3.3(1).

568 *Civil Procedure Rules 1998* (SI 1998/3132) r 3.3(4): 'The court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations.'

569 *Civil Procedure Rules 1998* (SI 1998/3132) r 3.3(5).

570 Osborne (2007) above n 170, 92 (emphasis added).

571 ALRC (1999) above n 64, proposal 12.6.

572 *Ibid*.

573 *Ibid* [12.102].

574 *Ibid* [12.96], citing Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) 54.

575 *Ibid* [12.99].

576 *Ibid* [12.35] citing submission 210 (Administrative Appeals Tribunal).

577 Family Law Council (2007) above n 563, 23 (see 19–23 more generally).

578 *Ibid* 70.

579 *Ibid*.

580 *Ibid*.

581 *Ibid*.

582 *Ibid* 71.

583 Hong Kong Chief Justice's Working Party (2001) above n 220, Proposal 31.

584 *Charter of Human Rights and Responsibilities Act 2006*.

585 Australian Law Reform Commission, *Federal Tribunal Proceedings*, Issues Paper No 24 (1998).

586 *Ibid* [8.15]. See also *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591, where the court was prepared to accept in this case that written submissions may be an adequate substitute for an oral hearing in the appropriate circumstances.

587 *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591, 602.



13.5 SUBMISSIONS

Several submissions contended that there should be greater scope for decisions to be made on the papers. For example, Judge Wodak commented that:

- he 'regularly and frequently give[s] decisions on the papers, mostly in ex parte procedural applications, such as for leave for discovery, or to interrogate or to amend a pleading'
- if he considers that the application may fail, 'the applicant party is offered the opportunity for oral argument, absent which the application will fail'
- 'if the party wishes to be heard, all other interested parties can participate in the hearing'
- he makes orders, on the papers, 'where all parties consent to the proposed orders, and where [he considers] the orders sought appropriate'
- he has found that 'on some occasions, parties, anticipating an unfavourable outcome of an application on the papers put contentious matters in a letter addressed to [his] Associate ... In such cases, [he always insists] on a hearing, so that the matters can be ventilated'.⁵⁸⁸

There was support for the proposal among some judges of the Supreme Court, as long as it was by consent. One judge commented that such a procedure could be useful where there are arguments about scheduling; for example, if there is a difference of one week. Another Supreme Court judge was supportive of the proposal but also said that it might encourage judges to 'put-off' making decisions and that decisions could 'pile up'. His view was that if there is a court hearing, a decision has to be made quickly.⁵⁸⁹

Maurice Blackburn commented that '[t]here are many occasions on interlocutory matters where we consider decisions on the papers should be possible'.⁵⁹⁰

Christopher Enright commented that there is a 'good case for a court to allow issues of law to be argued by written submissions, even if in appropriate cases they are supplemented by an oral hearing'.⁵⁹¹

The TAC considered that '[f]acilitated pre-trial interlocutory processes on the papers ... would reduce the need for pre-trial appearances'.⁵⁹²

Victoria Legal Aid expressed concern that imposing limits on hearings may simply 'shift costs rather than reduce costs'. For example, it was submitted that 'instead of making submissions orally, parties may be required to file written submissions'. It was said that this could 'disadvantage self-represented litigants, who may not be capable of presenting their evidence and arguments as efficiently as legal practitioners'.⁵⁹³

The Consumer Action Law Centre did not support any changes that would allow determinations to be made on the papers, unless all parties consented. The centre noted that the default judgment facility in the Magistrates' Court already causes 'significant detriment to consumers, and it is not in the interests of consumers (or of justice) to allow more determinations to be made on the papers'.⁵⁹⁴

A number of other comments were made in the submissions:

- Judge Wodak noted that in order to assist parties in seeking orders on the papers, there is a practice note which contains some guidelines on matters which may be the subject of such applications. He also commented that he has reservations about determining contentious matters on the papers:

*Even where all parties who have an interest in the subject matter of the application have a right to make written submissions, it can be a cumbersome process, and may not take significantly less time than a short contested application in court.*⁵⁹⁵

- Victoria Legal Aid commented that it was important to ensure that 'proposals to increase the proportion of decisions made "on the papers" do not unfairly disadvantage self-represented litigants, or those who may have legitimate cases that would otherwise have been properly explored at trial'.⁵⁹⁶
- One Supreme Court judge commented on the US procedure where a draft order or judgment is emailed to the parties and if they do not agree with the draft, they can request a hearing. A Supreme Court master queried whether in fact such a procedure

would add to costs as there may be 'reams of paper'. A further query was made regarding who would hear the application to contest the draft—whether it should be the same judge (as in the US) or a different judge.⁵⁹⁷

At present in the English High Court procedural directions are often made by masters in chambers, on the papers, after the parties have submitted comments on draft directions, by e-mail.

13.6 CONCLUSIONS AND RECOMMENDATION

The commission is of the view that making decisions on the papers in appropriate cases should be encouraged as a means of reducing costs and delay.

However, further consideration should be given to the question of whether there should be a requirement for consent of the parties and there is a need to specify in some detail the circumstances in which an oral hearing may be dispensed with. We consider that these matters should be examined by the proposed Civil Justice Council.

14. DETERRING OR CURTAILING UNNECESSARY LITIGATION

14.1 PROTHONOTARY REFUSING TO SEAL A DOCUMENT

Rule 27.06 of the *Supreme Court (General Civil Procedure) Rules 2005* provides:

- (1) *The Prothonotary may refuse to seal an originating process without the direction of the Court where the Prothonotary considers that the form or contents of the document show that were the document to be sealed the proceeding so commenced would be irregular or an abuse of the process of the Court.*
- (2) *Where a document for use in the Court is not prepared in accordance with these Rules or any order of the Court—*
 - (a) *the Prothonotary may refuse to accept it for filing without the direction of the Court;*
 - (b) *the Court may order that the party responsible shall not be entitled to rely upon it in any manner in the proceeding until a document which is duly prepared is made available.*
- (3) *The Court may direct the Prothonotary to seal an originating process or accept a document for filing.*

From time to time, the prothonotary may rely on sub-section (1) as a basis for refusing to issue an originating process. The power is not one to 'arbitrarily refuse to seal the document but a power to refuse it without the direction of the Court'.⁵⁹⁸

Although there are no available figures about how often this power is exercised, anecdotally it would appear that the process is most usually relied on where the person seeking to issue the originating process is a self-represented litigant.⁵⁹⁹ We understand from consultations that as a matter of practice, the prothonotary will generally refer the matter to the judge in the Practice Court.⁶⁰⁰ The judge either will determine the matter in chambers or may deal with the matter in open court. This is to be distinguished from the process that applies once the proceeding is commenced where a defendant may apply to have the proceeding dismissed for not disclosing a cause of action or as an abuse of process. Then the matter will necessarily be dealt with in open court and the court will have the benefit of argument from both sides.

The process under rule 27.06(1) should properly be reserved for matters where there is clearly no possibility that the plaintiff will succeed.⁶⁰¹ It is nonetheless a useful tool for the court to employ as a means of 'pre-emptive control'⁶⁰² or early intervention in matters which are an abuse of process. It is particularly useful where the judge determining the matter is able to hear it in open court and the person seeking to commence the proceeding has the benefit of hearing the judge's reasons.

We are of the view that there is scope to extend the operation of rule 27.06(1) to apply to applications as well as originating process. This would give the court the same power to dispose of interlocutory matters which are irregular or an abuse of process, before the application is issued.

It may also be that the rule should specifically provide for the court to have the option to determine the matter in open court.

588 Submission ED2 5 (Judge Tom Wodak).

589 Consultation with the Supreme Court of Victoria (9 October 2007).

590 Submission ED2 19 (Maurice Blackburn).

591 Submission CP 50 (Christopher Enright).

592 Submission CP 37 (Transport Accident Commission).

593 Submission CP 31 (Victoria Legal Aid).

594 Submission ED2 12 (Consumer Action Law Centre).

595 Submission ED2 5 (Judge Wodak).

596 Submission ED2 10 (Victoria Legal Aid).

597 Consultation with the Supreme Court of Victoria (9 October 2007).

598 Williams (2008) above n 114, [27.06.5]. See also *Federal Court Rules 1979 O 46 r 7A*, which essentially provides that a registrar may refuse to accept or issue a document if the document appears to the registrar on its face to be an abuse of the process of the court or to be frivolous or vexatious.

599 Grant Lester and Simon Smith, 'Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia's Vexatious Litigant Sanction 75 Years On' (2006) 13 *Psychiatry, Psychology and Law* 1, 18.

600 Consultation with Bronwyn Hammond, Self Represented Litigants Co-ordinator, Supreme Court of Victoria (26 July 2007).

601 *Little v Victoria* [(Unreported, Supreme Court of Victoria, Gillard J, 17 June 1997); and *Little v Victoria* (Unreported, Supreme Court of Victoria, Gillard J, 18 July 1997).

602 Lester and Smith (2006) above n 599, 18.



Recommendation

It is proposed that the operation of rule 27.06(1) of the *Supreme Court (General Civil Procedure) Rules 2005* be extended to apply to applications. One method by which this could be achieved is as follows:

In sub-paragraph (1) insert the words

- 'or summons' between 'originating process' and 'without'; and
- 'or interlocutory application so made (as may be the case)' between 'commenced' and 'would be irregular'.

In sub-paragraph (3) insert the words

- 'or summons' between 'process' and 'or accept'.

An additional sub-paragraph could be inserted as follows:

(4) The Court may make a determination pursuant to sub-section (3) in open court.

Rules in similar terms apply in the County Court and the Magistrates' Court of Victoria.⁶⁰³ It is proposed that amendments to similar effect should be made to the rules in these courts.

It is also proposed that, to the extent that it is not already provided for in the rules, such provisions be extended to apply to appeals or applications made in connection with appeals.

14.2 SUBMISSIONS

Submissions were divided on this issue. Victoria Legal Aid noted the 'important distinction made between vexatious litigants and the needs of the majority of self-represented litigants'. It also supported some of the proposals 'to ensure vexatious litigation is reduced within the civil justice system'.⁶⁰⁴

The Federation of Community Legal Centres also noted the important distinction made between vexatious litigants and the needs of the majority of self-represented litigants. The Federation contended, however, that any extension of the court's power to refuse documents would disadvantage its clients, 'who almost always have "irregular" paperwork, regardless of the merits of their case'. The Federation questioned the ability of court staff to make those 'determinations on the spot, especially when confronted with a non-English speaking litigant, a litigant with poor verbal skills, a mentally ill litigant with a legitimate issue, or any unrepresented litigant with poorly drafted paperwork'. It felt that this could leave self-represented litigants 'out of time as they attempt to re-draft their submissions to an acceptable form'.⁶⁰⁵

A number of other comments were made in the submissions:

- Legal Aid said that 'care needs to be taken to provide proper advice to vexatious litigants to explain the reasons why their case may have been disallowed, otherwise these proposals may simply transfer the problem to another agency in the civil justice system (for example, leading the vexatious litigants to seek redress through Victoria Legal Aid or other agencies)'.⁶⁰⁶
- The Supreme Court noted that the Self-Represented Litigants Co-ordinator provided materials to unrepresented litigants to assist them with preparing documents in accordance with court rules, so as to avoid the operation of rule 27 (which enables the registry to refuse a document for filing).⁶⁰⁷

14.3 CONCLUSIONS

We consider that the following proposals should be implemented:

- broadening preliminary control by expanding the court's power to refuse to seal or accept documents
- improving procedures for the earlier determination of disputes, in particular the disposition of unmeritorious claims and defences (referred to above)
- improving legislative provisions with respect to vexatious litigants or proceedings (discussed below).

The operation of r 27.06(1) of the *Supreme Court (General Civil Procedure) Rules 2005* should be extended to apply to applications. The rule should specifically provide for the court to have the option to determine the matter in open court.

Rules in similar terms apply in the County Court and the Magistrates' Court of Victoria. Amendments to similar effect should be made to the rules in these courts.

To the extent that it is not already provided for in the rules, such provisions should be extended to apply to appeals or applications made in connection with appeals.

Registry staff would require training and it may be appropriate for a senior registry member to be responsible for exercising this power.

15. OTHER COMMENTS IN SUBMISSIONS

Other comments made in submissions regarding the conduct of pre-trial procedures and trial procedures included the following:

- The Bar recommended (in the absence of the introduction of a docket system) that most civil cases of any complexity (say, cases with a duration of trial of five or more days) should be subject to a pre-trial review conference (as well as an initial early case management conference). The Bar's position was also that witness statements generally work well and efficiently, and now are well established in the civil justice system.⁶⁰⁸
- By way of contrast, one confidential submission stated that using witness statements or affidavits as the evidence-in-chief in superior courts is 'useless [and] ought to be scrapped'.⁶⁰⁹
- The Magistrates' Court commented that it has resisted the introduction of witness statements in civil litigation, mainly due to their expense.⁶¹⁰
- Victoria Legal Aid suggested that court fees should be amended to ensure that poorer litigants are not disadvantaged. For example:
 - a. fees should be waived for legally assisted litigants
 - b. fees should be proportionate to the quantum of claim.⁶¹¹
- The Law Institute contended that the main problem is one of resources. Not enough judges means that cases are sometimes not heard within an appropriate time frame, leading to increased costs and delays.⁶¹²
- The Legal Practitioners' Liability Committee advocated the efficient use of time in court. It is suggested that much greater use be made of written submissions, particularly in relation to opening and final submissions in non-jury trials.⁶¹³
- State Trustees said that '[c]onsideration ought to be given to the appointment of a judge or judges to the Practice Court for the sake of continuity, consistency and integrity of that court'.⁶¹⁴
- The Police Association submitted that '[h]earings would be potentially shortened if there were to be [an] 'Agreement on Certain Facts' alleged by the plaintiff [and] by the defendant ... [Furthermore,] any informal pre-trial discussion between representatives of the parties may alleviate the need for trials'.⁶¹⁵
- The TAC and WorkCover contended that the requirement for preparation and delivery of bulky voluminous court books should be removed as they are 'costly and time consuming to produce and environmentally unfriendly in terms of paper consumption'.⁶¹⁶
- The Law Institute suggested the introduction of a 'central registry to enable courts to allocate cases on the basis of the proceeding [given that] current jurisdictional limits of the courts now overlap to a large degree'.⁶¹⁷ The Magistrates' Court supported this proposal and stated that '[t]o work effectively, one would need trained staff and detailed guidelines for the staff to determine out of which court a proceeding should be issued'.⁶¹⁸
- One submission argued that: 'Thought should be given to ensuring that the various court personnel are used in the most effective manner; there seems to be scope to reengineer the court processes and reallocate work from judges to associates, registrars and masters, which would enable judges to focus their time more effectively on trials and writing judgements'.⁶¹⁹
- It was also suggested that a "'one size fits all" approach to case management is likely to be counterproductive and ... the body best placed to manage the conduct of civil litigation is the Court itself'.⁶²⁰

603 *County Court Rules of Procedure in Civil Proceedings 1999* r 27.06, *Magistrates' Court Civil Procedure Rules 1999* r 3.06.

604 Submission ED2 10 (Victoria Legal Aid).

605 Submission ED2 9 (Federation of Community Legal Centres (Vic) Inc.).

606 Submission ED2 10 (Victoria Legal Aid).

607 Submission CP 58 (Supreme Court of Victoria).

608 Submission CP 33 (Victorian Bar).

609 Submission CP 14 (Confidential submission, permission to quote granted 13 February 2008).

610 Submission CP 55 (Magistrates' Court of Victoria).

611 Submission CP 31 (Victoria Legal Aid).

612 Submission CP 18 (Law Institute of Victoria).

613 Submission CP 21 (Legal Practitioners' Liability Committee).

614 Submission CP 23 (State Trustees Ltd).

615 Submission CP 6 (Police Association).

616 Submissions CP 37 (Transport Accident Commission); CP 48 (Victorian WorkCover Authority).

617 Submission CP 18 (Law Institute of Victoria).

618 Submission CP 55 (Magistrates' Court of Victoria).

619 Submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra).

620 Submission ED1 29 (Australian Bankers' Association).



RECOMMENDATIONS

Chapter 5: Case Management

Judicial power

29. There should be a general statutory provision to clearly provide for judicial power/discretion to make appropriate orders and impose reasonable limits, restrictions or conditions in respect of the conduct of any aspect of the proceeding as the court considers necessary or appropriate in the interests of the administration of justice, and in the public interest, having regard to the overriding purpose. Such provision should make it clear that the overriding purpose is to prevail, to the extent of any inconsistency, over principles of procedural fairness derived from the common law.

The proposed statutory provision is intended to be of general application and specifically applicable to various proposals including case management, expert evidence, discovery, ADR, self-represented litigants, etc.

Rule making power

30. The commission suggests that the courts should consider utilising the full extent of their rule making powers to implement the reforms recommended by the commission and to encourage cultural change. There may be a need to amend the rule making powers of the courts so as to make it clear that the courts have clear and express power to make such rules as may be necessary or appropriate (a) to further the overriding purpose and (b) to implement, by way of rules, a number of the reform recommendations of the commission and in particular many of those relating to: (a) pre-action protocols (b) case management, (c) alternative dispute resolution, (d) pre-trial oral examinations, (e) self represented and vexatious litigants, (f) disclosure and discovery, (g) expert evidence, and (h) costs. However, a number of the commission's recommendations may need to be implemented by statute, particularly those that propose changes in the substantive law rather than changes in practice and procedure.

The rule making power is discussed further in Chapter 12 and is addressed in recommendation 166.

Active judicial case management

31. There should be more clearly delineated and specific powers to actively case manage. A rule or provision defining what is 'active case management' could be drafted as follows:

Active case management includes:

- (a) encouraging the parties to co-operate with each other in the conduct of proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and a hearing and accordingly disposing summarily of the others;
- (d) deciding the order in which the issues are to be resolved;
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) dealing with as many aspects of the case as it can on the same occasion;
- (j) dealing with the case without the parties needing to attend court;
- (k) making use of technology;
- (l) giving directions to ensure that the hearing of a case proceeds quickly and efficiently;
- (m) limiting the time for the hearing or other part of a case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness.

32. The courts should have an express power to call witnesses in civil proceedings without the parties' consent. This power could be used when there is no other reasonably practicable alternative means of achieving justice between the parties. A draft provision is as follows:

The court may, at the request of a party or of its own initiative order a person to appear to give evidence as a witness in a proceeding if the court is of the view that (a) such evidence is necessary or desirable in relation to a matter in dispute and (b) there is no reasonably practicable alternative means of determining such matter in dispute.

The imposition of limits on the conduct of the proceeding, trial time, interlocutory hearings and submissions

33. There should be more clearly delineated and specific powers to impose limits on trial time, length of oral submissions and length of written submissions etc. Set out below is a draft provision that specifies the types of directions or orders the court could make as to the conduct of a hearing:

Section/Rule X: 'Directions as to conduct of hearing'

- (1) *The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.*
- (2) *The court may, by order, give directions as to the order in which questions of fact are to be tried.*
- (3) *The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.*
- (4) *Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:*
 - (a) *limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,*
 - (b) *not allowing cross-examination of a particular witness,*
 - (c) *limiting the number of witnesses (including expert witnesses) that a party may call,*
 - (d) *limiting the number of documents that a party may tender in evidence,*
 - (e) *limiting the time that may be taken in making any oral submissions,*
 - (f) *that all or any part of any submissions be in writing,*
 - (g) *limiting the length of written submissions,*
 - (h) *limiting the time that may be taken by a party in presenting his or her case,*
 - (i) *limiting the time that may be taken by the hearing,*
 - (j) *with respect to the place, time and mode of trial,*
 - (k) *with respect to the giving of evidence at the hearing including whether evidence of witnesses in chief shall be given orally or by affidavit, or both,*
 - (l) *with respect to costs, including the proportions in which the parties are to bear any costs,*
 - (m) *with respect to the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing,*
 - (n) *with respect to the taking of evidence and receipt of submissions by video link, or audio link, or electronic communication, or such other means as the court considers appropriate,*
 - (o) *that evidence of a particular fact or facts be given at the hearing:*
 - I by statement on oath upon information and belief,*
 - II by production of documents or entries in books,*
 - III by copies of documents or entries; or*
 - IV otherwise as the court directs,*



- (p) that an agreed bundle of documents be prepared by the parties,
 - (q) that evidence in relation to a particular matter not be presented by a party, or
 - (r) that evidence of a particular kind not be presented by a party.
- (5) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party and/or the court a memorandum stating:
- (a) the estimated length of the trial, and the estimated costs and disbursements, and
 - (b) the estimated costs that the party would have to pay to any other party if they were unsuccessful at trial.

34. There should be more clearly delineated and specific powers to impose limits on the conduct of pre-trial procedures. Set out below is a draft provision that specifies the types of directions orders the court could make including as to pre-trial procedures.

Section/Rule Y: 'Directions as to practice and procedure generally'

- (1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.
- (2) The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
- (3) Without prejudice to the generality of subsection (1) the Court may give such directions or make such orders as it considers appropriate with respect to:
 - (a) discovery and inspection of documents, including the filing of lists of documents; either generally or with respect to specific matters;
 - (b) interrogatories;
 - (c) inspections of real or personal property;
 - (d) admissions of fact or admissibility of documents;
 - (e) the filing of pleadings and the standing of affidavits as pleadings;
 - (f) the defining of the issues by pleadings or otherwise; including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions;
 - (g) the provision of any essential particulars;
 - (h) the joinder of parties;
 - (i) the mode and sufficiency of service;
 - (j) amendments;
 - (k) counterclaims;
 - (l) the filing of affidavits;
 - (m) the provision of evidence in support of any application;
 - (n) a timetable for any matters to be dealt with, including a timetable for the conduct of any hearing;
 - (o) the filing of written submissions;
 - (p) costs;
 - (q) the use of assisted dispute resolution (including mediation) to assist in the conduct and resolution of all or part of the proceeding;
 - (r) the attendance of parties and/or legal practitioners before a Registrar/Master for a conference with a view to satisfying the Registrar/Master that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in

preparation for and at the trial;

- (s) *the attendance of parties and/or legal practitioners at a case management conference with a Judge or Registrar/Master to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial, at which conference the Judge or Registrar/Master may give further directions;*
 - (t) *the taking of specified steps in relation to the proceedings;*
 - (u) *the time within which specified steps in the proceedings must be completed;*
 - (v) *the conduct of proceedings.*
- (4) *If a party to whom such a direction has been given or against whom an order is made under subsection (1) or (2) fails to comply with the direction or order, the court may, by order, do any one or more of the following:*
- (a) *dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,*
 - (b) *strike out or limit any claim made by a plaintiff,*
 - (c) *strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly,*
 - (d) *strike out or amend any document filed by the party, either in whole or in part,*
 - (e) *strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,*
 - (f) *direct the party to pay the whole or part of the costs of another party,*
 - (g) *make such other order or give such other direction as it considers appropriate.*
- (5) *Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given or order made by the court.*
- (6) *The Court may revoke or vary any direction or order made under subsection (1) or (3).*

Methods to enhance party compliance with procedural requirements and directions

35. The proposed Section Y(4), above, expressly permits the court to impose costs and other sanctions for failure to comply with court directions or orders.

Expansion of Individual Docket Systems

36. The Commission considers that there is merit in giving further consideration to the extension of the individual docket system in the Supreme and County Courts.

The courts should retain a consultant or consultants to examine the feasibility of implementing a docket system in the County and Supreme Courts. If the individual docket system is extended, the courts should determine the method of implementation.

Any changes should be monitored or evaluated by the Chief Justice in the Supreme Court, the Chief Judge in the County Court and the proposed Civil Justice Council.

Greater use of telephone directions hearings and technology

37. The County Court could consider adopting the Supreme Court's approach to e-litigation. The Magistrates' Court may wish to consider adopting the Supreme Court's approach to e-litigation in more complex cases, including where there is a substantial portion of the discoverable material in electronic form.
38. There could be more use of telephone directions hearings to save the parties the time and the cost involved of legal practitioners attending a directions hearing. Email directions hearings and internet online messaging systems should also be considered, subject to appropriate security arrangements.



The use of case conferences and listing conferences as an alternative to directions hearings

39. Case management conferences could be used as an alternative to directions hearings.

Earlier and more determinate trial dates

40. Further consideration should be given to means by which trial dates could be set earlier than at present. Once a trial date is set, the courts should ensure that there are sufficient judicial resources available to hear the trial.

Reform of procedures for the earlier determination of disputes, including the summary disposal of unmeritorious claims and defences

41. The test for summary judgment in Victoria should be changed to provide that summary judgment can be obtained if the other party has 'no real prospect of success.'

42. There should be in the rules of court a statement of an explicit case management objective that the Court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.

43. There should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding appears desirable.

44. There should be a restatement and simplification of the rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants and the rules should be based on the same test. The Magistrates' Court rule should be extended to permit a defendant to apply for summary dismissal of the proceeding.

45. The limitations on categories of cases that are excluded from the procedure in the Supreme Court and the Magistrates' Court should be removed.

46. The court should retain a residual discretion to allow a matter to proceed to trial even if the applicable test is satisfied.

Methods for controlling interlocutory disputes

47. There should be additional measures to reduce the interlocutory steps in proceedings. This may be facilitated by:

- requiring parties to confer and encouraging parties seek to reach agreement on an issue before making an interlocutory application;
- more determinate costs consequences for unnecessary as well as unsuccessful applications;
- requiring certification of the merits of applications.

The Civil Justice Council could develop guidelines and education programs on appropriate ways of dealing with interlocutory disputes.

Power to make decisions without giving reasons

48. The Commission has considered whether, in certain circumstances, the courts should have the power to make decisions without giving reasons, unless the parties request reasons. A requirement that the court give reasons for decisions slows down the process and causes delay. Juries are not required to give reasons for their decisions. If the parties request reasons, a request should be made within a reasonable time.

The Commission is not presently persuaded that any general dispensation of the requirement to give reasons for decisions, particularly final decisions determining the rights of parties, is in the interests of the administration of justice, although it would no doubt expedite determinations. However, there are no doubt many situations where parties could be encouraged to consent to dispensing with reasons, particularly in relation to interlocutory orders and judgments. Also, there is a strong case for allowing short form reasons in some circumstances, such as interlocutory matters including leave to appeal applications.

This matter requires further detailed consideration and should be a matter for review by the proposed Civil Justice Council.

49. *Making decisions on the papers*

At present, in a number of instances, decisions may be made 'on the papers' without the necessity for oral argument. Giving decisions on the papers could reduce costs and delay.

The Commission believes that making decisions on the papers in appropriate cases should be encouraged as a means of reducing costs and delay. However, consideration should be given as to whether there should be a requirement for consent of the parties or criteria for the circumstances in which an oral hearing may be dispensed with. These matters should be examined by the proposed Civil Justice Council.

Chapter 5

Case Management



Chapter 6
**Getting to the Truth Earlier
and Easier**





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The perceived advantages of the disclosure process include fairness to both sides, playing ‘with all the cards face up on the table’, clarifying the issues between the parties, reducing surprise at trial and encouraging settlement. Any system of disclosure should have as a broad rationale the just and efficient disposal of litigation. It is against this broad rationale that any reforms should be considered.

Disclosure is not without its disadvantages. The principal one is that disclosure can be an expensive and burdensome process. The courts are generally alert to the danger of oppressive disclosure and inappropriate requests for wide ranging disclosure are not infrequently dismissed for being not necessary for the fair disposal of litigation. The burden can not only fall on the party giving disclosure, but also on an opposing party presented with a mass of documentation of marginal relevance. In such a case disclosure can, far from clarifying the issues, operate as a cloud.¹

1. INTRODUCTION

One of the most important objectives of the civil justice system is disclosure to all parties of information that is relevant to the dispute. In this chapter we examine various mechanisms to facilitate the disclosure of information, both oral and written, that is relevant to the matters in dispute. The commission’s recommendations in this area seek to accelerate disclosure of relevant information (including before commencement of proceedings), to overcome some of the limitations of the current disclosure regime, to enhance judicial control of discovery (and thereby reduce costs) and to promote cooperation between parties.

This chapter discusses the following elements of disclosure:

- disclosure prior to and at the commencement of litigation
- pre-trial oral examinations
- overcoming confidentiality constraints
- discovery of documents.

2. DISCLOSURE PRIOR TO AND AT COMMENCEMENT OF LITIGATION

In Chapter 2 we examine procedures for the disclosure of information and documents prior to and at the commencement of litigation. As we note, there are a number of civil justice reforms that have been introduced in recent years, both in Australia and elsewhere that seek to encourage or require people in dispute to communicate, disclose relevant information, and endeavour to reach agreement without the necessity for litigation. In Chapter 2 we propose the introduction of a new regime for such disclosure, communication and cooperation prior to the commencement of proceedings.

The proposed overriding obligations discussed in Chapter 3 come into operation at the time proceedings are commenced. They in part seek to have key participants in the litigation disclose information and documents known to them and considered relevant to the issues in dispute without any orders of the court or necessity for interlocutory applications.

3. PRE-TRIAL ORAL EXAMINATIONS

3.1 INTRODUCTION

Pre-trial examinations, in their various forms, provide a means of discovering information. Their purpose is broader than merely facilitating the recording of evidence prior to the start of a trial. They may serve as a useful means of recording a party’s oral evidence, and sometimes that of witnesses. However, a pre-trial examination is not generally regarded as a direct substitute for oral evidence adduced at trial. Rather, pre-trial examinations serve a similar function to written interrogatories but are not limited in scope to parties to the proceedings. Moreover, oral examinations are considered to offer significant benefits that interrogatories do not. In particular, oral examinations require an immediate direct oral response by the person examined, rather than a delayed written response, which is almost invariably settled by lawyers.

At present, the use of pre-trial examinations as a general mechanism of information-gathering in civil litigation is for the most part 'a North American phenomenon that does not exist in other common law jurisdictions'.² However, there are numerous examples in Australia of procedures for compelling a person to provide information to a specified examiner in a setting other than in court at trial. Moreover, various investigative bodies, at state and federal levels, have extensive powers to obtain information, including by way of compulsory oral examination.

The Supreme and County Court rules already provide for parties to be examined under oath before trial, albeit in limited circumstances (Orders 31 and 41).

We believe there is scope for expansion of the current rules to permit parties, persons who are to be called as witnesses and other persons to be orally examined before trial as a means of promoting greater disclosure earlier in proceedings. Such a procedure would complement a number of the commission's other recommendations, which are designed to expedite disclosure of information relevant to the issues in dispute.

The primary objective of the 'new' procedure is to facilitate the early gathering of relevant information (including from persons who may not otherwise be able to disclose information, other than at trial, including because of confidentiality constraints). This is not merely intended to be for the purpose of preparation for trial. It is likely that such earlier disclosure will promote settlement or resolution of the dispute by alternative dispute resolution. The procedure would involve the legal representatives of the parties getting together in an informal setting at a mutually convenient time and place. This process is likely to facilitate resolution, particularly given that the examination process will assist in assessing the strengths and weaknesses of the parties' cases.

The proposed arrangement is also designed to overcome the limitations of the existing rules, in part by avoiding the formality and selective nature of written interrogatories and witness statements. It seeks to reduce both costs and the need for judicial involvement, although the court would have the power to control or limit the use of the procedure to prevent abuse.

In the following sections of this chapter we outline examples of oral examinations in Victoria and other Australian jurisdictions, procedures in place in North America and the United Kingdom and the views expressed in consultations and submissions. Finally, we set out the details of the new pre-trial oral examination procedure recommended by the commission.

3.2 PRE-TRIAL EXAMINATIONS IN VICTORIA

3.2.1 Civil proceedings

The Supreme and County Court rules at present provide for two forms of pre-trial oral examination. The first is an alternative to serving written interrogatories, and the second is a means of taking evidence for trial before the trial commences. In both cases the answers given during the examination may be admitted into evidence at trial.

Under Order 31, one of the parties to a proceeding can examine another of the parties (including a corporation) as an alternative to serving interrogatories, if the latter consents in writing. An 'examiner' must be appointed by the relevant parties, and is charged with: determining the time and place of the examination, administering oaths and receiving affirmations, adjourning the examination as required and authenticating the deposition of the examinee. Both the examining party and the examinee can be legally represented at the examination. The examining party must ask questions 'in the nature of an examination-in-chief' and the examinee cannot be questioned by his or her own legal representative(s). Objections can be made on the same bases as in relation to written interrogatories,³ but otherwise all questions must be answered. If an objection is made, the examining party may seek a direction that the examinee answer the relevant question. In general, objections must be recorded in the deposition. Where an examinee lacks personal knowledge of a matter that is the subject of a question, but can obtain it through reasonable enquiries, the examination can be adjourned for that purpose. The costs of the examination are 'costs in the proceeding, unless the Court otherwise orders'. Such examinations are rarely, if ever, conducted, both because the court does not often permit interrogatories in any event, and because the process requires the consent of the examinee.

Under Order 41, the court may order that a person be examined before a judge, a master or an appointed 'examiner' (often a judge's associate or barrister) either within or outside Victoria. Each of the parties is entitled to attend the examination, along with their legal representatives. 'Unless the

1 Paul Matthews and Hodge Malek, *Disclosure* (2007) 4, [1.03] (citations omitted).

2 Discovery Task Force, *Report of the Task Force on the Discovery Process in Ontario* (2003) 112 <www.ontariocourts.on.ca/scj/en/reports/discoveryreview/> at 26 March 2008.

3 See *Supreme Court (General Civil Procedure) Rules 2005* (Cth) r 30.07.



Court otherwise orders, the person examined shall be examined, cross-examined and re-examined in like manner as at trial.’ Where objection is taken to a question in an examination held before an examiner other than a judge or a master, the question must be answered and the grounds of objection stated so that the matter can be determined by the court. The deposition (the record of examination) must be filed with the Prothonotary, and cannot ‘be disclosed to any person not a party before it has been admitted into evidence’. An examinee is entitled to ‘payment for expenses and loss of time as upon attendance at trial’, but can incur costs sanctions on default. This form of examination is used when there is doubt as to whether the examinee will be able to give evidence at trial, for example if the person might die before the trial begins or if a person is expected to be overseas at the time of the trial. It is regularly used in asbestos litigation where plaintiffs typically have a short life expectancy and it is necessary to take their evidence urgently.

Order 17 of the *Magistrates’ Court Civil Procedure Rules* provides that the court can summon any person to give evidence and/or produce any document or thing ‘at the hearing or at any stage of the proceeding’. The witness must be paid conduct money, and the party calling that witness is responsible for the ‘fees and expenses of and income lost’ as a result of attendance. This provision appears to be the equivalent of Order 41 in the Supreme and County Courts.

3.2.2 Criminal proceedings

Pre-trial examinations are also a feature of criminal proceedings in Victoria.

Prior to committal

Section 56A of the *Magistrates’ Court Act 1989* (Vic) allows an informant to seek, prior to the committal mention date,⁴ an order compelling a person to attend before the court for the purpose of being examined by the informant or producing a document or thing. The proposed examination must relate to a charge filed against the defendant and the informant must provide the court with certain information in making the application. The court must be ‘satisfied that it is in the interests of justice’ to order the examination. If an order is made, the defendant must be notified but has only a minimal role in the examination; he or she may attend and (in ‘exceptional circumstances’) address the court in person or through a practitioner, but is not a party to the application and cannot address the court on it or cross-examine the witness. Instead, the witness’ evidence must be given on oath in the form of evidence-in-chief, and recorded in the same manner as at a committal proceeding. The rules of contempt are applicable.

The Second Reading Speech to the *Magistrates’ Court (Amendment) Bill* suggests that the purpose of section 56A is to provide a means to compel ‘reluctant’ witnesses to give evidence:

*This power has become necessary to combat an increasing problem where persons or institutions refuse to cooperate with investigating authorities to provide statements, thereby jeopardising complex prosecutions, such as fraud cases. This new investigative procedure will enable evidence to be obtained and will minimise disruption to the later committal proceeding. The defendant will be entitled to a copy of the evidence arising out of a proceeding of this kind, whether or not the prosecution ultimately chooses to rely on the evidence of the witness.*⁵

After committal

Clause 24A of Schedule 5 to the *Magistrates’ Court Act 1989* provides that once a defendant has been committed for trial either the defendant or the Director of Public Prosecutions can make an application for an order that the evidence of a person be taken at a time and place determined by the court. At least 14 days’ notice must be given to the other party to the proceeding, who is entitled to address the court on it. The court cannot make an order in respect of a person who was examined at the committal, made a statement admitted as a record of evidence at the committal, has given evidence-in-chief under section 37(2) of the *Evidence Act 1958* (see below)—unless that person ‘subsequently makes a statement or a supplementary statement the truthfulness of which has been attested to’ and, inter alia, the taking of the person’s evidence is ‘justified’.⁶ The court can make ‘any order it considers necessary or in the interests of justice with respect to the examination or cross-examination of the person’, although there are certain limits on cross-examination.⁷ The evidence given must be given, recorded and treated as if it were a record of evidence given at the committal proceeding.

Prior to trial

Section 11 of the *Crimes (Criminal Trials) Act 1999* provides that prior to trial, a party may apply to the court 'for an order that the evidence of a person be taken at a time and place fixed by the court'. Such an application can only be made if the person was not available to be examined at the committal or his or her statement was not tendered in a hand-up brief served on the accused pursuant to Schedule 5 of the Magistrates' Court Act;⁸ and the person has not been examined under section 56A of the Magistrates' Court Act (see above). The court must be satisfied 'that it is in the interests of justice that the evidence of the witness be taken'. The explanatory memorandum for the *Crimes (Criminal Trials) Bill* noted that the proposed section 11:

sets out the grounds upon which a party may apply to have the evidence of a witness taken prior to trial. In most cases the defence will have had an opportunity to cross-examine a witness at the committal proceeding. If that opportunity has not been available, the defence may wish to cross-examine the witness in the absence of the jury. However, it is not appropriate for this to occur in all cases. Parties will not automatically be permitted to examine witnesses who were not examined at the committal proceeding, even where the magistrate refused to grant leave to examine witnesses at that stage. A preliminary examination will only be permitted where there is a serious risk of an unfair trial if the defence is not given the opportunity to examine the witness in the absence of the jury.

This provision is intended to replace the use of the Basha inquiry.⁹

3.2.3 Other forms of examination in Victoria

Several Victorian Acts make provision for people to be examined on oath in the context of legal proceedings or official investigations. As the following examples demonstrate:

- The *Judgment Debt Recovery Act 1984* enables a judgment debtor to attend court to be examined in relation to his or her financial circumstances and capacity to pay the amount of the debt. The debtor may be required to produce documents relevant to the oral examination.¹⁰
- The *Infringements Act 2006* empowers an infringements registrar to issue a summons for a person to attend before the registrar for oral examination to ascertain information about the person's financial circumstances in relation to payment of fines for infringement offences such as those under the *Road Safety Act 1986*.¹¹
- The *Motor Car Traders Act 1986*, *Prostitution Control Act 1984* and *Travel Agents Act 1986* permit inspectors to apply to the Magistrates' Court for orders requiring a person to answer questions orally or in writing at a specified time and place in relation to a licensed business.¹²
- Under the *Fair Trading Act 1999* the Director of Consumer Affairs Victoria may require a person, whom the Director believes is capable of providing information that can assist in monitoring compliance with the Act, to appear before the Director to give that information either orally or in writing.¹³ Similar powers exist under the *Taxation Administration Act 1997* (section 73), *First Home Owner Grant Act 2000* (section 41) and *Associations Incorporation Act 1981* (section 37D).

3.3 OTHER FORMS OF EXAMINATION IN AUSTRALIA

3.3.1 Federal Court Rules

Under Order 33 rule 13 of the *Federal Court Rules*, the court is empowered to make orders for 'the attendance of any person for the purpose of being examined' or 'the attendance of any person and the production by him of any document of thing specified or described in the order'. The person the subject of the order can be examined before and required to give production to the court, a court officer, an examiner, or 'other person authorised to take evidence'.

Under Order 24, the court is empowered, 'for the purpose of proceedings in the Court', to make orders for the examination of any person on oath or affirmation before a judge or other appointed examiner. The examination takes place for the most part 'in accordance with the procedure of the court', and cross-examination and re-examination are 'conducted in like manner as at a trial'. The

4 See *Magistrates' Court Act 1989* (Vic) sch 5 cl 4.

5 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 October 1998, 888 (Phillip Gude, Minister for Education).

6 In making this determination the court must consider the need to ensure that the prosecution case is disclosed, the issues are defined, a fair trial will take place (if the matter proceeds), matters relevant to a potential plea of guilty or nolle prosequi are clarified, trivial, vexatious or oppressive taking of evidence is not permitted and the interests of justice are otherwise served: *Magistrates' Court Act 1989*, sch 5, cl 24A(6). See also cl 24A(7) in relation to witnesses under 18 years of age.

7 See *Magistrates' Court Act 1989* (Vic) sch 5 cls 16, 24A(10), 24A(12).

8 See *Magistrates' Court Act 1989* (Vic) sch 5 cls 6–7.

9 A *Basha* inquiry involves a person giving evidence (not given at the committal) prior to trial in a separate hearing, as a function of 'the court's inherent power to prevent unfairness in a criminal trial': see *Harvey v County Court of Victoria* [2006] VSC 293 [20]–[23] (Hollingworth J).

10 *Judgment Debt Recovery Act 1984* s 15.

11 *Infringements Act 2006* Pt 9.

12 *Motor Car Traders Act 1986* s 82AF, *Prostitution Control Act 1984* s 611, *Travel Agents Act 1986* s 39H.

13 *Fair Trading Act 1999* s 106HA.



examiner is able to ask questions and give an opinion (but not rule) on objections, which can be determined later by the court. The deposition is transcribed for later use, although ‘witnesses shall not be examined to perpetuate testimony unless a proceeding has been commenced for that purpose’. This Order appears to apply in similar circumstances to Civil Procedure Rule 34.8 in England and Wales.¹⁴

In a meeting of the Federal Court User Group Liaison Committee held on 5 September 2002, Justice Branson suggested that ‘the Federal Court Rules might currently provide enough flexibility to allow such a process [a US-style “deposition”] to be ordered in an appropriate case if sought’.¹⁵

The Federal Court Liaison Committee of the Law Council submitted its *Final Report in Relation to Possible Innovations to Case Management* to the Practice Committee of the Federal Court in 2006.¹⁶ The report was based on broad consultation with the legal profession and made a number of recommendations related to case management in general, and oral depositions in particular.

The committee discussed at length a proposal to introduce oral depositions, which proved ‘controversial’:

*A widespread reaction to it was adverse on the grounds that it would be likely to be productive of unnecessary expense and even that it would constitute a reversal of the current policy of discouraging interrogation. Most practitioners opposed the proposal with support for it coming primarily from those with practical experience of both US deposition and trial practice.*¹⁷

The Committee commented:

*It is difficult to reconcile this intuitive fear of the introduction of depositions with either the experience of many litigators and judicial officers in the United States... [which suggests] ...that oral depositions frequently have the effect of facilitating compromise. It has been found in the United States that once a party both experiences a process of oral examination and sees how the opposing party reacts to oral examination, the parties form a better and more realistic assessment of their prospects of success and risks of failure in the litigation, thus enhancing the prospects of settlement.*¹⁸

The Committee identified a number of other benefits flowing from the introduction of ‘depositions’:

- They allow discovered documents to be better understood, which can lead to a diminished need for further documents to be discovered and lessen the risk of surprise at trial;¹⁹ experience in the United States suggests that ‘issues can be quickly dealt with by some questions of a witness which would otherwise be difficult to track through a paper trail’.²⁰
- Depositions lessen the need for written witness statements, which are ‘one of the principal sources of litigation expense and delay in complex commercial cases in Australia’ but are often self-serving, and limited in usefulness.
- They provide a means of isolating real divergences in the parties’ accounts of the facts, therefore ‘reducing the scope of the evidence [thought to be required] to be adduced by the parties.’²¹
- Expert evidence can be clarified in a manner that is simple and efficient, and disputes between experts pinpointed prior to their giving evidence viva voce at trial.²²

The committee envisaged that a scheme similar to that of the US *Federal Rules of Civil Procedure* (FRCP) could be workable in Australia, such that ‘depositions could be conducted before any legal practitioner but would be transcribed by Court Reporters and videotaped,’²³ however, it emphasised that the ‘controls and limitations’ attending depositions were critical to their success as a device of civil procedure.²⁴ It felt that:

*Given the wide spread concern as to the consequences of oral examinations if they ‘get out of control, there would seem to be real merit in the Court introducing some form of oral examination on a trial basis so that both the parties and the Court can assess their net effect.’*²⁵

It recommended that Order 33 rule 13 of the *Federal Court Rules* be amended, for the purpose of a two-year pilot scheme, to make provision for pre-trial oral depositions,²⁶ and considered that the amendment could reflect US rule 30 or make it explicit that:

- the court is empowered to order the examination of a person ‘at any time’
- the court is empowered to direct that an examination take place before ‘a qualified legal practitioner’

- the court is empowered to give directions as to the conduct of an examination (eg, that the party examining shall not be limited to nonleading questions)
- examination evidence that is otherwise admissible is admissible at trial but not, except in exceptional circumstances, as a substitute for evidence in person
- the court is empowered to limit both the number and duration of examinations available to the parties
- an examination can be both transcribed and videotaped for later use.²⁷

At the time of writing no steps appear to have been taken to implement these recommendations.

3.3.2 Family Law Rules 2004

The *Family Law Rules* empower a court with jurisdiction under the *Family Law Act 1975* (Cth) to request, 'at any stage in a case', the examination on oath of any person before a court or court officer, or to authorise a person to conduct such an examination.²⁸ The examining court or examiner is able to 'make procedural orders about the time, place and manner of the examination or taking of evidence',²⁹ and the original court is able to 'receive in evidence the record taken'.³⁰

3.3.3 Corporations Act 2001

Under the *Corporations Act 2001* (Cth), an 'eligible applicant'³¹ is entitled to request that a court summon a person for examination about a corporation's 'examinable affairs'.³² There are a number of purposes for such an examination; in general 'any purpose that will benefit the company, its creditors, its members or the public generally, will be within the contemplation of the section'.³³

If a summons is issued, it must require the person to attend the court for the purpose of being examined about the company's examinable affairs, and may also require the production of specified books.³⁴ The examination must be held in public unless there exist special circumstances.³⁵ Notice must be given to creditors of the corporation, insofar as practicable, as well as other eligible applicants,³⁶ and the latter are entitled to participate in the examination itself.³⁷ The examinee is entitled to have a legal representative attend and participate on his or her behalf.³⁸ The court is empowered to give directions as to both the scope of the examination, and the procedure to be followed,³⁹ and also has a general power to determine what constitutes 'appropriate' questioning of the examinee and to ask questions itself.⁴⁰ The privilege against self-incrimination is not applicable, but self-incriminating statements made during an examination are not admissible against the examinee in most criminal or penalty proceedings.⁴¹

Where the court requires the examination to be reduced to writing or transcribed, the record of examination can be used as evidence in proceedings against the examinee.⁴²

14 'Plainly Order 24 is designed for circumstances where it is not practical or convenient for a witness to attend court and give evidence in the ordinary way': *Martin v Tasmania Development Resources* (Unreported, Federal Court of Australia, Heerey J, 5 February 1999) [2].

15 Minutes of the Meeting of the Federal Court User Group Liaison Committee, 5 September 2002 <www.fedcourt.gov.au/aboutct/nsw_users_minutes_05092002.html> at 26 March 2008.

16 Law Council of Australia Federal Court Liaison Committee, *Final Report in Relation to Possible Innovations to Case Management* (2006). See also NSW Law Reform Commission, *Studies in Comparative Civil and Criminal Procedure*, Consultants Paper No 5 (1978) vol 2, part 5.

17 *Ibid* [107].

18 *Ibid* [108]–[109].

19 *Ibid* [115].

20 *Ibid* [127].

21 *Ibid* [118].

22 *Ibid* [119]–[123].

23 *Ibid* [125]; see also at [132]. Note that the committee rejected the idea that depositions could take place before the Federal Magistrates Court, for reasons of resources: at [131].

24 *Ibid* [110].

25 *Ibid* [146].

26 *Ibid* [148].

27 *Ibid* [148]–[150].

28 *Family Law Rules 2004* (Cth) r 15.72(1).

29 *Family Law Rules 2004* (Cth) r 15.72(2).

30 *Family Law Rules 2004* (Cth) r 15.72(3).

31 'Eligible applicants' include ASIC, liquidators or administrators of the corporation in question and others authorised by ASIC: *Corporations Act 2001* (Cth) s 9.

32 'Examinable affairs' means '(a) the promotion, formation, management, administration or winding up of the corporation; or (b) any other affairs of the corporation ... or (c) the business affairs of a connected entity of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b)': *Corporations Act 2001* (Cth) s 9.

33 LexisNexis Butterworths, *Australian Corporations Law Principles and Practice*, [5.7B.0010], at 15 April 2008, citing *Re New Tel Ltd (in liq)*; *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 [119] (Lander J). The authors of the publication cite as possible purposes: (a) to assist the liquidator to obtain information useful in winding up the company; (b) to assist in the gathering of evidence to support the bringing of criminal charges in connection with the company's affairs; and (c) to achieve the deterrent effect of a public examination.

34 *Corporations Act 2001* (Cth) s 596D.

35 *Corporations Act 2001* (Cth) s 597(4).

36 *Corporations Act 2001* (Cth) s 596E.

37 *Corporations Act 2001* (Cth) s 597(5A).

38 *Corporations Act 2001* (Cth) s 597(16).

39 *Corporations Act 2001* (Cth) s 596F.

40 *Corporations Act 2001* (Cth) s 597(5B).

41 *Corporations Act 2001* (Cth) s 597(12), (12A).

42 *Corporations Act 2001* (Cth) s 597(14).



If it is established that an examination amounts to an abuse of process (eg, is vexatious and oppressive, or seeks information for a purpose foreign to that countenanced in the statute) it will be disallowed.⁴³

The authors of *Australian Corporations Law Principles and Practice* write that 'examinations [under the Act] are not in the nature of legal proceedings before a court; they are more in the nature of investigative procedures where the court has a presence for the purpose, basically, of seeing fair play between the persons interrogating and the persons being interrogated'.⁴⁴

3.3.4 Bankruptcy Act 1966

In general, in bankruptcy proceedings, a court is empowered to order the examination on oath of a person before an officer of the court or other authorised person.⁴⁵ 'The procedure is basically designed to establish what assets the bankrupt had, what has happened to those assets and whether action should be begun (or continued) to recover them.'⁴⁶

Section 81 makes specific provision for the examination on oath⁴⁷ of persons declared to be bankrupts; a creditor, the trustee of the bankrupt's estate or the Official Receiver can seek to have the bankrupt ('the relevant person'), or an 'examinable person in relation to the relevant person' (eg a person indebted to the bankrupt, or thought to be in possession of the bankrupt's property) examined.⁴⁸ The applicant can also seek the production of certain 'books' (see section 5) in the possession of the prospective examinee.⁴⁹

If it proceeds, the examination must take place in public before the court, a registrar or a magistrate.⁵⁰ The proper subject matter of the examination is 'the relevant person and the relevant person's examinable affairs',⁵¹ being his or her 'dealings, transactions, property and affairs' and those of relevant associated entities.⁵² The examinee is able to have legal representation,⁵³ and creditors, as well as the trustee involved and the Official Receiver, are entitled to take part in the examination.⁵⁴ The court, registrar or magistrate may put or allow such questions to be put to the examinee as it considers appropriate, and the examinee must answer, even (in the case of the bankrupt) at the risk of self-incrimination.⁵⁵ The costs of examinees other than the debtor can be ordered to be paid out of the debtor's estate.⁵⁶

The court, registrar or magistrate is able to order that notes of the examination be taken down for signature by the examinee.⁵⁷ Such notes, and the examination transcript, can be used in evidence in 'any proceedings under [the Act], whether or not the [examinee] is a party to the proceeding', and can be inspected by certain specified people.⁵⁸

Failure to attend, be sworn or answer questions in compliance with a summons issued under the relevant sections of the Act is an offence, as is prevarication or the giving of evasive answers while under examination.⁵⁹

Section 77C of the Bankruptcy Act permits the Official Receiver to serve a notice on a person requiring them to attend before the Official Receiver to give evidence on oath relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under the Act. Such examinations are, unlike section 81 examinations, held in private, and therefore incur fewer costs.

3.3.5 Examinations conducted by Commonwealth agencies

A number of Commonwealth agencies, some of which are listed here, are empowered to compel a person to appear for examination under oath in the course of carrying out their investigations:⁶⁰

- The Australian Securities and Investments Commission (ASIC) has general powers of investigation where it suspects there has been a breach of the corporations legislation, or a legal contravention that concerns the management of a corporation or involves fraud and relates to a corporation.⁶¹ In such circumstances, ASIC can compel a person to appear before an ASIC member or staff member (an inspector) 'for examination on oath' if 'on reasonable grounds, suspects or believes that a person can give information relevant to a matter' under investigation.⁶²
- The Australian Crime Commission (ACC) is able, in certain circumstances, to summon a person to give evidence on oath or affirmation 'for the purposes of a special ACC operation/investigation'.⁶³ The summons must set out, insofar as is practicable in the circumstances, the general nature of the matters in relation to which the examiner intends to question the person, although this does not circumscribe the actual examination.⁶⁴ Provision is also made for the production of documents or things to an examiner on

notice, either in the summons or otherwise.⁶⁵ Before issuing a summons or requiring production the examiner 'must be satisfied that it is reasonable in all the circumstances to do so', and must make a written record of reasons.⁶⁶

- The Australian Competition and Consumer Commission (ACCC) can, by notice, require persons to appear before it to give evidence (on oath or affirmation) and/or produce documents in relation to, inter alia, most suspected breaches of the *Trade Practices Act 1974* (Cth) section 155. The Australian Law Reform Commission notes that 'the ACCC generally prefers to obtain its information through co-operation' and the decision to issue a notice under the Trade Practices Act 'is not taken lightly'.⁶⁷ The ACCC can also procure the attendance of a person for examination under a number of other provisions of the Trade Practices Act,⁶⁸ but section 155 is the 'most widely used'.⁶⁹
- Under the *Superannuation Industry (Supervision) Act 1993* (Cth), a 'Regulator' (ASIC, the Australian Prudential Regulatory Authority or the Commissioner of Taxation, depending on the context) can appoint inspectors to investigate the affairs of superannuation entities in certain circumstances, and can also exercise all of the powers of an inspector itself.⁷⁰ The inspector can oblige a relevant person to appear before him or her for examination.⁷¹
- The Commissioner of Taxation may give notice requiring a person to give oral evidence on oath or affirmation in connection with the administration of the *Income Tax Assessment Act 1936* (Cth).⁷² In general, the ATO will seek to attain information through non-coercive means before conducting a formal examination.⁷³
- The Commonwealth Ombudsman may, in the course of conducting an investigation, require a person to appear before him or her or an appointee for the purpose of answering relevant questions.⁷⁴
- The Australian Commission for Law Enforcement Integrity, which is headed by the Integrity Commissioner, investigates corruption within federal law enforcement agencies.⁷⁵ The Integrity Commissioner may summon a person to give evidence (including to produce documents or things) as part of a 'hearing' directed either to investigating a 'corruption issue' or conducting a 'public inquiry'.⁷⁶
- The Human Rights and Equal Opportunity Commission (or a delegate)⁷⁷ can compel a person to appear before it to provide, on oath or affirmation, information (and/or documents) relevant to certain matters the subject of

43 See *Australian Corporations Law Principles and Practice*, above n 33, [5.7B.0020].

44 Ibid [5.7B.0010] citing *Re Monadelphous Engineering Associates (NZ) Ltd (in liq); Ex parte McDonald* (1988) 7 ACLC 220, 223.

45 *Bankruptcy Act 1966* (Cth) s 34(a).

46 *Karounos v Official Trustee* (1988) 90 FCR 330. See also Australian Law Reform Commission General Insolvency Inquiry, *Report No 45* (1988) [584].

47 *Bankruptcy Act 1966* (Cth) s 81(1A).

48 *Bankruptcy Act 1966* (Cth) s 81(1).

49 *Bankruptcy Act 1966* (Cth) s 81(1B).

50 *Bankruptcy Act 1966* (Cth) s 81(1A), (2).

51 *Bankruptcy Act 1966* (Cth) s 81(1A).

52 *Bankruptcy Act 1966* (Cth) s 5.

53 *Bankruptcy Act 1966* (Cth) s 81(7).

54 *Bankruptcy Act 1966* (Cth) s 81(8).

55 *Bankruptcy Act 1966* (Cth) s 81(10), (11), (11A).

56 *Bankruptcy Act 1966* (Cth) ss 50(5), 81(14).

57 *Bankruptcy Act 1966* (Cth) ss 50(5), 81(15).

58 *Bankruptcy Act 1966* (Cth) ss 50(5), 81(17). See also s 255.

59 See *Bankruptcy Act 1966* (Cth) ss 264A–264E.

60 The following list draws from information in Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, Issues Paper No 33 (2007) Chapter 3. As noted in its final report, during the course of the inquiry the ALRC identified 41 federal bodies with coercive investigatory powers: *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Chapter 4.

61 *Australian Securities and Investments Commission Act 2001* (Cth) s 13(1).

62 *Australian Securities and Investments Commission Act 2001* (Cth) s 19(2). See *Australian Securities and Investments Commission Regulations 2001* (Cth) sch 1, Form 1.

63 *Australian Crime Commission Act 2002* (Cth), ss 24A, 28. Note that a 'special ACC operation/investigation' refers to a federal criminal investigation or an intelligence operation that the ACC is undertaking that has been deemed 'special' by its Board: s 4.

64 *Australian Crime Commission Act 2002* (Cth) s 28(3).

65 *Australian Crime Commission Act 2002* (Cth) ss 28(1) and 29(1).

66 *Australian Crime Commission Act 2002* (Cth) ss 28(1A) and 29(1A).

67 ALRC (2007) above n 60, [3.40]–[3.41].

68 See eg *Trade Practices Act 1974* (Cth) ss 65Q(1), 95S.

69 ALRC (2007) above n 60, [3.41].

70 *Superannuation Industry (Supervision) Act 1993* (Cth) s 265.

71 *Superannuation Industry (Supervision) Act 1993* (Cth) s 270(d).

72 *Income Tax Assessment Act 1936* (Cth) s 264.

73 See ALRC (2007) above n 60, [3.71].

74 *Ombudsman Act 1976* (Cth) s 9(2).

75 ALRC (2007) above n 60, [3.21].

76 *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 82–4.

77 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 19.



examination or inquiry.⁷⁸ It has broad powers as to the conduct of proceedings; it has, in general, the 'power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions',⁷⁹ and can 'make an examination or hold an inquiry in such manner as it thinks fit, and in informing itself in the course of an examination or inquiry, is not bound by the rules of evidence'.⁸⁰ The Privacy Commissioner has similar powers in relation to the investigation of complaints and other matters under the *Privacy Act 1988* (Cth).

- The Australian Communications and Media Authority may require a person to appear before its delegate for examination on oath or affirmation in connection with an investigation it is conducting.⁸¹
- Under the *Transport Safety Investigation Act 2003* (Cth), the Australian Transport Safety Bureau is charged with the investigation of 'transport safety matters', and granted certain powers for that purpose.⁸² The Executive Director of the Bureau may, by written notice, require a person to attend and 'answer questions put by any person relating to matters relevant to the investigation'.⁸³

The relevant legislation governing examinations conducted by or on behalf of these agencies generally makes provision for:

- who is to preside over the examination
- the procedures to be followed during the examination, including whether it is to be held in public or private
- the entitlement of the examinee to legal representation
- payment of the examinee's costs
- consequences of nonattendance or noncompliance with relevant notices or directions
- whether the examinee is entitled to refuse to answer questions on the grounds of privilege against self-incrimination or client legal privilege
- the recording and transcription of the examination
- whether the evidence is admissible in proceedings against the examinee or any other person.

3.4 DEPOSITIONS IN THE UNITED STATES

In the United States, pre-trial examinations called 'depositions' are one element of a broader discovery regime established under the FRCP. This regime is discussed later in this chapter in relation to discovery of documents. Similar provisions also apply in most state courts.

3.4.1 Pre-trial depositions

Purposes of depositions

Depositions in the United States are used for discovery of information about a case, developing and assessing cases and preserving testimony that may not be available if the matter proceeds to trial.⁸⁴ *Moore's Federal Practice* breaks down these purposes further:

- (1) *to discover evidence, including the identity of documents;*
- (2) *to discover what a witness knows or thinks;*
- (3) *to discover how the witness will testify at trial and to commit the witness to that testimony;*
- (4) *to perpetuate helpful testimony that may be unavailable at trial;*
- (5) *to obtain testimony to support or oppose a motion (eg for an injunction or summary judgment);*
- (6) *to discover an expert witness's calculations, assumptions, authorities, opinions and conclusions, and the limits of the witness's studies, tests and examinations;*
- (7) *to assess the persuasiveness and credibility of witnesses;*
- (8) *to establish foundation testimony needed for trial;*

(9) to impress one's opponent with the strength of one's case in order to induce a favorable settlement; and

(10) to preserve testimony in case a witness is unavailable at trial.⁸⁵

Thus, a deposition is not a direct substitute for the giving of oral evidence at trial:

*Although the deposition is defined in terms of constituting sworn testimony equivalent to that given in open court, depositions are used most often for gathering information and supporting pretrial motion practice rather than for use at trial or as a substitute for testimony at trial, although these are important functions of the deposition. The chief use of depositions at trial is for cross-examining witnesses and attempting to impeach their trial testimony to the extent that it differs from testimony previously given at a deposition.*⁸⁶

Procedural overview

Under the *FRCP*, a party to a proceeding may depose 'any person' as of right and without leave, unless the taking of the deposition would mean that more than 10 depositions had been taken 'by the plaintiffs, by the defendants, or by third party defendants in the proceeding; the proposed deponent has been deposed in the proceeding at an earlier stage; or the party seeks to take the deposition prior to the time otherwise applicable for the commencement of discovery.'⁸⁷ The deponent's attendance may be compelled by subpoena⁸⁸ and this is what usually occurs. Parties need only be given notice.

Depositions can also be used to elicit documents from deponents, if a subpoena (in the case of non-parties) or a rule 35 request for the production of documents or things (in the case of parties) is annexed to the subpoena or notice of deposition, as appropriate.

The presumptive limit of 10 depositions per side was introduced in order to limit burdensome discovery. The limit 'applies to each "side" or "position" in litigation and not to each party'.⁸⁹ Leave to take further depositions will not be given as a matter of course. Reference must be had to the factors identified in rule 26(b)(2), namely whether the additional depositions sought are 'unreasonably cumulative or duplicative, or [are] obtainable from some other source that is more convenient, less burdensome, or less expensive', whether the party seeking discovery has had other opportunities to discover the information sought and whether the benefits of the additional depositions would outweigh the 'burden or expense' involved. In considering these issues, some courts look at whether all of the depositions hitherto taken (that is, depositions taken as of right) were justified.⁹⁰

Similar considerations are applicable in respect of deposing persons for a second time, a practice not often permitted. *Moore's Federal Practice* notes that '[s]econd depositions may be justified in light of disclosure or discovery after the first deposition ... [but if] a second deposition is permitted, the courts frequently limit the scope of the second deposition to specific matters not covered in the first deposition'.⁹¹

It is a further presumptive requirement that each deposition be no more than seven hours in duration, although the court 'must' allow an extension if the interests of fairness demand it.⁹²

Reasonable notice in writing of a planned deposition must be given to all other parties to the proceeding.⁹³ In general, the deposition must take place before an 'officer',⁹⁴ being a person 'authorised to administer oaths by federal law or by the law in the place of examination',⁹⁵ although this requirement may be displaced by the court⁹⁶ or by written stipulation of the parties.⁹⁷ Under Rule 30(c):

The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence ... After putting the deponent under oath or affirmation, the officer must record the testimony ...

An objection at the time of the examination [including] to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the proceedings must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection.

- 78 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 21–22.
- 79 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 13(1).
- 80 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 14(1).
- 81 *Broadcasting Services Act 1992* (Cth) s 173–174.
- 82 *Transport Safety Investigation Act 2003* (Cth) ss 21–23, 28.
- 83 *Transport Safety Investigation Act 2003* (Cth) s 32(1)–(3).
- 84 Michael Legg, 'The United States Deposition—Time for Adoption in Australian Civil Procedure?' (2007) 31 *Melbourne University Law Review* 146, 151.
- 85 LexisNexis, *Moore's Federal Practice – Civil*, vol 7 (2006) § 30.41, reproducing a list set out in Schwarzer, Pasahow and Lewis, *Civil Discovery and Mandatory Disclosure: A Guide to Efficient Practice* (2nd ed, 1994) 3–3.
- 86 *Moore's Federal Practice* above n 85 § 30.02[1].
- 87 Fed R Civ P 30(a)(1),(2).
- 88 See Fed R Civ P 30(a)(1).
- 89 *Moore's Federal Practice*, above n 85, § 30.05[1][b].
- 90 *Ibid* § 30.05[1][b], citing *Barrow v Greenville Indep Sch Dist*, 202 FRD 480, 482–3 (ND Tex, 2001) and § 30.05[1][c].
- 91 *Ibid* § 30.05[1][c] (citations omitted).
- 92 Fed R Civ P 30(d)(1).
- 93 Fed R Civ P 30(b)(1).
- 94 Fed R Civ P 30(b)(5).
- 95 Fed R Civ P 28(a)(1)'Either an official court reporter or a private court reporter who is a notary public normally qualifies as an officer for the purposes of conducting a deposition as this person can administer an oath or affirmation, swear the witness, transcribe the proceedings, and attest to the deposition. In problematic or hotly contested cases, depositions may be conducted before special masters or magistrates as well so that a judicial officer can rule on objections and questions': *Moore's Federal Practice* above n 85 § 30.02[3].
- 96 See Fed R Civ P 30(b)(4).
- 97 See Fed R Civ P 29, 30(b)(4). Note also that the rules as to the administration of depositions taken outside the United States are different, and more complex: see Fed R Civ P 28.

An objection [during a deposition] must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).⁹⁸

A party or deponent may apply to the court to cease or limit the deposition under Rule 30(d)(3):

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken.

(B) Order. The court may order the deposition be terminated or may limit its scope and manner ... If terminated, the deposition may be resumed only by order of the court where the action is pending.

Thus, the scope for resisting unwelcome lines of questioning is quite limited. It is improper, for example, to instruct a witness not to answer a question on the basis that it is irrelevant or repetitious;⁹⁹ an objection can be made, and will be determined at a later point should the deposition evidence be invoked at trial, but the question must still be answered. It is not for counsel to endeavour to determine or enforce objections during the deposition itself. Failure to answer a question for a reason other than one specified in Rule 30(d)(1) may be the subject of a motion to compel and other sanctions.¹⁰⁰ Moreover, interruptions from counsel before a question has been answered, other than where such reasons exist, have not been favourably looked upon by the courts.¹⁰¹ Rule 30(d)(1) makes it clear that suggestive or 'coaching' objections in particular are not considered proper. Some objections must be made during the taking of the deposition, or will be waived for future purposes. In general,

though counsel ... need not object to issues of relevance, hearsay or other matters of substantive admissibility of evidence, counsel is required, on risk of waiver at trial, to object at the deposition to the impermissible form of the question or to any other question where an objection could cure the problem in the question and make the answer admissible (for example, an improper or insufficient foundation). Thus, defending counsel will be obligated, absent a contrary stipulation, to make at least the following objections: leading (except as to an opposing party), misleading (assumes facts not in evidence), compound or multifarious, narrative, vague, argumentative, misquoting the witness, asked and answered, improper opinion or conclusion, or lack of foundation.¹⁰²

Deponents and parties are entitled to request that a deponent be permitted 30 days to review and, if required, amend (in 'form or substance') the transcript or recording of a deposition. Reasons must be given in respect of any changes made,¹⁰³ but according to the National Institute for Trial Advocacy, most courts adopt a liberal attitude in this regard.¹⁰⁴

Corporate deponents

Special rules exist in respect of the deposition of corporations in acknowledgement of the fact that a litigant will often not be in a position to identify the person(s) within a corporation who holds particular information. A party wishing to depose a corporation must name that corporation in its subpoena or notice and 'describe with reasonable particularity the matters on which examination is requested'. The corporation must then nominate 'one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify'. The nominees are obliged to testify as to 'matters known or reasonably available' to the corporation.¹⁰⁵ A corporation counts as one deponent for the purpose of the presumptive 10 depositions per side limit, even if more than one person testifies on the corporation's behalf.¹⁰⁶

Stipulations as to depositions

As noted above, the FRCP allow the parties to make variations to most of the discovery rules by written agreement.¹⁰⁷ Such an agreement could stipulate, for example, that the parties are able to take more than 10 depositions without court approval, that one or more parties are able to depose a particular witness more than once without court approval, that a deposition be taken before a person other than an 'officer' as described in Rule 28, or that a particular deposition be used in the place of oral evidence at trial.¹⁰⁸

Use of depositions in court proceedings

In the usual case, oral evidence is taken from witnesses in open court. However, in certain circumstances, the FRCP provide that evidence given at a deposition (despite being hearsay) can be introduced at trial.¹⁰⁹ Rule 32 states, in part, that a deposition may be used against parties who were present or represented at, or notified of, the deposition, in accordance with the following provisions:

- (2) *Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose by the Federal Rules of Evidence.*
- (3) *An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director or managing agent, or a designee under Rule 30(b)(6) or 31(a)(4).*
- (4) *A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:*
 - (A) *that the witness is dead;*
 - (B) *that the witness is at a more than 100 miles from the place of hearing or trial, or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;*
 - (C) *that the witness is cannot attend or testify because of age, illness, infirmity or imprisonment;*
 - (D) *that the party offering the deposition could not procure the witness's attendance by subpoena; or*
 - (E) *on motion and notice, that exceptional circumstances make it desirable – in the interest of justice and with due regard to the importance of live testimony in open court –, to permit the deposition to be used..*
- (6) *If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce any other part that in fairness should be considered with the part introduced, and any party may introduce any other parts.*

Rule 32 also provides that a deposition taken as of right cannot be used against a party 'who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition' or who received less than 11 days notice of the deposition and had a motion for a protective order pending at the time the deposition was taken.¹¹⁰ This rule provides an 'escape hatch' against the unfair use of deposition evidence.¹¹¹

The 'exceptional circumstances' criterion is open-ended, the principal requirement being that the use of the deposition evidence would 'serve the interest of justice'.¹¹² Relevant factors include the reasons precluding the deponent from appearing in person, and the need for the evidence in the proceedings.¹¹³ One example of potential 'exceptional circumstances' provided in *Moore's Federal Practice* is where 'a party opposed to use of the deposition testimony has, by his or her actions, made a witness unavailable to testify at trial'.¹¹⁴

Objections made during the taking of a deposition will not suffice to obstruct a line of questioning, as noted above. However, Rule 32(d)(3)(B) establishes that some objections must nevertheless be made to avoid their being waived for trial purposes. In particular:

*Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.*¹¹⁵

On the other hand:

*An objection to a deponent's competence – or to the competence, relevance or materiality of testimony – are not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.*¹¹⁶

Thus, if objectionable deposition evidence is sought to be introduced before a court, and the right of objection has not been waived, the court can determine the issue.

98 Fed R Civ P 30(c)(1), (2).

99 *Moore's Federal Practice*, above n 85, § 30.43[2] (citations omitted).

100 See Fed R Civ P 37.

101 *National Institute for Trial Advocacy FRCP Commentary*, Rule 30.

102 *Ibid.*

103 Fed R Civ P 30(e)(1).

104 *National Institute for Trial Advocacy FRCP Commentary*, Rule 30.

105 Fed R Civ P 30(b)(6).

106 *Moore's Federal Practice*, above n 85, § 30.05[1][b], citing *Andrews v Fowler*, 98 F 3d 1069, 1080 (8th Cir, 1996).

107 Fed R Civ P 29.

108 See *Moore's Federal Practice*, above n 85, § 29.04[4] for these and further examples, as well as case citations.

109 See *Federal Rules of Evidence*, r 801.

110 Fed R Civ P 32(a)(5).

111 *National Institute for Trial Advocacy FRCP Commentary*, Rule 32.

112 *Moore's Federal Practice*, above n 85, § 32.28[2].

113 See *ibid* § 32.28.

114 *Ibid* § 32.28[5], citing *Comeaux v T L James & Co*, 666 F 2d 294, 301 (5th Cir, 1982).

115 Fed R Civ P 32(d)(3)(B).

116 Fed R Civ P 32(d)(3)(A).



Insofar as it is admissible, all of a deposition can be introduced into evidence at trial. However, this will often not be appropriate, for example, where the purpose of the introduction is to discredit an adverse witness. The partial introduction of deposition evidence is therefore permissible.¹¹⁷ In addition, the judge has a general discretion to control the presentation of deposition evidence, and as such may not allow an entire deposition to be read where the evidence contained therein adds nothing to evidence already adduced; the evidence is 'otherwise excludable under the *Federal Rules of Evidence*'; or it would be more appropriate and efficient to confine the evidence introduced to relevant passages of the deposition.¹¹⁸

Costs

Parties are expected to bear their own costs in relation to depositions, at least at an initial stage.¹¹⁹ However, such costs can form part of a costs award at the conclusion of the litigation, insofar as their accrual was 'necessitated' in the circumstances of the matter. This criterion calls for the exercise of judicial discretion.¹²⁰ *Moore's* notes:

*The best guide for determining whether depositions are recoverable costs asks how precisely the deposition aided in the obtainment of a favourable judgment. If counsel can show the deposition's utility for something beyond ordinary investigation or mere convenience, deposition costs other than counsel fees should be recoverable. Examples include significant use of the deposition in winning motion practice, to preserve testimony, to introduce testimony, or to cross-examine witnesses.*¹²¹

Sanctions

Rule 37 provides for orders and sanctions in respect of breach of deposition obligations.

The failure of a deponent to answer a question, or the giving of 'an evasive or incomplete' answer,¹²² can be the subject of a motion to compel, provided that the motion includes 'a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it ... without court action.'¹²³ The deposition can be suspended immediately for the purposes of the motion, although *Moore's Federal Practice* notes that it is preferable to conclude the deposition on other matters in the hope of narrowing the evidential gap, or eliciting the desired information in some other manner.¹²⁴

In considering a motion to compel, the courts have regard to whether the information sought is relevant, and whether it is protected under a privilege or the work product doctrine. In addition, the courts will consider the factors set out in Rule 26(b)(2) (see above).¹²⁵

If an order to compel is made, the court will, in an appropriate case, 'require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion'.¹²⁶

If the court declines to make an order to compel, it is able instead to make a protective order removing the contentious subject matter from the scope of discoverable evidence and, in an appropriate case, make orders as to costs.¹²⁷

Once an order compelling the giving of an answer has been made, continued refusal to cooperate on the part of the deponent can amount to contempt of court.¹²⁸ If the deponent is one of the parties further sanctions are available. The court is also empowered to make such orders as it considers to be just including: to order that relevant facts (the subject of non-cooperation) be taken to be established; to bar the recalcitrant party from introducing specified claims, defences or evidential matters; and/or to strike out all or part of pleadings, stay or dismiss the action, or enter a default judgment.¹²⁹ 'Generally, the more severe the consequences of the sanction, the more egregious the underlying discovery failure must be.'¹³⁰

If a party or a designated representative of a corporate party fails to appear before an officer for the taking of a deposition as required, the court may 'make such orders ... as are just', including those orders noted in the preceding paragraph.¹³¹ Some courts have read Rule 37(d) as justifying sanctions against parties who, despite being present at a deposition, have declined to respond to questions, or responded to them in a manner that is clearly inadequate.¹³² This approach has been used in particular in circumstances in which a corporation has designated a person or persons who lack requisite knowledge to be deposed on its behalf:

*When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent. If the agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.*¹³³

3.4.2 Pre-action depositions

In limited circumstances, a person who has not commenced an action can petition the court for permission to depose a potential witness, for the purpose of perpetuating that testimony.¹³⁴ Such a person must show that he or she ‘expects to be a party to an action ... but is presently unable to bring it or cause it to be brought’. The prospective action must be particularised (in terms of its subject matter, probable adverse parties, etc.), as must the substance of the information sought to be elicited from each deponent. In addition, the petitioner must ‘demonstrate the need for the evidence in a future action’ and provide a legal practical reason for the inability to simply file suit immediately.¹³⁵

In general, the court must be ‘satisfied that perpetuating the testimony may prevent a failure or delay of justice’.¹³⁶ *Moore’s Federal Practice* notes that:

*Rule 27 may not be used to search for possible claims, or to search for possible defendants. Nor should it be used to gather facts for use in framing a complaint ... Insisting that a petitioner describe the testimony that is to be perpetuated deprives Rule 27 of practical utility as a general discovery device, thereby guarding against surrogate efforts to obtain discovery.*¹³⁷

3.4.3 Reviews of depositions in the United States

The findings of empirical studies in the United States have tended to call into question some of the assumptions often made by critics of this regime. Subrin states that:

*This continual use of the phrase ‘fishing expeditions’ to condemn American discovery with little analysis gives pause. What neither foreign commentators on American discovery nor homegrown conservative critics tend to mention is the extensive empirical research in our country demonstrating that in many American civil cases, often approaching fifty percent, there is no discovery, and in most of the remainder of the cases there is remarkably little. A study by the Federal Judicial Center [discussed below] summarizes the findings of empiricists: ‘The typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of litigation, and ... discovery generally—but with notable exceptions—yields information that aids in the just disposition of cases.’*¹³⁸

However, the author notes that there also seems to be

*a substantial subset of cases, in the neighbourhood of five to ten percent, or possibly even fifteen percent, [in which] lawyers abuse the discovery rules both by over-discovery and by hiding and obfuscating information. There is frequent distortion of evidence, as a result of lawyer interventions including the kind of witness coaching that is forbidden in other countries.*¹³⁹

In 1997, the Federal Judicial Center undertook research into the use of discovery in civil cases.¹⁴⁰ Questionnaires were sent to lawyers on both sides in 1000 civil cases; 1178. It was found that:

- *High levels of discovery problems and high expenses were more likely to occur in cases with high stakes, high levels of contentiousness, high levels of complexity, or high volumes of discovery activity...*
- *48% of attorneys who had some discovery in their case reported discovery problems. Document production generated the highest rate of reported problems.*
- *Generally, discovery expenses represented 50% of litigation expenses and 3% of the amount at stake in the litigation.*
- *Discovery expenses incurred unnecessarily because of problems averaged 9% of discovery expenses and about 4% of overall litigation expenses.*
- *Depositions account for by far the greatest proportion of discovery expenses.*¹⁴¹

117 Fed R Civ P 32(a), subject to Rule 32(a)(4).

118 *Moore’s Federal Practice*, above n 85, § 32.61.

119 *Ibid* § 30.70.

120 See, eg, *Jensen v Lawler*, 338 F Supp 2d 739, 746 (SD Tex, 2004).

121 *Moore’s Federal Practice*, above n 85, § 30.71.

122 The extended definition of ‘failure to answer’ precludes deponents from relying on ‘artificially restrictive or hyper-technical’ interpretations of questions asked of them: *ibid* § 37.03.

123 Fed R Civ P 37(a)(1). A motion to compel can also be sought where a corporate deponent fails to designate a representative to be deposed on its behalf: Fed R Civ P 37(a)(3)(B).

124 *Moore’s Federal Practice*, above n 85, § 37.02[3].

125 *Ibid* § 37.22.

126 Fed R Civ P 37(a)(5)(A).

127 Fed R Civ P 37(a)(5)(B).

128 Fed R Civ P 37(b)(1).

129 Fed R Civ P 37(b)(2).

130 *Moore’s Federal Practice*, above n 85, § 37.96[2].

131 Fed R Civ P 37(d).

132 See *Moore’s Federal Practice*, above n 85, § 37.91[2].

133 *Resolution Trust Corp v Southern Union Co Inc*, 985 F 2d 196, 197–8 (5th Cir, 1993).

134 Fed R Civ P 27(a)(1).

135 *National Institute for Trial Advocacy FRCP Commentary*, Rule 27.

136 Fed R Civ P 27(a)(3).

137 *Moore’s Federal Practice*, above n 85, § 27.03 (references omitted).

138 Stephen Subrin, ‘Discovery in Global Perspective—Are We Nuts?’ (2002) 52 *DePaul Law Review* 299, 308.

139 *Ibid* 309.

140 Thomas Willging et al, *Discovery and Disclosure Practice, Problems and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases* (1997).

141 *Ibid* 2. The median cost was \$3500 in cases with depositions: *ibid* 8.



Depositions were found to cause fewer reported 'problems' than all other forms of discovery:¹⁴²

*About 25% of the attorneys who had used depositions in the sample case (67% said they had) reported problems with this discovery tool. The most frequent complaint (12% of those who had used depositions) was that too much time was spent on a deposition. The median length of the longest deposition was four hours, and 25% of the longest depositions took seven hours or more.*¹⁴³

*Problems were reported far more frequently ... in complex cases, contentious cases, and civil rights cases.*¹⁴⁴

The Center also asked respondents about the effect of 1993 amendments that aimed to curb argumentative or suggestive interjections on the part of legal practitioners:

*In our sample, a small number of attorneys reported problems in three areas of depositions conduct: that an attorney coached a witness (10%), instructed the witness not to answer (8%), or otherwise acted unreasonably (9%). These responses suggest that the 1993 amendments have not entirely eliminated these problems.*¹⁴⁵

The questionnaires also asked for respondents' opinions as to possible reforms to improve the discovery system in general. A substantial proportion of respondents (63%) felt that closer judicial case management was needed, followed by a change in attorney behaviour brought about by sanctions and/or codes of conduct.¹⁴⁶

3.5 Examinations for discovery in Canada

In all Canadian jurisdictions, provision is made for the taking of an 'examination for discovery' at a post-commencement, pre-trial stage. An examination can usually take place through 'either oral or written questions, but not both', and in practice 'primary reliance' is placed on oral examination.¹⁴⁷ There are significant inter-jurisdictional variations between the relevant rules of court.

3.5.1 Persons able to be examined

In Newfoundland and Labrador and Nova Scotia, the rules of court permit the parties to examine 'any party' regarding 'any matter, not privileged, that is relevant to the subject matter of the proceeding'.¹⁴⁸ However, the court is empowered to limit the number of persons to be examined in an appropriate case.¹⁴⁹

In Alberta, Saskatchewan, New Brunswick, Ontario, Manitoba, the Northwest Territories, Prince Edward Island and the Federal Court, parties are limited to examining adverse parties (or persons having a close association therewith; see below) at least as of right.¹⁵⁰ However, in Saskatchewan, New Brunswick, Ontario, Manitoba, the Northwest Territories, Prince Edward Island and in the Federal Court it is possible to seek leave of the court to examine third parties, in appropriate circumstances.¹⁵¹ In each of those jurisdictions the discretion of the court must be informed by certain specified factors such as whether the information sought could be obtained elsewhere, whether it would be fair to permit the examination and whether the examination would entail undue expense and/or delay. The court is also directed to make appropriate orders as to costs. In most cases, the depositions of non-parties are of limited use at trial (see below).¹⁵²

In Québec, examinations 'may only be held in accordance with the terms provided in the agreement between the parties or determined by the court, particularly as far as their number and length are concerned'.¹⁵³ Examination of non-parties requires permission of the court.¹⁵⁴

In most jurisdictions it is stipulated that parties may only be examined once unless the court has ordered otherwise.¹⁵⁵

The competing models were discussed in a 2002 report of the Alberta Law Reform Institute (the ALRI Report).¹⁵⁶ The report declined to recommend the granting of a right to depose 'mere witnesses' in Alberta, noting that:

*The Committee felt that to do so would increase significantly both the cost of litigation and the time it takes for a matter to get to trial. Allowing oral discovery of any person who is but a mere witness may increase the cost of litigation to a point where litigation is not a feasible option for the ordinary individual or small company. The Committee believes that the financial consequences of extending oral discovery to mere witnesses outweigh the benefits of such examinations.*¹⁵⁷

The various jurisdictions also differ somewhat in terms of their treatment of depositions of ‘related persons’ (that is, persons having a close association with one of the parties) as of right.

- The Saskatchewan rules allow the examination (without leave) of current or former ‘officer[s] or servant[s]’ of a corporation by an adverse party.¹⁵⁸ The parties can agree on an appropriate corporate representative, and in the alternative the court is empowered to appoint one.¹⁵⁹ The rules also provide that ‘a person for whose immediate benefit an action is prosecuted or defended, shall be regarded as a party for the purpose of examination’.¹⁶⁰
- In Prince Edward Island, Ontario, Manitoba, New Brunswick and the Northwest Territories, an ‘officer, director or employee’ of a corporation may be examined on its behalf (unless the court intervenes), but leave of the court is required to depose more than one representative of a corporation.¹⁶¹ The Manitoba rules allow the examining party to opt either to select an appropriate representative, or to defer to the corporation to produce a ‘knowledgeable’ person.¹⁶² In the Northwest Territories, the corporate representative is chosen by the corporation itself, although its choice can be displaced by court order.¹⁶³ In all five jurisdictions, separate provision is made for examining a partnership or sole proprietorship.¹⁶⁴ The New Brunswick, Ontario, Manitoba and Northwest Territories rules allow the court to limit the number of people exposed to examination in a proceeding.¹⁶⁵
- The Federal Court rules provide that corporations, partnerships, unincorporated associations and the Crown (through the Attorney General) can select representatives to be examined on their behalf, although in each case the court may substitute the nominee for some other person.¹⁶⁶
- In Alberta, the rules allow, as of right, the examination of one or more officers of a corporation, as well as of current or former employees who appear to have knowledge relevant to the proceeding acquired through their employment.¹⁶⁷ The examining party may require the corporation to select an appropriate representative if it lacks the knowledge to do so itself.¹⁶⁸

The ALRI Report considered the issue of the examination of persons related to corporate parties. It noted that there were several instances in which Alberta courts had granted leave to examine persons who were not officers, employees or former

- 142 Ibid 19.
- 143 Ibid 7.
- 144 Ibid 34.
- 145 Ibid 8.
- 146 Ibid 10. Note that these figures aggregate different factors cited by respondents coming under the broader umbrellas of ‘case management’ and ‘better conduct’.
- 147 Discovery Task Force (2003) above n 2, 29. Note that there is no provision in Saskatchewan for written discovery as such. In Alberta there is no general provision, but the use of written interrogatories may be ordered by the court: *Alberta Rules of Court* r 216(2) (j). The ALRI Report recommends that parties be given the option to use interrogatories as an alternative to oral examinations: Alberta Law Reform Institute, *Document Discovery and Examination for Discovery*, Alberta Rules of Court Project Consultation Paper 12.2 (2002) [169].
- 148 *Rules of the Supreme Court 1986* (Newfoundland and Labrador) r 30.01(1); *Civil Procedure Rules* (Nova Scotia) r 18.01(1).
- 149 *Rules of the Supreme Court 1986* (Newfoundland and Labrador) r 30.01(2); *Civil Procedure Rules* (Nova Scotia) r 18.01(2).
- 150 *Alberta Rules of Court* r 200; *Queen’s Bench Rules* (Saskatchewan) r 222; *Rules of Court* (New Brunswick) r 32.02(1); *Rules of Civil Procedure* (Ontario) r 31.03(1); *Court of Queen’s Bench Rules* (Manitoba) r 31.03(1); *Rules of the Supreme Court of the Northwest Territories* r 235; *Rules of Civil Procedure* (Prince Edward Island) r 31.03(1); *Federal Courts Rules* (Canada) r 236.
- 151 *Queen’s Bench Rules* (Saskatchewan) r 222A; *Rules of Court* (New Brunswick) r 32.10(1); *Rules of Civil Procedure* (Ontario) r 31.10(1); *Court of Queen’s Bench Rules* (Manitoba) r 31.10(1); *Rules of Civil Procedure* (Prince Edward Island) r 31.10(1); *Rules of the Supreme Court of the Northwest Territories* r 270; *Federal Courts Rules* (Canada) r 238.
- 152 *Rules of Court* (New Brunswick) r 32.10(5) is indicative; *Rules of Civil Procedure* (Prince Edward Island) r 31.11(1).
- 153 *Code of Civil Procedure* (Québec) r 396.2.
- 154 *Code of Civil Procedure* (Québec) r 398.
- 155 However, a single examination need not be unitary in a strict sense; for instance, ‘the practice in Alberta is that there is only one examination for discovery, but the examination may be adjourned as necessary’: ALRI (2002) above n 147, [173].
- 156 Ibid.
- 157 Ibid [145].
- 158 *Queen’s Bench Rules* (Saskatchewan) r 223(1), (4).
- 159 *Queen’s Bench Rules* (Saskatchewan) r 223(3).
- 160 *Queen’s Bench Rules* (Saskatchewan) r 224.
- 161 *Rules of Civil Procedure* (Prince Edward Island) r 31.03(2), (3); *Rules of Court* (New Brunswick) r 32.02(2); *Rules of Civil Procedure* (Ontario) r 31.03(2); *Court of Queen’s Bench Rules* (Manitoba) r 31.03(2), (3); *Rules of the Supreme Court of the Northwest Territories* r 238.
- 162 *Court of Queen’s Bench Rules* (Manitoba) r 31.03(6).
- 163 *Rules of the Supreme Court of the Northwest Territories* r 238.
- 164 *Rules of Civil Procedure* (Prince Edward Island) r 31.03(4); *Rules of Court* (New Brunswick) r 32.02(3); *Rules of the Supreme Court of the Northwest Territories* r 240.
- 165 *Rules of Court* (New Brunswick) r 32.02(9); *Rules of Civil Procedure* (Ontario) r 31.03(9); *Court of Queen’s Bench Rules* (Manitoba) r 31.03(11); *Rules of the Supreme Court of the Northwest Territories* r 246.
- 166 *Federal Courts Rules* (Canada) r 237(1), (2), (3).
- 167 *Alberta Rules of Court* r 200(1), (4).
- 168 *Alberta Rules of Court* r 200.1.



employees of a corporation, but nevertheless were ‘the person connected with [it] best informed’ about the subject matter of the proceeding.¹⁶⁹ The committee considered this to be a reasonable development in light of changing circumstances, noting that:

*Many ‘consultants’ or ‘independent contractors’ now perform services for corporations which in the past would have been performed by employees or corporate officers who would have been subject to discovery under the rules.*¹⁷⁰

It proposed that:

By agreement between the parties or with leave of the Court, a party to the proceedings may examine any person who performs or has performed services for a party adverse in interest, whether for remuneration or not. The person must also appear to have direct knowledge of material and relevant information acquired while performing those services. In order to obtain such an order, the party seeking to examine the person must satisfy the court that:

- (i) *the applicant cannot obtain information from other persons who may be discovered;*
- (ii) *it would be unfair to require the applicant to go to trial without examining the person; and*
- (iii) *the examination will not cause undue delay, expense or unfairness to any party or to the person to be examined.*¹⁷¹

The requirement of consent or leave was designed to prevent abuse of the expanded examination regime,¹⁷² with the consent option in particular being included to reduce the burden on court resources.¹⁷³ The committee considered that depositions taken through the proposed provision would need to be adopted by the relevant corporate officer in order to be read in at trial.¹⁷⁴

The ALRI Report also considered the mode of selection of corporate representatives, noting that ‘[d]uring consultations many people voiced concerns about delays which result from having uninformed corporate representatives presented for discovery’.¹⁷⁵ The committee ultimately decided it would be preferable to retain the incumbent regime under which corporate parties appoint their own representatives subject to court review. This, it felt, was justified in light of another proposal that corporate representatives be made subject to an express duty to inform themselves of relevant matters prior to examination.¹⁷⁶

3.5.2 Scope of examination

Various formulations are used to describe the permissible scope of examination in the different Canadian jurisdictions, although all are similar.¹⁷⁷ The ALRI Report points out that:

*The scope of examination for discovery is an issue which brings to the forefront the difficulty in balancing the benefits of the process with concerns of costs and delay. Allowing a broad, virtually unfettered scope of examination for discovery may ensure that any and all information is brought out, regardless of whether it is truly material or relevant to the issues in the action. However, a broad scope also increases the length of examination for discoveries, which in turn increases both the cost of the process and the time it takes to complete discoveries.*¹⁷⁸

In Ontario, Manitoba, New Brunswick, the Northwest Territories and Prince Edward Island an examinee is obliged to ‘answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action’.¹⁷⁹ It is immaterial that the information sought is evidence, or the question comprises cross-examination.¹⁸⁰ There is express provision in all jurisdictions to the effect that the examiner is entitled to obtain disclosure of the particulars of persons expected to have knowledge of ‘transactions or occurrences in issue in the action’, any expert opinion obtained by the deponent pursuant to the action, under certain conditions, and any insurance policy which might fund any judgment debt.¹⁸¹

In the Northwest Territories the rules also state that, regardless of privilege, a party may be examined as to the particulars of any ‘surveillance report or film’ of which the other party is the subject.¹⁸² In addition, explicit provision is made for the adjournment of examinations in order that examinees might better inform themselves about particular matters for the purposes of answering questions.¹⁸³

In Saskatchewan, examination questions must be of such a nature as to be ‘touching the matters in issue in the action’.¹⁸⁴

In the Federal Court, an examinee must answer

to the best of the person’s knowledge, information and belief, any question that

- (a) *is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or*
- (b) *concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.*¹⁸⁵

Examinees who are parties can be required to better inform themselves when unable to answer a question, and the examination can be concluded subject to the provision of answers to those questions.¹⁸⁶

In Alberta, the requirement since November 1999¹⁸⁷ has been that the examinee answer ‘relevant and material questions’.¹⁸⁸ Prior to the introduction of this criterion much broader questioning was permissible under a ‘touching the matters in question’ criterion. The 2002 ALRI Report favoured the retention of the ‘material and relevant’ formulation.¹⁸⁹ In contrast to the position in some other jurisdictions, an examination in Alberta is restricted to facts, such that evidence (eg, the relation of specific facts to an allegation of negligence) is not permitted to be elicited.¹⁹⁰

In British Columbia, subject to court order, an examinee must respond to ‘any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action’.¹⁹¹ Newfoundland and Labrador and Nova Scotia use a similar formulation, adding the qualification that the subject matter of the question need not be within the scope of the pleadings.¹⁹² In all three jurisdictions it is made explicit that an examination can be adjourned for the purposes of allowing an examinee to ‘inform himself or herself’ as to particular matters.¹⁹³ In British Columbia the rules add that an examinee ‘is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action’.¹⁹⁴

In Québec, an examination can encompass ‘all facts relating to the issues between the parties’.¹⁹⁵

3.5.3 Examination procedure

The procedure applicable in Ontario is generally indicative of the examination process in Canada. An examination of one or other of the parties can be initiated after the defendant has either served a statement of defence, or been noted in default.¹⁹⁶

The examination must take place before a person assigned by an official examiner or a reporting service,¹⁹⁷ who will administer the oath or affirmation and make arrangements

169 ALRI (2002) above n 147, [135].

170 Ibid [143].

171 Ibid [147].

172 Ibid [144].

173 Ibid [150].

174 Ibid [148].

175 Ibid [151].

176 Ibid [153]. See also at [154]–[157].

Such a duty exists in the *Federal Courts Rules* (Canada) r 241.

177 ALRI (2002) above n 147, [118].

178 Ibid [119].

179 *Rules of Civil Procedure* (Ontario) r 31.06(1); *Queen’s Bench Rules* (Manitoba) r 31.06(1); *Rules of Court* (New Brunswick) r 32.06(1); *Rules of the Supreme Court of the Northwest Territories* r 251; *Rules of Civil Procedure* (Prince Edward Island) r 31.06(1).

180 *Rules of Civil Procedure* (Ontario) r 31.06(1); *Queen’s Bench Rules* (Manitoba) r 31.06(1); *Rules of Court* (New Brunswick) r 32.06(1); *Rules of the Supreme Court of the Northwest Territories* r 251; *Rules of Civil Procedure* (Prince Edward Island) r 31.06(1).

181 *Rules of Civil Procedure* (Ontario) r 31.06(2)–(5); *Queen’s Bench Rules* (Manitoba) r 31.06(2)–(4); (New Brunswick) r 32.06(2)–(4); *Rules of the Supreme Court of the Northwest Territories* r 251–3; *Rules of Civil Procedure* (Prince Edward Island) r 31.06(2)–(5).

182 *Supreme Court Rules* (Northwest Territories) r 254.

183 *Supreme Court Rules* (Northwest Territories) r 251(2).

184 *Queen’s Bench Rules* (Saskatchewan) r 222.

185 *Federal Courts Rules* (Canada) r 240.

186 *Federal Courts Rules* (Canada) r 244.

187 Glen Poelman et al, ‘Civil Procedure and Practice: Recent Developments’ (2003) 41 *Alberta Law Review* 449, 459.

188 *Alberta Rules of Court* r 200(1.2).

189 ALRI (2002) above n 147, [122].

190 See, eg, *Millott Estate v Reinhard* (2000) 265 AR 350.

191 *Supreme Court Rules* (British Columbia) s 27(22).

192 *Rules of the Supreme Court 1986* (Newfoundland and Labrador) r 30.08(1); *Civil Procedure Rules* (Nova Scotia) r 18.09(1).

193 *Supreme Court Rules* (British Columbia) s 27(23); *Rules of the Supreme Court 1986* (Newfoundland and Labrador) r 30.08(2); *Civil Procedure Rules* (Nova Scotia) r 18.09(2).

194 *Supreme Court Rules* (British Columbia) s 27(22).

195 *Code of Civil Procedure* (Québec) r 397.

196 *Rules of Civil Procedure* (Ontario) r 31.04(2). The party seeking to conduct the examination must also have served an affidavit of documents on its opponent.

197 *Rules of Civil Procedure* (Ontario) r 34.02(1).



for transcription. If the subject of the examination is a party or a related person, that person must be served with a notice of examination; non-parties must be served with a summons.¹⁹⁸ Notice must be given to all other parties to the relevant action.¹⁹⁹ A deponent who is one of the parties (or a related person) must produce all of the non-privileged documents listed in his or her affidavit of documents,²⁰⁰ as well as non-privileged documents or things as requested in the notice of examination or summons.²⁰¹

The deponent is obliged to answer questions 'to the best of his or her knowledge, information and belief'.²⁰² Where there is no objection, counsel for a deponent can answer questions on the deponent's behalf.²⁰³ Objections may be made, although not on all bases.²⁰⁴ If an objection is made, a brief reason must be stated, then if the objector consents, the question can then be answered subject to a later court ruling if the answer is sought to be introduced as evidence, or (b) if the question is not answered, motion can be made to the court to rule on whether it is proper.²⁰⁵ However, a party who fails to answer a question (or fails to honour an undertaking to do so within a specified time) may be precluded from introducing the undisclosed information at trial,²⁰⁶ as well as facing other sanctions (see below). Following the initial examination, a deponent may be re-examined by his or her own counsel and/or any party adverse to the examining party.²⁰⁷ The examination must be recorded in a form that will enable a written transcript to be prepared.²⁰⁸

The rules permit parties and/or deponents to adjourn an examination 'for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope' where it is alleged that the examination is being conducted or obstructed through improper conduct, involving:

- an excess of improper questions
- an excess of improper interruptions or objections
- the examiner exhibiting bad faith
- the examiner behaving in an 'unreasonable manner so as to annoy, embarrass or harass' the deponent
- the persistent giving of answers that are 'evasive, unresponsive or unduly lengthy'
- 'neglect or improper refusal to produce a relevant document on the examination'.²⁰⁹

The court is permitted to make such orders as it considers just, including orders as to costs.²¹⁰

The Ontario rules also make provision for the videotaping of examinations²¹¹ and the correction of information advanced by a party deponent where such information was or has become incorrect.²¹²

In terms of the scope for intervention by legal representatives,²¹³ Poelman and Bodnar have commented, with reference to Alberta, that:

There are widely varying styles followed by counsel when representing a witness being examined for discovery. The temptation to interfere in the examination is often strong, particularly given the absence of a presiding judicial official. The courts have repeatedly expressed strong disapproval of interventions by counsel for a witness, and the point was recently reinforced by Power J in Landes v Royal Bank of Canada [1997] AJ No 1312.²¹⁴

In that case, Justice Power stated that:

Counsel should allow cross-examination of his client to be carried out without undue interruption. It is inappropriate for counsel to object to a question on the ground that he does not understand it. Questions are directed at the witness, not at counsel. It is up to the witness to state whether he understands a question or not. Counsel should never, in whatever manner, attempt to feed an answer to a witness. Counsel should not give answers to questions asked of the witness.²¹⁵

3.5.4 Use of examination evidence at trial

In Ontario, Manitoba, Saskatchewan, New Brunswick, the Northwest Territories, Prince Edward Island, and the Federal Court, the rules provide that the examination evidence of adverse parties (and related persons) may, if otherwise admissible, be read into evidence in whole or in part, 'whether the party or the person has already given evidence or not'.²¹⁶ Where examination evidence is introduced in part, an adverse party may seek a direction that 'any other part of the evidence that qualifies or explains the part first introduced' be introduced also.²¹⁷ On the other hand, the examination evidence of another

person, taken pursuant to leave of the court, cannot be read in.²¹⁸ All of these jurisdictions make some provision for the use of examination evidence, with leave, where the deponent is dead or otherwise unable or unwilling to appear at trial.²¹⁹ In Ontario, Manitoba, New Brunswick, the Northwest Territories, Prince Edward Island and the Federal Court, the rules provide that examination evidence can be used to impeach the deponent as a witness.²²⁰ In the Northwest Territories, the examination evidence of a party under a disability can be read in only with leave.²²¹

The relevant provisions in Newfoundland and Labrador and Nova Scotia allow more expansive use of examinations. The rules provide that admissible examination evidence can be used against any party who was represented at, or notified of, the examination: to impeach the deponent as a witness; where the deponent was a party, for any purpose, or where the deponent cannot be secured to give oral evidence, for any purpose, with leave of the court.²²² Where examination evidence is used in part, other relevant parts may be required to be introduced.²²³

In Alberta, the rules provide that a party is able 'at the trial or on motion [to] use in evidence as against any opposite party any part of the examination of that opposite party'.²²⁴ If a person examined for discovery cannot be procured to appear at trial, despite due diligence, his or her examination evidence can, at the discretion of the court, also be used.²²⁵ Where examination evidence is adduced in part, the court is empowered to 'direct that any other part of the examination be also used, if it is so connected with the part so used that the first mentioned part ought not be used without the other part'.²²⁶ The ALRI Report endorsed this general approach, but noted that 'the Committee was unable to agree whether parties who are not adverse in interest may use the discovery done by each other against a party adverse in interest. Currently this may only be done by agreement at the commencement of discoveries'.²²⁷

In Québec, a party who has obtained examination evidence may 'introduce as evidence the whole or abstracts only of the depositions taken'.²²⁸

3.5.5 Sanctions and improper conduct

Some jurisdictions make quite specific provisions in respect of improper conduct related to depositions, while others rely more on the generic rules of contempt.

In Ontario, Manitoba, New Brunswick and Prince Edward Island, the failure of an examinee to attend an examination, take an oath or affirmation or answer a 'proper question' can lead to a court order to attend or re-attend for the purpose of answering particular questions, the striking out of all or part of his or her evidence, or the making of 'such other order as is just'.²²⁹ If the examinee is one of the parties, the proceeding may be dismissed or that person's defence struck out if appropriate,²³⁰ and refusal to disclose information in response

- 198 *Rules of Civil Procedure* (Ontario) r 34.04.
- 199 *Rules of Civil Procedure* (Ontario) r 34.05.
- 200 *Rules of Civil Procedure* (Ontario) r 30.04(4).
- 201 *Rules of Civil Procedure* (Ontario) r 34.10.
- 202 *Rules of Civil Procedure* (Ontario) r 31.06.
- 203 *Rules of Civil Procedure* (Ontario) r 31.08; *Queen's Bench Rules* (Manitoba) r 31.08; *Rules of Civil Procedure* (Prince Edward Island) r 31.08.
- 204 See *Rules of Civil Procedure* (Ontario) r 31.06.
- 205 *Rules of Civil Procedure* (Ontario) r 34.12.
- 206 *Rules of Civil Procedure* (Ontario) r 31.07(1), (2).
- 207 *Rules of Civil Procedure* (Ontario) r 34.11(1).
- 208 *Rules of Civil Procedure* (Ontario) r 34.16.
- 209 *Rules of Civil Procedure* (Ontario) r 34.14(1).
- 210 *Rules of Civil Procedure* (Ontario) r 34.14(2).
- 211 *Rules of Civil Procedure* (Ontario) r 34.19.
- 212 *Rules of Civil Procedure* (Ontario) r 31.10.
- 213 Note that in general, access to examinations is restricted to the parties and their representatives: see Glen Poelman et al (2003) above n 187, 473–4.
- 214 Glen Poelman and Eugene Bodnar, 'Civil Procedure and Practice: Recent Developments' (1999) 37 *Alberta Law Review* 909, 931.
- 215 *Landes v Royal Bank of Canada* [1997] AJ No 1312, [34], quoted in *ibid*.
- 216 *Rules of Civil Procedure* (Ontario) r 31.11(1); *Court of Queen's Bench Rules* (Manitoba) r 31.11(1); *Queen's Bench Rules* (Saskatchewan) r 239; *Rules of Court* (New Brunswick) r 32.11(1), (2); *Rules of the Supreme Court of the Northwest Territories* r 266(1); *Rules of Civil Procedure* (Prince Edward Island) r 31.11(1); *Federal Courts Rules* (Canada) r 288. Note that in Manitoba it is provided that the evidence of a former officer or employee of a corporation, partnership or sole proprietorship cannot be read into evidence without leave: r 31.11(6).
- 217 *Rules of Civil Procedure* (Ontario) r 31.11(3); *Court of Queen's Bench Rules* (Manitoba) r 31.11(1); *Queen's Bench Rules* (Saskatchewan) r 239; *Rules of Court* (New Brunswick) r 32.11(4); *Rules of the Supreme Court of the Northwest Territories* r 266(3); *Rules of Civil Procedure* (Prince Edward Island) r 31.11(3); *Federal Courts Rules* (Canada) r 289.
- 218 *Rules of Civil Procedure* (Ontario) r 31.10(5); *Court of Queen's Bench Rules* (Manitoba) r 31.10(3); *Queen's Bench Rules* (Saskatchewan) r 222A(5); *Rules of Court* (New Brunswick) r 32.10(5); *Rules of the Supreme Court of the Northwest Territories* r 270(5); *Rules of Civil Procedure* (Prince Edward Island) r 31.10(9); *Federal Courts Rules* (Canada) r 239(6).
- 219 *Rules of Civil Procedure* (Ontario) r 31.11(6), (7); *Court of Queen's Bench Rules* (Manitoba) r 31.11(7), (8), (9); *Queen's Bench Rules* (Saskatchewan) r 239A(5); *Rules of Court* (New Brunswick) r 32.11(7), (8); *Rules of the Supreme Court of the Northwest Territories* r 267; *Rules of Civil Procedure* (Prince Edward Island) r 31.11(6), (7); *Federal Courts Rules* (Canada) r 290.
- 220 *Rules of Civil Procedure* (Ontario) r 31.11(2); *Court of Queen's Bench Rules* (Manitoba) r 31.11(2); *Rules of Court* (New Brunswick) r 32.11(3); *Rules of the Supreme Court of the Northwest Territories* r 266(2); *Rules of Civil Procedure* (Prince Edward Island) r 31.11(2); *Federal Courts Rules* (Canada) r 291. Note that the *Federal Courts Rules* specifically provide that '[a] party may use any part of its examination for discovery of a person as evidence to impeach the credibility of that person as a witness at trial only if the party first puts to the person the questions asked in that part of the examination'.
- 221 *Rules of the Supreme Court of the Northwest Territories* r 266(5).
- 222 *Rules of the Supreme Court* 1986 (Newfoundland and Labrador) r 30.13(1); *Civil Procedure Rules* (Nova Scotia) r 18.14(1).
- 223 *Rules of the Supreme Court* 1986 (Newfoundland and Labrador) r 30.13(2); *Civil Procedure Rules* (Nova Scotia) r 18.14(2).
- 224 *Alberta Rules of Court* r 214(1).
- 225 *Alberta Rules of Court* r 214(3).
- 226 *Alberta Rules of Court* r 214(4).
- 227 ALRI (2002) above n 147, [237].
- 228 *Code of Civil Procedure* (Québec) r 398.1.
- 229 *Rules of Civil Procedure* (Ontario) r 34.15(1); *Court of Queen's Bench Rules* (Manitoba) r 34.14(1); *Rules of Civil Procedure* (Prince Edward Island) r 34.15; *Rules of Court* (New Brunswick) r 33.12. In New Brunswick, the court is also permitted to strike out all or part of the defaulter's evidence, cause him or her to be apprehended by a sheriff or peace officer, or make any other order as it considers just.
- 230 *Rules of Civil Procedure* (Ontario) r 34.15(1); *Court of Queen's Bench Rules* (Manitoba) r 34.14(1); *Rules of Court* (New Brunswick) r 33.12; *Rules of Civil Procedure* (Prince Edward Island) r 34.15.



to a question means that information cannot be introduced at trial without leave.²³¹ In Ontario serious sanctions are available in relation to default or misconduct of the deponent, including, in some circumstances, sanctions for contempt of court.²³²

Ontario, New Brunswick and Prince Edward Island also make provision for sanctions in relation to excesses of improper questions, bad faith or otherwise oppressive conduct and the giving of evasive or unresponsive answers.²³³

In Alberta, the court may alter or waive the rules in relation to, or 'impose terms' on, parties who act or threaten to act 'in a manner that is vexatious, evasive, abusive, oppressive, improper or prolix'.²³⁴ 'Terms' includes inter alia orders in relation to costs, access to documents, schedules and time limits, interrogatories and notices to admit, judicial supervision and confidentiality orders.²³⁵ The failure of an examinee to attend, be sworn or answer proper questions amounts to contempt.²³⁶

The Saskatchewan rules provide that an examinee who fails to attend, be sworn or answer a 'lawful question' is 'deemed' to be in contempt 'and proceedings may be taken forthwith to commit [him or her]'. If the examinee is one of the parties, the action can be dismissed, or the defence can be struck out, as appropriate.²³⁷

In British Columbia, refusal or neglect to attend an examination, refusal to be sworn or answer questions, or refusal or neglect to follow a direction of the court can result in the dismissal of the proceeding or the effective striking out of a defence.²³⁸ Such failures also comprise contempt.²³⁹

The Newfoundland and Labrador rules provide that where an examinee refuses or neglects to attend, or refuses to be sworn, answer proper questions or produce required documents, the court may hold him or her in contempt, dismiss the proceeding or strike out the defence or make such other order as is just.²⁴⁰ In addition, where an examination is being conducted in bad faith, in an unreasonable or oppressive manner, or there is 'other good cause', the examiner may stop the examination or impose limitations of scope and/or manner.²⁴¹ The Nova Scotia rules are similar,²⁴² but also permit the examiner to report on the conduct of particular persons to the court so that the court can make whatever sanction it considers just.²⁴³

In the Northwest Territories, a person who fails, without adequate excuse, to attend an examination as required, be sworn, answer proper questions or respect the orders of the court is in civil contempt.²⁴⁴ This can lead to imprisonment, a fine or a costs order or, in the case of parties to a proceeding, the dismissal or stay of that proceeding, the striking out of a defence, or a prohibition on the use of particular evidence.²⁴⁵

In Québec, the court can terminate 'an examination that it considers excessive, vexatious or useless, and rule on the costs'.²⁴⁶

In the Federal Court, a person who 'disobeys a process or order of the Court' is in contempt.²⁴⁷ The court is permitted to 'limit' an examination 'that it considers to be oppressive, vexatious or unnecessary'.²⁴⁸ In addition, refusal to disclose information on examination precludes the adducing of that information at trial without leave.²⁴⁹

3.5.6 Pre-commencement examinations

In some jurisdictions, a person may seek permission to examine another person for the purpose of ascertaining the identity of an intended defendant.²⁵⁰ Applicants must show that they may have a cause of action or a prima facie case against the intended defendant, despite making reasonable enquiries they have been unable to identify the intended defendant, and they have reason to believe the proposed examination will yield information identifying the intended defendant.²⁵¹

The ALRI Report rejected the notion that a similar provision ought to be introduced in Alberta, noting that in an exceptional case the court's general discretion to alter provisions relating to time²⁵² could permit the same result to be achieved.²⁵³

3.5.7 Limitations on examinations in small claims

Most jurisdictions limit the use of examinations in relation to claims that fall below a particular threshold in terms of overall value.

In simplified procedures for small claims in Ontario, Prince Edward Island, Saskatchewan and Québec, examinations are not permitted.²⁵⁴ Written examinations only are permitted in Federal Court small claims where a simplified procedure applies.²⁵⁵

In British Columbia, either of the parties may elect to have an appropriate claim dealt with under the ‘fast track’ procedure set out in rule 66 of the Rules of Court. In fast track litigation examinations are limited to a duration of two hours, although this can be varied by consent or court order.²⁵⁶ In addition, a pilot expedited litigation program operating in several registries²⁵⁷ has, among other things, eliminated oral examinations as of right in most money or property claims valued at less than \$100 000, although examinations may still be permitted by agreement between the parties or court order,²⁵⁸ albeit subject to a presumptive time limit of two hours.²⁵⁹

In Alberta, claims valued at \$75 000 or less are dealt with under a special ‘streamlined procedure’. Claims can also be rendered subject to (or removed from) the regime through agreement or court order.²⁶⁰ In streamlined procedure claims, examinations of parties or their representatives are limited to six hours in duration.²⁶¹ This general rule is subject to court modification.²⁶²

3.5.8 Reviews of examinations in Canada

Canadian Bar Association Report

In 1996, the Canadian Bar Association (CBA) published its *Systems of Civil Justice Task Force Report*. It noted that oral examinations are ‘the target of much dissatisfaction under the current litigation process’ and are seen as ‘an expensive and sometimes wasteful exercise’.²⁶³ The Task Force did not appear to consider that oral examination should be abolished, other than in cases dealt with through ‘expedited and simplified proceedings’, but it recommended that all Canadian jurisdictions:

- amend [their] rules of procedure to limit the scope and number of oral examinations for discovery and the time available for discovery, and
- devise means to assist parties in scheduling discoveries and in resolving discovery disputes in an efficient manner.²⁶⁴

In December 2006, it was noted that 10 jurisdictions had taken some form of action in relation to the first recommendation, but that less had been done in respect of the second.²⁶⁵

Nova Scotia

In Nova Scotia, the Supreme Court²⁶⁶ is in the process of undertaking a Civil Procedure Rules Revision Project, and has convened a working group to examine issues arising in relation to discovery and disclosure. The working group produced a report in 2005, which considered the rules of that province in relation to examinations.²⁶⁷

The group considered that parties should be permitted to examine each other without a court order, and that where one is a corporation the other should be able to examine ‘one manager (to be defined) and one employee of the corporation without a court order’. The applicant would be permitted to

231 *Rules of Civil Procedure* (Ontario) r 31.07(2); *Court of Queen’s Bench Rules* (Manitoba), r 31.07(1); *Rules of Court* (New Brunswick) r 32.07; *Rules of Civil Procedure* (Prince Edward Island) r 31.07.

232 *Rules of Civil Procedure* (Ontario) r 34.15(2).

233 *Rules of Civil Procedure* (Ontario) r 34.14; *Rules of Court* (New Brunswick) r 33.11; *Rules of Civil Procedure* (Prince Edward Island) r 34.14.

234 *Alberta Rules of Court* r 216.1(1).

235 *Alberta Rules of Court* r 216.1(2).

236 *Alberta Rules of Court* r 703(1).

237 *Queen’s Bench Rules* (Saskatchewan) r 231.

238 *Supreme Court Rules* (British Columbia) r 2(5).

239 *Supreme Court Rules* (British Columbia) r 56(4).

240 *Rules of the Supreme Court 1986* (Newfoundland and Labrador) r 30.14.

241 *Rules of the Supreme Court 1986* (Newfoundland and Labrador) r 30.15.

242 See *Civil Procedure Rules* (Nova Scotia) r 18.15–16.

243 *Civil Procedure Rules* (Nova Scotia) r 18.13.

244 *Rules of the Supreme Court of the Northwest Territories* r 704.

245 *Rules of the Supreme Court of the Northwest Territories* r 705.

246 *Code of Civil Procedure* (Québec) r 396.4.

247 *Federal Courts Rules* (Canada) r 466.

248 *Federal Courts Rules* (Canada) r 243.

249 *Federal Courts Rules* (Canada) r 248.

250 See, eg, *Court of Queen’s Bench Rules* (Manitoba) r 31.12(1); *Rules of Court* (New Brunswick) r 32.12(1).

251 See, eg, *Court of Queen’s Bench Rules* (Manitoba) r 31.12(2); *Rules of Court* (New Brunswick) r 32.12(2).

252 *Alberta Rules of Court* r 548.

253 ALRI (2002) above n 147, [125].

254 *Rules of Civil Procedure* (Ontario) r 76.04, *Rules of Civil Procedure* (Prince Edward Island) r 75.1.04, *Queen’s Bench Rules* (Saskatchewan) rr 478(1), 484, *Code of Civil Procedure* (Québec) r 396.1.

255 *Federal Courts Rules* (Canada) r 296.

256 See *Supreme Court Rules* (British Columbia) r 66(13)–(15).

257 The pilot program commenced on 1 September 2005 in the Vancouver, Victoria, Prince George and Nelson registries, and was scheduled to operate for two years. The aim of the program ‘is to make it more economical to bring claims of \$100,000 or less to the Supreme Court’: ‘Rule 68’ (2005) BC Ministry of Attorney General, 2 <www.ag.gov.bc.ca/courts/civil/info/rule_68_brochure.pdf> at 26 March 2008.

258 *Supreme Court Rules* (British Columbia) r 68(27).

259 *Supreme Court Rules* (British Columbia) r 68(28)–(30).

260 *Alberta Rules of Court* r 659.

261 *Alberta Rules of Court* r 662.

262 *Alberta Rules of Court* r 660.

263 Canadian Bar Association, *Systems of Civil Justice Task Force Report* (1996) 43.

264 *Ibid.*

265 Margaret Shone, *Into the Future: Civil Justice Reform in Canada 1996 to 2006 and Beyond* (2006) 37–8.

266 In conjunction with the Law Reform Commission, the Nova Scotia Barristers’ Society and the Nova Scotia Department of Justice.

267 Justice John M Davison (Nova Scotia), *Final Report of the Discovery and Disclosure Working Group* (2005).



choose the corporate representatives to be examined, but the corporation could seek to have those persons substituted. The selected 'manager' would be obliged to be informed of relevant matters for the examination.

The group suggested that other persons believed to have 'information relevant to a material issue in the action' (excluding expert witnesses; see below) should be able to be examined by leave of the court (in a similar manner as in Ontario). In this connection, '[t]he rules should be framed to indicate a substantial burden on the applicant'.

A report of a separate working group inquiring into evidence recommended that 'there should be no discovery of experts as of right'.²⁶⁸ However, there were disagreements as to the circumstances in which leave to discover an expert ought to be granted, and the mechanism that should be involved.

British Columbia

The British Columbia Justice Review Task Force, established in 2002 on the initiative of the Law Society of British Columbia, released a report in November 2006 which proposed significant reform of the discovery regime in that province.²⁶⁹ The report states that:

*An examination for discovery is a very labour-intensive and therefore costly process. In addition, while conducting an oral discovery may be just another part of a lawyer's 'day at the office,' it can be a very intimidating and stressful experience for the client. It can also cause the client lost time from work and other substantial inconvenience.*²⁷⁰

The working group considered that 'the only potential benefit of oral discovery for the vast majority of cases is to assist the settlement process', given that so few cases make it to trial.²⁷¹ This benefit was not considered to render oral examination essential. The conclusion of the group was that its cost 'often outweighs the benefits'. It stated:

*In order to incorporate proportionality principles into discovery practice, we must place restrictions on the process available to the disputing parties, while maintaining fairness ... We therefore recommend that no oral discovery be allowed, except by order or consent, for all cases valued at \$100,000 or less ... for cases that are valued at more than \$100,000, we recommend that, absent leave [or consent to a second day], each party (regardless of the number of parties adverse in interest) be available for an oral examination for discovery for a maximum of one day ... The one day limitation is, admittedly, somewhat arbitrary, but we believe that some measure must be set and that one day should be enough time to conclude all necessary oral examinations of a party in the vast majority of cases.*²⁷²

In order to mitigate the adverse effects of the proposed contraction of the scope for examinations, the working group proposed that the parties to an action be obliged to exchange a list of witnesses intended to be called at trial complete with concise summaries of the evidence that it is anticipated will be given (termed 'will-say statements'). Such statements would provide a 'cost effective' means of avoiding surprise, and 'advance the discussions between the parties and ... promote the earlier resolution of disputes'.²⁷³

Ontario

In 2003, a task force established for the specific purpose of reviewing the discovery process in Ontario released its report.²⁷⁴ The task force gathered empirical data through a survey, questionnaires, a 'motions activity study' to assess the volume of discovery-related motions, and submissions and consultations.²⁷⁵ It concluded that '[d]iscovery-related problems do not arise in the majority of cases, but primarily in larger, "complex" cases or where there is a lack of co-operation between opposing counsel'.²⁷⁶

The task force made a large number of recommendations for reform. Some were of a general nature. It considered, for instance, that best practices for discovery planning ought to be developed, supplemented by enhanced formal and informal court control mechanisms.²⁷⁷ This, it was felt, would alleviate most difficulties as to the scheduling and location of examinations.²⁷⁸ In relation to oral examinations specifically, the task force considered the broad question of whether the benefits of oral examinations justified their costs, or whether the right to examine should be abolished or eliminated. It concluded that:

Whatever its true value, the majority of lawyers consulted view oral examinations as an indispensable discovery mechanism. Of all the discovery reform options canvassed by the Task Force, the elimination or restriction of access to oral examinations has been the most vehemently opposed by participants in the review. The Task Force has concluded that the imposition of restrictions at this time is not only unwarranted by the findings, but would be met with significant opposition from the litigation bar. With the implementation of other controls, the Task Force is of the view that many of the problems relating to oral discovery can be adequately addressed.²⁷⁹

These controls included the introduction of a presumptive one day limit, able to be displaced by agreement or court order, on the examination of an adverse party, reflecting ‘the general consensus that most examinations of a party can be completed in that time’.²⁸⁰ However, for the most part, it was felt that the development of ‘best practices’ in connection with oral examinations would mitigate the reported problems:

The Task Force anticipates that as part of discovery planning, parties will take steps to agree on the timing, duration and location of examinations, and to explore ways to maximise the efficiency and effectiveness of oral discovery. This might include a consideration of the use of agreed statements of fact, requests to admit and demands for particulars to better clarify issues prior to oral discoveries. The Task Force also recommends that best practices be developed on the proper conduct of oral discovery, including such matters as preparation for examinations, proper questions, undertakings and refusals.²⁸¹

The task force also considered the Ontario provisions for examination of corporate representatives, noting criticism of the rule limiting access, in the absence of a court order, to a single, current ‘officer, director or employee’. It considered that the parties should be able to agree to the examination of more than one representative before resort to a court order should be required.²⁸² On the examination of non-parties, the task force recommended a slight relaxation of the criteria for leave to examine, as well as the development of best practice standards concerning agreements for obtaining information from non-parties.²⁸³

In 2007 a summary of the findings and recommendations of the Civil Justice Reform Project was released.²⁸⁴ The project, led by Coulter Osbourne QC, was established to review potential areas of reform and deliver recommendations to make the civil justice system more accessible and affordable. Discovery, including oral examinations, was one of the areas under review.

To address problems associated with prolonged examinations (said by some consultants to be caused by ‘poorly prepared counsel ... unduly concerned about overlooking potential facts and issues’)²⁸⁵ Mr Osbourne recommended that each party should have up to a maximum of one day (seven hours) to examine parties adverse in interest, subject to agreement otherwise or a court order. Although it was recognised that this default rule had the potential to generate applications for extensions of time, he believed ‘counsel acting reasonably and having considered the cost of discovery and the importance, nature and value of the claim should be able to agree as to whether or not more than one day is needed’.²⁸⁶

Mr Osbourne declined to recommend that examinees be compelled to answer all questions, even where they were objected to on the basis of relevance, but did conclude that parties should be encouraged to voluntarily answer such questions, with objections to be recorded for later ruling by the court, as already provided for in the rules.²⁸⁷ He also suggested parties should be encouraged to discuss early in the litigation who would be required for examination, and the expected date and duration of any examinations.²⁸⁸

3.6 Depositions in the United Kingdom

The Civil Procedure Rules (CPR) make provision for the use of a deposition procedure in limited circumstances.²⁸⁹ They are similar to the Victorian rules discussed above. ‘The main purpose of taking [a deposition] is to obtain the evidence of the witness as if the witness were giving evidence at trial.’²⁹⁰ Under Rule 34.8(1), a party can apply for an order permitting a person to be examined on oath prior to a hearing. The deponent’s participation can be enforced, if required,²⁹¹ but he or she must be offered

268 Evidence Working Group (Nova Scotia), *Final Report* (2005), 4.

269 Civil Justice Reform Working Group, British Columbia, *Effective and Affordable Civil Justice* (Report to the Justice Review Task Force) (2006).

270 *Ibid* 27.

271 The working group quoted a figure of ‘less than 3%’: see *ibid* 27.

272 *Ibid* 28.

273 *Ibid* 28.

274 Discovery Task Force (2003) above n 2.

275 The various forms of information-gathering did not always produce correlating results. For example, the consultations revealed a ‘prevalent’ perception that opposing counsel are often unprepared for oral examinations, but only 5% of respondents to the case specific questionnaire identified this as a problem: see *ibid* 69.

276 *Ibid* 54.

277 *Ibid* 83–9.

278 *Ibid* 114.

279 *Ibid* 114.

280 *Ibid* 116.

281 *Ibid* 119.

282 *Ibid* 125.

283 *Ibid* 127.

284 Coulter Osbourne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

285 *Ibid* 59.

286 *Ibid* 59.

287 *Ibid* 60.

288 *Ibid* 65.

289 See in general Paul Matthews and Hodge Malek, *Disclosure* (2007) [17.01]–[17.09].

290 Sweet and Maxwell, *Civil Procedure (The White Book)* (at 15 April 2008) UK CP 34.9.

291 See CPR 34.10. See also *Civil Procedure Rules Practice Direction 34, Depositions and Court Attendances by Witnesses*, [4.8]–[4.11]. Note that ‘[a]n order for the examination of a witness under r 34.8 [alone] is not an order on the witness to attend for examination. Usually the witness is willing to attend and does attend his examination voluntarily’: *Ibid*, UK CP 34.10.



reasonable travel expenses and compensation for loss of time.²⁹² The deposition can be adduced in court—by any party—as evidence, although notice must be given,²⁹³ and the court has a discretion not to admit the deposition²⁹⁴ or to require the deponent to attend and give oral evidence.²⁹⁵

The purpose of the rules relating to depositions was discussed by the Court of Appeal in some detail in *Barratt v Shaw & Ashton*.²⁹⁶ There, the claimant sought to depose a witness and potential defendant in a professional negligence claim for the purpose of illuminating the strength of his claim against other persons. The claimant was not in a position to anticipate the content of the witness's evidence, and sought to depose him precisely because the witness had become 'reluctant to become engaged in any sort of dialogue about the case'.²⁹⁷ The claimant suggested that the *Civil Procedure Rules*, as drafted, supported an enlarged role for the deposition procedure. However, Lord Justice Mance stated:

I do not consider that the primary purpose of CPR 34.8 was in any way to enable the kind of procedural course now suggested. The primary purpose is and remains the taking of evidence on deposition and introducing it in that form at the trial from a witness whom it would be impossible to bring to court for trial. I am prepared to accept the alternative suggested in Butterworths Civil Court Practice; that is, of enabling a party who could not pursue his case without a particular witness's support to obtain evidence from that witness in advance ... If a party wishes to pursue an application for summary judgment under CPR 24 or to resist it, and he could not adduce the necessary evidence for that purpose without having the evidence taken on deposition of some witness, then that would be a classic example ... [But what the present claimant] wants is to obtain the evidence of a witness in advance simply in order to enable him to re-evaluate the strength of his claim against the present defendants to see whether a trial should now take place. Further, if he concludes that he has only a poor prospect against them alone, there is the subsidiary purpose of wanting to know whether he has a prima facie case against Mr Hirst [an alternative defendant]. It does not seem to me that CPR 34.8 is there to enable a potential claimant to have a potential defendant examined in advance to see what he has to say.²⁹⁸

Thus, it is clear that use of deposition procedures in the United Kingdom continues to be circumscribed, and in most cases will not be permitted unless it is probable that some circumstance will prevent the deponent from giving oral evidence at trial.

3.7 SUBMISSIONS

3.7.1 Responses to Consultation Paper

The Consultation Paper invited respondents to comment on whether a pre-trial examination procedure would be useful in Victoria and, if so, what its form and limitations ought to be.

Several respondents expressed opposition to the use of pre-trial examinations, the common concern being their potential to become 'another costly process-driven step' in legal proceedings,²⁹⁹ and to 'increase the costs of the parties and the courts without providing corresponding benefits'.³⁰⁰ One aspect of the costs issue raised was the potential for pre-trial examinations to both increase and 'front load' the cost of counsel:

The introduction of depositions, by reason of the skill sets required, would inevitably also lead to a far greater involvement of counsel in the early stages of a proceeding without necessarily reducing the overall costs of litigation.³⁰¹

Other respondents expressed concern that pre-trial examinations could impede the quick resolution of disputes. For instance, the Group submission suggested that:

To be a meaningful process, depositions can only be effective if the questions put are informed and educated. This could only occur once discovery has been completed. Accordingly, the deposition process is unlikely to be a step that will result in the early determination of proceedings—it may result in resolutions after or at the time of the deposition, but this is likely to be proximate to the time of trial.³⁰²

Some respondents believed that the potential benefits that pre-trial examinations offer might be able to be secured by other means. For instance, WorkCover suggested that a better option would be the implementation of 'a legislated pre-litigated framework similar to the VWA model',³⁰³ and the Group submission suggested that the 'early exchange of witness statements' would be beneficial in this regard.³⁰⁴ The Supreme Court's submission on this issue concluded:

*The current rules, and use of early witness statements are considered sufficient to enable effective disclosure of information at an appropriate time.*³⁰⁵

The Victorian Bar, on balance, opposed pre-trial examinations,³⁰⁶ noting not just their implications in terms of costs and time, but also the potential for their abuse, in particular where legal opponents have unequal resources. In support of its position it made reference to the United States:

*Oral depositions are the major method of discovery in the United States. They are also the most costly and have historically been subject to widespread abuse, especially in complex litigation. In extreme cases, most frequently in large scale class actions for securities law violations, plaintiffs use the deposition procedure as a litigation tactic to procure a settlement by requiring literally hundreds of witnesses from opposing parties to be deposed and typically make such depositions oppressive and lengthy.*³⁰⁷ *This is often effective at producing a settlement bearing in mind that under the American rules costs do not follow the event.*

The Bar did, however, recognise several benefits of pre-trial examinations:

the parties can ‘lock in’ a witness’s evidence under oath at a pre-trial stage

- the parties can develop evidence for use in dispositive motions
- the parties can gauge the effectiveness of each others’ witnesses prior to trial³⁰⁸
- opposing parties’ cases can be elicited in their own words, rather than ‘filtered through the editorial judgment of opposing lawyers’
- light can be shed on discovered documents
- ‘the number, length and costs of witness statements’, which are ‘one of the principal sources of litigation expense in complex commercial cases in Australia’, could be reduced
- expert evidence could be better probed and understood.

The Bar submitted that if pre-trial examinations were to be introduced in Victoria, it should occur on an experimental footing, ‘as part of a pilot scheme making available a limited and carefully-controlled form of discovery by the use of oral depositions with the leave of the Court’.³⁰⁹ It cautioned against an open-ended deposition regime, and proposed ‘the use of oral depositions be subject to leave of the court and limited in scope to (say) four to six key witnesses for a limited and specified duration’. The Bar also expressed support for the use of a mechanism under which a corporate deponent is permitted to designate a representative to be deposed on its behalf as a means of preventing abuse of a deposition regime.

292 CPR 34.8(6).

293 CPR 34.11(2)–(3).

294 CPR 34.11(1).

295 CPR 34.11(4). *The White Book* states that requiring the attendance of a deponent is ‘highly unusual’, noting that CPR 34.11(4) has been described as providing ‘a fallback procedure for when it seems preferable that the trial judge should hear some of the evidence orally’ (*Barratt v Shaw & Ashton* [2001] EWCA Civ 137 [12]): *White Book*, above n 290, UK CP 34.11.

296 [2001] EWCA Civ 137.

297 [2001] EWCA Civ 137, [3].

298 [2001] EWCA Civ 137, [13].

299 Submission CP 37 (Transport Accident Commission).

300 Submission CP 31 (Victoria Legal Aid). Concerns about costs were also noted in Submissions CP 33 (Victorian Bar), CP 48 (Victorian WorkCover Authority), CP 58 (Supreme Court of Victoria).

301 Submission CP 48 (Victorian WorkCover Authority). WorkCover notes that the increased cost could, in relation to its work, have an ‘overall negative impact on scheme viability in an environment where a robust pre-litigated process is currently producing high resolution of damages prior to the issuing of damages writs’.

302 Submission CP 47 (the Group submission). Concerns about the potential for delay were also noted in Submissions CP 47 (Group Submission), CP 58 (Supreme Court of Victoria).

303 Submission CP 48 (Victorian WorkCover Authority).

304 Submission CP 47 (the Group submission).

305 Submission CP 58 (Supreme Court of Victoria). The ‘rules’ referred to are rr 31.02 and O 41.

306 ‘[W]hile the Bar concedes depositions may have merit in some cases the Bar is sceptical that the introduction of depositions offers the potential for a meaningful reduction in costs or delay in the civil justice system’: Submission CP 33 (Victorian Bar).

307 This does not appear to take into account the presumptive limit of 10 depositions per ‘side’ in the FRCP: see above.

308 The Bar notes that ‘[a] weak or ineffective presentation by [a] witness—both as to substance and body language—may well have a critical impact upon the dynamic of the case and result in a quick settlement’: Submission CP 33 (Victorian Bar).

309 In this connection the Bar endorses Proposal 5(e) in Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006), discussed above: Submission CP 33 (Victorian Bar).

Getting to the Truth Earlier and Easier



In a similar manner, the Group submission, although declining to endorse pre-trial examinations, submitted that if introduced, ‘they should be only available with the leave of the court and their conduct and length should be strictly managed’. Further, ‘a deposition should [not] become an alternative to a witness being cross-examined in Court’.³¹⁰

A number of submissions were supportive of the introduction of pre-trial examinations.³¹¹ Most sought to draw attention to matters that would need to be addressed if this were to occur.

The Law Institute noted that the Supreme Court Rules permit pre-trial examinations as an alternative to written interrogatories where their subject consents. It submitted that the relevant provisions could be extended to permit the use of depositions pursuant to court order, and that such an extension would be preferable to the development of a novel procedure. However, it cautioned that a revised scheme ‘should have features which will limit the potential cost and delay burden on the parties and help avoid any abuse of process’. It suggested as possibilities:

- limiting the number of witnesses (excluding the parties) able to be deposed
- limiting the duration of depositions to four hours ‘except in exceptional cases’
- requiring a court order to conduct a deposition
- rendering deposition evidence inadmissible in court, other than in relation to prior inconsistent statements or where the witness has died or lost capacity
- requiring an officer of the court to attend a deposition
- restricting the use of depositions to circumstances in which mediation has failed.³¹²

Dibbs Abbott Stillman submitted that, as part of the reformed civil procedure regime set out in its submission, ‘oral interrogatories’ should be permitted (and should to a large extent supersede written interrogatories) if mediation (occurring subsequent to the close of pleadings and the filing of affidavits) fails to result in the resolution of a matter. It noted that:

The advantage of oral interrogatories is that [they allow] a party to assess the credibility of witnesses rather than view carefully crafted witness statements. The oral interrogatories would also, in effect to a large extent, amount to a party’s evidence in chief thereby shortening the length of trials. Provision could be made in the court rules for all objections arising out of oral interrogatories to be ruled upon prior to the commencement of the trial and that the balance of any transcript be deemed to be evidence in the trial.

Where there are issues of credibility which are not adequately illustrated by any video, a party should be at liberty to require that witness to give evidence before the Court.

The Court could also require any controversial or questionable evidence to be given again before it. This could be dealt with at directions hearing at a pre-trial stage ...

Oral interrogatories should also encourage parties to look at settlement of the proceedings and would allow parties to engage their own witnesses’ as well as the opposition’s witnesses’ credibility and ability to perform in the witness box.

Dibbs Abbott Stillman also suggested that:

Interrogatories should be either manually transcribed or video recorded. This may require an increase in the number of licensed transcribers. Legal practitioners should be given the power to swear in witnesses for the purposes of the oral interrogatories. Such interrogatories would take place at a relevant party’s solicitors’ offices or as otherwise mutually agreed between the parties.³¹³

The Police Association considered pre-trial examinations to have ‘merit’, but cautioned that if they are to be introduced, regard should be had to both legal professional privilege and to the Information Privacy Act.³¹⁴

The Victorian Aboriginal Legal Service submitted that it would be useful to have provisions under which witnesses (in particular expert witnesses) could be required to answer questions under oath as part of its proposed pre-issuing procedure. It suggested that witnesses should provide confidential reports in affidavit form, which a judge should then assess for the purposes of determining whether the witness should give evidence. If the answer is in the affirmative, and information additional to that set out in the report is required, the evidence should be given before the hearing.³¹⁵

3.7.2 Responses to Exposure Draft 1

In Exposure Draft 1 the commission suggested a procedure for a new form of pre-trial oral examination in civil proceedings. We proposed that a party be able to require a person with relevant information to answer questions by serving a notice on that person. Leave of the court would not be required. This was intended to eliminate the requirement to burden the court with additional interlocutory applications, and therefore to keep costs at a minimum.

IMF expressed support for the increased use of depositions on the basis that this would help focus attention on real issues and reduce issues in dispute, enable the parties to test the strengths and weaknesses of their positions and therefore promote informed resolution.³¹⁶ In consultation, the Insurance Ombudsman informed us that the oral examinations its office conducts in the course of its investigations are very effective for resolving matters, as the parties are able to see the strengths and weaknesses of their respective cases.³¹⁷ Clayton Utz suggested that depositions, which are ‘susceptible to “wordsmithing” by lawyers and limit the ability of witnesses to give their evidence in their own words’,

*offer an alternative to witness statements with all of [the] advantages but without the same disadvantages. In particular, they limit surprise and may contribute to early settlements by disclosing the strengths and weaknesses of a case prior to trial. At the same time, they allow witnesses to give their evidence in chief in their own words.*³¹⁸

The Mental Health Legal Centre also supported the availability of the examination process before the commencement of proceedings.

However, considerable concern was again expressed about the potential for the proposed procedure to increase costs and delay by adding an extra interlocutory step.³¹⁹ It was also argued that it would increase the burden on the courts if the court were moved to rule on disputes during the course of the examination.³²⁰ Clayton Utz and the Insurance Council suggested existing methods for collecting information, such as notices to admit and interrogatories, were adequate, particularly where information was being sought from a corporation and the process of responding to requests could take some time to complete. Other concerns expressed were that if prolonged, the examination procedure may violate a party’s right to an expeditious hearing, and that the process may be used as a fishing expedition.³²¹

AXA and Turks Legal did ‘not consider that the use of depositions would achieve the stated objective of facilitating settlement’. They, as well as Clayton Utz, argued that pre-trial examinations should only be introduced after further research and investigation into the experience in other jurisdictions.

A number of people with whom we consulted said they would support the introduction of pre-trial examinations provided safeguards against abuse were implemented. The most common suggestion was for pre-trial examinations to be subject to leave of the court, with capacity for the court to stipulate relevant conditions.³²² In consultations with the Supreme Court a number of judges supported pre-trial examination of non-parties subject to court order. It was also suggested that this should be limited to leading evidence in chief and not involve cross examination.³²³

Submissions expressed particular concern about the implications of the proposed procedure in cases involving self-represented litigants, whether that litigant was seeking to examine another person or was to be the subject of the examination him or herself.³²⁴ Some felt self-represented litigants would not have the skill to identify the relevant issues in dispute and would therefore be at a substantial disadvantage.³²⁵ Similarly, they would be unlikely to be able to prevent repetitive, unreasonable or oppressive questioning. On this basis, the Human Rights Law Resource Centre, PILCH and the Law Institute argued that examinations should not proceed where one or both parties are unrepresented. The Victorian Bar suggested that if the court were required to give leave for an examination in cases involving unrepresented litigants, it would either refuse to grant such leave, or would provide for appropriate safeguards (such as the appointment of a lawyer to assist the litigant during the examination).

The Australian Corporate Lawyers’ Association and Telstra submitted that vulnerable witnesses or parties should not be able to be examined, and Judge Wodak suggested examination of such people should be subject to leave of the court. The Federation of Community Legal Centres submitted

- 310 Submission CP 47 (the Group submission).
- 311 Submissions CP 6 (Police Association), CP 11 (Dibbs Abbott Stillman), CP 15 (Edison Massilamani), CP 18 (Law Institute of Victoria).
- 312 Submission CP 18 (Law Institute of Victoria).
- 313 Submission CP 11 (Dibbs Abbott Stillman).
- 314 Submission CP 6 (Police Association).
- 315 Submission CP 27 (Victorian Aboriginal Legal Service Co-operative Ltd).
- 316 Submissions ED1 8 (IMF Limited).
- 317 Consultation with the Insurance Ombudsman Service (5 September 2007).
- 318 Submission ED1 18 (Clayton Utz).
- 319 Submissions ED1 9 (Federation of Community Legal Centres), ED1 22 (AXA and Turks Legal), ED1 17 (Telstra), ED1 29 (Australian Bankers’ Association Inc), ED1 18 (Clayton Utz), ED1 31 (Law Institute of Victoria).
- 320 Submission ED1 12 (Allens Arthur Robinson and Philip Morris).
- 321 Submission ED1 21 (Insurance Council of Australia).
- 322 Submissions ED1 7 (Judge Wodak), ED1 12 (Allens Arthur Robinson and Philip Morris), ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra), ED1 24 (Victorian Bar), ED1 29 (Australian Bankers’ Association Inc). The Insurance Council of Australia also proposed that there should be appropriate safeguards.
- 323 Consultation with the Supreme Court of Victoria (2 August, 2007)
- 324 Submissions ED1 20 (PILCH), ED1 24 (Victorian Bar), ED1 25 (Victoria Legal Aid), ED1 31 (Law Institute of Victoria); Consultation with the Supreme Court of Victoria (2 August 2007).
- 325 Submission ED1 9 (Federation of Community Legal Centres).



that the informality of an examination could exacerbate power imbalances between parties and/or witnesses, and noted that some litigants may not be able to afford to pay a witness's expenses or for recording equipment, and would therefore be unable to initiate the examination procedure.

It was suggested that legal practitioners could be accredited to act as examiners to oversee examinations and administer oaths, similar to the process that now applies to search orders.³²⁶ A number of people believed that an independent person, such as a court official, should be present during examinations of vulnerable witnesses, such as children or people with a mental illness or disability.³²⁷ The Mental Health Legal Centre argued that such examinees should have an entitlement to some form of representation, advice, or assistance from adequately skilled lawyers before and during the examination.

The Bar expressed strenuous opposition to any proposal to remove the right of examinees to object to answer questions on the ground of legal professional privilege.

In relation to costs, the Law Institute argued that it would be dangerous to limit or fix costs, particularly in complex cases involving both counsel and solicitors. It believed the court should have discretion to award costs. Similarly, the Victorian Bar argued parties should not be limited to the costs of only one lawyer.

The Legal Services Commissioner suggested she and the Legal Services Board, as independent regulators of the legal professions, should be involved in the development of any rules or code of conduct.

3.8 CONCLUSIONS

The commission has concluded that, subject to appropriate safeguards, provision ought to be made for pre-trial oral examinations.

As discussed above, there is a range of circumstances in which officers, regulators and investigators have the power to require people to be examined orally to assist in their investigations. The information gathered in the course of those examinations can be used in subsequent or concurrent legal proceedings. It is necessary for such officers to have access to all relevant information to assist them to carry out their statutory functions, which often include commencing civil proceedings for recovery of funds or property, or prosecuting people who have contravened relevant laws. Clearly it has been determined that it is in the interests of justice for that information to be available to them with few restrictions, and for that information to be used in making decisions about whether to commence or continue legal proceedings.

We believe similar policy considerations apply equally to civil proceedings arising outside these regulatory and enforcement domains. That is, it is in the interests of justice for all relevant information to be disclosed at an early stage in proceedings, in an environment not constrained by the rules of evidence, to assist the parties to assess the strengths and weaknesses of their respective cases.

If the purpose of discovery is to promote disclosure and prevent trial by ambush, it makes little sense to distinguish between written and oral information in that context. Further, as Legg notes, drawing from US experience, the advantages of depositions 'cannot be obtained from document discovery. The deposition offers something more than can be gleaned from the bare text of a document'.³²⁸ The development of a clearer picture of the facts of a matter should be conducive to its settlement without the need to proceed to trial. The pre-trial examination process also compels the parties and their representatives to meet, which of itself could enhance the prospects of settlement in a particular case. Even if settlement does not occur, it is likely the matters in dispute can be narrowed as a result of the information gained from the examination, and summary judgment applications may become more likely to succeed.³²⁹

Moreover, the informality and immediacy that characterise the examination process render it far more difficult for legal practitioners to 'filter' the responses of clients, which can often render interrogatories useless as an evidence-gathering tool (although steps must still be taken to curb witness coaching) and affidavits and witness statements, in effect, incomplete.³³⁰ Clients too may appreciate the informality of examinations compared to the legalistic nature of pleadings and the rules of evidence: examinations can offer parties the opportunity to tell their story in their own words.

The procedure also offers access to information from potential witnesses who are unwilling for whatever reason to cooperate with a party to proceedings. The law currently permits people to withhold relevant information. Of course, they may be compelled by subpoena to give evidence at trial. However this process is not conducive to early resolution of disputes, and is rarely invoked given the general reluctance to call evidence from witnesses one has not had the opportunity to speak to in advance of trial. In recognition of the importance of full and early disclosure, parties and non-parties can be compelled (by subpoena or court order) to produce documents before trial.³³¹ We believe a similar approach should be available for the disclosure of oral information, which is often vital for establishing the full circumstances giving rise to the dispute in question.

Pre-trial examinations can also assist in the process of discovery of documents. Enabling litigants to examine knowledgeable witnesses as to the meaning and significance of particular discovered documents could both reduce the time needed to dissect them, and obviate (or at least narrow) the perceived need to obtain more. They can also be used to assist in the identification of the existence and location of relevant documents.

However in light of concerns expressed about the potential for abuse of the procedure and for escalation of costs, we have modified our draft proposal to recommend that pre-trial examinations only be permitted with leave of the court. In this way, the court will have the opportunity to determine whether an examination is necessary or desirable in a particular case. If it does grant leave, the court can also set down conditions to be observed in the conduct of the examination to ensure the process is not abused, to protect vulnerable witnesses and to control costs. Although the process does not involve direct judicial oversight, 'it is the spectre of the judge and the corrective orders they are empowered to make that is relied on to ensure control'.³³²

We have recommended a procedure that borrows from models in other jurisdictions, and responds to the concerns raised during our consultation process. It is substantially similar to the model recommended by the Federal Court Liaison Committee of the Law Council of Australia discussed, earlier in this chapter. The key features of the commission's proposed pre-trial examination process, the details of which are set out below, may be summarised as follows:

- Examinations would be possible by consent, or with leave of the court.
- Parties would be expected to attempt to agree on the details of the examinations.
- The court would have the power to make directions limiting the number and duration of examinations.
- It should not be necessary to require examinations to be conducted before an independent third party in most instances, but in appropriate cases examinations may be held before an examiner who is not a judicial officer (including an independent legal practitioner).
- There would be a process for identifying appropriate corporate deponents.
- Examinees would be entitled to refuse to answer questions on the ground of legal professional privilege, and protected against the disclosure or future use of self-incriminating information revealed in response to a question.
- Objections to particular questions asked during the course of an examination would be noted on the record for determination by the court in the event that the answer is later sought to be introduced into evidence.
- The transcript of the examination would be able to be introduced into evidence at trial in a number of circumstances.
- Subject to certain limits, the costs of examinations should be recoverable as costs of the proceeding.

The success of the pre-trial examination as a civil procedural device is to some extent dependent on the professionalism of legal practitioners. For this reason it will be important for the profession to develop a code of conduct for the standards of behaviour to be expected during examinations. Such behaviour should be guided by the provisions of our proposed overriding obligations. The proposed Civil Justice Council should oversee, monitor and review the implementation of the pre-trial examination procedure.

326 Consultation with the Supreme Court of Victoria (2 August 2007).

327 Submissions ED1 9 (Federation of Community Legal Centres), ED1 25 (Victoria Legal Aid); Supreme Court of Victoria Judges' Conference, 9 August 2007.

328 Legg (2007) above n 84, 152.

329 Ibid 168.

330 Ibid 155.

331 Under O 42A of the Supreme and County Court Rules, non-parties can be required by subpoena to produce documents to the Prothonotary or Registrar before a trial or interlocutory hearing: see further County Court of Victoria, *Order 42A—Subpoena for Production before Registrar: An Outline of Practice and Procedure for Practitioners* (2008), <[www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/\\$file/pn_subpoena_O42A.pdf](http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/pn_subpoena_O42A.pdf)> at 26 March 2008.

332 Legg (2007) above n 84, 162.



RECOMMENDATIONS

Pre-trial oral examination

50. A new pre-trial procedure should be introduced to enable parties to a civil proceeding to examine on oath or affirmation any person who has information relevant to the matters in dispute in the proceeding.

Objects of the procedure

51. The provisions relating to pre-trial examinations should incorporate an objects clause that states their primary purpose is not preparation for trial, but rather:
- to facilitate the pre-trial disclosure of relevant information
 - to assist the parties to obtain a better understanding of, and therefore to limit, the real issues in dispute
 - to facilitate settlement
 - to restrict or eliminate the need to call or test particular evidence if the matter proceeds to hearing.
52. The provisions should make it clear that requiring a person to submit to a pre-trial examination should be regarded as a step of last resort, to be taken only when less formal, cooperative means of obtaining information from relevant persons have failed. The requirement that the parties seek to exchange information in a non-adversarial manner prior to initiating a pre-trial examination should be expressed in a manner conformable with the overriding obligation.

Nature of the examination procedure

53. The parties should be entitled, with leave of the court, to examine any person on oath or affirmation. There should be a presumption in favour of granting such leave, subject to the exercise of judicial control to limit costs, prevent abuse and ensure appropriate safeguards are implemented. The court would have overriding power to limit the use of pre-trial examinations in a particular case.
54. The procedure should be available, with leave of the court, at any stage of the proceeding before the commencement of the trial, including in circumstances where the matter has been referred to an ADR process.

Details of the examination procedure

55. The application for leave to conduct an examination, together with a notice of examination, should be served on the person to be examined and all other parties to the litigation. The notice should contain details of:
- the time, place and expected duration of the pre-trial examination; where practicable, the examination should be held at a time and a place convenient to the person to be examined
 - the reasonable travel and out-of-pocket expenses to which the person to be examined is entitled (to be borne, at least initially, by the litigant initiating the examination)
 - the expected subject matter of the examination, in general terms
 - all documents that the examinee will be required to produce at the examination
 - where the person to be examined is a corporation, the proposed framework for agreeing on the individual(s) to be examined, and notice of the duty of such individual(s) to inform themselves as to relevant matters prior to their examination (see below, recommendation 59)
 - the legal rights of the person to be examined, including the right to appear at the hearing of the application for leave, the right to be legally represented at the examination, the right to object to answer questions if they are misleading, offensive, repetitive or call for the disclosure of information which is privileged and
 - the legal obligations of the person to be examined, including those arising under the overriding obligation if the person is a person to whom such obligations are applicable.

56. The court should be empowered to give such directions as it thinks appropriate as to the conduct of pre-trial examinations in a particular case at any time, either of its own motion or on application of one of the parties or an examinee. Such directions could include:
- limiting the number of examinations able to be initiated by a party
 - limiting the duration of an examination, or examinations
 - precluding the examination of a named person
 - precluding a particular litigant from participating in a specific examination
 - restricting the subject matter of a particular examination
 - setting the time or place at which particular examinations must take place
 - an order that specified persons be examined concurrently.
57. The court may appoint an independent legal practitioner to be present at the examination, to administer the oath and to control the conduct of the examination.
58. A litigant should be precluded from examining a natural person more than once, unless leave of the court is given or the examinee consents.
59. Where the person to be examined is a corporation, the examining party and the corporation must endeavour to reach agreement as to the person or persons most appropriate to be examined on the matters specified in the notice. Where agreement cannot be reached, the court should appoint a person or persons to be examined on the corporation's behalf. A person being examined on behalf of a corporation should be under an obligation to inform him or herself as to the matters specified in the notice prior to the examination (subject to any division of responsibilities between examinees, as agreed or directed by the court).
60. Unless the parties otherwise agree, the litigant who initiates an examination should be responsible for making appropriate arrangements with respect to:
- a suitable venue for the examination
 - the time and date of the examination
 - the travel and out-of-pocket expenses of the examinee
 - ensuring that the examination is recorded, and that a record of the examination is served on all parties in an appropriate form. Normally, it would be expected that a video recording, with sound, would be made of the examination.
61. The provisions should require all participants in a pre-trial examination, including the parties, their legal representatives and the examinee, to endeavour, in good faith, to:
- minimise the amount of time required for the examination
 - act in a collaborative manner, and minimise adversarial conduct
 - avoid needless formalities
 - avoid repetition and other oppressive behaviour
 - confine the examination to matters that are relevant to the issue in dispute.
- These requirements should be expressed in terms conformable with the overriding obligation.
62. The parties should be permitted to waive or modify any requirement in relation to pre-trial examinations by express agreement.
63. All parties to the action should be permitted to be present and/or represented at the examination, and to ask questions of the examinee.
64. Examinees should be required to answer all questions put to them while under examination, consistent with the overriding obligation. However, examinees should be protected against the disclosure or future use of self-incriminating information revealed in response to a question. Examinees should be permitted to refuse to answer questions which would otherwise result in the disclosure of information that is protected by legal professional privilege.



65. Examinations should be informal and the rules of evidence should not apply. There would, therefore, be no relevant distinction between examination and cross-examination. Examinees should be permitted to refresh their memory for the purpose of the examination. Objections to particular questions asked during the course of an examination should be noted on the record for determination by the court in the event that the answer is sought to be introduced into evidence. No objection should be permitted as to the form of questions, except where a question is misleading or offensive.
66. The court should consider whether it can facilitate the provision of urgent telephone directions as to the conduct of an examination on request. This could be done either through the judge presiding over the proceeding (if one has been allocated) or through any other officer of the court, such as a registrar or master, empowered to give directions. If this is impracticable, provision should be made for the adjournment of examinations for the purposes of obtaining directions. This may give rise to an order for costs.
67. Sanctions in respect of obstructive, repetitive, unreasonable or oppressive examination conduct should be able to be imposed on all participants in the examination process, including the parties, their legal representatives and the examinee. Sanctions should include costs orders, and such other orders as the court considers appropriate.
68. Interrogatories should not be permitted to be served on a person who has been the subject of an examination by a litigant who initiated or participated in that examination, unless the court gives leave.

Examinations prior to the commencement of legal proceedings

69. Prospective litigants should be permitted to conduct examinations prior to commencing proceedings, but only with leave of the court.

Use of information obtained at examination

70. Information obtained through a pre-trial examination should be able to be used at trial in four circumstances:
 - to impeach the testimony of a witness who has provided evidence at trial that is inconsistent with information he or she provided under examination (that is, as evidence of a prior inconsistent statement)
 - where the examinee has died, or become unfit to give evidence, or where it is impracticable to secure his or her presence at trial
 - where all parties to the litigation consent
 - where the court gives leave.
71. Where information comprising part of the transcript of an examination is admitted on the application of one of the parties, any other party can seek to have admitted any other part of the transcript.

Costs

72. The reasonable costs incurred in preparation for and conduct of examinations, subject to the discretion of the court, should be recoverable as costs of the proceeding. However, there should be a presumption that each litigant is limited to recovering the costs of engaging one legal practitioner per examination. The Costs Council should seek to develop a scale of fixed costs for the conduct of examinations.

73. Examinees should be entitled to recovery of their travel and out-of-pocket expenses, for example, loss of earnings, directly related to their attendance at the examination loss of earnings

Application

74. The provisions in respect of examinations should, at least initially, be applicable only to proceedings in the Supreme and County Courts.

Role of the Civil Justice Council

75. The proposed Civil Justice Council should, in conjunction with the courts, the Law Institute and the Bar Council:

- develop a general code of conduct in respect of examination conduct
- develop codes of practice to govern the use of pre-trial examinations in particular litigation contexts
- oversee the establishment of education and training programs to assist practitioners to develop good examination practices
- review the provisions relating to pre-trial examinations with a view to assessing their effectiveness and costs consequences, and considering possible changes to the existing scheme. The council should also consider and make recommendations about whether pre-trial examinations should be permissible in matters within the jurisdiction of the Magistrates' Court and, if so, whether any modifications to the general scheme are required in relation to such matters.

4. OVERCOMING CONFIDENTIALITY CONSTRAINTS

4.1 CONFIDENTIALITY CONSTRAINTS AND THE ADMINISTRATION OF JUSTICE

In the course of this review, the commission received expressions of concern that in a number of major current and recently completed cases lawyers acting for a party have been prevented from obtaining information from potential witnesses because of confidentiality constraints. Such constraints include those arising out of the express terms of contractual agreements, implied confidentiality obligations owed as a result of an employment relationship or otherwise arising in equity.

As noted by Lord Justice Bingham:

It is a well settled principle of law that where one party ('the confidant') acquires confidential information from or during his service with, another ('the confider'), in circumstances importing a duty of confidence, the confidant is not ordinarily at liberty to divulge that information to a third party without the consent or against the wishes of the confider.³³³

In the course of employment an employee may learn things that are considered to be confidential by the employer, and that either because of an express confidentiality agreement or impliedly because of the relationship, the employee is not at liberty to reveal that information without the consent of the employer. However, where the employee has knowledge of a wrong allegedly committed by the employer, and someone is bringing proceedings in relation to the wrong, the question arises as to whether the employee should be able to provide a statement, not publicly, but to be used in the proceedings, subject to any constraints on publication that the court may impose or that the parties may agree.

At present, courts have equitable jurisdiction to grant relief against actual or threatened abuse of confidential information. As Justice Deane has observed, the basis of equitable jurisdiction lies not in proprietary right but 'in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained'.³³⁴

³³³ *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 214, referred to in *Johns v Australian Securities Commission* (1993) 178 CLR 408, [19] (Brennan J).

³³⁴ *Moorgate Tobacco Co Ltd v Philip Morris* (1984) 156 CLR 414, 438.



As illustrated by the decision in *Burton*,³³⁵ except where the information reveals an iniquity (the ambit of which was expressed to be limited by Justice Campbell),³³⁶ or where the confider of the information consents, a lawyer cannot normally obtain *confidential* information from a witness or potential witness, even with that person's consent, except by obtaining evidence from that witness in the witness box. This has a substantial effect on the proper administration of justice.

Every employee or ex-employee owes an obligation of confidence to his or her employer. Senior employees are likely to have signed confidentiality agreements. Given this difficulty, a court cannot be confident that evidence that reveals the truth is before it. Where such information is adverse to the interests of the employer or former employer it is unlikely that such person will be called as a witness by the employer. Moreover, where disclosure of confidential information may not be in the forensic interests of the confider of that information, that person is unlikely to consent to disclosure to assist another party in actual or threatened litigation.

The commission has been informed in a submission, and in the course of consultations, that in a number of major cases against large corporations lawyers acting for the victims of an alleged large civil wrong have received threats that legal action may be taken against them if they seek to confer with or take witness statements from any employee or former employee of the company which is a party to the proceedings.

It has also been submitted to the commission that in some instances large corporations are using confidentiality agreements, ostensibly designed to protect trade secrets and commercially confidential information, to in effect prevent present or former employees from revealing serious misconduct.

Although communications with a number of law firms have confirmed that such threats of legal action have been made, the commission has not sought to investigate in detail the circumstances of each of the cases referred to. The commission has not conferred with each of the relevant persons in each case or sought to examine how widespread the concern is. For present purposes, the commission is prepared to assume that in most if not all instances there is a defensible concern to protect information claimed to be confidential. Moreover, the commission is mindful of the important purposes served by laws which protect confidential information, trade secrets and other information which may have an adverse affect if disclosed.

In another context, commercial confidentiality is apparently being used more and more frequently as a ground for withholding information from Parliament and parliamentary committees. As has been noted with reference to the Senate of the Australian Parliament:

*Commercial confidentiality claims were generally made to protect the interests of particular companies and individuals against potential competitors. The recent tendency, however, has been for claims of commercial confidentiality to be made in relation to **any** information that is vaguely commercial in nature, rather than in respect of information whose disclosure could **harm** the commercial interests of a person.³³⁷*

At present, with limited exceptions, any person can be required to give evidence *at trial*, notwithstanding any confidentiality obligation. Courts (and the parties in litigation) have various means available to them to protect the confidentiality of evidence adduced in legal proceedings. Even though confidentiality obligations do not normally prevent evidence being adduced in legal proceedings, it is clearly highly undesirable, and therefore almost never done, to call a witness on an important issue 'cold' (that is, without having conferred with the witness, taken a proof of evidence or obtained an affidavit or witness statement).

Moreover, modern litigation practice favours the disclosure of the evidence of proposed witnesses in advance of trial for a variety of reasons. This may facilitate settlement, lead to a narrowing of the issues in dispute, assist in identifying evidentiary issues about admissibility, enable the witnesses on the other side to consider their proposed evidence in light of the countervailing evidence and generally enable the parties and legal representatives to have a better understanding of the other side's case to enable preparation for trial. Cross-examination is unlikely to be as effective or efficient if there is no advance knowledge of the evidence to be given in chief. Perhaps more importantly, it also assists the court in relation to management of the litigation and the conduct of the trial.

Not being able to obtain relevant evidence in advance of trial, or to place it before the court at all, represents a significant impediment to the proper administration of justice.

Although proper confidentiality constraints should be maintained, and if necessary enforced, a litigant should be able to adduce all relevant evidence and to do so in a trial not prejudiced unnecessarily by extra costs, delays and adjournments. Further, if justice is to be properly administered, the courts are entitled to expect that relevant evidence has not been excluded or effectively rendered inaccessible by confidentiality constraints.

Importantly, confidentiality is not a ground for refusing to produce, in advance of trial, documents which are the subject of a subpoena or order for discovery. There are of course limited circumstances where otherwise relevant information (or documents) may not be required to be given (or produced) in judicial proceedings. For example, it may be protected from disclosure by client legal privilege, the privilege against self-incrimination, public interest immunity, or by statute.

The role of oral examinations

The new procedure for oral examinations proposed by the commission in this chapter will be invaluable where a present or former employee has information about a serious civil wrong by the employer and through a compulsory process can be compelled to disclose the information. However, if the employee is still well disposed to, under pressure from, or awaiting monies from the employer, it has been suggested that such disclosure is likely to be reluctantly given and that the minimum possible information will be provided.

Protection for witnesses outside the oral examination process

It has been submitted to the commission that in each of a number of important current or recent cases arising out of alleged corporate misconduct, a former senior employee has been prepared to provide a witness statement about the misconduct, but was unable to do so because the employer asserted that the disclosure would conflict with express or implied obligations of confidence arising out of the employment contract.

It has been suggested to the commission that it is not necessarily appropriate for voluntary disclosure to be made through the oral examination process for a range of reasons, including the desirability of the disclosure being made without the presence of opposing parties in an adversarial environment. If the person's evidence is to be adduced at trial, a witness statement will usually be required to be exchanged well before any hearing, and any cross-examination can be conducted at the hearing. The other party would also have the opportunity to orally examine the person before trial.

The commission is of the view that there should be a statutory provision making it clear that relevant information may be provided in connection with litigation, prior to trial, notwithstanding any confidentiality constraint that might otherwise prevent the disclosure or use of such information prior to trial. However, the provision should incorporate certain safeguards.

Proposed safeguards

The statutory provision should facilitate disclosure of information (that may otherwise be prohibited from disclosure prior to trial) only where such disclosure is solely for the purpose of the proper preparation and conduct of civil proceedings pending in a court in Victoria. Such disclosure should be made only to a legal practitioner acting for a party in the proceeding, and the legal practitioner to whom such disclosure is made must agree to receive the information solely for that purpose.

Before the disclosure is made, the party seeking such disclosure should apply to the court for the purpose of issuing a notice, similar to a subpoena, to be served on the person with relevant information. The notice would specify the nature of the information sought and set out the proposed time and place for conferring. If the person served with the notice, or any other person claiming to have an interest, does not object to the proposed conference, it may proceed at a time and place agreed between the party seeking the information and the person served with the notice.

If the person served with the notice, or another person claiming to have an interest, objects, the legal practitioner seeking to obtain the information would be required to serve a copy of the notice on all other parties to the proceedings and apply to the court for leave to proceed with the conference. At the hearing of the leave application, each of the parties, the person served with the notice, and any other person whom the court considers has a sufficient interest, should be able to appear. The court could refuse the application or grant it on such terms as the court considers appropriate.

335 *AG Australia Holdings Ltd v Burton & Anor* (2002) 58 NSWLR 464 (Campbell J).

336 *AG Australia Holdings Ltd v Burton & Anor* (2002) 58 NSWLR 464 [173]-[176]. There appears to be some difference of legal opinion as to whether (a) there is a 'public interest' defence to disclosure of confidential information, (b) in the case of an 'iniquity' on the part of the person claiming breach of confidentiality the duty of confidence simply does not arise, or (c) the existence of an 'iniquity' is simply a factor able to be taken into account in equity when deciding whether or not to grant discretionary remedies: see Robert Dean, *The Law of Trade Secrets and Personal Secrets* (2nd ed, 2002) 274. In *Australian Football League & Anor v The Age Company Ltd* [2006] VSC 308, Kellam J reviewed the present Australian law in relation to the 'Iniquity Rule' (at [57]-[71]). See also *McCabe v British American Tobacco Australia Services Limited* [2007] VSC 216 (Byrne J).

337 Parliament of Australia, Senate, *Brief Guides to Senate Procedure: No 11—Orders for production of documents* (2005) 2 <www.aph.gov.au/senate/pubs/guides/briefno11.pdf> at 25 March 2008 (emphasis in original).



There should also be provision for the person on whom the notice is served to receive, from the party seeking the information, payment for any loss of income or out of pocket expenses incurred. Subject to the discretion of the court, these could be ordered to be paid as part of the costs in the proceedings.

The commission's recommendations, which are set below, would address the present constraints on communicating with former or current employees subject to confidentiality obligations; would complement the proposed new oral examination regime; and, in some circumstances, would be of more practical benefit and less costly than the proposed new oral examination procedure.

4.2 SUBMISSIONS

In Exposure Draft 2 the commission sought views from interested parties on whether there is a need for a change in the law to facilitate access to information and evidence which may not currently be accessible before trial because of confidentiality constraints.

Law firm Maurice Blackburn stated that it was 'very concerned that obtaining evidence from a witness who may be subject to a confidentiality undertaking with a current or previous employer or other entity may find the witness and lawyer in breach, as found by Justice Campbell in *AG Australia Holdings Limited v Burton & Anor*'.³³⁸

According to the submission:

In our experience, large corporations often threaten lawyers acting for the victims of a significant civil wrong against taking witness statements from current and former employees.

Examples of this conduct by large well resourced defendants, just in cases conducted by MB, are as follows;

- (a) *In the GIO shareholder class action MB's partners (and the witness) were sued in satellite proceedings to the main proceeding (the Burton case) for taking a witness statement from an important former employee of GIO when he had obligations of confidence. That suit was successful and accordingly Mr Burton's statement and all documents derived from it were required to be removed from the file and not be placed before the Court. It cost more than \$700,000 to prepare the statement, defend the claim against MB and meet Burton's legal expenses in defending the suit.*

[GIO later settled the class action for \$112 million, but the formershareholders in deciding whether to accept the offer were not allowed to know what Mr Burton had told the lawyers, and the court was not allowed to be told in approval of the settlement].

ASIC later established in a prosecution that some GIO directors had acted dishonestly or unreasonably in the matters central to the GIO class action.

- (b) *In the GIO shareholder class action MB's partners (and the witnesses) were also sued in satellite proceedings for taking witness statements from three important former employees or consultants being a French external reinsurance consultant, the GIO Chief Auditor and a senior GIO reinsurance underwriter, all of whom were asserted to have obligations of confidence. That application was cross-vested back to the main proceeding but was withdrawn two days before it was due to be finally heard. This withdrawal only occurred after the plaintiff had spent more than \$200,000 in preparing for that fight, and after it became clear to the defendant that its hearing would reveal gross misconduct by the defendant.*
- (c) *In the Vitamins cartel class action MB's partners and the witness were threatened with a suit for taking a witness statement from the former CEO of one defendant. This witness admitted price fixing and market rigging. We were forced to pay for independent legal representation for the witness and the threat was not carried out. Ultimately the ACCC successfully prosecuted the cartel in large part relying on the evidence of this witness that we provided to them, but which we may have been unable to use in the civil case.*

- (d) *In the Aristocrat shareholder class action a former manufacturing manager of the defendant was threatened with a suit for making a witness statement in the proceeding. The witness had made a statement filed in the proceeding that assisted in establishing that the company had misstated its accounts. The witness was very concerned about this but the threat was not carried out. Subsequently at the trial, after 4 years of denials, the defendant admitted falsifying its profits and unreasonably maintaining its profit forecasts.*

In our experience the risk of suit by a large defendant deters many witnesses from making a statement in court proceedings. A disinterested witness is disinclined to take on such a risk even when he or she knows an injustice has been done to the plaintiff and the making of a statement would assist in redressing that. This does not serve the interests of justice ...

Confidentiality agreements, ostensibly to protect trade secrets and the like, are being used to prevent present or former employees of companies that have committed wrongs from revealing evidence of serious misconduct. Many wrongs will go unrecompensed and the victims will go without justice as a result. In a shareholder and cartel context, company directors can protect themselves from a suit by the ultimate owners of the company (the shareholders) or by the victims of the cartel simply by having the senior executives sign confidentiality agreements.³³⁹

Maurice Blackburn has more recently drawn attention to what is alleged to be a further example of this type of conduct by large corporations. It submitted that in the rubber cartel class action, which was commenced in the Federal Court in September 2006, the same issue is again arising. Following separate detailed investigations by both the European Commission and the US Department of Justice, findings were apparently made that a global rubber cartel existed. Several large international corporations allegedly admitted their involvement. Maurice Blackburn's client has sued one or more of these corporations and their Australian subsidiaries in relation to the cartel. When Maurice Blackburn telephoned a former Australian director to ascertain whether he knew about the operation of the cartel in Australia it was met with a demand from the corporation's lawyers that it cease such attempts. The lawyers asserted that the firm was acting illegally and seeking to induce a breach of the potential witness's obligation of confidence.

In its submission to the commission Maurice Blackburn commented that, although it supported the draft proposals of the commission for the introduction of a new procedure for pre-trial oral examinations, there were many potential witnesses who would voluntarily provide a witness statement if relieved of the threat of proceedings for breach of confidentiality obligations, without the necessity to use the more time consuming, expensive and adversarial formal procedure.

The submission proceeded to note:

Apart from efficiency, such a statement will also be taken much more effectively, if not taken in the adversarial context of a deposition hearing because:

- (a) *evidence in chief from an important witness in a deposition process could take many more weeks to obtain in a complicated case if the witness could not be proofed in advance;*
- (b) *because a witness in chief cannot be led or cross-examined, it will be very difficult to know whether everything that the witness knew that was relevant would come out;*
- (c) *many witnesses will explain what happened more freely without the former employer, or employer's legal representative, looking on, interjecting and having the answers recorded for later cross examination;*
- (d) *there is no prejudice to the defendant as the statement will be required to be exchanged well before any hearing, and any cross examination can occur when or if the witness is later called; and*
- (e) *the deposition type of adversarial process is overly expensive and undesirable if the witness consents to giving the statement.³⁴⁰*

338 Submission ED2 19 (Maurice Blackburn). See also *AG Australia Holdings Limited v Burton & Anor* (2002) 58 NSWLR 464.

339 Submission ED2 19 (Maurice Blackburn).

340 Submission ED2 19 (Maurice Blackburn).



In the course of recent consultations in relation to the commission's proposals, concern has been expressed about the proposed requirement that notice be given to the parties where there has been an objection to the taking of a statement from a person and the provision for parties (and others claiming an interest) to object to the proposed course. It was submitted that a party concerned to limit any other party's ability to gather evidence could simply send a letter to the other party, at the commencement of the litigation, objecting to conferral with any past or present employees. This would then require an application to the court to be made for approval. It was further contended that objections may become routine and that this would place unreasonable pressure on those with relevant information and result in a significant increase in the costs required to be borne by the party seeking the information.

The commission is concerned that the proposed safeguards may be open to abuse, but is of the view that a combination of new standards of conduct, arising out of the implementation of the proposed overriding obligations, together with sanctions and judicial vigilance, should be sufficient to prevent or correct any abuse.

In its submission Victoria Legal Aid expressed its support for 'provisions which allow for people who are subject to a confidentiality agreement to provide relevant information, provided this is court-ordered and does not expose the individual concerned to civil and/or criminal sanctions as a result'.³⁴¹ The Law Institute of Victoria stated that it had no comments at this stage but would like to be consulted in the future on this issue.³⁴²

RECOMMENDATIONS

76. There should be a statutory provision making it clear that relevant information may be provided in connection with litigation, prior to trial, notwithstanding any confidentiality constraint that might otherwise prevent the disclosure or use of such information. A draft provision is as follows:
- (1) *Subject to (2) and (5), a person in possession of information which is or may be relevant to an issue which has arisen or may arise in a civil proceeding pending in a court in Victoria may disclose such information*
 - (a) *to a court in Victoria in which such proceeding is pending or*
 - (b) *to a legal practitioner acting for a party in such proceeding, despite any express or implied confidentiality obligation that may otherwise prohibit such disclosure.*
 - (2) *Disclosure of information that may otherwise be prohibited from disclosure because of any express or implied confidentiality obligation is permissible under this section only where the disclosure is made:*
 - (a) *solely for the purpose of the proper preparation and conduct of the civil proceeding pending in a court in Victoria ('the purpose')*
 - (b) *in circumstances where the legal practitioner to whom such disclosure is made agrees to receive such information solely for the purpose.*
 - (3) *Where disclosure is made in accordance with the requirements of (2), neither the person who disclosed the information nor the legal practitioner to whom such information was disclosed shall be liable for such disclosure at law or in equity in any proceeding for damages or other relief.*
 - (4) *This section does not limit the operation of any other law permitting disclosure of information for the purpose of legal proceedings in a court in Victoria.*
 - (5) *This section does not apply in respect of any non disclosure obligation arising under any statute which makes it an offence to disclose information.*
77. For the purpose of facilitating disclosure it is proposed that there be a new statutory provision entitling a party to apply to the court for the purpose of issuing a notice, similar to a subpoena, to be served on the person with relevant information prior to trial. The notice would specify the nature of the information sought to be obtained and the proposed time and place for conferring with such person, *ex parte*, to ascertain relevant information. In the event that the person served with the notice (or some other person claiming to have an interest) does not object to the proposed conference it may proceed at a time and place agreed between the legal practitioner seeking the information and the person on whom the notice is served.

78. In the event that the person on whom the notice is served (or some other person claiming to have an interest) objects to the proposed conference (other than an objection as to the proposed date or location) the legal practitioner seeking to obtain information shall: (a) serve a copy of the notice on each of the other parties to the proceedings and (b) apply to the court for leave to proceed with the proposed conference. At the hearing of the application for leave (i) each of the parties to the proceedings, (ii) the person on whom the notice was served, and (iii) any other person who the court considers has a sufficient interest, may appear. The court may refuse the application for leave or grant leave on such terms and conditions as the court considers appropriate. A draft provision is as follows:

Obtaining Information and Documents

- (1) *If a party to a proceeding believes on reasonable grounds that a person:*
- (a) *has information or documents relevant to the proceeding; or*
 - (b) *is capable of giving evidence that is relevant to the proceeding;*
- the party may, by written notice issued by the [Registry of the] Court and given to the person, require the person:*
- (i) *to give the information to the party at the time and place specified in the notice; or*
 - (ii) *to produce the documents to the party within the time, and in the manner, specified in the notice; or*
 - (iii) *to attend before the party at the time and place specified in the notice, and answer questions relevant to the proceeding.*³⁴³
- (2) *Party includes the legal representative of a party.*
- (3) *At the request of a party the [Registry of the] Court shall issue a notice unless there are reasonable grounds for the belief that the notice is frivolous, vexatious or otherwise an abuse of the court's process.*
- (4) *If (a) the person who is given the notice notifies the party issuing the notice that he or she objects to giving the information or producing the documents or attending to answer questions, or (b) the party issuing the notice becomes aware that some other person claiming to have an interest objects to the disclosure of information or the production of documents, then the party shall, if the party intends to proceed to seek the information or documents, (a) provide a copy of the notice to each of the other parties to the proceeding and (b) apply to the court for leave to proceed with the steps proposed in the notice or an order that the person given the notice attend a pre-trial oral examination.*
- (5) *In determining an application for leave under (4) the court may (a) refuse leave, or (b) make such orders as the court considers appropriate, on such conditions as the court considers reasonable, to require the person to give information, produce documents or attend to answer questions.*

79. A person on whom a notice is served shall be entitled to receive from the party seeking the information payment in respect of (a) any loss of income and (b) reasonable travel, accommodation and other out-of-pocket expenses. Subject to the discretion of the court, such amounts shall be costs in the cause.

Comment: The commission has also considered whether this issue might be addressed by legislative clarification or prescription of those specific circumstances where confidentiality obligations do not preclude disclosure of certain types of information relating to an 'iniquity'. The commission does not favour this option. However, the commission's proposed procedure for conferring with persons in possession of relevant information is not intended to affect any existing law which may operate so as to prevent any confidentiality obligation from constraining disclosure of any 'iniquity'.

The commission's proposed procedure in relation to pre-trial oral examinations would be able to be used as an alternative to the proposed notice procedure.

341 Submission ED2 10 (Victoria Legal Aid).

342 Submission ED2 16 (Law Institute of Victoria)

343 This part of the provision is based on s 52 of the *Building and Construction Industry Improvement Act 2005* (Cth).



5. DISCOVERY OF DOCUMENTS

5.1 INTRODUCTION

In the Consultation Paper we sought views on whether reform was needed to the processes of obtaining information and documents in the Victorian civil justice system. In particular, we asked whether reform was needed to the rules about preliminary discovery, discovery from non-parties, discovery of documents and interrogatories. Exposure Draft 1 set out our preliminary reform proposals on discovery.

Comments made in submissions and consultations indicated a widespread concern that discovery processes in Victoria are expensive and inefficient, particularly in complex civil litigation. Although there are many calls for reform to the existing discovery rules and procedures, there is little consensus as to the most appropriate way forward. It is also acknowledged that discovery may not be a problem in all litigation. A summary of the responses the commission has received is set out later in this chapter.

The summary also incorporates the observations from the Australasian Institute of Judicial Administration (AIJA) Discovery Seminar, held on 24 August 2007, which was convened to discuss discovery problems and processes in different jurisdictions. Participants at this seminar included members of the judiciary from around Australia and New Zealand and representatives from professional bodies.

In light of the responses received and an examination of the discovery reforms that have been implemented in many other Australian states and overseas jurisdictions, the commission believes reform is needed in Victoria to make discovery more efficient and timely and to ensure that the costs of the process are more proportionate to the matters in dispute. The commission's discovery reform recommendations may be summarised as follows:

1. The narrowing of the test for determining whether a document must be discovered. Discovery should be limited to *'documents directly relevant to any issue in dispute'*.
2. The continuation of discovery as of right, subject to any directions of the court. Further consideration should be given to whether there is any need to limit the circumstances in which parties are entitled to discovery.
3. The introduction of a new procedure to facilitate interim inspection orders to permit early access to 'readily identifiable documents' without the necessity for such documents to be reviewed or categorised by the party in possession of them. Safeguards to protect access to documents should also be introduced, for example, restrictions on the use of information contained in inspected documents, the protection of confidentiality by way of court order and prevention of waiver of privilege.
4. Provision for the appointment of a special master to assist the parties and the court in relation to discovery in complex cases.
5. The introduction of more explicit and broad discovery case management powers for the courts.
6. The introduction of an obligation on parties to disclose the identity of any litigation funder or insurer exercising any control or influence over the conduct of any party and provision for judicial discretion to order disclosure of funding or insurance arrangements.
7. Provision for the court to order disclosure of lists or indexes of documents (including drafts) compiled by or in the possession of a party (even if such lists or indexes may be privileged) but only to the extent that such lists or indexes contain 'objective' information about documents.
8. Provision for the court to order the establishment of document repositories to be used by parties in multi-party litigation.

9. The introduction of additional sanctions for discovery abuse.
10. Provision for the court to limit the costs chargeable or recoverable in respect of discovery.
11. The publication of a short plain English explanation of disclosure obligations for distribution to litigants.

The commission has recommended that the threshold test of discoverability be narrowed from a *Peruvian Guano* ‘train of inquiry’ approach to a test of ‘direct relevance to any issue in dispute’. The commission acknowledges that this may not necessarily reduce the time and expense involved in the discovery process. However, a narrower test should better focus the minds of the parties on the parameters of discovery and encourage cultural change. To this end, the commission has also recommended that parties seek to reach agreement on discovery issues and discovery disputes before approaching the courts. Other recommendations expand the sanctions for discovery abuse and make provision for the court to be able to limit the costs that can be charged or recovered in relation to discovery.

The commission also believes it is important that the judiciary be assisted in its ongoing efforts to reduce costs and delay in the discovery process. Accordingly, we recommend that the discovery management powers of the courts be expressly articulated and that additional resources be introduced to assist the courts to mould discovery orders to suit the needs of individual cases.

These recommendations are targeted at documentary discovery after proceedings have commenced. This is when discovery appears to give rise to the most concerns about cost, delay and ‘alleged’ unfairness.³⁴⁴ Our recommendations for the introduction of pre-action protocols, as well as overriding obligations, will facilitate the early exchange of essential information between the parties before proceedings are commenced and as soon as they have commenced. These recommendations are considered in Chapters 2 and 3 of this report.

A number of additional reform suggestions and concerns in relation to discovery have been brought to our attention and are summarised at the end of this chapter. These issues are outside the scope of our discovery recommendations and may be considered in stage 2 of the commission’s inquiries or by the proposed Civil Justice Council.

5.2 BACKGROUND: WHAT IS DISCOVERY?

‘Discovery’ refers to the various compulsory procedures that enable one party to the litigation process to obtain documents and information from another.³⁴⁵ The discovery process encompasses the exchange of formal lists of documents and the inspection of those documents as well as the interrogatory process³⁴⁶ and oral examinations. Discovery also extends to the limited provision of information before commencement of proceedings.

Discovery is an essential tool of litigation. It is a critical element of fact-finding, truth seeking and decision making.³⁴⁷

An effective discovery process:

- ensures that parties participate in litigation with as much knowledge as possible—ie, that they are fully aware of the case to be met at trial and have access to all relevant information that may support their case³⁴⁸
- prevents a party being taken by surprise at trial
- assists in the calculation of quantum
- provides insights into credibility
- assists the parties to determine if any other parties should be joined to the proceedings
- narrows the issues in dispute, thereby limiting the scope, length and costs of trial
- promotes the early appraisal of a case and often brings about a case reassessment, thereby facilitating settlement
- assists the court to have all of the information before it to enable a dispute to be determined on the merits, justly and fairly
- advances the goal of ‘giving litigants a sense of empowerment in the fact-finding process’.³⁴⁹

344 Peter Sallmann and Richard Wright, *Going to Court: A Discussion Paper on Civil Justice in Victoria* (2000) 107. This report also focuses on documentary discovery for the same reason.

345 Stephen Colbran, Greg Reinhardt, Peta Spender, Sheryl Jackson and Roger Douglas, *Civil Procedure: Commentary and Materials* (3rd ed, 2005) 544.

346 *Ibid.*

347 Camille Cameron and Jonathan Liberman, ‘Destruction of Documents Before Proceedings Commence—What is a Court to Do?’ (2003) 27 *Melbourne University Law Review* 273, 274.

348 Colbran et al (2005) above n 345, 544.

349 Martin Redish, ‘Electronic Discovery and the Litigation Matrix’ (2001) 51 *Duke Law Journal* 561, 600.

Chapter 6

Getting to the Truth Earlier and Easier



In *Australian Dairy Corp v Murray Goulburn Co-op Co Ltd*³⁵⁰ Justice McGarvie noted that:

The purpose of discovery and inspection of documents is not only to acquaint a party with information which will facilitate the presentation of the party's case: it is also to inform the party of the weakness in the party's forensic prospects. Discovery and inspection of documents often lead to settlement of a proceeding and avoid unnecessary litigation.

The discovery process is 'constrained by principles about privilege and other restrictions which attempt to strike a balance between full access, valid protection of important relationships and other interests, and sensible control of the expense of the process'.³⁵¹

However, despite these safeguards and the integral role that discovery plays in the administration of justice it has become a hugely contested process, particularly in complex civil litigation. This is reflected in feedback to the commission which catalogued problems with discovery processes and suggested reforms. Discovery has also been strongly criticised recently by the judiciary across Australia and in the press, particularly in relation to a number of high profile cases.³⁵²

5.3 DISCOVERY MECHANISMS IN VICTORIA

In Victoria, discovery is available both before the commencement of proceedings and, more extensively, after proceedings have commenced.

The rules of court provide for limited pre-action discovery. In the County and Supreme Courts, pre-action discovery allows a prospective plaintiff to obtain information to determine the identity of a defendant³⁵³ or to obtain information from a prospective defendant to determine if a right to relief exists.³⁵⁴ In addition, a party to a proceeding can seek discovery of a document held by a non-party that relates to any issue in the proceeding to determine if the party has a right of relief against that non-party.³⁵⁵

Pre-action discovery cannot be made except with leave of the court and is subject to privilege restrictions.³⁵⁶ The court is empowered to make orders for an applicant's pre-action costs as well as the costs of the person against whom the pre-action discovery order is sought and other parties to the proceedings.³⁵⁷ Similar provisions apply in the Magistrates' Court.³⁵⁸

The commission's discovery recommendations are targeted at documentary discovery processes after proceedings have commenced, and do not address pre-action discovery mechanisms in Victoria. However, our pre-action protocol recommendations as well as our overriding obligations aim to facilitate the early exchange of essential information between the parties both before proceedings are commenced and as soon as they have commenced.

As discussed in Chapter 2, pre-action protocols prescribe codes of 'sensible conduct' that persons are expected to follow when there is a prospect of litigation.³⁵⁹ The objectives of pre-action protocols include requiring disputing parties to specify the nature of the information they need to be disclosed in order to consider settlement, to narrow the issues in dispute and provide a timetable for the exchange of relevant information and settlement proposals. Pursuant to the protocols the parties will be required to exchange documents essential to their claims before trial. Numerous safeguards will operate to protect information disclosed via pre-action protocols.

In Victoria, once proceedings have been commenced the rules of court and the common law prescribe what the parties are required to discover, when and how discovery will occur and the sanctions that may be imposed if discovery obligations are not met. There are some differences between the procedural rules in the Supreme, County and Magistrates' Courts.

5.3.1 Ambit of discovery

Threshold tests set out what documents are required to be discovered in each of the Victorian courts. Table 1 sets out the relevant discovery requirements and processes in each court.

350 [1990] VR 355, 369.

351 Colbran et al (2005) above n 345, 545.

352 For example, see *Seven Network Ltd v News Ltd* [2007] FCA 1062 (the C7 case), Michael Pelly, 'Snail's pace of corporate justice', *The Australian* (Sydney), 29 June 2007, 31–32, and Elisabeth Sexton, 'High costs of justice for companies', *Sydney Morning Herald* (Sydney), 2 June 2007, 28.

353 *Supreme Court (General Civil Procedure) Rules 2005* r 32.03 and *County Court Rules of Procedure in Civil Proceedings 1999* r 32.03.

354 Provided the court has determined that there is reasonable cause to believe that the applicant has or may have a right to relief. See *Supreme Court (General Civil Procedure) Rules 2005* r 32.05 and *County Court Rules of Procedure in Civil Proceedings 1999* r 32.05. In the United Kingdom, orders directed to the disclosure of the identity of a particular person are known as Norwich Pharmacal orders. (It was held in that case that 'if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers' (*Norwich Pharmacal Co. v Commissioners of Customs & Excise* [1974] AC 133, 175).

355 *Supreme Court (General Civil Procedure) Rules 2005* r 32.07 and *County Court Rules of Procedure in Civil Proceedings 1999* r 32.07.

356 *Supreme Court (General Civil Procedure) Rules 2005* r 32 (see especially r 32.02) and *County Court Rules of Procedure in Civil Proceedings 1999* r 32.02.

357 *Supreme Court (General Civil Procedure) Rules 2005* r 32.11 and *County Court Rules of Procedure in Civil Proceedings 1999* r 32.11.

358 *Magistrates' Court Civil Procedure Rules 1999* r 13.10. The Magistrates' Court suggested that preliminary discovery and discovery from non-parties are usually used interchangeably to obtain discovery of the identity of the owner of a motor vehicle, ie where the plaintiff knows the registration of a motor vehicle and wishes to obtain the name and address of the owner. Otherwise, the Magistrates' Court suggested that these processes are rarely used. See Submission CP 55 (Magistrates' Court of Victoria).

Table 1

MAGISTRATES' COURT	COUNTY COURT	SUPREME COURT
<p>A notice for discovery may be served as of right (Order 11.02).</p> <p>Leave is required in relation to proceedings under the <i>Accident Compensation Act 1995</i> and the <i>Workers Compensation Act 1958</i> (Order 11.02).³⁶⁰</p>	<p>Discovery is only permitted with the leave of the court (rule 34A.17).</p>	<p>A notice for discovery may be served as of a right where proceedings are commenced by writ and the pleadings are closed (rules 29.01 and 29.02).</p> <p>The usual practice is for a general order for discovery to be made rather than a notice for discovery to be served.³⁶¹</p>
<p>Discovery is made of all 'documents which are or have been in that party's possession relating to the proceeding' (Order 11.02).</p> <p>Discovery is not allowed in an arbitration for a small claim. A modified form of discovery is allowed for claims greater than \$5000 that are referred to the Court's arbitration (small claims) process.³⁶²</p>	<p>An application for discovery must be 'specific as to what documents or class of documents are sought to be discovered'.³⁶³</p>	<p>Discovery is of 'all documents which are or have been in that party's possession relating to any question raised by the pleadings' (rule 29.02).</p>

The party making discovery has the burden of determining which documents come under the relevant threshold test and are therefore discoverable.

In Victoria, the 'train of inquiry test' as propounded in the *Peruvian Guano* case remains the test of general application for discovery, although the courts have the power to limit the scope of discovery.

In the 1882 *Peruvian Guano* case Brett LJ stated:

*It seems to me that every document relates to the matters in question in the action, which not only would be evidenced upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.*³⁶⁴

It is the inclusion of documents that are indirectly relevant that makes the test for determining whether a document should be discovered in the Magistrates' and Supreme Courts—as well as general discovery in the County Court—considerably broad and problematic. Lord Woolf observed that the result of the *Peruvian Guano* decision

*was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.*³⁶⁵

359 Except in (defined) exceptional circumstances, compliance with the requirements of pre-action protocols would normally be expected to be a condition precedent to commencing action in each of the three Victorian courts.

360 The Magistrates' Court suggested that discovery was not allowed for these acts because it was felt that it was a generally 'unnecessary step in view of the issues in dispute between the parties and was used as a means to increase costs for no forensic purpose. See Submission CP 55 (Magistrates' Court of Victoria).

361 Submission CP 33 (Victorian Bar).

362 *Magistrates' Court Civil Procedure Rules 1999* r 21.05. This rule provides for a simplified form of discovery.

363 The County Court discovery process operates within the court's caseflow management system prescribed in r 34A. Pursuant to the 2002 *Consolidated Practice Note: Operation and Management of the County Court Civil Lists (Melbourne Registry)*, an application for discovery must be specific as to what documents or class of documents are sought to be discovered. Note that this Practice Note is currently being reviewed by the County Court and will be superseded: <www.countycourt.vic.gov.au> at 11 February, 2008.

364 *Compagnie Financiere Commerciale Du Pacifique v Peruvian Guano* (1882) 11 QBD 55, 63.

365 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) Chapter 21 [17].



A different procedure operates in the County Court, where discovery is available only with leave of the court and is initially restricted to categories of documents. Sallmann and Wright suggest that the category approach to discovery in the County Court was 'introduced because of the view taken by the Court that general discovery was being abused and was leading to unnecessary delays and costs in the conduct of litigation'.³⁶⁶

Pursuant to the County Court's 2002 Consolidated Practice Note an application for discovery is generally accompanied by a written schedule setting out the categories of documents of discovery required. Generally, discovery is ordered according to the schedules of categories of documents agreed between the parties and exchanged at the first directions hearing. The court will only order general discovery where it is satisfied that it is impracticable for categories of documents to be formulated.³⁶⁷

In 2007 the County Court issued further practice notes in relation to the Damages List—Applications Division, General Division and Serious Injury Division³⁶⁸ and the Business List—Commercial and Miscellaneous Divisions.³⁶⁹ In 2008 the County Court Building Cases Division Practice Note was also issued.³⁷⁰ In these lists the County Court states that the objective of discovery

*is to ensure that the procedure allows each party access to documents in circumstances where the absence of discovery would not permit justice to be done between the parties. On the other hand, it is recognised that discovery can be a lengthy and costly process and the level of discovery appropriate in a case must be measured against the issues in dispute.*³⁷¹

In these lists the court has abandoned the system of requiring parties to submit schedules of documents they want the other party to discover. Instead the court requires parties to discover certain minimum documents reflected in standard directions orders. A 'catch-all' category of documents refers to those documents it is 'reasonable in the circumstances' to discover. Initially it is for the parties to determine what is reasonable and if they are unable to do so, they can obtain the assistance of the court.³⁷²

The County Court notes that it will generally not participate in the process of approving lists of documents because

*to do so in advance takes a lot of time and removes from the parties the responsibility of negotiating to resolve these issues ... Where parties agree that discovery will be made in accordance with a schedule of documents, the court's order will merely note the fact of this agreement.*³⁷³

Judge Anderson of the County Court reported that the previous system that required the parties to submit schedules of documents, 'involved a number of steps and double handling'. He argued that the new system puts the onus back on the parties to determine what is 'reasonable' but that it is 'difficult to know whether it is better for the parties'. In his view however, from the court's perspective, 'considerable administrative work has been avoided and the number of discovery disputes is very small'.³⁷⁴

5.3.2 Judicial management of discovery

The Supreme and County Courts are empowered to confine or manage discovery through rules of court or practice notes. However, in contrast to other jurisdictions, the discovery management powers of the Victorian courts are not extensively defined.

The following rules assist the Supreme and County Courts to manage the discovery process:

- The court may preclude or limit documentary discovery to classes of documents or particular questions in the proceeding 'in order to prevent unnecessary discovery'.³⁷⁵

- The court may order discovery prior to the close of pleadings.³⁷⁶
- Where an application is made for a court order in relation to a discovery default and an objection is made to production of a document (for example, on privilege grounds) the court may inspect the document for the purpose of deciding the objection.³⁷⁷
- If it appears to the court that there are grounds to believe that some document or class of documents relating to any question in the proceedings may be or may have been in a party's possession, the court may order by its own motion and at any stage, that a party serve an affidavit stating whether a particular document (or a document of a particular class) is, or has been, in its possession and if it is no longer in its possession what has become of it.³⁷⁸

The courts have general powers to control proceedings.³⁷⁹ A more detailed discussion of these powers is contained in Chapters 1 and 5. Other relevant case management powers that exist in the County and Supreme Courts include:

- In the Applications, General and Serious Injury division of the Damages List of the County Court a discovery dispute will only be listed where the parties have set out the steps they have taken in good faith to try to resolve the dispute.³⁸⁰
- The County Court expects parties and their lawyers to act reasonably and responsibly in making and responding to the questions relating to discovery. Unreasonable behaviour will be taken into account when considering costs.³⁸¹
- In 2008 the Supreme Court issued a Practice Note introducing a 'new approach' to building cases in that court.

The pilot program requires the parties to attend an early resources conference. Before attendance the parties must complete an information sheet which is to be exchanged with the other side and with the court. The information sheet details a range of resource information including whether there are any special considerations concerning discovery that should be brought to the court's attention and whether it is appropriate to limit or stage discovery. The information sheet must be signed by the solicitor for the party who certifies that the information is correct and that he or she will bring to the court's attention 'any circumstances' which would alter the accuracy of the information provided.³⁸² The resources conference will be chaired by a master and set the resources budget for the proceeding. The master will consider the

366 Sallmann and Wright (2000) above n 344, 112.

367 See County Court (2002) above n 363, 7.

368 See County Court of Victoria, *Practice Note: Damages List—Applications Division, General Division and Serious Injury Division (PNCI 4-2007)* (2007) <www.countycourt.vic.gov.au> at 11 February 2008.

369 County Court of Victoria, *Practice Note: Operation and Management of the Business List, Commercial and Miscellaneous Divisions (Melbourne Registry) (PNCI 5-2007)* (2007) <www.countycourt.vic.gov.au> at 11 February 2008.

370 County Court of Victoria, *Practice Note: County Court Building Cases Division* (2008), <www.countycourt.vic.gov.au> at 27 February, 2008.

371 See County Court, (*PNCI 4-2007*) (2007) above n 368, [32]; (*PNCI 5-2007*) (2007) above n 369, [18]. County Court Building Cases Division (2008) above n 370 [13].

372 See County Court, (*PNCI 4-2007*) (2007) above n 368, [33]; (*PNCI 5-2007*) (2007) above n 369, [19]; Practice Note: County Court Building Cases Division (2008) above n 370 [14].

373 See County Court, (*PNCI 4-2007*) (2007) above n 368, [34].

374 Submission ED2 4 (Judge Anderson).

375 *Supreme Court (General Civil Procedure) Rules 2005* r 29.05 and *County Court Rules of Procedure in Civil Proceedings 1999* r 29.05.

376 *Supreme Court (General Civil Procedure) Rules 2005* r 29.07(1) and *County Court Rules of Procedure in Civil Proceedings 1999* r 29.07(1). Such an order may be limited to documents or classes of documents or particular questions in the proceeding as the court thinks fit.

377 See *Supreme Court (General Civil Procedure) Rules 2005* r 29.13; *County Court Rules of Procedure in Civil Proceedings 1999* r 29.13.

378 *Supreme Court (General Civil Procedure) Rules 2005* r 29.08.

379 See *Supreme Court (General Civil Procedure) Rules 2005* r 1.14, *County Court Rules of Procedure in Civil Proceedings 1999* rr 1.14 and 34A and the 'overriding objective' in the Magistrates' Court: *Magistrates' Court Civil Procedure Rules 1999* rr 1.02, 1.19, 1.22 as well as r 35.03 and *Magistrates' Court Act 1989* s 136 in relation to general powers to make directions.

380 See County Court (2002) above n 363, as modified by para 35 of *PNCI 4-2007* (2007) above n 368.

381 See County Court (2002) above n 363, [4(D)].

382 Supreme Court, *Practice Note 1 of 2008, Building Cases—A New Approach, Case Management Information Sheet*, question 5, <www.supremecourt.vic.gov.au> at 22 February, 2008.



resources which each party might apply to the litigation and among other things will consider 'whether any limit should be placed upon these resources or costs or upon discovery or other interlocutory step'.³⁸³

5.3.3 Electronic discovery in the Supreme Court

Supreme Court Practice Note 1 of 2007 provides guidance on the use of technology in any civil litigation in the Supreme Court.³⁸⁴ The practice note is broad in scope, covering electronic discovery and e-trials. It is likely to be appropriate where

*one or more of the following apply: a substantial portion of the potentially discoverable documents consists of electronic material; the total number of these documents exceeds 1000; there are more than three parties to the proceeding; and the proceeding is multi-jurisdictional or cross border.*³⁸⁵

A key element of the court's new approach to the use of technology in litigation is an expectation that parties will have met at an early stage regarding the discovery of electronic material. At a directions hearing about electronic discovery the court expects parties to have ascertained the scope of discoverable documents and the likely volume of material to be discovered, to have conferred about issues regarding the preservation and production of electronic material and to have sought to agree on the scope of each party's rights and responsibilities with respect to these matters. Further, there is an expectation that parties will have notified each other of problems reasonably expected to arise in relation to discovery and to have conferred about the desirability of limiting the parameters of searches, costs issues and the identification of data that may be destroyed.

The Practice Note also establishes a 'default standard' that describes the fields of discoverable documents, standards for the delivery of electronic documents to parties, the imaging of electronic documents and making discovery of electronic documents, etc. The default standards may be modified by agreement on an agreed protocol. An e-master and an e-litigation coordinator have been made available to assist parties and the court with interlocutory matters regarding the use of technology or to assist to settle protocols developed by the parties.

5.3.4 Timing

In the Magistrates' Court a notice for discovery must be served within 28 days after the notice of defence is given unless the court otherwise orders.³⁸⁶ In the County and Supreme Courts a notice for discovery is generally served when pleadings are closed.³⁸⁷ In the Supreme Court, '[t]he whole process of discovery of documents should be complete no later than 10 weeks after close of pleadings'.³⁸⁸

5.3.5 Affidavits of documents

The obligation to make discovery generally requires a party to search diligently to identify all discoverable documents in the party's possession, custody or power.³⁸⁹ 'Document' is defined broadly in section 38 of the *Interpretation of Legislation Act 1984*.

The rules regarding compilation of an affidavit of documents are largely the same in the three courts. The discovering party must compile (and serve on other parties) an affidavit of documents that:

- identifies documents that are or have been in its possession, custody or control. Documents should be arranged in a convenient order and must be sufficiently described to enable the document or group of documents to be identified
- distinguishes documents no longer in a party's custody, power or control and indicates when the document left a party's possession and the party's belief as to what has become of it
- identifies documents over which privilege is claimed and states the grounds of privilege.³⁹⁰

The discovery obligation is ongoing and therefore an affidavit of documents must be updated on an ongoing basis.³⁹¹

5.3.6 Production and inspection of discovered documents

The party giving discovery must produce for inspection every document in its possession that is enumerated in the party's affidavit of documents, other than privileged material. A party can also be required to produce documents referred to in pleadings, interrogatories or answers, affidavits or notices for inspection, unless privilege is claimed.³⁹²

In the Victorian courts production of discovered documents is arranged between the parties or may be required by way of Notice to Produce. If a party is served with a Notice to Produce it must within seven days of service advise the moving party of a time and place that the documents can be inspected. Such inspection must take place within the next seven days.³⁹³ The Supreme and County Court rules also make provision for a party to obtain a copy of any documents produced.³⁹⁴

'The confidential nature of a document ... is not itself a ground for resisting production'.³⁹⁵ In order to deal with the protection of documents that may reveal trade secrets and other confidential information, it is now common for the courts to order that documents be made available only to the legal advisers and nominated experts of the party.

Documents that are privileged, either by way of legal privilege or public immunity privilege, are required to be discovered but are not required to be produced for inspection. Claims for privilege are routinely made by parties in civil litigation. Privilege is a complex area of law relating to parties' substantive, not just procedural, rights. For this reason we have not examined this area during this phase of our review. We note that the Australian Law Reform Commission (ALRC) has recently recommended reform of the law relating to privilege in the context of investigations by federal investigatory bodies.³⁹⁶

5.3.7 Implied undertaking

The production and inspection of documents occurs by a process of court compulsion. As such, an inspecting party (including a legal representative) is subject to an implied undertaking not to use, or permit to be used, any document or any knowledge acquired from any document, or any copy of a document, otherwise than for the purpose of the proceeding, without the consent of the owner of the documents or without the leave of the court.³⁹⁷ Breach of this obligation may constitute a contempt of court.³⁹⁸ As Williams notes, the implied undertaking preserves the confidentiality of documents and encourages the parties to make full and frank discovery.³⁹⁹ Subject to certain limitations the implied undertaking does not prevent a party from giving discovered documents to a non-party, for example, disclosure to another person may be proper if it is necessary for the purposes of the litigation (for example providing documents to a prospective witness or an expert).⁴⁰⁰

The undertaking may be modified or released by consent without the intervention of the court.⁴⁰¹ Leave can be granted to use a document produced in an earlier proceeding in a fresh proceeding.⁴⁰² In order to gain the court's approval for such use the applicant needs to show special circumstances or persuasive reasons.⁴⁰³ Examples of such reasons include to enable the joinder of parties, where the parties and causes of action in the two proceedings were closely related, to launch contempt proceedings against the party disclosing the documents in respect of other proceedings, to allow the correction of a misleading statement by the other party.

383 Ibid [8].

384 Supreme Court of Victoria, *Practice Note 1 of 2007: Guidelines for the Use of Technology in any Civil Litigation Matter* (2007) <www.supremecourt.vic.gov.au> at 11 February 2008.

385 See Sandra Potter, 'Practical Electronics', *Lawyers Weekly*, 29 March 2007 <www.lawyersweekly.com.au/articles/Practical-electronics_z69351.htm> at 11 February 2008.

386 *Magistrates' Court Civil Procedure Rules 1999* r 11.03.

387 Note that a notice for discovery may be served before pleadings are closed but for the purpose of compliance with the discovery notice it is taken to have been served on the day after pleadings closed. See Neil Williams (LexisNexis Butterworths), *Civil Procedure—Victoria*, vol 1 (at January 2008) I 29.01.240.

388 Supreme Court of Victoria, *Practice Note 1 of 1996: Civil Case Management* (1996) 5 <www.supremecourt.vic.gov.au> at 11 February 2008.

389 See *Supreme Court (General Civil Procedure) Rules 2005* r 29.01(2) and *County Court Rules of Procedure in Civil Proceedings 1999* r 29.01(2). See also *Magistrates' Court Civil Procedure Rules 1999* r 11.02. Note that 'possession' means the right to possession of a document, 'custody' the actual physical holding of a document and 'power' an enforceable right to inspect the document. See Williams (2008) above n 387, I 29.01.225; and Colbran et al (2005) above n 345, 558–9.

390 See *Supreme Court (General Civil Procedure) Rules 2005* r 29.04, *County Court Rules of Procedure in Civil Proceedings 1999* r 29.04 and *Magistrates' Court Civil Procedure Rules 1999* r 11.04. The Supreme Court specifies further identifying fields for affidavits of documents: document discovery numbers, document date, document description and document source or provenance. See the Supreme Court of Victoria, *Practice Note 4 of 2004: Commercial List* (2004) 13, [6.2(d)] <www.supremecourt.vic.gov.au> at 11 February 2008.

391 See *Supreme Court (General Civil Procedure) Rules 2005* r 29.15, *County Court Rules of Procedure in Civil Proceedings 1999* r 29.15 and *Magistrates' Court Civil Procedure Rules 1999* r 11.05.1.

392 See *Supreme Court (General Civil Procedure) Rules 2005* rr 29.09, 29.10; *County Court Rules of Procedure in Civil Proceedings 1999* rr 29.09, 29.10 (documents referred to in particulars of claim, notice of defence of counterclaim or affidavits are discoverable) and *Magistrates' Court Civil Procedure Rules 1999* r 11.06.

393 See *Supreme Court (General Civil Procedure) Rules* rr 29.09, 29.10; *County Court Rules of Procedure in Civil Proceedings 1999* rr 29.09, 29.10; and *Magistrates' Court Civil Procedure Rules 1999* r 11.06.

394 *Supreme Court (General Civil Procedure) Rules 2005* r 29.09 and *County Court Rules of Procedure in Civil Proceedings 1999* r 29.09 set out that an inspecting party may take copies of a document and that this includes allowing the inspecting party to copy the document at a place agreed or providing a photocopy.

395 See Williams (2008) above n 387, I 29.01.80 citing *Mackay Sugar Co-op Assn Ltd v CSR Ltd* (1996) 137 ALR 183, referring to *Home Office v Harman* [1983] 1 AC 280, 380.

396 ALRC, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report 107 (2008).

397 See generally Williams (2008) above n 387, I 29.01.35.

398 Ibid referring to *United States Surgical Corp v Hospital Products Int Pty Ltd* (NSWSC, ED No 2094/90, 7 May 1982, unreported) and *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524.

399 Ibid I 29.01.50.

400 Ibid I 29.01.35.

401 Ibid I 29.01.70.

402 *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576 as cited in ibid I 29.01.75. See also the recent Federal Court decisions in *Cadbury Schweppes Pty Ltd v Amcor* [2008] FCA 88; [2008] FCA 398 (Gordon J).

403 Ibid I 29.01.75.



5.3.8 Sanctions

The Victorian courts are empowered to compel parties to make discovery and impose sanctions for breach of discovery obligations.⁴⁰⁴

If a party fails to comply with a notice for discovery in the Magistrates' Court the court may make orders that include requiring a party to make discovery within a specified time and/or dismissing a complaint or striking out a defence.⁴⁰⁵

The County and Supreme Courts have wide powers to order a party to do such acts as the case requires where a party:

- fails to make discovery
- fails to serve a notice appointing a time for inspection
- objects to produce any document for inspection
- offers inspection unreasonable as to time or place
- objects to allow any document to be photocopied or to supply a photocopy of the document.⁴⁰⁶

A party may serve a notice of default if a court order has not been complied with by the required time.

If the notice of default is not complied with within seven days of service, the court may order:

- if the defaulting party is a plaintiff, that the complaint be dismissed
- if the defaulting party is a defendant, that the notice of defence be struck out.⁴⁰⁷

Criminal and civil penalties may also apply for breach of the Document Unavailability Act or the Document Destruction Act. These acts are discussed in the next section of this chapter.

5.4 KEY PROBLEMS WITH DISCOVERY

In *Managing Justice* the Australian Law Reform Commission noted that 'in almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control'.⁴⁰⁸

Key concerns with discovery centre on expense, scale and delay, as well as abuse of discovery obligations.

5.4.1 Expense, scale and delay

The principal criticisms about discovery are that the objectives of the process are either not being achieved or can only be achieved at great cost.

Chief Justice Spigelman of the NSW Supreme Court has remarked on the cost of discovery:

*When senior partners of a law firm tell me, as they have, that for any significant commercial dispute the flag-fall for discovery is often \$2 million, the position is simply not sustainable.*⁴⁰⁹

These concerns have been echoed by Chief Justice Michael Black of the Federal Court, who believes that courts 'need to take a more interventionist role to avoid having trolley loads of documents being wheeled into court when hardly any of them are likely to be referred to and when every page will add to the cost of the litigation'.⁴¹⁰ It has been observed 'that the scope of discovery is generally where costs blow out: if you say you're going to discover everything, the process essentially becomes endless'.⁴¹¹

Chief Justice Doyle of the South Australian Supreme Court has expressed alarm that 'the average person can't afford to get involved in substantial civil litigation, even a fairly well-off person; to me it would be an absolute nightmare personally to be involved in a significant civil case'.⁴¹² Chief Justice Doyle is critical of discovery and believes 'discovery has become a scourge. We have to rein it in if we can'.⁴¹³

Journalist Elisabeth Sexton has written that '[d]iscovery, including reviewing and coding documents, commonly comprises half the total expense of a case'.⁴¹⁴ The exorbitant costs involved in marshalling and assembling huge quantities of documents of varying degrees of relevance to a case are invariably accompanied by claims for inflated photocopying expenses.

The Bar noted in its submission in response to the Consultation Paper that 'anecdotal evidence suggests that [discovery] is one of the most expensive steps in the interlocutory process'. Yet the Bar queried whether in some cases the expenditure incurred by parties justified the cost of the exercise.⁴¹⁵

In a further submission the Bar commented that:

Many judges, legal practitioners and clients agree that the rules on discovery should be amended, as the current rules are clearly distorting the delivery of justice significantly, with some plaintiffs and defendants using the costs associated with discovery to impose unreasonable cost (and resource) pressures on the other party.⁴¹⁶

The Law Institute also expressed concern about 'huge' discovery expenses and noted that 'in every case, it stands as a major step involving both time and cost, notwithstanding that different cases require substantially different concentration on discovery'.⁴¹⁷ Concerns about costs were also echoed by law firms Slater & Gordon and Allens Arthur Robinson at the AIJA seminar mentioned earlier.

The Bar suggested that a possible reason for the excessive cost of discovery is a culture within some sections of the legal profession not to leave any stone unturned, or to search for the smoking gun.⁴¹⁸ The Bar cited Justice Ipp's comments that this attitude

results in mountains of documents being produced (sometimes hundreds of thousands) that require weeks or even months to read, analyse and digest, and then to copy and index. In the end, the usual result is that the number of those documents that are critical to the result of the trial are substantially less than fifty.⁴¹⁹

The Chief Justice of the Western Australian Supreme Court, Wayne Martin, has similarly commented that 'the "no stone unturned" approach to litigation is very expensive, often more expensive than the parties can afford, and entirely disproportionate to the value of the subject matter in issue'.⁴²⁰

In the C7 litigation Justice Sackville observed that in addition to locating and producing documents the parties must

devote equally massive resources to inspecting the documents that have been produced. They must also collate and analyse documents that are helpful (and, indeed, those that are unhelpful) to their respective contentions. In the electronic age, when deleted e-mails or other documents stored in digital form can generally be retrieved, albeit sometimes with great difficulty, the process of production and inspection of documents becomes an industry in itself.⁴²¹

As suggested above, the expansive scope of discovery results in the production of often unnecessary and/or largely irrelevant documents, which only increases costs and causes delay in the progress of an action.⁴²²

In addition to legal costs, discovery also consumes the time and resources of the discovering party. The ALRC has estimated that 'the cost of executive and management time involved in complying with discovery obligations may be as great as, or greater than, legal costs'.⁴²³

Legal arguments relating to access to documents, for example whether documents are covered by legal professional privilege or public interest privilege as well as arguments about confidentiality and appropriate safeguards for access to confidential material, can be yet another source of cost. Interlocutory disputes about discovery delay not only the discovery process but also the progress of the proceeding generally.

The conduct of parties and solicitors in relation to discovery and the inherent flaws in discovery processes have been strongly criticised by judges in numerous cases in Australia. Some of these cases are mentioned below.

In *BT Australasia Pty Ltd v State of New South Wales & Telstra*, discovery was costly, wasteful and unmanageable. In a judgment arising out of an application for further and better discovery, Justice Sackville stated:

I have repeatedly said that all parties to this litigation have given insufficient attention to the need to control their own request for discovery in the interests of keeping the discovery process within manageable bounds. One consequence of the approach taken by the parties is that discovery in this case has assumed mammoth proportions. A second is that the parties are in continuous disputation as fresh discovery issues are raised, each said to require the time of the Court to resolve. Not only is this extraordinarily costly and, in my opinion, wasteful, but it diverts attention from the need, in a case that has now been going for three years, to prepare for trial. It also imposes a disproportionate burden on the Court.⁴²⁴

404 *Supreme Court (General Civil Procedure) Rules 2005* rr 29.11, 29.12.1, 29.14; *County Court Rules of Procedure in Civil Proceedings 1999* rr 29.11, 29.12.1, 29.14; *Magistrates' Court Civil Procedure Rules 1999* r 11.07. These rules regarding default also apply to counter-claims and third party claims.

405 *Magistrates' Court Civil Procedure Rules 1999* r 11.07.

406 *Supreme Court (General Civil Procedure) Rules 2005* r 29.11; *County Court Rules of Procedure in Civil Proceedings 1999* r 29.11.

407 *Supreme Court (General Civil Procedure) Rules 2005* r 29.12.1; *County Court Rules of Procedure in Civil Proceedings 1999* r 29.12.1.

408 ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, (2000) [6.67].

409 As cited by Pelly (2007) above n 352, 31.

410 *Ibid.*

411 Comment by Seamus E Byrne, as cited in Dearn, above n 494.

412 As cited by Brad Crouch, 'Judge "gives up" on civil system', *The Adelaide Sunday Mail* (Adelaide), 2 June 2007.

413 *Ibid.*

414 Sexton (2007) above n 352.

415 Submission CP 33 (Victorian Bar).

416 Submission CP 62 (Victorian Bar).

417 Submission CP 18 (Law Institute of Victoria).

418 Submission CP 33 (Victorian Bar).

419 Justice D A Ipp, 'Reforms to the Adversarial Process in Civil Litigation—Part II' (1995) 69 *Australian Law Journal* 790, 793 as cited by Submission CP 33 (Victorian Bar).

420 Sexton (2007) above n 352.

421 *Seven Network Ltd v News Ltd* [2007] FCA 1062, [13] (Sackville J).

422 See *Trade Practices Commission v CC (NSW) Pty Ltd* (1995) 58 FCR 426, 438 (Lindgren J).

423 ALRC, *Review of the Adversarial System of Litigation*, Issues Paper No 20 (1997) [7.20].

424 *BT Australasia v New South Wales* (No.10) [1998] FCA 479, 7 May 1998.



In *Trade Practices Commission v Santos Limited & Sagosco Holdings Limited*,⁴²⁵ the process of discovery lasted for approximately one year. Justice Heerey noted that discovery was a 'major cause of delay' in the case. He observed that

*discovery, including inspection, consumes vast amounts of time and money. It tends to generate numerous disputes over issues like privilege and confidentiality which can become ends in themselves. In the present case it may have been a mistake to have a general unqualified order for discovery.*⁴²⁶

In a Consultation Paper produced by the Law Reform Commission of Western Australia (LRCWA) it was observed that the problems with discovery resulted from practitioners being 'recruited into a burgeoning army engaged in discovery, inspecting, filing, listing copying, storing, carrying about and otherwise dealing with 100 000 documents which had been accumulated for the purposes of the litigation'.⁴²⁷

Problems caused by the volume and complexity of discovery are also at issue in current proceedings between Biota and GlaxoSmithKline.⁴²⁸ The case concerns allegations of breach of contract for the development and marketing of the influenza drug Relenza. At the time of writing the case was expected to go to trial in 2008 in the Victorian Supreme Court. According to a 2007 newspaper article GlaxoSmithKline has been gathering information from 25 countries in 17 languages and has spent \$40 million on the discovery process alone.⁴²⁹ It was further estimated that GlaxoSmithKline has 120 legal professionals working on the discovery process.⁴³⁰

In C7 Justice Sackville calculated that the case consumed more than 120 hearing days. In addition, the outcome of the processes of discovery and production of documents was an electronic database containing 85 653 documents, comprising 589 392 pages. Ultimately, 12 849 documents comprising 115 586 pages were admitted into evidence.⁴³¹

5.4.2 Abuse

The use of discovery as a tactical tool to leverage settlement or put off an opposing party is also frequently cited. Concerns about the overly adversarial approach to litigation by some parties and solicitors as well as gross inequalities between participants in litigation have also been brought to the commission's attention.⁴³²

Justice Ipp has identified three categories of discovery abuse:

1. *making unnecessarily broad discovery requests*
2. *withholding information to which the requesting party is entitled and*
3. *providing many irrelevant documents to overwhelm the other side [or to improperly conceal documents].*⁴³³

Justice Ipp noted:

*The purpose of the discovery system is to provide each side with all of the relevant documentary information in each party's possession so as to avoid trial by ambush. Although discovery, generally speaking, may have served that aim, its cost is often prohibitive. Some litigants impose costly, even crushing burdens on their opponents either by excessive demands for documents or by offloading an avalanche of unsorted files on the party demanding discovery, hoping that the searcher will be so exhausted that the damaging items will be overlooked or never reached. Instead of discovery being an essential element in the pursuit for justice it is too often a crippling obstacle to the speedy resolution of disputes.*⁴³⁴

These concerns were echoed in submissions by Maurice Blackburn, which claimed that 'one of the main problems with discovery is the use by major defendants of discovery cost as a tool to exhaust the plaintiff's resources'.⁴³⁵ Maurice Blackburn cited the example of the Multiplex class action,⁴³⁶ where it said that the

*'defendants contended to the Court that they be forced to undertake a \$28 million discovery exercise. This then underpinned an application by the defendant for a commensurate amount of security for costs which the plaintiff could not meet. The docket judge made it clear that he would not order discovery of this magnitude and the defendant's estimates then became modest'.*⁴³⁷

The actual extent of discovery abuse is not clear. The Australian Law Reform Commission has noted that 'discovery is too often examined through the lens of the large commercial case'.⁴³⁸ The Law

Reform Commission of Western Australia observed that ‘although there are well-documented instances of problems with discovery in large commercial and banking cases, there is no recent empirical data on the costs and benefits of discovery in relation to other cases’.⁴³⁹ At the AIJA seminar it was observed that discovery may not be problematic in all cases, and that discovery applications are not routine.

In relation to abuse by legal practitioners, there is also a divergence of opinion about whether there is a significant problem. For example, on the one hand Slater & Gordon raised concerns about what it considers to be the widespread and serious abuse of legal professional privilege in connection with discovery.⁴⁴⁰ On the other hand, Allens Arthur Robinson argued that practitioners take their discovery obligations seriously and denied abuse was widespread.⁴⁴¹

5.4.3 Document destruction

Recent reforms in Victoria have attempted to address one form of discovery abuse, namely, the destruction of documents. In the *McCabe* case Justice Eames exercised his discretion to strike out the defence of British American Tobacco.⁴⁴² He concluded that the plaintiff’s prospects of a fair trial had been irretrievably damaged by the unavailability of destroyed discoverable material. He found that in March 1998, a process of destruction of documents was undertaken which resulted in as many as 30 000 documents being destroyed.⁴⁴³ Justice Eames commented:

*Central to the conduct of a fair trial in civil litigation is the process of discovery of documents ... The party which controls access to the documents must ensure that its opponent is not denied the opportunity to inspect and use relevant documents, and it must disclose fully and frankly what has become of documents which have been in its possession, custody or control ... The process of discovery in this case was subverted by the defendant and its solicitors ... with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful. It is not a strategy which the Court should countenance, and it is not an outcome which, in the circumstances of this case, can now be cured so as to permit the trial to proceed on the question of liability.*⁴⁴⁴

On appeal Justice Eames’ decision was overturned and the Victorian Court of Appeal proceeded to formulate a narrow test for determining when it was appropriate to sanction a defendant for the destruction of documents prior to the commencement of proceedings.⁴⁴⁵ Professor Sallmann was subsequently commissioned by the Victorian Attorney-General to report on the most appropriate approach to destruction of documents. Professor Sallmann reported that ‘the narrowness of the [existing] test means that only the most extreme, deliberate and blatant instances of document destruction would be covered’.⁴⁴⁶

New rules, which came into effect on 1 September 2006, imported the structure and substance of Professor Sallmann’s recommendations. *The Victorian Crimes (Document Destruction) Act 2006* (the Document Destruction Act) and *Evidence (Document Unavailability) Act 2006* (the Document Unavailability Act) amended the *Victorian Crimes Act 1958* and *Evidence Act 1958* respectively. The Document Destruction Act introduced new criminal consequences and the Document Unavailability Act introduced new civil consequences for ‘document destruction’ and ‘document unavailability’. Both Acts deal with the destruction, concealing or rendering of a document illegible, undecipherable or incapable of identification.

5.4.4 Going to Court recommendations (2000)

Going to Court examined some of the problems in Victoria with documentary discovery as well as some of the reforms that had been implemented in other jurisdictions. Sallmann and Wright concluded that discovery was too important to be abolished. However, they claimed that the *train of inquiry* test had ‘outlived its usefulness as the general test’.⁴⁴⁷ It was recommended that the test be changed to one of ‘direct relevance’, with residual court discretion to enlarge the ambit of discovery where necessary.⁴⁴⁸

The report supported the narrower test of relevance adopted by the Federal Court and the emphasis placed on the role of the directions judge in supervising the discovery process. It concluded that greater case management should be achievable in large commercial cases, even in the absence of a Federal Court docket judge system.⁴⁴⁹ It was also suggested that attention be given to imposing ‘tight discovery timelines’ in order to limit the cost of the process.⁴⁵⁰

- 425 (1992) ATPR 41. See also decision by Heerey J *Trade Practices Commission v Santos Limited & Sagosco Holdings Limited* 42 FCR 203 (29 April 1993).
- 426 Peter Heerey, ‘Some Lessons from Santos’ (1994) 29 *Australian Lawyer* 24, 27.
- 427 Law Reform Commission of Western Australia, *Discovery—Should Whistle Blowers stop the Train of Inquiry*, Consultation Paper (2.6), Review of the Criminal and Civil Justice System in Western Australia (June 1999), 376.
- 428 *Biota Scientific Management & anor v Glaxo Group Limited & ors* [2006] VSC 71 (13 February 2006).
- 429 Nabila Ahmed, ‘It’s Biota v Goliath in massive court showdown’, *The Age* (Melbourne) 31 March 2007.
- 430 *Ibid.*
- 431 *Seven Network Ltd v News Ltd* [2007] FCA 1062.
- 432 Submission CP 5 (Confidential, permission to quote granted 4 February 2008); Submission CP 10 (Peter Mair).
- 433 *Ipp* (1995) above n 419, 793.
- 434 *Ibid.*
- 435 Submission ED2 19 (Maurice Blackburn).
- 436 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061. The Full Court of the Federal Court then considered it in: *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200.
- 437 Submission ED2 19 (Maurice Blackburn).
- 438 Australian Law Reform Commission, *Civil Litigation Practice and Procedure* Background Paper No 5 (1996), ch 2.
- 439 This was observed in the Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report No 92 (1999), [13.7].
- 440 Submission CP 20 (Slater & Gordon).
- 441 Australasian Institute of Judicial Administration, *Discovery Seminar* (Melbourne Business School, 24 August 2007).
- 442 *McCabe v British American Tobacco Australia Services Limited* (*‘McCabe’*) [2002] VSC 73 (22 March 2002) [385].
- 443 *McCabe* [2002] VSC 73, [169], see also [289].
- 444 *McCabe* [2002] VSC 73, [384]–[385].
- 445 *British American Tobacco Australia Services Ltd v Cowell* (as Representing the Estate of Rolah Ann McCabe, Deceased) [2002] VSCA 197 (6 December 2002).
- 446 Professor Peter Sallmann (Crown Counsel for Victoria), *Report on Document Destruction and Civil Litigation in Victoria* (2004) 12.
- 447 Sallmann and Wright (2000) above n 344, 113.
- 448 *Ibid.*
- 449 *Ibid.*
- 450 *Ibid.*



5.5 OTHER DISCOVERY MODELS AND REFORMS

The commission's recommendations are informed by our examination of the discovery processes in other Australian and overseas jurisdictions. In recent years, many of these jurisdictions have comprehensively overhauled their rules of civil procedure including their discovery processes.

In the following section of this chapter, we provide a brief analysis of the discovery landscape in Australia and overseas. The survey is, by necessity, selective but provides a valuable comparative perspective for redefining the discovery process in the Victorian courts.

5.5.1 Australia

Discovery practices vary considerably around Australia. A survey of Australian jurisdictions reveals the following:

- The test for determining whether a document should be discovered ('the discovery test') has been narrowed from a 'train of inquiry test' to a 'direct relevance test' in the Federal Court, South Australia, Queensland and in New South Wales. The Law Reform Commission of Western Australian has also recommended a narrower test. In the Northern Territory leave is required to obtain discovery of a document that is relevant only because it may lead to a 'train of inquiry'. The remaining states and territories generally follow a wider discovery test.
- Unlike Victoria, the rules in many other state courts set out in detail the way in which the courts and the parties may limit or confine discovery. There are also more onerous obligations on the parties to define the scope of discovery and to cooperate to resolve discovery disputes.

The pattern of reform across the breadth of Australia lends significant strength to the need for reform in Victoria.

Ambit of discovery

A narrower test

Queensland

The 'train of inquiry test' has been abolished in Queensland.⁴⁵¹ Parties are required to disclose all documents which are 'directly relevant to an allegation in issue in the pleadings and if there are no pleadings, directly relevant to a matter in issue in the proceedings'.⁴⁵² The changes to procedure and terminology in Queensland mirror the Woolf Reforms (set out later in this section).

The rules set out what types of documents are not required to be disclosed, for example a privileged document, or a document only relevant to credit or a materially identical copy of a document already disclosed.⁴⁵³ The rules specifically state that a document consisting of a statement or report of an expert is not privileged from production.⁴⁵⁴

South Australia

The South Australian Supreme Court has adopted a narrower direct relevance discovery test. Each party must disclose documents that are or have been in the party's possession and are 'directly relevant to any issues in the pleadings or are to be disclosed by order of the Court'.⁴⁵⁵

New South Wales

The test in New South Wales is significantly narrower than the train of inquiry test.

New South Wales has a dual track system of discovery and notices to produce.⁴⁵⁶ Discovery must be obtained by order of the court.⁴⁵⁷ The court may order discovery of documents within a class or classes specified in the order or one or more samples (selected in such manner as the court may specify) of documents within such class.⁴⁵⁸ A class of documents may be specified by relevance to one or more facts in issue, by description of the nature of the documents and the period within which they were brought into existence, or in such other manner as the court considers appropriate in the circumstances. An order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue.⁴⁵⁹

A matter is taken to be 'relevant to a fact in issue' if it

*could or contains material that could rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence.*⁴⁶⁰

In *National Australia Bank Ltd v Idoport Pty Ltd* the Court of Appeal indicated that the rules were designed to exclude the 'train of inquiry' process.⁴⁶¹ Under the NSW provisions discovery in claims arising out of death or personal injury is even more restricted. In such cases, there will be no order for discovery unless the court, for 'special reasons', orders otherwise.⁴⁶²

Northern Territory

The Northern Territory Supreme Court rules require discovery of all documents 'relating to a question raised by the pleadings'.⁴⁶³ However, a party is not required to discover a document 'relevant only because it may lead to a train of inquiry'.⁴⁶⁴

The Federal Court

The Federal Court has abolished the train of inquiry test; leave of the court is required for discovery. Pursuant to Order 15 rule 2 of the *Federal Court Rules* a party is required to discover documents that it is aware of at the time it makes discovery having conducted a reasonable search. A party must discover documents:

- that it relies on
- which adversely affect the party's case and
- that support or adversely affect another party's case.

This discovery test reflects the reform recommendations made by Lord Woolf (set out later in this section).

The court has indicated that in order to prevent orders for discovery that require production of more documents than are necessary for the fair conduct of the case, it will generally limit discovery orders to those required to be disclosed under Order 15 rule 2.⁴⁶⁵

In making a reasonable search a party may take into account:

- *the nature and complexity of the proceeding; and*
- *the number of documents involved; and*
- *the ease and cost of retrieving a document; and*
- *the significance of any document likely to be found; and*
- *any other relevant matter.*⁴⁶⁶

The parameters of discovery are further narrowed in the Federal Court's Fast Track List ('rocket docket') in the Victorian Registry. This list is discussed in Chapter 5. In this list, except where otherwise ordered, parties are required only to discover documents on which they intend to rely and documents that have a significant probative value adverse to their case.⁴⁶⁷ In addition, the scope of the parties' search obligations is further narrowed to a good faith proportionate search. A party must make a 'good faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive having regard to the nature and complexity of the issues raised by the case, including the type of relief sought and the quantum of the claim'. If requested, a description of the search that has been undertaken must be provided.⁴⁶⁸

451 The test of direct relevance applies in all courts except the Magistrates' Court unless the amount is over \$10 000 or the court otherwise orders.

452 *Uniform Civil Procedure Rules 1999* (Qld) r 211(1)(b) It has been held that 'directly relevant' pursuant to rule 211 is 'something which tends to prove or disprove the allegation in issue': *Robson v REB Engineering Pty Ltd* [1997] 2 Qd R 102, 105 (Demack J).

453 *Uniform Civil Procedure Rules 1999* (Qld) r 212(1).

454 *Uniform Civil Procedure Rules 1999* (Qld) r 212(2).

455 *Rules of the Supreme Court 2006* (SA) rr 136(1)(a), (b). At ALJ (2007), 4 above n 441 it was suggested that the directly relevant test had been broadened through the court's admission of circumstantial evidence (ie, documents that hurt or hinder a case). Therefore, in practice it was suggested that the South Australian test is actually similar to *Peruvian Guano*.

456 *Uniform Civil Procedure Rules 2005* (NSW) pt 21, div 2.

457 *Uniform Civil Procedure Rules 2005* (NSW) r 21.2. Although leave is not required to serve a notice to produce, a high degree of specificity is needed to obtain a document. A notice may require inspection of any document or thing referred to in any originating process, pleading, affidavit or witness statement that is filed or served and any other specific document or thing clearly identified in the notice and relevant to the fact in issue. General reference to documents will encompass documents referred to in particulars.

458 *Uniform Civil Procedure Rules 2005* (NSW) r 21.2(1).

459 *Uniform Civil Procedure Rules 2005* (NSW) r 21.2(3) and r 21.2(4).

460 *Uniform Civil Procedure Rules 2005* (NSW) r 21.1.

461 *National Australia Bank Ltd v Idoport Pty Ltd* [2000] NSWCA 8, [7].

462 *Uniform Civil Procedure Rules 2005* (NSW) r 21.8.

463 *Supreme Court Rules* (NT) r 29.02.

464 *Supreme Court Rules* (NT) r 29.02(3).

465 Federal Court of Australia, *Practice Note 14: Discovery* (1999). <www.fedcourt.gov.au/how/practice_notes_cj14.htm> at 26 March 2008.

466 *Federal Court Rules 1979* (Cth) r 15(2) (5).

467 Federal Court of Australia, *Notice to Practitioners issued by the Victorian District Registrar: Directions for the Fast Track List* (2007) [7.1] <www.fedcourt.gov.au/how/practicenotices_vic06.html> at 26 March 2008.

468 *Ibid* [7.2(b)-(c)].



Writing in December 2007, Damian Grave and Helen Mould reported that the discovery orders made in the court's fast track list 'have been narrowed and highly specific. There have not, as yet, been any interlocutory applications regarding discovery disputes'.⁴⁶⁹

Western Australia

The current discovery test in the Western Australian Supreme Court is broad and follows the train of inquiry approach. Parties are required to discover documents which have been in their 'possession, custody or power relating to any matter in question therein'.⁴⁷⁰ Discovery is available as of right and can occur at any time in accordance with principles of case-flow management.⁴⁷¹

The LRCWA recommended significant reforms to discovery processes in Western Australia in its Review of the Criminal and Civil Justice System in 1999.⁴⁷² The recommendations included:

- Changing the threshold test to disclosure of documents *directly relevant to a matter in dispute*.⁴⁷³ It was proposed that 'documents must bear directly on an issue joined in the exchange of case statements'.⁴⁷⁴
- Removing the availability of discovery as of right. Instead a case manager would be given discretion to order disclosure on application.⁴⁷⁵ The case manager would need to be satisfied that disclosure would contribute to the just resolution of the case so that the time and cost involved were proportional to the significance of the dispute.⁴⁷⁶
- Allowing for extra disclosure on application subject to certain requirements.⁴⁷⁷

Although some recommendations of the LRCWA made in relation to other issues have been implemented, it does not appear that the discovery recommendations mentioned above have been.⁴⁷⁸

Train of inquiry test

The remaining states and territories tend to have threshold discovery tests that are close to the test developed in *Peruvian Guano*.

Australian Capital Territory

In the ACT a document is discoverable if it 'relates, directly or indirectly, to a matter in issue in the proceedings; or is mentioned, expressly or by necessary implication, in a pleading or notice filed in the proceeding'.⁴⁷⁹

Tasmania

In the Supreme Court, subject to any agreement between the parties or an order of the court, discovery must be made of documents 'relating to any matter in question in the action'.⁴⁸⁰

Limiting scope of discovery

The discovery management powers of the Victorian courts are discussed above (see 'Judicial management of discovery'). As noted, Victorian courts have general powers to limit discovery. However, the rules of court are generally silent on the types of orders the courts may make in exercising that power. By contrast, in other Australian jurisdictions there are clearly delineated and specific powers to assist the court to manage the discovery process. In addition, the obligations on parties in the discovery process are broader and more clearly defined.⁴⁸¹

New South Wales

The discovery process has been further defined by the Supreme Court in the Commercial, Technology and Construction Lists in the Equity Division. Pursuant to a 2007 practice note, discovery must be made electronically in these lists. In addition, the following new procedures have been introduced:

- The parties must agree at an early stage about format, protocols, type and extent of discovery.
- The parties should agree on whether discovery will be made without the need to categorise documents into privileged and non-privileged material and whether discovery will be on a without prejudice basis. In this sense the discovery process enables a 'quick peek' at discovered documents.
- If the quick peek identifies material that is subject to privilege, the fact that it has been revealed to the other side does not waive that privilege. Chief Justice Spigelman explains that the Supreme Court has incorporated a rule similar to that existing in the United States

*so it is possible to disclose all documents without spending time and money working out precisely what the other side is entitled to and precisely what needs to be protected under the privilege ... one of the difficulties with just handing over your electronic documents is that people often want to pay lawyers a lot of money to sort out what is relevant—particularly to protect legal professional privilege ... we have a specific rule: if you give access in a broad way, you won't waive privilege.*⁴⁸²

- Parties are obliged to notify each other of potential discovery problems and confer on a range of discovery issues (eg, the type of software to be used).
- A joint memorandum between the parties setting out areas of agreement and disagreement (with reasons) and their best estimates of costs of discovery is contemplated. The court will make orders in relation to discovery having regard to the 'overriding purpose of the just, quick and cheap resolution of the dispute between the parties'.
- 'For the purpose of ensuring that the most cost efficient method of discovery is adopted by the parties, the court may limit the amount of costs of discovery that are able to be recovered.'⁴⁸³

Federal Court

The Federal Court will not order discovery as a matter of course, even where a consent order to that effect is submitted. Where discovery is ordered the court 'will mould any order to suit the facts of a particular case'.⁴⁸⁴

The robust discovery approach in the Federal Court departs significantly from the processes in Victoria. The court will also ask whether discovery is necessary at all and if so for what purposes and whether those purposes can be achieved by:

- a cheaper means
- disclosure only in relation to particular issues
- disclosure only in relation to defined categories of documents.⁴⁸⁵

In making its assessment the court will also consider:

- whether discovery should occur in stages
- whether discovery should occur by general description rather than identification of individual documents
- the issues in the case and the order in which they are likely to be resolved
- the resources and circumstances of the parties
- the likely cost of discovery and its likely benefit.⁴⁸⁶

Additional discovery management provisions in the Federal Court's Fast Track list include:

- the power to order additional discovery in relation to discrete issues, such as the quantification of damages. In this situation the court may order that discovery be by inspection alone.⁴⁸⁷
- requiring the parties to meet and confer and attempt to resolve a discovery dispute in good faith before approaching the court. If the parties are unable to resolve the dispute, any application to the court in the Fast Track list must contain a certificate setting out that they have met and conferred but that it was unsuccessful.⁴⁸⁸

The Federal Court's Practice Note No.17 of 2000 encourages parties to use information technology during discovery and at trial.⁴⁸⁹ Parties are encouraged to undertake discovery by exchanging electronic data created in accordance with an agreed protocol and to arrange for the inspection of discovered material using electronic data where appropriate. The practice note includes several annexures to assist parties to define information technology protocols and fields of data. The court expects the parties to have agreed on a range of matters, to have ascertained the number and categories of documents and to have attempted to agree about whether and how to use technology to exchange lists.

The recent rise in the volume of electronically stored information that is a potential source of evidence in civil proceedings has led the Federal Court to review its 2000 practice note. One of the criticisms of the existing practice note is that it may be considered 'unnecessarily ambiguous and overly

- 469 Damian Grave and Helen Mould, 'Rocket docket hits the target to reduce delays', *The Australian Financial Review* (Sydney), 14 December 2007.
- 470 *Rules of the Supreme Court 1971* (WA) r 26(1)(1).
- 471 *Rules of the Supreme Court 1971* (WA) r 26(1)(2). Leave of the court is required if the matter has been listed for trial.
- 472 LRCWA (1999) above n 439.
- 473 *Ibid* [13.8] (See also Recommendation 82).
- 474 *Ibid*. 475 *Ibid*. It was anticipated that this discretion will generally be exercised at a status conference.
- 476 *Ibid*, 105 Recommendation 82.
- 477 *Ibid*, 106 Recommendation 86. (only where there were reasonable grounds to believe that a document exists which has not been disclosed and which falls within a category identified by the case manager as bearing directly on an issue arising out of the exchange of case statements).
- 478 This has occurred through the new *Magistrates Court (Civil Proceedings) Act 2004* (WA) and the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).
- 479 *Court Procedures Rules 2006* (ACT) r 605(1).
- 480 *Supreme Court Rules 2000* (Tas) r 382.
- 481 More onerous obligations are placed on parties to agree on discovery protocols and to confer in relation to electronic discovery issues in the Supreme Court pursuant to Practice Note 1 of 2007. See Supreme Court (2007) above n 384.
- 482 See the comments by Spigelman CJ cited in Chris Merritt, 'Slashing paper chase expense', *The Australian* (Sydney), 27 July 2007.
- 483 Supreme Court of New South Wales, *Practice Note No. SC Eq 3: Supreme Court Equity Division - Commercial List and Technology and Construction List* (2007) [27]–[32] <www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/275aca41db3044e8ca25731e00254943?OpenDocument> at 11 February 2008.
- 484 Federal Court (1999) above n 465.
- 485 *Ibid*.
- 486 *Ibid*.
- 487 Federal Court (2007) above n 467, [7.3].
- 488 *Ibid*, [7.4].
- 489 Federal Court of Australia, Practice Note 17: Guidelines for the Use of Information Technology in Litigation in any Civil Matter (2000) <www.fedcourt.gov.au/how/practice_notes_cj17.htm> at 11 February 2008.



technical'.⁴⁹⁰ The Federal Court is currently finalising new e-discovery rules. It is expected that in the proposed scheme a document is to be 'produced, managed and reviewed in its original, electronic form or a searchable image representation of the native document, as opposed to the traditional conversion to hard copy form'.⁴⁹¹

In addition it is proposed that:⁴⁹²

- Documents will be exchanged in an electronically searchable format.
- 'Wherever possible the coding of each document is to be automatically extracted based on its meta data... as opposed to manually describing each document'.
- There will be mandatory pre-discovery conferences where lawyers and parties agree on the scheduling, scope, preservation and production of discoverable documents (including dealing with privilege). At the meeting parties will be expected to agree on a 'document management protocol' dealing with issues including the management of documents and how privileged documents are to be redacted.
- It is envisaged that the pre-discovery conference will be facilitated by a member of the court e-discovery panel. Such a person would be a 'court-appointed expert who will solely focus on objective issues of e-discovery and more generally, on using technology to increase efficiency of the conduct of the case for all parties'.⁴⁹³
- Compliance with the proposed practice note will be mandatory in the majority of matters 'say those exceeding a certain volume of documents, likely to be 200, after a brief period of grace'.⁴⁹⁴ Additionally, 'the overriding obligation will be to preserve relevant electronically stored information and be able to produce material in a timely fashion ... [and] [y]ou would have to demonstrate that any destruction of documents had been done in good faith'.⁴⁹⁵ The proposed scheme will also incorporate penalties for e-discovery violations.⁴⁹⁶

Seamus Byrne, a member of the Federal Court's working party on e-discovery, suggests that a clear and concise practice note will improve access to justice by allowing 'smaller law firms and sole practitioners to perform e-discovery with top tier firms on a "more even" playing field'.⁴⁹⁷ Byrne also notes that 'on a wider basis, limiting the scope of discovery appears to create greater case management efficiency in both the Federal Court (Fast Track List, Victorian Registry) and Supreme Court of New South Wales (PN SC Eq 3 of 2007)'.⁴⁹⁸

South Australia

The Supreme Court rules provide for document disclosure agreements between the parties dispensing with disclosure or regulating the extent of disclosure and how it is to be made.⁴⁹⁹

The court also has broad powers to modify or regulate the disclosure of documents including:

- extending the obligation to disclose classes of documents
- relieving a party of an obligation to disclose
- providing for disclosure in separate stages
- requiring a list of documents to be arranged or indexed in a particular way
- requiring disclosure from computer readable lists
- making orders for the enforcement of disclosure agreements or cancelling a disclosure agreement.⁵⁰⁰

Other discovery management powers allow the court to make orders regarding the confidentiality of documents.⁵⁰¹ The rules also prescribe the types of documents that are not required to be disclosed.⁵⁰²

Queensland

The Queensland Civil Procedure Rules provide the courts with the power to relieve the discovery burden having regard to factors including:

- the time, cost and inconvenience involved compared with the cost of the proceeding
- the relative importance of the question to which the documents relate
- the probable effect on the outcome of the proceeding
- other relevant considerations.⁵⁰³

In addition, in certain circumstances, a party may by notice request the delay of the disclosure of another party's documents until a time that is reasonable having regard to the stage of the proceedings.⁵⁰⁴

ACT

In the ACT the courts may limit a party's duty of disclosure or require a party to make further disclosure. The courts may also require that disclosure occur in stages or in a stated way (for example by way of bundle). Before making an order regard must be had to:

- *the principle that disclosure of documents in a proceeding should be limited to disclosure that is reasonably necessary for fairly disposing of the proceeding, or part of the proceeding, or for saving costs;*
- *the likely relevance and significance, in relation to the proceeding, of the documents, or particular documents that may be discovered*
- *the likely time, cost and inconvenience of disclosing documents or particular documents.*⁵⁰⁵

Rules of court also limit the scope of discovery in Tasmania and the Northern Territory.⁵⁰⁶

Western Australia

The Supreme Court has broad discovery case management powers. On application or of its own motion the court may order that:

- a party give discovery at that stage or at some specified future stage in the action
- discovery be limited to specified documents or documents in specified classes
- discovery be limited to documents directly relevant to any specified matter in question or all matters in question, and discovery be given of all documents relating to any specified matter in question or to all matters in question.⁵⁰⁷
- The court may also make orders:
- as to which parties are to be given discovery
- that any or all of the parties not give discovery at that stage of the proceeding or at all
- that an affidavit verifying a list of documents be provided.⁵⁰⁸

If the court is satisfied that the right to discovery or the inspection of documents depends on the determination of any issue or question in the matter it may order that the issue or question be determined first.⁵⁰⁹

The LRCWA observed that the discovery management powers of the Supreme Court appeared to have 'little impact in practice: discovery is rarely limited by court order and it still normally occurs at the close of pleadings. It is unclear whether this is because practitioners are unaware of the provisions or there is a general reluctance to use them'.⁵¹⁰ Accordingly,

490 Seamus E Byrne, 'Controlling the Flow', *Lawyers Weekly*, 3 September 2007 (available at <www.lawyersweekly.com.au/articles/Controlling-the-flow_z74426.htm> at 11 February 2008).

491 *Ibid.*

492 See comments in *ibid.*

493 *Ibid.*

494 See comments by Seamus E Byrne as cited in Karen Dearne, 'Federal Court finalises e-discovery rules', *The Australian* (Sydney), 16 October 2007.

495 *Ibid.*

496 Dearne (2007) above n 494.

497 See Byrne (2007) above n 490.

498 *Ibid.*

499 *Rules of the Supreme Court 2006* (SA) r 138. Such agreements must be made within seven days after the close of pleadings.

500 *Rules of the Supreme Court 2006* (SA) r 139.

501 *Rules of the Supreme Court 2006* (SA) r 144.

502 See *Rules of the Supreme Court 2006* (SA) r 136(6).

503 *Uniform Civil Procedure Rules 1999* (Qld) r 224.

504 *Uniform Civil Procedure Rules 1999* (Qld) r 220. Where the documents relate to a specified question or are of a specified class and they are asked for at a time that is reasonable having regard to the stage of the proceeding.

505 *Court Procedures Rules* (ACT) r 606(3).

506 In Tasmania the Supreme Court may dispense with or limit discovery. On application the court may order discovery of a particular document or class of documents or as to any matter or question. Further, if discovery is not necessary or not necessary at a particular stage, the Court may order that discovery not occur or occur at a particular stage. (see *Supreme Court Rules 2000* (Tas) rr 383(6)(c), 382). The court may also order that discovery be delayed until an issue or question is determined (*Supreme Court Rules 2000* (Tas) r 387). In the NT Supreme Court the parties may agree to limit or dispense with discovery by agreement (*Supreme Court Rules 1987* (NT) r 29.02(2)). To prevent unnecessary discovery the court may order that discovery not be required or be limited to such documents or classes of documents or to such of the questions in the proceedings, as are specified in the order (*Supreme Court Rules 1987* (NT) r 29.05).

507 *Rules of the Supreme Court 1971*(WA) r 26(7)(3)(b)(i)–(iii).

508 *Rules of the Supreme Court 1971*(WA) r 26(7)(3)(c)–(e).

509 *Rules of the Supreme Court 1971* (WA) r 26(3).

510 LRCWA (1999) above n 439, [13.4].



the LRCWA believed that changes to the discovery threshold test were also important. The LRCWA also recommended some additional reforms to the discovery management powers of the court. It proposed that:

- 'The court should retain a discretion to order disclosure in phases, particularly for, but not limited to, drawing a distinction between documents relating to issues of liability, and documents relating to issues of damages.'⁵¹¹
- Strict time limits should apply for complying with orders which should not be departed from without very good reason.⁵¹²
- The case manager should have a discretion to permit cross-examination on an affidavit of disclosure prior to trial 'when it is clear that a party providing disclosure appears to be misinterpreting the test of direct relevance, or shielding behind that test'.⁵¹³

Production and inspection of discovered documents

In contrast to Victoria,⁵¹⁴ in the Western Australian and South Australian Supreme Courts and in Queensland the rules of court place quite extensive inspection and production obligations on parties. There are requirements as to how documents must be arranged (for example, grouped according to topic or class, identified by index number or description). In addition, a party must provide facilities for inspection and copying and make a person available who can explain the ordering system used and assist to locate and identify particular documents.⁵¹⁵

Sanctions

The sanctions that apply for breach of discovery obligations in the Victorian courts are set out above. The rules in some other states and territories more clearly articulate the range of sanctions that may be imposed if a discovery obligation is breached.

Western Australia

If a party fails to comply with a discovery obligation the Supreme Court is empowered to make such orders as it thinks just, including an order dismissing the action, striking out a defence and entering judgment accordingly. In addition, a party that fails to comply with an order for discovery or production of documents shall be liable to attachment.⁵¹⁶ Further, service of an order for discovery or production on a party's solicitor is sufficient to found an application to enforce the order. If a solicitor is served with an order and without reasonable excuse fails to notify the client then that solicitor shall also be liable to attachment.⁵¹⁷

Queensland

If a party fails to disclose a document the court may order that the party:

- *must not tender the document or adduce the contents of the document at trial without the court's leave*
- *is liable for contempt for not disclosing the document*
- *may be ordered to pay the costs or part of the costs of the proceeding.*⁵¹⁸

In this situation a party may apply to the court seeking:

- an order staying or dismissing part or all of the proceeding
- a judgment or other order
- an order that the document be disclosed in a specified time and manner.⁵¹⁹

South Australia

In South Australia the Supreme Court may make any orders it thinks appropriate to ensure that discovery obligations are complied with, including requiring a party to appear before it for examination or to answer written questions relevant to ascertaining whether the party has made full disclosure.

ACT

In the ACT the courts have broad powers to deal with a party that breaches a discovery obligation. A person may be liable for contempt of court where:

- a discovery order is contravened without reasonable excuse⁵²⁰
- a document is used otherwise than for the proper purposes of the proceeding.⁵²¹

Solicitors may also be liable for contempt of court if, without reasonable excuse, they fail to notify a party of a notice of disclosure, a notice of production or service of interrogatories.⁵²² The court also has the power:

- to order that the proceeding be struck out or dismissed or that a party not be allowed to defend part or all of a proceeding⁵²³
- where a party fails, without reasonable excuse, to disclose to another party a document that is required to be disclosed, they cannot tender the document in evidence against the other party at hearing or tender evidence of its contents without the leave of the court.⁵²⁴ In this situation the court may also order that party to pay any costs incurred by another party because of the failure.

Other rules and procedures

Avoiding duplication

In the Federal Court a document 'is not required to be disclosed if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given'.⁵²⁵

In Queensland a party is not required to disclose copies provided that the copy does not contain any alteration or other information that is likely to affect the outcome of the proceeding.⁵²⁶

Certification

In the WA Supreme Court and in Queensland pursuant to the *Uniform Civil Procedure Rules* a solicitor is required to provide a certificate to the court at or before trial setting out that he or she has fully explained the duty of discovery to the client and identifying the individual to whom the duty was explained.⁵²⁷

In NSW and the ACT rules provide for a solicitor's 'certificate of advice', which states that the solicitor has advised the party of the party's obligations in relation to discovery and is not aware of any discoverable documents other than those mentioned in the party's list of documents.⁵²⁸ In the Federal Court a list of documents must contain a 'certificate of compliance' signed by the solicitor with the conduct of the matter stating 'I certify that, according to my instructions, this list and the statements in it are correct'.⁵²⁹

The LRCWA recommended that solicitors and parties certify that they are not aware of 'any documents that are directly relevant to any of the categories of documents identified by the case manager which have not already been disclosed'.⁵³⁰

5.5.2 Overseas

England and Wales and the Woolf reforms

Lord Woolf's report into the civil justice system in England and Wales resulted in the commencement of the Civil Procedure Rules (CPR) in April 1999.⁵³¹ As a result of Lord Woolf's review significant changes were made to the discovery regime, including renaming 'discovery' as 'disclosure' and more tightly delineating the types of documents that need to be disclosed. Lord Woolf's recommendations were influenced by the contention that

511 Ibid, 105, Recommendation 83.

512 Ibid, Recommendation 84.

513 Ibid, Recommendation 89.

514 The rules of the various courts in Victoria set out time frames for compliance with inspection requests. In addition, *Supreme Court (General Civil Procedure) Rules* 2005 r 29.09(4) and *County Court Rules of Procedure in Civil Proceedings* 1999 r 29.09(4) provide that an inspecting party is entitled to take copies of a document.

515 See *Rules of the Supreme Court 1971 (WA)* rr 26(8) and (8A), *Rules of the Supreme Court 2006 (SA)* r 141, *Uniform Civil Procedure Rules 1999 (Qld)* r 217(3).

516 Attachment is a summary process exercisable against the person for contempt of court. Historically, attachment was the proper remedy for refusal or neglect to obey a judgment or order to do a particular act; committal was the remedy to enforce a judgment or order to abstain from doing an act. The processes of attachment and committal are retained in Western Australia but may be used interchangeably. See Butterworths, *Halsbury's Laws of Australia*, Title 105, Contempt, 2 Criminal Contempt, (E) 'Breach of duty by persons officially connected with court proceedings', 'Solicitors' [105–75], available at <www.lexisnexis.com.au> at 18 February, 2008.

517 See *Rules of the Supreme Court 1971 (WA)* r 26(15)(4).

518 *Uniform Civil Procedure Rules 1999 (Qld)* r 225(1).

519 *Uniform Civil Procedure Rules 1999 (Qld)* r 225(2).

520 *Court Procedures Rules 2006 (ACT)* r 670.

521 *Court Procedure Rules 2006 (ACT)* r 673. The fact that a document has been filed, received in evidence or read out in court does not affect the application of this rule to the document, but the court may take that fact into account in deciding what action it takes.

522 *Court Procedures Rules 2006 (ACT)* r 672.

523 *Court Procedures Rules 2006 (ACT)* r 671.

524 *Court Procedures Rules 2006 (ACT)* r 674. In deciding whether to give leave under subrule (2), the court must act in accordance with the *Evidence Act 1995 (Cth)*, pt 3.11.

525 *Federal Court Rules 1979 (Cth)* r 15(2)(4).

526 *Uniform Civil Procedure Rules 1999 (Qld)* r 212(1).

527 *Rules of the Supreme Court 1971 (WA)* r 26(15A); *Uniform Civil Procedure Rules 1999 (Qld)* r 226.

528 *Court Procedures Rules 2006 (ACT)* r 608(4). See also *Uniform Civil Procedure Rules 2005 (NSW)* r 21.4(3).

529 *Federal Court Rules 1979 (Cth)* Form 22 (List of Documents).

530 LRCWA (1999) above n 439, 106 Recommendation 88.

531 See Lord Woolf, *Access to Justice—Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).



*an overgenerous approach to discovery can be as disadvantageous to the outcome of a trial as a failure to give proper discovery ... [T]he length of trial increases because the time is spent in dealing with the paper mountain and time and cross-examination on peripheral issues is greater.*⁵³²

The discovery regime in England and Wales prior to the CPR provided parties with an automatic right to discovery of 'documents which are or have been in their possession, custody or power relating to the matters in question in the action'.⁵³³ Seldom-used provisions enabled the parties and the court to limit discovery. The parties could agree to limit or dispense with discovery or apply to the court to restrict discovery if it was 'not necessary either for disposing fairly of the action or for saving costs'.⁵³⁴

In his Interim Report Lord Woolf observed that the existing discovery process was a significant barrier to access to justice in England and Wales. Some of the problems brought to Lord Woolf's attention included:

- the excessive costs of the process
- the enormous resources required to be deployed to carry out discovery
- the increasing tendency to record matters in writing and the greater complexity of modern business
- the use of discovery as a weapon to pressurise the other side
- the failure to weed out documents that were not essential, which added to costs of every stage of the proceeding
- the slavish copying of documents instead of carrying out an inspection to isolate only relevant documents.⁵³⁵

While conceding that the problems with the discovery process were numerous and varied, Lord Woolf concluded that discovery was a cornerstone of the civil justice system in England and Wales and therefore it should not be abolished.⁵³⁶ This was supported by the submissions to Lord Woolf, which concentrated on modifying the timing and scale of discovery.

Lord Woolf's new disclosure regime—standard and extra discovery

The central platform of Lord Woolf's discovery reforms was to limit the availability of full discovery to a small minority of cases in which it could be shown that it was justified.⁵³⁷ The reforms were based on the following categorisation of documents:

1. *The parties' own documents*: documents which parties rely on in support of their contentions in the proceedings.
2. *Adverse documents*: documents of which parties are aware and which to a material extent adversely affect their own case or support another party's case.
3. *Relevant documents*: documents which are relevant to the issues in the proceedings, but which do not fall into categories 1 or 2 because they do not obviously support or undermine either side's case. They are part of the 'story' or background. They include documents which, though relevant, may not be necessary for the fair disposal of the case. In Lord Woolf's opinion, most documents are disclosed pursuant to this category but have the least effect in the litigation.
4. *Train of inquiry test*: documents which may lead to a train of inquiry under the *Peruvian Guano* principles.⁵³⁸

On the basis of these categories Lord Woolf recommended two types of discovery: 'standard' and 'extra'. Lord Woolf recommended that standard discovery should be the first step, with the extent and timing of any extra discovery to be determined by the court.⁵³⁹

Standard discovery incorporated categories 1 and 2 documents. Lord Woolf recommended that standard discovery apply to matters in the Fast Track list.⁵⁴⁰ 'Standard disclosure' was subsequently embodied in CPR 31.6.⁵⁴¹ Extra discovery encompassed other relevant documents that told the story of the case as well as train of inquiry documents (ie, categories 3 and 4).⁵⁴² This reform was embodied in CPR 31.12, which provides that the court may order disclosure that is wider than standard disclosure.

Lord Woolf observed that because extra discovery is 'responsible for the bulk of the cost of discovery and produces the least benefit' it should only be available by order of the court. Further, when making an order for extra discovery 'the court would have to be satisfied not only that it was necessary to

do justice but that the cost of such disclosure would not be disproportionate to the benefit and that a party's ability to continue the litigation would not be impaired by an order for specific disclosure'.⁵⁴³

Lord Woolf suggested that the new approach had

*the effect of preventing a party, if he [or she] acts reasonably honestly, from putting forward a case which he knows to be inconsistent with his own documents. It thus offers not a perfect, but a realistic, balance between keeping disclosure in check while enabling it still to contribute to the achievement of justice.*⁵⁴⁴

New search obligations

The Civil Procedure Rules require the parties to conduct a reasonable search for documents. The factors relevant in deciding the reasonableness of a search include:

- the number of documents involved
- the nature and complexity of the proceedings
- the ease and expense of retrieval of any particular document
- the significance of any document which is likely to be located during the search.⁵⁴⁵

The requirement to conduct a reasonable search and rights to inspect documents are informed by considerations of proportionality to the issues in the case.⁵⁴⁶ A party may seek to withhold disclosure on the grounds that it would be disproportionate to the issues in the case.⁵⁴⁷

How is disclosure made?

Disclosure occurs by exchanging lists of documents accompanied by a 'disclosure statement' that:

- sets out the extent of the search that has been made to locate documents which are required to be disclosed
- certifies that the party understands the duty to disclose documents
- certifies that to the best of that party's knowledge he or she has carried out that duty.⁵⁴⁸

The parties may agree in writing to disclose documents without making a list or to disclose documents without the disclosing party making a disclosure statement.⁵⁴⁹

Proceedings for contempt may be brought against a person who makes or causes to be made a false disclosure statement, without an honest belief in its truth.⁵⁵⁰

Further limitations on disclosure

Lord Woolf also observed that there was little use in restricting discovery if a party is still required to search through all of his or her documents to identify those in categories 1 and 2. Accordingly, he recommended that initial disclosure should apply only to relevant documents which the party is aware of when the discovery obligation arises.⁵⁵¹ The disclosure obligations are further narrowed by the recommendation that it is generally only necessary to disclose one version of a document.⁵⁵²

532 See Lord Woolf (1995) above n 365, [21.6] (comments by the Bar).

533 Ibid [21.10]–[21.11].

534 Ibid [21.10]–[21.13], referring to RSC rr 24(1)(1)–(1)(2), r 24(2). The court was empowered to: determine any issue before discovery was allowed; limit discovery where it decided it was not necessary; restrict the production of documents unless it is satisfied that it would enable the matter to be disposed of fairly or would save costs.

535 Ibid [21.1]–[21.9].

536 Woolf (1996) above n 531, Recommendation 134 and [12.37]; see also Woolf (1995) above n 365, [21.9] and [21.18].

537 Woolf (1995) *ibid*, [21.20].

538 Ibid [21.22]–[21.24]. See also Woolf (1996) above n 531, [12.38].

539 Woolf (1996) above n 531, Recommendation 136.

540 Ibid [3.23] and [12.39].

541 *Civil Procedure Rules 1998* (SI 1998/3132) r 31.6 sets out the documents that are required to be disclosed for 'standard disclosure' as comprising:

- (a) the documents on which he [she] relies;
- (b) the documents which—
 - i. adversely affect his [her] own case;
 - ii. adversely affect another party's case;
 - iii. support another party's case; and
- (c) the documents which he[she] is required to disclose by a relevant practice direction.

542 Woolf (1996) above n 531.

543 Ibid [12.40] and Final Recommendation 139.

544 Ibid [12.45].

545 See *Civil Procedure Rules 1998* (SI 1998/3132) r 31.7.

546 See *Civil Procedure Rules 1998* (SI 1998/3132) r 31.3(2).

547 See *Civil Procedure Rules 1998* (SI 1998/3132) r 31.3(2)(b). The importance of proportionality is further emphasised in Practice Direction 31 (October 2005) 'Disclosure and Inspection' which expands on Part 31. See Ministry of Justice (UK), *Practice Direction 31—Disclosure and Inspection* (2005) <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part31.htm> at 12 February 2008. This Practice Note also deals with proportionality considerations and search requirements in relation to electronic discovery.⁵⁴⁸ *Civil Procedure Rules 1998* (SI 1998/3132) r 31.10(6).

548 *Civil Procedure Rules 1998* (SI 1998/3132) r 31.10(6).

549 *Civil Procedure Rules 1998* (SI 1998/3132) r 31.10 (8).

550 *Civil Procedure Rules 1998* (SI 1998/3132) r 31.23

551 Woolf (1996) above n 531, [12.41] and Final Recommendation 137.

552 Ibid (1996) Final Recommendation 138.



Commentary on the Woolf reforms

Lord Justice Nacob in *Nichia Corporation v Argos Ltd* made observations about the new 'standard disclosure' provided for in the CPR.⁵⁵³ He concluded that 'while there may be instances where the more pragmatic new rules miss documents formerly and properly discoverable, the "right" result will be achieved in the vast majority of instances and more cheaply so'.⁵⁵⁴ He noted:

There is more to be said about the change to standard disclosure and indeed to the express introduction of proportionality into the rules of procedure. 'Perfect justice' in one sense involves a tribunal examining every conceivable aspect of a dispute. All relevant witnesses and all relevant documents need to be considered. And each party must be given a full opportunity of considering everything and challenging anything it wishes ...

But a system which sought such 'perfect justice' in every case would actually defeat justice. The cost and time involved would make it impossible to decide all but the most vastly funded cases. The cost of nearly every case would be greater than what it is about. Life is too short to investigate everything in that way. So a compromise is made: one makes do with a lesser procedure even though it may result in the justice being rougher. Putting it another way, better justice is achieved by risking a little bit of injustice.

The 'standard disclosure' and associated 'reasonable search' rules provide examples of this. It is possible for a highly material document to exist which would be outside 'standard disclosure' but within the Peruvian Guano test. Or such a document might be one which would not be found by a reasonable search. No doubt such cases are rare. But the rules now sacrifice the 'perfect justice' solution for the more pragmatic 'standard disclosure' and 'reasonable search' rules, even though in the rare instance the 'right' result may not be achieved. In the vast majority of cases it will be, and more cheaply so.⁵⁵⁵

Commercial Court Long Trials Working Party

A recent report by the *Commercial Court Long Trials Working Party* in the UK identified that the burden of 'disclosure has grown hugely now that tape records of telephone conversations, e-mail and electronic storage of information are almost universally used in commerce'. Although the report concluded that disclosure remains important and should be retained it suggested that a more 'surgical' approach to disclosure was needed.⁵⁵⁶ It argued that rules allowing the courts to make more 'supple orders for disclosure' (if necessary issue by issue) needed to be utilised more often by the courts.⁵⁵⁷

The Working Party proposed that:

- Automatic disclosure should not take place until after a case management conference.
- In advance of the case management conference the parties should prepare a schedule identifying the disclosure that is required by reference to the issues identified in the list of issues, setting out whether 'standard disclosure' or less or more disclosure is required on each particular issue and why.
- The objective should be to 'control disclosure on each issue by reference to classes of document, and periods of time and level of disclosure, that are proportionate to the costs involved and the likelihood of the disclosure assisting the court in determining the issue'.⁵⁵⁸

The working party noted that because disclosure is a particularly delicate issue in complex cases, lawyers who are able to make disclosure decisions should be present and be able to answer questions at the time the judge considers the scope of disclosure.⁵⁵⁹ It also suggested that a guide should be developed containing a sample disclosure request document, outlining the cost sanctions for disclosure of large quantities of irrelevant documents and indicating that the court may only order generous disclosure if the requesting party paid the costs of that disclosure up front.⁵⁶⁰

New Zealand

In 2002 the New Zealand Law Commission (NZLC) published its report on general discovery.⁵⁶¹ The NZLC recommended that discovery should continue to be available as of right but restricted in its scope by:

- *limiting the obligation to matters directly in issue and withholding the entitlement to general discovery until the state of the pleadings sufficiently defines the issues*
- *making it easier in appropriate cases to obtain a[n]... order limiting the width of the discovery obligation or prescribing the manner in which in the particular circumstances it is to be performed*
- *[excluding] any obligation to list such documents as pleadings and unmarked copies.*⁵⁶²

The NZLC indicated that there will be cases in which discovery of background material and train of inquiry information will be appropriate and recommended that the court be empowered to order supplementary discovery, provided that:

- *compliance with such an order will not unreasonably delay the expeditious disposal of the proceedings; and*
- *the cost of compliance is not disproportionate to what is at stake in the proceedings.*⁵⁶³

The NZLC also recommended that in cases where the burden of narrower discovery may still be too great the courts be given the power to further curtail discovery on the basis of the same factors set out above.⁵⁶⁴

Other recommendations emphasised court flexibility to order supplementary discovery and mould discovery orders to suit the particular needs of a case as well as to make it easier to obtain discovery in appropriate circumstances.⁵⁶⁵ The NZLC also recommended putting 'an end to the pedantry of listing: copies of pleadings and other documents filed in court in the proceedings; and additional unmarked copies of listed documents'.⁵⁶⁶ It was also suggested that an order enforcing a discovery obligation may be resisted if the pleadings of a party fail to adequately define the issues.⁵⁶⁷

New Zealand High Courts Rules

The discovery rules examined by the NZLC were replaced on 1 November 2004.⁵⁶⁸ The train of inquiry approach to discovery was maintained in those rules.⁵⁶⁹

The rules have again been revised but are yet to come into force. The revised rules again retain the train of inquiry approach.⁵⁷⁰ Proposed rule 8.18(2) states that parties must list documents that 'relate to any matter in question in the proceeding'. The court may order a party to pay costs to another party if the court considers that a party has impeded the process of discovery and inspection by listing documents in an affidavit that are not required to be included.⁵⁷¹ A party may apply for an order varying the terms of a discovery order.⁵⁷²

New Zealand District Court Rules

The existing *District Courts Rules* (1992) provide for discovery of any document 'relating to any matter in question in the proceeding'.⁵⁷³ The court may limit or dispense with discovery in order to prevent 'unnecessary discovery'.⁵⁷⁴

The District Court Rules have also recently been reviewed. The proposed new rules establish a 'radically new regime for the management of claims in the District Court'.⁵⁷⁵ The proposed new regime may be summarised as follows:

- The initiating party serves a claim containing the facts to be relied on.
- The other side must admit or deny facts in the claim or put forward an alternative proposition.

553 [2007] EWCA Civ 741 as cited in Heather McKenzie, *Memo from the Clerk to the Rules Committee (NZ) to Justice Baragwanath*, 8 August 2007 [36] as distributed at AIIA (2007) above n 441.

554 McKenzie (2007) above n 555.

555 *Nichia Corporation v Argos Ltd* [2007] EWCA Civ 741, [50]-[52].

556 Judiciary of England and Wales, *Report and Recommendations of the Commercial Court Long Trials Working Party*, (December, 2007) Recommendation A4, 26.

557 *Ibid*.

558 *Ibid*, Recommendation A4, 7.

559 *Ibid*, Recommendation A4, 26.

560 *Ibid*, Recommendation A4, 27.

561 New Zealand Law Commission, *General Discovery*, Report No 78 (2002).

562 *Ibid* [18]. The test existing at the time of the report was discovery of 'documents which are or have been in possession or power relating to any matter in question in the proceeding, with or without verification' (*High Court Rules* (NZ) r 293(1)).

563 *Ibid* [9].

564 *Ibid* [16].

565 *Ibid* [18].

566 *Ibid* [14].

567 *Ibid* [15].

568 McKenzie (2007) above n 553, [11].

569 *High Court Rules* (NZ) 295(2)(b).

570 McKenzie (2007) above n 553, [15]. For express mention that the *Peruvian Guano* test remains authoritative the Clerk cites: *NGC New Zealand Ltd v Todd Petroleum Mining Co Ltd and Ors* (HC Wellington CIV 2004-485-1753, 29 March 2006); *Silver Fern Shipping Ltd v Centre Point Limited* (HC Wellington CIV 1998-485-051, 31 March 2005).

571 Proposed new NZ High Court Rules r 8.29, <www.courtsofnz.govt.nz/about/system/rules_committee/documents/HighCourtRulesforconsultation_000.pdf> at 19 February 2008.

572 *Ibid* r 8.22.

573 *District Courts Rules 1992* (NZ) rr 315, 319.

574 *District Courts Rules 1992* (NZ) r 317(2).

575 The Rules Committee (NZ), *Consultation Paper: District Court Claims* (2004) [5].



- If the matter does not settle and the plaintiff wishes to continue he or she must serve an 'information capsule' on the other side. The capsule contains information on the nature of the claim and information that the plaintiff intends to rely on. The capsule must 'list or describe sufficiently the essential documents supporting the plaintiff's [or defendant's] claim'.⁵⁷⁶ The documents supporting the party's claim are those on which he or she intends to rely 'as at the time of service'.⁵⁷⁷
- The defendant must lodge an information capsule in response.
- If the plaintiff elects to proceed, the court will examine the claim, information capsules and response to determine if the matter should proceed to trial or a settlement conference.⁵⁷⁸

In consultation it was suggested to the commission that this new process would ensure that the parties had sufficient information to enable a sensible dialogue at a settlement conference. It was observed that a large proportion of cases settle in the District Court at a settlement conference but not until after the parties had incurred significant discovery costs.⁵⁷⁹

The proposed new rules also envisage summary and simplified trials for appropriate matters with restricted disclosure.⁵⁸⁰ A summary trial is contemplated where the case is uncomplicated or a modest amount is at stake, the trial is only likely to run for a day and the case can come on for hearing quickly. In both of these scenarios parties are required to exchange any further documents that they rely on 10 working days before trial.⁵⁸¹ The proposed new District Court Rules are in draft form only and may be subject to amendment as they are finalised.

Hong Kong

The Chief Justice's Working Party on Civil Justice reform examined the scope of the obligation to make discovery under the train of inquiry test as part of its broader review of the civil justice system in Hong Kong. In its 2001 Interim Report it identified that:

*In many jurisdictions, the practice of discovery, particularly in larger, more complex cases, has given rise to serious complaint. It is said to be a major source of litigation expense. It lengthens trials and is amenable to use as an oppressive weapon by richer litigants to delay, harass and exhaust the financial resources of poorer opponents.*⁵⁸²

The working party was heavily influenced by the UK reforms. The Interim Report identified two risks with narrowing the test for discovery along the lines of the Woolf reforms. The first concern was that it may result in an increase in the number of interlocutory applications for specific discovery. However, the report noted that this did not appear to have occurred in England and Wales and that this was 'possibly because of the court's discouragement of and sanctions against unnecessary interlocutory applications'.⁵⁸³

The second risk identified was that a narrower the test may mean that important documents do not come to light or that unscrupulous litigants or unscrupulous lawyers may be more likely to get away with improper disclosure.⁵⁸⁴ The working party noted that 'it is extremely difficult to estimate the size of this actual or potential problem' and that there is no evidence to suggest that the incidence of it had intensified following the UK reforms.⁵⁸⁵

A number of comments were also made in the Interim Report about the divergence of views on whether the narrower test had resulted in cost savings. On the one hand it was argued that the reforms led to increased costs because greater scrutiny of the documents had to occur. On the other hand it was argued that costs had been reduced overall because fewer documents were handled and large numbers of documents were excluded from detailed consideration.⁵⁸⁶

The following proposals were suggested by the working party:

- Automatic discovery should be retained but the train of inquiry test should no longer be the primary measure of a party's discovery obligations. Subject to the parties agreeing otherwise, a primary test restricted to directly relevant documents—namely, those relied on by the parties themselves, those adversely affecting each party's case and those supporting the opponents' case—should be adopted instead. It also proposed the introduction of reasonable search requirements along the lines of the Woolf reforms (proposals 25 and 26).

Ultimately, however, the working party recommended the retention of the *Peruvian Guano* test. It recommended that a practice direction and timetabling questionnaire be issued with a view to encouraging parties to achieve economies in the discovery process by agreement, and to encourage the courts, in appropriate cases, to give directions with the same aim.⁵⁸⁷

- The court should be expected to exercise its case management powers with a view to tailoring an appropriate discovery regime for the case at hand. It should have a residual discretion to both direct what discovery is required—to narrow or widen the scope of discovery to include, if necessary and proportionate, full *Peruvian Guano* style discovery—and in what way discovery is to be given (proposal 29).

Ultimately, broader case management principles were recommended but with *Peruvian Guano* principles taken as the starting point for such case management.⁵⁸⁸

The Final Report states that 'instead of cases being routinely allowed to proceed to full automatic *Peruvian Guano* discovery, it ought to become standard practice to consider whether any economising modifications should be made to the scope and manner of meeting the parties' discovery obligations'.⁵⁸⁹ Further recommendations provided for broad pre-action disclosure and discovery from non-parties similar to the new CPR rules. It was recommended that 'orders for pre-action disclosure should relate to disclosure and inspection of specific documents or classes of documents which are 'directly relevant' to the issues in the anticipated proceedings'.⁵⁹⁰

Since publishing its Final Report, the Hong Kong Steering Committee on Civil Justice Reform has issued amended rules of court. The *Rules of the High Court (Amendment) Rules 2008*⁵⁹¹ maintain a broad discovery test, namely, documents 'relating to matters in question in the action'.⁵⁹² However, as foreshadowed by the working party, the rules also provide for greater discovery case management. The new rules provide that:

- On application the court may limit discovery to particular documents or classes of documents or to certain matters in question. If the court is satisfied that discovery is not necessary or not necessary at that stage in the action it may order that there not be discovery either at all or at that stage.⁵⁹³
- The court may order that an issue or question in the matter be determined before any discovery is made.⁵⁹⁴
- The court may order the discovery of a particular document at any time.⁵⁹⁵
- Discovery is available before proceedings are instituted via summons. The summons must specify the document sought and show that the document is *directly* relevant to an issue arising or likely to arise in the proceeding and that the person is likely to have the document.⁵⁹⁶
- For the purposes of managing the case and furthering case management objectives the court may limit discovery, specify how discovery is to be made and specify the times at which inspection may occur.⁵⁹⁷

Canada

Canadian Federal Court

In the Federal Court all relevant documents must be listed and described in an affidavit of documents.⁵⁹⁸ A document is considered 'relevant' if a party 'intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case'.⁵⁹⁹

At a provincial level in Canada the test for discovery appears to be considerably broad. However, recent reform assessments have supported the narrowing of the standard of relevance in order to address widespread discovery concerns.

Canadian Bar Association: Systems of Civil Justice Taskforce Report (1996)

The Canadian Bar Association's (CBA) Systems of Civil Justice Taskforce Report noted that 'there are different rules governing discovery across Canada but there is nearly universal dissatisfaction with most of them'.⁶⁰⁰ In consultations the CBA heard that 'litigation and business lawyers from across the country ranked the complexity and number of discoveries and scheduling problems in the discovery process as key factors contributing to procedural delay'.⁶⁰¹

576 *Proposed District Courts Rules 2007* rr 2.12(3)(e), 2.13(3)(f) note other information is also specified: <www.courtsofnz.govt.nz/about/system/documents/DistrictCourtsRules2007.pdf> at 12 February 2008.

577 *Ibid* rr 2.12(2)(b), 2.13(2)(b)..

578 As outlined at AJA (2007) above n 441.

579 *Ibid*.

580 Rules Committee (2004) above n 575, [42]–[46], and the attached *Response of District Court Claims Sub-Committee on Submissions on Rules Committee Consultation Paper* [41]. It is envisaged that there will be a period in which parties can apply to the court to review this decision.

581 *Proposed District Courts Rules 2007* above n 576, rr 2.42(2) (summary trial disclosure) and 2.50(2) (simplified trial disclosure).

582 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform: Interim Report and Consultative Paper* (2001) [404].

583 *Ibid* [416].

584 *Ibid* [417] and [418].

585 *Ibid* [418].

586 *Ibid* [419].

587 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform: Final Report*, (2004) Recommendations 72, 73.

588 *Ibid* Recommendation 80.

589 *Ibid* [478].

590 *Ibid* Recommendation 77.

591 *Rules of the High Court (Amendment) Rules 2008 (HK)* <www.civiljustice.gov.hk/rhc_draft_200802/rhc.html> at 19 February 2008.

592 *Ibid* r 1.

593 *Ibid* r 2(5).

594 *Ibid* r 4.

595 *Ibid* r 7.

596 *Ibid* r 7A.

597 *Ibid* r 15.

598 *Federal Courts Rules* (Canada) r 223(1).

599 *Federal Courts Rules* (Canada) r 222(2).

600 Canadian Bar Association (1996) above n 263, 43.

601 *Ibid*.



The taskforce recommended that the rules of procedure should limit the discovery process by:

- *limiting the time frame in which discovery takes place*
- *narrowing the scope of relevance and/or*
- *capping the number of discovery events that can be undertaken by the parties.*⁶⁰²

The task force also recommended that consideration be given to:

- *restricting the scope of discovery, moving toward a narrower standard of relevance*
- *using sanctions to penalize duplicative or cumulative discovery*
- *mandatory discovery conferences between counsel and/or before a judge*
- *more effective processes for resolving conflicts as they arise in the discovery process, through case management and teleconferencing or 'hotline' arrangements with chambers judges.*⁶⁰³

Alberta Rules of Court Project (2003)

The Alberta Rules of Court govern practice and procedure in the Alberta Court of Queen's Bench and the Alberta Court of Appeal. The Alberta Rules of Court Project was the first comprehensive review of the Rules of Court since 1968 and was aimed at addressing the concerns raised by the legal community and the public about the 'timeliness, affordability and complexity of civil court proceedings'.⁶⁰⁴

Part of the review considered documentary discovery and evidence. The committee considered whether the narrower discovery regime that had been introduced in 1999 had been successful. Since 1999, an affidavit of records must disclose 'relevant and material records'.⁶⁰⁵ Pursuant to rule 186.1 of the Alberta Rules of Court

'a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected:

- a) *to significantly help determine one or more of the issues raised in the pleadings; or*
- b) *to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues risen in the pleadings'.*

The 1999 test is narrower than the previous test, which required disclosure of documents 'relating to matters or questions in the cause or matter'. The re-formulation was aimed at addressing concerns that a wide test 'results in the production of numerous unnecessary and largely irrelevant documents which only increase the costs of the action and cause delay in the progress of the action'.⁶⁰⁶ The amendments also 'limit the scope of relevance by excluding tertiary relevance, make [sic] discovery of records automatic, increasing the penalties for non-compliance, and making the terminology a little less confusing'.⁶⁰⁷

The committee identified 'a consensus in the case law that the new rules substantially reduce the scope of documentary discovery'.⁶⁰⁸ The new test was said to eliminate 'fishing expeditions'.⁶⁰⁹ However, in consultation the committee asked counsel how the 'material and relevant' test had actually affected the production of documents. Interestingly, the feedback was that 'in practice nothing has changed' and that people continued to produce the same documents they had under the old rule.⁶¹⁰ A further criticism was that the 1999 test was too subjective and gave counsel too much discretion about what was to be produced. It was also observed that the new test expanded the 'gray area' of whether documents fell under the test and gave rise to ethical dilemmas for lawyers. In addition, it was suggested that the 1999 test may be giving rise to lengthier pleadings in an attempt to broaden the scope of documentary discovery.⁶¹¹ It was also noted that few people believed that the new test achieved its aims of 'shortening document discovery or lessening expense'.⁶¹²

The committee indicated that there were benefits in limiting the scope of discovery to exclude documents that only have a tertiary relevance. It concluded that it was not desirable to return to a broader test.⁶¹³

To address concerns about non-disclosure the committee recommended more severe consequences for non-disclosure of a document that should have been produced. The committee referred to tougher rules in other jurisdictions allowing the court to prohibit the use of a document in evidence, revocation or suspension of the right to initiate or continue an examination for discovery, dismissal of an action, striking out of a defence and imposition of costs orders.⁶¹⁴ The committee also recommended that

an ongoing duty of disclosure be introduced, pursuant to which counsel would be required to continuously disclose 'relevant and material documents which have not been disclosed in the Affidavit of Records' with adverse consequences for non-compliance.⁶¹⁵

The committee also noted that some Canadian provinces (Ontario, Prince Edward Island, New Brunswick and Manitoba) and the US Federal Court specifically require the production of insurance policies if an insurer is liable to satisfy all or part of a judgment, or liable to indemnify or reimburse a party, although information about the policy is not admissible in evidence unless it is relevant to the issue in the action.⁶¹⁶ The committee ultimately decided against the introduction of a general requirement to disclose insurance policies. Although it expressed concern about disclosing insurance policies in complex civil litigation, it did acknowledge 'that practically speaking insurance coverage may factor into some settlements'.⁶¹⁷ It noted that although there may be benefits in disclosing insurance information in personal injury matters 'at this time the effects of disclosing insurance information in other types of actions, particularly in those involving complex commercial insurance policies, are not known'.⁶¹⁸

Nova Scotia Civil Procedure Rules Revision Project (2005)

The Nova Scotia Discovery and Disclosure Working Group also focused on the question of an appropriate test for discoverable documents. It was submitted that the 'semblance of relevance'⁶¹⁹ test led to excessive expense and delay.⁶²⁰

In consultation, several possibilities for change were suggested including: the use of qualifying adjectives (e.g. directly, strictly, primarily, significantly); the addition of a qualifying word such as 'material'; or defining 'relevance' more strictly (as Alberta had done).⁶²¹

The working group ultimately adopted the Alberta committee's suggestion to use 'relevant and material' as the appropriate discovery test.⁶²² It was further suggested that if the rules were to address the concerns of lawyers that the scope of discovery may still be too wide, this should be done at the drafting stage when 'relevant' could be defined.⁶²³

Ontario reform proposals 2003 and 2007

The Report of the Task Force on the Discovery Process in Ontario (2003) identified dissatisfaction with the cost and delay associated with the discovery process, and concerns that it acted as a barrier to access to justice.⁶²⁴

The task force recommended reform on two fronts:

1. The incorporation of enhanced cost and time saving mechanisms in the Rules of Civil Procedure including: discovery management mechanisms; a narrower scope of discovery; enhanced early disclosure and production requirements; improved access to non-party discovery and discovery of corporate representatives and experts; new timelines for certain discovery steps (including documentary disclosure, production of expert reports, completion of undertakings and answering refusals); a standardised, simplified process for resolving discovery disputes; and the enunciation of principles of efficiency and professionalism.
2. Development of a best practices manual containing practical guidelines on the conduct of discovery, in order to: promote among lawyers a broader acceptance of the value of collaboration and an appreciation for cost effective and efficient ways to conduct discovery; establish practical guidelines outside the rules; facilitate recognition by the profession and the judiciary of acceptable 'norms' for the conduct of discovery.⁶²⁵

The development of a 'Best Practices Manual' reflected the task force's recognition that 'rule changes alone could not address all discovery problems particularly those related to the prevalent culture of litigation'.⁶²⁶

The task force recommended narrowing the scope of discovery by amending the broad 'semblance of relevance' standard⁶²⁷ to 'relevant to any matter in issue in an action'.⁶²⁸ It anticipated that this change would:

- provide a clear signal to the legal profession that restraint is to be used in the discovery process, thereby strengthening the objective that discovery be conducted with due regard to cost and efficiency
- help curb discovery abuse and eliminate areas of inquiry that cannot reasonably be considered relevant, even though they currently survive a 'semblance of relevance' test.⁶²⁹

602 Ibid.

603 Ibid.

604 ALRI (2002) above n 147, ix.

605 *Alberta Rules of Court* r 187

606 ALRI (2002) above n 147, [48].

607 Ibid.

608 Ibid [49].

609 See comments by Master Funduk and Johnstone J cited in *ibid* [50] and [52].

610 Ibid [53].

611 Ibid.

612 See discussion in *ibid*.

613 See discussion in *ibid* [59].

614 See discussion in *ibid* [59]–[60].

615 See discussion in *ibid* [62].

616 See discussion in *ibid* [75].

617 See discussion in *ibid* [79].

618 See discussion in *ibid*.

619 The *Civil Procedure Rules* (Nova Scotia) refer to documents 'relating to every matter in question in the proceeding': r 20.01.

620 Discovery and Disclosure Working Group (Nova Scotia), *Memorandum concerning the 'Civil Procedure Rules Revision Project': Final Report of the Discovery and Disclosure Working Group* (2005) 4–5.

621 Ibid 6.

622 Ibid 7.

623 Ibid.

624 Discovery Task Force (2003) above n 2, [1].

625 Ibid.

626 Ibid, Introduction.

627 The existing test in r 30.02(1) was disclosure of: 'every document relating to any matter in issue in an action'. The test has been interpreted exceptionally widely as a 'semblance of relevance' to the issues disclosed in the proceedings. See *ibid* [3].

628 Ibid. This was to be applied to rr 30.02(1), 30.03, 31.06(1).

629 Ibid.

Getting to the Truth Earlier and Easier



It was noted that the new test would not ‘impede the parties’ ability to obtain information, but will oblige them to focus on information that is truly necessary’.⁶³⁰

The task force also observed that the incorporation of discovery management mechanisms into Ontario’s discovery process would help to address the problems that had been identified in its review. It was noted that

*‘encouraging parties to reach a consensus on discovery matters—either on their own or with the court’s intervention where necessary—will help to promote cooperation, ensure complete, timely and orderly production of documents, clarify the scope of discovery, eliminate scheduling difficulties and delays and reduce the potential for protracted disputes’.*⁶³¹

The report suggested that amendments be made to existing rules, providing ‘express authority for the court to require or create a discovery plan at a case conference’.⁶³² and that a new discovery rule be introduced which provides for ‘individualized management of the discovery process in “appropriate” cases’.⁶³³

Few of the recommendations of the 2003 task force were incorporated into the Rules of Civil Procedure, and a further reform investigation was subsequently conducted.

In 2007 the Ontario Civil Justice Reform Project reported that the vast majority of those consulted agreed that the scope of discovery (‘semblance of relevance test’) ought to be restricted and replaced with a simple test.⁶³⁴ The Hon. Coulter Osborne concurred with the 2003 task force conclusion that the ‘semblance of relevance’ test should be replaced with ‘relevant to any matter in issue in the action’.⁶³⁵ He noted that, ‘in keeping with the principle of proportionality, the time has come for this change to be made, which I hope in turn will inform the culture of litigation in the province, particularly in larger cities’.⁶³⁶

He stated that the recommendation to restrict the test was not targeted at lawyers who made reasonable discovery requests but rather at ‘those who make excessive requests or otherwise abuse the discovery process’. It was noted that the narrower test would have little or no impact on those lawyers who already act reasonably during the discovery process. Instead, ‘its effects would be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably be considered necessary, even though they currently survive “semblance of relevance” analysis’.⁶³⁷

He recommended that parties should be encouraged to discuss early in the litigation how discovery would unfold, when and how production would occur and when oral examination for discovery would take place. He suggested consideration be given to a practice direction promoting discovery planning, by providing that the court may refuse to grant discovery relief or may make appropriate cost orders on a discovery motion where parties have failed to:

- *consider, and to the extent reasonable, apply the E-discovery guidelines ... in particular, the requirement to meet and confer regarding the identification, preservation, collection, review and production of electronically stored information*
- *develop a written discovery plan addressing the most expeditious and cost effective means of completing the discovery process in a manner that is proportionate to the needs of the action, including [but not limited to]:*
 - *the scope of documents to be preserved as determined by both relevance and application of the principle of proportionality (in the context of the costs associated with document searches and production being balanced with the needs of the particular case)*
 - *dates for the exchange of sworn affidavits of documents*
 - *number of experts and timing of delivery of expert reports*
 - *time, cost, and manner of production of documents from the parties and any third parties who may have relevant documents*
 - *names of those to be produced for oral discovery (an issue which may be relevant if a party is a corporation) and the dates and length of examinations.*⁶³⁸

British Columbia Justice Review (2006)

The British Columbian Justice Reform Working Group observed that ‘although the information obtained through the discovery process may lead the parties to a resolution of the case or a fairer trial process, discovery is also a major element in the cost of litigation’.⁶³⁹ To address this problem the working group recommended (among other things) that the scope of document discovery be limited by requiring parties to produce only those documents:

- *referred to in the party’s pleading*
- *to which the party intends to refer at trial, or*
- *in the party’s control that could be used by any party at trial to prove or disprove a material fact.*

The working group was critical of the train of inquiry standard of relevance and argued that the new formulation of the test ‘properly balances the burden of document disclosure with fairness’ and ‘ensures that all documents that are material to the case are disclosed, but that marginally related documents are not required to be disclosed and copied, and then to be read and analysed by the party who requested the documents—all at substantial costs to the litigants’.⁶⁴⁰

United States Federal Court

In general, pursuant to rule 26(b)(1) of the *Federal Rules of Civil Procedure*, ‘parties may obtain discovery regarding any non-privileged matter that is *relevant* to any party’s claim or defense – including the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter’.⁶⁴¹

Rule 26(a)(1) gives effect to discovery as of right, requiring that, except as exempted or limited by order of the court, a party must, without awaiting a discovery request, provide to the other parties:

- the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defences, unless solely for impeachment, identifying the subjects of that information;
- a copy of, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defences, unless the use would be solely for impeachment;
- a computation of each category of damages claimed by the disclosing party. The documents or other evidentiary material on which the computation is based (unless privileged or protected from disclosure) must be made available for inspection and copying including materials bearing on the nature and extent of injuries suffered; and
- any insurance agreement that may satisfy part or all of a judgment which may be entered in the action or may indemnify or reimburse for payments made to satisfy the judgment must be made available for copying and inspection.⁶⁴²

‘A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.’⁶⁴³

The court also has the power to order discovery of ‘any matter relevant to the subject matter involved in the action’ for good cause,⁶⁴⁴ and may limit by order the number of depositions and interrogatories and the length of depositions under rule 30, and the number of requests under rule 36.⁶⁴⁵

With a view to reducing the scope of discovery, the US Federal Court Rules provide that the court may limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive*
- the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or*
- the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.*⁶⁴⁶

630 Ibid.

631 Ibid [2].

632 Ibid [4].

633 Ibid [5]–[8].

634 Osborne (2007) above n 284, 66.

635 Ibid 65.

636 Ibid 58. The project identified that discovery problems did not exist everywhere in Ontario and were largely confined to larger, complex cases and most frequently in large urban centres, for example Toronto.

637 Ibid.

638 Ibid 66.

639 Civil Justice Reform Working Group (BC) (2006) above n 269, 25.

640 Ibid 26.

641 Fed R Civ P 26(b)(1) (emphasis added).

642 In general, parties must make initial disclosures at or within 14 days after the parties’ conference (unless otherwise agreed or ordered by the court, or the party was joined after the conference [in which case the joined party is given 30 days] (26(a)(1)). Pursuant to Fed R Civ P 26(a)(1)(B), certain types of proceedings are exempted from the initial disclosure requirements.

643 Fed R Civ P 26(a)(1)(E).

644 Fed R Civ P 26(b)(1).

645 Fed R Civ P 26(b)(2)(A).

646 Fed R Civ P 26(b)(2)(C).



Access to trial preparation materials

The US rules also enable access to a party's trial preparation materials prepared in anticipation of litigation or for trial (including material produced by or for the party's attorney, consultant, insurer or agent) on showing that the party seeking discovery has a substantial need for the materials in order to prepare its case and is unable without undue hardship to obtain the information by other means.⁶⁴⁷ The court is required to protect from disclosure the 'mental impressions, conclusions or opinions or legal theories of an attorney or other representative of a party concerning the litigation'.⁶⁴⁸

Protection of privileged information

Provision is also made for the protection of privileged information that is disclosed. Rule 26(c) provides that the party claiming privilege may notify the other parties of the claim and the basis for the claim. After notification the receiving party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the privilege claim is resolved. A receiving party may promptly present the material under seal to the court for determination of the claim. If the receiving party disclosed the information before being notified it must take steps to retrieve it. Further, the producing party must preserve the information until the claim is resolved.

5.6 SUBMISSIONS AND CONSULTATIONS

The commission called for submissions in relation to discovery generally, and in response to draft proposals for reform of court rules in Victoria. In this section we summarise the responses received by the commission in submissions and consultations.

5.6.1 Importance of discovery

Generally, those with whom we consulted recognised and supported the essential role that discovery plays in the civil justice system in Victoria.⁶⁴⁹

The Legal Practitioners' Liability Committee submitted that 'the right to discovery of documents and interrogation (in appropriate cases) is vital'.⁶⁵⁰

Slater & Gordon stated that discovery was essential to the administration of justice. It emphasised that discovery was particularly vital for plaintiffs because much of the information necessary to progress a plaintiff's case is in the hands of the defendant. Moreover, because documents provide evidence of contemporaneous events and, as opposed to oral evidence, are not subject to coaching or sanitisation, they are invaluable.⁶⁵¹

Similarly, Maurice Blackburn advised that 'in every class action relating to corporate misconduct, negligence or product liability that we have conducted, discovery or its availability was critical to the plaintiff's recovery of damages'. Accordingly, it was strongly opposed to limiting discovery in any way.⁶⁵²

Christopher Enright stressed the importance of the management of information in the litigation process. He advocated for reform to ensure the:

- *structuring of information to facilitate storage and retrieval*
- *full disclosure of information*
- *efficient processing of information.*⁶⁵³

5.6.2 Ambit of discovery

The commission received a number of submissions that considered the various threshold discovery tests in the Victorian courts. Some of the submissions set out problems with the train of inquiry approach to discovery as well as discovery by categories of documents. Other submissions cautioned against the abolition of the train of inquiry approach to discovery of documents.

A number of submissions expressed opposition to narrowing the discovery test.

The Law Institute accepted that discovery is problematic. However, it did not believe that the abolition of the train of inquiry test would solve those problems or serve the interests of justice. Instead, it supported 'a differential approach to discovery, both across jurisdictions and having regard to the nature, value or complexity of a particular proceeding or class of proceeding'.⁶⁵⁴

Corrs Chambers Westgarth argued that the current regulatory framework in relation to discovery is appropriate and sufficiently flexible to deal with the current demands of modern litigation. In its view, the greatest problems lie in the distillation of discovery and its use in trial. It recommended that the docket judge system be used to ensure a greater focus on documents used at trial and that the parties produce 'tender bundles' as opposed to court books. It suggested that this would greatly reduce the complexity involved in trial preparation as well as time and cost.⁶⁵⁵

The Supreme Court observed that there is a general consensus that discovery is a costly and time consuming process in many cases and that this is partly due to the train of inquiry test. However, the court advocated caution when considering changes to the discovery test because of the experience of some practitioners that crucial documents may not fit within defined categories or a narrower test of direct relevance. It believed that 'any change to the discovery test would need to be supported by evidence that the new test would in fact reduce the costs of discovery without jeopardising parties' ability to obtain important information'.⁶⁵⁶

Other submissions were in favour of narrowing the test.

The Group submission noted that the train of inquiry test was formulated in 1882 and predated all current methods of document production, save for handwriting and book printing. It argued that the train of inquiry test is out of touch with the information technology revolution and requires a party to meet the 'burden of reviewing frequently vast quantities of documents for relevance, and it must do so by reference to an inherently imprecise test'.⁶⁵⁷ It also submitted that the use of paralegals and junior lawyers to carry out discovery work means that a conservative approach to discovery is often adopted, which can result in the discovery of even more documents. Although the submission maintained that discovery should remain a key element in the civil litigation process it argued there is a need to balance that importance 'against the excessive burden that can be created by the obligation to provide (and to receive) general discovery on a *train of inquiry* footing'.⁶⁵⁸

The Transport Accident Commission (TAC) also supported narrowing discovery to ensure it focuses on the issues in dispute. It argued that general discovery should only be ordered if a party can satisfy the court as to the reason why it is required and the other party can satisfactorily demonstrate why documents cannot be exchanged voluntarily.⁶⁵⁹

In its submission to the consultation paper the Victorian Bar indicated that some of its members supported maintaining the train of inquiry test and others believed that the discovery test should be narrowed. However, on the whole the Bar concluded that it supported the narrowing of the discovery test to require disclosure of documents that are directly relevant to the questions in the proceeding, as opposed to requiring discovery of documents 'relating to any question raised by the pleadings'. The Bar observed that the broad Supreme Court test meant that 'any document that relates to the dealings between the litigants is often included in very lengthy affidavits of documents, due to an attitude of erring on the side of inclusion to avoid any possible dispute'.⁶⁶⁰

The Bar also recommended that the courts adopt a more managerial role in relation to discovery and that the parties be encouraged to limit discovery. It believed that greater emphasis should be placed on resolving discovery issues at an early case management conference. It supported discovery by categories or in waves as appropriate and suggested that general discovery should remain as the default position for cases of less complexity where it may be cheaper than discovery by categories.⁶⁶¹

In a supplementary submission the Bar contended that 'it should be possible to limit discovery in a way that still preserves the principle that all relevant documents be discovered through a legislative amendment that requires only discovery of the documents needed to prove or answer the core elements of a case'. Further, it argued that discovery 'should be limited by the principle of proportionality, so that if a discovery exercise would far outweigh the value of the matter in dispute, it should not be ordered. This is entirely consistent with the viewpoint that justice must be fair and accessible'.⁶⁶²

Peter Mair expressed concern that the discovery process legitimises a 'fishing expedition'. He believes that disputes rarely warrant protracted processes of formal 'discovery' and pleadings.⁶⁶³

647 Fed R Civ P 26(b)(3)(A).

648 Fed R Civ P 26(b)(3)(B).

649 Submission CP 42 (Corrs Chambers Westgarth, Confidential Submission, permission to quote granted 14 January 2008), Submission CP 48 (Victorian WorkCover Authority).

650 Submission CP 21 (Legal Practitioners' Liability Committee).

651 As outlined at AJA (2007) above n 441.

652 Submission ED2 19 (Maurice Blackburn).

653 Submission CP 50 (Christopher Enright).

654 Submission CP 18 (Law Institute of Victoria).

655 Submission CP 42 (Corrs Chambers Westgarth, Confidential Submission, permission to quote granted 14 January 2008).

656 Submission CP 58 (Supreme Court of Victoria).

657 Submission CP 47 (the Group Submission).

658 Submission CP 47 (the Group Submission).

659 Submission CP 37 (Transport Accident Commission).

660 Submission CP 33 (Victorian Bar).

661 Submission CP 33 (Victorian Bar).

662 Submission CP 62 (Victorian Bar). On the issue of proportionality; see also CP 33 (Victorian Bar).

663 Submission CP 10 (Peter Mair).



In Exposure Draft 2 the commission proposed that the train of inquiry test (*Peruvian Guano*) should be retained but that express provisions be introduced to enable the court to take an active role in discovery case management. In making this proposal we were conscious that narrowing the discovery test would not necessarily reduce the amount of work needed to be done to determine whether particular documents should be discovered.

Victoria Legal Aid supported the commission's proposal.⁶⁶⁴ The Law Institute did not believe that there had been many problems regarding the ambit or availability of discovery. It suggested that any problems with discovery are 'best overcome by judge-managed lists'.⁶⁶⁵

QBE Insurance expressed concern that the commission had not recommended that the discovery test should be narrowed. It submitted that the arguments in support of a narrower test for discovery were stronger than those in favour of retaining the train of inquiry approach and that the broad test was outdated. It explained that the level of information exchanges that occur on a daily basis 'in all levels of business means that it is unrealistic and counter-productive to the case management proposals to expect parties to provide broad discovery when most of the information is likely to be largely irrelevant to the litigation'.⁶⁶⁶ Further, it claimed that the commission's review 'provides an opportunity for the commission to remove complication and inefficiency, but in particular, undue expense, from the discovery processes in Victoria by emphasising the test for discovery is direct relevance'.⁶⁶⁷

In an article published on its website, Allens Arthur Robinson also expressed opposition to maintaining the train of inquiry test. It suggested that by failing to narrow the test the commission may have 'missed an opportunity to alleviate the complication, expense, and inefficiency of the current discovery process'.⁶⁶⁸

At the AIJA seminar there was a divergence of views about the most appropriate test for discovery in Victoria (and, indeed, nationally).⁶⁶⁹ The general view was that the discovery test was not the best or the most important means of dealing with discovery problems, and problems could continue regardless of what test was applied.⁶⁷⁰ It was further noted that there is a lack of evidence about whether narrowing the test has been successful in reducing costs and delay and whether there have been any problems about the definition of relevance.

Participants from the NSW Supreme Court were not aware of any disputation having arisen from the interpretation of 'direct relevance' in that court.⁶⁷¹ A participant from the Federal Court also suggested there was no evidence to suggest that its narrower test was problematic.⁶⁷² Participants from the NSW Supreme Court and the Federal Court saw little advantage in returning to a train of inquiry approach when no harm had come from narrowing the test. One participant noted that a narrower test had led to a decrease in arguments about categories in the District Court of Queensland.⁶⁷³

5.6.3 Availability of discovery

TAC suggested that neither discovery nor interrogatories should be available as of right and, where allowed, should be focused on the relevant issues between the parties. It was contended that the discovery process should be viewed as a privilege and maintained for appropriate cases.⁶⁷⁴

In Exposure Draft 2 the commission listed the following as options dealing with the availability of discovery:

- discovery as of right, subject to the court's power to limit this right where appropriate
- limiting discovery as of right to certain categories and/or provide for informal discovery
- discovery with the leave of the court.

QBE Insurance Group argued that discovery should not be available as of right, but should only be available with the leave of the court to ensure court control.⁶⁷⁵

At the AIJA seminar there was a divergence of views about whether discovery should be available as of right.⁶⁷⁶ However, most participants agreed that a right to discovery in the majority of claims is still appropriate. It was thought that it would be wrong to shape discovery reforms to suit only large complex litigation. Instead it was stressed that there is a need for flexible solutions and flexible reforms.

5.6.4 Categories of documents

Some submissions in response to the Consultation Paper expressed concern at using categories to confine discovery.

The Group submission noted that in the County Court, in particular, frequently the combined effect of the separate schedules of categories submitted by the parties' practitioners is simply to restate all of the issues that were raised by the pleadings. Moreover, it noted that in many cases, particularly where the volume of documents is not excessive in any event, the requirement to determine whether relevant documents are or are not within one or another of the categories simply adds a further layer of cost to the discovery process. The submission suggested that discovery by categories should only occur where:

- there is likely to be a reasonably substantial quantity of relevant documents in the proceeding
- the parties' practitioners are obliged to confer and to seek to agree on issues about which discovery is to be given
- prior to any order being made, there is a process whereby a judicial officer or referee actively reviews that agreement in the context of the case.⁶⁷⁷

Travis Mitchell also suggested that the use of discovery by category has not been successful in the County Court. He argued that 'discovery by categories provides another area in which solicitors can argue and delay proceedings' and that categories have not reduced the scope of discovery.⁶⁷⁸

TurksLegal and AXA suggested that the use of categories of documents in the County Court has not saved costs as anticipated, because the categories of documents commonly contain a 'catch all' category which amounts to general discovery in another form. They submitted that the exchange of schedules of documents is an unnecessary procedural step and should be abandoned.⁶⁷⁹

By contrast, the Legal Practitioners' Liability Committee submitted that, in the County Court, categories of documents work well to confine the issues in dispute.⁶⁸⁰

Allens Arthur Robison indicated that in some situations the use of categories did not work to narrow discovery.⁶⁸¹ It also suggested that myriad factors can be responsible for loss or causation in a claim and these reasons cannot always be neatly fitted into categories.⁶⁸² Although the Bar supported greater use of categories in the management of discovery it cautioned against categories that are so extensive as to cover the field.⁶⁸³

At the AIJA seminar there was a divergence of opinion about the value of category-based discovery. One participant suggested that category-based discovery in NSW works largely by agreement and if there were concerns about discovery the court would consider ordering general discovery. It was noted that general discovery was rarely ordered in NSW. By contrast, another participant contended that the use of categories had not worked in the Federal Court.

The Supreme Court advised that it had not adopted categories of documents as a general practice and that it did not believe that the general use of categories would be beneficial. However, it suggested that categories may be appropriate in some situations (for example to restrict discovery on quantum).⁶⁸⁴ Indeed, at the AIJA seminar a participant suggested that parties rarely apply to limit the scope of discovery in the Supreme Court.⁶⁸⁵

5.6.5 Greater cooperation by parties

There was support in the submissions for the view that parties should play a greater role in defining the scope of discovery and determining how discovery is to be made.

The Supreme Court argued that greater use of the rules permitting discovery management requires a degree of initiative from the parties and their legal representatives. It observed that 'while the Court can encourage certain practices through case management, the parties are the only ones in a position to know the extent of documentation in particular areas, and where limiting discovery will produce real cost savings'.⁶⁸⁶

Similarly, at the AIJA seminar it was observed that judges are not always in a position to be able to look at the pleadings and immediately understand the factual matrix of a dispute or to understand the technology involved. It was therefore suggested that it was important for parties to play a much greater role in determining the parameters of discovery.⁶⁸⁷

The TAC submitted relationship building between litigants and practitioners regularly appearing in specialist lists should be encouraged.⁶⁸⁸

664 Submission ED2 10 (Victoria Legal Aid).

665 Submission ED2 16 (Law Institute of Victoria).

666 Submission ED2 17 (QBE Insurance Group).

667 Submission ED2 17 (QBE Insurance Group).

668 Peter O'Donahoo, Susie Stone and Adam Butt, *Focus: Commercial Litigation—October 2007: Review of Victoria's Civil Justice System—Part 2* (2007) Allens Arthur Robison <www.aar.com.au/pubs/ldr/foc/18oct07.htm> at 12 February 2008.

669 Indeed, as noted in Submission CP 58 (Supreme Court of Victoria), 'attempts to reach a national consensus on harmonised discovery rules in Australia have floundered'.

670 As outlined at AIJA (2007) above n 441.

671 Ibid.

672 Ibid.

673 Ibid.

674 Submission CP 37 (Transport Accident Commission).

675 Submission ED2 17 (QBE Insurance Group).

676 As outlined at AIJA (2007), above n 441.

677 Submission CP 47 (the Group submission).

678 Submission CP 4 (Travis Mitchell).

679 Submission CP 41 (TurksLegal and AXA Australia).

680 Submission CP 21 (Legal Practitioners' Liability Committee).

681 For example in the C7 case it suggested there were 75 document categories and 10 to 12 subcategories and a two day mediation was required to resolve category issues between the parties. As outlined at AIJA (2007) above n 441.

682 As outlined at AIJA (2007) above n 441.

683 Submission CP 33 (Victorian Bar).

684 The Supreme Court suggests the following reasons as to why categories may not be beneficial: 'those with experience of jurisdictions where there is currently discovery by categories caution against it; when the categories are set parties may not be fully aware of the significant issues in the case which can lead to later applications to add further categories; there can be frequent disputes about what documents fall within a category; as a result of the above there may be little if any cost benefit'. See Submission CP 58 (Supreme Court of Victoria).

685 AIJA (2007) above n 441.

686 Submission CP 58 (Supreme Court of Victoria).

687 As outlined at AIJA (2007) above n 441.

688 Submission CP 37 (Transport Accident Commission).



QBE expressed in principle support for the commission's preliminary proposal that the parties should endeavour to reach agreement on discovery issues and to narrow disputed issues before approaching the court.⁶⁸⁹ Slater & Gordon also expressed support for further cooperation between the parties on discovery issues.⁶⁹⁰

5.6.6 Interim disclosure orders

In Exposure Draft 2 the commission set out a proposal for a new form of interim disclosure order. We proposed that, subject to certain safeguards, the court should be able to order a party to make available for inspection all documents that it has within an identified category or class without the party with possession of such documents being required to review them before disclosure. The receiving party would sort through the documents and identify those that it considers important to its case. In appropriate situations this approach may assist to reduce excessive discovery costs which both parties currently incur in the process of reviewing, sorting and listing documents for an affidavit of documents.

QBE argued this idea runs contrary to the overriding purpose of facilitating the just, efficient, timely and cost effective resolution of the real issues in the dispute because it allows general or indirect discovery and even 'fishing expeditions'.⁶⁹¹

In consultation with the Supreme Court several judges expressed support for the commission's proposal.⁶⁹² The submission from Victoria Legal Aid also supported the proposal but expressed some concern about enforceability. It suggested that this proposal would need to be carefully monitored if it were introduced.⁶⁹³

5.6.7 Referees and special masters

In Exposure Draft 2 the commission proposed that special masters should be available to assist the courts and the parties to manage discovery issues in complex cases.

Slater & Gordon expressed support for the introduction of special personnel to manage discovery in large cases. It was noted that the use of special masters in relation to discovery in the United States encouraged parties to cooperate.⁶⁹⁴ It was also suggested that a special master may offer valuable assistance with privilege issues or disputes.⁶⁹⁵

QBE also expressed support for the use of special masters.⁶⁹⁶ There was also general support at the AIJA seminar for the use of special masters to manage discovery issues at the expense of parties in large complex cases.

The Group submission envisaged that a special referee may assist in relation to electronic discovery issues. It suggested that a referee could facilitate discussions between practitioners, determine disputes of a technical nature and report to the court as to the progress of the collection, processing and exchange of electronic documents. It noted that 'the appointment of such referees may act to considerably reduce the resource burden to the Courts of the closer management of the discovery process that is generally desirable in large and complex cases'.⁶⁹⁷

5.6.8 Judicial management of discovery

There was widespread support in the submissions received in response to the Consultation Paper for the view that courts should exercise more control over discovery processes.

The Bar was in favour of greater judicial management of discovery, particularly in cases of greater complexity, and argued that the court should assist to identify core issues in a proceeding and define appropriate categories for discovery or order discovery in waves.

The Law Institute supported the idea of judge-managed lists, with available practice notes to make the discovery process more efficient.⁶⁹⁸ However, the commission notes that a spokesperson from the Law institute has been quoted as stating that although it would be good to streamline the discovery process, 'the proposed regulation increased the danger that important information to a trial might be missed'.⁶⁹⁹

The Supreme Court expressed support for greater use of rules permitting staged discovery. The court also favoured greater reference to principles of proportionality and case management in the exercise of the court's discretion in relation to discovery. The court believes that greater specification of what amounts to reasonable discovery should also be considered.⁷⁰⁰ Allens Arthur Robinson was in favour of the court exercising more control over the discovery process.⁷⁰¹

There were limited responses to the commission's Exposure Draft 2 proposal for the introduction of more clearly delineated and specific powers to facilitate proactive judicial case management of discovery. Victoria Legal Aid supported the proposal provided that the powers remained exclusively with the judiciary.⁷⁰² QBE also offered in principle support.⁷⁰³

Telstra and the Australian Corporate Lawyers Association noted that although extensive reform of the discovery process is needed in commercial litigation, 'different considerations may apply in smaller matters in which one or both parties have limited resources'.⁷⁰⁴

5.6.9 Disclosure of funding, financing and insurance arrangements

In response to the Consultation Paper the commission received extensive commentary in relation to the regulation of litigation funding mechanisms. As this issue is currently being considered by the Standing Committee of Attorneys-General, we have not covered it in our review. We have, however, considered the issue of disclosure of litigation funding arrangements and insurance. We have also proposed that the overriding obligations should extend to funders and insurers who exercise influence or control over a party to litigation. In this context, we received submissions about whether there should be an obligation on parties to disclose the terms and conditions on which any financial support is being provided by an insurer or litigation funder.

The Bar, Allens Arthur Robinson and the TAC expressed support for the disclosure of funding agreements. The Bar noted that 'save for the redaction of any cap on the extent of own (as distinct from adverse) costs, the Bar does not see a cogent reason why the funding agreement should not be disclosed to the defendant'.⁷⁰⁵ Allens Arthur Robinson suggested that because all parties have an interest in the proper administration of justice, information on litigation funding agreements should be served on the other party or parties to the litigation.⁷⁰⁶ The TAC indicated that if commercial litigation funding is being provided in a personal injury matter, then in its view the funding agreement should be disclosed.⁷⁰⁷ On the other hand, the Police Association, The Law Institute and WorkCover argued that the terms and conditions of such arrangements should remain confidential.⁷⁰⁸

Dibbs Abbott Stillman suggested that a funding agreement should be submitted to the court for review, and if the court was satisfied with the terms of the agreement it could be approved on the papers.⁷⁰⁹

In Exposure Draft 2 the commission proposed that parties should be required to disclose the identity of an insurer or litigation funder exercising control over the conduct of the insured or assisted party, with the court having discretion to order disclosure of the insurance policy or funding arrangement if appropriate.

The commission received a detailed submission from QBE in response to this proposal. QBE did not object to the disclosure of the identity of an insurer or litigation funder and suggested that this information is useful to understand a party's attitude to litigation. However, it objected to the production of the details of the insurance or funding arrangement, arguing that the terms of a party's insurance policy or funding arrangement are confidential and do not concern the evidential issues in the litigated matter. QBE was concerned that disclosure of terms could reveal a party's motives and tactics without any corresponding disclosure by the other party.

QBE suggested that if the proposed overriding obligations were met by the parties this should significantly prevent trial by ambush. Further, QBE was not sure how disclosure of information such as the sum insured or agreed return would assist in settlement negotiations. It suggested that if the plaintiff had knowledge that the defendant had a large sum insured, it might distract the focus from the issues in dispute and act as an incentive to pursue the litigation more vigorously.

QBE further argued that any settlement is influenced by legal and nonlegal considerations. An insurance policy or funding arrangement are a considerations of the second type, and the relevant party is best able to decide its weight for the purposes of negotiation.

In its submission in relation to the commission's proposed overriding obligations, IMF argued that funders and insurers should be obliged to inform the court at the commencement of proceedings of their identity, the fact that they will be funding the litigation and the terms of that funding.⁷¹⁰ IMF further recommended that the early and effective disclosure of litigation risk information would lead to the early settlement or provide a sound foundation for the efficient management of proceedings where litigation cannot be avoided.⁷¹¹

- 689 Submission ED2 17 (QBE Insurance Group).
- 690 As outlined at AJIA (2007) above n 441.
- 691 Submission ED2 17 (QBE Insurance Group).
- 692 Consultation with the Supreme Court of Victoria (9 October 2007).
- 693 Submission ED2 10 (Victoria Legal Aid).
- 694 As outlined by Slater & Gordon at the Australasian Institute of Judicial Administration, *Discovery Seminar* (held at the Melbourne Business School, 24 August AJIA (2007) above n 441).
- 695 Submission CP 20 (Slater & Gordon).
- 696 Submission ED 2 17 (QBE Insurance Group). Submission ED2 2 (Confidential Submission, permission to quote granted 17 January 2008) also supported this proposal.
- 697 Submission CP 47 (the Group submission).
- 698 Submission ED2 16 (Law Institute of Victoria).
- 699 As cited by Harriet Morley in 'Litigation Lawyers Question Civil Changes', (2008) January/February *Law Institute Journal* 29.
- 700 Submission CP 58 (Supreme Court of Victoria).
- 701 As outlined at AJIA (2007) above n 441.
- 702 Submission ED2 10 (Victoria Legal Aid).
- 703 Submission ED2 17 (QBE Insurance Group).
- 704 Submissions CP 47 (Australian Corporate Lawyers Association), CP 46 (Telstra).
- 705 Submission CP 33 (Victorian Bar).
- 706 Submission CP 38 (Allens Arthur Robinson).
- 707 Submission CP 37 (Transport Accident Commission).
- 708 Submissions CP 6 (the Police Association), CP 37 (Transport Accident Commission), CP 18 (Law Institute of Victoria).
- 709 Submission CP 11 (Dibbs Abbott Stillman).
- 710 See Submission ED1 8 (IMF Australia). Similar comments were made in Submission CP 57 (IMF Australia). See also IMF's various submissions on civil justice reform available on its website, and in particular IMF Australia, *Litigation Funding for Consumers of Civil Justice System Services* (2006) 7 <www.imf.com.au/presentations/LitigationFundingForConsumers.pdf> at 13 February 2008.
- 711 Submission ED1 8 (IMF Australia).



5.6.10 Discovery of lists and indexes

In Exposure Draft 2 we proposed that the court be given the discretion to require a party to disclose all lists and indexes of documents to the extent that they contained objective information about the documents in the list. This proposal was not supported by QBE because it believed that it would encourage general or indirect discovery and even ‘fishing expeditions’.⁷¹²

5.6.11 Use of document repositories

In Exposure Draft 2 we proposed that the court should be able to order the creation of document repositories to be used by parties in multi-party litigation.

Allens Arthur Robinson and Philip Morris expressed concern that the use of document repositories may broaden the scope of discovery to an unacceptable extent and may also raise protection of privilege issues. They contended that discovery should be limited to the matters in issue between the parties.⁷¹³

However, the Law Institute supported the proposal. The institute suggested that the court rules should reflect a judicial discretion to release a document having regard to certain factors including costs. Legal Aid also strongly supported the creation of document repositories to be used by parties in multi-party litigation.

5.6.12 Use of discovered documents in other litigation

In Exposure Draft 2, the commission sought views about whether there is a need for a change in the existing laws or procedural rules relating to discovery in order to facilitate use of documents produced by a party in one proceeding in other proceedings involving that party in order to reduce costs and delay.

QBE believed the commission should carefully consider the potential outcomes of such a proposal, particularly in relation to privilege and the rights of parties to present or defend a matter based on the particular facts or circumstances relevant to that matter. Generally, a person who is not a party to a matter has no standing which would enable them to use the evidence presented in the matter. QBE argued that it does not necessarily follow that the defendant will defend a particular matter in the same way as they have done previously. It will depend on the facts or circumstances presented relevant to each individual plaintiff. QBE maintained that discovery should be dealt with individually in each case. On the other hand, Legal Aid strongly supported the capacity to use documents discovered in one proceeding in another proceeding.

5.6.13 Sanctions and compliance with court orders

Submissions in response to the Consultation Paper suggested that tougher sanctions were needed to deal with discovery abuse and that compliance with court timelines and orders needed to be more strictly enforced.⁷¹⁴ Peter Mair argued that the tendency to abuse discovery ‘in an ocean-wide trawling exercise’ should be harshly penalised.⁷¹⁵ The TAC suggested that compliance with a requirement for full disclosure of all relevant information ‘could be supported by the non-compliant party being prevented from relying on any document that had been withheld later in the proceedings and at trial’.⁷¹⁶

In Exposure Draft 2 the commission proposed that additional sanctions be introduced in relation to discovery abuse. Tougher sanctions for fishing expeditions were supported in a number of the responses to Exposure Draft 2.⁷¹⁷

The Law Institute noted that the sanctions proposed by the commission arguably already exist, but did support more clearly defined obligations of parties and legal representatives in relation to discovery. It submitted that such reforms would reinforce the recently implemented document destruction offences and also assist in overcoming any confusion in relation to the circumstances in which the court will impose sanctions.⁷¹⁸

Legal Aid supported the proposals regarding abuse of discovery and sanctions. However, it expressed some concern about the meaning and practical effect of two of the proposed sanctions (namely, ‘where parties deliberately delay the production of documents beneficial to their case or detrimental to the other party, the Court may prohibit or limit the use of the specific documents in evidence’, and ‘Cross-examination on an affidavit of documents if it is likely that the party is misinterpreting its disclosure obligations or is failing to disclose discoverable documents’).

Christopher Enright proposed new enforcement mechanisms to deal with breaches of disclosure obligations including criminal and civil wrongs, an adjustment in an award of costs or the power to overturn a judgment.⁷¹⁹

The Bar stated that 'the Woolf reforms dealing with discovery were implemented on the basis that to fail to address abuses of the discovery process make it less likely that justice will be done in any given case. We believe the same rationale applies for Victoria'.⁷²⁰

5.6.14 Limiting costs of discovery

One submission proposed that where repeated discovery applications were made an applicant should not be entitled to the costs of the application unless it could be shown that the respondent's failure had caused substantial prejudice to the applicant.⁷²¹

In Exposure Draft 2 the commission proposed that the courts be given the power to limit the commercial costs incurred in connection with discovery by ordering that the costs able to be charged to clients and/or able to be recovered from another party by way of costs orders be limited to the actual cost to the law practice of such work.

At the AIJA seminar the comment was made that costs of discovery processes were often marked up by law firms, although it was noted that large corporate clients and litigation funders are now moving to cap discovery costs and are increasingly contracting directly with litigation support service providers.

The Law Institute strongly opposed limiting the costs charged in respect of discovery, arguing there is no widespread abuse of discovery. It was concerned about any proposal that would increase the gap between the amount solicitors charge clients and the amount able to be recovered. It argued that any widening of this gap would potentially discourage less-resourced litigants from bringing actions, and that imposing a financial limit on discovery is 'anathema to the notion of a fair trial'.⁷²² In contrast, QBE offered in principle support to the commission's recommendation.⁷²³

5.6.15 Limiting discovery of copies of documents

A number of submissions addressed the issue of unnecessary and unreasonable discovery.

WorkCover suggested that a plaintiff should be required to provide a list detailing documents that have already been obtained from a defendant or its insurer to ensure further identification and production of those documents is not undertaken. Alternatively, it proposed that only those documents not disclosed in a formal pre-litigation process should be listed.⁷²⁴

Hollows Lawyers suggested that faxes, photocopies and emails are in most cases adequate proof of a document's existence, and the production of unnecessary proofs and copies of documents only increases costs.⁷²⁵ Similarly, the Supreme Court suggested that greater specification of what was reasonable discovery would be helpful. By way of example, the court suggested that it was not reasonable to discover multiple copies of chain e-mails sent on the same day.⁷²⁶

In Exposure Draft 2 the commission proposed that a copy of a document should not be required to be disclosed if it contained no information, mark or obliteration or other information that is likely to affect the outcome of the proceedings. The Law Institute endorsed this proposal; QBE also offered in principle support.⁷²⁷

5.6.16 Disclosure obligations

The Magistrates' Court suggested that full and proper discovery is often not given because of a 'lack of knowledge' of the train of inquiry test.⁷²⁸

The importance of cultural change in relation to discovery was emphasised at the AIJA seminar. It was suggested that there was a need for appropriate policies and cost incentives to reinforce judicial efforts to change current discovery practices.

In Exposure Draft 2 the commission recommended that a short plain English explanation of disclosure obligations be prepared by the Legal Services Commissioner or other appropriate entity.

The Law Institute supported the commission's proposal and also suggested that practice notes and specialist judge-managed lists will 'help to educate practitioners and self-represented litigants about discovery'.⁷²⁹ The Legal Services Commissioner also supported this proposal, noting that one of her core functions is to educate the legal profession and the public about issues of concern.⁷³⁰

- 712 Submission ED2 17 (QBE Insurance Group).
- 713 Submission ED2 8 (Allens Arthur Robinson and Philip Morris Ltd).
- 714 Several of the submissions indicate that timelines need to be flexible enough to recognise the relative resources and special circumstances of parties.
- 715 Submission CP 10 (Peter Mair).
- 716 Submission CP 37 (Transport Accident Commission).
- 717 Submissions ED2 2 (Confidential Submission, permission to quote granted 17 January 2008) and ED2 17 (QBE Insurance Group).
- 718 Submission ED2 16 (Law Institute of Victoria).
- 719 Submission CP 50 (Christopher Enright).
- 720 Submission CP 62 (Victorian Bar).
- 721 Submission CP 14 (Confidential submission, permission to quote granted 13 February 2008).
- 722 Submission ED2 16 (Law Institute of Victoria).
- 723 Submission ED2 17 (QBE Insurance Group).
- 724 Submission CP 48 (Victorian WorkCover Authority).
- 725 Submission CP 52 (Hollows Lawyers).
- 726 Submission CP 58 (Supreme Court of Victoria).
- 727 Submissions ED2 16 (Law Institute of Victoria) and ED2 17 (QBE Insurance Group).
- 728 Submission CP 55 (Magistrates' Court of Victoria).
- 729 Submission ED2 16 (Law Institute of Victoria).
- 730 Submission ED2 6 (Legal Services Commissioner), referring to s 6.3.2(b) & (c) of the *Legal Profession Act 2004*.



5.6.17 Conclusions

There is clearly no simple solution to the vexed issue of discovery in civil litigation. As Sallmann and Wright suggest, discovery is a 'tough nut to crack'.⁷³¹ It is clear from a survey of discovery reforms in other Australian and overseas jurisdictions that there is a general acceptance that discovery is essential to the administration of justice, but at the same time it is responsible for significant problems including undue cost, delay and unfairness. Reforms in other jurisdictions have favoured preserving discovery 'but in a tighter, tougher and more streamlined form'.⁷³² The call for tighter control over the discovery process has been echoed in submissions to the commission and in consultations.

The commission has concluded that reform to the discovery processes in Victoria is desirable. Reform is recommended on the following fronts:

1. narrowing the discovery test to direct relevance
2. greater case management powers of the court to oversee and control the discovery process
3. greater participation and cooperation by parties to set the parameters of discovery and resolve disputes before approaching the court
4. clearly articulating and increasing sanctions for discovery abuse.

The commission's recommendations aim to achieve a more efficient discovery process and to encourage cultural change, while preserving fundamental discovery principles.

The discovery test

Reform options

In Exposure Draft 2 the commission set out the following options for determining whether a document should be discovered. These were drawn from models in other jurisdictions and the submissions made to our review:

- narrowing the discovery test to documents of *direct relevance* to questions in the proceeding or to an issue in the pleadings (as opposed to requiring discovery of documents '*relating to any questions raised by the pleadings*')
- alternatively, framing a narrow test along the lines of:
 - the test in the Federal Court where discoverable documents are those on which a party relies, which adversely affect a party's case or which support or adversely affect another party's case⁷³³ or
 - the test in NSW where discovery is generally limited to classes or categories of documents and will only be ordered of a document if it is relevant to a fact in issue⁷³⁴
- narrowing the discovery test to documents which can be linked to a material fact pleaded in the statement of claim and which is in dispute⁷³⁵
- narrowing the test to 'direct relevance', while empowering the court to order further discovery if satisfied that 'compliance with such an order would not unreasonably delay the expeditious disposal of the proceeding' and 'the cost of compliance is not disproportionate to what is at stake in the proceedings'⁷³⁶
- implementing the Lord Woolf approach of permitting 'standard discovery' as of right and 'extra discovery' if the litigant can satisfy the court that it is necessary
- retaining the train of inquiry test but introducing express provisions requiring that the court takes an active role in discovery management⁷³⁷
- limiting discovery of documents to (a) those which a party intends to rely on and (b) those which are inimical to the case sought to be relied on.

Arguments in favour of narrowing the discovery test

A survey of reform recommendations from other jurisdictions and academic and professional commentary reveals the following arguments in support of a narrower discovery test:

- A broad discovery test is problematic because it enables parties to:
 - make excessive discovery demands
 - discover excessive numbers of documents
 - withhold key documents until the final stages of a proceeding or to hide key documents among mountains of other discovered material.

These tactics are employed to wear down opponents, delay trials and exert leverage for settlement. The time and costs involved in reading, analysing, digesting, copying and indexing large numbers of documents can be disproportionate to the value of subject matter in dispute.

- Technological change has led to a proliferation of documentary material. Documents are easily created and exchanged. Communications are now occurring 24 hours a day with the use of e-mail sent from laptops and 'Blackberrys'. At the same time, civil litigation has become more complex. The proliferation of documents and the increase in the number of issues pleaded in civil claims has meant that discovery has become more complex, time consuming and costly. The discovery test should seek to limit the documents to be disclosed.
- Lawyers take their discovery obligations seriously and if there is doubt about the relevance of a document it is often discovered. Pursuant to the train of inquiry approach a discovered document may refer to other documents. It is usual practice to then seek discovery of the additional documents referred to because they may lead to a relevant train of inquiry. The more conscientiously discovery obligations are carried out, the more expensive the process becomes.
- The breadth of the train of inquiry test means that it is often easier, cheaper and safer to disclose documents in their entirety rather than to closely analyse the documents to identify those relating specifically to issues in dispute. In addition, para-legals and support staff are often enlisted to sort through documents and formulate lists. Without detailed technical knowledge of the issues in dispute or an understanding of the discovery test a conservative approach to discovery is usually taken.
- Ultimately, although the scope of discovery is vast, the proportion of discovered documents actually relevant or fundamental to a dispute is comparatively few. The majority of discovered documents are not used at trial and do not appear in court books or tender bundles.
- Anecdotal evidence suggests that a narrower test facilitates cultural and ethical change. This is so even if a narrower test is interpreted broadly by the court so that in practice it encompasses documents of indirect and direct relevance. A narrower test assists by focusing participants on the role of discovery in the wider litigation. It also assists to narrow issues and encourage careful and proportionate discovery.

Arguments against narrowing the discovery test

The following arguments are often raised to support maintaining the broader train of inquiry test:

- Limiting the discovery test may result in the loss of important information.
- One of the difficulties of having a 'narrower' discovery test or of limiting discovery to categories of documents is that this usually still requires the review, culling and categorisation of all potentially relevant documents to select a subset. This is usually the most expensive part of the discovery process and such expense is not necessarily reduced, or substantially reduced, by merely limiting the ambit of the subset of documents ultimately discovered.
- Narrowing the test requires greater reliance on the integrity of the parties. A narrower test requires a subjective assessment of whether a document is 'relevant' to an issue in the pleadings and may be used as a tool to withhold documents.
- A narrower test may lead to an increased number of discovery disputes or more interlocutory applications.
- In some fact situations a wide discovery test may be preferred to assist a party to prove its case, for example where the other party holds most of the documents relevant to the issues in dispute.

731 Sallmann and Wright (2000) above n 344, 105.

732 Ibid 106.

733 *Federal Court Rules 1979* (Cth) r 15(2).

734 *Uniform Civil Procedure Rules 2005* (NSW) r 21.2.

735 This is similar to r 187.1(2) of the *Alberta Rules of Court*, which requires an affidavit disclosing 'relevant and material' records. A question or record is relevant and material only if the record could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings; or to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings (*Alberta Rules of Court* rr 186.1(a), (b)).

736 NZLC (2002) above n 561 [9].

737 This approach is similar to that of Hong Kong: see Chief Justice's Working Party on Civil Justice Reform (2004) above n 587, Recommendation 80 and Proposal 29.

738 Discovery Task Force (2003) above n 2, 92.



- Using categories of documents to restrict discovery is problematic because:
 - there is a potential for dispute about appropriate categories and which documents fall within those categories
 - it may still require the parties to review all documents within their possession, custody or control to determine whether they fall within the specified categories
 - at the time categories are set parties may not be aware of significant issues in the case which can lead to later applications for further categories of discovery
 - categories are not likely to be helpful if they merely reflect the issues raised by the pleadings.
- General discovery avoids the potential for unsatisfactory settlements based on limited disclosure of relevant documents.
- A wide interpretation of a narrow test of direct relevance may not result in any practical difference to the scope of discovery.
- Problems are likely to exist whether the test for discovery is broad or narrow.

The commission's view

The commission's preliminary proposal was that the train of inquiry test be retained and that express provisions be introduced to enable the court to take an active role in discovery case management. However, on reconsideration the commission has concluded that the discovery test should be limited to 'documents directly relevant to any issue in dispute'.

The discovery test has already been narrowed in many other Australian jurisdictions and overseas. Indeed, the train of inquiry test has been abolished in England and Wales where it was first developed.

We acknowledge there is little evidence to support the contention that a narrower test will necessarily confine the scope of discovery, thereby saving costs and time. Adopting a narrower test will still compel parties to review, cull and categorise all potentially relevant documents in order to select a discoverable subset, usually the most expensive part of the discovery process.

Although narrowing the discovery test will not necessarily reduce the time and expense incurred in the review of potentially discoverable documents, it does reflect an important shift in the approach to discovery and litigation generally. As noted by the Ontario Task Force, a narrower test will 'provide a clear signal to the legal profession that restraint is to be used in the discovery process, thereby strengthening the objective that discovery be conducted with due regard to cost and efficiency'.⁷³⁸ We also believe that a narrower test will 'help to curb discovery abuse and eliminate areas of inquiry that cannot be reasonably considered relevant'.⁷³⁹

As noted elsewhere in this report, the Victorian Bar has suggested that the success of the Woolf reforms owed much to cultural change embraced by the judiciary and legal profession and that 'a willingness to make radical changes to philosophies and practices will also be required to successfully embed the Victorian reforms'. The commission agrees with this observation and notes that the Bar has indicated that 'it is committed to working with its members and other legal professionals to begin the process of cultural change'.⁷⁴⁰ In a similar spirit the Supreme Court has indicated that the new pilot program in the Building List is 'intended to inculcate, and to the extent necessary to enforce, a professional culture in which attention is focussed, not on overwhelming an adversary, but rather upon achieving a just and cost-effective outcome for the litigants'.⁷⁴¹

We believe that a narrower discovery test, combined with our other discovery recommendations, will encourage important cultural change and assist parties to focus their attention on the main purpose of discovery in the litigation process.

Should discovery be as of right or only with leave of the court?

In *Managing Justice*, the Australian Law Reform Commission concluded that the discovery process 'needs supervision and control, but in setting such controls the court should note that discovery is an essential part of the process. The information obtainable through discovery is required to facilitate settlement as well as to present at trial'.⁷⁴²

The commission shares the view that discovery plays a vital role in the administration of justice and should be retained, subject to the modifications recommended in this report. However, we acknowledge that the question of whether discovery should continue to be available as of right may require further consideration as the impact of any reforms is monitored.

The obligation to confer to try to resolve discovery issues

The commission remains of the view that requiring formal confirmation of conferral prior to the issue of interlocutory process as a precondition for obtaining relief will help ensure that the practice is followed and reinforce a culture of using the court as a final resort.

While it is an informal expectation in Victoria, in some jurisdictions the requirement to certify bona fide attempts to confer before initiating an interlocutory application is set out in the rules of court. For example, rule 59.09 of the *Rules of the Supreme Court 1971 (WA)* provides that:

No order shall be made in chambers unless the application was filed with a memorandum stating—

(a) that the parties have conferred to try to resolve the matters giving rise to the application; and

(b) the matters remain in issue between the parties.

Rule 37 of the *US Federal Rules of Civil Procedure* takes this a step further. In certain situations, certification of the applicant's good faith conferral or attempt to confer in an effort to resolve the issue without court action is required. This is also backed up by explicit costs consequences for both lawyers and clients.

Our recommended overriding obligations seek to ensure that parties cooperate and endeavour to reach agreement during the course of the proceedings. However, we believe there should be a specific requirement that the parties confer prior to the issuing of any interlocutory application—including in respect of discovery—to determine whether the dispute can be resolved or whether the issues in dispute can be narrowed.

The newly introduced Commercial List and Technology and Construction List Practice Note in the NSW Supreme Court sets out the responsibilities of practitioners and the aspects of discovery which they are expected to 'meet to agree upon'.⁷⁴³ It also sets out in detail the matters which practitioners are expected to have knowledge of at any hearing in relation to discovery. In the County Court Damages List the court will only list the hearing of a discovery application where the parties have set out the steps they have taken in good faith to resolve the issues in dispute between them.⁷⁴⁴ This provides a useful model which could be adopted more broadly in Victoria.

Some of the issues the court may expect practitioners to have agreed on in relation to discovery include:

- the extent of probable disclosure and how it is to be made
- any issues concerning the preservation and production of discoverable documents including electronically stored information
- any problems reasonably expected to arise in connection with the discovery of electronically stored information, including difficulty in the recovery of data
- the probable or anticipated number of categories of documents
- the volume of documents likely to be discovered
- whether documents contain any privileged or confidential material and how this material should be dealt with.

If discovery issues remain in dispute it is proposed that the parties file a joint memorandum to the court identifying:

- areas of agreement on proposed discovery
- areas of disagreement
- respective best estimates of the cost of discovery.

The commission believes that greater party cooperation should be required on discovery issues. Such cooperation should assist to define the scope of discovery, reduce the number of interlocutory discovery disputes and limit the scope of such disputes. It would also facilitate the timely production of discovery. Importantly, the reform would also help to foster cooperation and thereby reduce the

739 Ibid.

740 Submission CP 62 (Victorian Bar).

741 Supreme Court, *Practice Note 1* (2008) above n 382, [1].

742 ALRC (2000) above n 408, [6.73].

743 Supreme Court of NSW (2007) above n 483, [27]–[32].

744 See County Court, (*PNCI 4-2007*) (2007) above n 368, [35].



adversarial approach to discovery which currently exists. Moreover, it recognises that, particularly in cases involving extensive discovery, the parties are best placed to sort out discovery problems, given that judges will have limited appreciation of the details of the documents relevant to the proceedings.

Interim disclosure orders

In appropriate cases the commission believes that interim disclosure orders will greatly assist the efficiency of the discovery process.

In some circumstances it is possible for a party in possession of documents to generically describe or define such documents, or subsets of documents ('readily identifiable documents'), without having to conduct a search or examine the individual documents. Depending on the nature of the documents and the issues in dispute it may be highly likely that many such documents will be relevant to the litigation.

For example, in a building dispute, there may be certain readily identifiable folders containing correspondence and communications between the supervising architect and the builder. In a drug product liability case, there may be certain readily identifiable folders or files in the possession of the drug company containing reports of known or suspected adverse drug reactions. In many other types of dispute there are likely to be analogous 'readily identifiable documents'.

We believe there would be utility in a procedure which would provide for interim orders for access to readily identifiable documents so as to:

- facilitate access to documents relatively promptly
- avoid the party in possession of such documents having to incur time and expense in reviewing such documents prior to the determination of what documents should be produced by way of discovery
- transfer the cost of initially reviewing such documents to the party seeking the documents
- avoid the necessity for the party in possession of such documents having to prepare a list of the documents.

An interim order for access to categories of 'readily identifiable documents' would be without prejudice to such further orders as may be appropriate in relation to discovery generally.

Also, there would need to be limited access, initially to lawyers for a party, with appropriate safeguards to prevent use of documents that may be privileged or otherwise confidential.

Subject to certain safeguards outlined below, it is proposed that the court be able to order a party to make available for inspection all documents that it has within an identified category or class of documents without being put to the trouble and expense of being required to review and list each of the documents or to make a judgment about whether each is relevant to the proceedings. The receiving party would sort through the documents and extract and identify those that it considers important to its case.

In appropriate situations this approach may assist to reduce excessive discovery costs which both parties currently incur in the process of reviewing, sorting and listing documents for an affidavit of documents.

An analogous procedure appears to have been introduced to facilitate production of electronic documents in the NSW Supreme Court Equity Division-Commercial List and Technology and Construction List.⁷⁴⁵

The commission is not persuaded that the introduction of interim disclosure orders will impede the efficient resolution of proceedings. However, in light of the concerns expressed in the submissions regarding enforceability, the commission believes that the use of interim disclosure orders should be monitored by the proposed Civil Justice Council. In addition, we have modified our proposal to incorporate increased safeguards for confidentiality, access to documents and the use of those documents. We have also strengthened the safeguards for waiver of privilege and extended this protection to train of inquiry documents.

Referee and special master assistance to the court

The commission believes there should be provision for an independent person (a 'special master') to be appointed by the court to assist in the case management of discovery issues in complex cases. We envisage that a special master could:

- provide court supervised intervention in the discovery aspect of the dispute
- actively endeavour to case manage and assist in the resolution of any dispute between the parties in relation to discovery and/or
- investigate and report to the court on any issue in relation to discovery.

The special master should be a judicial officer (of a lower tier than a judge) or a senior legal practitioner. Preferably, the appointee would have experience or expertise in the areas that are the subject of the litigation. In some cases special expertise may be desirable, for example, in matters involving electronic discovery.

The proposed adaptation of the role of special master to the management of discovery would incorporate elements of the US model, the existing role of court masters and the role of a special referee under Order 50 of the *Supreme Court (General Civil Procedure) Rules 2005*.

Pursuant to Order 50 the Supreme Court may refer any question to a 'special referee' to decide the question or give the referee's opinion with respect to it.⁷⁴⁶ Where an order is made the court shall direct that the special referee report in writing to the court.⁷⁴⁷ Further, the court may give directions for the conduct of the reference and may direct that the special referee have the same authority as the court with respect to discovery of documents.⁷⁴⁸ The court may adopt the report of the special referee or only adopt it in part or decline to adopt it and give such orders as it thinks fit.⁷⁴⁹

The following comments were made at the AIJA seminar about the use of referees in the NSW Supreme Court:

*Discovery issues have been referred to referees, usually members of the Bar, and this process enables the parties to settle their discovery disputes very promptly. There have also been instances of the parties choosing a 'facilitator' to assist with complex discovery which has also resulted in cost efficient and timely resolution of discovery issues, with the Court only being asked to rule on matters upon which it has been impossible for the parties to agree.*⁷⁵⁰

In the Federal Court in the C7 litigation, a former judge was appointed by the court to deal with various discovery issues and was apparently successful in narrowing the issues remaining in dispute. He and another former judge also served as mediators to deal with a range of pre-trial issues.⁷⁵¹

In the United States, rule 53 of the *Federal Rules of Civil Procedure* authorises judges to appoint special masters. A court may appoint a special master to:

- (A) perform duties consented to by the parties;
- (B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by:
 - (i) some exceptional condition, or
 - (ii) the need to perform an accounting or resolve a difficult computation of damages;or
- (C) address pre-trial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.⁷⁵²

Appointment of a special master must be warranted by factors that include addressing pre-trial and post-trial matters that cannot be addressed in an effective and timely manner by an available judicial officer.⁷⁵³ Before ordering the appointment of a special master 'the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable delay and cost'.⁷⁵⁴

An order referring a matter to a special master generally specifies the scope of the reference and any limitations on the master's authority, the circumstances under which ex parte communication by the master with the court or a party will be appropriate, the time and format for delivering a report by the master, the master's delegated powers and the basis and terms of the master's remuneration.⁷⁵⁵

745 See Supreme Court of NSW (2007) above n 483, [29.4]–[29.4.2].

746 *Supreme Court (General Civil Procedure) Rules 2005* r 50.01(1).

747 *Supreme Court (General Civil Procedure) Rules 2005* r 50.01(2).

748 *Supreme Court (General Civil Procedure) Rules 2005* r 50.02.

749 *Supreme Court (General Civil Procedure) Rules 2005* r 50.04.

750 As outlined at AIJA (2007) above n 441.

751 Consultation with Justice Sackville (24 October 2007).

752 Fed R Civ P 53(a)(1)(A), (B), (C).

753 Fed R Civ P 53(a)(1)(C).

754 Fed R Civ P 53(a)(3).

755 Fed R Civ P 53(b)(2).



Ordinarily, the special master must produce a report to the judge on the subject of the reference, including any findings of fact or conclusions of law. The parties may stipulate that the special master's findings of fact be accepted as final, leaving only questions of law for review, on a *de novo* basis. Otherwise, the court must decide *de novo* all objections to a special master's findings of fact.⁷⁵⁶ A special master may also by order impose on a party a non-contempt sanction and may recommend contempt sanctions against a party and sanctions against a non-party.⁷⁵⁷

In the Victorian context, the commission believes the appointment of a special master in relation to discovery may be appropriate where, for instance:

- the matter is of some complexity
- the financial stakes or resources of the parties justify imposing the expense of managing discovery issues on the parties
- the amount of activity required has the potential to absorb a disproportionate amount of judge time
- the effective and adequate management of discovery is beyond the proper scope of the judicial role and/or
- it is an appropriate use of resources likely to bring about the resolution of issues.

The special master would have the authority of a court appointment and would be involved with all relevant parties. In appropriate cases the special master may make determinations and give rulings, for instance, on issues of privilege. It is envisaged that the special master would adopt appropriate case management strategies and make directions. Specifically we envisage that a special master may:

- conduct meetings and/or hearings in a more informal manner than a usual court hearing
- explain the parties' duties pursuant to the overriding obligations and other relevant rules governing the conduct of discovery
- investigate and help the parties to identify appropriate strategies in relation to the management of discovery
- hear and determine interim applications in relation to discovery, such as applications for further and better discovery, questions of privilege, applications to confine the ambit of discovery
- prepare a report to the court
- facilitate discussion between the parties in relation to electronic discovery, determine technical disputes and report to the court on progress in the collection, processing and exchange of electronic data.

The special master, with the agreement of the parties, would be able to conduct meetings or hearings at a time and place convenient to the parties and not necessarily at the court. The commission believes that it is generally preferable to appoint a special master with the parties' consent, and either to permit the parties to agree on the selection or to make the appointment from a list submitted by the parties.

The costs of an externally appointed special master should be at the discretion of the court, and on an interim basis may be ordered to be costs in the cause.

We believe that the use of special masters will greatly assist the court to adopt a more interventionist approach to discovery, without compromising judicial objectivity and independence. The use of special masters should assist to free up judge time, which may otherwise be consumed by complex and protracted discovery processes. In addition, the use of special masters may assist to reduce the likelihood of discovery disputation or at least better define the scope of those disputes. A special master would be able to play a hands-on role in shaping the scope of discovery and dealing with discovery issues as they arise.

Judicial management of discovery

The commission recommends the introduction of more clearly delineated and specific powers to facilitate proactive judicial case management in relation to discovery. We believe that increased judicial management of the disclosure process, combined with new obligations on parties to meet to agree on discovery issues and the use of special masters, will greatly assist in keeping the scope of disclosure focused and reduce delay and costs.

A number of recent comments by Federal Court judges add weight to the need for a more interventionist judiciary in the context of discovery. In relation to the C7 litigation Justice Sackville asserted that 'it is critical that legislators recognise that the pure, traditional concept of procedural fairness should no longer govern the conduct of mega-litigation'. He called for greater judicial control and intervention in the conduct of cases, as well as greater party cooperation.⁷⁵⁸ Chief Justice Black has also suggested that the ideals and benefits of judicial case management need to be reasserted, including 'a sharp and early focus on the essential issues, an insistence that the court's timetables and directions are complied with and co-operation rather than confrontation in the procedures leading to trial'.⁷⁵⁹

Expanding discovery case management powers should encourage the judiciary and the parties to be more proactive in confining the scope of discovery and ensuring that the process assists rather than hinders the administration of justice.

The commission believes that the court should be explicitly empowered to develop a disclosure regime appropriate to the facts of a particular case and to widen or narrow the scope of disclosure as it sees fit. The court may order that parties do not need to make discovery of documents which have already been provided to the relevant parties through:

- the proposed overriding obligations
- informal discovery
- compliance with any pre-action protocols
- oral examinations
- preliminary discovery
- interim disclosure.

The exercise of the court's discretion should be consistent with a party's right to a fair trial and not prejudice the right to the reasonable opportunity to adduce evidence and cross-examine witnesses.

The commission's case management provisions are based in part on the Rules of the Supreme Court of Western Australia and the Supreme Court Civil Rules in South Australia. We have added a discretion to require the disclosure of specified classes of documents prior to the close of pleadings. Given the views expressed to the commission in relation to the use of categories of documents we believe that this is something that should be left to the discretion of the court under these broader discovery case management powers.

Disclosure of funding, financing and insurance arrangements

There are various proposals at present under consideration in Australia in relation to the regulation of commercial litigation funders. One proposal is to require disclosure of funding agreements. Some commercial litigation funders (eg, IMF) make disclosure at present.⁷⁶⁰ Given that our recommended overriding obligations extend to litigation funders who exercise any control or influence over the funded party in litigation there is a need for disclosure of the existence of litigation funding arrangements.

Similarly, the proposed overriding obligations extend to insurers who exercise control or influence over the insured party in the course of the proceeding. Accordingly, there is a corresponding need for disclosure of the existence of insurance arrangements.

In the United States and Canada insurance arrangements may be discoverable. In some instances this may be admissible evidence. Professor Reinhardt suggests that in the United States, 'where the existence of insurance is relevant (perhaps to explain why the plaintiff behaved in the way they did after an accident has occurred) and the court is persuaded that the admission of the evidence will outweigh any prejudicial effect, evidence can be admitted'.⁷⁶¹

In the recent decision of *Harcourt v FEF Griffin*⁷⁶² the Queens Bench Division of the English High Court held that disclosure of insurance details may be ordered where a claimant is able to demonstrate some real basis for suggesting that the disclosure is necessary, in order to determine whether further litigation will be useful or simply a waste of time.

In Australia where an insurer has denied indemnity the courts may permit the plaintiff to join the defendant's insurer in the proceeding in order to allow discovery.⁷⁶³ Alternatively, Professor Reinhardt suggests that 'the authorities establish that the plaintiff will be unable to effect joinder or otherwise

756 Fed R Civ P 53(f).

757 Fed R Civ P 53(c)(2).

758 Comments by Sackville J cited in Elisabeth Sexton (2007) 'Judge Calls for Radical Shake-up of Court Cases', *Brisbane Times* (Brisbane), 23 August 2007.

759 Comments of Black CJ of the Federal Court as cited in Pelly (2007) above n 352, 31.

760 IMF publishes its case investment portfolio for current funded cases, where its budgeted fee is over \$500 000, by quarterly announcements to the Australian Stock Exchange. See IMF Australia, *Funded Cases: Overview* (2008) <www.imf.com.au/cases.asp?content=casesmain> at 13 February 2008. The published information seeks to balance informing shareholders of investment activities and maintaining confidentiality, observing implied undertakings to the court and not prejudicing cases it is funding.

761 Professor Greg Reinhardt, 'Can courts ignore the reality of insurance in litigation?' (Paper presented at the Australian Insurance Law Association, 2007 Geoff Masel Lecture Series, Melbourne, 12 September 2007) 2. Reinhardt cites *Reed v Wimmer* 195 W Va 199 465 SE2d 199 (1995), Court of Appeals West Virginia.

762 *Harcourt v FEF Griffin (Representatives of Pegasus Gymnastics Club) and others* [2007] EWHC 1500 (QB) [19].

763 Reinhardt cites *JN Taylor Holdings Pty Ltd (in liq) v Bond* (1993) 59 SASR 432; Reinhardt (2007) above n 761, 8.



to seek discovery direct from the insurer'.⁷⁶⁴ The traditional reluctance to require the disclosure of the existence of insurance or of insurance details in Australia may be because of a lack of relevance or prejudice in the determination of liability or quantum.⁷⁶⁵

However, Professor Reinhardt suggests that a number of recent Australian decisions recognise the significance of insurance in the determination of cases and that an insurer may be the real litigant.⁷⁶⁶ He argues that 'in all cases where there is insurance which may respond to the claimant/plaintiff's claim, discovery should be required of relevant insurance information, subject only to legal professional privilege where this applies'.⁷⁶⁷ Professor Reinhardt believes that such disclosure is unlikely to prejudice the insurer. He suggests that the issue of whether there is a liability to indemnify will still need to be determined and 'the risk that the claimant/plaintiff will frame or amend their claim to take account of the available insurance should not concern the insurer. The court is obliged to look at the substance rather than the form of the claim made by the plaintiff against the defendant'.⁷⁶⁸

In considering the position of insurers it is important to bear in mind that in some cases the insurer will merely be at risk of having to indemnify the insured in the event that the claim against the insured succeeds; in other situations the insurer will have paid the claim(s) against the insured and will be bringing proceedings against a third party, using a right of subrogation, in order to recover some or all of the amount paid out.

In South Australia in personal injuries cases there is a requirement that notice of a claim be given at least 90 days before the filing of the claim and such notice must be given to the defendant's insurer if the identity of the insurer is known to the plaintiff.⁷⁶⁹ The aim is to enable settlement of the claim before action.

The commission is of the view that disclosure should be made of insurance and litigation funding arrangements in appropriate circumstances. We emphasise that we are not recommending the disclosure of the terms of all insurance or funding agreements in all cases. Disclosure will only be ordered if the court deems that it is appropriate having regard to the particular circumstances of the case.

Discovery of lists and indexes

Lists or indexes of documents that may be relevant to proceedings are often created by parties or their solicitors in preparation for or in anticipation of proceedings. In the normal course of trial preparation these lists may eventually be refined and used as the basis for a final list of documents verified by an affidavit. Such lists or indexes may be excluded from discovery because they are privileged.

A number of cases in the United States have considered the issue of disclosure of lists and indexes of documents created in preparation for proceedings. In the United States a party may withhold documents from disclosure if they have been created as a result of an attorney's activities for pending or anticipated litigation. In a number of cases the courts have ordered that access should be given to lists and indexes notwithstanding that these incorporate 'work product' information. However, access is usually only granted in respect of 'objective' information contained in indexes and lists and where the requesting party can show a substantial need and undue hardship. The courts have prevented disclosure of work product documents where they contain subjective comments, opinions and theories of lawyers as to the value of a document or the strategy behind a document's selection.⁷⁷⁰

The commission believes that in appropriate cases it would be helpful for a party to have early access to such lists or indexes as may be in the possession of another party. This may prompt a party to narrow the issues in its case, provide a level playing field and expedite discovery. Access should extend to draft lists as well as final lists. If the requirement excluded draft lists there may be scope for parties to avoid complying with the obligation by only creating draft lists or indexes.

We emphasise that the proposed power to order the discovery of lists and indexes is discretionary and will only be ordered in appropriate cases. We have amended our earlier proposal to explicitly include draft lists.

Use of document repositories

The commission believes that in situations where there may be a likelihood of multiple claims involving a party who has given discovery in one proceeding, it may be desirable to put in place a mechanism to facilitate access by other parties to relevant documents on an ongoing basis, so as to avoid duplicative discovery in multiple proceedings.

In the United States, courts have ordered parties to house documents in repositories so that they are easily accessible to other parties in multiparty litigation or in multiple proceedings.⁷⁷¹ A 'document repository ... acts as a shared facility for the copying, collection, storage, and dissemination of nonprivileged documents related to the litigation'.⁷⁷² In some instances, document repositories for use in future litigation have been established as part of the terms of settlement of litigation.

A document repository may be useful where there is or is likely to be analogous litigation involving the same party. The court may order the party to establish a document repository in the first case or any subsequent case. A party would be able to apply to the court to be given access to, make a copy of, or be provided with a copy of, any document in the repository. In the United States courts usually require a party seeking access to documents in a repository to enter into a 'protective order' to prevent use of the documents for any purpose other than the litigation in question. If a party objects to creating the repository or producing documents contained therein, US courts may issue an order directing creation or production.⁷⁷³

The use of document repositories would relieve a party from the obligation of giving discovery in every case and thereby 'reduce substantially the expense and burden of document production and inspection'.⁷⁷⁴ This would also avoid delays arising out of discovery obligations.

The commission remains of the view that this reform would be useful and should greatly reduce delay and costs in appropriate cases.

Use of oral examinations in connection with discovery

The commission has made recommendations earlier in this chapter for the introduction of a new form of pre-trial oral examination procedure. We note that this process may be used to ascertain information about the existence, location and organisation of documents that may be discoverable.

Abuse of discovery and sanctions

The commission remains of the view that tougher and broader sanctions for discovery abuse will encourage the parties and practitioners to take their discovery obligations seriously and assist to establish acceptable norms for the conduct of discovery. More clearly defined sanctions will also encourage parties to work towards the efficient resolution of discovery issues and discourage the use of discovery as an adversarial tool. The commission has based its recommended provisions on the sanction provisions in the rules of court in other Australian and overseas jurisdictions.

In light of comments made by Victoria Legal Aid we have clarified the proposed sanctions. Provisions have been incorporated to explicitly permit the court to order indemnity costs against a party or a lawyer who aids and abets any discovery default, and also to enable the court to compel a person to give evidence in connection with a discovery default.

Limiting the costs of discovery

The commission recommends that the courts in Victoria be given the power to limit the commercial costs incurred in connection with discovery by ordering that the costs able to be charged to clients and/or able to be recovered from another party by way of costs orders be limited to the actual cost to the law practice of such work. This should include a reasonable allowance for overheads.

We note that the NSW Supreme Court's Commercial List and Technology and Construction List Practice Note provides that the court on its own motion or on application may limit the amount of costs to be recovered by any party for the purpose of ensuring the most cost efficient method of discovery is adopted by the parties.⁷⁷⁵

The commission has consulted with a number of practitioners about how discovery costs are charged at present. Practices clearly vary between law practices, between clients and between different categories of litigation. In some instances, clerks or law students may be engaged to assist in connection with document review. They may be paid at a relatively low hourly rate (eg, \$30 per hour) but charged to clients at significantly higher hourly rates (eg, between \$150 and \$250 per hour). It has been suggested that this is one of the major reasons for the very large costs associated with discovery.

In other instances, junior counsel or others may be engaged to assist at a rate which is passed on to the client without any 'mark up.' The commission's recommendation would not affect the latter practice but would empower the court to prevent or limit the former practice. However, the firm would still be allowed to recover some reasonable component for overheads.

764 Ibid, citing *CE Health Casualty & General Insurance Ltd v Pyramid Building Society* (1997) 9 ANZ Insurance Cases 61–345, and *Beneficial Finance Corporation Ltd v Price Waterhouse* (1997) 9 Australian and New Zealand Insurance Cases 61–360.

765 Ibid 2.

766 Ibid 6. He provides the example of *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC27; (2003) Aust Torts Reports 81–692. This case involved claims for damages resulting from cessation of gas supplies to the plaintiffs as a result of an explosion at Longford in Victoria. Reinhardt observes that the judgment seems to suggest that 'the real litigants were insurers well able to cover themselves through an increase in premium or some other financial adjustment' (at 5). Cases relevant to the issue of insurers being the real litigant include *Linsley v Petrie* [1998] 1 VR 427; *Leader Westport Printing Pty Ltd v IPD Instant Duplicating Pty Ltd* (1998) SANZ Insurance Cases 60–856.

767 Ibid 8.

768 Ibid 8–9.

769 *Magistrates Court (Civil) Rules 1992* (SA) r 20 A(2). See also *Supreme Court Civil Rules 2006* (SA) r 33(3).

770 See, eg., *Beverly Scovish, Administratrix v The Upjohn Company Et Al*, No. 526520 Conn Super (1995); *Cynthia Sue Hense, Appellant v G.D. Searle & Co, Appellee*, 452 N.W.2d 440, Iowa Sup (1990); *R.J. Reynolds Tobacco Company Et Al v Minnesota Et Al*, 517 U.S. 1222(1996) and Minn App (1995) CX-95 2536. See also r 26(b)(3) of the *US Federal Rules of Civil Procedure*, which provides that trial preparation materials may be disclosed on showing that the party seeking disclosure has a substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering such discovery the court shall protect mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

771 The court is empowered to do this under Fed R Civ P 26(c)(2).

772 Charles S McCowan, Jr & Calvin C Fayard Jr, 'Symposium: Class Actions in the Gulf South and Beyond: Louisiana Complex Litigation' (2006) 80 *Tulane Law Review* 1905, 1924.

773 Judge Stanley Marcus et al (eds), *Manual for Complex Litigation* (4th ed, 2004) § 11.444.

774 Ibid.

775 Supreme Court of NSW (2007) above n 483, [32].



The commission is also of the view that there would be utility in making express provision for the courts to make orders limiting the amount of costs that may be recoverable on a party–party basis, similar to the provisions contained in Order 62A of the Federal Court Rules. Although of broader relevance than discovery, such power could be exercised to place limits on recoverable party–party costs in connection with discovery.

The commission believes that reform is necessary to the way in which discovery costs are charged and recovered. Not only will the reform potentially reduce the costs of the discovery process but it will also facilitate cultural change among practitioners. We emphasise that the court’s power would be discretionary and the court will no doubt take into account the particular circumstances of each case.

Copies of documents

Chief Justice Black has expressed concern in the media that ‘many documents referred to in commercial cases are simply multiple reproductions of electronic source material. The cost of reproducing them in great volumes is enormous. Much of this is repetitive and quite unnecessary.’⁷⁷⁶

Limiting the disclosure of multiple copies of documents is a simple reform that may reduce costs and save time. A copy should not be required to be disclosed if the additional copy contains no information, mark or obliteration or other information that is likely to affect the outcome of the proceedings. The commission notes that similar provisions are included in rule 212(1) of the *Queensland Uniform Civil Procedure Rules 1999*.

It is appreciated that in some cases whether a particular document has been in the possession of a person may be relevant to that person’s knowledge or conduct.

Statement of disclosure obligations

The commission believes that a statement of disclosure obligations would greatly assist parties to be aware of and understand their obligations in respect of disclosure of relevant documents and information. Further, in combination with greater emphasis on party cooperation and new sanctions it is hoped that this recommendation will assist to facilitate cultural change within the legal community and among parties.

The statement should set out the sanctions for breach of disclosure obligations. It has also been suggested that parties should perhaps be required to sign a copy of the obligations and return them to the court when filing their affidavits of documents.

RECOMMENDATIONS

Discovery of documents

80. The test for determining whether a document must be discovered should be narrowed. Discovery should be limited to ‘documents directly relevant to any issue in dispute’.
81. Discovery should continue to be available as of right subject to any directions of the court.
82. Parties should be required to seek to reach agreement on discovery issues and to narrow any issues in a discovery dispute before making an interlocutory application.
83. In order to reduce costs and delays arising out of discovery of documents the court should have the discretion to order (on such terms including as to confidentiality or restricted access, as the court considers appropriate) a party to provide any other party (or an appropriately qualified independent person nominated by the other party and approved by the court) with access to **all** documents in the first party’s possession, custody or control that fall within a general category or general description (regardless of whether some such documents are not relevant to the issues in dispute in the proceedings or do not fall within the description of documents that may be the subject of an order for discovery) where:
 - (a) the documents are able to be identified by general description or fall within a category of documents where such category or description is approved by the court
 - (b) the documents are able to be identified and located without an unreasonable burden or unreasonable cost to the first party;

- (c) the costs to the first party of differentiating documents within such general category or description which are (i) relevant or (ii) irrelevant to the issues in dispute between the parties are in the opinion of the court excessive or disproportionate;
- (d) access to irrelevant documents is not likely to give rise to any substantial prejudice to the first party which is not able to be prevented by way of court order or agreement between the parties
- (e) access is to facilitate the identification of documents for the purpose of obtaining discovery of such identified documents in the proceedings.

Where an order is made for access for inspection pursuant to this provision, the other party shall not be permitted to copy, reproduce, make a record of, photograph or otherwise use, either in connection with the proceedings or in any other way, documents or information examined as a result of such inspection except to the extent that would allow the other party to describe or identify an examined document for the purpose of obtaining discovery of such identified document in the proceedings.

There is a need to make provision for any disclosure under this provision to be without prejudice to an entitlement to subsequently claim privilege over any information that has been inspected and is claimed to be privileged. In other words, disclosure pursuant to this provision does not give rise to waiver of privilege. The proposed protection against waiver of privilege should also extend to any document obtained as a result of a chain of inquiry arising out of the interim disclosure of documents.

The proposed Civil Justice Council should monitor the use and effectiveness of interim inspection orders.

84. The rules of court should be amended to provide that in appropriate cases the court may appoint a special master to manage discovery. A special master should be a judicial officer (of a lower tier than a judge) or a senior legal practitioner who will actively case manage the discovery aspect of a proceeding. The special master may make directions, give rulings and determine applications.

The costs of any externally appointed special master should be at the discretion of the court and, on an interim basis, may be ordered to be costs in the cause.

85. The court should have broad and express discretion in respect of disclosure. A draft provision is as follows:

The court may make any order in relation to disclosure it considers necessary or appropriate, including to

- (a) *relieve a party from the obligation to provide discovery*
- (b) *limit the obligation of discovery to:*
 - (i) *classes of documents as specified by the court*
 - (ii) *documents relevant to one or more specified matter(s) in dispute*
- (c) *order that discovery occur in separate stages*
- (d) *require discovery of specified classes of documents prior to the close of pleadings*
- (e) *relieve a party from the obligation to provide discovery of*
 - (i) *documents that have been filed in the action*
 - (ii) *communications between the parties' lawyers or notes of such communications*
 - (iii) *correspondence between a party and the party's lawyer or notes of oral communications between a party and the party's lawyer;*
 - (iv) *opinions of counsel*
 - (v) *copies of documents that have been disclosed or are not required to be disclosed.*
- (f) *expand a party's obligation to provide discovery*
- (g) *modify or regulate discovery of documents in some other way*



- (h) order that a list of documents be indexed or arranged in a particular way
 - (i) require discovery to be provided by a certain time
 - (j) relieve a party of the obligation to provide an affidavit verifying a list of documents
 - (k) make orders as to which parties are to be given documents by any specified party
 - (l) require the party discovering documents to:
 - (i) provide facilities (including copying and computerised facilities) for the inspection and copying of the documents
 - (ii) make available a person who is able to explain the way the documents are arranged and help locate and identify particular documents or classes of documents
 - (m) make any other direction that the court considers appropriate.
86. Parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or assisted party in the course of the proceeding. The court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate.
87. The court should be given discretion to require the disclosure of all lists and indexes (including drafts) of documents in a party's possession, custody or control, even if such lists and indexes may be privileged, but only to the extent that those lists and indexes contain 'objective' information about the documents encompassed by the lists, including information such as date, subject matter, author, recipient, etc.
88. There should be legislative powers for courts to order the creation of document repositories to be used by parties in multi-party litigation.
89. The court should have broad and express discretion to deal with discovery default. A draft provision is as follows:
- Where the court finds that there has been (a) a failure to comply with discovery obligations or orders of the court in relation to discovery or (b) conduct intended to delay, frustrate or avoid discovery of discoverable documents ('discovery default'), the court may make such orders or directions as it considers appropriate, including:*
- (a) for the purpose of proceedings for contempt of court
 - (b) orders for costs, including indemnity cost orders against any party or lawyer who is responsible for, who aids and abets any discovery default
 - (c) in respect of compensation for financial or other loss arising out of the discovery default
 - (d) for adjournment of the proceedings with costs of that adjournment to be borne by the person responsible for the need to adjourn the proceedings
 - (e) to revoke or suspend the right to initiate or continue an examination for discovery
 - (f) for the purpose of preventing a party from taking steps in the proceeding
 - (g) in respect of any adverse inference arising from the discovery default
 - (h) in respect of facts taken as established for the purposes of litigation
 - (i) for the purpose of compelling any person to give evidence, including by way of affidavit, in connection with the discovery default
 - (j) for the purpose of prohibiting or limiting the use of documents in evidence
 - (k) for the purpose of dismissing any part of the claim or defence of a party responsible for the discovery default
 - (l) in respect of disciplinary action against any lawyer who is responsible for, who aids and abets any discovery default.

Unless the court orders otherwise, any party may cross-examine or seek leave to conduct an oral examination of the deponent of an affidavit of documents prepared by or on behalf of any other party if there is a reasonable basis for the belief that the other party may be misinterpreting its discovery obligations or failing to disclose discoverable documents.

90. In order to reduce the costs of discovery, the court should have discretion to make orders limiting the costs able to be (a) charged by a law practice to a client or (b) recovered by a party from another party, to costs which represent the actual cost to the law practice of carrying out such work as may be necessary in relation to discovery (with a reasonable allowance for overheads but excluding a mark up or profit component being added to such actual costs) or otherwise as the court sees fit.
91. Provision should be made for limitation on the disclosure of copies of documents.
92. A short plain English explanation of disclosure obligations should be prepared by the Legal Services Commissioner (or other appropriate entity). This should be provided to the parties and circulated to employees or agents who are asked to assist in the discovery process.

5.7 ISSUES FOR FURTHER CONSIDERATION

During our review a number of additional concerns were raised about certain aspects of the discovery process. We have not given detailed consideration to all of these issues in this phase of the commission's review. Accordingly, we have not formulated any recommendations to specifically address the concerns raised. We have listed these issues below to enable them to be considered in the second phase of the commission's civil justice review or by the proposed Civil Justice Council.

5.7.1 Privilege

Slater & Gordon expressed concern about the abuse of privilege in connection with discovery of documents. It suggested that key documents were often 'not revealed or their production delayed through abusive claims for privilege'.⁷⁷⁷ Slater & Gordon claimed that the difficulty with current procedure is that the onus is placed on the party disputing a claim of privilege without having seen the document or documents in question. The following reforms have been mooted to address these problems:

- Parties should be required to particularise the individual documents in respect of which privilege is claimed, sufficient to enable the document to be identified.
- Privilege could be disputed on application supported by affidavit.
- In the event of a dispute, the parties and their lawyers ought to be required to outline the claim in respect of each document by way of affidavit.
- The disputed claims would be heard by a judge (other than the judge case managing the proceeding).
- The onus of proof would rest on the party claiming privilege.

The commission's recommendation for the introduction of special masters or referees should assist the court to manage privilege issues and disputes.

⁷⁷⁷ As outlined at AIIA (2007) above n 441.



5.7.2 Non-party discovery

Several submissions raised concerns about non-party discovery mechanisms in the Victorian courts. TurksLegal, the TAC, Victoria Legal Aid and the Law Institute submitted that procedures for obtaining discovery from third parties are cumbersome, slow and costly. Allens Arthur Robinson expressed frustration because:

- non-parties do not follow timelines
- non-parties' legal representatives are protective of information held by the non-party
- it is difficult to determine who the relevant parties are.⁷⁷⁸

TurksLegal favoured reform along the lines of the approach in the Queensland Uniform Civil Procedure Rules.⁷⁷⁹

The TAC stated that historically the Supreme Court has refused to issue pre-hearing subpoenas under rule 42.10 until a date for the hearing has been fixed. It lamented that this inhibited early settlement or effective early mediation. The TAC recognised that the new Order 42A rules in the Supreme Court, which came into force on 1 February 2007,⁷⁸⁰ may go some way towards addressing these concerns.⁷⁸¹ However, it noted that the new process is premised on paper production and believes that parties should be encouraged to produce documents electronically. It suggested that remote access and secure portal mechanisms would be more efficient and cost effective.⁷⁸²

The AMA made a detailed submission about the discovery problems faced by medical practitioners. The AMA said medical practitioners should be paid for their costs of complying with subpoenas. It also suggested that the nature of medical practice raises difficulties in relation to the need to store and retain medical records. The AMA called for the following by way of practical solutions:

- the establishment of an independent digital registry to be used by all courts which could store subpoenaed documents
- a court officer to attend the non-party's premises to electronically store the information
- costs to be borne by the issuing party
- courts to consider the electronic lodgement of material
- medical practitioners to be permitted to provide a photocopy or a digital copy of an original record (at the expense of the issuing party)
- a procedure be introduced to ensure that subpoenaed documents are returned as soon as possible
- a definition of 'medical records' should act as a checklist or guide for the types of documents held about a particular person.⁷⁸³

The Law Institute supported these proposals, and argued that some of them should apply generally to subpoenas. It recommended further reform to rule 42.10 to:

- extend the operation of the rule for production of documents before trial, regardless of whether an actual trial date has been set
- require a party who files a subpoena to immediately serve a copy on all other parties to the proceeding
- extend the plaintiff's right to first inspection to all subpoenaed material and enable the plaintiff's lawyer to photocopy the document to obtain instructions. In addition, the period of time in which the plaintiff has to object to inspection should be extended.

5.7.3 Interrogatories

Several submissions expressed frustration about unnecessary and repetitive interrogatories.⁷⁸⁴

Legal Aid contended that interrogatories are an inefficient mechanism for clarifying the issues in a dispute. It observed that precedent questions are often used which are not sufficiently relevant to the particular case, or that parties often evade giving meaningful answers to interrogatories.⁷⁸⁵

Hollows Lawyers also argued that interrogatories are expensive and of little benefit. The commission was asked to look in detail at the difference in the interrogatory systems in Victoria and NSW (where interrogatories are not permitted in personal injury cases) and to seek uniformity.⁷⁸⁶

The TAC did not believe that interrogatories should be available as of right. It observed that interrogatories are ‘frequently word processed or litigation support software precedent documents with standard questions in relation to liability that have equally standard responses’. It suggested that they do nothing to advance the resolution of the dispute while having a significant cost disadvantage. The TAC favoured requiring a party to demonstrate why an interrogatory should be provided and confining interrogatories to specific issues.⁷⁸⁷ Slater & Gordon argued that there should be standard rules which provide that interrogatories should only be allowed with the leave of the court.⁷⁸⁸

WorkCover submitted that interrogatories should remain at the discretion of the court, as this would enable the court to pre-empt the use of pro-forma interrogatories and would give lawyers the opportunity to give careful consideration to the need to interrogate. It also suggested that interrogatories should not be allowed where they seek to cover matters which have already been the subject of affidavits sworn by the parties.⁷⁸⁹

One submission proposed that costs should not be awarded to the applicant in an interrogatory motion unless it can be shown that the respondent’s failure causes substantial prejudice to the applicant.⁷⁹⁰

The Magistrates’ Court advised that although parties have an unrestricted right to interrogatories they are rarely used in that jurisdiction.⁷⁹¹

5.7.4 Pleadings

Concerns were raised about imprecise pleadings and the consequent impact on discovery.

The Group submission argued that there are serious problems in relation to pleadings that have an impact on the range of documents required to be discovered. Because claims are often couched in very general terms this necessitates wide ranging discovery.⁷⁹² The Magistrates’ Court also observed that the pleadings process is often unsuccessful, which in turn results in an unsuccessful discovery process.⁷⁹³ Some further concerns expressed about pleadings are noted in Chapter 12.

5.7.5 Electronic discovery

We received numerous detailed submissions about electronic discovery.

The Group submission set out some of the differences between electronic material and hard copy files and noted issues that are specific to locating and identifying electronic material.⁷⁹⁴ The submission argued that the discovery process must be carefully tailored to the circumstances of each individual matter and the types of data likely to be involved. It stressed that sufficient time should be made available in the interlocutory timetable to deal with electronic discovery issues. It also suggested parties should be required to reach informed agreements on a range of electronic discovery issues such as the scope of searches and recovery of inaccessible data.

The Group submission suggested that large scale discovery would be aided by the establishment of specialist management lists. It recommended that practitioners in that list be accredited in electronic discovery. Although Telstra and the Australian Corporate Lawyers Association generally supported the Group submission in relation to electronic discovery, they did not support introducing an accreditation requirement. Instead, they noted that most practitioners develop expertise in electronic discovery through experience.⁷⁹⁵

<e.law> Australia provided a detailed submission to the commission on electronic discovery issues and the use of technology in trials. The submission supported the use of electronic discovery and electronic courtrooms. It suggested consultation should be undertaken with technology support teams within law firms and with litigation lawyers, to develop a standard for the preparation and exchange of electronic material for discovery.⁷⁹⁶

The commission has proposed (in Chapter 5) that the County Court could consider adopting the Supreme Court’s approach to e-litigation. The Magistrates’ Court might also consider this in more complex cases. We note that that consideration will also need to be given to the forthcoming Federal Court electronic discovery rules and practice note, which were discussed earlier in this chapter. QBE submitted that it is important that, where possible, Victoria’s discovery obligations do not conflict with those rules.⁷⁹⁷

778 Ibid.

779 Submission CP 41 (TurksLegal & AXA Australia).

780 *Supreme Court (General Civil Procedure) Rules 2005 r 42A* now enables a party by service of a subpoena to compel a person not a party to produce documents for evidence before the hearing of an interlocutory or other application in the proceeding or the trial.

781 Submission CP 37 (Transport Accident Commission).

782 Submission CP 37 (Transport Accident Commission).

783 Submission CP 24 (Australian Medical Association).

784 See also Submission CP 1 (Confidential, permission to quote granted 17 January 2008).

785 Submission CP 31 (Victoria Legal Aid).

786 Submission CP 52 (Hollows Lawyers).

787 Submission CP 37 (Transport Accident Commission).

788 Submission CP 20 (Slater & Gordon).

789 Submission CP 48 (Victorian WorkCover Authority).

790 Submission CP 14 (Confidential, permission to quote granted 13 February 2008).

791 Submission CP 55 (Magistrates’ Court of Victoria).

792 Submission CP 47 (the Group submission).

793 Submission CP 55 (Magistrates’ Court of Victoria).

794 Submission CP 47 (the Group submission).

795 Submission CP 46 (Telstra) and CP 47 (Australian Corporate Lawyers Association).

796 Submission CP 19 (<e.law> Australia Pty Ltd). <e.law>’s submission considers the Supreme Court Practice Note 1 of 2002, *Guidelines for the Use of Technology in Civil Matters*. A new practice note has since been issued by the Supreme Court, namely, *Practice Note 1* (2007) above n 384.

797 Submission ED2 17 (QBE Insurance Group).

Chapter 6

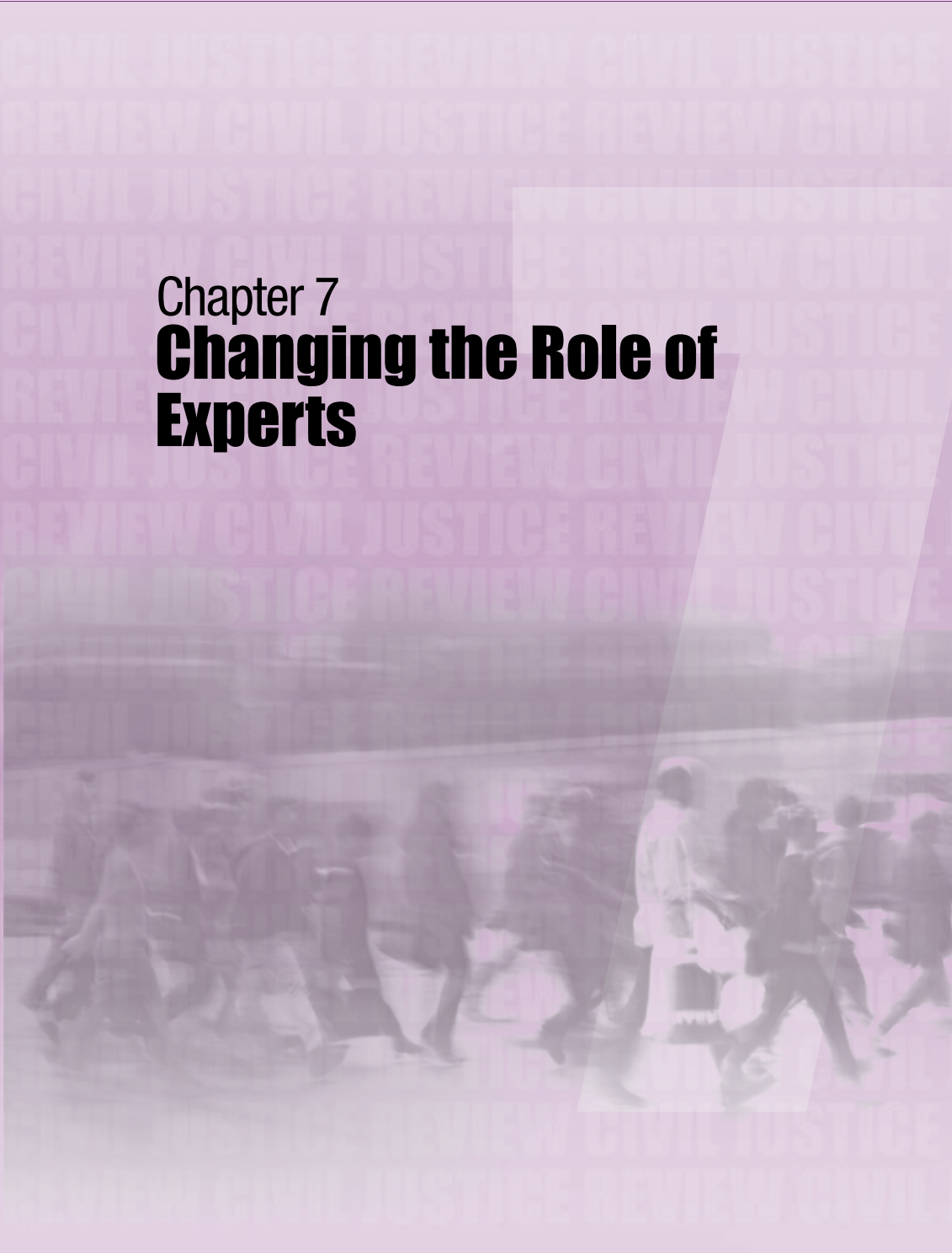
Getting to the Truth Earlier and Easier



5.7.6 Use of documents in different proceedings

Further consideration should be given to whether there is any need to reform the existing laws or procedural rules relating to discovery in order to facilitate use of documents produced by a party in one proceeding in other proceedings involving that party as a means of reducing costs and delay.

Chapter 7
**Changing the Role of
Experts**



Changing the Role of Experts

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Often plaintiffs and defendants are subject to extra trauma and expense as a result of days and days of argument over the competing views of so-called experts.¹

1. INTRODUCTION

Expert evidence has recently been the subject of extensive enquiry and reports in a number of jurisdictions. These reviews have led to the introduction of a new framework for the judicial control of expert evidence to improve the usefulness of and address the high costs of such evidence.

New strategies for controlling expert evidence include:

- limiting the number of expert witnesses to be called
- appointing single joint experts (that is, one expert appointed jointly by the parties, sometimes referred to as the 'parties' single joint expert') or court-appointed experts
- permitting experts to give evidence concurrently in a panel format (often referred to as 'concurrent evidence' or 'hot-tubbing'), or in a particular order
- introducing a code of conduct to be observed by experts
- formalising processes for instructing experts and presenting experts' reports
- requiring disclosure of fee arrangements
- imposing sanctions on experts for misconduct
- developing training programs for expert witnesses.

Victoria has implemented some, but not many, of these measures.

Reviews by the NSW Law Reform Commission² (NSWLRC) and the NSW Attorney General's Civil Procedure Working Party³ chaired by Justice Hamilton have culminated in new procedural rules, and a revised Code of Conduct for Expert Witnesses, which came into force recently in NSW. Those rules promote flexibility and court control, and provide greater scope for the court to make directions in relation to the use of expert evidence.

In view of the extensive review and consultation carried out in NSW and given the desirability of increased harmonisation in procedural rules both within and between jurisdictions, we recommend that the recently introduced NSW provisions should be adopted in Victoria, with some minor modifications, as discussed at the end of this chapter. Before setting out our recommendations, we examine the comments made in submissions, consultations and relevant literature, and review developments in other jurisdictions.

2. THE PROBLEMS WITH EXPERT EVIDENCE

The reforms mentioned above aim to address the many concerns expressed by the judiciary and profession about the quality and cost of expert evidence. Justice Peter McClellan of the NSW Supreme Court believes 'the effective and fair use of expert evidence is one of the most significant issues which the courts now face',⁴ and unless courts are able to address perceived problems, the community's confidence in the legal system will be fundamentally undermined.⁵

Justice Stuart Morris, former President of VCAT, describes the problem from a judicial perspective:

Judges harbour a strong anxiety about the use of expert evidence in court, which can be explained in several ways. Questions have been raised about levels of competence, lack of training and accreditation of so-called experts. Expert evidence may also unduly prolong litigation without significantly assisting the trier of fact, leading to a higher cost of litigation. And an over-reliance on expert evidence may shift the burden of responsibility from the bench to the witness box.⁶

Expert evidence has been identified as one of the principal sources of expense, complexity and delay in civil proceedings.⁷ This is in part the result of parties calling multiple experts in jurisdictions 'where limits have not been placed upon the number of experts who can be qualified and called. Quantity rather than quality of opinion has often been the norm'.⁸

- 1 Rob Hulls, quoted in Matthew Coghlan, 'Lawyers Defend Use of Expert Witnesses', *Australian Financial Review* (Sydney), 26 May 2006, 59.
- 2 New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005).
- 3 NSW Attorney General's Working Party on Civil Procedure, *Reference on Expert Witnesses*, Report (2006).
- 4 Justice Peter McClellan, 'The New Rules' (Speech delivered at the Expert Witness Institute of Australia and The University of Sydney Faculty of Law Conference, Sydney, 16 April 2007).
- 5 Justice Peter McClellan, 'Concurrent Expert Evidence' (Speech delivered at Medicine and Law Conference, Law Institute of Victoria, Melbourne, 29 November 2007).
- 6 Justice Stuart Morris, 'Getting Real about Expert Evidence' (Paper presented at the National Environment Law Association Limited, 2005 National Conference, Canberra, 13–15 July 2005).
- 7 New South Wales Chief Justice Spigelman, quoted in Jonathan Pearlman, 'Courts Rebel on Paid Evidence', *Sydney Morning Herald* (Sydney), 6 September 2004 <www.smh.com.au/article/s/2004/09/05/1094322646202.html?from=storylhsat9March2007> at 10 April 2008; Justice James Wood, 'Expert Witnesses—The New Era' (Speech delivered at the 8th Greek Australian International Legal and Medical Conference, Corfu, June 2001); Coghlan (2006) above n 1.
- 8 Justice Wood (2001) above n 7.

Changing the Role of Experts



Perhaps the most common criticism of expert witnesses is that they are overly partisan and fail to provide the court with a neutral or independent opinion:

When expert witnesses give paid evidence, they are part of a system that is an affront to common sense. Experts paid by parties to court cases may be unbiased but they are not disinterested. So, it should be no surprise that the evidence presented by expert witnesses is in most cases entirely predictable: it favours those who pay their bills.⁹

The NSWLRC describes this phenomenon as ‘adversarial bias’, and identifies three varieties:¹⁰

- deliberate partisanship—‘an expert deliberately tailors evidence to support his or her client’¹¹
- unconscious partisanship—‘the expert does not intentionally mislead the court, but is influenced by the situation to give evidence in a way that supports the client’¹²
- selection bias—‘litigants choose as their expert witnesses persons whose views are known to support their case’.¹³

It is alleged in some cases that the bias displayed by an expert is serious enough to amount to professional misconduct. Such misconduct may involve experts giving evidence about matters beyond their expertise or deliberately falsifying their evidence. Whether the court can or should be able to impose sanctions on expert witnesses in such cases remains controversial.¹⁴

The actual extent of adversarial bias is, of course, almost impossible to calculate. However, in 1999 the Australasian Institute of Judicial Administration released a report entitled *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*. The report contained the findings of research conducted by Ian Freckelton, Prasuna Reddy and Hugh Selby, who sent a questionnaire (incorporating multiple choice questions and space for ‘free-form comments’) to all 478 Australian judges, and received 244 responses.¹⁵ Some of the key findings of that study were:

- 68.1 per cent of respondents said they ‘occasionally encountered’ expert bias, while 27.59 per cent said they encountered it ‘often’;¹⁶ 34.84 per cent of respondents (the largest proportion) felt expert bias to be the ‘single most serious’ of the seven categories of expert evidence problems that were put to them.¹⁷
- 76.72 per cent of respondents said they were ‘occasionally’ faced with evidence that they found difficult to understand, while 14.22 per cent had this experience ‘often’.
- An overwhelming percentage of respondents thought expert reports, evaluated in terms of ‘usefulness’, were in general ‘reasonable’, ‘good’ or ‘very good’.¹⁸ However, 53.39 per cent of respondents thought lawyers played a role in settling the content of experts’ reports ‘occasionally’, while 17.8 per cent of respondents thought this occurred ‘often’.¹⁹
- 54.34 per cent of respondents thought that more use of court-appointed experts would be ‘helpful’, while 33.79 per cent thought it would not be helpful.²⁰ Some judges indicated that they regarded the judicial appointment of an expert as ‘trespassing into the arena of litigation’.²¹

Adversarial bias, as the term suggests, can also be seen as an inevitable feature of a system in which courts must arrive at decisions about complex questions of fact based on the competing views of opposing experts. Justice Davies, former Justice of Appeal of the Supreme Court of Queensland, believes such a system only serves to further polarise the opinions of expert witnesses and to induce adversarial bias. This in turn obscures the real questions in dispute, makes the judge’s role more difficult and potentially favours more articulate and positive witnesses.²² The solution to this problem, Justice Davies argues, is to have the court appoint its own expert witnesses.

Apart from being a problem for judges, the culture of adversarialism is also said to have the effect of deterring experts from participating in litigation:

It is commonplace to hear people who have much to offer to the resolution of disputes—doctors, engineers, valuers, accountants and others—comment that they will not subject themselves to a process which is not efficient in using their time. It is equally common to be told that the person will not give evidence in a forum where the fundamental purpose of the participants is to win the argument rather than seek the truth. A process

*in which they perceive other experts to be telling 'half truths' and which confines them to answering only 'the questions asked' depriving them of the opportunity, as they see it, to accurately inform the court, is rejected as 'game playing' and a waste of their time.*²³

Justice Garry Downes, President of the Australian Administrative Appeals Tribunal, on the other hand, denies that adversarial bias in expert evidence is a significant problem:

*My impression from 32 years of examining expert witnesses and four years of listening to them is that, with very few exceptions, they do not deliberately mould their evidence to suit the case of the party retaining them. When they do, this emerges. They certainly expose the matters which support the hypothesis which most favours the party calling them. But, provided the matters are legitimate and that any doubt as to the strength of the hypothesis is exposed, I see nothing wrong with this. Indeed, I think this process is one of the great values of the traditional approach to expert evidence. It is exposing different expert points of view for evaluation by the judge.*²⁴

On this basis, Justice Downes advises adopting caution in relation to the use of single and court-appointed experts, because 'there is no way of testing whether the conclusions are correct'.²⁵

Submissions to our review also raised problems encountered with expert evidence.

The Victorian Bar identified the following key problems with expert evidence:

- There is a problem with 'adversarial bias' in expert witnesses. This seems to be a perennial issue and steps have already been taken through the implementation of the Expert Witness Codes of Conduct in Form 44A of the Supreme Court Rules. However, the question still arises whether any further measures need to be undertaken to reduce partisan and unethical expert witnesses.
- The use of experts in the courts is excessive. At present, there is no restriction on the number of expert witnesses that a party can call to support its cause. Also, in multi-party proceedings, a number of parties who adopt the same expert position can call a number of expert witnesses, who are all essentially supporting the same opinion. This creates potential for considerable costs and delay.
- There is a problem with how expert witnesses can give evidence and be cross-examined in the most effective and flexible way at trial.²⁶

The question of bias was also raised by the TAC, the Victorian WorkCover Authority and the Legal Practitioners' Liability Committee. The TAC submitted that the rules governing expert witnesses 'require urgent reform' and noted the measures introduced in NSW to address adversarial bias.²⁷ WorkCover supported the need for review to 'address the requirement of expert objectivity' and for any changes to the rules to reinforce the expectation that 'the expert is required to assist the court and not a party to the litigation'. WorkCover also submitted that:

Addressing the court's approach to the use of expert evidence might also go some way towards addressing the increasing costs of the provision of expert evidence and/or curtail the obtaining of 'expert' opinion as a matter of process and with little or no focus on evidentiary need or quality of content.

The Legal Practitioners' Liability Committee submitted that the 'most prevalent problem is the expert who acts more as an advocate for their client's case, than providing independent expert evidence'.

A number of judges told us that in their opinion adversarial bias on the part of expert witnesses remains a problem, despite the code of conduct.²⁸

Judge Wodak submitted that:

in certain types of civil litigation, the role of expert testimony, and thus the cost of it, is very significant in both relative and absolute terms. Litigation involving allegations of, for example, professional negligence, product liability, patents, and intellectual property all invariably involve expert evidence. Sometimes the expert evidence consumes much of the time of the trials. The cost of obtaining expert reports has become a very substantial burden for parties. At times, there is difficulty encountered in obtaining expert opinion. That is a difficulty sometimes experienced more by one side than the other, for example, by plaintiffs in medical negligence litigation.

- 9 Chris Merritt, 'Put Paid to the Hired Witnesses', *The Australian* (Sydney), 3 February 2006, 7.
- 10 NSWLRC (2005) above n 2, 71–4. For a further analysis of expert witness bias, see Deirdre M Dwyer, 'The Causes and Manifestations of Bias in Civil Expert Evidence' (2007) 26 *Civil Justice Quarterly* 425.
- 11 NSWLRC (2005) above n 2, [5.8].
- 12 *Ibid* [5.10].
- 13 *Ibid* [5.13].
- 14 For further discussion, see Chapter 3, in particular the examination of *Meadow v General Medical Council* [2006] EWCA Civ 390, [2007] 1 All ER 1.
- 15 Ian Freckelton, P Reddy and H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (1999) Appendix A.
- 16 *Ibid* 25–6.
- 17 *Ibid* 37.
- 18 *Ibid* 41.
- 19 *Ibid* 40.
- 20 *Ibid* 102.
- 21 *Ibid* 103.
- 22 The Hon Geoffrey Davies, 'Court Appointed Experts' (2005) volume 5 (1), *Queensland University of Technology Law and Justice Journal* 89.
- 23 Justice Peter McClellan, 'Contemporary Challenges for the Justice System—Expert Evidence' (Speech delivered at Australian Lawyers' Alliance Medical Law Conference, Sydney, 20 July 2007).
- 24 Justice Garry Downes AM, 'Problems with Expert Evidence: Are Single or Court-appointed Experts the Answer?' (2006) 15 *Journal of Judicial Administration*, 185, 186.
- 25 *Ibid* 185, 187. See also Gary Edmond, 'After Objectivity: Expert Evidence and Procedural Reform' (2003) 25 *Sydney Law Review*, 131.
- 26 Submission CP 33 (Victorian Bar).
- 27 Submission CP 37 (Transport Accident Commission).
- 28 Supreme Court consultations, 2 August 2007, 9 August 2007. This view was also expressed in two confidential submissions.



Submissions from the Victorian Aboriginal Legal Service, Turks Legal and AXA Australia, and Deacons also raised the problem of the cost and delay associated with expert evidence. The Supreme Court noted that 'courts are ultimately reliant upon the integrity of experts',²⁹ and that enhancing case management may help to ensure their integrity and reduce delays. The Law Institute of Victoria acknowledged that 'changes to the way in which expert evidence is presented to the court in civil proceedings could offer significant cost and time savings and increase the integrity of the evidence'.

Concerns were also raised about delays experienced in obtaining reports from medical experts in some personal injury matters. Such delays can cause additional procedural delays and expense, for example if a mediation has to be postponed because a relevant medical report has not been obtained.³⁰

The Mental Health Legal Centre expressed concern about the problem of access to experts such as psychiatrists:

For too many people this is a 'threshold' requirement that cannot be met because of cost and difficulty finding practitioners with sufficient accessibility, recognised expertise and independence.

The Forensic Accounting Special Interest Group of the Institute of Chartered Accountants in Australia called for greater consistency between the rules of the Supreme, County and Magistrates' Courts, as well as between Victoria and other Australian jurisdictions, although it did not see a strong case for change in terms of the obligations of expert witnesses.³¹ The Magistrates' Court advised that it did not encounter problems with expert witnesses because the lower value of the claims within its jurisdiction renders it uneconomic for parties to call an excessive number of experts.³²

On the other hand, some people believe the drive to reform the rules relating to expert evidence is misplaced. Law firm Maurice Blackburn submitted that there was no reason to change the rules governing expert evidence, especially in the area of medical negligence litigation, given the high rate of pre-trial settlement of such matters. The firm also noted the potential for additional demands on experts to deter them from continuing to offer their services for litigation. The Law Institute of Victoria also warned against the introduction of further pre-trial requirements for expert evidence:

Given that the vast majority of litigation is resolved prior to trial, it is important to avoid imposing rules which will increase costs and delays without ultimately improving the outcome for the parties.³³

Dr Gary Edmond provided the commission with his extensive submission to the NSWLRC's expert evidence reference in February 2005. In it Dr Edmond noted there is little empirical information on expert evidence, such that 'the extent and seriousness of problems associated with [it] is largely unknown' and much debate 'is predicated upon anecdote and speculation and focussed exclusively on trials'.³⁴ Dr Edmond also argued:

Bias, objectivity, impartiality, neutrality and independence are not particularly precise or analytically reliable concepts when it comes to assessing expert evidence. They tend to be used descriptively, and retrospectively, to privilege certain subjects and opinions. All experts (and expertise) are more [or] less aligned, subjective, interested, biased and dependent ...³⁵

Controversy, disputes and disagreement are largely intractable features of modern scientific activity. For many commentators and proponents of law reform there seems to be a suggestion that legal contexts produce partisan pressures. While legal contexts may contribute to ... polarisation and alignment ... few commentators recognise that there are no neutral procedures or mechanisms for resolving expert disagreement.³⁶

Similarly, in its submission to the NSWLRC the Forensic Accounting Group challenged the assumption that adversarial bias is pervasive. The submission noted that it is not surprising that litigants tend to adduce expert evidence that supports their cases, and that divergences of opinion can sometimes be traced to differences in the 'facts' provided to experts in the first place. It emphasised that complex fields of knowledge do not lend themselves to attempts to formulate definitive answers:

in our experience, the existence of different and contrary views among experts frequently reflects the complexity of the matters on which they are asked to opine. Complex questions can often be addressed from a number of different perspectives,

each perspective offering a different solution. Where this occurs, it would be wrong to conclude that one or both experts are biased.

The existence of complexity in relation to matters in which experts may offer an opinion creates a particular challenge for those non-experts called upon to assess the evidence of the experts. How can a person who, by definition, does not have personal knowledge of the matter on which expert evidence is called, identify the cause of a difference in views between two or more experts? To conclude that such a difference is caused by bias or partisanship would be to rule out what in our opinion is the more likely answer: genuine differences of opinion held by reasonable unbiased experts and brought about by the complexity of the matter under consideration.

3. CURRENT LAW IN VICTORIA

Order 44 of the Supreme and County Court civil procedure rules and Order 19 of the Magistrates' Court rules govern the use of expert evidence in Victorian courts. Order 33 of the Supreme and County Court rules and Order 19A of the Magistrates' Court rules deal specifically with medical examinations and exchange of medical reports in personal injury matters.

Leave of the court is not required to adduce expert evidence. Parties seeking to adduce expert evidence do, however, have to serve on each other party a copy of any expert's report before trial.³⁷ The court generally makes orders at an early directions hearing fixing dates for the exchange of expert reports.³⁸

In the Supreme and County Courts parties must provide their experts with a copy of the expert witness code of conduct, and in turn experts must acknowledge they have read the code and agree to be bound by it.³⁹ The code of conduct (form 44A) stipulates that an expert 'has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness' and 'is not an advocate for a party'. It also specifies the form and content required of experts' reports. The court may direct expert witnesses to confer and to provide a joint report specifying the extent to which they agree and reasons for any disagreement.⁴⁰ The Supreme Court's Commercial List Practice Note indicates that the court may give directions that expert evidence be presented in a panel format, and may limit the number of experts each party may call.⁴¹

In personal injury matters, plaintiffs must serve on defendants those medical reports which the plaintiff intends to tender at trial.⁴² Defendants must likewise serve on the plaintiff those reports they intend to tender at trial, but they must also serve on the plaintiff any medical report prepared as a result of an examination of the plaintiff, regardless of whether they intend to use it at trial.⁴³ The Law Institute of Victoria, the Victorian Bar Council and AMA Victoria have developed Guidelines for Cooperation between Doctors and Lawyers.⁴⁴ The guidelines aim to promote cooperation between lawyers and doctors in the preparation of expert medical reports, medical examination of plaintiffs and attendance at court by doctors to give expert evidence.⁴⁵ The County Court may refer medical questions arising in proceedings under the *Accident Compensation Act 1985* to a medical panel for opinion.⁴⁶ The court must treat such opinion as final and conclusive.⁴⁷

Parties are only compelled to disclose an expert's report if they intend to adduce evidence from the expert at trial. Legal professional privilege attaches to an expert's report obtained by a party for the purpose of the litigation if the party does not intend to call that expert to give opinion evidence.⁴⁸

In the Commercial List of the Supreme Court:

*A party will be taken to have waived for the purpose of the proceeding legal professional privilege to the content of a witness statement which has been served in that proceeding. Legal professional privilege attaching to the content of an unserved draft witness statement, including an expert's witness statement, is not taken to be waived merely by the filing and service of the final form of such witness statement.*⁴⁹

There is no code of conduct for expert witnesses in the Magistrates' Court, nor do the Magistrates' Court rules set out that experts have a duty to assist the court. However, the Magistrates' Court is in the process of drafting a new set of rules which would, if implemented, align its rules with those of the County and Supreme Courts, and therefore incorporate a code of conduct.

- 29 Submission CP 59 (Supreme Court of Victoria), 41.
- 30 County Court Medical List Users Meeting, 29 November 2006.
- 31 Submission CP 26 (Forensic Accounting Special Interest Group, Institute of Chartered Accountants in Australia).
- 32 Submission CP 56 (Magistrates' Court of Victoria).
- 33 Submission CP 19 (Law Institute of Victoria).
- 34 G Edmond, *Expert Evidence*, Submission to the NSW Law Reform Commission (2005) 6.
- 35 *Ibid* 12.
- 36 *Ibid* 15.
- 37 *Supreme Court (General Civil Procedure) Rules 2005* r 44.03.
- 38 See Supreme Court Commercial List Practice Note No 4 of 2004 (as amended by Practice Note No 6 of 2007); County Court Applications Division, General Division and Serious Injury Division Practice Note PNCI 4-2007; County Court Operation and Management of the Business List, Commercial and Miscellaneous Divisions (Melbourne Registry) Practice Note PNCI 5-2007; County Court Damages (Medical) Division Consolidated Practice Note Revised 26 November 2007.
- 39 *Supreme Court (General Civil Procedure) Rules 2005* r 44.03.
- 40 *Supreme Court (General Civil Procedure) Rules 2005* r 44.06.
- 41 Supreme Court Commercial List Practice Note No 4 of 2004 (as amended by Practice Note No 6 of 2007) [11.4], [15.4].
- 42 *Supreme Court (General Civil Procedure) Rules 2005* r 33.07.
- 43 *Supreme Court (General Civil Procedure) Rules 2005* r 33.08.
- 44 Law Institute of Victoria, *Guidelines for Co-operation Between Doctors and Lawyers*, (as at 22 March 2005) provided to the commission by the Law Institute on 5 October 2006.
- 45 The equivalent guidelines in operation in SA state that a doctor should provide a medical report to a solicitor within one month of the examination. No such time frame is provided for in the Victorian guidelines. See Australian Medical Association (South Australia) and the Law Society of South Australia, *The Medico-legal Joint Statement* (May 2005) [3.11].
- 46 *Accident Compensation Act 1985* (Vic) s 45.
- 47 *Accident Compensation Act 1985* (Vic) s 68.
- 48 See Neil Williams, *Civil Procedure Victoria* [44.01.40].
- 49 Supreme Court Commercial List Practice Note No 4 of 2004 (as amended by Practice Note No 6 of 2007) [10.4].

There are no express sanctions for breach of the code of conduct by an expert witness. However, as discussed in Chapter 3, there are a number of potential sanctions experts may face if they breach their duties to the court.⁵⁰

4. DEVELOPMENTS IN OTHER JURISDICTIONS

The commission has reviewed proposals and measures developed and implemented in other jurisdictions, both in Australia and overseas, to address widespread concerns about expert evidence.

4.1 NEW SOUTH WALES

4.1.1 NSW Uniform Civil Procedure Rules

Following a report by the NSWLRC and its subsequent review by the NSW Working Party on Civil Procedure (both summarised below), new rules governing expert evidence were introduced in NSW in 2006.⁵¹ They are currently in force under Part 31 of the *Uniform Civil Procedure Rules 2005* and their key features are as follows:

- **A purposes clause:** the main purposes of the expert evidence rules are to ensure the court has control over the giving of expert evidence, to restrict expert evidence to that which is reasonably required, to avoid unnecessary costs associated with retaining experts, to enable a single expert to be engaged by the parties or appointed by the court and to declare the duty of an expert witness in relation to the court (r 31.17).
- **A requirement to seek directions:** parties are required to seek directions from the court if they intend to adduce expert evidence at trial (r 31.19).
- **A detailed list of the court's power to give directions:** the court may give such directions as it considers appropriate regarding the use of expert evidence, including a list of 10 specified directions such as limiting the number of expert witnesses who may be called to give evidence on a particular question or refusing to allow expert evidence to be permitted on a specified issue (r 31.20).
- **Disclosure of contingency fee arrangements:** experts providing their services on a contingent or deferred fee basis must disclose that information in any report they prepare for the proceedings (r 31.22).
- **Additional duties on expert witnesses:** experts must read, agree to be bound by and comply with the code of conduct (r 31.23). Schedule 7 sets out two new duties: a duty of the expert witness to comply with a direction of the court, and a duty to work cooperatively with other expert witnesses.
- **Detailed rules providing for conferences and joint reports:** the court may direct witnesses to confer and endeavour to reach agreement on any matters in issue, to prepare a joint report specifying matters agreed and not agreed, and to base any joint report on specified facts or assumptions of fact (rr 31.24–31.26).
- **More extensive requirements for experts' reports:** rule 31.27 and schedule 7 also list what must be included in an expert's report. These requirements are more extensive than those currently in force in Victoria.⁵²
- **An extensive list of options for the manner in which expert evidence is to be given:** the court may give detailed directions to facilitate, among other things, concurrent expert evidence (hot-tubbing) or the giving of evidence in a particular sequence (r 31.35).
- **A power to appoint single joint experts:** the court has a discretion to order that an expert be engaged jointly by the parties, and may make directions in respect of the selection and engagement of the parties' single expert, the instructions to be given to the expert, and the remuneration of the expert. The parties may seek clarification of the single expert's report, may cross-examine the expert, but are not entitled to adduce other expert evidence unless the court orders otherwise (rr 31.37–31.45).

- **A power to appoint court-appointed experts:** the court has a discretion to appoint an expert to inquire into and report on an issue on behalf of the court, and may make directions to facilitate such an appointment. The parties may seek clarification of the expert's report, may cross-examine the expert, but are not entitled to adduce any other expert evidence without leave of the court (rr 31.46–31.54).

The Practice Notes for the Supreme Court's General Case Management List and the Commercial List and Technology and Construction List encourage practitioners to make arrangements for the use of single experts.⁵³ The General Case Management List Practice Note describes the types of directions the court is likely to make in personal injuries matters. The court will limit the number of experts to be called by a party to one medical expert in any speciality (unless there is a substantial issue as to ongoing disability), and two experts of any other kind. All expert evidence will be given concurrently unless there is a single expert appointed or the court grants leave for the evidence to be presented in a different way. A single expert will generally be appointed to give opinion evidence in relation to each head of damages.

The experience of the NSW expert evidence rules has been the subject of recent commentary and analysis. In relation to court-appointed experts, Justice Hamilton has observed that 'in my experience, albeit limited, of the use of a court appointed expert, the production of a well reasoned expert report will often quell disputation, even in cases which [are] otherwise embattled'.⁵⁴ Single experts are often used in the Supreme Court for issues such as cost of care in personal injury matters.⁵⁵ Single and court-appointed experts and concurrent evidence are routinely and successfully used in the NSW Land and Environment Court.⁵⁶

Justice Hamilton also reports that in the NSW Supreme Court the conference provisions are widely used and the hot-tubbing provisions increasingly so. Justice Peter McClellan reports that concurrent evidence 'has met with overwhelming support from the experts and their professional organisations' because they are 'better able to communicate their opinions ... and more effectively respond to the views of the other expert or experts'.⁵⁷ Another benefit is the increased opportunity for experts to express their views in their own words, given the more reduced scope for questioning by counsel.⁵⁸ Justice McClellan also estimates that taking expert evidence concurrently can reduce the time required for such evidence by 50–80 per cent.⁵⁹ He describes the process as follows:

*The experts are sworn together and using the summary of matters upon which they disagree the judge settles an agenda with counsel for a directed discussion, chaired by the judge, of the issues the subject of disagreement. The process provides an opportunity for each expert to place their view before the court on a particular issue or sub-issue. The experts are encouraged to ask and answer questions of each other. Counsel may also ask questions during the course of the discussion to ensure that an expert's opinion is fully articulated and tested against a contrary opinion. At the end of the process the judge will ask a general question to ensure that all of the experts have had the opportunity of fully explaining their position.*⁶⁰

Dr Gary Edmond also acknowledges that the introduction of the new expert evidence rules appears to have produced beneficial results, such as the quick resolution of some complex cases and the potential to improve communication and comprehension.⁶¹ However, he argues that, in light of the equivocal data available on its impact on cost and delay, 'when it comes to improving access to justice by systematically reducing costs, expediting legal processes or producing more reliable evidence, the benefits of concurrent evidence have yet to be demonstrated'.⁶²

4.1.2 NSWLRC Report (2005)

In 2005, the NSWLRC released a report entitled *Expert Witnesses*.⁶³ The report traced the historical development of current practices for expert evidence, and set out recent developments in NSW and elsewhere before examining specific issues in detail.

Permission rule

The NSWLRC recommended that leave of the court be required for the introduction of all expert evidence in civil proceedings (the permission rule).⁶⁴ The purpose of the permission rule, it felt, would be to make it clear that the courts have 'comprehensive control over expert evidence',⁶⁵ and the existence of the rule would encourage the courts to develop (through practice decisions and/or practice notes) cohesive policies in this connection.⁶⁶

50 See also NSWLRC (2005) above n 2, [9.75].

51 *Uniform Civil Procedure Rules (Amendment No 12) 2006* (NSW).

52 See *Supreme Court (General Civil Procedure) Rules 2005* r 44.01(3); *County Court Rules of Procedure in Civil Proceedings 1999* r 44.01(3). There is no code of conduct in the *Magistrates' Court Civil Procedure Rules 1999*.

53 Practice Note No SC CL5 Supreme Court Common Law Division—General Case Management List (5 December 2006); Practice Note SC Eq 3 Supreme Court Equity Division—Commercial List and Technology and Construction List (30 July 2007).

54 Justice John Hamilton, 'Containment of Costs: Litigation and Arbitration' (Paper presented at IAMA National Conference, Adelaide, 1–3 June 2007) 19.

55 Justice McClellan (20 July 2007) above n 23.

56 See Justice Peter Biscoe, 'Expert Witnesses: Recent Developments in NSW' 2007 114 *Australian Construction Law Newsletter* 38; Justice McClellan (29 November 2007) above n 5.

57 Justice McClellan (20 July 2007) above n 23. See also Justice Garry Downes, 'Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience' (Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004).

58 Justice McClellan (29 November 2007) above n 5.

59 *Ibid.*

60 *Ibid.*

61 Gary Edmond, 'Secrets of the "Hot Tub": Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia' (2008) 27(1) *Civil Justice Quarterly* 51, 67, 69.

62 *Ibid.* 76.

63 NSWLRC (2005) above n 2.

64 *Ibid.* [R6.1]. A similar recommendation was made by Lord Woolf.

65 *Ibid.* [6.11].

66 *Ibid.* [6.8], [6.10].



Disclosure

No recommendations were made about disclosure of experts' reports. The NSWLRC felt that the existing rules about the disclosure of reports to be relied on at trial were adequate.⁶⁷ It declined to recommend an extension of the rules to render all experts' reports obtained for litigation purposes (whether intended to be relied on at trial or not) subject to disclosure obligations, noting that such a move could encourage litigants to 'shop' for extreme opinions to avoid the prospect of obtaining a (counterproductive) adverse report.⁶⁸ Moreover, the NSWLRC did not support the introduction of a requirement that all written communications between litigants or their representatives and experts be disclosed, citing practical difficulties and the potential for such a requirement to be ineffectual in practice.⁶⁹

Consultation between experts

The NSWLRC noted that the Uniform Civil Procedure Rules already made provision for courts to direct expert witnesses to confer and produce a joint report setting out 'matters agreed and matters not agreed and reasons for any disagreement',⁷⁰ and most submissions 'supported the requirement for experts to consult before hearing'.⁷¹ Some concern was raised as to the real benefits of expert conferences and their potential to be unproductive or dominated by one or other of the participants.⁷² The NSWLRC did not propose any change to the rules,⁷³ but emphasised that courts would often need to give detailed directions about the conduct of a conference in a particular case.⁷⁴

Concurrent evidence

The NSWLRC noted that the use of concurrent evidence in the Land and Environment Court⁷⁵ had been well received:

*This procedure has met with overwhelming support from experts and professional organisations. They find that, not being confined to answering questions put by the advocates, they are better able to communicate their opinions to the court. They believe that there is less risk that their opinions will be distorted by the advocates' skills. It is also significantly more efficient in time. Evidence that may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary.*⁷⁶

The NSWLRC considered that the use of concurrent evidence could have potential benefits in a broader range of cases:

*The process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field. The experience in the Land and Environment Court indicates that the nature of the evidence is affected by this feature, and that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination. Similarly, it seems that the questions may tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination.*⁷⁷

However, it emphasised that:

- it was difficult to predict whether the widespread implementation of concurrent evidence procedures would produce tangible benefits
- their usefulness would depend on 'the skills, preparedness and cooperation of the lawyers and experts involved' as well as the skill of individual judges in 'structuring and [maintaining] control of the discussion'.⁷⁸

For these reasons, the NSWLRC declined to recommend that the Rules give concurrent evidence preference over more traditional methods,⁷⁹ and concluded that the courts' powers under the Rules⁸⁰ were sufficient to enable the use of the former in appropriate cases.⁸¹

Joint expert witnesses and court-appointed witnesses

The report devoted considerable attention to the issue of single joint expert witnesses. The NSWLRC outlined the basic concept in this way:

In general terms, the idea of the joint expert witness is to limit the expert evidence on a question arising in the proceedings to that of one expert witness, selected jointly by

*the parties affected, or, if they fail to agree, in a manner directed by the court. If a party is dissatisfied with the expert's evidence, the court has discretion to allow that party to adduce other expert evidence ... The primary objective of a joint expert witness is to assist the court in reaching just decisions by promoting unbiased and representative expert opinion. Another important objective is to minimise costs and delay to the parties and to the court by limiting the volume of expert evidence that would otherwise be presented.*⁸²

It noted that:

*Evaluations of the Woolf reforms have found the concept of the single joint expert witness to be working well, and that judges, lawyers and parties to proceedings have displayed a willingness to use single experts, especially in matters that do not involve substantial amounts and where the issues are relatively uncontroversial.*⁸³

The NSWLRC considered possible advantages to the use of single joint experts. It considered that the use of single joint experts could mitigate 'significant problems [that existed] with the way expert evidence comes before the court'.⁸⁴ In particular, it noted:

- the potential exists for expert evidence to become less expensive and time-consuming.⁸⁵ However, there was a dearth of 'systematic evidence' on this point,⁸⁶ and in some circumstances (in particular contentious ones) there was the potential for the use of a joint expert witness to generate expense and other difficulties.⁸⁷
- the potential exists to 'reduce bias inherent in the adversarial system' and eliminate the problem of polarisation, therefore improving the calibre of evidence placed before the court.⁸⁸ Adversarial bias and polarisation was a 'serious problem', although there existed no valid measure of its extent.⁸⁹ It was noted that:

*The jointly selected expert will not have been selected because he or she supports a party's cause, and, after selection, will be under no pressure to support one party rather than another. Agreement on the selection will be reached only if both sides regard the candidate as being well qualified, and as being a fair and reasonable professional. The court is then likely to have the benefit of sound professional testimony, reasonably representative of thinking in the discipline.*⁹⁰

Against these putative benefits were weighed a number of potential problems:

- Some submissions warned that parties would be likely to engage 'shadow' experts 'to brief them on the relevant issues and assist with cross-examination of the single expert', which would frustrate the intention of reducing the cost of expert evidence.⁹¹
- Some submissions expressed concern that the use of single joint experts would suppress legitimate differences of opinion (both methodological and substantive) that might exist in particular fields of expertise.⁹² However, the NSWLRC felt that this was 'an objection to the appointment of a joint expert witness in [contentious] cases, not an objection to the court having the option of a joint expert witness in appropriate cases'.⁹³ The character of the field of knowledge in question was a matter that courts could take into account in determining whether or not to approve the use of a joint expert.⁹⁴
- Some consider that the use of joint expert witnesses involves an abdication of the court's decision-making function, as 'the prospect of a judge rejecting the evidence of a joint expert witness is so unlikely that the process effectively transfers the decision-making authority on the issue requiring expert opinion from the judge to the expert'.⁹⁵ The NSWLRC rejected this idea, noting that the parties retained the power to interrogate and make submissions on the evidence of the expert, and call their own experts if the circumstances warrant it, and that 'the ultimate decision' as to the significance of the evidence remains with the court.⁹⁶

Having taken these considerations into account, the NSWLRC recommended that the use of joint expert witnesses be added to the 'array of options' available to a court in endeavouring to 'facilitate the just, quick and cheap resolution of the real issues in the proceedings'.⁹⁷ The NSWLRC did not feel that the joint expert witness ought to supersede the court-appointed witness, citing 'fundamental differences between the two roles'.⁹⁸ Rather, it felt that the court-appointed witness

67 Ibid [6.20]. See Uniform Civil Procedure Rules 31.28 (NSW).

68 NSWLRC (2005) above n 2, [6.32]–[6.33].

69 Ibid [6.25]–[6.28].

70 See Uniform Civil Procedure Rules 31.24 (NSW).

71 NSWLRC (2005) above n 2, [6.36].

72 Ibid [6.37]–[6.38], [6.41].

73 Ibid [6.45].

74 Ibid [6.43]–[6.44].

75 See *ibid* [6.50] as to the procedure adopted.

76 Ibid [6.51].

77 Ibid [6.56].

78 Ibid [6.57]–[6.58].

79 Ibid [6.61].

80 See Uniform Civil Procedure Rules 31.35.

81 NSWLRC (2005) above n 2, [6.62].

82 Ibid [7.6]–[7.7].

83 Ibid [7.4], citing Department of Constitutional Affairs, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (2001) [4.16]; Department of Constitutional Affairs, *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (2002) [4.21], [4.27]–[4.28].

84 NSWLRC (2005) above n 2, [7.33].

85 Ibid [7.9].

86 Ibid [7.21].

87 Ibid [7.23].

88 Ibid [7.9], [7.14].

89 Ibid [7.20].

90 Ibid [7.19].

91 Ibid [7.9].

92 Ibid [7.9], [7.29].

93 Ibid [7.30].

94 Ibid [7.30], [7.32].

95 Ibid [7.27], citing R Scott, 'Court Appointed Experts' (1995) 25 *Queensland Law Society Journal* 87.

96 NSWLRC (2005) above n 2, [7.28].

97 Ibid [7.33], [7.1].

98 Ibid [7.36].



should be retained, 'with amendments designed to restore the core concept of enabling the court to obtain expert assistance which it believes that it would not otherwise receive,⁹⁹ and providing unequivocally for the court's control over that process'.¹⁰⁰

The NSWLRC considered it essential that the role and purpose of the joint expert witness be clearly delineated.¹⁰¹ In particular, its recommendations included that:

- the court is empowered to order that a joint expert witness be engaged, with the witness to be selected by agreement between the parties or, failing this, by direction of the court
- the joint expert witness must consent to being selected
- the parties are prohibited from seeking the opinion of any persons proposed as a joint expert witness before the selection is made
- the parties must agree on instructions to be given to the joint expert and, failing agreement, each must serve on their opponent the instructions separately given to the expert, who will then provide a report responding to the alternative instructions
- the expert is permitted to seek the court's assistance or directions on performance of the role, but must put the issue to the parties' legal representative before doing so
- the parties are responsible for providing the expert with the relevant code of conduct
- the expert is required to send the report on the issue or issues to the parties, who can seek clarifications in writing
- the parties affected by the expert evidence are permitted to examine, cross-examine or re-examine the expert as the court directs
- the parties are not permitted to adduce separate expert evidence on a matter submitted to the joint expert without leave
- the parties are jointly and severally liable for the expert's fees, but the court may direct when and by whom the fees are to be paid and retains its powers in relation to costs.¹⁰²

The NSWLRC also recommended some minor clarifications in relation to court-appointed experts, the main purpose of which was to differentiate them from joint experts.¹⁰³

Ethical witness conduct

The NSWLRC proposed some small changes to the existing code of conduct for expert witnesses, and proposed that it be made explicit that the code applied to joint experts and court-appointed experts as well as experts engaged by the parties.¹⁰⁴

The NSWLRC also gave extensive consideration to the engagement of experts pursuant to 'contingency fees', such that 'the amount payable to the expert is directly affected by the outcome of the proceedings'.¹⁰⁵ Some submissions were hostile to such arrangements, noting their potential to compromise the independence of the expert and encourage speculative litigation, whereas others considered them necessary to ensure access to justice.¹⁰⁶ It was noted that there was no 'reliable evidence about their prevalence'.¹⁰⁷ The NSWLRC felt that outright prohibition of contingency fee arrangements would be difficult to enforce and could preclude some meritorious cases from being run (although it had no data as to how often this might occur).¹⁰⁸ It stated:

Rather than prohibition, a more constructive approach for the law to take would be to ensure, as far as possible, that the terms on which experts are engaged are made known to the other parties and to the court. This would make it possible for a party to cross-examine the expert (and perhaps other witnesses) in order to bring out the funding arrangements and their potential implications. Submissions could then be made as to the effect of the funding arrangements on the objectivity of the expert. It would be open to a party to submit that, in all the circumstances, the funding arrangements should lead the court to attach little weight to the expert's evidence, or even, perhaps, disregard it entirely.¹⁰⁹

Accordingly, the NSWLRC recommended that all fee arrangements for the engagement of experts be disclosed to all parties and the court.¹¹⁰

With regard to unprofessional behaviour on the part of expert witnesses, the NSWLRC considered that existing ‘sanctions’ were sufficient but felt that ‘there should be a requirement, by rule of practice note, that expert witnesses be notified of the sanctions available in the case of inappropriate or unprofessional conduct’.¹¹¹

4.1.3 NSW Working Party on Civil Procedure (2006)

The NSW Attorney General’s Working Party on Civil Procedure, chaired by Justice John Hamilton, was charged with considering and responding to the recommendations of the NSWLRC. Its report¹¹² emphasised the value of flexible procedures for experts and stressed (endorsing Lord Woolf and the NSWLRC) the importance of courts maintaining control over the use of expert evidence.¹¹³

Permission rule

The Working Party expressed doubts about the direct transplanted of Lord Woolf’s permission rule into the NSW Rules:

*As I understand it, the [permission] rule was cast in this form by Lord Woolf as a shock tactic to confront the situation he saw in England in the 1990s of partiality and proliferation of expert witnesses in court proceedings ... [However, it must be remembered that there is a] difference in context between England in 1995 and NSW in 2006. We have in that time strengthened case management powers enormously. We have introduced rules that compel the exchange of expert reports and the use of reports as evidence in chief; that prescribe a code of conduct for expert witnesses; that provide for compulsory conferences between experts; and (although this is beyond what is dealt with in the Report) that provide for ‘hot tubbing’ at the trial, that is, the giving of evidence concurrently by more than one expert ... The shock of the new is not as necessary in NSW in 2006 as it was in England in 1995.*¹¹⁴

The Working Party reported ‘no support at all’ among its members for the introduction of a permission rule,¹¹⁵ noting ‘two principal objections’:

- a permission rule would undercut the adversarial basis of litigation, as ‘[w]e still have a system where it is the responsibility and prerogative of the parties to assemble the evidence and shape their own cases’¹¹⁶
- the need for flexible procedures ‘is at odds with the notion that, at some unspecified stage of the proceedings, there should be an application which should produce an answer, yea or nay, as to whether any, and if so, what expert evidence should be given’.¹¹⁷

However, the Working Party did consider ‘that there should be a rule that ensures control by the court of the giving of expert evidence in all proceedings’.¹¹⁸ It was of the opinion that expert evidence could be dealt with in the course of ordinary directions hearings and case management conferences, and therefore felt that it would suffice to place an obligation on the parties to seek directions about expert witnesses.¹¹⁹

*That rule should provide (1) that any party to whom it is or becomes apparent that expert evidence will be given at a trial must promptly seek the directions of the court in this regard; (2) that such directions may be sought at a directions hearing or case management conference, but, if there is no appropriate directions hearing or case management conference available, then directions must be sought by notice of motion.*¹²⁰

Directions (which the Working Party felt should be non-exhaustively specified in the Rules) could:

- require that no expert evidence be given on a particular subject
- limit the subjects on which expert evidence could be given
- limit the number of experts permissible on a particular subject
- provide for the appointment of a single expert witness or a court appointed expert
- mandate the holding of conferences of experts.¹²¹

Joint expert witnesses and court-appointed witnesses

The Working Party agreed with the NSWLRC’s conclusion that joint expert witnesses and court-appointed witnesses should be differentiated under the Uniform Rules: ‘it is desirable that there should

99 Eg, because ‘the parties do not intend to call evidence at all on the matter in question, or where the court believes the expert evidence the parties have called or will call has been or will be unsatisfactory’: *ibid* [7.38].

100 *Ibid* [7.56].

101 *Ibid* [7.60].

102 *Ibid* [8.6]–[8.26], [R8.1].

103 *Ibid* [R8.2].

104 *Ibid* [9.15]–[9.19].

105 *Ibid* [9.20].

106 *Ibid* [9.24]–[9.25].

107 *Ibid* [9.27].

108 *Ibid* [9.36]–[9.37].

109 *Ibid* [9.38].

110 *Ibid* [9.41], [R9.2].

111 *Ibid* [9.76], [R9.3].

112 NSW Attorney General’s Working Party (2006) above n 3.

113 *Ibid* [4]–[5]. Lord Woolf’s recommendations about reform of the UK civil justice system are discussed later in this chapter.

114 NSW Attorney General’s Working Party (2006) above n 3, [6]–[7].

115 *Ibid* [12].

116 *Ibid* [10].

117 *Ibid* [11].

118 *Ibid* [12].

119 *Ibid* [14].

120 *Ibid* [14].

121 *Ibid* [16].



be the ability to appoint an expert essentially under the control of the court as well as one essentially under the control of the parties'.¹²² It endorsed the NSWLRC's recommendations about the procedures that ought to govern parties' single experts and court-appointed experts.¹²³

Ethical witness conduct

The Working Party was in partial agreement with the NSWLRC in relation to its proposed changes to the Uniform Civil Procedure Rules expert witness code of conduct, but favoured the retention of a provision about the form of expert reports, to which it felt it was important to draw the experts' attention.¹²⁴

There was some disagreement about the disclosure of fee arrangements. The Working Party concluded that disclosure should only be required as a matter of course in the case of speculative or deferred fees,¹²⁵ acknowledging the view that 'the routine revelation of fees in all cases is an unwarranted intrusion which may lead to a diminution in the pool of persons available as expert witnesses'.¹²⁶

With regard to sanctions, the Working Party questioned whether it was 'appropriate to wave under the nose of prospective witnesses in every case the existing sanctions, which in general terms one would have thought that they are aware of in any event'.¹²⁷

The Working Party also disputed the NSWLRC's view that costs orders could be made against experts, which raised the further question of whether such an order *ought* to be available. It concluded:

*The total experience in litigation of the members of the Working Party ran to centuries rather than years or even decades. None of the members, to his or her recollection, had in fact been involved in any case where an order for costs against an expert witness appeared to be called for. Balancing the rarity of occasions for the imposition of the sanction against the risk of its availability causing experts to withdraw themselves from giving reports, the Working Party has come to the conclusion that a costs sanction should not be provided for at this stage.*¹²⁸

4.2 QUEENSLAND

The *Uniform Civil Procedure Rules 1999* (Qld) state that a 'witness giving evidence in a proceeding as an expert has a duty to assist the court' and that that duty 'overrides any obligation the witness may have to any party to the proceeding or to any person who is liable for the expert's fee or expenses'.¹²⁹ The rules set out the requirements for the form and content of an expert's report¹³⁰ and permit the court to direct experts to meet and confer.¹³¹

One of the main purposes of the rules is to 'ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court'.¹³² An expert may give evidence in a proceeding if:

- the parties have agreed in writing that expert evidence may help in resolving a substantial issue in the proceeding and jointly appoint an expert to prepare a report
- a party applies to the court for an order that an expert be appointed
- the court of its own motion appoints an expert.¹³³

The rules provide for the appointment of an expert *before* proceedings have been commenced.¹³⁴ If the parties agree that there is a dispute between them that will probably result in a proceeding, and obtaining expert evidence immediately may help in resolving a substantial issue in the dispute, they may jointly appoint an expert to give an opinion on an issue. Alternatively, they may apply to the court for the appointment of an expert. If the dispute proceeds to litigation, that expert is the only person who may give evidence on that issue, unless the court otherwise orders.¹³⁵

Similarly, if an expert is appointed jointly by the parties after proceedings have been commenced, that expert is the only expert who may give evidence on the issue, unless the court orders otherwise.¹³⁶ If a party applies to the court for the appointment of an expert, the party must file supporting material, including the names of at least three experts qualified to give evidence on the issue in question.

When considering whether to appoint an expert on the application of a party or of its own initiative, the court may consider:

- (a) the complexity of the issue; and
- (b) the impact of the appointment on the costs of the proceeding; and

- (c) the likelihood of the appointment expediting or delaying the trial of the proceeding; and
- (d) the interests of justice; and
- (e) any other relevant consideration.¹³⁷

Justice Davies has expressed the view that the model implemented in these rules will eliminate adversarial bias, and because the parties are able to select the expert (either before or after proceedings are commenced) they will be disinclined to appoint their own 'shadow' experts, which will therefore reduce costs.¹³⁸ The model also provides for the appointment of an additional expert where there are genuine differences of opinion, which could counter some of the criticisms otherwise able to be levelled at the concept of single joint experts.

4.3 SOUTH AUSTRALIA

In South Australia expert reports to be relied on in the Supreme and District Courts must comply with Practice Direction 5.4, which requires experts to acknowledge they have read and understood the relevant rules and practice direction.¹³⁹ The Practice Direction states that experts' overriding duty is to assist the court and that they are not advocates for a party. It also specifies the form and content of experts' reports and sets out the consequences of failure to comply with the rules or practice direction:

- The court may adjourn the hearing or trial at the cost of the party in default or that party's lawyer.
- The court may direct that evidence from that expert not be adduced by that party at the trial in the action.
- The trial judge may award costs to the other parties or reduce costs otherwise to be awarded to the party in default.¹⁴⁰

Parties seeking to rely on expert evidence at trial must, on request from another party, disclose 'details of any fee or benefit the expert has received, or is or will become entitled to receive, for preparation of the report or giving evidence on behalf of the party' as well as 'details of any communications relevant to the preparation of the report...between the party, or any representative of the party, and the expert; and...between the expert and another expert'.¹⁴¹ The court may relieve a party from disclosing such information.¹⁴²

The Rules also make provision for shadow experts.¹⁴³ A shadow expert is an expert 'engaged to assist with the preparation of a party's case but not on the basis that the expert will, or may, give evidence at the trial'. If a party engages a shadow expert, the party must notify the other parties of the engagement and the details of the expert.

The rules permit the court to make directions in respect of expert evidence, including that the expert witnesses confer and report on the matters on which they agree and disagree, and that they give evidence in a particular sequence or concurrently.¹⁴⁴

The South Australian Magistrates' Court has power 'to refer any question arising in an action for investigation and report by an expert in the relevant field'.¹⁴⁵ Such an expert becomes an officer of the court and may exercise any powers the court delegates.¹⁴⁶ When making a report, an expert appointed by the court must give the following undertaking:

*I undertake to limit my expressions of opinion to matters within my expertise, to disclose the factual material upon which my opinions are based, and to be fair, unbiased and accurate in my expression of opinion.*¹⁴⁷

Andrew Cannon, Deputy Chief Magistrate and Senior Mining Warden, South Australia, has researched and reported on the success of the court's practice of referring technical matters (such as building disputes) to experts:

*The experience of the South Australian Magistrates Court is that it can be of great benefit to a court to have its own expertise available. This can be used to assist parties to settle their disputes at the outset, to prepare for an efficient trial, to assist the court to understand technical issues during a trial, and to provide expert opinions to the court to decide technical issues ... Costs are saved and the court now deals effectively with complicated technical issues. Technical issues now rarely cause cases to become bogged down in technical complexities that result in the parties being denied a prompt, affordable remedy.*¹⁴⁸

- 122 Ibid [22].
- 123 Ibid [23] (NSWLRC Recommendation 8.1), [24] (NSWLRC Recommendation 8.2).
- 124 Ibid [25].
- 125 Ibid [28].
- 126 Ibid [27].
- 127 Ibid [32].
- 128 Ibid [33].
- 129 *Uniform Civil Procedure Rules 1999* (Qld) r 426.
- 130 *Uniform Civil Procedure Rules 1999* (Qld) r 428.
- 131 *Uniform Civil Procedure Rules 1999* (Qld) r 429B.
- 132 *Uniform Civil Procedure Rules 1999* (Qld) r 423.
- 133 *Uniform Civil Procedure Rules 1999* (Qld) r 429G.
- 134 *Uniform Civil Procedure Rules 1999* (Qld) rr 429R, 429S.
- 135 *Uniform Civil Procedure Rules 1999* (Qld) r 429R.
- 136 *Uniform Civil Procedure Rules 1999* (Qld) r 429H(6).
- 137 *Uniform Civil Procedure Rules 1999* (Qld) r 429K(1).
- 138 The Hon G L Davies, 'Court Appointed Experts' (2005) *Queensland University of Technology Law and Justice Journal*, 89, 99.
- 139 *Supreme Court Civil Rules 2006* (SA) r 160(3)(e), Supreme Court of South Australia, *Practice Directions to Operate in Conjunction with the Supreme Court Civil Rules 2006*. The relevant District Court rules and practice direction are identical: *District Court Civil Rules 2006* (SA) r 160(3) (e), District Court of South Australia, *Practice Directions to Operate in Conjunction with the District Court Civil Rules 2006*.
- 140 Supreme Court of South Australia, *Practice Directions to Operate in Conjunction with the Supreme Court Civil Rules 2006* [5.4.6].
- 141 *Supreme Court Civil Rules 2006* (SA) r 160(5).
- 142 *Supreme Court Civil Rules 2006* (SA) r 160(6).
- 143 *Supreme Court Civil Rules 2006* (SA) r 161.
- 144 *Supreme Court Civil Rules 2006* (SA) r 213.
- 145 *Magistrates Court Act 1991* (SA) s 29.
- 146 *Magistrates Court Act 1991* (SA) s 29(2).
- 147 *Magistrates Court (Civil) Rules 1992* (SA) r 69A(2).
- 148 Andrew Cannon SM, 'Courts Using Their Own Experts' 2004 13(3) *Journal of Judicial Administration* 182, 194.



4.4 WESTERN AUSTRALIA

4.4.1 Law Reform Commission of Western Australia Report (1999)

In 1999, the Law Reform Commission of Western Australia (LRCWA) released the final report on its review of the criminal and civil justice system.¹⁴⁹ The LRCWA noted that ‘uncontrolled expert evidence has been described as one of the major costs in civil litigation’¹⁵⁰ and stated that ‘the lack of impartiality of witnesses is a major problem’.¹⁵¹ It recommended, among other things:

- that courts encourage a shift towards use of an agreed single expert (using costs sanctions against uncooperative parties)¹⁵²
- that parties be able to submit questions to opponents’ experts prior to trial, on payment of ‘reasonable costs’¹⁵³
- formalisation of a rule that no expert evidence be adduced without leave¹⁵⁴
- enhanced case management, with the potential for a case manager to require the parties to endeavour to agree to certain facts prior to the engagement of an expert or experts, for the purpose of avoiding later controversies¹⁵⁵
- maintenance of a distinction between ‘expert advisers’ (who have assisted one of the parties in a partisan manner pre trial) and ‘expert witnesses’ (who provide ‘independent’ evidence at trial), with expert witnesses being required to disclose (and able to be cross-examined on) the nature of their relationship with a litigant.¹⁵⁶
- that legal professional privilege be waived in relation to expert witnesses called at trial.¹⁵⁷

The LRCWA noted:

*The desired result is not that solicitors engage two experts—one as adviser and one as witness—but that solicitors ensure that in most cases their communications with the expert will not compromise the expert’s independence. This in turn may lead to a culture where agreement between the parties is more realistic and where the existing adversarial nature of expert evidence is altered so that experts will be more likely to reach agreement.*¹⁵⁸

- that where the parties fail to appoint a single expert, their partisan experts be required to respond to each others’ statements, noting points of agreement and disagreement, and detailing reasons for the latter¹⁵⁹
- that costs be disallowed for experts’ reports of excessive length¹⁶⁰
- that, for the purpose of reinforcing experts’ obligation to assist the court, experts’ reports contain a declaration to the effect that all relevant and appropriate matters have been enquired into and documented¹⁶¹
- establishment of an Expert Evidence Forum for the purpose of encouraging communication between judges, practitioners, litigants and experts themselves.¹⁶²

The LRCWA noted that it was dissuaded from suggesting more adventurous reforms for expert evidence because of a lack of data about ‘the use and cost of expert witnesses in litigation’ and ‘strong stakeholder opposition’.¹⁶³

4.4.2 Western Australia Rules

The rules provide that no expert evidence may be adduced at trial without leave of the court.¹⁶⁴ The court may give directions in respect of the expert evidence sought to be adduced, and the general form of order made by the court requires the experts to confer for the purpose of narrowing or removing any differences between them.¹⁶⁵ The court may limit the number of experts able to be called to give evidence at trial.¹⁶⁶

The Practice Direction for cases in the Commercial and Managed Cases List of the Supreme Court of Western Australia encourages more flexibility in relation to expert evidence:

*Innovative approaches to expert evidence will be encouraged, including the parties conferring with a view to agreeing some or all of the facts upon which the expert opinions are to be based and the questions to be addressed to the experts. Conferral of experts prior to trial will normally be ordered. The taking of expert evidence concurrently at trial will be considered.*¹⁶⁷

A code of conduct applies to any experts engaged to give evidence in a proceeding in the District Court of Western Australia.¹⁶⁸ The code states that expert witnesses have an overriding duty to assist the court, and are not advocates for the parties retaining their services. It also sets out requirements for the form and content of experts' reports and for conferences between experts. Expert witnesses must certify that they have read and complied with the code of conduct.¹⁶⁹

4.5 COMMONWEALTH

4.5.1 Australian Law Reform Commission: Managing Justice (2000)

In 2000, the ALRC released *Managing Justice: A Review of the Federal Civil Justice System*, which made several recommendations 'aimed at ensuring decision-makers are provided with independent expert evidence, presented or interpreted in the manner that best assists them to make high quality decisions'.¹⁷⁰

The ALRC noted that federal courts and tribunals have 'well developed rules and procedures enabling them to control the use of expert evidence',¹⁷¹ and that most practitioners and experts consulted felt that their powers were adequate to the task.¹⁷² The major criticism respondents made in connection with expert evidence related to

*particular case types where parties routinely use the same expert witnesses who become associated as 'applicant' or 'respondent' experts. These criticisms were most applicable to proceedings in the AAT.*¹⁷³

The ALRC felt that the Family Court and the Administrative Appeals Tribunal ought to adopt guidelines similar to those in operation in the Federal Court, which were under review at the time of writing, but in general explained the overriding obligation of an expert witness.¹⁷⁴ It also favoured the development of codes of practice for expert witnesses by the Australian Council of Professions and its constituent bodies, reasoning that these organisations 'have a stake in protecting the integrity of the body of knowledge and understanding from which their expertise is drawn'.¹⁷⁵

The ALRC considered, but rejected, the idea of a general moderation of legal professional privilege between experts and the parties responsible for engaging them, noting that 'it would be unfair to expose experts to cross-examination on the contents of draft reports (which may be no more than the 'preliminary musings' of the expert). Experts often modify their views as they carry out more work'.¹⁷⁶

The ALRC expressed support for 'the further development of Federal Court and tribunal prehearing conferences and other communication and contact between relevant experts',¹⁷⁷ and endorsed the LRCWA's proposal to permit pre-trial interrogation of an opponent's expert.¹⁷⁸

The ALRC noted that the use of agreed/appointed experts had the potential to produce costs savings, but that this object would be frustrated if litigants felt compelled to call their own witnesses to 'supplement or refute' their opinions.¹⁷⁹ It felt that the use of agreed experts should be encouraged, in particular where an 'established area of knowledge' was concerned.¹⁸⁰ It favoured the integration into the case management process of opportunities for the parties to consider settling on a single expert.¹⁸¹ On the subject of court-appointed experts, the ALRC noted that some submissions expressed 'strong reservations', although in general judges saw the practice in a more favourable light than practitioners.¹⁸²

The ALRC also discussed the practice of taking the evidence of experts in panels, or hot-tubbing. It noted that hot-tubbing had produced some efficiencies in the Federal Court and the Administrative Appeals Tribunal, although reservations were expressed in submissions about its appropriateness in all cases. It considered that 'it is desirable for courts and tribunals to have rules or practice directions expressly empowering, and therefore encouraging, judges and tribunal members to direct that expert evidence be adduced in a panel format' and made a recommendation to that effect.¹⁸³

4.5.2 Federal Court of Australia Rules

Where parties intend to call expert witnesses to give opinion evidence, the Federal Court may direct that the experts confer, that they give evidence concurrently or file statements or affidavits indicating whether, after hearing the factual evidence, they adhere to or wish to modify their original opinion.¹⁸⁴

Further, the court has issued guidelines for experts preparing reports and/or giving evidence in a proceeding before it.¹⁸⁵ The guidelines are not binding, but the court expects cooperation from legal practitioners and experts in their implementation. They are intended, in part, to 'assist individual

149 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System: Final Report*, Report No 92 (1999).

150 *Ibid* [22.1].

151 *Ibid* [22.2].

152 *Ibid* [22.3], [R238], [R239].

153 *Ibid* [22.4], [R240].

154 *Ibid* [22.5], [R241].

155 *Ibid* [22.6], [R242].

156 *Ibid* [R243].

157 *Ibid* [R245].

158 *Ibid* [22.13].

159 *Ibid* [R246].

160 *Ibid* [22.16]–[22.17], [R247].

161 *Ibid* [22.17], [R248].

162 *Ibid* [22.23], [R250].

163 *Ibid* [22.24].

164 *Rules of Supreme Court 1971* (WA) r 36A.03(2).

165 Supreme Court of Western Australia, Notice to Practitioners 1 May 1996, Form 80.

166 *Rules of Supreme Court 1971* (WA) r 36A.05.

167 Supreme Court of Western Australia, Practice Direction No 4 of 2006.

168 District Court of Western Australia, Consolidated Practice Direction—Civil Jurisdiction, Annexure C.

169 *District Court Rules 2005* (WA) r 48.

170 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [6.74].

171 *Ibid* [6.78].

172 *Ibid* [6.79]; see also [6.93].

173 *Ibid* [6.78].

174 *Ibid* [R64].

175 *Ibid* [6.101], [R65].

176 *Ibid* [6.84].

177 *Ibid* [R62].

178 *Ibid* [R63].

179 *Ibid* [6.102].

180 *Ibid* [6.104], [R66].

181 *Ibid* [6.112].

182 *Ibid* [6.109], [6.111].

183 *Ibid* [6.112], [R67].

184 Federal Court Rules (Cth) r 34A.03.

185 Federal Court of Australia, Practice Direction, *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (6 June 2007).



expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them'.¹⁸⁶ The guidelines, which must be provided to any expert witness retained by a party, set out the matters to be addressed in the expert's report, and stipulate that:

- 1.1 *An expert witness has an overriding duty to assist the court on matters relevant to the expert's area of expertise.*
- 1.2 *An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential.*
- 1.3 *An expert witness's paramount duty is to the court and not to the person retaining the expert.*¹⁸⁷

The guidelines also ask that any pre-existing relationship between the expert and the party seeking to proffer the expert as a witness be disclosed.

The Federal Court has the power to appoint an expert as a court expert to enquire into and report on a question that arises in the proceeding.¹⁸⁸ Where such an expert is appointed, the parties are entitled to adduce evidence of one other expert if they give prior notice of their intention to do so.¹⁸⁹ The court also has the power to appoint, with the consent of the parties, an expert to assist the court on any issue of fact or opinion identified by the court.¹⁹⁰ An expert assistant submits a report to the court and the parties but does not give evidence in the proceeding.¹⁹¹ The parties have an opportunity to comment on the expert assistant's report, and may apply to adduce evidence in relation to an issue identified in the report.

4.6 UNITED KINGDOM

4.6.1 Woolf Report (1996)

Lord Woolf had significant concerns about the incumbent regime for the use of expert evidence in litigation, arguing that it was susceptible to misuse.¹⁹² However, his interim proposals on the topic, which focused on mitigating 'the full-scale adversarial use of expert evidence', met with substantial resistance during the consultation stage.¹⁹³ Members of the legal profession, he opined, were 'reluctant to give up their adversarial weapons'.¹⁹⁴

Lord Woolf nevertheless felt reform to be needed if 'more focused use of expert evidence' was to be achieved, and premised his recommendations on the notion that 'the expert's function is to assist the court'.¹⁹⁵ He considered that there was no uniform solution appropriate to all cases, and that the preferable approach would be a 'flexible' one built around enhanced court control and broad management discretion. In particular, he proposed:

- making leave of the court a condition precedent to the adducing of expert evidence, such that the court can, for example
 - prevent the use of expert evidence, in general or on particular subjects
 - limit the number of experts whose evidence the parties can adduce
 - direct the use of a single expert on a particular matter
 - require an expert's evidence to be given in writing
 - direct the parties' experts to meet and produce a joint report noting matters of agreement and divergence¹⁹⁶
- limiting the scope of expert evidence in fast-track cases (eg, one expert per side per field of expertise, global limit of two experts per side, preference for single joint experts, no oral evidence)¹⁹⁷
- the entrenchment of the use of single experts as a legitimate case management tool, of particular value in matters involving 'established areas of knowledge'. Lord Woolf noted that there was significant opposition within the legal profession to the use of single experts, but felt that judges should consider whether it was appropriate in a particular matter.¹⁹⁸ He noted that:

*A single expert is much more likely to be impartial than a party's expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up.*¹⁹⁹

- encouraging, in matters where each of the parties appoints its own expert, cooperation between the experts (if possible resulting in a joint report),²⁰⁰ and empowering the court to direct that a (private) meeting of experts be conducted (on such terms as the court sees fit) for the purpose of narrowing the outstanding issues²⁰¹
- reinforcing the idea that the paramount obligation of experts is to assist the court in an impartial manner, through:
 - the formal recognition of experts' overriding duty to the court²⁰²
 - a requirement that experts' written reports be addressed to the court, where prepared for the purposes of contemplated litigation²⁰³
 - a requirement that written instructions (and/or a précis of written instructions) given to experts be annexed to their reports for the reports to be admissible²⁰⁴
 - a requirement that experts' reports be accompanied by a declaration that the experts understand their obligations and have fulfilled certain requirements in preparing their reports²⁰⁵
- granting a power to the court 'to order that an examination or tests should be carried out in relation to any matter in issue, and a report submitted to the court'²⁰⁶
- granting wide powers to the court to appoint experts and/or assessors of its own motion²⁰⁷
- encouraging training and proper instruction of experts, in particular with regard to the nature of their role in the legal process.²⁰⁸

4.6.2 Civil Procedure Rules

In England and Wales Part 35 of the *Civil Procedure Rules 1998* seeks to restrict expert evidence to that which is reasonably required to resolve the proceedings. The Rules stipulate that an expert's duty is to help the court and that the duty overrides any obligation the expert may have to the party instructing or paying the expert.²⁰⁹ Expert evidence may only be adduced with leave of the court, and the court may limit the amount of the expert's fees and expenses able to be recovered from the other party.²¹⁰ If two or more parties wish to adduce expert evidence the court may direct that evidence be given by one expert only, a single joint expert.²¹¹ The court may limit the amount that may be paid by way of fees and expenses to a single joint expert.²¹² Where more than one expert is to give evidence, the court may direct them to meet and discuss the extent of agreement between them.²¹³ Instructions given to an expert by a party are not privileged, and are required to be stated in the expert's report.²¹⁴

A Practice Direction supplements the Rules, annexing a Protocol for the Instruction of Experts to give evidence in civil claims, which was developed under the auspices of the Civil Justice Council.

Many expert witnesses in the UK are listed on the Register of Expert Witnesses.²¹⁵ A recent survey of 414 experts on the register revealed there has been a reduction in the number of cases for which experts have been required to give evidence in court, and that 73 per cent of experts surveyed (commonly medical experts) had been instructed as single joint experts.²¹⁶ The study also produced data on rates charged by experts for writing reports and appearing in court. Another recent study has produced findings on the training available for expert witnesses.²¹⁷

4.6.3 Commercial Court Long Trials Working Party (2007)

A recent report by the Commercial Court Long Trials Working Party in England concluded that expert reports 'in large scale litigation are often too long and over elaborate.'²¹⁸ The Working Party identified that the main reason for this was the 'failure of the parties and the court to define with sufficient precision the relevant expert disciplines and issues before the experts write their reports.'²¹⁹ It commented that the existing practice of deciding expert witness disciplines at an early case management conference was problematic because at that point disclosure and the exchange of witness statements had not yet occurred.²²⁰

- 186 Ibid.
- 187 Ibid.
- 188 Federal Court Rules (Cth) r 34.02.
- 189 Federal Court Rules (Cth) r 34.06.
- 190 Federal Court Rules (Cth) r 34B.02.
- 191 Federal Court Rules (Cth) r 34B.03.
- 192 Lord Woolf, *Access to Justice: Final Report* (1996) [13.2].
- 193 Ibid [13.5]. Indeed, the interim proposals on expert evidence 'provoked more opposition than any ... other recommendations'.
- 194 Ibid [13.16].
- 195 Ibid [13.11].
- 196 Ibid [13.13]–[13.14], [R156].
- 197 Ibid [13.15]. See [R13]–[R17].
- 198 Ibid [R167], [R168].
- 199 Ibid [13.21].
- 200 Ibid [13.24], [R169].
- 201 Ibid [13.42]–[13.51], [R172]. Lord Woolf also proposed that it be unprofessional conduct to instruct an expert not to seek to reach agreement: [13.43], [R162].
- 202 Ibid [13.29], [R159].
- 203 Ibid [13.30], [R160].
- 204 Ibid [13.33], [R170].
- 205 Ibid [13.34]–[13.37], [R161].
- 206 Ibid [13.41], [R171]. This recommendation evolved from a proposal that, for access to justice reasons, a court should have the power to order a defendant to provide a claimant with an in-house expert report on a particular issue in appropriate cases: [13.38]–[13.40].
- 207 Ibid [R157], [R158].
- 208 See *ibid* [13.52]–[13.57], [R173].
- 209 *Civil Procedure Rules 1998 (UK)* (SI 1998/3132) r 35.3.
- 210 *Civil Procedure Rules 1998 (UK)* (SI 1998/3132) r 35.4.
- 211 *Civil Procedure Rules 1998 (UK)* (SI 1998/3132) r 35.7.
- 212 *Civil Procedure Rules 1998 (UK)* (SI 1998/3132) r 35.8.
- 213 *Civil Procedure Rules 1998 (UK)* (SI 1998/3132) r 35.12.
- 214 *Civil Procedure Rules 1998 (UK)* (SI 1998/3132) r 35.10.
- 215 J S Publications, *UK Register of Expert Evidence* <www.jspubs.com> at 19 December 2007.
- 216 Dr Chris Pamplin, 'Cross-examining the Experts' (2007) 157 *New Law Journal* 1480.
- 217 Penny Cooper, *Expert Witness Lessons: A study of expert witness training and how it might be improved* (2007).
- 218 Judiciary of England and Wales, *Report and Recommendations of the Commercial Court Long Trials Working Party*, (December 2007) recommendation A6, 8.
- 219 Ibid.
- 220 Ibid [76].



The Working Party suggested that parties should more closely consider the disciplines and precise issues to be covered by experts before the court made any orders. In addition, it concluded that judges ‘must take a more active part in the question of whether expert evidence is really needed on a particular topic, and if it is, the particular issues that evidence will cover’.²²¹

The key recommendations of the Working Party included:

- the List of Issues should identify expert issues, either when it is first produced or subsequently when they have been properly identified
- expert reports should be framed by reference to those issues
- expert reports should normally be exchanged sequentially
- the court should delay settling the List of Issues, to the extent that it relates to expert issues, if more time is needed before doing so
- the court should always consider limiting the length of expert reports.²²²

4.7 CANADA

4.7.1 Canadian Bar Association Report (1996)

In 1996, the Canadian Bar Association published its *Systems of Civil Justice Task Force Report*. It expressed concern about ‘what appears to be a growing tendency to use increasing numbers of experts at trial’ and the failure of judges to adopt ‘a consistent approach to curtail the scope of opinion evidence offered in complex cases’.²²³ It thought these problems could be mitigated through procedural reform and enhanced case management. In particular, it recommended:

- the establishment of strict requirements with regard to both initial and continuing disclosure of expert reports
- the exchange of ‘expert “critique” reports’—‘reports prepared by each party’s expert critiquing the opinions and work undertaken by the opposing party’s expert as reflected in the initial expert report’ and which ‘reflect the rebuttal evidence that experts might be expected to give at trial’
- that judges adopt a more interventionist stance with regard to ‘assisting parties to limit the costs and delay associated with the use of experts’.²²⁴

The association also offered suggestions for possible efficiencies in relation to the introduction of expert evidence at a trial, in particular, the increased use of written evidence-in-chief, ‘limits on the number of experts to be called per issue’ and the calling of experts in ‘panels’, where appropriate.²²⁵

4.7.2 Alberta Rules of Court Project (2003)

The Alberta Law Reform Institute recently considered the law in that province in connection with expert witnesses as part of its Rules of Court Project.²²⁶ The Institute’s Discovery and Evidence Committee established as part of the project examined a number of issues pertinent to the control of expert evidence.

Issues addressed in its Consultation Paper included whether there ought to be ‘prescribed criteria for the form of expert reports’. The committee noted:

It was generally agreed that standardizing the format or prescribing minimum standards for the content of expert reports has many benefits. Doing so may assist in ensuring that expert reports provide useful and complete information to the court. It is more difficult for an expert to rebut or replicate the results of an opposing expert if expert statements and reports are not sufficiently detailed and do not set out the methodology or data that the expert used in reaching his or her conclusions, thus establishing minimum standards for the content of the report may permit more efficient and effective rebuttal. Reports may be deliberately ambiguous to disguise weaknesses in the conclusion therein. Prescribing minimum standards may allow all parties to better evaluate both their own and their opponents’ positions. Setting minimum standards for the content and form of an expert report was also thought to benefit less experienced lawyers and ‘non professional’ expert witnesses in creating useful and complete expert reports.²²⁷

The committee formulated a set of guidelines for experts' reports that it considered should be incorporated in the Rules.²²⁸

- Whether the scope for oral expert evidence given at trial ought to be limited. The committee did not favour a presumption against the attendance of experts at trials, noting the usefulness of examination and cross-examination in developing and explaining the substance of written reports and isolating problems therein. Thus, it favoured retention of the incumbent regime under which the parties could 'replace oral expert testimony with a written expert report upon notice'. It also felt that there should be scope for the pre-trial examination of experts.²²⁹
- Whether there should be limits on the number of experts available to the parties. The committee noted that each of the parties was restricted to one expert per issue in a 'very long trial' action,²³⁰ but that in other cases there were no limitations because a previous provision restricting each of the parties to three experts in total had been repealed.²³¹ The committee expressed doubt about the usefulness of a 'per issue' criterion and stated that its 'initial opinion is that the current Rules provide adequate safeguards to limit the number of experts who can be called'.²³²
- Whether the use of joint experts should be required or encouraged. The committee was sceptical about the benefits of compelling the use of joint experts:

*While the Committee recognizes the perceived benefits of requiring parties to use single joint witnesses, it had doubts about the practical application of doing so. There was a concern that arguments concerning choosing and instructing the joint expert would cause extensive delay and result in numerous court applications. In the Committee's view requiring joint experts would likely cause more problems than it would solve. However, the rules should permit the parties to use a joint expert by consent or with leave of the court.*²³³

- Whether the Rules should continue to permit the use of court-appointed experts, and if so on what terms. The committee concluded there are times when court-appointed experts can be useful and proposed that the Rules regarding court-appointed experts stay as they are.²³⁴
- Whether expert witnesses should be examined for discovery. As the committee noted, the examination of experts could be useful to ensure full disclosure and eliminate ambiguities in written reports, thus narrowing the issues in dispute at trial. However, the committee expressed serious concerns about permitting a prima facie right to discover experts prior to trial in part because requiring experts to be present for discovery in addition to trial may be impractical and expensive.²³⁵ However, in light of its potential benefits, the committee considered that it should be possible to seek leave to examine an expert in 'exceptional circumstances'.²³⁶
- Whether provision should be made for pre-trial conferences of experts in all actions.²³⁷ The committee thought the pre-trial conference was an 'interesting idea', but one that would be compromised by practical difficulties (cost/delay, difficulty of scheduling etc) and should be restricted to long or complex trials where consent or leave is given.²³⁸
- Whether provision should be made for convening panels of experts (hot-tubbing). The committee was receptive to this idea, noting that it could be efficient and militate against partisanship. However, it also felt it would not be appropriate in all circumstances and could be 'a significant infringement upon a party's ability to call [its] evidence in the manner it [chooses]'.²³⁹ It recommended that a concurrent evidence procedure be made available as an option but that it only be used by consent of the parties or with leave of the court.²⁴⁰
- Whether guidelines ought to govern the conduct of experts. There appears to have been a degree of in principle support for the notion of guidelines, but some members of the committee considered that they would be better promulgated by professional bodies than written into the Rules.²⁴¹ Doubt was expressed about 'whether guidelines in the rules

221 Ibid [78].

222 Ibid recommendation A6, 8.

223 Canadian Bar Association, *Systems of Civil Justice Task Force Report* (1996) 44.

224 Ibid.

225 Ibid.

226 Alberta Law Reform Institute, *Expert Evidence and 'Independent' Medical Examinations*, (2003), Consultation Memorandum 12.3.

227 Ibid [32].

228 Ibid Appendix.

229 Ibid [54].

230 Under the Rules, a 'very long trial' action is one which 'will or is likely to require more than 25 trial days': r 5(1) (u).

231 Alberta Law Reform Institute (2003) above n 226 [56].

232 Ibid [62].

233 Ibid [67].

234 Ibid [76]–[77].

235 Ibid [89].

236 Ibid [90].

237 Note that pre-trial conferences were, at the time of writing, available in 'very long trial' matters.

238 Alberta Law Reform Institute (2003) above n226, [95]–[96].

239 Ibid [101].

240 Ibid.

241 *Supreme Court Civil Rules 2006 (SA)* r 160(5).



- would have any real or practical effect on expert testimony, particularly in curing bias'.²⁴² Ultimately, the committee did not recommend the incorporation into the Rules of conduct guidelines for experts.²⁴³

Other issues considered by the committee included the use of timelines for the exchange of experts' reports and associated sanctions, whether experts' reports ought to be exchanged simultaneously or sequentially, and whether and when the courts should engage referees or assessors.

4.7.3 Nova Scotia Rules Revision Project (2005)

In Nova Scotia, a recent working group examination of the rules of court relating to evidence touched on several matters connected with expert witnesses.²⁴⁴ The working group considered, in part, that:

- an initial expert report should be served at least 120 days prior to the date set down for hearing, and a response at least 45 days before
- there should be a 'standardization' of expert reports (along the lines suggested in a schedule annexed to the report)
- examination of experts should not be available as of right, although whether oral examination or written examination should be available with leave was contentious.

4.7.4 British Columbia Justice Review (2006)

The British Columbia Justice Review Task Force, established in 2002 on the initiative of the Law Society of British Columbia, released a report in November 2006 which proposed, among other things, reform of some of the rules relating to expert evidence in that province.²⁴⁵ The task force's overarching recommendation was to 'reduce expert adversarialism and limit the use of experts in accordance with proportionality principles'.²⁴⁶ This recommendation had several components, in particular:

- the incorporation of a statement of the duties of an expert witness into the Rules of Court, similar to that in the UK and Queensland; although 'difficult to enforce', such a statement would set 'an important standard for experts to follow' and had 'no down-side'.²⁴⁷
- the better use of existing provisions for the appointment of an independent expert, acting on the court's instructions; the task force felt that the appointment of such an expert ought to be considered at the (proposed) case planning conference²⁴⁸
- the close judicial management of issues relating to experts at the (proposed) case planning conference, with particular reference to issues requiring expert evidence, the appropriate number of experts, the appropriateness of a joint expert/court-appointed expert, deadlines for disclosure of information on which an expert's opinion is based, deadlines for the exchange of experts' reports, meetings between opposing experts.²⁴⁹ The task force stated:

*We believe that providing the CPC [case planning conference] judge with the discretion to place limits on the use of experts will provide the most flexible and most fair approach to matching the available process to the size and complexity of the claim. Although consideration of the issue of experts will take some time at the CPC, we believe that this will be well worth the investment, as we expect it to reduce costs by reducing the number of experts, reducing the issues to those clearly in dispute, and reducing the adversarial nature of the relationship between opposing experts.*²⁵⁰
- a presumptive limit of one expert per side in litigation involving a claim valued at less than \$100 000.²⁵¹

The task force declined to recommend widespread use of single joint experts, noting that there had been no formal evaluation of their effectiveness in other jurisdictions and that the Expedited Procedure Project Rule in place in British Columbia allowed for their use.²⁵²

4.7.5 Ontario Civil Justice Reform Project (2007)

The Ontario Civil Justice Reform Project, headed by the Hon. Coulter A Osborne QC, released its recommendations in 2007.²⁵³ The project's recommendations about expert evidence may be summarised as follows:

- Early in the litigation process, parties should discuss jointly retaining a single expert to reduce costs and avoid unnecessary competing expert reports, but use of joint experts should not be mandatory.

- The presiding judicial officer at pre-trials, settlement conferences and trial management conferences should consider and make orders about the appropriate number of experts that may be called by each side and on particular issues and whether expert evidence is admissible.
- A judge presiding over pre-trial processes may grant leave to call more than three experts (or fewer in simplified procedure cases).
- The court should consider, in exercising its discretion on the appropriate number of experts, whether the proposed number of experts is reasonably required for the fair and just resolution of the proceeding, whether the proposed number of experts is consistent with the principle of keeping costs and the length of the proceeding proportionate to the amount or issues at stake, and any other factors relevant to the fair, just, expeditious and cost-effective resolution of the proceeding.
- A new provision should establish that it is the duty of experts to assist the court on matters within their expertise and that this duty overrides any obligation to the persons from whom they have received instructions or payment. Experts should be required to certify that they are aware of and understand this duty.
- The presiding judicial official at pre-trials, settlement conferences and trial management conferences should be able to order opposing experts in appropriate cases to meet, on a without-prejudice basis, to discuss one or more issues in the respective expert reports to identify, clarify and resolve issues on which the experts disagree and prepare a joint statement on the areas of agreement, or reasons for continued disagreement.
- Parties should discuss the number of experts and the timing for delivery of expert reports within 60 days of the action being set down for trial. As a default, rule 53.03 should be amended to require all expert reports to be exchanged within the 90/60/30 days before pre-trial or settlement conference, subject to the parties' agreement otherwise or court order.
- The information to be included in expert reports should be specified.

4.8 USA

Court control of expert evidence in the US: Gatekeeper approach

In the US federal jurisdiction, the court may screen expert witnesses before they give oral evidence at a trial. This 'gatekeeper' role in part arises out of the fact that most civil trials are before juries.

In *Daubert v Merrell Dow Pharmaceuticals Inc*,²⁵⁴ the US Supreme Court had occasion to consider the implications of rule 702 of the Federal Rules of Evidence, which at the time provided:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In particular, the court was required to evaluate the status of the so-called *Frye* criterion in light of the introduction of the Federal Rules in 1975. The *Frye* criterion had been set out in a 1923 decision of the Court of Appeals for the District of Columbia,²⁵⁵ the court stating:

While courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The Supreme Court noted that the narrow 'general acceptance' test had been the 'dominant standard for determining the admissibility of novel scientific evidence at trial' since the decision in *Frye* (albeit a much-criticised one). However, it did not consider the *Frye* standard to have been preserved by rule 702:

Nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a 'general acceptance'

242 Ibid.

243 Ibid [106].

244 Evidence Working Group [Nova Scotia], *Final Report of the Evidence Working Group* (2005).

245 British Columbia Justice Review Task Force, *Effective and Affordable Civil Justice*, Report of the Civil Justice Reform Working Group to the Justice Review Task Force (2006).

246 Ibid 29.

247 Ibid 30–1.

248 Ibid 31.

249 Ibid 31–2.

250 Ibid 32–3.

251 Ibid 32.

252 Ibid 31.

253 Coulter Osbourne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

254 509 US 579 (1993).

255 *Frye v United States*, 293 F 1013 (DC Cir 1923).



standard. The drafting history makes no mention of Frye, and a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony'.

The court held that rule 702 makes it incumbent on a trial judge to 'ensure that any or all scientific evidence admitted is not only relevant ['will assist the trier of fact ... to determine a fact in issue'] but reliable ['scientific ... knowledge']'. In other words, the judge assumes a gatekeeper role and must be satisfied, at an initial stage, that tendered expert evidence is grounded in the scientific method and 'fits' with regard to, or is applicable to, a fact in issue in the case. The court emphasised that the inquiry is a 'flexible' one, and set out a non-exhaustive list of factors that might bear upon it, including:

- whether the theory or technique said to be validated by 'scientific knowledge' has been, or is capable of being, tested (ie, whether it is falsifiable)
- whether the theory or technique 'has been subjected to peer review and publication'
- 'the known or potential rate of error' of a particular scientific technique, and 'the existence and maintenance of standards controlling the technique's operation'
- the degree of 'general acceptance' of the theory or technique (the *Frye* criterion).

The court further emphasised that '[t]he focus ... must be on principles and methodology, not on the conclusions that they generate'.

Other factors identified as potentially relevant to the *Daubert* exercise in subsequent cases include whether:

- the subject matter of expert evidence is linked to research conducted by the expert independent of the litigation, or whether his or her work has been carried out just for the purpose of the litigation
- the link between the expert's premises and his or her conclusion is sound, or at least reasonable
- other possible theories or opinions as to the subject matter of the evidence can be ruled out
- studies conducted by the expert have been thorough, and whether other relevant studies have been considered
- the opinion is over-reliant on anecdotal evidence.²⁵⁶

The *Daubert* opinion has been criticised as 'open-ended and vague'.²⁵⁷ Nonetheless, it is clear, as Saks points out, that its effect is to significantly increase the burden on judges to come to terms with technical and scientific evidence:

The major paradox of judicial gatekeeping of 'scientific, technical or other specialized' expert knowledge is that those to whom the law assigns the responsibility for screening such evidentiary offerings have no particular expertise for conducting those evaluations. Our legal system provides judges with few tools to help them evaluate the assertions of experts ... Frye-like tests allowed judges to piggy-back their decisions onto someone else's judgment of whether the proffered evidence was sufficiently valid to be admitted ... The move from Frye to Daubert increases judges' gatekeeping duty by requiring them to evaluate claims of scientific expertise much as scientists would.²⁵⁸

In two subsequent opinions, the Supreme Court has endeavoured to clarify particular aspects of the *Daubert* principles. In *General Electric Co v Joiner*,²⁵⁹ the court affirmed that appellate review of a trial judge's decision under the *Daubert* principle must take place according to an 'abuse of discretion' standard rather than on a de novo basis. In *Kumho Tire Co v Carmichael*,²⁶⁰ the court made it clear that the *Daubert* principle was applicable to all forms of expert knowledge, not just those that could be characterised as 'scientific': 'We do not believe that rule 702 creates a schematism that segregates expertise by type while mapping certain types of questions to certain types of experts'. It also sought to re-emphasise the flexible nature of the *Daubert* test:

[Daubert] made it clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not necessarily apply even in every case in which the reliability of scientific testimony [as such] is challenged. It might not be surprising in a particular case, for example that a claim made by a scientific witness has never been the subject of

peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of Daubert's general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so called generally accepted principles of astrology or necromancy.

Interestingly, it has been suggested that it is increasingly common for litigants and/or law firms to fund scientific research for publication to render particular novel litigation theories more 'legitimate' for the purposes of the *Daubert* criteria.²⁶¹

In 2000, rule 702 was amended in an attempt to render it more reflective of the decisions in *Daubert*, *Joiner* and *Kumho Tire Co*. The rule now reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

5. SUBMISSIONS

Submissions received by the commission, in response to both the questions asked in the Consultation Paper and the proposals contained in the exposure draft released on 28 July 2007, expressed a range of views about the options available for controlling expert evidence. A similar divergence of views was expressed by those with whom we consulted directly. In addition to submissions made to our review, we were also provided with the submissions made to the NSWLRC by the Forensic Accounting Special Interest Group of the Institute of Chartered Accountants in Australia and Dr Gary Edmond.

5.1 NSW PROVISIONS

The Victorian Bar, the Royal Australasian College of Surgeons, Clayton Utz, IMF, the Australian Bankers Association, the Law Institute of Victoria and a number of judges supported the introduction of provisions along the lines of those in NSW. The Victorian Bar noted the 'excellent and detailed' report of the NSWLRC on expert witnesses, suggesting that '[v]ery much the same problems [as those addressed by the NSWLRC] apply in Victoria'.

The Bar endorsed a number of the NSWLRC's recommendations, and in particular suggested that provision be made for:

- the use of court-appointed and joint experts in appropriate cases, and under appropriate rules²⁶²
- the application of identical duties of disclosure in relation to written and oral expert evidence
- the disclosure of fee arrangements with experts
- notifying experts of the sanctions applicable to inappropriate behaviour
- a requirement that litigants give notice to the court of experts they intend to call, and an explicit power of the court to restrict the number of experts who can be called
- the use, in appropriate cases, of concurrent evidence.

The Law Institute appreciated the potential for greater harmonisation in the rules if the NSW provisions were to be implemented in Victoria, and acknowledged that changes to the rules could offer time and cost benefits and increase the integrity of the evidence.

However, the Forensic Accounting Group believed the current provisions for controlling expert witnesses are sufficient, and should be explored further before introducing more changes.

5.2 COURT CONTROL

The Supreme Court recommended the introduction of new provisions in relation to experts, although it noted that the need for 'careful and sometimes intensive case management' rendered their application more appropriate 'in complex cases in specialist lists where expert evidence forms a

256 See *US Federal Rules of Evidence Manual* § 702.02[6]–[7].

257 *Ibid* § 702.02[6].

258 Michael J Saks, 'The Aftermath of *Daubert*: An Evolving Jurisprudence of Expert Evidence' (2000) 40 *Jurimetrics* 230–1.

259 522 US 136 (1997).

260 526 US 137 (1999).

261 William L Anderson, Barry M Parsons and Dr Drummond Rennie, 'Daubert's Backwash: Litigation-Generated Science' (2001) 34 *University of Michigan Journal of Law Reform* 619.

262 The Victorian Bar also raised questions about court-appointed experts: 'should there be an entitlement for the parties to cross-examine the court-appointed expert? Should the parties be entitled to call their own expert evidence to respond [to] or rebut, or even support, opinions expressed by the Court-appointed expert?'



significant aspect of the case'. One judge also expressed the view that there is room for the courts to improve the process, and to be more rigorous before trial by examining experts' reports for admissibility issues.²⁶³

The court recommended that courts and tribunals be given a discretion to make orders:

- limiting the number of experts in a proceeding
- compelling an expert evidence directions hearing, to take place after discovery and the exchange of lay witness statements²⁶⁴
- directing the formal nomination of experts, and directing them 'to confer (without reference to the parties or their lawyers), and produce a joint report' stating matters agreed and not agreed²⁶⁵
- rendering the joint report the sole expert evidence permitted to be adduced at trial on an issue, 'subject to cross-examination and the use of concurrent evidence procedures where appropriate'
- directing that mediation follow the production of a joint report.

Questioning the Law Institute's submission that there was no need for reform of the rules relating to expert evidence prior to mediation, the court stated:

In the view of the Court, early production of a joint expert report offers significant time and cost savings to litigants. Such a report enables issues to be crystallised, and may increase the likelihood of a successful mediation.

The court also noted that any suggestion of 'inequality of experts', which is to some degree endemic to litigation, could be 'counterbalanced' through court control, codes of conduct, concurrent evidence procedures, etc.

The Legal Practitioners' Liability Committee supported

'a tightening of the rules in relation to expert evidence. Whilst each party should be able to lead its own expert evidence, the court should be involved at directions hearings assisting the parties in identifying and formulating the questions on which an expert's opinion will be required'.

It argued that judges adopt inconsistent approaches to the question of whether or not particular expert evidence is useful and admissible, which renders it difficult for the parties to be certain about what evidence should be obtained before trial.

The Group submission did not support limiting the number of experts able to be called at trial, suggesting that this would be an 'overreaction'. Deacons noted that the court can address instances of abuse through its power over costs. The Group submission also opposed the use of 'stop clock' restrictions on the examination of experts, which it believed could be prejudicial to the parties.

WorkCover submitted:

Addressing the court's approach to the use of expert evidence might also go some way towards addressing the increasing costs of the provision of expert evidence and/or curtail the obtaining of 'expert' opinion as a matter of process and with little or no focus on evidentiary need or quality of content.

5.3 SINGLE JOINT EXPERTS

Submissions did not express enthusiastic support for the concept of single joint experts and many—such as Allens Arthur Robinson and Philip Morris, the Mental Health Legal Centre, and Clayton Utz—argued that it would pose a risk to the administration of justice.

The Supreme Court rejected the use of single experts:

Experts may have bona fide differences of opinion, and parties should not be foreclosed from producing that evidence. Further difficulties with the single expert model included the possibility that a single expert may limit the different points of view of which the judge may be informed, and a concern that a single expert witness is a challenge to the fundamental concept of the role of the judge—to hear both sides, and make a finding of fact.

The joint submission of Turks Legal and AXA Australia expressed doubts about the appropriateness of reports prepared by both parties' experts in conjunction with one another, noting that disagreements between the experts can increase costs and delay, and that 'joint' views are 'often moderated so as to be more generally acceptable to both parties [such that both experts' actual opinions are] tainted by external factors'.

Mallesons agreed with the NSWLRC that the use of single experts might be appropriate in more straightforward cases, but that partisan experts must be permitted in more complex ones (although consultation between experts could remain useful). It did not recommend that parties be able to be compelled to share a single witness.

Allens Arthur Robinson and Philip Morris and Corrs argued that if the court is able to appoint a single expert, the rules should state such appointments are discretionary and only to be made in appropriate cases or only with the parties' consent.²⁶⁶ Allens Arthur Robinson and Philip Morris also submitted that parties should still be able to adduce their own expert evidence if a single expert is appointed.

The TAC supported the concept of single agreed joint witnesses, although it cautioned that '[p]rocesses for the joint or agreed instruction of the appointed expert appear imperative and will require careful consideration'.²⁶⁷ The Victorian Aboriginal Legal Service (VALS) also supported the use of single experts as a means of promoting independence and controlling cost and complexity.

Judge Wodak submitted:

Whilst I am prepared to support careful consideration of both concurrent evidence and a single expert rule, I do so on a qualified basis. I would support the use of such initiatives in substantial litigation, where the cost, and judicial time inevitably involved would be justified. I would commend caution in seeking to apply this approach universally.

In its submission to the NSW Working Party the Forensic Accounting Group also urged caution in the use of single joint experts, although it did not object to them in principle. It made a number of suggestions as to the form of the amendments proposed by the NSWLRC.

On a different but related question, Hollows Lawyers expressed support for the idea of joint medical examinations conducted by doctors for both the plaintiff and the defendant.

Dr Edmond considered that the imposition on litigants of single experts could diminish the appearance of fairness of a proceeding, and thus impact on litigant satisfaction.²⁶⁸

5.4 COURT-APPOINTED EXPERTS

The Supreme Court submitted that 'all courts and tribunals' should be able, on application or of their own motion, to appoint a 'special referee to report to the court or tribunal on any issue in the proceeding'. It proposed that:

- the referee should be appointed and provided with 'all relevant documents and witness statements well in advance of trial'
- the referee's task should be 'to produce a report to the court soon after the completion of evidence, and prior to the completion of final submissions'
- the referee 'may be permitted to take part in the trial of [the relevant] issue, or facts relevant to it, in such manner as the court or tribunal directs including by asking questions of both expert and lay witnesses'
- the court/tribunal can 'adopt the report of the special referee in whole or in part after having heard submissions from all interested parties'.

The court considered that there should be a presumption that the parties should meet the costs of the referee in equal shares, subject to the court's discretion.

VALS expressed support for the appointment of independent experts by the court. It proposed that experts should be subject to a deposition-like procedure for the purpose of answering questions about their written reports. VALS also recommended:

People on the Urgent Civil Law List should be [able] to benefit from access to Court employed experts which would preclude the need for each side to seek their own expert reports. This is similar to the current Medical Panel which makes decisions in relation to percentage of injury.

263 Supreme Court consultation 2 August 2007.

264 The court noted that the court or tribunal involved could have input in the questions to be put to experts, and the facts that should be assumed.

265 The court noted that '[t]he report must be in plain English and employ layperson's terms where possible'.

266 Submissions ED1 13 (Allens Arthur Robinson and Philip Morris), ED1 32 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted 14 January, 2008)

267 Submission CP 37 (Transport Accident Commission).

268 Edmond (2005) above n 34, 21.



The Group submission proposed that if court-appointed experts were to be engaged the parties ought to be able to cross-examine them as of right, and suggests that sound protocols dealing with communication between the expert and the parties would be required. It was also suggested that court-appointed experts would be more appropriate in certain classes of cases than others.

Dr Brendan Dooley, on behalf of the Royal Australasian College of Surgeons, advocated the appointment of medical panels in the early stages of medical negligence cases to act, in effect, as court-appointed experts. The panel would be chaired by a lawyer, but the members would be medical experts. The panel would examine the plaintiff, meet with the doctors and review all of the medical reports before making a decision on liability to be submitted to the court for final determination.

Dr Dooley felt that the use of medical panels could:

- diminish bias
- establish at an early stage whether claimants meet the threshold impairment requirement for a medical negligence proceeding and/or give claimants an indication of the strength of their position, leading to the abandonment of unmeritorious claims
- avoid the cost and delay involved in the 'to-ing and fro-ing of medical reports between the two parties' and in general increase speed of resolution. He considered that the costs of using a panel system would be 'relatively low', and estimated that 'probably at least 70–75 per cent of cases judged by the panel would be withdrawn or settled at the time of the meeting of the panel, or soon after'.

The Forensic Accounting Group urged caution in the use of single court-appointed witnesses, stressing that while the option ought to be available it should be recognised that it is not appropriate in all cases.

Dr Gary Edmond raised the problem of potential for impugning judicial independence if judges are able to select whose evidence will be presented to the court.²⁶⁹ Dr Edmond also cautioned:

*Court appointed experts may limit discretion by forcing judicial hands. Judges may lose the ability to weigh competing claims and produce policy sensitive compromises ... Judges should not underestimate the discretions and institutional benefits conferred by having a range of expert perspectives. If they exclude dissenting views or reduce the range of perspectives judges may become increasingly beholden to expert elites.*²⁷⁰

5.5 PRE-TRIAL CONFERENCES AND CONCURRENT EVIDENCE

The Supreme Court considered that concurrent evidence procedures should be used where 'possible and appropriate'. It envisaged a procedure in which '[t]he judge takes the lead with asking questions, and then invites counsel to question the witnesses. The experts can also question their colleagues ... The judge controls the discussion'. It noted a number of benefits of concurrent evidence:

- better evidence, 'as experts can act as checks and balances on each other'
- 'experts are more inclined to give evidence' as there is less emphasis on 'adversarial pointscoreing'
- a less hostile environment in the courtroom
- time and cost savings.

As to expert conferencing and joint reports, the court considered that '[t]he aim of parties involved in producing expert evidence to the Court should be to place all relevant information before the judge in a single document'.

Judge Wodak advocated further consideration of initiatives such as concurrent evidence.

The Law Institute acknowledged that changes to the mode of presentation of expert evidence at trial could be constructive, and in particular supported consideration of pre-trial expert conferences, statements of agreed facts and hot-tubbing, which it noted has 'appeared to reduce the amount of time experts are required to give evidence in court'.²⁷¹

The TAC endorsed consideration of hot-tubbing.

WorkCover considered that 'careful pilot studies' were required to determine the appropriateness of introducing hot-tubbing and pre-trial conferencing in Victoria, and recommended consideration of the different parameters that might be applicable in different classes of proceedings.

The Group submission suggested that the following measures ('aimed at distilling and narrowing the areas of dispute between experts and ... reducing the time and cost' of adducing expert evidence) could improve the management of expert evidence:

- after exchange of expert reports and any reply reports, the appointment of a facilitator (by agreement between the parties or, failing which, by the Court)
- compulsory, facilitated meetings between the relevant experts
- production of a joint expert report or statement of differences
- engagement of the experts in the process of 'hot tubbing'.

The Group noted that meetings between experts offer a chance for the 'resolution through communication [of outstanding issues] between the experts', but cautioned that such meetings would be of little value unless their purpose and form were clearly defined. In the Group's opinion:

Standard protocols for meetings of experts would have to be adopted. The protocols could be modified by the Court where required, and could address who would attend the compulsory meetings, who would be responsible for preparing a first draft of any joint report, the format of a joint report etc ...

Consideration should be given to the value of the appointment by agreement between the parties or by the court of an appropriately qualified facilitator. The role of the facilitator would be to facilitate the meetings between the experts and ensure that the process of preparing a joint expert report to the Court identifying the issues which remain contested occurs.

The Forensic Accounting Group expressed support for 'the selective use of other procedures, such as joint expert conferences, to better manage the use of expert witnesses'. In its submission to the NSWLRC the group noted that dialogue with one's peers was more productive than 'the traditional approach to expert evidence (exchange of written reports followed by cross-examination)' and was more consistent with an expert's duty to assist the court. However, it registered concern

at the lack of consistency and timeliness of the application of [conferencing] provisions. It is our experience that experts' conferences are not held in all matters, and, when held, are frequently held after the trial has commenced. The FASIG's view is that, whenever opposing parties propose to call experts on the same topic, a conference of experts should be held as soon as each expert has become sufficiently apprised of the relevant subject matter to allow preliminary views to be formed and communicated to the other expert.

Maurice Blackburn expressed concern that the expansion of joint conferences would deter practitioners (already difficult to secure in medical negligence matters) from acting as experts, and add to litigation costs. It concluded:

At a recent Medical List Users' Group meeting with Judge Wodak, it was unanimously agreed by practitioners acting on behalf of both plaintiffs and defendants that there was no need to move to single or joint experts. However, it was noted that where a claim had not been resolved at mediation, the parties might agree to a conference between experts on damages being held ... Rule 44.06 of the County Court Rules of Procedure in Civil Proceedings already provides discretion for the court to direct expert witnesses to confer and provide the Court with a joint report. In circumstances where the rules already provide for joint conferences in appropriate cases, we do not consider that there is a need for the rules to be further amended.

Dr Gary Edmond thought the use of concurrent evidence might be preferable to single experts, as it 'allow[s] for disagreement, but the parties and judge are able to explore the extent and reasons for disagreement with all the relevant experts simultaneously'.²⁷²

The Victorian Aboriginal Legal Service suggested that parties should be able to require another party's expert witness to attend at a convenient place (not the court) to answer questions on oath.

269 Ibid 19.

270 Ibid 20.

271 Submission CP 18 (Law Institute of Victoria).

272 Edmond (2005) above n 34, 22.



5.6 CODE OF CONDUCT

WorkCover identified ‘an overriding need to ensure that the rules address the requirement of expert objectivity and ... confirm that the expert is required to assist the court and not a party to the litigation’.

In its submission to the NSWLRC the Forensic Accounting Group ‘applauded’ the use of codes of conduct and other like instruments to communicate the courts’ expectations to experts and those retaining them, and detailed the enforceable Statement of Forensic Accounting Standards of the Institute of Chartered Accountants in Australia and CPA Australia. However, it expressed concern about the proliferation of differing instruments in the various Australian jurisdictions, and proposed that a uniform code of conduct be developed, and supported by an individual, context-specific ‘guidance note’ in each court and tribunal.

The joint submission of Turks Legal and AXA Australia stated that ‘sceptics’ would say that the current expert witness code of conduct ‘has little effect’.

Dr Gary Edmond argued that if codes of conduct are too detailed but divorced from practical reality (as Edmond argues they often are), they may create ‘artificial problems’, as all ‘derogations, no matter how significant, become vulnerable to detailed retrospective examination and critique’.²⁷³

5.7 DISCLOSURE OF FEE ARRANGEMENTS

Some submissions expressed opposition to experts being able to offer their services on a ‘no win, no fee’ basis. Telstra, the Australian Corporate Lawyers Association and the TAC said such arrangements should not be permitted. The TAC also noted that the Medical Practice Board of Victoria Medico-Legal Guidelines discourage the practice on the basis that they are ‘generally considered unethical’.²⁷⁴ The Group submission suggested that contingent fee arrangements create an ‘inherent conflict’ and are at odds with the expert’s obligation to assist the court. WorkCover felt that fee arrangements ‘which may be perceived as compromising objectivity should be confirmed as inappropriate’.

On the issue of disclosure of experts’ fee arrangements, a number of judges supported such disclosure, but the Forensic Accounting Group submitted that there should only be disclosure of the *basis* of charging fees, not of the details of hourly rates or amounts outstanding. Telstra, the Australian Corporate Lawyers Association and Maurice Blackburn all submitted that there is no reason for financial arrangements to be disclosed. The Victorian Bar and Australian Bankers’ Association felt the issue required further consideration.

In its submission to the NSW Working Party, the Forensic Accounting Group was critical of the NSWLRC’s proposal to require disclosure of the fee arrangements under which an expert is engaged. It noted that its members were already under a professional obligation to disclose in expert reports the basis on which their fees were calculated, and prohibited from charging contingent or success-related fees. However, it objected to the imposition of a more specific obligation to disclose the actual amount involved, arguing that there was insufficient justification for such an incursion on a private commercial arrangement.

5.8 SANCTIONS

The Supreme Court considered that experts who breach the code of conduct should be able to be made personally liable for the costs of their evidence.

Mallesons highlighted ‘the difficulty of sanctioning expert witnesses for unethical conduct’, and endorsed the NSWLRC proposal that all experts be notified of the sanctions available. However, the firm did not support an ‘overly punitive’ suite of sanctions, noting that such a measure could discourage experts from acting in litigation.

The Forensic Accounting Group did not believe ‘there should be any significant change to the alteration of legal obligations of expert witnesses. There are already many anecdotal examples of parties having difficulty in obtaining appropriately qualified expert witnesses, and any significant increase in such obligations would serve to potentially further reduce the pool of such qualified witnesses’. It also argued that imposing sanctions was contrary to the concept of immunity of witnesses, and that there are already adequate sanctions in the form of complaints mechanisms and judicial findings on the quality of evidence. Victoria Legal Aid also argued that sanctions would dissuade experts from becoming involved in litigation. Maurice Blackburn argued experts should not be singled out for attention.

The Victorian Bar and the Australian Bankers' Association felt the issue of sanctions required further detailed consideration.

Dr Gary Edmond believed criteria for the imposition of sanctions were problematic, as it would be difficult to isolate partisanship from legitimate (and honest) disagreement and the endeavour to do so could lead to the imposition of 'artificial standards' on experts.²⁷⁵

5.9 PRIVILEGE

According to the Supreme Court, there is still significant argument about the status of draft reports and instructions to experts.²⁷⁶ However, a number of submissions argued that the current rules and common law governing privilege in communications with experts operate fairly.²⁷⁷ The Forensic Accounting Group argued that it would be counterproductive if privilege were to be lost on all communications between experts and their instructing solicitors as this would make it more difficult and/or expensive for the key issues to be explored and then narrowed if the need arose. In its submission to the NSWLRC, the group opposed the introduction of a formal requirement obliging experts to disclose all instructions/communications, noting that instructions can develop over time and there is little basis for assuming that litigants commonly conceal attempts to influence experts' reports.

There appeared to be a degree of consensus that privilege should be retained for communications between solicitors and those experts retained to assist a party but not ultimately called to give evidence.²⁷⁸ Allens Arthur Robinson and Philip Morris submitted:

Privilege should apply to communications with an expert, or any document connected with the engagement of the expert, where the expert is to give, but has not yet given, evidence in a court proceeding. There is a real risk that removing privilege in such cases would discourage parties from providing full disclosure of all relevant information to experts or from engaging experts at all, with detrimental effects for the administration of justice. Similarly, if a party briefs an expert but does not intend to call them to give evidence, that party should be entitled to the protection of privilege if the other party attempts to subpoena the expert.

5.10 SERVICE OF EXPERTS' REPORTS

The joint submission of Turks Legal and AXA Australia noted that a requirement that all expert reports be filed with the court prior to being sent to the parties 'would have the effect of focussing the experts' minds on the fact that the initial audience for their reports is the court', but could disincline the expert to take a 'moderate stance'.

In terms of regulation of the receipt of expert evidence at trials, Mallesons Stephen Jaques considered that the current Federal Court Rules offer a 'sufficient formula'.

5.11 OTHER MATTERS

The TAC expressed particular concern about current over-reliance on written reports in Transport Accident Act serious injury applications in the County Court: '[e]valuation of written medical reports without even sighting the expert is fraught with difficulty'.²⁷⁹

No submissions addressed the permission rule. We assume this means that there is no support for the introduction of a requirement for leave to adduce expert evidence. Several submissions stressed the importance of parties retaining the right to call expert evidence in support of their cases.²⁸⁰

Victorian barrister Albert Monichino has stated that the 'Rules of Court in Victoria concerning expert evidence are, with respect, out of date ... they mirror rules previously in force in New South Wales which have been substantially re-worked'.²⁸¹

6. CONCLUSIONS

The commission has concluded there is considerable merit in adopting the bulk of the recently introduced NSW provisions governing expert evidence. This approach, we believe, would assist in achieving the important policy objectives of:

- promoting judicial flexibility and control

273 Ibid 16.

274 Submission CP 37 (Transport Accident Commission).

275 Edmond (2005) above n 34, 17–18.

276 Consultation with Supreme Court 6 June 2007.

277 Submission ED1 32 (Corrs Chambers Westgarth, confidential submission, permission to quote granted 14 January, 2008).

278 Submissions ED2 19 (Maurice Blackburn); ED1 11 (Mental Health Legal Centre); ED1 18 (Clayton Utz); ED1 12 (Allens Arthur Robinson and Philip Morris).

279 Submission CP 37 (Transport Accident Commission). The TAC noted the comments of the Court of Appeal in *Dodoro v Knighting* (2004) 10 VR 277 and *Franklin v Ubaldi Foods Pty Ltd* [2005] VSCA 317.

280 Submissions ED1 25 (Victoria Legal Aid); ED1 11 (Mental Health Legal Centre); ED1 32 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted 14 January, 2008).

281 Albert Monichino, 'Recent Developments in Expert Evidence—Lessons for Victoria' (Paper presented at LexisNexis Litigation and Dispute Resolution Conference, Melbourne, 27–9 March 2007).



- strengthening the integrity and reliability of expert evidence by emphasising the expert's duty to assist the court
- achieving a greater degree of uniformity between jurisdictions.

We acknowledge that some stakeholders and commentators argue that reforms to rules about expert evidence should be implemented only after conducting empirical research to determine whether a significant problem exists.²⁸² In this respect we believe that a new set of Rules can have a normative effect, and concur with the conclusions reached by the NSWLRC:

*Although it is not possible to quantify the exact extent of the problem, in the Commission's view it is safe to conclude that adversarial bias is a significant problem, at least in some types of litigation. Measures that would reduce or eliminate adversarial bias, therefore, are likely to have potential benefits, even if the extent of those benefits cannot accurately be determined.*²⁸³

New approaches to the presentation of expert evidence can also address the problems of delay and excessive costs associated with expert evidence. Hot-tubbing, as evidenced by experience in NSW, has the potential not only to reduce the hearing time devoted to expert evidence (and therefore costs), but also to improve the integrity of opinion evidence and the usefulness of that evidence to decision makers.

In particular, the NSW provisions we recommend should be implemented in Victoria are:

- a purposes clause: r 31.17
- a requirement to seek directions: r 31.19
- a detailed list of the court's power to give directions: r 31.20
- detailed rules providing for conferences and joint reports: rr 31.24–31.26
- a list of options for the manner in which expert evidence is to be given, including concurrently: r 31.35
- a power to appoint single joint experts: rr 31.37–31.45
- a power to appoint court-appointed experts: rr 31.46–31.54
- additional obligations of expert witnesses: a duty to comply with a direction of the court and a duty to work cooperatively with other expert witnesses: schedule 7
- more extensive requirements for experts' reports: schedule 7.²⁸⁴

The commission is mindful that initiatives implemented in NSW and Queensland—in particular single joint experts and court-appointed experts—remain controversial, including in NSW.²⁸⁵ However, we think that in appropriate circumstances appointment of such experts may be useful. We emphasise that such appointments would be discretionary. In exercising its discretion the court would be likely to take into account the particular circumstances of the case, as well as the circumstances in which appointments of single experts have been usefully made in other jurisdictions. We have not recommended the introduction of a model similar to Queensland's, where the Rules establish a presumption in favour of single experts in all cases. As noted in some of the submissions to our review, the appointment of single joint experts may be appropriate in more straightforward cases, for example the assessment of future care needs of a plaintiff in a personal injury matter, but not for complex issues of liability.²⁸⁶ Similarly, the court would retain discretion to decide when to direct that experts give their evidence concurrently. Ongoing research, monitoring and review of these procedures will assist the courts to make more informed decisions about when to make use of them.

There are three areas where it is proposed that Victoria depart from the NSW model and one area where further clarity is required.

On the issue of sanctions, as noted earlier in this chapter, the NSWLRC thought that power to order costs against experts already exists, and recommended that in the code of conduct experts be made aware of this possible sanction. The Working Party concluded there is no power in the court to order costs against experts and was not in favour of sanctions or any form of 'warning' that might have a chilling effect on the willingness of experts to give evidence. The NSW Rules follow the Working Party and do not implement the NSWLRC's position. On one view, the Working Party's concern is overstated. Courts in England and Wales have power to order costs against experts and there does not appear to be any evidence or suggestion that this has had a 'chilling effect'. We recommend

that experts should not be singled out for attention in relation to sanctions, but equally should not be immune from sanctions applicable to other participants in the civil justice system, including costs orders in appropriate cases.

On the issue of disclosure of financial arrangements with experts, the NSWLRC recommended that there should be transparency and all financial arrangements should be disclosed. The Working Party took a different view and only favoured disclosure of arrangements where the expert had agreed to a deferral of payment or payment in the event of a 'successful' outcome. One difficulty with this is that it may not cover arrangements whereby an expert agrees to a fee that is apparently payable in any event, but in practice is written off if the party loses and is unable to afford to pay. There is considerable force in the view that 'problems' arising out of pecuniary interest are not limited to situations where the fees are deferred or contingent on outcome. Experts who are paid substantial sums of money and who have pre-existing or ongoing financial or other 'commercial' arrangements with parties to litigation may be no less problematic. We recommend that disclosure of financial arrangements should be required, but should not be selective. In this regard we note that such arrangements are often, if not always, the subject of cross-examination of experts in any event.

A point of difference between the NSW provisions and those in Victoria is the rule relating to service of medical reports prepared on the basis of an examination of a plaintiff by an expert retained by a defendant in personal injury matters. There are strong policy reasons to retain the requirement for defendants to serve any such reports on the plaintiff, regardless of whether or not they intend to use them in court, given the reports relate directly to the plaintiff's own medical condition. Such a provision does not currently exist in NSW.

Further clarity is required in relation to the application of client legal privilege and litigation privilege to experts. There are some important questions of principle (both in favour of retaining the existing privilege and in favour of abrogating it) and some obvious practical problems which require detailed consideration. One current practical problem arises out of the inherent uncertainty of the scope of implied waiver when the expert is to be called as a witness and where a report is prepared and served. This creates problems for the parties and for the court, and is the subject of much interlocutory and *inter partes* disputation in some jurisdictions. We believe the position requires clarification: privilege should not apply to any communication with an expert who is to give evidence in a court proceeding or any document arising in connection with the engagement of the expert, including drafts of reports, letters of instruction etc. The existing law regarding privilege would continue to apply where a person has been engaged as an expert, but where it is not proposed that the person be called as an expert witness in the proceeding.

RECOMMENDATIONS

93. Victoria should adopt reforms based on the recently introduced NSW expert evidence provisions. This would enhance the court's control over the provision of expert evidence. The court's powers would be discretionary. Reforms based on the NSW provisions should: (a) be subject to certain specific modifications; (b) exclude those provisions where there is already a substantially equivalent provision in Victoria; and (c) be subject to retaining certain specific Victorian provisions.

The provisions should apply in the Supreme, County and Magistrates' Courts. In particular the following provisions should be implemented:

- 93.1 A purposes clause, to ensure the court has control over the giving of expert evidence, to restrict expert evidence to that which is reasonably required, to avoid unnecessary costs associated with retaining experts, to enable a single expert to be engaged by the parties or appointed by the court and to declare the duty of an expert witness. A draft provision is as follows:

The main purposes of this order are as follows:

- (a) *to ensure that the court has control over the giving of expert evidence*
- (b) *to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings*
- (c) *to avoid unnecessary costs associated with parties to proceedings retaining different experts*

282 Associate Professor Gary Edmond from the University of New South Wales is currently undertaking an empirical study of expert evidence, including an evaluation of recent procedural reforms, supported by the Australian Research Council: email from Gary Edmond 14 March 2007. See: Gary Edmond, 'Secrets of the "Hot Tub": Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia' (2008) 27(1) *Civil Justice Quarterly* 51.

283 NSWLRC (2005) above n 2, [5.15].

284 These requirements are more extensive than those currently in force in Victoria. See the *Supreme Court (General Civil Procedure) Rules 2005* r 44.01(3); *County Court Rules of Procedure in Civil Proceedings 1999* r 44.01(3).

285 See, eg, the discussion in Justice Garry Downes AM, 'Expert Witnesses in Proceedings in the Administrative Appeals Tribunal' (Paper presented to a conference of the NSW Bar Association, Administrative Law Section, Sydney, 22 March 2006). See also Edmond (2008) above n282, 51.

286 See *Casey v Cartwright* [2007] 2 All ER 78, 87 (Dyson LJ).



- (d) *if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court*
- (e) *if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings*
- (f) *to declare the duty of an expert witness in relation to the court and the parties to proceedings.*

93.2 A requirement that the parties seek directions before calling expert witnesses, as follows:

- (1) *Any party:*
 - (a) *intending to adduce expert evidence at trial*
 - or
 - (b) *to whom it becomes apparent that he or she, or any other party, may adduce expert evidence at trial, must promptly seek directions from the court in that regard.*
- (2) *Directions under this rule may be sought at any directions hearing or case management conference or, if no such hearing or conference has been fixed or is imminent, by notice of motion or pursuant to liberty to restore.*
- (3) *Unless the court otherwise orders, expert evidence may not be adduced at trial:*
 - (a) *unless directions have been sought in accordance with this rule*
 - (b) *if any such directions have been given by the court, otherwise than in accordance with those directions.*

In NSW this rule (r 31.19) does not apply to proceedings involving a professional negligence claim. This exclusion may not be appropriate in Victoria.

93.3 A broad and express discretion to give directions in relation to the use of expert evidence, in the following terms:

- (1) *Without limiting its other powers to give directions, the court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings.*
- (2) *Directions under this rule may include any direction:*
 - (a) *as to the time for service of experts' reports*
 - (b) *that expert evidence may not be adduced on a specified issue*
 - (c) *that expert evidence may not be adduced on a specified issue except by leave of the court*
 - (d) *that expert evidence may be adduced on specified issues only*
 - (e) *limiting the number of expert witnesses who may be called to give evidence on a specified issue*
 - (f) *providing for the engagement and instruction of a parties' single expert in relation to a specified issue*
 - (g) *providing for the appointment and instruction of a court-appointed expert in relation to a specified issue*
 - (h) *requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue*
 - (i) *that may assist experts in the exercise of their functions*
 - (j) *that experts who have prepared more than one expert report in relation to any proceedings are to prepare a single report that reflects their evidence in chief.*

93.4 A broad and express discretion to direct expert witnesses to confer, to endeavour to reach agreement on any matters in issue, to prepare a joint report specifying matters agreed and matters not agreed and reasons for any disagreement. A draft provision is as follows:

- (1) *The court may direct expert witnesses:*
 - (a) *to confer, either generally or in relation to specified matters*
 - (b) *to endeavour to reach agreement on any matters in issue*
 - (c) *to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement*
 - (d) *to base any joint report on specified facts or assumptions of fact, and may do so at any time, whether before or after the expert witnesses have furnished their experts' reports.*
- (2) *The court may direct that a conference be held:*
 - (a) *with or without the attendance of the parties affected or their legal representatives*

or

 - (b) *with or without the attendance of the parties affected or their legal representatives, at the option of the parties*

or

 - (c) *with or without the attendance of a facilitator (that is, a person who is independent of the parties and who may or may not be an expert in relation to the matters in issue).*
- (3) *An expert witness so directed may apply to the court for further directions to assist in the performance of such expert functions.*
- (4) *Any such application must be made in writing to the court, specifying the matter on which directions are sought.*
- (5) *An expert witness who makes such an application must send a copy of the request to the other expert witnesses and to the parties affected.*
- (6) *Unless the parties affected agree, the content of the conference between the expert witnesses must not be referred to at any hearing.*
- (7) *If a direction to confer is given under rule (1)(a) before the expert witnesses have furnished their reports, the court may give directions as to:*
 - (a) *the issues to be dealt with in a joint report by the expert witnesses*
 - (b) *the facts, and assumptions of fact, on which the report is to be based, including a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert witnesses.*
- (8) *This rule applies if expert witnesses prepare a joint report as referred to in rule (1)(c).*
- (9) *The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.*
- (10) *The joint report may be tendered at the trial as evidence of any matters agreed.*
- (11) *In relation to any matters not agreed, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.*
- (12) *Except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report.*

93.5 A broad and express discretion to make directions for the manner in which expert



evidence is to be given, including to facilitate concurrent expert evidence (hot-tubbing). A draft provision is as follows:

In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same issue or similar issues, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

- (a) *a direction that, at trial:*
 - (i) *the expert witnesses give evidence after all factual evidence relevant to the issue or issues concerned, or such evidence as may be specified by the court, has been adduced*
 - or
 - (ii) *the expert witnesses give evidence at any stage of the trial, whether before or after the plaintiff's case has closed*
 - or
 - (iii) *each party intending to call one or more expert witnesses close that party's case in relation to the issue or issues concerned, subject only to adducing evidence of the expert witnesses later in the trial*
- (b) *a direction that after all factual evidence relevant to the issue, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:*
 - (i) *whether the expert witness adheres to any opinion earlier given*
 - or
 - (ii) *whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given*
- (c) *a direction that the expert witnesses:*
 - (i) *be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h))*
 - (ii) *when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence*
- (d) *a direction that expert witnesses give an oral exposition of their opinion, or opinions, on the issue or issues concerned*
- (e) *a direction that expert witnesses give their opinion about the opinion or opinions given by other expert witnesses*
- (f) *a direction that expert witnesses be cross-examined in a particular manner or sequence*
- (g) *a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:*
 - (i) *by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another*
 - or
 - (ii) *by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete*
- (h) *a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witnesses who are concurrently giving evidence*
- (i) *such other directions as to the giving of evidence in the circumstances referred to*

in paragraph (c) as the court thinks fit.

93.6 A discretion to direct the parties to engage a single joint expert, and to make directions for the preparation of the expert's report and the cross-examination of the expert. A draft provision is as follows:

(1) *Selection and engagement*

- (a) *If an issue for an expert arises in any proceedings, the court may, at any stage of the proceedings, order that an expert be engaged jointly by the parties affected.*
- (b) *A parties' single expert is to be selected by agreement between the parties affected or, failing agreement, by direction of the court.*
- (c) *A person may not be engaged as a parties' single expert unless he or she consents to the engagement.*
- (d) *Any party affected who knows that a person is under consideration for engagement as a parties' single expert:*
 - (i) *must not, prior to the engagement, communicate with the person to obtain an opinion as to the issue or issues concerned, and*
 - (ii) *must notify the other parties affected of the substance of any previous communications for that purpose.*

(2) *Instructions to parties' single expert*

- (a) *The parties affected must endeavour to agree on written instructions to be provided to the parties' single expert concerning the issues arising for the expert's opinion and the facts, and assumptions of fact, on which the report is to be based.*
- (b) *If the parties affected cannot so agree, they must seek directions from the court.*

(3) *Parties' single expert may apply to court for directions*

- (a) *The parties' single expert may apply to the court for directions to assist in the performance of the expert's functions in any respect.*
- (b) *Any such application must be made in writing to the court, specifying the matter on which directions are sought.*
- (c) *A parties' single expert who makes such an application must send a copy of the request to the parties affected.*

(4) *Parties' single expert's report to be sent to parties*

- (a) *The parties' single expert must send a signed copy of his or her report to each of the parties affected.*
- (b) *Each copy must be sent on the same day and must be endorsed with the date on which it is sent.*

(5) *Parties may seek clarification of report*

- (a) *Within 14 days after the parties' single expert's report is sent to the parties affected, and before the report is tendered in evidence, a party affected may, by notice in writing sent to the expert, seek clarification of any aspect of the report.*
- (b) *Unless the court orders otherwise, a party affected may send no more than one such notice.*
- (c) *Unless the court orders otherwise, the notice must be in the form of questions, no more than ten in number.*
- (d) *The party sending the notice must, on the same day as it is sent to the parties' single expert, send a copy of it to each of the other parties affected.*



- (e) *Each notice sent under this rule must be endorsed with the date on which it is sent.*
 - (f) *Within 28 days after the notice is sent, the parties' single expert must send a signed copy of his or her response to the notice to each of the parties affected.*
- (6) *Tendering of reports and answers to questions*
- (a) *Unless the court orders otherwise, the parties' single expert's report may be tendered in evidence by any of the parties affected.*
 - (b) *Unless the court orders otherwise, any or all of the parties' single expert's answers in response to a request for clarification may be tendered in evidence by any of the parties affected.*
- (7) *Cross-examination of parties' single expert*
- Any party affected may cross-examine a parties' single expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected.*
- (8) *Prohibition of other expert evidence*
- Except by leave of the court, a party to proceedings may not adduce evidence of any other expert on any issue arising in proceedings if a parties' single expert has been engaged under this Division in relation to that issue.*
- (9) *Remuneration of parties' single expert*
- (a) *The remuneration of a parties' single expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by direction of the court.*
 - (b) *Subject to sub-rule (c), the parties affected are jointly and severally liable for the remuneration of a parties' single expert.*
 - (c) *The court may direct when and by whom a parties' single expert is to be paid.*
 - (d) *Sub-rules (b) and (c) do not affect the powers of the court as to costs.*

93.7 The court should have a broad and express discretion to appoint experts. A draft provision is as follows:

- (1) *Selection and appointment*
- (a) *If an issue for an expert arises in any proceedings the court may, at any stage of the proceedings:*
 - (i) *appoint an expert to inquire into and report on the issue*
 - (ii) *authorise the expert to inquire into and report on any facts relevant to the inquiry*
 - (iii) *direct the expert to make a further or supplemental report or inquiry and report*
 - (iv) *give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert or give directions on the giving of such instructions.*
 - (b) *The court may appoint as a court-appointed expert a person selected by the parties affected, a person selected by the court or a person selected in a manner directed by the court.*
 - (c) *A person must not be appointed as a court-appointed expert unless he or she consents to the appointment.*
 - (d) *Any party affected who knows that a person is under consideration for appointment as a court-appointed expert:*

- (i) *must not, prior to the appointment, communicate with the person to obtain an opinion as to the issue or issues concerned*
 - (ii) *must notify the court as to the substance of any previous communications for that purpose.*
- (2) *Instructions to court-appointed expert*

The court may give directions as to:

 - (a) *the issues to be dealt with in a report by a court-appointed expert*
 - (b) *the facts, and assumptions of fact, on which the report is to be based, including a direction that the parties affected must endeavour to agree on the instructions to be provided to the expert.*
- (3) *Court-appointed expert may apply to court for directions*
 - (a) *A court-appointed expert may apply to the court for directions to assist in the performance of the expert's functions in any respect.*
 - (b) *Any such application must be made in writing to the court, specifying the matter on which directions are sought.*
 - (b) *A court-appointed expert who makes such an application must send a copy of the request to the parties affected.*
- (4) *Court-appointed expert's report to be sent to registrar*
 - (a) *The court-appointed expert must send his or her report to the registrar, and a copy of the report to each party affected.*
 - (b) *Subject to the expert having complied with the code of conduct and unless the court orders otherwise, a report that has been received by the registrar is taken to be in evidence in any hearing concerning a matter to which it relates.*
 - (c) *A court-appointed expert who, after sending a report to the registrar, changes his or her opinion on a material matter must immediately provide the registrar with a supplementary report to that effect.*
- (5) *Parties may seek clarification of court-appointed expert's report*

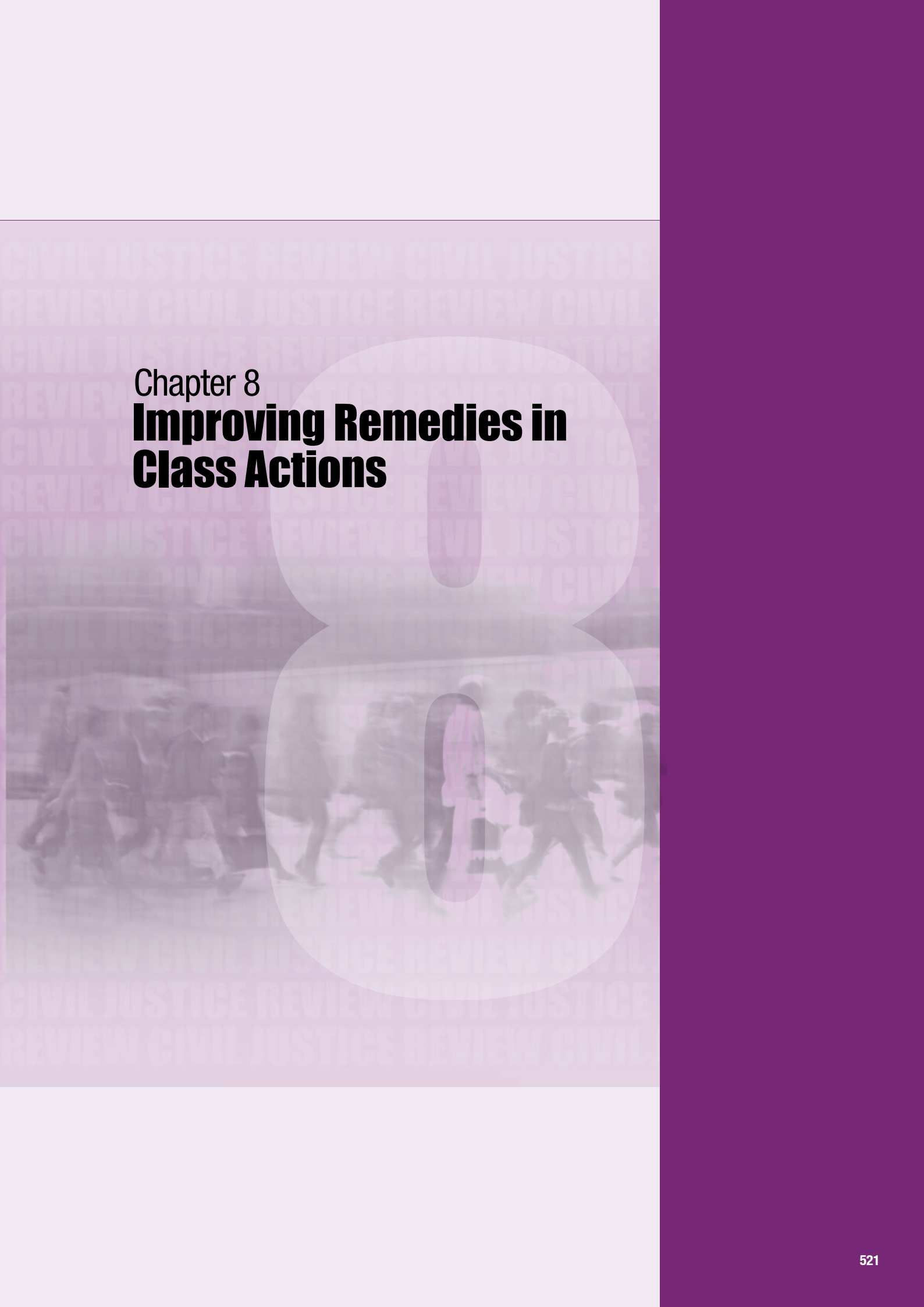
Any party affected may apply to the court for leave to seek clarification of any aspect of the court-appointed expert's report.
- (6) *Cross-examination of court-appointed expert*

Any party affected may cross-examine a court-appointed expert, and the expert must attend court for examination or cross-examination if so requested on reasonable notice by a party affected.
- (7) *Prohibition of other expert evidence*

Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any issue arising in proceedings if a court-appointed expert has been appointed under this Division in relation to that issue.
- (8) *Remuneration of court-appointed expert*
 - (a) *The remuneration of a court-appointed expert is to be fixed by agreement between the parties affected and the expert or, failing agreement, by direction of the court.*
 - (b) *Subject to sub-rule (c), the parties affected are jointly and severally liable for the remuneration of a court-appointed witness.*
 - (c) *The court may direct when and by whom a court-appointed expert is to be paid.*
 - (d) *Sub-rules (b) and (c) do not affect the powers of the court as to costs.*



94. There should be a more extensive code of conduct for expert witnesses, including a duty to:
 - (1) comply with the applicable overriding obligations
 - (2) comply with a direction of the court
 - (3) work cooperatively with other expert witnesses.
95. Expert witnesses should not be immune from sanctions applicable to other participants in the civil justice system, including costs orders in appropriate cases. However, there should not be specific sanctions directed solely at expert witnesses.
96. Expert witnesses shall, at the time of service of their reports or at any other time ordered by the court, disclose: (a) the basis on which they are being remunerated for services as an expert witness, including whether any payment is contingent on the outcome of the proceedings; (b) the details of any hourly, daily or other rate; and (c) the total amount of fees incurred to date.
97. It should be made clear that privilege in respect of any communication with an expert or any document arising in connection with the engagement of the expert (including drafts of reports, letters of instruction etc) is waived as soon as it is confirmed that the expert will be called to give evidence in court. Privilege in respect of communications with experts retained but not proposed to be called to give evidence would not be affected.
98. The requirement that the defendant serve on the plaintiff any medical report prepared as a result of an examination of the plaintiff, regardless of whether the defendant intends to use it in court, should be retained.



Chapter 8
**Improving Remedies in
Class Actions**



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The importance of access to justice, as a fundamental human right which ought to be available to all, is clearly a new consideration that stimulates fresh thinking about representative or 'grouped' proceedings.¹

As a procedural device, class actions excite an inordinately passionate public debate, and correspondingly, evoke quite disparate views as to their efficacy, utility and desirability. At one end of the spectrum, the class action has been variously described as a 'Frankenstein monster' and a 'rather loony proposal'; at the other end, it has been endorsed on the basis that it is 'one of the most significant procedural developments of the century'.²

[Australian class action legislation] was intended to provide a mechanism that promotes efficiency through aggregation of claims, enabling the pursuit of legitimate claims by people who might not otherwise be able to do so. Notwithstanding this general agreement, some decisions are in effect inconsistent with the intent of the legislation. These decisions have had negative consequences for class action applicants and have hampered the development of a healthy class action regime'.³

1. INTRODUCTION AND SUMMARY

In its initial Consultation Paper in October 2006 the commission sought views on whether the law relating to representative or class actions needs reform. The submissions received are summarised at the end of this chapter. Views were also sought on whether there is a need for reform in the funding of representative or class actions. The submissions received are summarised in Chapter 10.

On 28 June 2007, the commission published an exposure draft inviting submissions on class action reform proposals. Exposure Draft 1 set out four draft recommendations in relation to statutory class actions.

Two of the draft proposals are technical and are intended to solve practical problems arising out of judicial interpretations of the class action provisions in Part 4A of the *Supreme Court Act 1986* and Part IVA of the *Federal Court of Australia Act 1976* (Cth). The issues involve: (a) whether the class action procedure can be used for a group comprising only those who consent to the pursuit of claims on their behalf; and (b) whether it is necessary in cases involving multiple defendants for all class members to have individual claims against each of the defendants. The commission's recommendations are that limited classes should be permissible and that all class members should not be required to have claims against all defendants, provided that all class members have a claim against at least one defendant. Several recent judgments in the Federal Court, referred to below, have concluded that the statutory provisions should be interpreted in a way consistent with the commission's proposals.

The third proposal involves giving the court power to grant *cy-près* type remedies in certain circumstances, including where damages have not been claimed by class members following class action settlements or judgments. This may involve a significant change in the law, depending on the interpretation of one of the existing statutory class action provisions and the presently available remedies in the case of 'unjust enrichment'.

The fourth proposal involves the establishment of a new funding mechanism, with benefits for both plaintiffs and defendants in statutory class actions. The operation of the fund would not be limited to class actions. It could provide assistance in actions brought under the representative action rule or in any other civil proceeding. However, the proposed fund is likely to be in demand in class actions and likely to derive substantial revenue from these proceedings. The issue of funding is examined in Chapter 10.

After reviewing the submissions received the commission has recommended that certain reforms should be implemented. This chapter deals with the recommendations about statutory class action procedures and remedies. Chapter 10 deals with the funding of class actions and includes the commission's recommendations for the establishment of a new funding body.

1 *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386: [2006] HCA 41 [145] (Kirby J).

2 Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 3–4 (footnotes omitted).

3 Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399.



2. TECHNICAL AMENDMENTS TO THE LAW

Since the enactment of the Commonwealth and Victorian class action laws there has been considerable legal dispute and interlocutory appeals (at both federal and state levels) about the interpretation of key provisions.

This legal controversy involves, in part: (a) whether all class members are required to have individual claims against *all* defendants in cases where there are multiple defendants; and (b) whether a class action can be brought where the class is limited to identified individuals who have consented to the pursuit of claims on their behalf.

Judicial interpretations in these two areas have led to controversy between judges, academic criticism and ongoing interlocutory battles and appeals. These interpretations have added substantially to costs and delays in many class action proceedings. In other instances, cases have not been able to proceed because of non-compliance with procedural 'requirements'.⁴

Evidence suggests that the class action provisions are no longer being used by some plaintiffs and litigation funders. Instead they have sought to use the representative action rule, to circumvent some of the problems arising out of conflicting interpretations of the class action provisions. In some cases judicial rulings have resulted in a substantial increase in the size of the class on whose behalf the proceedings are maintained.⁵

The commission's recommendations are intended to solve perceived problems by clarifying the law. The most recent judicial interpretations of these key statutory provisions indicate that the proposals would not change the law. There is a clear need for certainty to avoid ongoing costly and protracted disputation that will otherwise continue until there is either reform of the law or determination by the High Court.

2.1 CLASS ACTIONS LIMITED TO PERSONS WHO CONSENT TO PROCEEDINGS

In Exposure Draft 1 the commission proposed there should be no legal impediment to the use of the class action procedure by identified persons or entities who are aggregated together or who consent to the pursuit of claims on their behalf.

There is at present a 'problem', arising out of the decision of the Federal Court in *Dorajay Pty Ltd v Aristocrat Leisure Ltd*⁶ and the corresponding decision of the Victorian Supreme Court in *Rod Investments (Vic) Pty Ltd v Adam Clark*.⁷

There are several dimensions to this problem. These are discussed in detail in a number of articles.⁸ Recently, Justice Finkelstein of the Federal Court took a different view from that of Justice Stone of the Federal Court and Justice Hansen of the Supreme Court in the decisions mentioned above.⁹ Justice Finkelstein's decision has been affirmed by the Full Federal Court.¹⁰

In *P Dawson Nominees Pty Ltd v Multiplex Limited*¹¹ the Federal Court dealt with an application, under section 33N of the *Federal Court of Australia Act 1976* (Cth), for an order that the action no longer proceed as a class action. In part, the application arose because the group members were limited to persons who had agreed to enter into litigation funding agreements with a commercial litigation funder and who had retained the one firm of solicitors. As Justice Finkelstein noted, the statutory class action provisions provide that where the threshold criteria are satisfied a class action may be commenced by one or more class members 'as representing some or all of them'.¹² He then observed that the Federal Court statutory class action regime 'allows a subset of all possible plaintiffs to constitute a group and there is no express restriction on how this subset is defined'.¹³ The matter was permitted to proceed, with Justice Finkelstein concluding that the law allowed the limitation of the group to those who had individually consented to the conduct of proceedings on their behalf.¹⁴

Justice Finkelstein noted that there were 'economically rational' reasons to limit the group on whose behalf the proceedings are brought.¹⁵ Such a limitation provides each group member with an 'incentive to contribute'; keeps the costs and the number of group members down; and makes it easier to settle the proceedings. Moreover, there is a 'greater prospect of [each individual group member] obtaining a higher percentage' of any settlement and the defendant benefits as a result of a smaller number of claimants and a 'smaller pay out'.¹⁶ Justice Finkelstein concluded that although the statutory class action regime facilitates the conduct of actions on behalf of persons without their

consent, the provisions do not preclude actions on behalf of those who do consent.¹⁷ He found nothing ‘inappropriate’, within the meaning of section 33N(1)(d) of the Federal Court of Australia Act, in the claims being pursued as a class action.¹⁸

This decision was recently upheld by the Full Federal Court, although Justices French, Lindgren and Jacobson did not agree with all aspects of Justice Finkelstein’s reasoning.¹⁹

Justice French agreed with the reasons given by Justice Jacobson, and noted that the court’s discretion under section 33N(1)(d) to order that proceedings no longer continue as a class action where it was satisfied that it was ‘otherwise inappropriate’ for the matter to proceed was not a ‘charter to introduce a quasi legislative rule effectively excluding from representative proceedings groups defined by reference to accession to an agreement with a litigation funder’.²⁰

Justice Lindgren also generally agreed with Justice Jacobson but made a number of additional observations. As he noted:

*The concluding words of s 33C(1) ‘as representing some or all of them’ [show] positively an intention that there was to be no right of complaint merely because some of the persons falling within para (a), (b) and (c) of s 33C(1) had been omitted from the group as defined.*²¹

Contrary to the position of Justice Stone in *Dorajay*, Justice Lindgren held that a criterion that in order to be a group member a person must have entered into a funding agreement with a particular funder and retained a particular firm of solicitors was permitted under Part IVA.²² However, as Justices Lindgren and Jacobson noted, the facts of the present case were different, and thus distinguishable, from those in *Dorajay* in that in the latter case persons could become group members after the commencement of the proceedings (in effect, opt in) by becoming clients and agreeing to the litigation funding arrangements.

The principal issues in the appeals were the proper construction and operation of sections 33C(1) and 33N(1) of the *Federal Court of Australia Act 1976* and the relationship between those sections. The appeals also raised for consideration the definition and composition of the group and in particular whether a group defined by and limited to those who had agreed to enter into a litigation funding arrangement was contrary to the provisions of Part IVA.

Justice Jacobson held that in considering whether it is ‘otherwise inappropriate’ to allow the matter to proceed as a class action, the court may look to the purpose served by continuation of the proceedings, and may consider the way in which the group is defined.²³

The fact that the legislation expressly permits a class action to be brought on behalf of ‘some or all’ of the potential class members was said to permit a representative party to commence a proceeding on behalf of less than all of the

4 Several such cases are referred to in Peter Cashman, *Class Action Law and Practice* (2007) ch 4.

5 See *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 (‘Dorajay’) and *Rod Investments (Vic) Pty Ltd v Adam Clark* [2005] VSC 449.

6 (2005) 147 FCR 394 (Stone J).

7 [2005] VSC 449 (Hansen J).

8 See, eg, Vince Morabito, ‘Class Actions Instituted Only for the Benefit of the Clients of the Class Representative’s Solicitors’ (2007) 29(1) *Sydney Law Review* 5; Peter Cashman, ‘Class actions on behalf of clients: Is this permissible?’ (2006) 80 *Australian Law Journal* 738; Bernard Murphy and Camille Cameron ‘Access to Justice and the Evolution of Class Action Litigation in Australia’ (2006) 30 *Melbourne University Law Review* 399; Peter Cashman, *Class Action Law and Practice* (2007) 197–223.

9 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061 (‘Dawson Nominees’).

10 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007) (French, Lindgren and Jacobson JJ).

11 [2007] FCA 1061.

12 *Federal Court of Australia Act 1976* (Cth) s 33C(1). Section 33C(1) of the *Supreme Court Act 1986* is in identical terms.

13 *Dawson Nominees* [2007] FCA 1061 [17].

14 *Dawson Nominees* [2007] FCA 1061 [48]–[51].

15 *Dawson Nominees* [2007] FCA 1061 [48].

16 *Dawson Nominees* [2007] FCA 1061 [48].

17 *Dawson Nominees* [2007] FCA 1061 [49].

18 *Dawson Nominees Pty Ltd* [2007] FCA 1061 [53].

19 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007) (French, Lindgren and Jacobson JJ) (‘Multiplex’).

20 *Multiplex* [2007] FCAFC 200 (21 December 2007) [1].

21 *Multiplex* [2007] FCAFC 200 (21 December 2007) [10].

22 *Multiplex* [2007] FCAFC 200 (21 December 2007) [28].

23 *Multiplex* [2007] FCAFC 200 (21 December 2007) [107].



potential group members.²⁴ According to Justice Jacobson it was not for the court to determine questions of appropriateness or inefficiency by reference to considerations other than those expressed or apparent in Part IVA.²⁵

Justice Jacobson accepted that the definition of the group is one of the matters the court can consider in determining whether to allow the matter to proceed in representative form, but held that this issue could not be determined by the mere fact that the group did not include the entire class of persons on whose behalf the proceedings could have been brought.²⁶ He could see nothing in the relevant provisions of Part IVA which precluded a group being defined in the manner adopted in that case.²⁷

Justice Jacobson did not consider that the funding criterion imposed an opt-in requirement; he held that, apart from the threshold requirements of section 33C(1), nothing in Part IVA precludes persons from reaching agreement, prior to the commencement of a proceeding, as to the definition of the group.²⁸

He accepted that the narrowness of the group and its self interest may provide legitimate concerns for the administration of justice, but held that Part IVA permits the commencement of such limited proceedings.²⁹

Prior to the decision of the Full Federal Court, a decision in *Jameson v Professional Investment Services Pty Ltd*³⁰ by Justice Young of the NSW Supreme Court expressed a preference for the views of Justice Stone³¹ and Justice Hansen³² over the views of Justice Finkelstein.³³ However, the decision in *Jameson* was based primarily on the judge's view that the various representations to group members lacked sufficient commonality and would require proof of reliance on the part of each group member.³⁴ Thus Justice Young's observations on the limited class issue in *Jameson* do not form part of the primary reasons in the judgment.³⁵

Class action provisions were introduced to facilitate the commencement of proceedings on behalf of a defined group, with a right of individual members to opt out of the proceedings if they do not want to be bound by the result or wish to conduct their own separate actions. However, judicial views remain divided on whether it is legally permissible or appropriate to bring a class action on behalf of a limited group of identified individuals, including where each of the class members has consented to proceedings on their behalf.

On one view of the existing law and the recommendations of the Australian Law Reform Commission (ALRC) in its report on group actions,³⁶ this is permissible (and has in fact occurred in numerous instances). However, the ongoing controversy is likely to lead to further disputes and appeals, adding to the costs and delays in class action litigation. It has resulted in a number of instances in the abandonment of the class action procedure and resort to the representative action rule in order to avoid the 'problem'. However, the attempt to use the representative action rule rather than the statutory class action provisions suffered a setback with the decision of Justice White of the NSW Supreme Court in *O'Sullivan v Challenger Managed Investments Ltd*.³⁷ Applications for leave to appeal from this decision were discontinued following amendment of the NSW representative action rule in late 2007.

The commission recommends that the position should be resolved by making it clear that the statutory class action procedure can be used by a group or groups of individuals who are aggregated together, including where such individuals consent to the pursuit of proceedings on their behalf. This is now the position for class actions in the Federal Court, given that the decision of Justice Finkelstein in *P Dawson Nominees Pty Ltd v Multiplex Limited* was recently upheld by the Full Federal Court.³⁸

The other statutory requirements for the commencement of a class action would still need to be satisfied and the court would retain its existing discretion to order, in appropriate circumstances, that the proceeding not continue in representative form.³⁹

However, as Justice Finkelstein and the Full Court of the Federal Court have held, such discretion should not be able to be exercised to prevent a class action from proceeding merely because the defined group of identified individuals is smaller than the total of the group of affected persons on whose behalf a class action could have been brought.⁴⁰

In the United States the decision of the Federal District Court to allow an opt-in class under Rule 23 of the Federal Rules of Civil Procedure was overturned on appeal.⁴¹ However, the American Law Institute has recognised the desirability, in appropriate cases, of permitting limited or opt-in classes and has proposed a model law to facilitate this.⁴²

If a defendant or potential group member is concerned about the limited extent of the group involved in the proceedings, a question arises as to whether there should be provision for the defendant or potential group member to apply for an order expanding the definition of the group. In this event, the court might order the expansion of the group, particularly where there is a prospect of multiple class actions and/or individual proceedings.

At present the court may, at any stage of a class action proceeding, give leave to amend the writ commencing the class action so as to 'alter the description of the group'.⁴³ However, this can only be done (under this provision at least) 'on application made by the plaintiff'.⁴⁴ However, as Justice Finkelstein noted in *P Dawson Nominees Pty Ltd v Multiplex Limited*, a respondent may make an application under section 33ZF to enlarge the group membership.⁴⁵

On one view, in the interests of judicial economy and given the cost consequences for the defendant(s), the entitlement of groups of individuals to group together to pursue a class action should not allow a multiplicity of individual and/or class action proceedings by persons with common, similar or related claims against the same defendant(s). However, in appropriate cases, the court might use existing powers to order any such separate proceedings be consolidated or heard together.⁴⁶

On the other hand, any provision for application by parties other than the representative party, or non-parties, to expand the group may lead to further disputation, delay and cost escalation. Under the present regime, people or entities who are already included in the class as defined at the start of litigation have a right to opt out, including for the purpose of pursuing separate proceedings.⁴⁷ This occurred in the Esso class action proceedings, for example.⁴⁸ In the current Amcor price-fixing litigation, one of the large commercial entities (Cadbury Schweppes) has opted out and initiated a separate proceeding.⁴⁹ There are no doubt many situations where different persons or entities may have good reasons to run their case separately to other similar proceedings.

Where the simultaneous conduct of a multiplicity of 'similar' proceedings is considered undesirable, the existing powers of the court and procedural rules facilitate orders staying new proceedings until existing proceedings are determined, or ordering that different proceedings be consolidated or heard together.⁵⁰

Even if express power is conferred to permit applications by defendants or prospective group members to expand the class, judges may be reluctant to require the representative party to take on the responsibility (and the associated costs) of conducting an action on behalf of a larger class than the representative party has agreed to. The representative party may not be prepared to continue to conduct the matter on this basis, particularly given the potential personal liability for the defendant's costs if the case fails. A litigation funder providing financial support for the class action proceeding may also have concerns about expansion of the group (although such concerns may abate if the funder is able to secure an entitlement to a share of the amount recovered by the larger group where the litigation is successful).

- 24 *Multiplex* [2007] FCAFC 200 (21 December 2007) [111].
- 25 *Multiplex* [2007] FCAFC 200 (21 December 2007) [118]. Reference was also made to the ordinary rules of the Australian common law of statutory interpretation as set out by the Full Federal Court in *Braverus Maritime Inc v Port Kembla Coal Terminal* (2005) 148 FCR 68 at [36].
- 26 *Multiplex* [2007] FCAFC 200 (21 December 2007) [123].
- 27 *Multiplex* [2007] FCAFC 200 (21 December 2007) [141].
- 28 *Multiplex* [2007] FCAFC 200 (21 December 2007) [194].
- 29 *Multiplex* [2007] FCAFC 200 (21 December 2007) [198].
- 30 *Jameson v Professional Investment Services Pty Ltd* [2007] NSWSC 1437 (12 December 2007).
- 31 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* 2005) 147 FCR 394.
- 32 *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449.
- 33 *Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061.
- 34 [2007] NSWSC 1437 (12 December 2007) [87], [123].
- 35 *Multiplex* [2007] FCAFC 200 (21 December 2007) [33].
- 36 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988). However, as noted by the Full Federal Court in *Multiplex*, references to the ALRC report may be misleading as several of the ALRC's recommendations were not implemented. This included the proposed power to stay proceedings or make other orders where a class action had been commenced on behalf of less than all of those who had similar or related claims.
- 37 [2007] NSWSC 383, [54]–[57].
- 38 *Multiplex* [2007] FCAFC 200 (21 December 2007) (French, Lindgren and Jacobson JJ).
- 39 *Federal Court of Australia Act 1976* (Cth) s 33N.
- 40 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, [48]–[49]; *Multiplex* [2007] FCAFC 200 (21 December 2007) [10], [111], [123], [141].
- 41 *In re Ski Train Fire in Kaprun, Austria on Nov 11, 2000*, 220 FRD 195 (SDNY 2003); *Kern v Siemens Corp* 393 F 3d 120 (2d Cir 2004).
- 42 The American Law Institute, *Principles of the Law of Aggregate Litigation*, Discussion Draft 2 (2007) 176–177.
- 43 *Supreme Court Act 1986* s 33K(1).
- 44 *Supreme Court Act 1986* s 33K(1).
- 45 [2007] FCA 1061 [55], referring to the order made by Sackville J in *Darcy v Medtel Pty Ltd* [2002] FCA 925.
- 46 *Supreme Court (General Civil Procedure) Rules 2005* r 9.12.
- 47 *Supreme Court Act 1986* s 33J.

48 *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731.

49 *Cadbury Schweppes Pty Ltd v Amcor Ltd*. See for example the recent interlocutory decision of Gordon J (2008) [FCA 88].

50 *Supreme Court (General Civil Procedure) Rules 2005* r 9.12.



Allowing the class to be expanded without the consent of the representative party may also make settlement more difficult, particularly where there is uncertainty as to the number of people within the expanded class definition and difficulty in determining how many will ultimately come forward and be able to establish their individual entitlements.

On balance, the commission is of the view that arguments in favour of permitting expansion of the class other than with the consent of the representative plaintiff are outweighed by the arguments against.

Of course, a person who is concerned by his or her own exclusion from the ambit of the group may, under existing provisions, apply to be joined as a party to the proceedings.⁵¹ This would enable the person to participate and to obtain any benefit from the outcome. However, as a party he or she would have potential liability for any adverse costs order.

2.1.1 Support for the draft proposal

Numerous submissions⁵² supported the commission's draft proposal to clarify that the statutory class action procedure is able to be used by a group or groups of individuals who are aggregated together, including where such individuals or entities consent to the pursuit of proceedings on their behalf.

The Law Institute of Victoria supported the draft proposal on the basis that this would clarify an issue that has currently given rise to 'much confusion and differing judicial interpretations'.⁵³

Professor Peta Spender supported the draft proposal, subject to the right of a 'defendant or potential group member to make application for an order expanding the definition of the group' and the court having power to order the expansion of the class.⁵⁴

2.1.2 Opposition to the draft proposal

There was no opposition to the commission's draft proposal, although various concerns were raised.

Clayton Utz noted that, in light of the decision in *P Dawson Nominees Pty Ltd v Multiplex Limited*,⁵⁵ at least one Federal Court judge is of the view that limited opt-in classes are not repugnant to the 'construction, intention and spirit of Part IVA' of the Federal Court Act and the corresponding provision in the Supreme Court Act. However, the submission noted that the Full Court of the Federal Court and possibly the High Court may be asked to resolve this issue.⁵⁶ As noted above, the Full Federal Court's decision in the *Multiplex* case has affirmed the validity of limited classes under Part IVA of the Federal Court Act.⁵⁷

The submission noted two issues that require further consideration. On the first question, whether the interests of justice will be served where the proceeding is brought on behalf of some rather than all potential claimants, it suggested that the prospect of further proceedings by claimants excluded from the first class action seems at odds with the underlying rationale of an opt-out regime.

Second, the Clayton Utz submission raised the issue that those who have claims brought on their behalf because they agree to the terms proposed (by the law firm or litigation funder) may have 'little, if any, bargaining power' and the court supervisory role only comes into play after they are 'inside the clubhouse'.

2.2 REQUIRING ALL GROUP MEMBERS TO HAVE CLAIMS AGAINST ALL DEFENDANTS

In its first exposure draft the commission proposed that there should be no 'requirement' that all class members should be required to have individual claims against *all* defendants in class action proceedings involving multiple defendants.

The requirement that all class members have individual claims against all defendants derives from the Federal Court case of *Philip Morris (Australia) Ltd v Nixon*, in which counsel conceded that this was a requirement of Part IVA of the *Federal Court Act 1976* (Cth), and in particular section 33C(1)(a).⁵⁸ This provides, in part, that a class action may be commenced where '7 or more persons have claims against the same person'. Justice Sackville concluded:

*[T]he expression 'the same person' in s 33C(1)(a) is to be read as including more than one person (see Acts Interpretation Act 1901 (Cth) s 23(b)), provided that all applicants and members of the represented class make claims against all respondents to the proceedings.*⁵⁹

On this construction, every plaintiff and group member must, in cases involving multiple defendants, have an individual claim against *each* of the defendants.

The alleged failure to satisfy this requirement has given rise to continuing judicial and academic controversy, interlocutory disputation, strike-out applications and appeals. This has added substantially to costs and delays in class action litigation.⁶⁰

A number of judges have raised doubts about whether there is in fact any such requirement, but have felt constrained to follow the Full Court decision in *Philip Morris*. A differently constituted Full Court of the Federal Court upheld the validity of a proceeding despite objections by the respondents that each group member did not have a claim against each respondent.⁶¹

The problems with this requirement may be illustrated by several factual situations.

In a product liability case, there may often be a single manufacturer of an allegedly defective product but different distributors (eg, in different states or regions). Persons claiming loss or damage as a result of use of the defective product may have a claim against both the manufacturer and the distributor. Where the manufacturer had manufactured all the products in question then a class comprised of all users of the product could join the manufacturer in any class action proceedings. However, where different distributors were involved, none of them could be joined as a defendant, at least for the purpose of compensation, as all class members would not have an individual claim for damages against each individual distributor.

This problem also arises in investor class action litigation. There may be defendants against whom all class members have a claim and other potential defendants against whom only some individuals in the class have individual claims. For example, in shareholder litigation it is not uncommon to join directors as defendants to the class action. In some instances there may be fluctuating membership of the board of directors, with some directors only appointed after the date on which certain class members either acquired or sold shares, or before or after certain documents were published or representations were made. Depending on when the various causes of action of shareholders arose and/or when certain losses were suffered, some shareholders may not have claims for compensation or damages against some directors. The problem is further complicated where the proceedings are commenced against one or more defendants but additional parties are brought in by the original defendants for the purpose of claims for indemnity, contribution or proportionate liability.

One solution to these problems would be to bring separate class action proceedings on behalf of each relevant subgroup. However, a preferable solution would be to clarify the position (or, where necessary, change the law) to make it clear that in cases where there is at least one defendant against whom *all* class members have individual claims (thus satisfying what, on one construction, appears to be the requirement of section 33C(1)(a) of both the Federal Court Act and the Supreme Court Act), additional defendants may be joined even if only some members of the class have individual claims against such additional defendants.

The Federal Court has further considered the present state of the law in light of the decisions in *Philip Morris (Australia) Ltd v Nixon*⁶² and *Bray v F Hoffman-La Roche Ltd*.⁶³ In *McBride v Monzie Pty Ltd*⁶⁴ Justice Finkelstein concluded that *Philip Morris* had been overruled by *Bray*, despite two other first instance judgments⁶⁵ which had held that the relevant comments in *Bray* were not part of the primary reasons in the judgment. Thus, according to Justice Finkelstein, there is no legal requirement that all group members must have a claim against all respondents and therefore the only issue which required resolution (on this aspect of that case) in relation to the requirements of section 33C(1)(a) was whether the applicant had a claim against each of the respondents.⁶⁶

It seems clear from section 33D(1) of both the federal and state class action provisions that the representative applicant must have an individual claim against each of the defendants. Thus, in some cases involving multiple defendants there may need to be more than one representative applicant. The commission's proposal for where there are defendants against whom all class members do not have claims against does not address the existing standing requirements for representative plaintiffs. Whether or not a representative plaintiff has a sufficient interest to bring a claim against a defendant on their own behalf (and also on behalf of the class members) will depend on the nature of the cause(s) of action, the nature of the relief claimed and the ordinary statutory or other standing requirements for such causes of action or relief. Some statutory provisions enable 'any person' to seek certain remedies, including injunctions and declarations.

51 *Supreme Court (General Civil Procedure) Rules 2005* rr 9.02, 9.03, 9.06.

52 Including those by a commercial litigation funder: submissions ED1 8 (IMF (Australia) Ltd); ED1 31 (Law Institute of Victoria); ED1 11 (Mental Health Legal Centre); ED1 25 (Victoria Legal Aid).

53 Submission ED1 31 (Law Institute of Victoria).

54 Submission ED2 13 (Professor Peta Spender).

55 [2007] FCA 1061.

56 Submission ED1 18 (Clayton Utz).

57 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007) [194].

58 *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487, [108].

59 *Ibid.*

60 Submission CP 7 (Maurice Blackburn).

61 *Bray v Hoffmann La-Roche* (2003) 130 FCR 317.

62 (2000) 170 ALR 487, at [514] Sackville J, [489] Spender J and [492] Hill J.

63 (2003) 130 FCR 317.

64 [2007] FCA 1947 (7 December 2007).

65 *Johnstone v HIH Ltd* [2004] FCA 190 at [38] and *Guglielmin v Trescowthick (No 2)* (2005) 220 ALR 515, 522.

66 Interestingly, as noted in the judgment, the parties gave undertakings that they would not seek to appeal any order arising out of the judgment until the final disposition of the case.



2.2.1 Submissions supporting proposed change

Various submissions supported the need to remove the requirement that all class members must have a claim against all defendants. However, opinions differed as to how this should be achieved.

In its submission the commercial litigation funder IMF supported the commission's draft recommendations.⁶⁷

Associate Professor Morabito supported liberalisation of standing requirements generally. This would permit 'ideological' plaintiffs such as environmental, consumer and public interest organisations to bring class action proceedings without any requirement to have a personal claim against any defendant. On this model, the representative plaintiff would not be legally required to have a personal claim against anyone.⁶⁸

Law firm Maurice Blackburn proposed that the representative plaintiff should be required to have a claim against all defendants but that where this requirement is satisfied, the claimants with claims against one or more defendants could be included as group members.⁶⁹ This proposal was based on proposed amendments to the class action statutory provisions drafted by counsel with significant class action experience.⁷⁰ However, this 'one claim against all' requirement is quite different from the draft reform proposed by the commission.

Under the commission's draft proposal, all class members would be required to have a claim against one defendant. This 'all with claims against one' model is consistent with the views of a number of judges that this is the correct interpretation of the present legislative requirement. According to Justice Finkelstein, neither the language nor the context of section 33(1)(a) of the Federal Court Act⁷¹ required the conclusion reached by the Full Court in *Philip Morris*.⁷² In the opinion of Justice Finkelstein, the section simply does not address the situation where some members of the group have claims against some other person provided that the legislative requirement that there be common claims of all class members against 'the same person' is satisfied.⁷³ However, other single judges of the Federal Court have felt constrained to follow the decision of the Full Federal Court in *Philip Morris*.⁷⁴

The fact that there is ongoing uncertainty, forensic disputation at first instance and on appeal and a divergence of views among appellate judges on the meaning of the existing legislative provision supports the commission's view that the position needs to be clarified. Of course this could be done by way of legislative amendment to make explicit the *Philip Morris* requirement that all class members are required to have claims against all defendants.

At present, this requirement has not prevented defendants in class action proceedings from joining additional defendants, for the purpose of indemnity or contribution claims, despite the fact that all class members do not have claims against such additional defendants.⁷⁵

The Law Institute of Victoria supported the draft proposal on the basis that this would clarify an issue that has currently given rise to 'much confusion and differing judicial interpretations'.⁷⁶

2.2.2 Submissions opposing proposed change

One submission expressed concern about the prospect of disparate claims being heard together and the risk that 'the advantages of grouping may easily be outweighed by diversity and unmanageability of the issues'.⁷⁷ It contended that the objective of judicial economy would not be achieved if all individual class members did not have a personal claim against all defendants in a single class action.

In fact, liberalisation of the existing restrictive requirement is conducive to judicial economy as it will avoid the necessity for separate proceedings against defendants against whom all class members do not have a claim.

Another submission raised concerns about manageability, additional interlocutory applications and an increase in complexity and duration of trials where subgroups have claims against one or more defendants which are not common to all class members.

In considering these issues it is useful to differentiate the question of whether there should be a threshold *legal requirement* that all class members have a claim against all defendants from the *discretionary questions* of whether a class action should be permitted to proceed where this is not the case and how the litigation is to be judicially managed. Removing the threshold legal requirement does not mean that the court cannot, in appropriate circumstances, exercise its discretion to make orders for the separate determination of the claims against certain defendants where not all class members

have claims against such defendants. Where such claims are truly ‘disparate’, the court may determine that such claims should not be permitted to proceed as part of the class action proceeding or, alternatively, should be determined separately in such proceeding.

3. EXPRESS POWERS TO GRANT CY-PRÈS RELIEF

The legal doctrine of cy-près is neither new nor radical, yet it has rarely been used by the Australian courts. Its power to do good—to help right wrongs—is immense and virtually untapped in the Australian marketplace.⁷⁸

In its earlier exposure draft the commission proposed the introduction of a new judicial power (or clarification of existing powers) to order cy-près type remedies in class action proceedings.

Proposal 6.3 of the commission’s exposure draft advocated that the court should have power to order cy-près type remedies where:

- (a) there has been a proven contravention of the law
- (b) a financial or other pecuniary advantage (‘unjust enrichment’) has accrued to the person or entity contravening the law as a result of such contravention
- (c) a loss suffered by others is able to be quantified
- (d) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.

The proposed ‘new’ power (or, on one view, clarification of existing powers) would, at least initially, be limited to class actions. In the light of practical experience, consideration could later be given to whether this power should be available in other contexts.

3.1 ORIGINS OF CY-PRÈS REMEDIES

Cy-près principles evolved in the context of charitable trusts.⁷⁹ Sometimes it is impossible or impracticable to give effect to the declared intention of a donor. In some circumstances, the general law (and in most jurisdictions, statute)⁸⁰ enables the court to give effect as near as is possible to that intention.⁸¹ The rationale is that this is preferable to allowing the donation to fail altogether. For example, where a disposition is directed to a charitable purpose which cannot be fulfilled in the precise manner stated (eg, because its object is unclear or does not exist, or insufficient funds are made available), but the trust instrument manifests a ‘general charitable intention’,⁸² the court can order its application to a purpose that is closely aligned with the donor’s declared intention. Similar principles apply where the donor applies funds for a specific charitable purpose which later fails, or where the original charitable purpose of a donor is fulfilled but funds are left over. In some jurisdictions, legislation vests the Attorney-General with the power to make orders as to the establishment of cy-près schemes in limited circumstances.⁸³

3.2. CY-PRÈS IN THE CONTEXT OF LITIGATION

3.2.1 General

The ‘next best’ approach to the application of funds embodied in the doctrine of cy-près can be (and has been) transposed onto the litigation context. Higgins summarises the possible purposes of cy-près remedies in a litigious setting (with particular reference to consumer litigation):

Cy-pres solutions may serve many ends. Compensation of wronged parties may be effected by a class action where private actions will be prohibited by the disproportionate legal and administrative costs of action. A subsidiary concern as regards compensation is the preservation of intra-class equity. Demographic and socioeconomic factors may militate against recovery by certain sectors of affected consumer classes. Barriers of information, education and access may prevent direct recovery by parties who would nonetheless be able to enjoy indirect compensation through the administration of a cy-pres mechanism.

Goals of disgorgement/punishment can be achieved through cy-pres—the defendant is not allowed to retain illegally obtained profits merely through the subtlety and dispersion of the illegal means. Associated deterrent ends can similarly be achieved through

- 67 Submission ED1 8 (IMF (Australia) Ltd).
- 68 Submission CP 28 (Associate Professor Vince Morabito).
- 69 Submission CP 7 (Maurice Blackburn).
- 70 Dr Kris Hanscombe SC and Lachlan Armstrong of the Victorian Bar (see Attachment D of Submission CP 7 (Maurice Blackburn)).
- 71 The corresponding provision in the *Supreme Court Act 1986* is identical.
- 72 *Bray v Hoffman La-Roche Ltd* (2003) 130 FCR 317, [248].
- 73 Carr J agreed with Finkelstein J but Branson J took a different view.
- 74 See *Johnstone v HIH Insurance Ltd* [2004] FCA 190, [41] (Tamberlin J) and *Guglielmin v Trescowthick (No 2)* [2005] FCA 138, [29] (Mansfield J).
- 75 *King v GIO Australia Holdings Ltd* [2000] FCA 1543, [6]–[7]. See also Cashman (2007) above n 4, 248.
- 76 Submission ED1 31 (Law Institute of Victoria).
- 77 Submission ED1 12 (Allens Arthur Robinson and Philip Morris), quoting from the report of the Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988). The submission was also adopted in ED1 17 (Telstra) and ED1 16 (Australian Corporate Lawyers Association). Submission ED1 18 (Clayton Utz) also opposed modification of the principle that all class members should have claims against all defendants but acknowledged that there is a ‘diversity of [judicial] opinion within the Federal Court which is yet to be resolved’.
- 78 Louise Sylvan, *Cy-près: The Next Best Thing?* (2003) Choice <www.choice.com.au/goArticle.aspx?id=103708> at 10 December 2007.
- 79 See generally Rachael Mulheron, *The Modern Cy-près Doctrine: Applications & Implications* (2006) ch 3.
- 80 See, eg, *Charities Act 1978* s 2.
- 81 On the relationship between the general law and statute, see *Aston v Mount Gambier Presbyterian Charge* [2002] SASC 332.
- 82 See Butterworths, *Halsbury’s Laws of Australia*, vol 4 (at 10 December 2007) 75 Charities ‘2 General Charitable Intention’ [75-605]–[75-610].
- 83 See, eg, *Charities Act 1978* s 4(3).



demonstrating that wrongdoers will be prevented from retaining illegal profits. The purposes to which residual funds are then put can further achieve these ends through educational and litigation uses.⁸⁴

In litigation involving a single plaintiff or a small number of claimants, direct compensation is in general achievable and there is no obvious role for *cy-près* distribution. However, as Higgins points out, there is considerable scope for the application of *cy-près* principles in class action proceedings given the difficulties that can attend the distribution of damages in those cases:

[Many] consumer class actions are characterised by large class size and small per capita damages, a heterogenous affected class that presents difficulties of identification, education, communication and proof, and [hence] poor recovery rates.⁸⁵

She provides an example of a situation in which direct compensation would be problematic:

Certain trade practices violations, though flagrant, may have dispersed and de minimis effects that present barriers to consumer action. A horizontal price fix that results in an incremental \$2 rise in the price of a consumer good over a 12 month period is unlikely to warrant any individual cause. However, across a wide class, nugatory individual effects may aggregate to a significant total abuse.⁸⁶

Endeavouring to achieve disgorgement/punishment and deterrence has not been one of the traditional preoccupations of class action law in Australia. To date, the focus has been primarily if not exclusively on compensation for group members who can individually prove and quantify their loss. However, there is an important policy question as to whether a defendant should be permitted to retain the proceeds of unlawful conduct just because it is impossible or impracticable to make direct reparation to individuals who have suffered loss as a result.

In class actions, there are two distinct situations in which a plaintiff might wish to invoke *cy-près* principles:

- to deal with the undistributed remainder of an award, where it is considered inappropriate that such remainder revert to the defendant
- to deal with a situation in which it is impossible, impracticable or otherwise inappropriate to distribute direct compensation to individuals who have suffered loss or damage from unlawful conduct, but where it is possible to calculate aggregate damages for the group.

In some overseas jurisdictions, the use of *cy-près* schemes in both situations is well entrenched:

The notion underpinning class actions cy-près is that where a judgment or settlement has been achieved against a defendant, and where distribution to the class of plaintiffs who should strictly receive the sum is 'impracticable' or 'inappropriate', then (subject always to court approval) the damages should be distributed in the 'next best' fashion in order, as nearly as possible, to approximate the purpose for which they were awarded.⁸⁷

There are two principal forms that *cy-près* relief can take. First, 'price rollback' relief involves damages recovered in respect of unlawful conduct being used to reduce the cost to purchasers of the defendant's goods or services.⁸⁸ However, such relief may be considered objectionable because, for example:

- (a) the damages are in effect used to subsidise the defendant's operation and could in fact provide it with a competitive price advantage in non-monopolistic markets
- (b) class members are obliged to continue to patronise the defendant in order to be compensated
- (c) there is no automatic correlation between persons who suffered damage and persons benefiting from the award, in particular where the defendant's products/services are not often the subject of regular repeat purchasing
- (d) a defendant is able to 'internalise' the 'loss' involved by, for example, producing its products at a cheaper price during the relevant time period.⁸⁹

The second, less controversial form of *cy-près* relief involves distributing all or part of an award among nominated organisations where it cannot be directed to compensation of persons who have suffered damage. This is considered to be justified because the interests of those organisations are thought to

be aligned with those of class members.⁹⁰ However, there have been cases in which the link between class members and the ultimate recipients of class action damages has been somewhat tenuous, as discussed below.

3.2.2 United States

The basis of the class actions regime at federal level in the United States is rule 23 of the Federal Rules of Civil Procedure. However, the provision makes no reference to *cy-près* distribution. Accordingly,

*it is by virtue of judicial innovation that the United States possesses the most developed cy-près jurisprudence relevant to class actions—although it is fair to say that the application of cy-près in this context has received quite a mixed reception among American courts.*⁹¹

Mulheron notes a number of instances in which courts have endorsed the use of *cy-près* distribution, but also points out that some judges have been more ambivalent—stating, for instance, that it ‘should be reserved for unusual circumstances’.⁹² However, it does appear to be settled that *cy-près* distribution is appropriate and permissible where it occurs pursuant to a settlement agreement concluded by the parties.⁹³ Indeed, courts have been known to advertise for applications from potential recipients where a settlement agreement leaves an undistributed balance.⁹⁴ Whether a court order can mandate such distribution is less clear.⁹⁵ Mulheron further points out that courts are, in general, more disposed to be liberal when it is the application of the unclaimed part of an award that is at issue, although a ‘distribution of the entire settlement or judgment sum is not precluded in practice’.⁹⁶

The American Law Institute has recently published a Draft of the Principles of Aggregate Litigation in which it suggests that *cy-près* relief ought only to be considered in ‘circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim’.⁹⁷ These sentiments were referred to with approval in a recent case in the Court of Appeals for the Second Circuit.⁹⁸

No uniform position has emerged on the required relationship between the purpose of a class proceeding and the object(s) to which funds are to be applied *cy-près*.⁹⁹ Some courts have maintained a conservative position on this point, insisting on the establishment of some form of nexus or proximate relation between the interests of class members and the *cy-près* recipient(s).¹⁰⁰ Others have been more liberal and permitted the distribution of funds to unrelated organisations or causes.¹⁰¹ In *Superior Beverage Co v Owens-Illinois*, the court stated:

*[W]hile use of funds for purposes closely related to their origin is still the best cy pres application, the doctrine of cy pres and courts’ broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations, both for current programs or, where appropriate, to constitute an endowment and source of future income for long-range programs to be used in conjunction with other funds raised contemporaneously.*¹⁰²

For instance, in *In re Motorsports Merchandise Antitrust Litigation*,¹⁰³ which dealt with price-fixing of NASCAR race souvenirs, the court approved (over the objections of the defendants) a distribution scheme under which funds were provided to the Make-A-Wish Foundation, the American Red Cross, Race Against Drugs (a nationwide drug prevention education program), Children’s Healthcare of Atlanta, the Atlanta Legal Aid Society, the Georgia Legal Services Program, Kids’ Chance (an organisation providing scholarships for children whose parents have been killed or incapacitated in workplace accidents), the Duke Children’s Hospital and Health Center, the Lawyers Foundation of Georgia and the Susan G Komen Breast Cancer Foundation. The court opined that ‘[t]he absence of an obvious cause to support with [undistributed or unclaimed] funds does not bar a charitable donation’.¹⁰⁴ As Mulheron observes:

*The disadvantage of this [more liberal] approach ... is that the framework for determining between competing plaintiffs for the fund disappears—hunting for the ‘next best’ application of the monies becomes a highly subjective and discretionary exercise, akin, perhaps, to a lottery or prize for the most inventiveness.*¹⁰⁵

84 Ruth Higgins, ‘The Equitable Doctrine of Cy-près and Consumer Protection’ (2002) *The Trade Practices Act Review*, <www.tpareview.treasury.gov.au/content/subs/105_Attachment1_ACA.rtf> at 10 December 2007.

85 *Ibid* 2.

86 *Ibid* 1.

87 Mulheron (2006) above n 79, 215.

88 *Ibid* 218. See also the examples at 219–20.

89 *Ibid* 220–1.

90 *Ibid* 222.

91 *Ibid* 236.

92 *Ibid* 238, quoting *Mace v Van Ru Credit Corp*, 109 F 3d 338, 345 (1997).

93 See, eg, *In re ‘Agent Orange’ Product Liability Litigation*, 818 F 2d 179, 185 (1987) (noting the wider latitude available to courts where cases settle).

94 See, eg, *Superior Beverage Co v Owens-Illinois*, 827 F Supp 477, 478 (ND Ill, 1993).

95 Mulheron (2006) above n 79, 242–3.

96 *Ibid* 243–4.

97 American Law Institute, *Draft of the Principles of the Law of Aggregate Litigation* § 3.08 (Cy Pres Settlements), quoted in *Masters v Wilhelmina Model Agency Inc*, 473 F 3d 423, 435–6 (2d Cir, 2007).

98 *Masters v Wilhelmina Model Agency Inc*, 473 F 3d 423, 436 (2d Cir, 2007).

99 Mulheron (2006) above n 79, 270.

100 *Ibid* 270–1.

101 See, eg, *Superior Beverage Co v Owens-Illinois*, 827 F Supp 477, 478–80 (ND Ill, 1993); *In re Motorsports Merchandise Antitrust Litigation*, 160 F Supp.2d 1392, 1394 (ND Ga, 2001). See also Mulheron (2006) above n 79, 271–3.

102 *Superior Beverage Co v Owens-Illinois*, 827 F Supp 477, 479 (ND Ill, 1993).

103 160 F Supp 2d 1392, 1396–9 (ND Ga, 2001).

104 At 1394, citing *Jones v National Distillers*, 56 F Supp 2d 355, 359 (SDNY 1999).

105 Mulheron (2006) above n 79, 273. This arbitrariness has led to the argument (rejected by the court) that defendants should themselves be able to select the charities to receive the proceeds of *cy-près* distribution: *In re Motorsports Merchandise Antitrust Litigation*, 160 F Supp 2d 1392, 1395 (ND Ga, 2001).



Nevertheless, she argues:

[W]hilst the triggers and the further objective criteria for the application of cy-près should be stringently adhered to in order to ensure that the doctrine is not abused or fractured, once those 'narrow gates' have been safely negotiated, the court should arguably be permitted to apply the damages to the 'next best' use that it perceives. Sometimes this will entail a distribution for a purpose 'as near as possible' to the purpose for which the action was brought; and sometimes, the 'next best' use will benefit the class members in other ways, somewhat distinct from the class suit itself. A 'wide gate' at the stage at which the damages are applied for cy-près purposes ensures the optimal use of scarce resources, and allows for a greater degree of pragmatism and flexibility.¹⁰⁶

In *Jones v National Distillers*, the court allowed the undistributed remainder of a settlement fund to pass to the Legal Aid Society Civil Division, which had but a tenuous connection to the intent behind the litigation concerned. However, Justice Motley emphasised that as the cause of action in the matter had arisen more than 20 years prior, it was futile to attempt to select a charitable application that carried a meaningful potential benefit for actual class members.¹⁰⁷

United States courts have exhibited a degree of wariness on the related issue of how specific a proposed application of cy-près funds must be to attract court endorsement. In the *Agent Orange* litigation, the District Court had mandated the establishment of an independent 'class assistance foundation ... to fund projects and services that will benefit the entire class'.¹⁰⁸ The Court of Appeals for the Second Circuit considered that while the creation of such a fund could be, in principle, an appropriate response to the needs of a large and variegated class,

the district court must in such circumstances designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds. The district court failed to do so in the instant case. Instead, it provided that the board of directors of a class assistance foundation would control, inter alia, 'investment and budget decisions, specific funding priorities ... [and] the actual grant awards ... and that the court would retain only "[a] comparatively modest supervisory role" in such decision-making' ... [W]hile a district court is permitted broad supervisory authority over the distribution of a class settlement ... there is no principle of law authorizing such a broad delegation of judicial authority to private parties.¹⁰⁹

The court expressed particular concern that the board as constituted would be under no obligation to consider the interests of the class as a whole or limit itself to activities consistent with the judicial function. It noted that it was open to the district court, on remand, to 'designate in detail [appropriate] programs and provide for their supervision'.¹¹⁰

In the recent matter of *Fears v Wilhelmina Model Agency Inc*, Justice Baer formulated orders designed for compliance with the *Agent Orange* requirements, distributing funds to various named charities on the basis that such funds would be distributed in stages, with future distributions contingent on 'achievement' as detailed in an annual report provided to the court.¹¹¹

3.2.3 Canada

Most Canadian jurisdictions have, over the past two decades, introduced class action statutes that allow for aggregate relief to be awarded in appropriate circumstances.¹¹² All of these statutes make provision for the cy-près application of undistributed amounts, and most follow a similar model.¹¹³ In Manitoba, for instance, section 34 of the *Class Proceedings Act*¹¹⁴ provides as follows:

Undistributed award

(1) *The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even if the order does not provide for monetary relief to individual class or subclass members.*

Considerations re undistributed award

(2) *In deciding whether to make an award under subsection (1), the court must consider:*

(a) *whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass; and*

(b) *any other matter the court considers relevant.*

Undistributed award if class members unknown

(3) *The court may make an order under subsection (1) whether or not the class or subclass members can be identified or all their shares can be exactly determined.*

Award may benefit non-class members

(4) *The court may make an order under subsection (1) even if the order would benefit:*

(a) *persons who are not class or subclass members; or*

(b) *persons who may otherwise receive monetary relief as a result of the class proceeding.*

Unclaimed award

(5) *If any part of an [aggregate] award... remains unclaimed or is otherwise undistributed after a time set by the court, the court may order that the unclaimed or undistributed part of the award:*

(a) *be applied against the cost of the class proceeding;*

(b) *be forfeited to the Government;*

(c) *be returned to the party against whom the award was made.*

Near identical provisions (with minor variations of expression) are applicable in Saskatchewan,¹¹⁵ Newfoundland and Labrador,¹¹⁶ Alberta,¹¹⁷ British Columbia¹¹⁸ and New Brunswick.¹¹⁹ These statutes place significant limits on the inventiveness of the courts in dealing with unclaimed funds: (a) there must be a reasonable expectation that the application of such funds will benefit class members in some sense; and (b) the court must consider whether ‘unreasonable benefits’ will be conferred on non-class members (although this is stated not to be itself determinative). Thus, while *cy-près* schemes ‘inherently involve some subjective choice of a “deserving” recipient’,¹²⁰ the discretion of the court in most Canadian jurisdictions is not left at large.

The corresponding provision in Ontario is similar,¹²¹ but there are also some notable differences, the effect of which is to render it less expansive overall. First, before making orders in respect of the undistributed remainder, the court must be satisfied that ‘a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order’.¹²² Secondly, any unclaimed or undistributed balance that remains after the time set by the court for application of funds then reverts to the defendant ‘without further order of the court’.¹²³ Thirdly, the Ontario provision does not contain a stipulation to the effect that the court must consider whether ‘unreasonable benefits’ might flow to non-class members in deciding whether or not to make an order in the nature of *cy-près*.

The Federal Court’s rules relating to class actions also countenance the *cy-près* application of the remainder of damages awarded on an aggregate basis, stating that ‘a judge may make any order in respect of the distribution of monetary relief, including regarding an undistributed portion of an award due to a class or subclass or its members’.¹²⁴

In Quebec, the Code of Civil Procedure also permits the award of aggregate damages (or ‘collective recovery’), in which case the court can order that the defendant either ‘deposit the established amount in the office of the court or with a financial institution operating in Quebec, or to carry out a reparatory measure that it determines or to deposit a part of the established amount and to carry out a reparatory measure that it deems appropriate’.¹²⁵ In the event that the court considers that distributing the award to individual claimants would be ‘impossible or too expensive’, it can, after making provision for the ‘law costs’ of the proceeding, ‘the fees of the representative’s attorney’ and ‘the claims of the members, if any’, deal with ‘the balance in the manner it determines, taking particular account of the interest of the members, after giving the parties and any other person it designates an opportunity to be heard’.¹²⁶

- 106 Mulheron (2006) above n 79, 274.
- 107 *Jones v National Distillers*, 56 F Supp 2d 355, 358–9 (SDNY 1999).
- 108 *In re ‘Agent Orange’ Product Liability Litigation*, 818 F 2d 179, 184 (2d Cir, 1987) (‘Agent Orange’).
- 109 ‘Agent Orange’, 818 F 2d 185 (2d Cir, 1987).
- 110 ‘Agent Orange’, 818 F 2d 186 (2d Cir, 1987).
- 111 2005 US Dist LEXIS 7961, 37–8 (SDNY, 2005). On appeal, the matter was remanded back to the District Court on the basis that Baer J had failed to advert to an option available to him in relation to the distribution of remaining funds (treble damages). The Court of Appeals made a number of observations as to *cy-près* schemes but did not comment on the supervision mechanisms that Baer J had proposed: see *Masters v Wilhelmina Model Agency Inc*, 473 F 3d 423 (2d Cir, 2007).
- 112 See Mulheron (2006) above n 79, 232–4. Quebec is an exception as its class action regime came into force in 1979.
- 113 Mulheron (2006) above n 79, 234.
- 114 CCSM 2002, c C130.
- 115 *Class Actions Act*, SS 2001, c C-12.01, s 37.
- 116 *Class Actions Act*, SNL 2001, c C-18.1, s 34. Note that in Newfoundland and Labrador the court is not obliged to consider whether a proposed mode of distribution would deliver unreasonable benefits to non-class members, although it is mentioned as a relevant consideration: s 34(2).
- 117 *Class Proceedings Act*, SA 2003, c C-16.5, s 34. The Alberta provision allows the court to make ‘any order [it] considers appropriate’ to deal with unclaimed or undistributed amounts, rather than setting out the three options available in Manitoba and other jurisdictions: s 34(5).
- 118 *Class Proceedings Act*, RSBC 1996, c 50, s 34.
- 119 *Class Proceedings Act*, SNB 2006, c C-5.15, s 36.
- 120 Mulheron (2006) above n 79, 270.
- 121 *Class Proceedings Act*, SO 1992, c 6, s 26.
- 122 *Class Proceedings Act*, SO 1992, c 6, s 26(4).
- 123 *Class Proceedings Act*, SO 1992, c 6, s 26(10).
- 124 *Federal Courts Rules*, SOR/98-106, r 299.3(2).
- 125 *Code of Civil Procedure*, RSQ 1965, c C-25, s 1032.
- 126 *Code of Civil Procedure*, RSQ 1965, c C-25, ss 1034–6. See Mulheron (2006) above n 79, 233.



As Mulheron has noted:

It has been judicially acknowledged in Canadian courts that cy-près provisions in class action regimes serve the important policy objectives of general and specific deterrence of wrongful conduct, and that ‘the private class action litigation bar functions as a regulator in the public interest for public policy objectives’. This statutory incorporation of the cy-près doctrine is further evidence that class suits in this jurisdiction do not serve a solely compensatory function (a view entirely at odds with Australian law reform, legislative and judicial opinion).¹²⁷

She further states:

Although Ontario’s provisions appear to be worded on the basis that any undistributed residue of an aggregate award can be distributed cy-près ... the provision has clearly been applied to entire judgments or settlements, apparently on the basis that it would be impracticable to provide a more direct benefit by distributing any part of the monetary award to individual class members.¹²⁸

Mulheron cites as an example *Tesluk v Boots Pharmaceutical plc*.¹²⁹ In that case Justice Winkler was asked to approve a settlement in a class action concerning misrepresentation in connection with the sale of a pharmaceutical product for treating hypothyroidism. The settlement to which the parties had agreed provided for \$2.25 million to be directed to five specified organisations, ‘to be used for specific research projects, education and outreach having to do with thyroid disease’.¹³⁰ This was seen to be appropriate because there were some 520 000 class members each with a low-value claim against the defendant.

Justice Winkler took a number of factors into account in concluding that the settlement was fair and appropriate in the circumstances:

- the matter would be expensive and its outcome uncertain in the event that it proceeded to trial (limited costs had been incurred thus far)
- the terms were comparable to those of a similar settlement agreed in Quebec
- ‘individual distribution of this settlement would be impracticable and not in the interests of the class as a whole’ as ‘[c]osts would simply dissipate the settlement fund in large measure’
- the fact that ‘the negotiation with the defendants was short and to the point’ and that there had not been ‘an overabundance of communication with class members’ was not, in the circumstances, problematic.¹³¹

He commented that:

Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a cy-près distribution to recognized organizations or institutions which will benefit class members.¹³²

The whole of the amount due to a particular class was also the subject of cy-près distribution in *Alfresh Beverages Canada Corp v Hoechst AG*.¹³³ The proceeding concerned price fixing of preservatives that had effects on their distributors, manufacturers who used them as a component of other products, intermediaries in their sale and consumers who purchased products containing them over a long period of time. While provision was able to be made for the direct compensation of the distributors and manufacturers, Justice Cumming recognised there were ‘significant problems in identifying possible claimants below the manufacturer level’. He thus approved a settlement that involved funds being distributed to the Canadian Council of Grocery Distributors and Canadian Federation of Independent Grocers (for intermediaries), as well as the Food Institute at the University of Guelph, the Consumers Association of Canada and the Canadian Association of Food Banks (for consumers) as ‘surrogate’ recipients.¹³⁴

The reference to recognised organisations in *Tesluk* is telling; the courts have exhibited considerable caution in permitting funds to be distributed to particular recipients. In approving a settlement with a cy-près component in *Ford v F Hoffman–La Roche Ltd* Justice Cumming commented:

It is necessary and appropriate that only well-recognized entities be the recipients of the cy-près distributions. Such entities have an established record of providing nonprofit services, with transparency in respect of their activities and accounting. They provide

*the greatest level of confidence and assurance to the general consuming public that the monies distributed will be responsibly used.*¹³⁵

The *Ford* proceedings had to do with large-scale price fixing of vitamin products and, as in *Alfresh*, direct compensation of intermediate purchasers and consumers of affected products was not feasible. Class counsel had evaluated possible *cy-près* recipients of funds with reference to certain specified factors. Potential recipients on behalf of intermediate purchasers (all of them industry organisations) were judged according to:

- (a) *the organization's membership base;*
- (b) *whether the organization was national in scope;*
- (c) *the organization's ability to deliver benefits to a particular group of Intermediate Purchasers; and*
- (d) *the organization's financial stability.*¹³⁶

Potential recipients on behalf of consumers were scrutinised on the basis of:

- (a) *the organization's ability to deliver benefits in each province and territory;*
- (b) *the organization's ability to reach one or more of the target age groups, being children, youth, adults, or the elderly;*
- (c) *whether the organization was non-denominational;*
- (d) *whether the organization had a charitable or non-profit designation;*
- (e) *the organization's financial stability and budget;*
- (f) *the organization's history of advocacy, service delivery, research or education relevant to Vitamin Products.*¹³⁷

In addition, each proposed recipient had 'prepared a detailed proposal for the expenditure of its share of the settlement monies' and was to be 'held accountable for the monies it receives through compliance with strict governing Rules'.¹³⁸

According to Berryman, discussion of the doctrine relating to *cy-près* distribution of damages awards in Canada is limited to five reported cases.¹³⁹

3.3 AUSTRALIA: BACKGROUND

In its 1979 discussion paper *Access to the Courts—II: Class Actions*,¹⁴⁰ the ALRC observed that *cy-près* schemes could be used to deal with situations where, for example, it is impossible or impracticable to track down class members or isolate their personal losses, or where the circumstances are such that it is improbable that individual class members will make claims, or 'where the cost of distributing damages could absorb the damages fund'.¹⁴¹ The ALRC considered that *cy-près* schemes could assist to overcome practical and legal difficulties involved in maintaining class actions which would otherwise blunt their effectiveness against a wrongdoer. It recognised that the use of *cy-près* remedies could render the class action something more than a mere procedural device; it could 'assume the character of a consumer protection mechanism to deter unlawful conduct, force the wrongdoer to surrender unlawful profits and distribute those profits in a way to benefit class members'.¹⁴² It noted that there were both advantages and disadvantages to taking such a step,¹⁴³ and suggested that some people considered it

more appropriate for [procedures such as cy-près] to be restricted to government so that the primary objective of private class actions remains one of compensation and compensation alone. The issue is whether it is preferable for the enforcement of legislation to be left:

- *to private individuals who come forward—in the knowledge that they will usually be few, or*
- *to governmental agencies.*¹⁴⁴

In 1995, the Victorian Attorney-General's Law Reform Advisory Council¹⁴⁵ engaged Vince Morabito and Judd Epstein to review Victorian law with respect to civil proceedings involving more than one claimant. Morabito and Epstein recommended that a class actions model similar to that existing under the Federal Court Act be introduced at state level,¹⁴⁶ but also recommended that provision be made to allow *cy-près* distributions 'in appropriate circumstances'.¹⁴⁷

127 Mulheron (2006) above n 79, 234, quoting *Alfresh Beverages Canada Corp. v Hoescht AG* (2002), 16 CPC (5th) 301(SCJ) [16].

128 *Ibid* 235–6.

129 (2002), 21 CPC (5th) 196 (SCJ).

130 (2002) 21 CPC (5th) 196 (SCJ) [9].

131 (2002) 21 CPC (5th) 196 (SCJ) [11]–[15].

132 (2002) 21 CPC (5th) 196 (SCJ) [16].

133 (2002) 16 CPC (5th) 301.

134 *Alfresh Beverages Canada Corp v Hoescht AG* (2002) 16 CPC (5th) 301 [15], [17].

135 *Ford v F Hoffman–La Roche Ltd* (2005) 74 OR (3d) 758 (SCJ) [158] ('Ford').

136 *Ford* (2005) 74 OR (3d) 758 (SCJ) [84].

137 *Ford* (2005) 74 OR (3d) 758 (SCJ) [96].

138 *Ford* (2005) 74 OR (3d) 758 (SCJ) [49], see also [86], [98].

139 These cases are: *Sutherland v Boots Pharmaceutical PLC* [2002] OJ No 1361; *Currie v McDonald's Restaurants of Canada* [2006] OJ No 813; *Garland v Embridge Gas Distribution Inc*, [2006] OJ No 4273; *Gilbert v CIBC* [2004] OJ No 4260 and *Ford v F Hoffman–La Roche* (2005) 74 OR (3d) 758 (SCJ). See Jeff Berryman, 'Class Actions (Representative Proceedings) and the Exercise of the Cy Pres Doctrine: Time for Improved Scrutiny' (Paper presented at the Second International Symposium on the Law of Remedies, Auckland, 16 November 2007) 18.

140 Australian Law Reform Commission, *Access to the Courts—II: Class Actions*, Discussion Paper No 11 (1979).

141 *Ibid* [48].

142 *Ibid* [50].

143 *Ibid* [50]–[51].

144 *Ibid* [52].

145 A predecessor of the VLRC.

146 Vince Morabito and Judd Epstein, *Class Actions in Victoria—Time for a New Approach*, Victorian Attorney-General's Law Reform Advisory Council, Expert Report 2, (1997) 44 (Recommendation 2).

147 *Ibid* 57 (Recommendation 12).



Despite widespread recognition of their potential, and in contrast to the position elsewhere, the two Australian class action statutes do not on their face countenance the application of *cy-près* principles in dealing with damages awards to a plaintiff class. In observations apposite to the Victorian scheme, Mulheron has noted:

*Of the leading class actions jurisdictions, Australia is the odd one out—the Australian federal class action regime ... does not statutorily reference a cy-près distribution of all or any part of the judgment that a class may obtain against a defendant ... Reversion to the defendant of any unclaimed amount is preferred to a cy-près distribution.*¹⁴⁸

Cy-près remedies could be given explicit recognition in Australian law through amendments to: (1) class action statutes themselves; and/or (2) consumer law statutes.

3.3.1 Class action statutes in Australia

Sections 33Z and 33ZA of the Supreme Court Act 1986

Section 33Z(1)(f) of the *Supreme Court Act 1986* permits the court, in a group proceeding, to ‘award damages in an aggregate amount without specifying amounts awarded in respect of individual group members’. The court must, however, be satisfied that ‘a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment’.¹⁴⁹ Section 33Z(2) provides that where damages are awarded, the court ‘must make provision for the payment or distribution of the money to the group members entitled’.¹⁵⁰

Under section 33ZA(1), the court is able to constitute a fund into which aggregate damages will be paid to facilitate their distribution to group members.¹⁵¹ If it does so, it must set a date before which such persons must make a claim upon the fund.¹⁵² After that date, the defendant is able to make an application for an order that the undistributed remainder of the fund revert to it.¹⁵³ The court would appear to have a discretion on this point; it is entitled to make ‘such orders as it thinks fit’ as to the return of the money.¹⁵⁴

Section 33Z(1)(g) of the *Supreme Court Act 1986* also permits the court to ‘make such other order as is just, including, but not restricted to, an order for monetary relief other than for damages and an order for non-pecuniary damages’. The implications of this provision are somewhat obscure, in particular given that it differs from section 33Z(1)(g) of the *Federal Court of Australia Act 1976*, which uses the simple formulation ‘make such other order as the court thinks just’.

Whether or not the provision would permit orders in the nature of *cy-près* relief, either in respect of the undistributed remainder of a damages award or otherwise, is unclear. It is perhaps instructive that monetary relief cannot be granted under the provision unless (as where aggregate damages are awarded) the court can make a ‘reasonably accurate assessment ... of the total amount to which group members will be entitled under the judgment’.¹⁵⁵

Doubt as to the meaning of section 33Z(1)(g) aside, sections 33Z and 33ZA of the *Supreme Court Act 1986* and the *Federal Court of Australia Act 1976* would not seem to countenance the application of *cy-près* principles to generate a primary remedy in a class action.

Section 33ZA(5), dealing with the undistributed remainder of a class action settlement fund, reflects the recommendation of the ALRC in its 1988 report, *Grouped Proceedings in the Federal Court*.¹⁵⁶ The ALRC there recognised that ‘[o]ne alternative is that [the remainder] be used to benefit uncompensated group members indirectly’, although it cautioned that the attempt to do so could result in a ‘windfall gain to non group members and give the respondent an unfair price advantage over its competitors’.¹⁵⁷ It concluded:

*The grouping procedure is not intended to penalise respondents or to deter behaviour to any greater extent than that provided for under the existing law. Any money ordered to be paid by the respondent should be matched, so far as is possible, to an individual who has a right to receive it. If this cannot be done, there is no basis for confiscating the residue to benefit group members indirectly, or for letting it fall into Consolidated Revenue, simply because the procedure used was the grouping procedure. It would be a significant extension of present principles of compensation to require the respondent to meet an assessed liability in full even if there is no person to receive the compensation. Any such change would be in the nature of a penalty, and would go beyond procedural reform.*¹⁵⁸

However, the ALRC also considered that where a respondent made no application or funds were not returned for some other reason, the remainder should 'go into a special fund which could be made available for the financing of grouped proceedings'.¹⁵⁹ The recommendation to establish such a fund has not been implemented, and both class actions statutes are silent as to the application of the undistributed remainder where the court exercises its apparent discretion *not* to return that remainder to the defendant.

Other reports of law reform agencies evinced less readiness to permit undistributed balances to revert to a defendant. In 1977, the Law Reform Committee of South Australia, in considering the potential for the introduction of a class actions regime, noted that '[t]here is a strong body of opinion ... that a defendant should not be able to take advantage of the inertia and dispersion of class members when the wrongful conduct and total amount involved has been proved to the Court's satisfaction'.¹⁶⁰ As the committee noted, where such an amount is exacted from a defendant:

*The question arises—where should [the undistributed] balance be paid? Should it be kept by the defendant, paid into Consolidated Revenue or applied to some appropriate fund related to class actions? There are precedents in the United States for applying such moneys to funds designed to confer some benefit on persons who have been or will be affected by the type of conduct in question.*¹⁶¹

The committee ultimately suggested that undistributed damages could be paid into a litigation fund and that '[o]nce such a fund ha[s] accumulated a reasonable amount sufficient to meet anticipated demands thereon, later undistributed balances could be paid to Consolidated Revenue. The amount invested in the fund could be reviewed from time to time'.¹⁶²

In the Discussion Paper *Access to the Courts—II*, the ALRC had noted that '[w]here a surplus remains unclaimed [following the distribution of a damages fund], [a] *cy-près* scheme will also permit an application of the fund to a charitable or otherwise beneficial public use, which is seen to be preferable to permitting a defendant to retain his unjust enrichment'.¹⁶³ It ultimately put forward a scheme for discussion under which surplus monies remaining once individual claims had been met pursuant to a successful class action would be paid into a 'Class Actions Fund', which would be used to assist plaintiffs to bring class action claims in appropriate cases.¹⁶⁴

Morabito and Epstein also expressed support for the *cy-près* application of undistributed funds in their 1995 report for the Victorian Attorney-General's Law Reform Advisory Council.¹⁶⁵

Section 33M of the Supreme Court Act 1986

One further impediment to *cy-près* relief under the present Victorian class action regime is section 33M of the *Supreme Court Act 1986*, which allows the court to discontinue (or partially stay) a proceeding as a class action where the plaintiff seeks an award of money to group members, and it appears probable that if the plaintiff is successful, the costs involved in the identification of, and distribution of money to group members 'would be excessive having regard to the likely total of these amounts'. In essence, what is involved is a 'cost-benefit equation'.¹⁶⁶ Section 33M of the *Federal Court of Australia Act 1976* (Cth), to which the Victorian provision is identical in effect, embodies a recommendation of the ALRC, which was concerned that the aggregation of large numbers of limited claims had the potential to become uneconomical.¹⁶⁷

Morabito and Epstein did not make explicit comment as to whether section 33M ought to be adopted in Victoria, although they noted that it and like provisions tend to encourage interlocutory dispute,¹⁶⁸ and recommended that 'the power of the court to order the termination of class suits which satisfied the prerequisites for such suits [should] be limited as much as possible'.¹⁶⁹ However, as Morabito has elsewhere noted in connection with the federal provision:

*Section 33M has been criticized because it leaves class members without remedy just because they are disparate and their individual claims are relatively small. This is inconsistent with the access to justice aim of [the class actions regime] and hinders the ability of [class action] proceedings to enforce the law and discourage unlawful behaviour.*¹⁷⁰

Morabito notes that at the time of introduction of the Commonwealth scheme, the Australian Democrats had advocated an amendment to section 33M, which would have replaced the court's power to terminate a class action proceeding in such circumstances with a power to order that class members not be paid. The proposed provision would have left the plaintiff with the option of

148 Mulheron (2006) above n 79, 230.

149 *Supreme Court Act 1986* s 33Z(3).

150 *Supreme Court Act 1986* (Vic) s 33Z(2).

151 *Supreme Court Act 1986* s 33ZA(1).

152 *Supreme Court Act 1986* s 33ZA(3)(c).

153 *Supreme Court Act 1986* s 33ZA(5).

154 *Supreme Court Act 1986* s 33ZA(5).
Note that the Federal Court Act uses the formulation 'such orders as are just': s 33ZA(5).

155 *Supreme Court Act 1986* s 33Z(3).

156 ALRC (1988) above n 36 [240].

157 *Ibid* [237].

158 *Ibid* [239].

159 *Ibid* [240].

160 Law Reform Committee of South Australia, *Relating to Class Actions*, Report No 36 (1977) 9.

161 *Ibid*.

162 *Ibid* 10.

163 ALRC (1979) above n 140, [49].

164 *Ibid* [98]. It was envisaged that the proposed fund would also benefit defendants by meeting any liability for costs awarded against the assisted representative applicant.

165 Morabito and Epstein (1997) above n 146, 57.

166 Cashman (2007) above n 4, 309.

167 ALRC (1988) above n 36, [151].

168 Morabito and Epstein (1997) above n 146, [6.16].

169 *Ibid* 48 (Recommendation 4).

170 Vince Morabito, 'The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions' (2004) 42(3) *Osgoode Hall Law Journal* 473, 490 (footnote omitted).



continuing and seeking an order that all undistributed compensation be referred to a prescribed legal aid fund.¹⁷¹ Senator Sid Spindler, proposing the amendment, noted that its purpose was to 'ensure that funds which have become available as a result of a successful action are not reclaimed by bodies of persons who have caused the damage but are put to a beneficial use'.¹⁷² However, the Democrats' amendment was defeated, Senator Michael Tate (then Minister for Justice and Consumer Affairs) commenting:

[A]lthough I can see the motive behind Senator Spindler's concerns and do not say that they are completely without merit, I believe that the task of the court is to adjudicate between parties and to award compensation to an injured party in those cases where it is appropriate ... if for one reason or another that compensation cannot be easily paid or persons cannot be paid to whom payment ought to be made, the defendant should not be disadvantaged. We do not believe it is right in a sense that the defendant be punished by having assets diminished simply because a payment cannot be made to those who otherwise would be entitled to receive a payment.¹⁷³

The courts have tended to resist arguments that difficulties of proof of the precise losses of individual class members ought to preclude class actions from proceeding. In *ACCC v Golden Sphere International Inc*,¹⁷⁴ the respondents submitted that the circumstances would render the court unable to make a 'reasonably accurate assessment' of aggregate damages as required under section 33Z(3) of the Federal Court Act.¹⁷⁵ Justice O'Loughlin considered it probable that there was variation between the circumstances of individual class members, but dismissed the respondents' submission, commenting:

Pt IVA of the [Federal Court of Australia] Act is not to be read down through any evidentiary inability to identify every member of the group and the relevant amount of damage that each member has or may have suffered ... These are aspects of the case that can be determined at a later stage by the trustee ... The respondents have proffered no evidence or assistance; they are content to sit back and despite their conduct, claim that they should not be the object of an award of damages because of the applicant's alleged inability to prove those damages. To allow such an attitude to prevail would be tantamount to allowing the respondents to profit from their wrong doings. The ACCC has proposed that damages be based only on the minimal sum of \$A50 per member. If the respondents properly considered that this figure was excessive, the remedy was in their hands to submit the contradictory evidence.¹⁷⁶

Maurice Blackburn's submission suggests that in the context of class actions, and particularly in the area of anti-competitive conduct, *cy-près* remedies would reduce the cost and complexity of proceedings, result in the modernisation and simplification of the law and promote fairness and access to justice. The present legislative approval of assessment of aggregate damages would facilitate the application of *cy-près* style principles.¹⁷⁷

3.4 CONSUMER LAW STATUTES

3.4.1 Introduction

The bodies established under statute to monitor and enforce trade practices legislation at both state and federal levels are well placed to seek compensation (of a *cy-près* nature or otherwise) on behalf of affected consumers in situations where it is unlikely that an individual would undertake to conduct representative proceedings when the personal stakes are small and the risk of adverse costs considerable.

Recent decisions at a federal level have affirmed that the Australian Competition and Consumer Commission (ACCC) is unable to seek an award of compensation (let alone *cy-près* compensation) on behalf of consumers who have suffered loss due to contraventions of the *Trade Practices Act 1974* (Cth) except in narrowly defined circumstances. However, the position appears to be quite different for Consumer Affairs Victoria.

3.4.2 The ACCC

The scope for the ACCC to seek compensation or related remedies on behalf of a significant number of consumers is limited.¹⁷⁸ The *Trade Practices Act 1974* (Cth) enables the court, on application, to make orders as it considers 'appropriate' to compensate persons who have suffered loss or damage

from unlawful conduct under the Act.¹⁷⁹ Either an affected person or the ACCC (on behalf of affected persons) can make an application. However, the ACCC is limited to bringing action on behalf of named persons who have given their express consent to involvement in the action.¹⁸⁰ In effect, an opt-in regime is in place and the ACCC is ill-equipped to seek compensation, direct or indirect, in situations where a large class of consumers have suffered small-scale losses which are difficult to separate.

Two recent cases have explored the potential for the ACCC to seek orders that non-parties (that is, consumers) be compensated pursuant to non-representative proceedings that it has commenced and conducted.

In *Medibank Private Ltd v Cassidy*,¹⁸¹ the Federal Court was required to consider (in relation to analogous provisions of the *Australian Securities and Investments Commission Act 1989* (Cth)) whether its power to grant injunctive relief under section 80 of the *Trade Practices Act 1974* extended to awarding such compensation. The court held that it did not.¹⁸² Central to its reasoning was the manner in which the scheme of remedies available under the Act had developed.¹⁸³ It noted:

- At first, section 80 had permitted the ACCC to seek an injunction restraining contravening conduct, but where the court granted such an injunction, section 87(1) allowed it to also make ‘such other orders as it [thought] fit’ to compensate persons that the conduct had injured. Such orders could be made irrespective of whether or not those persons were parties to the proceedings.¹⁸⁴
- In 1977, the Act was amended such that section 87 orders were restricted to parties to the proceeding. The amendment was made for ‘constitutional reasons’.¹⁸⁵
- In 1983, section 80 was amended so as to allow the making not just of restraining orders but also mandatory orders ‘in such terms as the Court determines to be appropriate’.¹⁸⁶ However, ‘there was no suggestion that the effect of the amendment was to confer on the Court the very power that Parliament had taken away, by the [earlier] amendment to s 87’.¹⁸⁷
- Section 87(1B) was later amended to permit the ACCC to seek compensation under section 87 on behalf of specified persons who had consented to the application (as discussed above).¹⁸⁸

Having regard to this sequence of amendments to the Act, the court held that it was not open to order compensation in favour of non-parties on application of the ACCC, stating:

*Such an interpretation would give rise to a capricious and irrational scheme. The effect of such a construction would be that certain of the provisions of s 87 would be quite otiose and have no work to do.*¹⁸⁹

Special leave to appeal the *Medibank* decision to the High Court was refused.¹⁹⁰

In *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd*,¹⁹¹ the respondent was found to have engaged in misleading conduct under the Act. The ACCC sought orders under section 80 requiring the respondent to provide a refund to consumers who had purchased its product in reliance on that conduct. Justice Dowsett noted that although sections 80 and 87 had been amended after the decision in *Medibank*, the changes were not such as to disturb the court’s reasoning in that case.¹⁹²

It is notable that the ALRC in 1979 suggested that the original section 87(1), affording the court broad powers to make orders for compensation in proceedings for an offence, ought to be revived, assuming that the constitutional problems associated with it could be circumvented.¹⁹³ In 1994, the ALRC recommended, along similar lines, that the Trade Practices Act be amended to permit the court to make appropriate orders ‘to compensate a person who has suffered loss or damage’ as a result of a contravention of the Act and/or ‘to undo the effects of the contravention’.¹⁹⁴ These recommendations have not been implemented, and the issue does not appear to have been the subject of consideration in the Treasury’s recent review of the Trade Practices Act.¹⁹⁵

Catriona Lowe, Co-CEO of the Victorian-based Consumer Action Law Centre, observed in May 2007:

*There have been 15 acts of parliament amending the TPA (16 if small business reforms are passed by June) since the Medibank and Danoz decisions. Yet not once has the government taken the opportunity to fix fundamental limitations on the ACCC’s ability to help consumers.*¹⁹⁶

- 171 Ibid 490–1. For the text of the Democrats’ proposed amendment, see Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3034 (Sid Spindler).
- 172 Commonwealth, 13 November 1991, above n 171.
- 173 Ibid 3034 (Michael Tate). See also ibid 3035 (Peter Durack).
- 174 (1998) 83 FCR 424.
- 175 Section 33Z of the *Federal Court of Australia Act 1976* (Cth) is for present purposes identical to s 33Z of the *Supreme Court Act 1986*.
- 176 (1998) 83 FCR 424, 449.
- 177 Submission CP 7 (Maurice Blackburn).
- 178 See Cashman (2007) above n 4, 576–7.
- 179 *Trade Practices Act 1974* (Cth) s 87(1A).
- 180 *Trade Practices Act 1974* (Cth) s 87(1B).
- 181 [2002] FCAFC 290.
- 182 *Medibank Private Ltd v Cassidy* [2002] FCAFC 290, [35], [45] (Sundberg, Emmett and Conti JJ) (‘Medibank’).
- 183 *Medibank* [2002] FCAFC 290 [19].
- 184 *Medibank* [2002] FCAFC 290 [22].
- 185 *Medibank* [2002] FCAFC 290 [24], citing the Explanatory Memorandum of the amending Act.
- 186 *Medibank* [2002] FCAFC 290 [26].
- 187 *Medibank* [2002] FCAFC 290 [27].
- 188 *Medibank* [2002] FCAFC 290 [28]–[29].
- 189 *Medibank* [2002] FCAFC 290 [32].
- 190 See Transcript of Proceedings, *Cassidy v Medibank Private Ltd* (High Court of Australia, McHugh and Hayne JJ, 20 June 2003).
- 191 [2003] FCA 881.
- 192 *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881, [271].
- 193 ALRC (1979) above n 140, [96].
- 194 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) [4.8].
- 195 Trade Practices Act Review Committee, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003).
- 196 Catriona Lowe, ‘Give ACCC Consumer Reforms It Needs’ (Letter to the Editor), *The Australian Financial Review* (Sydney) 28 May 2007, 59.



Thus, the ACCC is not at present entitled to seek compensation on behalf of a substantial class of victims of unlawful conduct, although consumer advocates continue to back amendments to the Trade Practices Act to enable the ACCC to seek compensation (eg, refunds) on behalf of consumers and civil penalties designed to preclude wrongdoers from profiting from their unlawful conduct.¹⁹⁷

Even if the ACCC was empowered to seek compensation on behalf of a large aggregation of consumers, it is doubtful that *cy-près* relief would be among the available remedies. In *Cauvin v Philip Morris Ltd*,¹⁹⁸ determined in 2002, an individual plaintiff sought remedies in the nature of *cy-près* orders via the court's powers under the Trade Practices Act. However, the court held that it lacked the power to make such orders.¹⁹⁹

The *Cauvin* proceedings were instituted following the decisions in *Ha v New South Wales*²⁰⁰ and *Roxborough v Rothmans of Pall Mall Australia Ltd*,²⁰¹ in which it was determined, respectively, that legislation imposing a 'tax' on tobacco products was invalid, and that all identifiable amounts paid to tobacco wholesalers by tobacco retailers under this legislation were to be returned to the retailers.²⁰² However, as was recognised in *Roxborough*, the retention of those amounts would have comprised a windfall gain to either the wholesalers or the retailers.²⁰³ In real terms, it was consumers who had absorbed the impact of the invalid tax through increased prices for the affected products. The plaintiff, *Cauvin*, brought a representative action on behalf of such consumers, seeking, on a number of bases, that the funds collected be paid to them or otherwise used for their benefit.²⁰⁴ Most of the claims were struck out, but the court's consideration of the claims made under the Trade Practices Act is, for present purposes, illuminating.

In essence, the plaintiff's claim was that the wholesalers and retailers had engaged in unconscionable conduct in contravention of section 51AA and/or section 51AB of the Act, and that as she had standing to seek an injunction under section 80, the court could make 'other orders' under section 87(1).²⁰⁵ The plaintiff sought orders that would compensate consumers for, prevent or mitigate past or future loss or damage, 'including, if the court thinks fit, an order that the moneys be paid into an appropriate fund for [their] benefit'.²⁰⁶ 'Whether this was to reduce the cost of cigarettes over a period or for purposes such as "Quit for Life" [was to be] left to the court to decide'.²⁰⁷ It was accepted that it would be difficult, if not impossible, for the plaintiff to establish that she had purchased cigarettes on which tax was not forwarded to the government, or to identify all the individuals comprising the class she sought to represent.²⁰⁸ Justice Windeyer held that the claim must fail, noting that he did not accept that the plaintiff or those she purported to represent had suffered a recognisable 'loss':

*The plaintiff's real case is not for an amount but for a fund, not to compensate purchasers, because it is accepted that they cannot be identified, but for some other good purpose for community welfare or consumer benefit.*²⁰⁹

Justice Windeyer found that there was no scope under the Act for the making of an order to establish such a fund:

*It has not been explained on what basis the court has any such power ... Whatever may be the position in the United States of America [with respect to class actions] there is no power in this court to make orders for disposition of a fund other than to persons who establish an entitlement to compensation out of such fund. Notions based on *cy-près* analogies, escheat, fluid recovery and deterrent distribution are just that. On no basis are they within the remedies available under s 87 of the Trade Practices Act.*²¹⁰

Similar issues in the context of the *Fair Trading Act 1987* (NSW) were considered in *Commissioner for Fair Trading v Thomas*.²¹¹ Section 72 of that Act provided that the court had the power, where certain contraventions of the provision led to a person suffering loss or damage, to 'make such order or orders as it thinks appropriate' against those involved in the contravention, provided that the order or orders would 'compensate the first-mentioned person wholly or in part for the loss or damage or [would] prevent or reduce the loss or damage'.²¹²

In *Thomas*, the various defendants (who were in business as credit consultants) were found to have engaged in unlawful conduct under the Act, with the result that a substantial number of consumers had suffered loss. The Commissioner of Fair Trading sought orders under section 72 establishing a trust comprising monies recovered from the defendants. The commissioner would administer the trust, with a view to compensating consumers for their losses.²¹³ The trust would operate for a certain

period, at the end of which all undistributed monies would be paid into the Financial Counselling Trust Fund.²¹⁴ The purpose of the latter fund is to assist nonprofit organisations engaged in financial counselling, the training of financial counsellors or other educational programs on the management of personal finances.²¹⁵

Justice Shaw found there was a ‘jurisdictional question’ as to whether the court was empowered to order the establishment of such a trust.²¹⁶ The defendants contended that the court had no such power, relying on *Cauvin*.²¹⁷ However, Justice Shaw considered *Cauvin* to be distinguishable on the basis of differences between section 72 of the Fair Trading Act (NSW) and section 87(1) of the Trade Practices Act, in particular that the court has broader powers under the former:

*any appropriate orders are empowered [under s 72] if they are compensatory in character, and the making of such orders does not require the person who suffers loss or damage ... to be the applicant or plaintiff invoking the court’s jurisdiction [as with s 87(1)]. The adjective ‘appropriate’ [in s 72] is of wide import and confers a broad discretion in the court to do justice.*²¹⁸

Justice Shaw further observed:

*It appears that in Cauvin, the orders sought were not directed to compensate consumers for identifiable loss or damage but [wholly] for other, more general, community purposes.*²¹⁹

Justice Shaw thus appears to have held that it was (at least in theory) within the power of the court ‘to make the orders as sought constituting the trust’.²²⁰ However, he declined to order that the remainder of the compensation fund revert to the Financial Counselling Trust Fund:

I have no doubt that [the Trust Fund’s] are worthy objectives and in an era when debt and financial difficulty appears quite widespread that the educative function of such a trust performs a significant public purpose. Nevertheless, the question is whether if there is a surplus in the trust fund which I propose to order it is the defendants in the present litigation who ought to be contributing to the financial counselling fund by a coercive order of this court.

*In my opinion, such a requirement could be characterised as punitive rather than reflecting the leitmotiv of the statutory provisions which are the foundation of the plaintiff’s case. Whilst valiantly seeking to pursue this aspect of the orders [counsel for the plaintiff] fairly indicated that this was ‘the weakest’ part of his argument. I therefore propose that an order be made that if there is a surplus in the fund once the trustee has completed all inquiries and made all payments to consumers which he considers proper and justifiable that any remaining funds shall be repaid to the defendants proportionately to their contribution to the fund.*²²¹

In 2003, the Commonwealth Treasury released a report following a review of the Trade Practices Act.²²² A number of submissions had advocated the inclusion in the Act of an explicit provision empowering the court to make *cy-près* orders.²²³ However, the Review Committee rejected this idea, stating that the application of funds in this manner would raise issues outside the courts’ competence:

*Acceptance of such a proposal would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance.*²²⁴

However, the committee’s subsequent observation that ‘[a]t present, pecuniary penalties [under the Act] are paid into [Consolidated Revenue], the expenditure of which is a matter ... for the Government’ tends to indicate that its conclusion may have been the artefact of a confusion between damages and penalties, as available under the Act.²²⁵ The thrust of the submissions made to the review was that *cy-près* orders ought to be available to enable the court to use funds obtained through unlawful conduct to effect a form of indirect compensation of affected persons when an action is brought on their behalf—not to divert the proceeds of ACCC enforcement actions to particular ‘purposes’.

197 Ibid.

198 [2002] NSWSC 736.

199 *Cauvin v Philip Morris Ltd* [2002] NSWSC 736 (‘Cauvin’), [33].

200 (1997) 189 CLR 465.

201 (2001) 208 CLR 516 (‘Roxborough’).

202 *Cauvin* [2002] NSWSC 736, [2].

203 (2001) 208 CLR 516, [5] (Gleeson CJ, Gaudron and Hayne JJ), [114]–[115] (Kirby J).

204 *Cauvin* [2002] NSWSC 736, [14] (Windeyer J).

205 *Cauvin* [2002] NSWSC 736, [25], [28].

206 *Cauvin* [2002] NSWSC 736, [14] (Windeyer J, quoting the plaintiff’s statement of claim).

207 *Cauvin* [2002] NSWSC 736, [30].

208 *Cauvin* [2002] NSWSC 736, [16].

209 *Cauvin* [2002] NSWSC 736 [31].

210 *Cauvin* [2002] NSWSC 736 [31], [33].

211 [2004] NSWSC 479 (‘Thomas’).

212 *Fair Trading Act 1987* (NSW) s 72.

213 *Commissioner for Fair Trading v Thomas* [2004] NSWSC 479 (‘Thomas’), [1].

214 *Thomas* [2004] NSWSC 479, [1].

215 *Credit (Savings and Transitional) Regulation 1984* (NSW), reg 29(3).

216 *Thomas* [2004] NSWSC 479, [24].

217 *Thomas* [2004] NSWSC 479 [25].

218 *Thomas* [2004] NSWSC 479 [27].

219 *Thomas* [2004] NSWSC 479 [27].

220 *Thomas* [2004] NSWSC 479 [29].

221 *Thomas* [2004] NSWSC 479 [54]–[55].

222 Trade Practices Act Review Committee, above n 195.

223 Ibid. Submissions are available on the website of the Department of the Treasury <www.tpareview.treasury.gov.au/content/home.asp> at 12 December 2007. See, eg, submissions of the Communications Law Centre <http://tpareview.treasury.gov.au/content/subs/177_Submission_CLC.rtf>; the Consumer Law Centre Victoria <http://tpareview.treasury.gov.au/content/subs/031_Submission_CLC.rtf>; the Australian Consumers’ Association <http://tpareview.treasury.gov.au/content/subs/105_Summary_ACA.rtf>; Canberra Consumers <<http://tpareview.treasury.gov.au/content/subs/184.rtf>>; David Roche <http://tpareview.treasury.gov.au/content/subs/012_Submission_Roche.rtf> (all at 12 December 2007).

224 Trade Practices Act Review Committee (2003) above n 195, 163.

225 Ibid.



3.4.3 Consumer Affairs Victoria

Consumer Affairs Victoria is in a much better position to seek compensation on behalf of large groups of consumers who have suffered loss or damage in respect of the same unlawful conduct. Under section 105(1) of the *Fair Trading Act 1999*, the Director of Consumer Affairs Victoria is able to 'institute or continue proceedings on behalf of ... a person or persons in respect of a consumer dispute'.²²⁶ The term 'proceeding' encompasses both group and representative proceedings for the purposes of the section.²²⁷ The director must be satisfied that the person or persons have a good cause of action and that it is in the public interest to act on their behalf.²²⁸ The director must also obtain the consent of the person on whose behalf the proceedings are brought, but in the case of representative or group proceedings only the consent of the representative party is required.²²⁹ Revocation of consent does not preclude the director from continuing the action.²³⁰

The powers of the director to institute and intervene in group or representative proceedings arise from recent amendments. Section 105 in the Act as passed made no mention of such proceedings (and, in addition, required the director to obtain permission from the minister before becoming involved in an action and retain the consent of the person represented throughout).²³¹ The amending Act, the *Fair Trading (Enhanced Compliance) Act 2004*, was directed to 'establish[ing] better enforcement mechanisms to protect consumers' and involved a shift in the 'enforcement of consumer protection legislation from reliance on criminal prosecutions to a greater reliance on civil and administrative interventions'.²³²

The orders that can be sought for breaches of the Act are also broader than at federal level, and could be broad enough that representative action proceedings may not be required to obtain redress on behalf of consumers for unlawful conduct under the *Fair Trading Act 1999*.

Under section 149A(1), the minister, the director or 'any other person' is able apply in the Supreme Court or the County Court for a mandatory injunction requiring a person who has engaged in (or been involved in) unlawful conduct 'to do any act or thing'.²³³ Section 149A(3) sets out a non-exhaustive list of possible orders that the court can make, including orders that the person 'refund money to purchasers' (c.f. the position under the Trade Practices Act, as described above).²³⁴ Prior to the introduction of section 149A in 2004,²³⁵ applicants were restricted to seeking injunctions to restrain conduct under section 149. In the Second Reading Speech to the relevant amending Act, Attorney-General Rob Hulls made specific reference to enabling 'remedial injunctions'.²³⁶

There is also provision for the court to make such orders as it considers 'fair' where it is found that the defendant has contravened the Act and another person has suffered loss or damage as a result.²³⁷ Section 158(2) provides a non-exhaustive list of possible orders, which can include a requirement that the defendant refund money paid by the injured person or provide other compensation for the breach but does not explicitly mention *cy-près* orders.²³⁸ Provision is also made for a limited amount of compensation to be awarded in recognition of humiliation or distress caused by conduct constituting an offence under the Act.²³⁹

Reasoning similar to that of Justice Shaw in *Thomas* may therefore not preclude the court making *cy-près* orders under either section 149A or section 158.

Section 149A is a provision of open standing; 'any ... person' is able to apply for an injunction under it.²⁴⁰ Thus, if the section was found to license the making of *cy-près* orders, an individual consumer (or indeed an organisation of consumer advocates) would be able to seek such orders in an appropriate case.

3.5 CY-PRÈS AND SETTLEMENTS

There have been a number of instances in Australia in which *cy-près* type remedies have been incorporated into settlement agreements.

The Consumer Law Centre Victoria (now merged into the Consumer Action Law Centre) was itself established with the proceeds of a legal settlement:

*The outcome is a consumer advocacy group which can represent the interests of consumers in a manner which ultimately assists in reducing consumer detriment and improves the protection of consumer interests broadly.*²⁴¹

In more recent times, a settlement agreement in a class action has made provision for the *cy-près* application of the undistributed remainder of the settlement fund:

*In King v AG Australia Holdings Limited and Ors*²⁴² the Settlement Agreement, which was approved by the Federal Court of Australia, provided that undistributed damages would be paid to the Australian Institute of Management for the purposes of training corporate officers and directors, or to the Australian Shareholders' Association.²⁴³

Information has also been provided to the commission that the ACCC has in the past reached arrangements under which settlement monies were placed in a fund for the purpose of assisting consumers, including through research.

3.6. EXISTING CY-PRÈS TYPE MECHANISMS

3.6.1 Consumer credit funds

New South Wales: Financial Counselling Trust Fund

In the *Thomas* case,²⁴⁴ as discussed above, the NSW Commissioner for Fair Trading sought to have the unclaimed residue of an award paid into the Financial Counselling Trust Fund.²⁴⁵ That fund, established in 1993, is itself maintained through an arrangement analogous to a *cy-près* scheme, set up under the *Credit Act 1984* (NSW).²⁴⁶ Where a credit provider's contract fails to comply with that Act, the amount the affected debtor has to pay is, in some circumstances, reduced (eg, through the provider forgoing 'credit charges').²⁴⁷ In this situation, the credit provider is able to apply to the Consumer, Trader and Tenancy Tribunal for an order increasing that amount.²⁴⁸ The tribunal must determine whether the provider's noncompliance ought to be excused. If it decides that the provider's conduct is excusable it can order that the debtor is liable for the original amount. Where it is not excusable the tribunal can order that the debtor is liable for such part of the amount financed/owing and the contracted credit charge as it sees fit.²⁴⁹

Section 86 allows the tribunal to deal with several contracts (or a class of contracts) at once where the provider's conduct has affected them all.²⁵⁰ In this situation, under section 86B the tribunal may determine that all credit charges must be repaid to the provider, but that the provider must remit a specified amount to the fund.²⁵¹ In setting the amount, the tribunal must have regard to the number of contracts in issue (and can make an estimate thereof if required).²⁵² Before making such an order, the tribunal must be satisfied:

- (a) the credit provider's noncompliance with the Act was 'sufficiently serious to warrant the ... provider being penalised'; and

226 Note that a 'consumer dispute' is a dispute between a purchaser or possible purchaser and a supplier of goods and services in trade or commerce: *Fair Trading Act 1999* s 105(5). This definition does not appear to limit the director's involvement in proceedings only to causes of action arising under the Act.

227 *Fair Trading Act 1999* s 105(5).

228 *Fair Trading Act 1999* s 105(2)(a), (c).

229 *Fair Trading Act 1999* s 105(3)(a), (b).

230 *Fair Trading Act 1999* s 105(4).

231 These latter requirements were removed by s 43 of the *Fair Trading (Amendment) Act 2003*.

232 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 November 2004, 1509 (Rob Hulls, Attorney-General).

233 *Fair Trading Act 1999* s 149A(1).

234 *Fair Trading Act 1999* s 149A(3).

235 See *Fair Trading (Enhanced Compliance) Act 2004* s 19.

236 Victoria, *Parliamentary Debates*, 11 November 2004, above n 232.

237 *Fair Trading Act 1999* s 158.

238 *Fair Trading Act 1999* s 158(2). The s 158(2) list was, in fact, exhaustive until amended by s 61(1) of the *Fair Trading (Amendment) Act 2003*. The stated purpose of the amendment was to 'remove unnecessary restrictions on access to the ancillary remedies under the [Act]': Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 1495 (Rob Hulls, Attorney-General).

239 *Fair Trading Act 1999* s 160.

240 *Fair Trading Act 1999* s 149A(1).

241 Submission of the Australian Consumers' Association to the Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act (2002)* 9, available at <http://tpareview.treasury.gov.au/content/subs/105_Summary_ACA.rtf> at 12 December 2007.

242 [2003] FCA 980.

243 Submission CP 7 (Maurice Blackburn).

244 *Commissioner for Fair Trading v Thomas* [2004] NSWSC 479.

245 *Thomas* [2004] NSWSC 479 [1].

246 The *Credit (Savings and Transitional) Regulation 1984* (NSW), reg 29 states that the fund 'is established for the receipt of money the subject of a direction under section 86B' of the *Credit Act 1984* (NSW).

247 The 'credit charge' is, in general terms, the difference between the amount financed and the amount that must be repaid under a contract of credit: see *Credit Act 1984* (NSW) s 11(1)(a).

248 *Credit Act 1984* (NSW) s 85(1).

249 *Credit Act 1984* (NSW) s 85(2).

250 *Credit Act 1984* (NSW) s 86(1).

251 *Credit Act 1984* (NSW) s 86B(1).

252 *Credit Act 1984* (NSW) s 86B(1), (2).



(b) that it would be 'unreasonable' to require the provider to take the practical steps that would be involved in reducing the credit charges in respect of individual debtors, eg because of the administrative problems involved in making small adjustments in respect of the contracts of a large number of debtors.²⁵³

The Financial Counselling Trust Fund is able to be applied to assist nonprofit organisations engaged in financial counselling, the training of financial counsellors or other educational programs with regard to personal financial management.²⁵⁴ In other words, penalties exacted from credit providers for contraventions of the Credit Act are directed to assisting consumers in their dealings with such providers. The fund is now administered under the NSW Department of Fair Trading's Financial Counselling Services Program.²⁵⁵

In the Second Reading Speech to the Credit (Amendment) Bill 1992 (NSW) introducing the section 86B scheme, then NSW Attorney-General Peter Collins emphasised its principal purpose was to preclude a credit provider benefiting from noncompliance simply because it would be impracticable to adjust their arrangements with each individual debtor:

[[I]t is clear that in cases involving thousands of contracts where the Tribunal does not find that a breach is a minor error which ought to be excused, a credit provider whose credit charges are partially restored faces very considerable costs in identifying and locating past and current borrowers, reconstructing contracts, calculating refunds, adjusting existing loan accounts, processing and posting refunds and dealing with those returned unclaimed. The benefit to individual borrowers, on the other hand, may be small. This bill gives the Tribunal an alternative: the discretion to direct that forfeited credit charges be paid into a fund used to benefit consumers of credit as a whole.²⁵⁶

However, Mr Collins mentioned that the main purpose of reducing the amount for which debtors are liable under the Act is to penalise the credit provider, not to 'compensate' the debtors, who indeed need not have suffered loss. The direction of confiscated monies to the fund could in some cases do no more than deprive the debtors of what would otherwise be a 'windfall'.²⁵⁷ In this sense, the principal object of the section 86B scheme is regulation rather than indirect compensation of a traditional *cy-près* character.

Victoria: Consumer Credit Fund

In Victoria, the Consumer Credit Fund operates on a similar basis. The fund derives finance from a number of sources,²⁵⁸ including forfeited credit charges (as in NSW),²⁵⁹ civil penalties under the Consumer Credit (Victoria) Code,²⁶⁰ and certain penalties imposed on credit providers by the Victorian Civil and Administrative Tribunal.²⁶¹ The Minister for Consumer Affairs is able to draw on the fund to provide grants to nonprofit persons or organisations (or, since 2003, to the Director of Consumer Affairs Victoria)²⁶² providing education services, information, advice or assistance to credit users, or conducting research into the use of credit. The possible applications of the fund are, therefore, broader than those of its NSW counterpart.

When the fund was established, grants could not be made to enable the provision of assistance to credit users 'by the conduct of legal proceedings'. This caveat was the subject of some debate in parliament, and the Labor opposition moved an amendment to have it deleted.²⁶³ Labor MP Bruce Mildenhall commented:

We do not suggest that trust funds be specifically used for [the purpose of legal proceedings] but just that the restriction that they not be used for that purpose be deleted and that the advisory committee have the option of using trust funds for that purpose.

Some spectacular test cases in Victoria and the rest of Australia have proven to be the best way of enforcing and highlighting consumer rights and creating greater awareness of the ability of consumers to pursue their rights by enabling and resourcing consumers in taking a matter to an appropriate forum and having it dealt with in an appropriate way.²⁶⁴

The Labor amendment failed, with then Attorney-General Jan Wade arguing:

Advocacy assistance is already available on consumer issues through the Consumer Credit Legal Service Co-op, which has played a very important role in protecting consumer interests over a number of years. It has done it very well and will continue to do that.

*The Consumer Law Centre has a very large endowment which I have no doubt will be put to use in the provision of advocacy services. I do not see the need to extend the purposes for which the fund can be used.*²⁶⁵

The restriction relating to legal proceedings was removed in 2004,²⁶⁶ as part of a package of amendments that also empowered the Director of Consumer Affairs Victoria to bring group or representative proceedings on behalf of consumers (see above). In the Second Reading Speech to the amending Act, Attorney-General Rob Hulls noted that one purpose of removing the restriction was to 'allow the government to run test cases'.²⁶⁷

In making grants, the minister must act on the recommendations of the majority of an advisory committee comprising various prescribed stakeholders (see below).²⁶⁸ The composition and mode of operation of the committee were also controversial at the time of its inception. The Labor opposition was critical of the level of involvement of the minister in the management of the fund, and moved amendments designed to give the committee exclusive control of it.²⁶⁹ Mr Mildenhall highlighted the fact that 'government moneys are not involved; [the Fund comprises] moneys derived from the settlement of consumer actions'.²⁷⁰ He commented:

It is more appropriate that an advisory committee rather than the minister responsible be the arbiter of how trust funds are to be used.

It may well be that, through pressures on the minister's office, contacts the minister has had and other political considerations, an action a consumer group might want to take might be seen as far from desirable in the minister's mind. An advisory committee could be well and truly dissuaded, prevented or prohibited given the present provisions of the bill from taking up such causes.

*To remove the possibility of conflict and of the minister's acting at cross-purposes as an ultimate authority on the use of these funds and as part of a government for which such consumer issues might assume a political significance, it is desirable from a policy perspective that there be an adequate separation of the role of the minister from the role of the advisory committee.*²⁷¹

However, the government rejected the Labor amendments, Ms Wade stating that '[w]here public funds are involved, whether they be taxpayer funds or funds obtained in some other way on behalf of the public, it is far better that the minister have a responsibility to ensure that those funds are expended appropriately'.²⁷²

The relevant provisions have not been subsequently amended. The minister retains ultimate control over the making of grants, and is also empowered to appoint the members of the committee, which must comprise not more than:

253 *Credit Act 1984* (NSW) s 86B(3)(a), (b).

254 *Credit (Savings and Transitional) Regulation 1984* (NSW) reg 29(3).

255 See NSW Office of Fair Trading, *Financial Counselling Services Program* (2007) <www.fairtrading.nsw.gov.au/corporate/aboutus/financialcounsellingservicesprogram.html> at 13 December 2007.

256 NSW, *Parliamentary Debates*, Legislative Assembly, 9 April 1992, 2473 (Peter Collins).

257 *Ibid* 2474 (Peter Collins).

258 See *Credit (Administration) Act 1984* s 86AA(2).

259 See *Credit Act 1984* s 86A.

260 See *Consumer Credit (Victoria) Act 1995* s 38.

261 See *Consumer Credit (Victoria) Act 1995* s 30(4)(b).

262 See *Fair Trading (Further Amendment) Act 2003* s 21(3).

263 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 1995, 1660 (Bruce Mildenhall).

264 *Ibid* 1652 (Bruce Mildenhall).

265 *Ibid* 1661 (Jan Wade).

266 See *Fair Trading (Enhanced Compliance) Act 2004* s 34(2).

267 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 November 2004, 1510.

268 *Credit (Administration) Act 1984* ss 86AB–86AC. For examples of the kinds of projects for which funds have been provided, see, eg, Minister for Consumer Affairs, 'Grants to Assist Disadvantaged with Credit Issues' (Media Release, 4 April 2005), available at <www.consumer.vic.gov.au/CA256F2B00231FE5/page/Listing-cavApril2005-04-04-2005+++GRANTS+TO+ASSIST+DISADVANTAGED+WITH+CREDIT+ISSUES?OpenDocument&1=74-2005-&2=18-April-&3=~&REFUNID=B24156D41CFCE554CA256FE40008692E-->> at 13 December 2007.

269 Victoria, *Parliamentary Debates*, above note 162, 1660 (Bruce Mildenhall).

270 *Ibid* 1652.

271 *Ibid*.

272 *Ibid* 1661.



- two persons 'with an interest in the provision of education, advice, or assistance to consumers'²⁷³
- two persons selected from among 'names submitted by a prescribed body representing interests of credit providers'²⁷⁴
- two persons selected from among 'names submitted by a prescribed body representing the interests of consumers'.²⁷⁵

Other States

A Consumer Credit Fund also operates in Queensland.²⁷⁶

3.6.2 Community service orders under the Trade Practices Act

Section 86C of the Trade Practices Act establishes a suite of 'non-punitive orders' that the court can, on application by the ACCC, impose on a person who has contravened specified sections.²⁷⁷ One is a 'community service order', which requires the contravener to perform a service 'for the benefit of the community or a section of the community'.²⁷⁸ Such service must be related to the contravening conduct;²⁷⁹ two examples are provided in the Act:

Example: The following are examples of community service orders:

- (a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and*
- (b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.*²⁸⁰

In *Australian Competition and Consumer Commission v Econovite Pty Ltd*,²⁸¹ the respondent, a manufacturer and distributor of livestock food supplements, admitted breaches of the Trade Practices Act in representations about the composition of several of its products and their registration under Western Australian law.²⁸² Consent orders were proposed, among which were three section 86C orders:

- (1) that the respondent produce and distribute throughout Western Australia 5000 copies of an informational pamphlet on specified aspects of cattle nutrition, to be drafted by an independent expert
- (2) that the respondent arrange for an animal nutrition expert to deliver at least three seminars on the same topics for livestock producers in Western Australia
- (3) that the respondent produce 250 copies of a wall chart setting out a 'simple guide to the nutrient supplementation requirement[s] of cattle', to be distributed to 'consumers of livestock feed supplements'.²⁸³

Justice French expressed some doubt as to whether the orders sought related to the contravening conduct to a sufficient degree,²⁸⁴ but was prepared to assume that they were within the scope of section 86C. However, he declined to make the orders for the pamphlet and the seminars on the basis that they would involve significant reliance on third parties and the respondent would lack control over, and responsibility for, the services provided.²⁸⁵ Justice French considered the respondent had the requisite expertise to produce the wall chart, but added the proviso that its proposed text be reviewed by the ACCC prior to production.

Comment was also made on community service orders in *Australian Competition and Consumer Commission v High Adventure Pty Ltd*.²⁸⁶ There, the respondents (a family-owned corporation and its sole director) admitted to various contraventions related to resale price maintenance.²⁸⁷ The ACCC sought the imposition of onerous pecuniary penalties.²⁸⁸ Justice Gray, taking the respondents' conduct to be less culpable than alleged by the ACCC and mindful of their strained financial circumstances, noted that he

drew the attention of counsel for the applicant to s 86C of the [TPA] and raised with him the possibility of a community service order ... in lieu of a financial penalty. In terms of s 86C(1), such orders can only be made on application by the present applicant. I urged counsel for the applicant to seek instructions to make such an application. On the view I take, an order under s 86C, framed so as to require the second respondent to make such use of his skills and knowledge in relation to paragliding in the promotion

of safety in that activity would have been a far more beneficial outcome than the imposition of pecuniary penalties. There would be much merit in forcing the second respondent to give up his time and to perform unpaid work that would enhance the safety of the activity of paragliding. This would have a more powerful deterrent effect, not only on the second respondent himself, but also generally, than the imposition of large pecuniary penalties that were never collected, because the first respondent went into liquidation and the second respondent was forced to become a bankrupt. Counsel for the applicant sought, but was not given, instructions to make an application for an order pursuant to s 86C. I can only conclude that it is the desire of the applicant to ruin the respondents financially.²⁸⁹

The penalties ultimately imposed on the respondents were much lighter than those the ACCC had sought, Justice Gray noting that he imposed them ‘reluctantly’ and reiterating his belief that ‘an order under s 86C would have been of far greater value’.²⁹⁰

3.7 SUPREME COURT POWER TO GRANT *CY-PRÈS* REMEDIES

Whether the court already has the power to grant *cy-près* type remedies is a vexed question.

Under part 4A of the *Supreme Court Act 1986*, in a class action proceeding the court is empowered to determine questions of law and of fact, to make declarations of liability, to ‘grant any equitable relief’, to award damages to group members, to ‘award damages in an aggregate amount’ (‘without specifying amounts awarded in respect of individual group members’) and to:

*make such other order as is just, including, but not restricted to, an order for monetary relief other than for damages and an order for non-pecuniary damages.*²⁹¹

In contrast, the corresponding provision of the Federal Court Act provides that the court may ‘make such other order as the Court thinks just’.²⁹²

Both the federal and Victorian statutory class action provisions also provide for a fund to facilitate the distribution of money to class members.²⁹³ Along with provisions for notifying class members, the making of claims on the fund by eligible class members and the distribution of funds to class members who have established an entitlement to be paid out of the fund, the statutory provisions give the court a *discretion* to make orders ‘for the payment from the fund to the defendant of the money remaining in the fund’.²⁹⁴

In providing that the court ‘may make such orders as it thinks fit’ for payment to the defendant of any surplus in the fund, the legislation appears to assume there may be circumstances

273 *Credit (Administration) Act 1984* s 86AC(1)(a).

274 *Credit (Administration) Act 1984* s 86AC(1)(b). Prescribed bodies are the Australian Bankers’ Association Inc, the Credit Union Services Corporation, the Australian Finance Conference and the Mortgage Industry Association of Australia: *Credit (Administration) (Committee) Regulations 2006*, reg 4(1).

275 *Credit (Administration) Act 1984* s 86AC(1)(c). Prescribed bodies are the Financial and Consumer Rights Council Inc, the Australian Consumers’ Association, the Consumer Credit Legal Service Inc, the Consumer Law Centre of Victoria Limited, the Brotherhood of St Laurence and the Good Shepherd Youth and Family Service Inc: *Credit (Administration) (Committee) Regulations 2006* reg 4(2).

276 See *Consumer Credit (Queensland) Act 1994* (Qld) pt 6.

277 The introduction of community service orders in this context followed a recommendation of the ALRC: ALRC (1994) above n 194, Recommendation 36.

278 *Trade Practices Act 1974* (Cth) s 86C(4).

279 The ALRC commented that such a requirement ‘is necessary to prevent community service orders being used to promote “pet charities”’. In determining the nature of a community service the court should be required to consider what, if any, damage was suffered by the community as a whole as a result of the contravention, and to require a reasonable relationship between the community service project and the nature of the damage’: ALRC (1994) above n 194, [10.17].

280 *Trade Practices Act 1974* (Cth) s 86C(4).

281 [2003] FCA 964 (‘*Econovite*’).

282 *Econovite* [2003] FCA 964, [4].

283 *Econovite* [2003] FCA 964, [7].

284 *Econovite* [2003] FCA 964, [15]: ‘[I]t is debatable whether mandated general advice about the provision of mineral supplements to livestock is a service that relates to conduct involving mis-statements about the composition of nutrient blocks. The examples of community service orders provided in the statute itself suggest something with a corrective element in relation to the contravention’.

285 *Econovite* [2003] FCA 964 [16].

286 [2005] FCA 762 (‘*High Adventure*’).

287 *High Adventure* [2005] FCA 762 [1]–[2].

288 *Econovite* [2003] FCA 964 [48]–[49].

289 *Econovite* [2003] FCA 964 [50].

290 *Econovite* [2003] FCA 964 [53].

291 *Supreme Court Act 1986* s 33Z(1)(d), (f), (g).

292 *Federal Court of Australia Act 1976* (Cth) s 33Z(1)(g).

293 *Federal Court of Australia Act 1976* (Cth) s 33ZA, *Supreme Court Act 1986* s 33ZA.

294 *Supreme Court Act 1986* s 33ZA(5), *Federal Court of Australia Act 1976* (Cth) s 33ZA(5).



where the court may decline to make such an order. The reference in the legislation to ‘the money remaining in the fund’ does not seem to contemplate, at least expressly, that the court may order payment to the defendant of only some of the surplus in the fund.

In its report which led to the federal class action provisions, the ALRC not only recommended that a special fund should be established to provide financial assistance in class action proceedings, but also made it clear that any unclaimed residue which had not been otherwise allocated to class members or which was not returned to the defendant ‘might, in appropriate cases, also go to this fund. A fund could be set up to be self-financing to some extent’.²⁹⁵

However, before considering the circumstances where there may be ‘money remaining in the fund’ it is necessary to consider the nature and extent of the power conferred by section 33Z(1)(g). What is the meaning of the words ‘an order for monetary relief other than for damages and an order for non-pecuniary damages’?²⁹⁶ There does not appear to be any Victorian class action case law on the meaning of these terms. Orthodox principles relating to the assessment of damages suggest that there are three types of ‘non-pecuniary’ loss. These comprise pain and suffering, loss of amenities and loss of expectation of life.²⁹⁷

Corrs Chambers Westgarth expressed the view that the power presently conferred on the Supreme Court by section 33Z(1)(g) of the Supreme Court Act is ‘sufficiently broad to allow the court to grant *cy-près* type remedies’.²⁹⁸

If a proper construction of this provision and other powers of the court is that there is no power vested in the court in a case of ‘unjust enrichment’ to do anything other than to order either compensation/damages to those persons individually identified (who come forward and make a claim, prove their entitlement and quantify their loss) or to make orders for the return of any surplus to the defendant, then it is recommended that the court should have such further power. Legislative clarification is necessary to avoid ongoing uncertainty and scope for forensic argument and appeals about the nature and extent of the existing powers.

Although in some jurisdictions, including in Canada, broad powers to order *cy-près* relief have been conferred on courts by class action statutes, such power has been held to be within the equitable or other jurisdiction of those courts. Thus, in the United States at least, *cy-près* jurisprudence has developed through judicial innovation.²⁹⁹

As noted by one author, the situations in which *cy-près* remedies may be appropriate include where:

- individual recovery would be low and the cost of proof of entitlement or distribution would be disproportionate
- the identities of class members are not able to be ascertained
- class members are unlikely to ‘come forward’ to submit claims
- the identity of class members ‘changes constantly’
- the ‘sheer number of class members makes individual distribution of damages difficult’.³⁰⁰

One example of where such a power is clearly required is the recent Australian litigation arising out of the constitutional invalidity of state tobacco excise laws. This gave rise to a multitude of proceedings in the NSW Supreme Court between tobacco retailers and tobacco wholesalers as to who should be entitled to retain the money, after it was held that it could not be validly collected by state revenue authorities. The money in question had in fact been collected from consumers of tobacco products, but the consumers failed in their attempt to bring class action proceedings to recover the money because the individual consumers who had paid the amounts in question were unable to be identified and the court did not have power to order some form of *cy-près* or public interest remedy. Thus, the retailers and wholesalers who litigated the issue were battling over what was a windfall for either party.

Another area where *cy-près* remedies may be particularly appropriate is in the area of price fixing. Current regulatory activity and class action litigation in this area is problematic for a number of reasons.

The regulatory focus is on civil penalties, payable to consolidated revenue, with relatively little effort being made by regulatory bodies to obtain compensation for those who have suffered loss. Although class actions brought on behalf of purchasers of products which have an inflated price because of price fixing or other unlawful anti-competitive conduct are compensatory in nature, there is often

considerable uncertainty as to who in fact suffered loss. Moreover, the loss suffered by various groups is difficult to quantify. First-line purchasers of the price fixed products or services (eg, wholesalers) may pass on some or all of the inflated costs to indirect purchasers (eg, retailers) who may pass on some or all of the inflated prices to consumers.

In the Australian vitamins class action litigation, the class as originally formulated encompassed all groups in this chain of supply, including the ultimate consumers.³⁰¹ Eventually, the ultimate consumers and indirect purchasers were excluded from the ambit of the class. The settlement provided a substantial amount for distribution to first-line purchasers and nothing for those who may have suffered loss further down the line.³⁰² As noted by Berryman:

*A very live issue before Canadian courts is the extent to which a defendant can argue that a direct claimant has incurred no loss because they have been able to pass on the excessive costs suffered to their own consumers, and secondly, whether indirect purchasers, usually consumers, have any class action claim at all.*³⁰³

This is also a live issue before Australian courts. Although to date price-fixing class action litigation has only been commenced in the Federal Court, there is no reason why certain causes of action cannot be brought under the class action provisions in the *Supreme Court Act 1986*. There may, however, be some reluctance to do this given that certain statutory causes of action are within the exclusive jurisdiction of the Federal Court.

Other situations which may be suitable for the application of *cy-près* remedies include the recently reported instances of certain petrol stations secretly transferring lower octane petrol to tanks reserved for higher octane fuel and selling the petrol at higher prices to unsuspecting motorists. In such situations it may be relatively simple to calculate the overall amount of 'unjust enrichment'. However, it may not be economically sensible or practicable to seek to identify each of the individual motorists who have been overcharged.

3.8 CY-PRÈS REMEDIES AND POSSIBLE CLASS MEMBER CLAIMS

There is at least one situation where the exercise of the power to grant *cy-près* type remedies would need to be carefully considered or constrained. There may be circumstances where the relevant limitation law(s) applicable to certain causes of action have not expired and where there is a prospect of further claims by persons who have suffered loss and damage but who are not within the ambit of the group on whose behalf the proceedings are being brought. It would be manifestly unfair to deprive a defendant of the amount of any unjust enrichment through the exercise of *cy-près* type remedies but permit future claims by persons claiming to have suffered loss and damage if the amount of such loss and damage had been 'disgorged' pursuant to the previous *cy-près* remedies.

There are a number of ways in which this potential problem could be addressed. For example, the power to order *cy-près* relief could be limited to situations where there was no real prospect of future claims by individual class members, including where the individual amounts in issue are relatively modest or where the relevant limitation period(s) has expired. Alternatively, this could be a factor required to be taken into account by the court in deciding whether to order *cy-près* remedies or in determining the nature and extent of *cy-près* relief to be ordered.

Another option would be to order that the distribution of any money by way of *cy-près* relief be deferred for a specified period, within which individual class members would have an opportunity to come forward and make claims for payment based on their individual legal entitlements. Depending on the nature of the case, the question of distribution of damages to members of the class would ordinarily be considered first, before the *cy-près* distribution of any residue. However, in cases where the individual payments to class members are likely to be modest and the transaction costs of assessing each individual claim are likely to be disproportionate to the amount in question, *cy-près* remedies may be the preferred or only option other than allowing the defendant to retain monies found to have been unlawfully obtained.

3.9. CY-PRÈS REMEDIES AND LEGISLATIVE CONSTRAINTS

If a provision is introduced which empowers the court to grant *cy-près* type relief—including in circumstances where it is not practicable or cost effective to identify or distribute monies to individual

295 ALRC (1988) above n 36, [312].

296 *Supreme Court Act 1986* s 33Z(1)(g).

297 See Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) 525.

298 Submission ED1 32 (Corrs Chambers Westgarth, confidential submission, permission to quote granted 14 January 2008).

299 See generally, Mulheron (2006) above n 79, 236.

300 *Ibid* 259–62; see also Berryman (2007) above n 139, 11–12.

301 *Bray v F Hoffman–La Roche Ltd* (2002) 118 FCR 1, [2].

302 *Darwalla Milling Co Pty Ltd v F Hoffman–La Roche Ltd (No 2)* [2006] FCA 1388, [5].

303 Berryman (2007) above n 139, 30, referring to J Laskin, L Plumpton and A Kershaw, 'The Certification of Competition-related Class Actions in Canada' in S Pitel (ed.), *Litigating Conspiracy: An Analysis of Competition Class Actions* (2006) 219.



class members who have suffered loss or damage—this will have a bearing on the application of existing provisions which empower the court to prevent a class action continuing, or to prevent it continuing in class action form or in respect of monetary relief, in certain circumstances.

For example, section 33M of the Supreme Court Act provides that in a class action which includes a claim for payment of money to group members, the court may direct that the proceeding no longer continue as a class action or may stay the claim for monetary relief if the court concludes

*that it is likely that, if judgment is given in favour of the [representative party], the cost to the [respondent] of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of the amounts.*³⁰⁴

Section 33N also empowers the court to order that the proceeding no longer continue as a class action, where it is ‘satisfied that it is in the interests of justice to do so’ because:

- (a) the costs would be excessive having regard to the costs of separate proceedings by group members
- (b) relief can be obtained by another type of proceeding
- (c) the class action will not provide an ‘efficient and effective means of dealing with the claims of group members’
- (d) ‘it is otherwise inappropriate that the claims be pursued by means of a [class action]’.³⁰⁵

In order to reconcile any tension between the power to order *cy-près* remedies and the application of the above provisions, the legislative power to grant *cy-près* relief would need to be applicable notwithstanding the provisions of sections 33M and 33N of the Supreme Court Act.

With the commission having resolved, in principle, that the court should have express power to make *cy-près* type orders, it remains to consider various matters of detail as to how such power might be exercised.

3.10 RECIPIENTS OF *CY-PRÈS* DISTRIBUTIONS

An important question arises as to whether a *cy-près* power should only be available for the purpose of distributing money for the benefit of persons who have suffered loss or who fall within the general characteristics of those whose losses have given rise to the ‘unjust enrichment’ in question. For example, to take the well known US case of *Daar v Yellow Cab Co*,³⁰⁶ where the taxi company had overcharged passengers during a certain period, should any relief be only for the benefit of (past, present or future) taxi passengers? Alternatively, should the court be able to apply any monies for the benefit of users of public transport, or consumers generally? If so, would the court be comfortable in exercising such a broad discretion to determine who the beneficiaries should be? Should this be subject to appeal?

The application of *cy-près* remedies under class action legislation in Ontario involves a three-stage process. First, the court must decide that an aggregate assessment of damages is appropriate to the case.³⁰⁷ Second, if the court determines that individual claims must be made to effectively distribute the aggregate award of damages, distributions will be made to eligible class members who establish their entitlement within the time set by the court.³⁰⁸ Thereafter, all or part of any remaining part of an award may be ‘applied in any manner that may reasonably be expected to benefit class members ... if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.’³⁰⁹

The commission believes the court’s powers should not be limited or constrained so as to require that any distribution of money be only for the benefit of persons who fall within the general characteristics of those whose losses have given rise to the ‘unjust enrichment’. For example, to take the tobacco excise litigation: it may not be considered appropriate to apply the funds in question to bring about a reduction in the price of tobacco products. Why should such funds not be allocated, for example, to assist anti-smoking groups and campaigns designed to reduce the incidence of tobacco consumption? In one view, both would be in the ‘interests’ of tobacco consumers. Any decision about how such monies should be distributed will involve value judgements and a choice between various alternatives.

3.11 PAYMENT INTO A FUND

The commission has considered whether the power to grant *cy-près* relief should encompass the power to order monies to be paid into the Justice Fund (or some other fund). The commission believes this option should be open to the court.

3.12 MANNER OF *CY-PRÈS* RELIEF

The commission has considered whether the court should have a general discretion as to how any *cy-près* relief should be implemented or whether the court's role should be limited to approving or choosing between proposals made by the parties to the litigation. The commission believes the court should have a general discretion which should not be constrained by the proposals of the parties.

3.13 INTERVENTION BY OTHER BODIES

The commission believes there should be scope for intervention by public interest organisations or other individuals or entities for the purpose of making submissions on how any proposed *cy-près* distribution should be implemented.

3.14 JUDICIAL APPROVAL OF SETTLEMENT AGREEMENTS

At present, the class action statutory provisions require court approval for any class action settlement.

After reviewing the Canadian experience with *cy-près* remedies, the Canadian academic Professor Jeff Berryman notes that a major criticism of many settlements is the apparent lack of connection between the members of the class and the beneficiaries of *cy-près* distribution schemes.³¹⁰ Although some United States courts have applied *cy-près* schemes in a manner which appears to have only 'tangential links to the original purpose' underlying the class action proceedings, other courts have 'exercised control' and rejected *cy-près* schemes that 'moved too far away from the underlying purpose of the litigation'.³¹¹

Professor Berryman notes that in the United States one author has suggested the following guidelines for adoption:

- i. A proposed *cy-pres* fund should invoke the active involvement of the adjudicator to ensure that indirect distribution benefits absent class members and meet[s] the standards of openness, fairness and effectiveness.
- ii. The process of *cy-pres* distribution begins with a consideration and articulation by the court of the purposes and intended beneficiaries of the fund and the standards for fairness and accountability in distribution.
- iii. The principal role of plaintiff's counsel is to assure that indirect distributions offer the greatest benefits possible to absent class members—not to select and advocate for specific recipients of a *cy-pres* fund.
- iv. When economically feasible, the court should base fluid recovery (benefit *cy-pres*) distributions on an open, competitive application process...
- v. Outreach, evaluation, selection, administration and monitoring functions should be carried out in a competent, cost-effective, and defensible manner.
- vi. Fairness in fluid recovery distributions requires two indispensable conditions: (1) equal access to information and the criteria on which distributions are made, and (2) clear disclosure or prohibition of conflict of interest circumscribing the critical functions of evaluation, recommendation, and selection.³¹²

As Berryman proceeds to note, jurisdictions that have enacted class action regimes have done so to improve access to justice. This is not only to compensate injured parties but 'to empower citizens in deterring illegitimate and widespread practises by economically powerful actors'.³¹³ Although *cy-près* remedies serve to enhance these goals it is important to ensure that class actions are not 'allowed to become the personal fiefdom of class action lawyers, to distribute largesse to favoured charities while at the same time masking their own healthy legal fees'.³¹⁴

The commission believes the court should retain power to *not* approve a settlement agreement reached between the parties as to how any *cy-près* distribution is to be made.

304 *Supreme Court Act 1986* s 33M(b).

305 *Supreme Court Act 1986* s 33N(1).

306 67 Cal 2d 695 (1967). The taxi company had overcharged by unlawfully altering the meters of the cabs. The court ordered the company to reduce the fares below the authorised fares for a specified period.

307 *Class Proceedings Act, SO 1992*, c 6, s 24(1).

308 *Class Proceedings Act, SO 1992*, c 6, s 24(7).

309 *Class Proceedings Act, SO 1992*, c 6, s 26(4).

310 Berryman (2007) above n 139, 29.

311 *Ibid* 33.

312 *Ibid* 34-35, quoting Armando Menocal, 'Proposed Guidelines for *Cy-pres* Distribution' (1998) 37(1) *Judges' Journal* 22.

313 *Ibid* 37.

314 *Ibid*.



3.15 REQUIREMENT TO GIVE NOTICE

The *Supreme Court Act* presently provides for notice to be given of any matter at any stage of a class action proceeding.³¹⁵ The commission believes the parties should be required to give court-approved notice to the public that the power may be exercised and this should include, where appropriate, notice to particular entities that may be eligible for consideration as recipients of the funds.

3.16 RIGHT OF APPEAL

It is necessary to consider whether the exercise of the court's discretion to grant *cy-près* remedies should be subject to appeal. The commission believes there should be only limited appeal rights, based on *House v The King*³¹⁶ type principles, rather than a general right of appeal from the exercise of judicial power to grant *cy-près* remedies.

3.17 CIVIL PENALTIES AS ALTERNATIVE TO *CY-PRÈS* REMEDIES

As an alternative to conferring an express *cy-près* power on the court, the commission has considered whether it might be preferable to create a civil penalty based on the amount of any 'unjust enrichment', or to provide for forfeiture of this amount. Such a penalty could be paid to consolidated revenue or into a designated fund (the Justice Fund), or applied for specified 'public interest' purposes.

In its report on class actions, the Ontario Law Reform Commission favoured forfeiture, rather than return of funds to the defendant, where class members were unable to be individually compensated. This was in recognition of the need for deterrence. The resulting legislation in Ontario provided for *cy-près* distribution of any residue after compensation to individual class members. However, forfeiture was rejected in favour of return of funds to the defendant in the event that *cy-près* distribution is not considered appropriate.³¹⁷ Other Canadian provinces allow for forfeiture.³¹⁸ Although both Ontario and British Columbia have statutory provisions for the return of funds to a defendant, and British Columbia has an additional provision for forfeiture, such provisions have not been 'relied upon or made the subject of a court order'.³¹⁹ Apparently this is because it is common practice to make express provision for *cy-près* distribution in a way that ensures there is no undistributed surplus.³²⁰

Although under the commission's proposal some or all of any amount of the residue of damages may, at judicial discretion, be paid into the proposed Justice Fund, the commission believes the remedy available should be limited to *cy-près* type orders rather than extended to encompass civil penalties or forfeiture.

3.18 STAKEHOLDER VIEWS ON *CY-PRÈS* REMEDIES

3.18.1 Submissions supporting *cy-près* remedies

Support for the introduction of *cy-près* remedies in class action litigation came from a number of sources, including the largest commercial litigation funder in Australia, several large plaintiff law firms, PILCH, Victoria Legal Aid, academics with particular expertise in the area of class actions,³²¹ and the Consumer Action Law Centre.

The Consumer Action Law Centre noted that it often deals with 'disputes which must logically be only one instance of a systemic issue involving large numbers of customers [of] the same trader', and suggested that where representative proceedings are inadequate to ensure that all affected consumers receive compensation '*cy-près* orders would be a better solution than allowing a party to profit from errors or illegal conduct'.³²²

Associate Professor Vince Morabito suggested that lack of a *cy-près* mechanism in the class action regime as it stands is 'largely attributable to unwillingness on the part of the ALRC to embrace behaviour modification as one of the purposes of class action devices'. He suggested that such modification is a 'desirable goal', and that empowering the Supreme Court to use *cy-près* remedies would also enable it to prevent defendants being unjustly enriched as a result of their own unlawful behaviour.³²³

Law firm Maurice Blackburn also supported making *cy-près* relief available in class actions. It noted a number of advantages to doing so:

- *Cy-près* settlements provide a useful mechanism for indirectly benefiting ... persons who suffered loss where the victims of anti-competitive conduct are not identifiable, or their claims are relatively small.

- The current regime allows defendants to retain at least some (if not all) of the proceeds of their unlawful conduct, whereas '[b]y directing damages to consumer advocacy and public interest groups, *cy-près* settlements facilitate the disgorging of illegitimate profits from firms who have engaged in anti-competitive conduct and thus enhance consumer welfare in a broader sense'.
- The current regime encourages representative plaintiffs to attempt to define the 'class' in terms of a high expenditure threshold, to avoid having it struck out under section 33M.
- *Cy-près* schemes would permit the undistributed remainder of an award in class action proceedings to be dealt with in a 'simpler, fairer and more cost-effective' manner, and thus 'promote compliance with the law by ensuring that the wrongdoers do not retain their illicit profits'.³²⁴

Maurice Blackburn proposed that provision be made for the court to order that the undistributed remainder of a class action award be applied *cy-près*. It suggested that sections 33 and 34 of the British Columbian Class Proceedings Act provide an 'appropriate model'.³²⁵

IMF expressed concern that the financial risks involved in acting as a representative plaintiff in class action proceedings, coupled with the difficulty of securing litigation funding in the absence of an opt in approach to class composition, are a significant disincentive to commencing them. In the result, one of the principal objects of class action legislation—the enhancement of access to justice—can be frustrated. IMF proposed as a potential solution that courts be empowered, at the outset of class action proceedings, to make provision for any award of damages to be paid into a fund, from which a litigation funder is entitled to a specified percentage. IMF appeared to regard this as an application of *cy-près* principles, which, it submitted, would have other benefits, such as rendering the enforcement of consumer law more efficient.³²⁶

3.18.2 Submissions opposing *cy-près* remedies

Opposition to the proposed introduction of an express power to grant *cy-près* remedies came from Allens Arthur Robinson and Philip Morris, in a joint submission which was also adopted by Telstra and the Australian Corporate Lawyers Association.³²⁷

Law firm Clayton Utz raised the question of whether the courts are either 'equipped or ought to be the arbiter of any unclaimed residue' and suggested that this was a matter for the legislature. It also contended that there is doubt as to whether liability insurance policies would indemnify a defendant against liability to pay damages on a *cy-près* basis.³²⁸

4. SUBMISSIONS ON GENERAL REFORM OF CLASS ACTION LAWS

In its initial Consultation Paper in October 2006 the commission asked whether the law relating to representative or class actions needs reform. The submissions summarised below were received before the commission released specific reform proposals in Exposure Draft 1. Views were also sought on the need for reform in the funding of representative or class actions. The submissions received are summarised in Chapter 10.

4.1 VICTORIAN BAR

In its initial submission, the Victorian Bar addressed what it considered the 'principal source of dissatisfaction, at least amongst plaintiffs' lawyers or litigation funders, namely trying to "capture" the class for the purpose of the proceeding'.³²⁹

The submission focused on what the commission understands to be recent proposals submitted to the Supreme Court Rules Committee for a change to the representative action rule: Order 18 of the Victorian *Supreme Court Rules*. The Bar contended that the proponents for change are seeking to 'bypass the opt out procedure in Part 4A and instil the opt in procedure through an enlarged Order 18'. The drive for change was said to be coming from commercial litigation funders. The Bar concluded that the sorts of changes envisaged would be 'dubious' and would 'in effect sterilise the utility of Part 4A'.

In its submission the Bar referred to the recent decisions of the Federal Court³³⁰ and the Victorian Supreme Court,³³¹ which had held that the restriction of the class members to those who had instructed a particular firm of lawyers and had opted in for the purpose of the proceedings had the effect of subverting the opt-out regime incorporated in the federal and state statutory class action

315 *Supreme Court Act 1986* s 33X(5).

316 (1936) 55 CLR 499.

317 Law reform proposals and the Canadian experience with *cy-près* remedies are both examined in detail by Berryman (2007) above n 139.

318 British Columbia, Newfoundland, Saskatchewan and Manitoba. See Berryman (2007) above n 139, 14.

319 *Ibid* 15.

320 *Ibid*.

321 Submissions CP 28 (Associate Professor Vince Morabito); ED2 13 (Professor Peta Spender).

322 Submission CP 43 (Consumer Action Law Centre).

323 Submission CP 28 (Associate Professor Vince Morabito).

324 Submission CP 7 (Maurice Blackburn).

325 See *Class Proceedings Act*, RSBC 1996, c. 50 as noted in Submission CP 7 (Maurice Blackburn).

326 Submission CP 57 (IMF (Australia) Ltd).

327 Submission ED1 12 (Allens Arthur Robinson and Philip Morris), adopted by submissions ED1 17 (Telstra); ED1 16 (Australian Corporate Lawyers Association).

328 Submission ED1 18 (Clayton Utz).

329 Submission CP 33 (Victorian Bar).

330 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394.

331 *Rod Investments (Vic) Pty Ltd v Adam Clark* [2005] VSC 449.



procedures.³³² These decisions have been the subject of professional,³³³ academic³³⁴ and, most recently, judicial criticism.³³⁵ In a recent decision (discussed above) the Full Federal Court has held that class actions may be brought under Part IVA on behalf of a limited group of persons who consent to proceedings being brought on their behalf.

The Victorian Bar submission expressed the view that, on the face of it, the present representative action Rule in Victoria, Order 18 of the *Supreme Court Rules*, seems 'broad and beneficent with a sufficient body of case law to tell about the application of the Rule'. The submission also contended that in most cases, the 'same interest' requirement may not present difficulties.³³⁶

The Bar referred to two areas of criticism. First, 'limitations' of the 'same interest' requirement had led some proponents for reform to propose that Order 18 should be amended to incorporate the 'broader criteria for the commencement of [statutory class action] proceedings in section 33C' of the *Supreme Court Act 1986*. Second, there was no power under Order 18, or at least no express power, to expand the class of represented persons after commencement of the representative action proceeding. The Bar contended, based on a recent decision of the High Court,³³⁷ that a representative action cannot be commenced with an 'open' class (in the sense of a class identified generically) with the proceedings thereafter limited to named 'plaintiffs' who agree to the terms of litigation funding and thereby opt in for the purpose of continuing the proceedings for their benefit.³³⁸

The Bar also drew attention to the fact that, at present, members of the class as defined at the commencement of the proceedings have a 'free ride'. They are not required to enter into a litigation funding agreement, they are not required to retain the law firm acting for the representative party and they have statutory immunity from any adverse costs orders. The legislation does, however, provide that in the event of a judgment for damages in favour of class members, they may be required to contribute to any shortfall between the legal costs incurred by the representative party in conducting the proceedings and the amount of costs recovered from the unsuccessful party.³³⁹ Also, there appears to be a legislative power to require these members to contribute to unrecovered costs where they are beneficiaries of a settlement of the class action proceedings.³⁴⁰

This 'free rider' problem has resulted in various attempts to limit both class actions and representative action proceedings to persons who either enter into litigation funding arrangements with a commercial litigation funder or who enter into a fee, and, retainer agreement with the law firm acting on behalf of the representative party.

Although single judges of both the Federal Court and the Victorian Supreme Court, in the cases referred to in the Bar's submissions, have held that this opt-in methodology is not permissible, Justice Finkelstein of the Federal Court recently held that class actions are able to be maintained on behalf of a limited group of persons who each individually consent to the conduct of proceedings for their benefit,³⁴¹ and this decision has been upheld by the Full Federal Court.³⁴²

Insofar as these recent decisions are correct, neither the representative action rule nor the statutory class action provisions need amendment to facilitate the conduct of proceedings for the limited benefit of identified individuals who have given their consent, at least as at the date of commencement of the proceedings. The statutory class action provisions expressly allow for the addition of group members after the proceedings have been initiated³⁴³ but the representative action rule does not.³⁴⁴

In relation to the 'broad and beneficent' meaning of the 'same interest' requirement of the representative action rule in Victoria, a recent decision of the NSW Supreme Court, on an analogous provision of the *Uniform Civil Procedure Rules 2005* (NSW),³⁴⁵ highlights some of the present difficulties.

In that case, Justice White held that the rule did not permit actions for damages on behalf of a group to be brought as a representative action.³⁴⁶ The action was commenced by a representative plaintiff on behalf of herself and a group of identified investors who were unit holders in a property trust.³⁴⁷ The action included claims for declaratory relief and damages on the basis of allegedly misleading and deceptive information in a prospectus. Justice White held that the claim for declaratory relief on behalf of the represented group members should be permitted to proceed but the claims for damages were struck out.³⁴⁸ After reviewing various Australian and English authorities, Justice White held that the representative action Rule only permitted the representative plaintiff to pursue claims, in a representative capacity, which were beneficial or common to all of the group members.³⁴⁹ This would exclude the claims for damages given that each group member would have to establish a causal connection between the alleged contraventions and their loss and because the losses were separate for each person.³⁵⁰

4.2 LAW INSTITUTE OF VICTORIA

In its initial submission the Law Institute of Victoria indicated that the rules relating to representative proceedings were ‘satisfactory’ but that ‘some reform might be necessary in order to recognise the role now played by commercial litigation funding companies ... in representative [and class action] proceedings’.³⁵¹

4.3 MENTAL HEALTH LEGAL CENTRE

The Mental Health Legal Centre stated that class action procedures should be ‘flexible enough to facilitate actions in as many cases as possible’.³⁵²

4.4 ALLENS ARTHUR ROBINSON

In its initial submission, law firm Allens Arthur Robinson contended that there was no need to reform current class action procedures. The submission expressed support for:

- the precise identification or description of class members
- the need for all class members to have claims against all defendants
- compliance with pleading rules in class actions
- preservation of the existing opt-out mechanism.³⁵³

4.5 LEGAL PRACTITIONERS’ LIABILITY COMMITTEE

The Legal Practitioners’ Liability Committee in its initial submission expressed the view that ‘a litigation funder’s involvement in a proceeding should be disclosed to the other parties’.³⁵⁴

4.6 MAURICE BLACKBURN

In its initial submission, law firm Maurice Blackburn identified a number of areas needing reform in class action laws and related practices and procedures.

It contended that class actions should be permitted to be brought on behalf of groups limited to individuals who have consented to particular arrangements such as ‘contributions to a “fighting fund”’, agreement to litigation finance arrangements or appointment of a particular law firm. It proposed two alternative solutions to resolve this problem: amendment of either section 33C of the *Supreme Court Act 1986* or Order 18 of the *Supreme Court Rules*.³⁵⁵

The submission expressed concern at the ‘satellite litigation’ said to be characteristic of much class action litigation. This encompassed interlocutory applications brought for the purpose of achieving tactical delay and attrition or with a view to preventing the proceedings going forward in representative form. The provisions of sections 33N of the *Supreme Court Act 1986* were of particular concern.³⁵⁶

Maurice Blackburn also expressed concern about the present requirement that all group members should have individual claims against *all* defendants where more than one defendant is joined.³⁵⁷ Conflicting decisions on this question mean that there will continue to be ‘practical difficulties’ until the issue is resolved. In a recent decision in the Federal Court, Justice

332 Submission CP 33 (Victorian Bar).

333 See, eg, Peter Cashman, ‘Class Actions on Behalf of Clients: Is This Permissible?’ (2006) 80 *Australian Law Journal* 738; Cashman (2007) above n 4, 197–223.

334 See eg Vince Morabito, ‘Class Actions Instituted only for the Benefit of the Clients of the Class Representative’s Solicitors’ (2007) 29 *Sydney Law Review* 5; Vince Morabito, ‘Group Litigation in Australia—“Desperately seeking” Effective Class Action Regimes’ (National report for Australia prepared for the International Conference on *The Globalization of Class Actions*, Oxford University, 13–14 December 2007, 18–19.

335 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061 (Finkelstein J) [61]–[64]. See, however, the decision of Young J of the NSW Supreme Court in *Jameson v Professional Investment Services Pty Ltd* [2007] NSWSC 1437 (12 December 2007) and the decision of the Full Federal Court in the appeal from the decision of Finkelstein J: *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007).

336 Submission CP 33 (Victorian Bar).

337 *Campbell’s Cash and Carry Pty Ltd v Fostif* (2006) 80 ALJR 1441.

338 Submission CP 33 (Victorian Bar).

339 *Supreme Court Act 1986* s 33ZJ.

340 *Supreme Court Act 1986* s 33ZF.

341 *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, [49].

342 *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 (21 December 2007). This decision is discussed above: see ‘Class actions limited to persons who consent to proceedings’.

343 *Supreme Court Act 1986* s 33K.

344 See *SZ v Minister for Immigration and Multicultural Affairs* [2000] FCA 458 [20] (and its interpretation of the Federal Court Rules 1979 (Cth) O 6 r 3).

345 *Uniform Civil Procedure Rules 2005* (NSW) r 7.4. In November 2007 the NSW representative action rule was amended both in order to overcome a drafting difficulty with the former rule and also to bring the rule more into alignment with s 33C of the *Federal Court of Australia Act 1976* and s 33C of the *Supreme Court Act 1986* (Vic).

346 *O’Sullivan v Challenger Managed Investments Ltd* [2007] NSWSC 383 (‘O’Sullivan’), [48]–[49] (White J).

347 *O’Sullivan* [2007] NSWSC 383, [4].

348 *O’Sullivan* [2007] NSWSC 383, [72]–[74]. Applications for leave to appeal the decision were discontinued after the NSW representative action rule was amended in late 2007.

349 *O’Sullivan* [2007] NSWSC 383 [41].

350 *O’Sullivan* [2007] NSWSC 383 [55]–[56].

351 Submission CP 18 (Law Institute of Victoria).

352 Submission CP 22 (Mental Health Legal Centre).

353 Submission CP 38 (Allens Arthur Robinson).

354 Submission CP 21 (Legal Practitioners’ Liability Committee).

355 Submission CP 7 (Maurice Blackburn).

356 Submission CP 7 (Maurice Blackburn). See also Morabito and Epstein (1997) above n 146, [7.22–7.28].

357 Submission CP 7 (Maurice Blackburn). This position was confirmed by the Full Court of the Federal Court in *Philip Morris v Nixon* (2000) 170 ALR 487, but goes against both earlier and some subsequent cases. See also: *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342, [36] (Hansen J); *Guglielmin v Trescowthick (No 2)* [2005] FCA 138, [24] and [29]; *Johnstone v HIH Insurance Ltd* [2004] FCA 190, [41]. Other courts have taken a different view of this ‘requirement’, and in *Philip Morris* the point was conceded rather than argued and judicially determined: [108]. See *Bray v Hoffman-La Roche Ltd* (2003) 200 ALR 607 and *Milfull v Terranora Lakes Country Club (in liq)* (2004) 214 ALR 228, [3]. See generally Vince Morabito, ‘Class Actions Against Multiple Respondents’ (2002) 30 *Federal Law Review* 295.



Finkelstein has concluded that the earlier Full Federal Court decision in *Philip Morris* is obiter and that the later Full Court decision in *Bray* (in which he was a member of the court) represents the law on this issue.³⁵⁸ To date, however, there appear to be continuing practical problems including battles over pleadings and interlocutory applications, which may give rise to significant expense and delay. In some cases the proceedings may be discontinued, as occurred in the *Philip Morris* case.³⁵⁹

The solution proposed by Maurice Blackburn was amendment of the statutory class action provisions so that a claim could be pursued by ‘any person having a claim ... against every defendant, as representing some or all of the persons having a claim against any of the defendants’.³⁶⁰ This was said to still meet the requirements of the current statutory provision that there must be at least seven persons having ‘claims against the same person’.³⁶¹ However, the amendment proposed would not necessarily mean that a class action would include seven persons with claims against one defendant. The threshold requirement of the proposed reform would be that only the plaintiff must have claims against all defendants. Thereafter the group would encompass ‘some or all’ (without any number specified) of the group members having a claim against any of the defendants.³⁶²

Maurice Blackburn in its initial submission also contended that the Supreme Court should have power, in appropriate circumstances, to order a *cy-près* distribution of damages in class action proceedings. The submission identified a number of policy arguments in favour of *cy-près* remedies, referred to analogous local schemes³⁶³ and examined overseas developments where *cy-près* remedies have been developed, with particular reference to the US and Canada.³⁶⁴

4.7 IMF (AUSTRALIA)

IMF contended that the relatively small number of class actions to date was not because of a shortage of viable meritorious claims but reflected the costs and risks of class action litigation. It said part of the problem was the potential liability of the representative plaintiff for adverse costs (coupled with the statutory immunity of group members), which was a disincentive to take on the role of representative party. The problem is made worse by excessive costs and delays, in part due to lengthy preliminary legal argument.³⁶⁵

Funders are concerned to ensure that costs are spread across all members of the represented group. This has led to cases being brought only on behalf of persons who have agreed contractually with the funder to pay the costs of the funding (including a commission or percentage of the amount recovered) if the claims are successful.³⁶⁶

According to IMF, the impact of the decision in *Dorajay Pty Ltd v Aristocrat Leisure Limited*—that proceedings requiring group members to opt in were ‘inconsistent with the terms and policies of Part IVA’³⁶⁷—is that funders will be ‘unlikely to provide funding for proceedings brought under Part IVA of the *Federal Court Act 1976* or Part 4A of the *Supreme Court Act 1986* (Vic)’.³⁶⁸

Since the decision in *Dorajay* was followed by the Victorian Supreme Court in *Rod Investments* there have apparently been no new class action proceedings commenced in the Victorian Supreme Court. More recent decisions in other jurisdictions, which have come to a different view, are reviewed in an earlier part of this chapter.

4.8 CONSUMER ACTION LAW CENTRE

The Consumer Action Law Centre drew attention to a number of areas where it contended there is a need for reform:

- In cases where a consumer may obtain a just outcome in a legal claim, other affected individuals may not.
- Where regulators take action individual consumers who have suffered loss do not receive compensation.
- The absence of power to award compensation or refunds to consumers is a problem.
- Where identified individuals have suffered loss, a party may ‘still benefit from the inability to identify all those who should be compensated’.
- The cost of taking class action proceedings is ‘not warranted’ for many consumer transactions.
- The doctrine of *cy-près* should be employed to indirectly provide restitution to affected consumers who are not group members in class action proceedings or who are unable to be directly contacted.³⁶⁹

4.9 ASSOCIATE PROFESSOR VINCE MORABITO

In his initial submission in response to the Consultation Paper, Associate Professor Morabito proposed a number of reforms to class action procedures and funding arrangements. In his view, there are 12 major reasons why the two goals of class action mechanisms, 'access to justice and judicial economy', have not been fully attained:

- the problem of 'standing' arising out of 'the requirement that the representative plaintiff ... must have [an individual claim] against the defendant'
- the judicially imposed requirement that each representative plaintiff and each class member must have a claim against each defendant
- endless interlocutory challenges, by defendants, to the employment of the class action procedure
- the conferral on trial judges of extremely broad powers to terminate properly instituted class actions
- formidable cost barriers to the institution of class proceedings
- the limited scope of the statutory provision³⁷⁰ which provides for the gap between costs incurred by the class representative and the costs recovered by from the unsuccessful defendant to be recouped from class members who obtain monetary relief by way of judgment
- the judicial rejection of various criteria used to limit the class members
- several unsatisfactory aspects of class action settlements
- the prospect of costs orders against lawyers acting for representative plaintiffs in class action proceedings
- security for costs orders against representative plaintiffs
- the non-availability of *cy-près* remedies
- the inability to institute defendant class proceedings.³⁷¹

5. RESPONSE TO DRAFT PROPOSALS

As Justice Lindgren has observed, people either love or hate class actions.³⁷² Those who love class actions are 'class action lawyers, litigation funding companies, and ... class action claimants. The haters are the corporations that are on the receiving end of a class action, their officers and lawyers'.³⁷³

Not surprisingly, the submissions in response to the draft class action proposals reflected this dichotomy. Support for the proposals, albeit in some cases qualified, came from law firms acting for claimants in class action proceedings,³⁷⁴ environmental, consumer and legal aid organisations,³⁷⁵ academics with an interest in class actions,³⁷⁶ a larger commercial litigation funder³⁷⁷ and persons involved as plaintiffs in litigation.³⁷⁸ Support for some or all aspects of the proposals also came from the Law Institute of Victoria and State Trustees.³⁷⁹ Opposition to the proposals came from corporations that have been sued in class action proceedings,³⁸⁰ law firms acting for defendants in class action proceedings³⁸¹ and the Australian Corporate Lawyers Association.³⁸²

RECOMMENDATIONS

99. There should be no legal 'requirement' that all class members have legal claims against all defendants in class action proceedings, but all class members must have a legal claim against at least one defendant.
100. There should be no legal impediment to a class action proceeding being brought on behalf of a smaller group of individuals or entities than the total number of persons who may have the same, similar or related claims, even if the class comprises only those who have consented to the conduct of proceedings on their behalf.
101. The Supreme Court should have discretion to order *cy-pres* type remedies where (a) there has been a proven contravention of the law, (b) a financial or other pecuniary advantage has accrued to the person contravening the law as a result of such contravention, (c) the loss suffered by others, or the pecuniary gain obtained by the person contravening the law, is capable of

358 *McBride v Monzie Pty Ltd* [2007] FCA 1947 (7 December 2007).

359 Submission CP 7 (Maurice Blackburn).

360 This proposal is based on a draft amendment prepared by Dr K Hanscombe SC and L Armstrong of counsel, and follows from the view of the majority in *Bray v Hoffman-La Roche Ltd* (2003) 200 ALR 607, [122], [130] (Carr J), [248] (Finkelstein J).

361 *Supreme Court Act 1986* s 33C(1)(a), leaving aside, for present purposes, whether this requires all persons to have claims against every defendant.

362 This could presumably encompass a plaintiff with, say, a product liability claim against a product manufacturer (eg, a medical product) and a medical negligence claim against a health service provider involved in prescribing or using the product, with the inclusion of group members (possibly fewer than seven) with medical negligence claims against the provider.

363 Eg, the *Consumer Credit (Victoria) Act 1995* s 38. Some settlement agreements have provided for *cy-près* type distributions of settlement funds. See, eg, *King v AG Australia Holdings Limited* [2003] FCA 980, [4.1.1], where undistributed damages were to be paid to the Australian Institute of Management or the Australian Shareholders' Association.

364 Submission CP 7 (Maurice Blackburn).

365 Submission CP 57 (IMF (Australia) Ltd).

366 Submission CP 57 (IMF (Australia) Ltd).

367 [2005] FCA 1483, [125].

368 Submission CP 57 (IMF (Australia) Ltd).

369 Submission CP 43 (Consumer Action Law Centre).

370 *Supreme Court Act 1986* s 33ZJ.

371 Submission CP 28 (Associate Professor Vince Morabito).

372 Justice KE Lindgren, 'Class actions and access to justice' (Keynote address presented at the International Class Actions Conference, Sydney, 25–26 October 2007, 1).

373 *Ibid.*

374 Eg, in consultations with the firms Maurice Blackburn and Slater & Gordon.

375 Submissions ED1 14 (Environment Defenders Office); ED1 11 (Mental Health Legal Centre); ED1 20 (Public Interest Law Clearing House); CP 43 (Consumer Action Law Centre); ED1 25 (Victoria Legal Aid).

376 Eg, submissions CP 28 (Associate Professor Vince Morabito); ED2 13 (Professor Peta Spender).

377 Submission CP 57 (IMF (Australia)).

378 Who wish to remain anonymous.

379 Submissions ED1 31 (Law Institute of Victoria); ED1 6 (State Trustees).

380 Submissions ED1 12 (Allens Arthur Robinson and Philip Morris); ED1 17 (Telstra).

381 Submissions ED1 12 (Allens Arthur Robinson and Philip Morris); ED1 18 (Clayton Utz).

382 Submission ED1 16 (Australian Corporate Lawyers Association).



reasonably accurate assessment and (d) it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered a loss.

102. The power to order cy-près type remedies should include a power to order payment of some or all of the amount available for cy-près distribution into the Justice Fund.
103. The court's power to order cy-près type remedies should not be limited to distribution of money only for the benefit of persons who are class members or who fall within the general characteristics of class members.
104. The court's general discretion as to how any cy-près relief should be implemented should not be limited to any proposal or agreement of the parties to the class action proceeding.
105. Unless the court orders otherwise, the parties should be required to give court-approved notice to the public that the power to order cy-près type remedies may be exercised. Where appropriate, this should include notice to particular entities that the court or the parties consider may be appropriate recipients of funds available for cy-près distribution.
106. Subject to leave of the court, persons other than the parties to the class action proceeding may be permitted to appear and make submissions in connection with any hearing at which cy-près orders are to be considered by the court.
107. There should be no general right of appeal against the exercise of the court's discretion as to the nature of the cy-près relief ordered but there should be a limited right of appeal, based on *House v The King*³⁸³ type principles.

Chapter 9
**Helping Litigants with
Problems and Hindering
Problem Litigants**



Helping Litigants with Problems and Hindering Problem Litigants

1 Introduction

1.1 Self-represented litigants

- 1.1.1 Profile of self-represented litigants
- 1.1.2 Problems caused by self-representation
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- 1.2.1 Introduction
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1.3 Vexatious litigants

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- 1.3.2 Distinction between self-represented and vexatious litigants
- 1.3.3 Scope of the problem
- 1.3.4 Victorian legislation
- 1.3.5 Limitations
- 1.3.6 Developments in other jurisdictions
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- 1.3.8 Exposure Draft 2 proposals and responses
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Recommendations

- 1.3.10 Additional matters

Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts.¹

1. INTRODUCTION

In this chapter we examine some of the problems encountered (and occasionally caused) by particular users of the civil justice system, and make recommendations to ameliorate those problems. The chapter is divided into three sections:

- self-represented litigants
- interpreters
- vexatious litigants.

Chapter 10 discusses the related issue of current limitations on the availability of legal aid funding and assistance.

1.1 SELF-REPRESENTED LITIGANTS

A considerable number of litigants in civil proceedings are not represented by lawyers. This is sometimes a matter of choice, but is more often because people are unable to afford to pay lawyers' fees and do not qualify for any form of legal assistance. Self-representation gives rise to two broad concerns. On the one hand, it places litigants at a disadvantage in presenting their cases and negotiating the court's processes. On the other hand, it has an impact on the efficient administration of the system, because this group of litigants requires a substantial degree of assistance and guidance from the court.

These concerns were raised during our review in consultations and submissions, but have also been examined extensively in other contexts, 'by law reform commissions, parliamentary committees, and other bodies, in reports for government and courts, in academic studies, court annual reports and statistics, and newspaper and journal articles'.²

The problems associated with self-representation are multi-faceted, and there is no single solution. The commission's approach to these problems aims to strike a balance between:

- providing greater access to justice for those who for whatever reason find themselves without legal representation, and
- reducing the number of unmeritorious cases brought before the courts, which inevitably cause a strain on limited public resources.

We believe that measures aimed at providing greater access to the legal system through improved advice and support for self-represented litigants can help reduce the number of unmeritorious claims before the courts, which in turn should increase the effectiveness and efficiency of the civil justice system. The need for further planning and research is also highlighted. Although specific issues arise in relation to individual courts, we have attempted to identify common issues, needs and strategies, particularly in the superior courts.

1.1.1 Profile of self-represented litigants

Litigants appearing in the court system without legal representation have been variously termed 'self-represented litigants', 'unrepresented litigants' or 'litigants in person'. For the purpose of consistency, this report refers to self-represented litigants. A small proportion of the category of self-represented litigants may be described as 'querulous' or 'vexatious', that is, 'litigants whose approach to advancing their cause or matters is irrational or obsessive'.³ It is important to distinguish between this group and the needs of the majority of self-represented litigants. Vexatious litigants are considered later in this chapter.

Although it is not possible to provide definitive information on the number of self-represented litigants across the Victorian court system, some limited information is available. For the period between 8 May 2006 and 16 April 2007, 4.2% of civil cases commenced in the Trial Division of the Supreme Court and 11.4% of cases commenced in the Court of Appeal were cases involving one

1 Mason CJ, Brennan, Deane, Dawson and McHugh JJ in *Cachia v Hanes* (1994) 120 ALR 385 [40] 391.

2 Australian Institute of Judicial Administration and the Federal Court of Australia, *Forum on Self-represented Litigants: Report* (2005)1 <www.ajia.org.au/online/SRLForumReport.pdf> at 15 February 2008.

3 *Ibid.*

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or more unrepresented parties.⁴ The numbers of self-represented litigants are much higher in other jurisdictions; for example, the Family Court observed in that in 2006–2007 34% of litigants may be without legal representation at trial.⁵

In overseas jurisdictions the numbers of self-represented litigants in civil matters are higher again. Canadian Chief Justice Beverly McLachlin has recently noted, '[in] some courts [in Canada], more than 44% of cases involve a self-represented litigant'.⁶ In Hong Kong in 2000, 42% of High Court hearings involved at least one litigant in person.⁷

The individual characteristics and circumstances of self-represented litigants vary, as do the nature of the issues and the demands faced in each case:

*Self-represented litigants are not a homogenous group, but exhibit a wide range of very diverse needs for information, advice and direction as well as exhibiting a wide range of emotional states and responses to litigation.*⁸

Self-represented litigants do, however, share a position of disadvantage in the legal system:

*By definition litigants in person lack the skills and abilities usually associated with legal professionals. Most significantly, lack of knowledge of the relevant law almost inevitably leads to ignorance of the issues that are for the curial resolution for the court or tribunal ... this ranges from lack of knowledge of courtroom formalities, to a lack of knowledge of how the whole court process works from the initiation of a proceeding to hearing. Litigants in person also lack familiarity with the language and specialist vocabulary of legal proceedings.*⁹

Self-represented litigants are also disadvantaged by a lack of objectivity, which bears on their ability to assess the merits of their case.¹⁰ The process of translating facts into legal form requires

*knowledge of law and the rules by which a case may be established in a court, that is, familiarity with the rules of procedure and evidence. It is a process which is conditioned by, but which goes beyond, the relevant. Overarching these considerations, just as doctors and patients have different understandings of an illness, so lawyers and clients understand a legal wrong in different ways ... It suffices to say that there is a difference between subjective and objective knowledge. It is vastly more difficult for litigants in person to display the required objectivity.*¹¹

Commentators have observed that 'adversarial litigation in common law civil justice systems is designed on the assumption that litigants will be represented by competent, legally trained professionals' and that 'when people represent themselves, conventional assumptions about how the case will be conducted do not apply because most self-represented litigants will have none of the attributes the system design assumes they will have—knowledge of civil procedure, advocacy, evidence and law, and duties to the court'.¹²

Some self-represented litigants are without legal advice or representation for all stages in the process of litigation. Others receive legal assistance at some stages of a dispute. Other litigants are partially represented.

Just as self-represented litigants are a diverse group of individuals and their levels of representation vary, so too do their reasons for failing to secure legal assistance. Reasons include:

- they cannot afford private legal representation
- they do not meet merit-based criteria for pro bono representation or are otherwise unable to secure pro bono representation
- government-funded legal aid is not available
- community legal centres do not have the resources to provide ongoing representation
- they cannot find a lawyer who will agree to represent them (for example, if their case does not have any legal merit)
- they choose not to engage a lawyer.

The increasing level of self-representation in courts at all levels has been observed and documented in a range of contexts and echoed in the submissions.¹³ The reason most often identified for this increase is the cost of engaging private legal representation, which is prohibitive for many, and the unavailability of legal aid in most civil cases.¹⁴ The Victorian Bar suggested that 'the substantial

reduction in legal aid in the past 10 or so years has placed a considerable strain on the civil justice system in Victoria. It has resulted in an exponential increase in the number of self-represented litigants'.¹⁵

The Public Interest Law Clearing House (PILCH) noted that despite an increase in the number of people it refers to pro bono assistance and/or representation the number of people appearing unrepresented in courts has not abated. PILCH suggested the following explanations for this trend:

- restrictions on the availability of legal aid
- the increasing cost of litigation
- society becoming more litigious
- information about the law and legal remedies which have been pursued in the courts gaining increasing coverage in the media, including on television and the Internet.¹⁶

PILCH further observed that the gap in the availability of legal advice and representation in civil law areas for those who cannot afford to pay for legal services is compounded for disadvantaged groups such as those who have a mental illness or are from culturally and linguistically diverse communities.¹⁷

Despite the significant contribution of legal practitioners in Victoria to pro bono schemes, such schemes cannot meet the needs of every person requiring assistance. PILCH noted that its existence 'and the significant ongoing contribution of pro bono practitioners are not enough to ensure the self-represented litigants are able to be heard fairly and expeditiously'.¹⁸

The pro bono work of the Victorian legal community and the limitations of legal aid funding are discussed in detail in Chapter 10.

1.1.2 Problems caused by self-representation

As noted above, there are two main dimensions to the issues or problems posed by self-represented litigants. On the one hand, self-represented litigants generally have significant difficulty representing themselves effectively and thereby place their substantive rights at risk. Litigants' ability to assert or defend their rights in the court system is undermined if they lack the skills and knowledge to do so.¹⁹

On the other hand, self-represented litigants place a significant burden on the effective and efficient functioning of the court system. The court, registries, lawyers and other parties often find it difficult to deal with self-represented litigants. Processes such as negotiation, case management and hearings are often more difficult and protracted.

In relation to court procedure and practice and documentation, research reveals patterns such as:

- incorrect use of forms
- detailed correspondence with the registry, often containing applications
- misdirection of correspondence containing formal submissions or requests

4 See Supreme Court of Victoria, *Perception or Reality: Project Report, Self-represented Litigants Co-ordinator 2006-2007* (internal report only, made available to the commission by the Chief Justice) (2007), 1, , 5. The figures were based on quantitative and qualitative data collected by the Self-represented Litigants Co-ordinator.

5 28% have one self represented litigant. 6% have both parties unrepresented. Family Court of Australia, *Annual Report 2006-2007*, 54.

6 See The Right Hon Beverly McLachlin, 'The Challenges We Face' (Speech presented at the Empire Club of Canada, 8 March 2007, Toronto) < http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/Challenges_e.asp> at 25 March 2008. See also Anne-Marie Langan, 'Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario' (2005) 30 *Queen's Law Journal* 825, as cited by McLachlin. Langan cites data compiled by the Ontario Ministry of the Attorney-General stating that 43.2% of applicants in the Family Court Division of the Ontario Court of Justice were unrepresented when they first filed with the court. For 1998-2003 the average percentage of self-represented litigants in Ontario family courts was 46%.

7 Chief Justice's Working Party on Civil Justice Reform (HK), *Civil Justice Reform: Interim Report and Consultative Paper* (2001) Appendix C Table 21.

8 Supreme Court (2007) above n 4, 1.

9 Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) 3. This description of disadvantage was adopted by Bell J in *Tomasevic v Travaglini* [2007] VSC 337, [79].

10 AIIA (2001) above n 9, 4.

11 Joseph M Jacob, *Civil Justice in the Age of Human Rights* (2007) 144.

12 Camille Cameron, Elsa Kelly and Eric Wing Hong Chui, 'Judges' Perspectives on the Impact of Self-representation in Hong Kong Civil Cases' (2006) 8 (3) *Australian Journal of Asian Law*, 262, 263.

13 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 181-3.

14 Courts Consultative Council, *Courts Strategic Directions Project* (2004), Part B: Strategic Directions Statement, 102-103.

15 Submission CP 33 (The Victorian Bar).

16 Submission CP 34 (Public Interest Law Clearing House).

17 Submission CP 34 (Public Interest Law Clearing House).

18 Submission CP 34 (Public Interest Law Clearing House).

19 See also discussion in Attorney-General's Department, Parliament of Australia, *Federal Civil Justice System Strategy Paper* (2003) 92-125.

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- requests for extensions of time
- wrongly framed requests for relief, particularly judicial review.²⁰

In its submission to our review, the Supreme Court said that self-represented litigants:

- have difficulty in preparing documents which express their case in a form acceptable to the court
- may bring applications that are misguided
- have difficulty articulating their cases, and
- may take up a lot of time in court.

These difficulties have the tendency to hamper and prolong court proceedings and 'also create a risk that meritorious claims brought by self-represented litigants may be obscured by, or fail because of, poor articulation, incoherence or procedural irregularity'.²¹ The court submitted that the lack of representation can lead to inefficient use of court time because matters often have to be adjourned to enable litigants to recast their claims or applications (which in turn adds to cost and delay for other parties). It also reported that for court staff, dealing with self-represented litigants 'can cause a great deal of stress. Animosity and, in extreme cases, threats of violence towards staff may result'.

The recent report of the Self-Represented Litigants Project in the Supreme Court provides a further insight into some of the issues or problems posed by self-represented litigants.²² Some of the problems identified include:

- Despite formalising a referral process for self-represented litigants to possibly obtain legal assistance and/or representation, there remains an unsatisfied need for such assistance and there are gaps in such legal assistance service delivery.
- Advice regarding procedure may ensure fairness of process, but is not sufficient to enable self-represented litigants to place their case within a legal context without accompanying legal assistance and/or advice.
- Compliance with procedural rules and/or orders by self-represented litigants is difficult to enforce even with careful and repetitive explanation, direction and instruction.
- Litigation is a polarising process particularly where there is one or more unrepresented party involved. Without early intervention polarisation is likely to become more pronounced. Such polarisation has the potential to make alternative dispute resolution/mediation difficult, if not impossible.

As manager of the County Court Medical List, Judge Wodak has observed that some litigants are unable to secure new representation after a solicitor ceases to act. He noted that:

Sadly, in some of these cases, the former solicitor exercises a lien over the file, for unpaid costs, and the client is unable or unwilling to pay the outstanding costs, and cannot show a prospective new solicitor the file ... The willingness of many legal firms to take on a proceeding on a no win no fee basis does not help, where a plaintiff cannot show a potential new solicitor the existing file, and the solicitor, understandably, is reluctant to take the case on, sight unseen.²³

Judge Wodak also echoed concerns that self-representation can cause complications in case and list management and for other parties.

Australian Law Reform Commission research reveals that self-represented litigants may be less successful in the case outcome than represented parties and that they are more likely to withdraw, cease defending or have their cases determined following a hearing.²⁴ Research in the Federal Court has also indicated that self-represented litigants are less likely to be successful, are more likely to discontinue their actions and are more likely to have costs ordered against them.²⁵ The Supreme Court's submission included statistics from the Court of Appeal which similarly indicated 'an extremely low rate of success of self-represented litigants'. These findings may not be due entirely to the absence of representation. Many such litigants may not have meritorious claims or defences, either at first instance or on appeal.

1.1.3 Addressing the problem

A number of strategies have been suggested or implemented in Victoria and elsewhere to assist self-represented litigants to navigate the legal system. Broadly, such initiatives involve:

- improving the availability of legal representation through legal aid and pro bono schemes
- improving the availability of legal advice and assistance through duty lawyer schemes
- providing procedural and practical advice by dedicated court staff
- providing written information and kits for self-represented litigants
- providing resources such as computer access and photocopying
- developing plans to assist courts to address the needs of self-represented litigants
- training and educating judicial officers and court staff
- developing guidelines for the legal profession
- researching and monitoring the incidence of self-representation and its impact on the system.

We discuss some recent developments in this area, before considering the views expressed in submissions and consultations.

A recent study by the co-ordinator of the Queensland Public Interest Law Clearing House, Tony Woodyatt, investigated overseas developments aimed at addressing the needs of self-represented litigants, with a view to informing the establishment of necessary services in the superior courts of Queensland.²⁶ In particular the study focused on the work of the Justice Citizens Advice Bureau in the Royal Courts of Justice (UK) and developments in Minnesota.

Some of the key strategies and initiatives identified in Woodyatt's report included:

Minnesota

- the 'ask an attorney program' in the St Louis District Court which involves volunteer attorneys attending court for '2 afternoons per month for 3–4 hours to provide legal advice and to guide litigants in person through court forms'
- the establishment of 'computer terminals and access to court materials and research tools in the court library in order to assist litigants to prepare their case' and to provide access to self-help materials issued by other courts in the state²⁷
- self-help centres in the Fourth Judicial District Court, where assistance is provided through a range of government and community agencies. On arrival at a self-help centre clients are triaged and assigned to work stations. Computers are available to provide access to forms and information. Two attorneys are available to provide procedural advice and assistance with form completion and some limited legal advice. The self-help centres are also able to field online questions from self-represented litigants.²⁸ In 2006 'the self-help centres assisted 35 000 people'²⁹ and the program was being significantly expanded throughout Minnesota in 2007.

UK

- The Justice Citizens Advice Bureau provides direct assistance to litigants appearing before the Royal Courts of Justice. The bureau is staffed by a solicitor and an honorary legal advisor who is a full time lawyer drawn from the 60 firms that support the service. Clients are seen in three hour morning and afternoon sessions, five days a week for 45 minute sessions. Assistance includes drafting court documents, writing letters and explaining processes. Any documents prepared by the bureau include the clause that they have been prepared with the assistance of the Advice Bureau but that the bureau does not represent that party. Detailed file notes are taken by advising solicitors, and staff members usually only attend two sessions per week to allow enough time for research, administration and record keeping.³⁰
- The bureau is supported by the Personal Support Unit, which uses trained volunteers to provide moral and practical support. Volunteers may accompany litigants to court, assist at court offices, and provide emotional support and information about what happens in court.³¹

- 20 John Dewar, Bronwyn Jerrard and Fiona Bowd, 'Self-representing Litigants: A Queensland Perspective' (2002) 23 *The Queensland Lawyer*, 65, 68.
- 21 Submission CP 58 (Supreme Court).
- 22 Supreme Court (2007) above n 4, Executive Summary, 1–5.
- 23 Judge Tom Wodak, 'Optimising Process Workflow; The County Court Medical List 2005–2006', (Paper presented at the Law Institute of Victoria Medicine and Law Conference, 23 November 2006), 39 and 41.
- 24 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [1.58]; ALRC, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999) [9.53] as cited in Attorney-General's Department (2003) above n 19, 96.
- 25 See H Gamble and R Mohr, 'Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal' (Paper presented at the 16th Annual Conference of the Australian Institute of Judicial Administration, 4–6 September 1998, Melbourne) 3 as cited in Attorney-General's Department (2003) above n 19, 96. See also Law Society of NSW, *Self-Represented Litigants: Position Paper* (2002) 9.
- 26 Tony Woodyatt, *Report to Investigate and Study Overseas Developments Addressing the Needs of Self-represented Litigants* (The Winston Churchill Memorial Trust of Australia) (2007).
- 27 *Ibid* 8.
- 28 *Ibid* 10.
- 29 *Ibid*.
- 30 *Ibid* 11–14.
- 31 *Ibid* 15.

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Overall Woodyatt noted that:

Whilst there is criticism that self-help services encourage self-representation, the experience in the USA and England is that the services are responding to need and demand, and a failure to respond to that demand results in greater clogging of the courts with unrepresented litigants and underscores the failure of the legal system to provide equal justice to those who cannot afford a lawyer.³²

On the basis of his inquiries Woodyatt made several recommendations for Queensland including:

- the establishment of a self-help centre located in the Supreme and District Courts
- appropriately designed simple English materials, based on current best practice, describing court procedures, legal terminology, form completing requirements
- the provision of easy access forms through the courts and community based services
- training for staff and volunteers in communication skills, client behaviour characteristics and needs as well as options for assistance and referral for problem resolution
- the establishment of a scheme similar to the UK Bar's Free Representation Unit involving new barristers and law students to provide free representation before some tribunals
- that the Queensland Bar Association and Law Society pro bono schemes be funded to streamline their operations and be coordinated with all other relevant free and low-cost legal services to augment services to those self-representing in Queensland courts
- the establishment of a foundation to raise money for legal services for the poor.³³

Queensland PILCH has since implemented the first community-based trial court civil law advice and assistance scheme for self-represented litigants in Australia.³⁴ The pilot program began in October 2007 and is situated in the District Court of Queensland. It assists with matters in both the trial divisions of the superior courts and the Court of Appeal. The Self-Representation Civil Law Service has been established and funded as one part of 'accessCourts', which is a three-part coordinated approach to assisting litigants in person.³⁵

The service is closely modelled on the UK Justice Citizens Advice Bureau. Direct advice is provided in the clinic that is run three mornings and three afternoons a week. It is staffed by a service solicitor and para-legal and by volunteer lawyers. Volunteer barristers provide assistance in relation to Court of Appeal matters.

In addition, dedicated registry staff in the Supreme and District Court Registries provide self-represented litigants with information about how to fill in court forms. Computers are available in the registry for use by self-represented litigants, and volunteer networkers provide emotional support and practical advice to self-represented litigants.

Improving levels of assistance and support

Recommendations for improving access to the legal system by self-represented litigants generally include calls for increasing the level of assistance and support provided by the courts and the profession. Typically this involves suggestions for legal assistance, including duty lawyer schemes, and the provision of specially trained court staff.

The Law Reform Commission of Western Australia's review of the civil and criminal justice system in that state suggested a number of responses to self-represented litigants, including the establishment of a duty counsel scheme.³⁶ The Federal Civil Justice System Strategy Paper also supported the further development of duty lawyer schemes in the federal courts.³⁷

In Victoria the Courts Strategic Directions Project broadly recommended increasing the level of legal advice and support for self-represented litigants by the extension to courts of additional duty lawyers, resources or the utilisation of judicial registrars to assist self-represented litigants with pre-hearing procedures and the completion of court documents.³⁸ The report suggested that:

Consideration should also be given to creating the position of In Person Litigant Procedural Co-ordinator in each Court and Tribunal to be a contact point, give procedural advice, handle difficult users, arrange interpreters and provide referrals to Legal Aid and the Dispute Settlement Centre.³⁹

The project also recommended that the following practical measures should be assessed and where appropriate implemented and adequately resourced:

- development of litigant-in-person plans to provide necessary information to unrepresented persons
- increasing the level of legal advice and support for litigants in person including extension to courts of additional duty lawyers or registrars
- training and educational material for judicial officers through the Judicial College of Victoria in dealing with litigants in person
- greater engagement of the legal profession in the provision of pro bono services for litigants in person in appropriate cases including the utilisation of existing pro bono structures
- development of simpler procedures to facilitate appropriate outcomes for litigants in person
- initiation of a program to collect and analyse data about litigants in person as basis for seeking improvements for the support of such litigants.⁴⁰

Aside from established and formalised pro bono referral schemes supported by professional associations and law firms (discussed in Chapter 10), the private profession continues to embark on initiatives aimed at assisting those in need. The most recent example is a pilot Duty Barrister Scheme in the Melbourne Magistrates' Court that has commenced with a view to potential extension of the scheme to other courts if the pilot is successful.⁴¹ Duty lawyers are provided by Victoria Legal Aid at VCAT, and in the Magistrates' Court by Legal Aid and community legal centres. In the Magistrates' Court these lawyers typically deal with criminal and family violence matters. There are currently no duty lawyer schemes operating in the Supreme and County Courts.

Submissions to our review reiterated the need for adequate legal assistance and support. The Human Rights Law Resource Centre submitted that the right to legal advice and representation is one of the basic elements of a right to a fair hearing which is now recognised in the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).⁴² The centre observed that human rights jurisprudence indicates that 'an individual's access to justice should not be prejudiced by the reason of his or her inability to afford the cost of independent legal advice or legal representation'.⁴³ The submission noted that human rights jurisprudence in relation to the right to legal advice and representation does not provide an obligation on the state to provide free legal assistance in civil matters. However, it observed that it does 'require the state to make the court system accessible to everyone which may itself entail the provision of legal aid. Indeed, the complexity of some cases may actually require legal aid to ensure a fair hearing'. It further suggested that an individual's access to the justice system should not be prejudiced by reason of inability to afford the cost of independent legal advice or legal representation.

The National Pro Bono Resource Centre advocated the provision of funding for duty lawyers at courts,⁴⁴ and the Public Interest Law Clearing House (PILCH) recommended the provision of additional resources for duty lawyer programs in all courts in Victoria.⁴⁵ Corrs Chambers Westgarth submitted that:

*To alleviate the impediment of self-represented litigants, which in our experience creates procedural impediments to the Court and adversaries often resulting in delay, cost burdens (borne by the legally represented party), we believe that a duty solicitor should be appointed and made available in the Supreme Court, to assist and, if necessary, appear for self-represented parties. Relevant resources from the Department of Justice may be properly required to fund and maintain the duty solicitor. In this way we believe this measure would greatly assist not only self-represented litigants, but would also assist their adversaries and, more importantly, the court.*⁴⁶

Although the commission acknowledges the ongoing need for more legal assistance for self-represented litigants, we believe the expansion of duty lawyer schemes requires careful consideration to identify appropriate contexts and methods of delivery. Duty lawyer schemes may be inappropriate in the higher courts because most complex disputes would not necessarily be suitable for one-off ad hoc legal assistance. Further, an expansion of these schemes, if they are to be conducted by Legal Aid, would no doubt require additional allocation of legal aid resources, an issue which is beyond the scope of this stage of the review.

32 Ibid 7.

33 Ibid 22.

34 Submission ED1 20 (Public Interest Law Clearing House).

35 Queensland Public Interest Law Clearing House Incorporated, *Launch of accessCourts* (2007) <www.qpilch.org.au/01_cms/details.asp?ID=384> at 25 February 2008.

36 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) 153–60. See, in particular, Recommendation 205.

37 Attorney-General's Department (2003) above n 19, 112. See, in particular, Recommendation 13.

38 Courts Consultative Council (2004) above n 14, 104.

39 Ibid. This recommendation would appear to be a precursor to the establishment of the SRL Co-ordinator pilot program in the Supreme Court in 2006–7.

40 Ibid 105.

41 The Victorian Bar, *Annual Report* (2007) 10 <www.vicbar.com.au> at 15 February 2008.

42 Submission CP 36 (Human Rights Law Resource Centre). See *Charter of Human Rights and Responsibilities Act 2006* s 24.

43 Submission CP 36 (Human Rights Law Resource Centre).

44 Submission CP 16 (National Pro Bono Resource Centre).

45 Submission CP 34 (Public Interest Law Clearing House).

46 Submission CP 42 (Corrs Chambers Westgarth, confidential submission, permission to quote granted 16 January 2008).

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In 2006 the Supreme Court of Victoria commenced a one year pilot program employing a Self-Represented Litigants Co-ordinator based in the Supreme Court Registry. The co-ordinator acts as the primary contact for self-represented litigants on a day-to-day basis, but does not provide legal advice. The system has been likened to a triage system.⁴⁷ The major tasks of the co-ordinator include:

- providing accurate and consistent procedural and practical advice to self-represented litigants, short of giving legal advice
- assisting litigants to complete necessary forms and file documents
- liaising with other court staff, including judges and associates, registry and prothonotary staff and lower courts, in order to expedite self-represented litigants' proceedings
- keeping statistics on self-represented litigants
- monitoring best practice responses to self-represented litigants from other jurisdictions
- providing referrals to other agencies including PILCH, Victoria Legal Aid and community legal centres. The co-ordinator also works to build relationships with other such agencies and, in particular, has developed a memorandum of understanding with PILCH.⁴⁸

Importantly, the co-ordinator helps to manage the expectations of self-represented litigants before the court by providing information about what the court can and cannot do.⁴⁹

The Supreme Court submission to the Consultation Paper noted:

While contacts vary with each case, a significant amount of time is usually required to listen to the litigant, identify issues and supply information. In some cases a whole day may be spent dealing with a litigant with particularly complex issues. There are often repeat contacts with litigants.

This is intensive work that involves dealing with complex issues, difficult individuals and people in times of great stress. Ideally, the functions currently undertaken by the Co-ordinator would be performed by a team, to allow breaks from the frontline work and conferencing with multiple staff and to avoid fixation by certain litigants on an individual.⁵⁰

Submissions and consultations have provided consistently positive reports about the effectiveness of the appointment of the Self-represented Litigants Co-ordinator in the Supreme Court. The court itself noted that '[d]emand for the new position has far outstripped our expectation. Some 170 referrals were made to the co-ordinator in the first five months of her tenure and there have been over 320 referrals to date, not including repeat contacts'.⁵¹ The court also stated that results have been favourable for self-represented litigants, the court and other litigants.⁵² The Supreme Court called for the ongoing investment of resources in the co-ordinator position. It noted that the expansion of such services would enable the development of policy, court practice and documentation and the acquisition of resources and information.⁵³

The Law Institute of Victoria, Legal Aid, the Federation of Community Legal Centres, the Consumer Action Law Centre, the National Pro Bono Resource Centre, PILCH, the Mental Health Legal Centre, Springvale Monash Legal Service and the Human Rights Law Resource Centre all supported the self-represented litigants co-ordinator initiative. Most of these agencies also called for the role to be funded on an ongoing basis, and implemented in all courts, including suburban and regional registries. PILCH advised that it would work closely with co-ordinators to ensure they understand PILCH's eligibility criteria and processes and what assistance can be provided on a pro bono basis to applicants in regional, rural and remote areas.⁵⁴

The Law Institute noted that PILCH had worked closely with the Self-Represented Litigants co-ordinator in the Supreme Court and that as a 'result of that collaboration, many self-represented litigants who would have otherwise been unaware of the scheme were referred to solicitors who provided legal representation and advice on a pro-bono basis'. The Law Institute also submitted that having a co-ordinator was an ideal way of improving self-represented litigants' knowledge of the court's processes and procedures.⁵⁵

The Federation of Community Legal Centres advised that many of its clients have their claims rejected by the courts, not for the content of the claim but because they have not used the form required by the court. It argued for a dedicated court worker to assist people to understand and complete

documents required for court hearings. The Federation noted that 'if court procedures do not provide flexibility, for example to take into account literacy issues, courts must be resourced to provide necessary support to litigants'.⁵⁶

Some reservations were, however, expressed about the role of self-represented litigants co-ordinators. Legal Aid cautioned that co-ordinators should not 'simply function to siphon "difficult" litigants away from courts and towards bodies such as VLA',⁵⁷ and also expressed concerns about the expansion of the program into a duty lawyer scheme:

*The SRL Co-ordinator functions effectively because it does not provide legal advice, nor does it file and/or appear on behalf of the litigant (as a 'duty lawyer' would do).*⁵⁸

Judge Wodak noted that even though the co-ordinator's role is not to give legal advice and he considers this to be an appropriate role, legal advice is often what is actually required.⁵⁹

Court-based pro bono assistance and referral

Another strategy pursued by courts to assist self-represented litigants is the development of pro bono assistance or referral schemes. Models of court-based pro bono referral schemes range from formal pro bono referral schemes (for example, the Federal Court Legal Assistance Scheme established under Order 80 of the Federal Court Rules) to informal schemes such as that conducted by the registrar of the Victorian Court of Appeal in criminal appeals.

Under the formal schemes, referrals are generally made by the court to a registrar, who refers a self-represented litigant to a barrister or solicitor for specified assistance. For example, Order 80 rule 4 of the Federal Court Rules provides:

The Court or a Judge may, if it is in the interests of the administration of justice, refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel for legal assistance.

The court registries maintain lists of lawyers who have agreed to participate in the schemes. There is no stated means or merits test. However, the court may take into account the litigant's means and capacity to obtain legal assistance, the nature and complexity of the proceedings and any other matter it considers appropriate. A referral may be made for the following kinds of assistance:

- advice in relation to the proceeding
- representation on direction, interlocutory or final hearing or mediation
- drafting or settling of documents to be filed or used in the proceeding
- representation generally in the conduct of the proceeding or of part of the proceeding.⁶⁰

A referral is not intended to be a substitute for legal aid, nor is it a guarantee of representation or an indication that the court has formed an opinion on the merits of the litigant's case.⁶¹

In 2004 a report of the Australian Institute of Judicial Administration (AIJA) forum on self-represented litigants noted that most existing court and tribunal-based pro bono schemes are fairly limited and there is little in the way of evaluation.⁶²

In its submission to the Consultation Paper the National Pro Bono Resource Centre cautioned against a further proliferation of court-based pro bono schemes until those currently operating are evaluated, and a needs analysis is undertaken, in consultation with court users and access to justice sector service providers. The centre also refrained from advocating the expansion of pro bono services generally as a solution to challenges associated with self-represented litigants:

*Pro bono can, however, provide some limited assistance, but it should not be used as a substitute for properly funded legal services to disadvantaged people who cannot afford to pay for legal services.*⁶³

There are arguments for and against formal court-based pro bono schemes. On the one hand, considerable legal work is already done on a pro bono basis by the Victorian legal profession, in particular, through PILCH and the pro bono schemes run by the professional bodies. It is possible that court-based pro bono referral schemes would generally draw on the same pool of volunteer lawyers that already provide their services to other pro bono referral schemes. There is also a considerable degree of coordinated referral work done, in particular under the auspices of PILCH, and there is a need to ensure that services are not duplicated.

- 47 Submission CP 58 (Supreme Court of Victoria).
- 48 PILCH has advised that several matters have been referred to it by the SRL Co-ordinator and that it has worked closely with the co-ordinator: See Submission CP 34 (Public Interest Law Clearing House).
- 49 Submission CP 16 (National Pro Bono Resource Centre). See also their reference to the *Australian Financial Review* (Sydney), 16 June 2006, 57.
- 50 Submission CP 58 (Supreme Court of Victoria).
- 51 Submission CP 58 (Supreme Court of Victoria).
- 52 Submission CP 58 (Supreme Court of Victoria).
- 53 Submission CP 58 (Supreme Court of Victoria).
- 54 PILCH indicated that self-represented litigant co-ordinators in rural areas would 'assist SRL's to understand and navigate the services which are available, including where appropriate, referrals to PILCH's members for pro-bono advice and/or representation'. See Submission ED2 18 (Public Interest Law Clearing House). See also Submission CP 34 (Public Interest Law Clearing House).
- 55 Submission ED2 16 (Law Institute of Victoria).
- 56 Submission ED2 9 (Federation of Community Legal Centres).
- 57 Submission ED2 10 (Victoria Legal Aid).
- 58 Submission ED2 10 (Victoria Legal Aid).
- 59 Submission ED2 5 (Judge Wodak).
- 60 *Federal Court Rules 1979* (Cth) O 80 r 5.
- 61 A referral under the Federal Court's Order 80 Legal Assistance Referral Scheme only 'imposes upon the Registrar an obligation to attempt to arrange for the legal assistance mentioned in the certificate'. See *Taylor v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 319, [12].
- 62 AIJA and Federal Court (2005) above n 2, 19.
- 63 Submission CP 16 (National Pro Bono Resource Centre).

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On the other hand, court-based pro bono schemes have the potential to add another dimension to the assistance provided to self-represented people. Some lawyers who would not otherwise volunteer to provide their services to a pro bono referral scheme may be inclined to do so if the scheme is conducted by the court. Further, as is the case with the Federal Court Order 80 scheme, a court-based scheme is not subject to a rigorous means and merits test and therefore may provide a streamlined way of the court securing legal assistance for a party in relation to certain aspects of a proceeding.

The Consumer Action Law Centre supported the establishment of a pro bono referral scheme in all Victorian courts and tribunals. Support was extended to both a formal system of referral (similar to Order 80) and an ad hoc system of referral administered by the self-represented litigants co-ordinator. It also supported links with existing organisations such as PILCH.⁶⁴

The Federation of Community Legal Centres also supported the proposal on the proviso that it should not be a substitute for properly funded legal aid programs. The Federation recommended that case management and pro bono schemes be extended to the Magistrates' Court, on the basis that the majority of community legal centre clients appear in that court, 'where crowded lists and summary procedures mean that self-represented litigants are most likely to be ignored'.⁶⁵

Judge Wodak expressed support for a pro bono scheme that could provide assistance either in 'acting for an otherwise unrepresented person in a proceeding or in trouble shooting, that is, in providing assistance on specific issues in a proceeding'.⁶⁶

The Mental Health Legal Centre argued that consideration should be given to the court having the power to not only approach legal aid and pro bono providers to seek assistance for a party, but to effectively order that representation be provided unless this becomes untenable through exceptional circumstances.⁶⁷

The Law Institute recommended that greater funding be given to bodies such as the Law Aid Scheme, Legal Aid and community legal centres to deliver legal assistance and representation to self-represented litigants in civil proceedings. It also recommended that in the absence of adequate funding of Legal Aid and community legal centres, the profits of the proposed Justice Fund should be applied to provide pre-litigation advice to potential litigants. The potential litigant could then use that advice to decide whether to pursue the claim, and if the claim went ahead the court could 'feel more confident about requiring such litigants to comply with court rules and timetables'.⁶⁸

Although PILCH supported the investigation and consideration of further avenues to assist self-represented litigants, it was concerned that a court based scheme would draw on the same pool of law firms and lawyers who already provide their services through PILCH and 'create an additional, duplicate referral scheme, which would potentially entail a separate referral protocol'.⁶⁹ PILCH argued that courts should refer litigants to PILCH, which would then assess the applicant's eligibility through the various schemes that it administers.⁷⁰ It emphasised that the existing system works well, is efficient and should continue to be utilised.

PILCH also noted that its members have had difficulties with referrals through the Order 80 scheme because referrals often involve people who choose to remain self-represented and to ignore legal advice, and also because once the referral has been made the solicitor is 'locked in', even if the solicitor does not believe that a client has a reasonable chance of success.

Special masters

Court resourced strategies to address the issues posed by self-represented litigants have typically focused on:

- the provision of referral, information and self-help advice provided by court staff or
- the deployment of judicial resources in the form of judges taking extra time to manage matters, to explain procedures and the rules of evidence or distil arguments put forward by self-represented litigants.

There are limitations to both these strategies.

First, many of the programs that have been implemented to meet the challenges of self-represented litigants have focused on providing guidance and information and have fallen short of providing legal assistance. However, often what is needed is substantive legal advice and assistance.

Second, there are restrictions on the role judges can play because of resource constraints and the proper exercise of judicial power. There are obvious difficulties in judges providing 'advice' or assistance to particular litigants. The role of the judge is to provide resolution of the dispute through adjudication. Judges cannot descend into the arena of the dispute without jeopardising their perceived impartiality and objectivity or giving rise to the potential for an application for disqualification on the grounds of reasonable apprehension of bias.

Hence, there is a gap between what the court can offer in the way of practical assistance, on the one hand, and adjudication by a judge, on the other. In order to address this gap the commission proposed in Exposure Draft 2 that a judicial officer of a lower tier than a judge (a 'special master') be appointed to intensively case manage proceedings where one or more of the parties is without legal representation.

The appointment of special masters in complex commercial disputes and class actions is discussed in this report in the context of alternative dispute resolution (ADR) and the recommended adoption of a wider range of ADR processes (see Chapter 4) as well as in the discussion about discovery (see Chapter 6). The proposed adaptation of the role of special master would incorporate elements of the US model, the existing role of court masters and the role of a special referee under Order 50 of the *Supreme Court (General Civil Procedure) Rules 2005*.

The commission believes that the appointment of a special master may be appropriate to assist in a case involving self-represented litigants where, for instance:

- the matter is of some complexity
- the effective and adequate supervision of the matter has the potential to absorb a disproportionate amount of 'judge time'
- the effective and adequate supervision of the matter is beyond the proper scope of the judicial role (that is, it requires the judge to descend into the arena of the dispute)
- it is an appropriate use of resources likely to bring about the early resolution of the matter.

We envisage that the appointment would be of an independent person (for example, a master of the court or senior legal practitioner not otherwise involved in the litigation) to become actively involved in the proceeding. The appointee would derive a degree of authority, having been appointed by the court. The special master could provide early intervention and an investigation of the issues in dispute, with the aim of adopting appropriate case management strategies and achieving early resolution of the dispute. The special master would have the power to report back to the court as to the future conduct of the proceeding. However, unlike the US model, the special master would not hear evidence on oath and would not make findings of fact.

The role is distinct from that of a mediator, who can meet privately with parties and attempt to resolve the dispute. Absent settlement, a mediator can do little more than report back to the court that the matter has not settled. A mediator is unable to screen out baseless claims.

The special master could be involved with both parties, not just the self-represented litigant. We envisage that a special master may:

- meet the parties together. With the consent of the parties, the special master may also meet with the self-represented party privately
- conduct meetings and/or hearings in a more informal manner than a usual court hearing. This is likely to be less threatening to the self-represented litigant
- conduct interlocutory hearings in an inquisitorial style
- explain the parties' duties pursuant to the overriding obligations and other relevant rules governing the conduct of civil litigation
- investigate and help the parties to identify the key legal issues in dispute
- prepare a report to the court as to the recommended future conduct of the proceeding, in particular, about:
 - whether the matter involves an apparently unmeritorious claim deserving of a summary judgment application or other form of summary disposal. Subject to amendment to the rules, such applications may be brought on the court's own motion or by one of the parties

- 64 Submission ED2 12 (Consumer Action Law Centre).
- 65 Submission ED2 9 (Federation of Community Legal Centres).
- 66 Submission ED2 5 (Judge Wodak).
- 67 Submission CP 22 (Mental Health Legal Centre).
- 68 Submission ED2 16 (Law Institute of Victoria). The Mental Health Legal Centre also noted that if legal aid or pro-bono representation was unavailable, at a 'very minimum entitlement should be a comprehensive expert assessment of the merits of a claim ... before the proceedings commence'. It suggested that this would 'hopefully go a long way towards reducing delays and costs': Submission CP 22 (Mental Health Legal Centre).
- 69 Submission ED2 18 (Public Interest Law Clearing House).
- 70 Submission ED2 18 (Public Interest Law Clearing House).

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- whether the matter is potentially meritorious and deserving of pro bono assistance
- whether the matter is appropriate for early judicial intervention or mediation or some other form of ADR (such as early neutral evaluation).

The special master, with the agreement of the parties, could conduct meetings or hearings at a time and place convenient to the parties and not necessarily at the court.

If the matter is to be mediated we envisage that someone other than the special master would conduct the mediation.

Some of the perceived advantages of this approach would be:

- a saving of 'judge time' in dealing with self-represented litigants
- a shift from the present court model which has limitations for self-represented litigants in particular, who often require substantive assistance in identifying legal issues or formulating their case properly
- employment of proactive case management and, where appropriate, strategies for early disposal of unmeritorious proceedings.

The best candidate for the role of special master is one whose independence and neutrality cannot reasonably be questioned. It is also important that the person can communicate effectively with the parties, and in particular the self-represented party. The court should make every effort to appoint a person acceptable to the parties. It would generally be preferable to appoint a special master with the parties' consent, and either to permit the parties to agree on the selection or to make the appointment from a list submitted by the parties (or a court panel).

The commission's preliminary proposal was supported by a confidential submission from a private litigant who suggested that a special master have the power to 'throw out unmeritorious matters'.⁷¹

Other submissions supported the proposal but raised concerns about the costs of the special master.⁷² The Consumer Action Law Centre argued that self-represented litigants would be disadvantaged if costs of the special master were costs in the cause. It noted that it 'was not just or equitable to impose a requirement on self-represented litigants that a Special Master be present, and then make them pay for this master if they are unsuccessful'. The centre believed the costs of a special master should be funded through the court, and not paid for by the parties.

The Federation of Community Legal Centres argued that because special masters would be appointed to improve case management in the courts, not to directly assist the parties, it would be inequitable to order that the costs be in the cause. The Police Association also queried whether costs of the special master placed an additional financial burden on someone with limited means.⁷³

The Law Institute argued that the appointment of a special master would not be an adequate substitute for the provision of legal advice and assistance to self-represented litigants. It was concerned about issues of liability on the part of the judicial officer. The Law Institute submitted that the proposed functions of the special master are already provided for (for example parties are assisted to identify dispositive legal issues in dispute during mediation), and argued that the proposal would add to the cost of litigation without any benefit to the parties.⁷⁴

The Police Association submitted that self-represented litigants 'should be allowed some leniency in the preparation of and the conduct of their presentation/submission. It may be appropriate that they be allowed access to court officers, who can inform them of court protocols so as to maintain formalised practices within the proceedings'.⁷⁵

Information and education

For self-represented litigants

As noted above, self-represented litigants typically encounter difficulties in the conduct of legal proceedings. They may have difficulty identifying or formulating relevant legal issues, gathering and testing relevant evidence and gauging the strengths and weaknesses of their case. They are also likely to struggle with substantive law and court procedure and practice.

Although they are constrained in the provision of substantive advice, Victorian courts have generally taken steps themselves to provide information to self-represented litigants. In Victoria this has been one of the main focuses of court-based assistance for self-represented litigants.

In the Supreme Court the Self-represented Litigants Co-ordinator has been responsible for the development of materials including:

- plain language materials to assist self-represented litigants
- updating of the Supreme Court website to cater specifically for self-represented litigants, in conjunction with the existing website development project
- materials to assist judges, masters and staff to work effectively with self-represented litigants.

The materials to assist self-represented litigants include information about Supreme Court procedures such as:

- preparation and swearing of affidavits
- making application for leave to appeal from an order of the Victorian Civil and Administrative Tribunal (VCAT)
- making application for bail
- disputing a solicitor's bill
- amending pleadings
- a civil litigation flowchart relating to proceedings commenced by writ.

The co-ordinator has also produced templates for commonly used court documents with basic instructions for their completion. The topics addressed so far have been identified on the basis of the types of applications more commonly made by self-represented litigants, and the procedures that pose frequent difficulties for them.⁷⁶

According to the Supreme Court this material is being reviewed and will be made available in the registry and on the court's website.⁷⁷ The Supreme Court expects that this material will benefit those who use it and assist to reduce the court time consumed by procedural irregularities generally. It is anticipated that it will have a 'significant impact on access to justice and improve the operation of the civil justice system'.⁷⁸

The County Court of Victoria has produced a *Guide for Self Represented Litigants* aimed at improving self-represented litigants' knowledge of court processes and procedures.⁷⁹ The guide is available on the court's website.

Overseas courts have developed court-based self-help centres aimed at supporting self-represented litigants with a range of information and resources.

For example, in the United States, the Judicial Council has provided funding for projects to address the needs of self-represented litigants. The Los Angeles County Superior Court established a program to create a centralised Self-Help Management Centre to develop partnerships with the local courts, the Bar, law schools and social services organisations.⁸⁰ The services provided by the centre include the provision of information, materials about the court and its proceedings and procedures, instructions on how to complete forms, and the provision of reference materials regarding legal service providers, social service agencies and government agencies, as well as other educational material. Clients can also attend workshops or receive one-on-one assistance.

Other courts have worked to apply technological solutions to the delivery of information to self-represented litigants. In the Supreme Court of California, County of Contra Costa, for example, a program has been established to emphasise the use of technology in providing services. The goals of the program are to explore the use of technological solutions for completion of forms, provision of information, meeting with litigants at a distance, and other services. The program aims to combine and deliver expert information and assistance via the Internet, computer applications, and real time videoconference workshops to develop a Virtual Self-Help Law Centre for self-represented litigants with divorce, child custody and visitation, domestic violence, civil and guardianship cases. The centre's resources are intended to help parties to navigate the court process, complete, file and serve court forms, handle their court hearings, and understand and comply with court orders.⁸¹

Submissions received by the commission consistently pointed to the need for additional information and resources to be made available to self-represented litigants.

71 Submission ED2 2 (Confidential, permission to quote granted 17 January 2008).

72 Submissions ED2 12 (Consumer Action Law Centre), ED2 18 (Public Interest Law Clearing House).

73 See Submissions ED2 9 (Federation of Community Legal Centres) and ED 15 (The Police Association).

74 Submission ED2 16 (Law Institute of Victoria).

75 Submission CP 6 (The Police Association).

76 Submission CP 58 (Supreme Court of Victoria).

77 Submission CP 58 (Supreme Court of Victoria).

78 Submission CP 58 (Supreme Court of Victoria).

79 County Court of Victoria, *Self Represented Litigants Information Kit* (2004) <www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Information_Guides/file/srp_web.rtf> at 25 February 2008.

80 Judicial Council of California, *Administrative Office of the Courts – Model Self-Help Centers Pilot Program*. More information is available at <www.courtinfo.ca.gov> at 25 February 2008.

81 See the California Courts Online Self-Help Center, <www.courtinfo.ca.gov/selfhelp> at 25 February 2008.

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Fitzroy Legal Service identified a general need for additional resources to explain court processes and to provide sample court documents. It submitted that ‘unrepresented litigants find it too difficult to manage the preparation of pleadings and so ultimately do not pursue their claim’. It also advised that court documents in the Magistrates’ Court are often rejected by the registry for non-compliance with the rules, but with no explanation of the basis for the rejection.⁸²

The National Pro Bono Resource Centre recommended better resourcing of courts and tribunals to produce and provide accessible self-help information for self-represented litigants, as well as trained support staff. The centre suggested that resources could include workshops, community legal information and access to free document generation facilities at courts.⁸³

PILCH recommended exploring developments with a technological focus, such as:

- publication of written materials (proposed above) on the court’s website
- provision of information
- links to Victoria Legal Aid, the Federation of Community Legal Centres, pro bono referral services, social service agencies and government complaint bodies and agencies
- completion of forms online and
- helping self-represented litigants at a distance to submit questions to the self-represented litigants co-ordinators at the courts.⁸⁴

In Exposure Draft 2 the commission made a number of preliminary proposals for the provision of information and educational materials to self-represented litigants, judicial officers and court staff.

We suggested that an audio-visual aid to explain the processes of civil litigation be produced and made available on the courts’ websites, as well as in court registries.

The Consumer Action Law Centre and the Law Institute supported this proposal. The Law Institute also suggested it was vital that self-represented litigants are informed about the costs implications if proceedings are unsuccessful.⁸⁵

Legal Aid suggested that an audio-visual aid may be insufficient to respond to the needs of self-represented litigants and ‘workshops’ may be more appropriate, and noted that the Legal Aid Libraries have a role in providing this information to the public.

For judicial officers

In *Tomasevic v Travaglini* Justice Bell of the Supreme Court of Victoria discussed the role of the judge in cases involving self-represented litigants:

Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

Most self-represented persons lack two qualities that competent lawyers possess—legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed.⁸⁶

For some time, there has been recognition of the specialised skills required by judicial officers in dealing with self-represented litigants. In 2004 the County Court published a Trial Management Guide for the Judiciary specifically dealing with self-represented litigants.⁸⁷

One of the practical measures in relation to self-represented litigants recommended in the Courts Strategic Directions Statement was the provision of training and educational material for judicial officers about how best to deal with self-represented litigants. It was recommended that such training be provided by the Judicial College of Victoria.⁸⁸

Currently, the Judicial College undertakes a number of training programs aimed at providing Victorian judicial officers with practical skills, in particular, to assist them in dealing with self-represented litigants. The programs are based on interactive experiential learning rather than an information-based model.

As a part of a judicial orientation course, newly appointed judicial officers from across the courts and VCAT are given the opportunity to engage in 'court craft' sessions. Sessions include opportunities for role-playing and developing practical strategies and techniques for addressing conflict in court, particularly involving self-represented litigants or difficult counsel. A court craft program is also conducted annually for 10 existing judicial officers. The program incorporates actors and facilitators in a workshop format.

In 2007 the college also embarked on a pilot online educational forum about self-represented litigants. The forum was moderated and six judicial officers from the Magistrates' and County Courts in Victoria participated, together with judicial officers from Canada and New Zealand. It involved problem-based scenarios involving self-represented or partially represented litigants in criminal proceedings.

In the latter half of 2008 the college will deliver a two-day program for Victorian judicial officers focusing specifically on managing the challenges posed by self-represented litigants. The first day of the program will address the law, particularly the obligations to ensure procedural fairness and a fair hearing. The second day will be aimed at the development and practice of skills and techniques that will assist judicial officers to best deal with self-represented litigants in court.

The recently introduced *Courts Legislative Amendment (Judicial Education and Other Matters) Act 2007* provides the heads of the four Victorian jurisdictions with power to direct their respective judicial officers to participate in professional development and judicial education activities.⁸⁹

In his submission, Judge Wodak supported the commission's preliminary proposal for the expansion of training and education for court officials and judicial officers in dealing with and managing self-represented litigants. He suggested that such training was particularly important for judicial officers and court staff who are active in case and list management, because they have greater contact with self-represented litigants. He also believed additional support would be required for judicial officers and court staff dealing with self-represented litigants at trial.⁹⁰

The Consumer Action Law Centre supported ongoing judicial and court staff education in this area, and believed it would be useful to develop a specific manual to assist them to deal even-handedly with self-represented litigants.⁹¹ The centre also submitted that the way judicial officers and court staff interact with self-represented litigants should be reviewed to ensure that these litigants are dealt with fairly.⁹²

PILCH suggested that the Victorian Government provide additional funding to prepare, publish and deliver training and educational material for judicial officers on best practice management of self-represented litigants.⁹³

Professional guidelines for lawyers

Some jurisdictions have developed ethical guidelines for lawyers acting for parties opposed to self-represented litigants.⁹⁴

The Law Society of Alberta's Code of Professional Conduct, for example, provides that when dealing with an unrepresented party, a lawyer has an obligation to ensure that there is no misunderstanding as to whose interests the lawyer is acting to protect.⁹⁵ In addition, the lawyer must advise the other party to retain independent counsel, because in the conduct of negotiations the lawyer may have particular opportunity to use an unrepresented party's inexperience, lack of education or lack of legal knowledge to improperly further the interests of the lawyer's client.⁹⁶ The lengths to which a lawyer must go in ensuring a party's understanding of these matters will depend on all relevant factors, including the party's sophistication and relationship to the lawyer's client and the nature of the agreement in question. Assuming that a lawyer has complied with his or her duty the lawyer may thereafter represent the client in the same manner as though the other party were represented by counsel.⁹⁷

82 Submission CP 44 (Fitzroy Legal Service).

83 Submission CP 16 (National Pro Bono Resource Centre).

84 Submission CP 34 (Public Interest Law Clearing House).

85 Submission ED2 16 (Law Institute of Victoria).

86 *Tomasevic v Travaglini & Anor* [2007] VSC 337 (13 September 2007) [139]-[141].

87 Elizabeth Richardson, *Self Represented Parties: A Trial Management Guide for the Judiciary* (2004).

88 Courts Consultative Council (2004) above n 14 154.

89 *Courts Legislative Amendment (Judicial Education and Other Matters) Act 2007* s 3-6.

90 Submission ED2 5 (Judge Wodak).

91 Submission ED2 12 (Consumer Action Law Centre).

92 Submission ED2 12 (Consumer Action Law Centre).

93 Submission CP 34 (Public Interest Law Clearing House).

94 In relation to guidelines for judicial officers dealing with self-represented litigants in the Family Court, see *Re F: Litigants in Person Guidelines* (Family Law) [2001] FamCA 348.

95 The Law Society of Alberta, *Code of Professional Conduct* (2007) <www.lawsocietyalberta.com/files/Code.pdf> at 10 April 2008, ch 11, r 5(a).

96 *Ibid* r 5(b).

97 *Ibid* r 5.

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The NSW Bar Association has published guidelines for barristers dealing with self-represented litigants, as has the Law Society of NSW for solicitors.⁹⁸

The Law Society of NSW has explained the rationale for its guidelines as follows:

*Legal practitioners are officers of the court, subject to the provisions of the Legal Profession Act and professional conduct and practice rules, and interact with other legal practitioners on that shared understanding ... Self represented litigants do not have these parameters and legal practitioners would therefore be assisted by a framework of ethical principles to guide them in court appearances where the other party is not represented.*⁹⁹

The Law Society guidelines:

- outline the general duties solicitors are bound to perform to self-represented opponents
- state that solicitors should deal with a self-represented party to the same standard as they would a represented party
- explain that solicitors should set the parameters for dealing with a self-represented party
- clarify that solicitors can and should advance points and take all objections and make all submissions reasonably open to them in advancing their client's case.¹⁰⁰

In setting the parameters of the relationship between the solicitor and the self-represented party the guidelines suggest that certain matters may need to be brought to the attention of the self-represented party, including that he or she should communicate with the solicitor and not the solicitor's client, preferably in writing.¹⁰¹ Solicitors are also advised to explain, in all dealings with a self-represented party, that they are neither acting for nor providing advice to the party.¹⁰² Other suggestions relate to conducting negotiations and concluding settlement.¹⁰³ The guidelines also specify that solicitors should instruct their staff on how to deal with a self-represented party.¹⁰⁴ The Law Society guidelines also incorporate useful information sheets for self-represented parties, which explain key concepts that help to clarify relationships and obligations between legal representatives and self-represented parties.

In Exposure Draft 2 the commission proposed that the Law Institute and the Victorian Bar develop professional guidelines to assist solicitors and barristers in dealing with self-represented litigants to whom they are opposed.

The Law Institute strongly supported this proposal. However, some concern was expressed that self-represented litigants may consider these guidelines mandatory and use them as a basis for instigating complaints proceedings.¹⁰⁵

The proposal was also supported by PILCH and the Consumer Action Law Centre. However, the Consumer Action Law Centre noted that it would be important to ensure the guidelines did not 'perpetuate the prejudiced and inaccurate stereotypes that exist' in relation to self-represented litigants. It suggested that self-represented litigants are widely misunderstood and prejudiced in legal and non-legal circles. In this regard, the centre referred to the commission's suggestion that the guidelines consider 'personal security issues', noting that 'the judiciary and court staff need to accept that self-represented litigation is here to stay, forms a substantial percentage of civil proceedings, and is due primarily to individuals' lack of funds to pay lawyers combined with a lack of public funding to low-income earners for civil litigation'.¹⁰⁶

Research

Although the problems associated with self-representation are widely recognised, there is little data collection or qualitative research about the phenomenon. Some courts have started to collect data about self-represented litigants, albeit relatively recently.

In 2004, a Commonwealth Senate committee recommended that federal courts and tribunals should report publicly on the number of self-represented litigants.¹⁰⁷ The Senate committee also recommended that state governments commission research to quantify the economic effects that self-represented litigants have on the justice system and the social welfare system.¹⁰⁸ Victoria Legal Aid specifically endorsed these recommendations in its submission to our review.¹⁰⁹

A program to collect and analyse data about self-represented litigants was also one of the practical measures recommended in the Courts Strategic Directions Statement.¹¹⁰

In Exposure Draft 2 the commission proposed that properly resourced programs be implemented in all courts to provide information about the numbers of self-represented litigants, their impact on the court system and the effectiveness of measures adopted to assist and manage matters involving self-represented litigants.

The Law Institute and PILCH supported this proposal.¹¹¹ Similarly the Consumer Action Law Centre strongly supported additional research on self-represented litigants, possibly funded through the proposed Justice Fund, in particular in relation to the way judicial officers and court staff interact with self-represented litigants. The centre suggested that such research could 'consider outcomes in forums where self-representation is commonplace, and perhaps even mandated, such as the civil claims list of VCAT'.¹¹² It also submitted that objective research may dispel many of the inaccurate perceptions held about self-represented litigants.

Management plans

Self-represented litigant management plans are a form of strategic planning in the courts aimed at developing a well thought out strategy for assisting such litigants.

In 2001 the Australian Institute of Judicial Administration (AIJA) produced a report, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, in which it raised issues to be addressed in the courts' process of strategic planning. It noted that management strategies require collaboration and cooperation with the legal profession, including law firms and practitioners, the Bar, legal aid providers, government departments in the justice sector and advice agencies.¹¹³ The AIJA followed up on this report by organising a forum on self-represented litigants, attended by representatives of courts and tribunals across Australia, as well as observers including the National Pro Bono Resource Centre and legal aid representatives.

The Courts Strategic Directions Project also recommended the development of litigant-in-person plans in the courts and VCAT 'to provide essential information to enable unrepresented persons appropriate access to the Courts'.¹¹⁴

In 2002 the Federal Court adopted a Self Represented Litigants Management Plan. The plan identified a number of management practices to address the needs of self-represented litigants.¹¹⁵ As a result of that plan the court has implemented the following:

- arrangements to improve the nature and quality of statistical and other information collected by the court on self-represented litigants and their needs
- a re-writing of court brochures and guides to ensure that they use clear language and are simple to understand
- the provision of further staff training on giving appropriate advice and assistance to self-represented litigants and on handling difficult situations involving such litigants
- the development of rules and practices that will allow the court to more effectively deal with self-represented litigants.¹¹⁶

The court has indicated that it is currently compiling a new management plan.¹¹⁷

In 2007 the Federal Court also developed new functions to enable its new electronic case management system (Casetrack) to produce a range of statistical reports which will enable the court to more closely monitor the impact that self-represented litigants have on the litigation process and to measure the effectiveness of initiatives to assist them.¹¹⁸

The Law Institute, PILCH and the Consumer Action Law Centre supported the commission's proposal that courts develop self-represented litigant management plans for consideration in overall organisation and planning.

Deterring or curtailing unnecessary litigation

Some self-represented litigants are involved in matters which ought not to have been commenced, either because the litigant does not have a meritorious claim, or because the matter could or should have been resolved without commencing proceedings. Similarly, some self-represented defendants do not have a meritorious defence to the claim against them.

In this report we make a number of recommendations designed to deter or curtail unnecessary litigation. For example, we recommend that parties should take certain steps before commencing litigation in an attempt to resolve their dispute. Pre-action protocols may help self-represented parties

- 98 NSW Bar Association, *Guidelines for Barristers on Dealing with Self-represented Litigants* (2001) <www.nswbar.asn.au/docs/resources/publications/selfrepresented16_10.pdf> at 25 February 2008; Law Society of NSW, *Guidelines for Solicitors Dealing with Self-represented Parties* (2006) <www.lawsociety.com.au/uploads/files/1147303074860_0.17867041264764721.pdf> at 25 February 2008.
- 99 Law Society of NSW, *Self-Represented Litigants: Position Paper* (2002) 14.
- 100 Law Society of NSW (2006) above n 98, [1.2].
- 101 *Ibid* [1.2(c)].
- 102 *Ibid* [3.3].
- 103 *Ibid* [1.2(c)].
- 104 *Ibid* [3.2].
- 105 Submission ED2 16 (Law Institute of Victoria).
- 106 Submission ED2 12 (Consumer Action Law Centre).
- 107 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 187, see Recommendation 53.
- 108 *Ibid* Recommendation 54.
- 109 Submission CP 31 (Victoria Legal Aid).
- 110 Courts Consultative Council (2004) above n 14, 154.
- 111 Submissions ED2 16 (Law Institute of Victoria) and ED2 18 (Public Interest Law Clearing House).
- 112 Submission ED2 12 (Consumer Action Law Centre).
- 113 AIJA (2001) above n 9, 11.
- 114 Courts Consultative Council (2004) above n 14, 104.
- 115 Federal Court, *Annual Report 2006-2007* (2007), 29.
- 116 See comments in Federal Court, *Annual Report 2003-2004* (2004) Chapter 2.
- 117 Federal Court, above n 115.
- 118 *Ibid*.

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to understand the cases they face, and take appropriate action at an earlier stage to avoid being sued. The proposed overriding obligations seek to ensure that frivolous, vexatious and unmeritorious claims and defences are not conducted. Under our proposal the court would have power to make orders bringing such proceedings to a swifter conclusion. Later in this chapter we also make recommendations designed to improve the process for having problematic litigants declared vexatious. Such measures, we believe—when combined with strategies designed to assist self-represented litigants to pursue their cases effectively—should relieve some of the burdens experienced by the courts in dealing with the problems associated with self-representation.

However, the Federation of Community Legal Centres expressed concern that a number of the commission's preliminary proposals emphasised deterrence over assistance. It submitted that 'access to the courts is a civil right and in the absence of civil legal aid, self-representation is a necessity for many people. Deterrents to self-representation are not only counter productive but they fuel unacceptable prejudices against self-represented litigants'.¹¹⁹

1.1.4 Conclusions and recommendations

Despite the increased attention given to self-represented litigant issues in recent years, the problems associated with such litigants are ongoing. It seems to be increasingly recognised that they will remain a feature of the Australian legal system. For that reason, it is important that ongoing work is undertaken to accommodate those who for whatever reason seek to navigate the system without representation, and to find ways for them to participate properly in the process. Of course, these objectives must be balanced against the need for courts to administer the civil justice system efficiently and fairly.

Self-represented Litigants Co-ordinator

The Self-represented Litigants Co-ordinator has proven to be successful in the Supreme Court and there was strong support in the submissions for the continuation and expansion of this program. We believe the initiative should be funded on an ongoing basis, and should also be implemented in other courts to broaden the support and assistance available to self-represented litigants and to relieve some of the pressures on existing court and registry staff. We also support calls for the program to be implemented in suburban and regional registries of the courts.

Court-based pro bono referral

Although the Self-represented Litigants Co-ordinator works closely with established pro bono referral programs, we believe that further consideration of a formal, court-based pro bono scheme is warranted. The proposed Civil Justice Council would be best placed to conduct further research, analysis and consideration in consultation with the courts, VCAT and the existing pro bono schemes operating in Victoria.

Special masters

The use of special masters has the potential to greatly assist in cases involving self-represented litigants. A special master would be a judicial officer of lower tier than a judge, or an independent legal practitioner, and would take on the role of case managing a proceeding where one or more parties was self-represented and required considerable assistance from the court. The commission stresses that the appointment of a special master would be an option to assist the court only where appropriate, and that the court would retain a broad discretion in relation to the recoverability of the costs of an external special master.

Information for self-represented litigants

The provision of information, material and practical assistance for self-represented litigants should be considered an integral part of the services provided by courts. Although such measures are not a substitute for face-to-face legal advice or legal representation, they are invaluable in ensuring litigants have the capacity to participate effectively in the system. The use of technology in delivering such information has the obvious benefit of improving accessibility for those who may face barriers to attending court in person, particularly litigants who may be living in rural or remote areas.

One particular measure we believe would assist self-represented (and indeed represented) litigants would be the production of an audio-visual aid, such as a DVD, explaining the fundamental principles and procedures of the civil justice system. The Victoria Law Foundation is one agency that may have the requisite expertise and resources to develop such an aid. Not only would this provide

much-needed information to litigants, but it would also help reduce the time spent by court staff and lawyers explaining such matters. This would free up time to provide information specific to a particular case. The aid could be made available for viewing at court registries and on the Internet, and could be distributed to key service providers such as community legal centres and Victoria Legal Aid. Viewing of the DVD by self-represented litigants at the outset of proceedings could potentially be made compulsory to ensure they have been provided with consistent, accurate information about the procedures of the court, and their rights and responsibilities as participants in the civil justice system.

Judicial officer training programs

Self-represented litigants will continue to be a significant group of users of the Victorian court system. In light of the *Tomasevic* decision, where it was held that the right to a fair trial 'can only be enhanced' by the Charter, the courts are under an obligation to assist litigants without legal representation to ensure them a fair trial.¹²⁰ It is therefore imperative that judicial officers are adequately equipped to deal with these litigants' particular needs and the issues they raise in court. This involves not just retaining control of proceedings but appreciating the needs of self-represented litigants and developing an appropriate and acceptable approach. As Lord Woolf said:

*Courts and judges must be more responsive to the needs of litigants in person ... In proceedings where litigants appear in person, judges at all levels should adopt a more interventionist approach to hold the ring and ensure the adequate presentation of the litigant's case. This new role will require adequate training.*¹²¹

Focus on this aspect of the judicial role should be considered an integral part of ongoing training and education for judicial officers. The Judicial College of Victoria is likely to be able to play a key role in that training. Judicial officers who have participated in the college's programs consider them to be very valuable. Such programs provide scope for new judicial officers to develop skills and strategies and help existing judicial officers to rejuvenate their approach to the challenges posed when a party appears in court unrepresented.

While the college is already undertaking innovative work in this area, there is scope to provide more of such training. By necessity the numbers of judicial officers who are participating in these specialised programs each year is relatively small. Subject to funding, the college is well placed to take the lead in the extension of such programs to more members of the Victorian judiciary.

Training for court staff

It is also important for targeted training and education programs to be extended to all non-judicial court staff who come into contact with self-represented litigants. Submissions to our review supported ongoing training for court staff.

Professional guidelines

Professional guidelines for lawyers opposed to self-represented litigants would be of benefit to both practitioners and self-represented litigants.

If the commission's recommended overriding obligations are implemented, all participants in the civil justice system, including parties represented or otherwise, will be subject to explicit standards of conduct. In these circumstances it will be all the more important for guidelines to be developed that will elaborate on and provide a commentary about the content and ramifications of these obligations.

The NSW Law Society guidelines provide a very useful basis on which to found a similar tool in Victoria. However, where there is relevant divergence between states the new guidelines should address specific matters relating to the civil justice system in Victoria and, in particular, matters arising out of the overriding obligations (in the event they are implemented). Guidelines could address issues such as general duties and obligations, parameters of relationships, protocols for communication, keeping records of conversations, conduct during negotiations, concluding settlement and, when necessary, personal security issues.

Research

There is minimal data available on the numbers of litigants before Victorian courts who are self-represented. Data collection is important for identifying the numbers of such litigants (and determining whether their incidence is increasing), their key characteristics and the types of matters in which they are involved. There would also be value in obtaining data about their level of participation in court proceedings and the impact on the court system. For instance, do matters involving self-represented

119 Submission ED2 9 (Federation of Community Legal Centres).

120 *Tomasevic v Travaglino & Anor* [2007] VSC 337 (13 September 2007) [72].

121 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 23, [20].

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litigants require more attendances at court registries and/or more court appearances? Do they always take longer? What are the cost implications of extra time taken by court staff and judicial officers in assisting self-represented litigants? It would also be valuable to ascertain through appropriate research whether self-representation is relevant to the outcome of the proceedings as suggested in some studies mentioned above.

Research would help ascertain the most effective court-based programs and case management strategies for assisting self-represented litigants, and would enable informed decision-making about proper resourcing of the courts and how resources should be best directed.

Such research could be conducted or commissioned by the proposed Civil Justice Council. Relevant data could potentially be gathered using court-based technology systems including the Integrated Courts Management System.

Management plans

We believe management plans can be useful for the development of integrated strategies for responding the needs of self-represented litigants. Such plans should be an integral part of court organisational planning so that measures to meet the challenges of self-represented litigants are well targeted and outcomes can be measured against identified aims and objectives.

RECOMMENDATIONS

108. The Self-represented Litigants Co-ordinator program in the Supreme Court of Victoria should be resourced and funded on an ongoing basis and the scope of the existing program should be extended. For instance, additional positions should be resourced and funded in the County Court and the Magistrates' Court (initially in the Melbourne registries, with a view to extending services to suburban and regional registries).
109. The proposed Civil Justice Council, in conjunction with the courts and VCAT, should investigate the possibility of implementation of a court-based pro bono referral scheme (along the lines of the Order 80 scheme in the Federal Court) in each of those courts.
110. In appropriate cases, the Supreme and County Courts should have the option of appointing a special master in matters where one or more of the parties are self-represented. A special master should be a judicial officer of a lower tier than a judge, or a senior legal practitioner, who will case manage proceedings in proactive manner in order to facilitate the appropriate disposition of the proceeding. The costs of any externally appointed special master should be at the discretion of the court and, on an interim basis, may be ordered to be costs in the cause.
111. Courts at all levels should be properly resourced to develop information and material for self-represented litigants and to enhance the delivery of resources of this kind, where possible, through technological solutions. Such resources should be considered an integral part of the services provided to court users.

In particular, an audio-visual aid should be produced (possibly by or with the assistance of the Victoria Law Foundation) to explain in broad terms the processes of civil litigation. This resource could be made available on the courts' websites, as well as in court registries.
112. Existing training programs for judicial officers addressing the needs of, and the challenges posed, by self-represented litigants should be resourced to allow for the extension and further development of such programs to a greater number of judicial officers in Victoria each year. Where it is not already the case, programs should be extended to masters and court registrars. Such programs should be considered an integral part of ongoing training and education for judicial officers.
113. To the extent that it is not already the case, courts of all levels should provide training for all court staff who come into contact with members of the public, including registry staff and judges' associates, about the needs of and challenges posed by self-represented litigants. In particular, training is required for court staff to develop strategies to help them:
 - work with self-represented litigants
 - avert and manage difficult situations
 - provide accurate information about services and resources and, in particular, to distinguish between information and advice.

114. The Law Institute and the Victorian Bar should develop professional guidelines to assist solicitors and barristers in dealing with self-represented litigants to whom they are opposed. Guidelines could address issues such as protocols for communication, record keeping, conduct during negotiations and personal security issues.
115. Programs should be put in place in all courts and properly resourced to provide:
- reliable data about the numbers of self-represented litigants and their levels of participation in the court system
 - analysis of data to assess the impact of self-represented litigants on the court system
 - qualitative research to assess the effectiveness of measures adopted to assist self-represented litigants and manage matters in the court system where at least one party is unrepresented.
116. Where appropriate, data collection should be a by-product of the Integrated Courts Management System or other existing systems. Analysis of the data and qualitative research should be undertaken or commissioned by the proposed Civil Justice Council.
117. Courts at all levels should develop self-represented litigant management plans. Such plans should be considered an integral part of overall planning by the courts so that measures put in place to meet the challenges of self-represented litigants are well targeted and outcomes can be measured against identified aims and objectives.

1.2 INTERPRETER SERVICES

1.2.1 Introduction

The lack of accessible interpreting services in civil matters was raised in submissions as a matter requiring 'urgent redress'.¹²²

A language barrier or hearing impairment may fundamentally impact on the basic communication required between a litigant and the court, affecting access to court services and the efficient and proper disposition of court business. The situation is compounded when a party is self-represented and is impecunious. A language barrier may also dissuade a person from bringing an otherwise meritorious claim, or pursuing a valid defence.

In its submission the Human Rights Law Resource Centre argued:

*In Victoria, the court plays no role in civil proceedings in organising an interpreter to be present or to ensure that the services of an interpreter are available where required. The unavailability of interpreting services in the courts presents a major barrier to access to justice. A party's ability to participate in the legal process is severely undermined where he or she is unable to afford to pay for an interpreter to attend a hearing.*¹²³

Non-English speaking or hearing impaired litigants need assistance to communicate with court staff or judicial officers and to understand court proceedings to ensure the justice system operates fairly. Assistance is also required during ADR processes such as mediation.

In some limited circumstances involving the exchange of basic information (such as during attendances at a court registry) it may be adequate for the assistance to be provided by another person known to the litigant (such as a friend or relative) or even a member of the court staff who is proficient in the litigant's first language or other means of communication. However, it is not appropriate for such people to interpret during appearances in court. Friends or family members, for instance, may not be objective or independent from the dispute, and there may be issues about the accuracy of the interpretation. Despite this, sometimes people related to a litigant do, in fact, take on that role in court. PILCH provided the following case study in its submission:

122 Submission CP 34 (Public Interest Law Clearing House).

123 Submission CP 36 (Human Rights Law Resource Centre).

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Mr H, an elderly man who speaks limited English, had a fruit and vegetable stall at a primary school. Proceedings were brought against him in the County Court by a plaintiff who alleged that he fell over a box of vegetables at the stall and suffered injuries. The school did not have public liability insurance. Mr H was referred to a pro bono practitioner for representation in the County Court who advised Mr H that he had reasonable prospects of success in defending the matter. Mr H was unable to afford the cost of an interpreter to be present during court proceedings, the court would not provide an interpreter, and Mr H had to rely on his daughter to interpret for him. It is unclear at this stage who will pay for an interpreter in the event that Mr H needs to be cross-examined.¹²⁴

1.2.2 Current position in Victoria

When represented by Legal Aid or a community legal centre a litigant will generally be provided with an interpreter at court.¹²⁵ However, this is not the case when litigants are represented by lawyers acting pro bono, or are self-represented.

As a matter of long-standing practice, in criminal proceedings in the Supreme Court, interpreters are generally provided by the Crown. There are also a number of legislative provisions directed to guaranteeing interpreters in such proceedings. In the County Court if a judge requests an interpreter to assist someone in court the registry will book one through the Legal Interpreting Service. In this case the court will pay for the cost of the interpreter attending court.¹²⁶

In the Magistrates' Court a specific legislative provision ensures interpreters for non-English speaking defendants in most criminal proceedings. Section 40 of the *Magistrates' Court Act 1989* provides:

If—

- (a) *a defendant is charged with an offence punishable by imprisonment; and*
 - (b) *the Court is satisfied that the defendant does not have a knowledge of the English language that is sufficient to enable the defendant to understand, or participate in, the proceedings—*
- the Court must not hear and determine the proceeding without a competent interpreter interpreting it.¹²⁷*

We also understand that the Magistrates' Court makes interpreters available when required in proceedings under the *Crimes Family Violence Act 1987*.

Section 526 of the *Children, Youth and Families Act 2005* also provides:

If the Court is satisfied that a child, a parent of a child or any other party to a proceeding has a difficulty in communicating in the English language that is sufficient to prevent him or her from understanding, or participating in, the proceeding, it must not hear and determine the proceeding without an interpreter interpreting it.

The Charter also specifically guarantees the provision of interpreters in criminal matters. Section 25(2) relevantly provides with respect to 'rights in criminal proceedings' that a person charged with a criminal offence is entitled to certain minimum guarantees, including:

- (i) *to have the free assistance of an interpreter if he or she cannot understand or speak English; and*
- (j) *to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance.¹²⁸*

The position in civil proceedings is different. There are no specific legislative requirements for the provision of interpreters in civil matters. Generally, it is considered the responsibility of parties and their legal representatives to provide interpreters when required and the court plays no role in organising such assistance. We understand that in the Supreme Court, in some circumstances, a judge may make arrangements for an interpreter. However, this occurs on an ad hoc and discretionary basis. In contrast, VCAT will arrange for an interpreter where it is needed in civil disputes at no cost to any party.¹²⁹

We also note that none of the Victorian courts has a publicly available and published policy concerning the provision of interpreters in the courts.

1.2.3 Other models

The Federal Magistrates Court of Australia provides a valuable comparison. It has a detailed policy about the provision of interpreters and translators in that court.¹³⁰ The policy has the stated objective of ensuring 'uniform access to interpreter services throughout the Federal Magistrates Court of Australia'.¹³¹ It states further:

*The basic principle of access and equity is that no client of the Court should be disadvantaged in proceedings before the Court or in understanding the procedures and conduct of court business, because of a language barrier or hearing or speech impairment. The two-way process of communication and understanding between the client and the Court may require that the Court engages an interpreter, or on rare occasions a translator.*¹³²

The Federal Magistrates Court Policy addresses issues such as:

- when to use an interpreter
- funding of interpreter services
- accreditation of interpreters
- deaf, hearing impaired and/or speech impaired clients
- registry managers' responsibilities
- feedback and complaints.

The Federal Court also acknowledges the difficulties faced by litigants who have little or no understanding of English. The court's annual report states that it will 'not allow a party or the administration of justice to be disadvantaged by a person's inability to secure the services of an interpreter'.¹³³ The report also states that the policy is to 'provide these services for litigants who are unrepresented and who do not have the financial means to purchase the services, and for litigants who are represented but have an exemption from, or have been granted a waiver of fees under the Federal Court of Australia Regulations'.¹³⁴

The Family Court's Interpreters Policy states that the court will arrange for interpreting services both via telephone and onsite. Interpreting services are provided externally by the Translating and Interpreting Service (TIS), which is funded by the Department of Immigration and Citizenship. There is no charge to the parties for the use of this service. The court states that:

*The basic principles of access and equity are that no Court client should be disadvantaged in proceedings before the Court or in understanding the procedures and conduct of Court business, because of a language barrier. The two-way process of communication and understanding between the client and the Court may require that the Court engage an interpreter or a translator.*¹³⁵

In South Australia interpreting services are arranged through the various courts and paid for by the court in which the matter is heard. Practice Direction 5.2 in the Supreme Court indicates that an interpreting service is available in criminal and civil proceedings and to persons required to give evidence in either criminal or civil proceedings in court.¹³⁶

In the Tasmanian Magistrates' Court any person who is unable to understand or who has difficulty with English can ask for an interpreter in the courtroom. If the interpreter is arranged by the court there will be no cost to the person who needs the service. The court's approach is said to be consistent with the government's policy, *Tasmania's Culturally Diverse Society*.¹³⁷

1.2.4 Victorian Government policy

A Victorian government project undertaken in 2001 aimed to produce a needs analysis of language services in Victoria and developed a strategy to improve interpreting and translating services for Victorians from culturally and linguistically diverse backgrounds. As part of the project, a report prepared in 2002 recommended that 'further investigation was required into the provision of interpreting services in the corrections, courts and tribunal areas to establish the extent to which demand is met by parties other than the government agency and the extent and nature of remaining

124 Submission CP 34 (Public Interest Law Clearing House).

125 Submission CP 32 (Federation of Community Legal Centres).

126 See County Court of Victoria, *Multicultural Directory* (2005) <www.justice.vic.gov.au/CA256DB80025241B/page/Justice+Services-Courts+and+Tribunals-Courts+of+Victoria?OpenDocument&1=15-Justice+Services-&2=10-Courts+and+Tribunals-&3=20-Courts+of+Victoria-> at 25 February 2008.

127 See also *Crimes Act 1958* s 464D.

128 See also Article 14(3)(f) of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Similar provisions are contained in the *Human Rights Act 1998* (UK) and the *Human Rights Act 2004* (ACT) s 22.

129 See VCAT, *Hearings: Civil Disputes/ Small Claims* (2006) <<http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Civil+Disputes-Small+Claims-Hearings?OpenDocument&1=45-Civil+Disputes-Small+Claims-&2=10-Hearings-&3=->> at 26 February 2008. Section 63 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that unless the tribunal directs otherwise a party may be assisted in a proceeding by an interpreter or another person necessary or desirable to make the proceeding intelligible to that party.

130 Federal Magistrates Court, *Federal Magistrates Court Interpreter and Translator Policy* (2007) <www.fmc.gov.au/services/html/interpreters.html as at 26 February, 2008.

131 *Ibid* [1.1].

132 *Ibid* [1.2].

133 Federal Court (2007) above n 115.

134 *Ibid*.

135 Family Court of Australia, *Interpreters Policy: Guidelines to Ensure Uniform Access to Interpreter Services Throughout the Family Court of Australia* (2006) <www.familycourt.gov.au/presence/connect/www/home/about/business_administration/plans_policies/plans_and_policies_intpreters_policy_2006 as at 26 February, 2008.

136 South Australian Supreme Court, *Practice Directions 2006: Part I—Direction 5.2, 'Interpreters in Court'* (2006) (as amended to 1 January 2008 (Amendment No. 3)) <www.courts.sa.gov.au/lawyers/practice_directions/2006-SC-pd/SC-PDs-am03.pdf> at 26 February 2008. The court requires reasonable notice to arrange for an interpreter from an external provider (the Interpreting and Translating Centre).

137 See Magistrates Court of Tasmania, *Interpreters* (last modified 2007) <www.magistratescourt.tas.gov.au/services/interpreters> at 26 February 2008.

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unrevealed demand'.¹³⁸ In 2003 the government produced its policy on *Improving the Use of Translating and Interpreting Services: A Guide to Victorian Government Policy and Procedures*.¹³⁹ This policy noted the right of the accused in most criminal trials to an interpreter, but in relation to civil matters dealt only with witnesses:

*The party calling a witness may decide to provide an interpreter but a witness does not have an automatic right to give evidence in their native language. However for the convenience of the Court and to make the trial fair it would be preferable for the witness to give evidence through an interpreter.*¹⁴⁰

In 2004 the government produced a report outlining some of the major projects which had been undertaken at 'the halfway mark of the Strategy'.¹⁴¹ Other than in relation to a project in the Family Violence Division of the Magistrates' Court, the 2004 report makes no mention of developments in the courts and tribunals areas. Apparently, the government concluded the strategy in June 2006.

In June 2006 the Department of Justice published a Language Services Policy and Guidelines for Working with Interpreters and Translators.¹⁴² It states that one of the minimum standards for the Department of Justice is as follows:

Clients who are not able to communicate through written or spoken English should be given access to professional interpreting and translating services:

- *when required to make significant decisions concerning their lives; or*
- *where essential information needs to be communicated to inform decision making.*¹⁴³

It would appear that the current position in the courts in civil proceedings is inconsistent with this policy.

1.2.5 The Human Rights Charter

As referred to above, the right to the free assistance of an interpreter is guaranteed in criminal proceedings by the Charter. It is also arguable that the failure to provide an independent and competent interpreter to a party who requires it in a civil proceeding is inconsistent with the right in section 24 of the Charter of every person to a fair hearing.¹⁴⁴

On 23 August 2007, the United Nations Human Rights Committee adopted General Comment No 32 on the right to a fair trial and equality before courts and tribunals pursuant to article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). The General Comment is an important source of guidance on the interpretation and application of section 24 of the Charter in Victoria.¹⁴⁵ One of the key features of the General Comment is the recognition that:

*The right to equality before courts and tribunals also ensures equality of arms ... [and] applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party. In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.*¹⁴⁶

1.2.6 Pro bono representation

If a non-English speaking litigant is unrepresented, it is up to him or her to secure an interpreter. In its submission, PILCH specifically pointed to issues concerning the availability of interpreters that may arise where a non-English speaking litigant is represented by a lawyer acting pro bono.¹⁴⁷ It is foreseeable that in such a case the client will not have the means to afford the services of an interpreter. PILCH provided one specific case study as follows:

Mr C was the defendant in civil proceedings arising from a car accident. He did not speak any English. However, VLA determined he was not eligible for assistance. He was referred to a pro bono solicitor and barrister to represent him at the hearing in the Magistrates' Court. The barrister paid for an interpreter to be present in court out of his own pocket as the court would not provide an interpreter.

It is not only in court that the issue arises. Lawyers acting pro bono do not have the benefit of interpreting services to assist with communication with their clients. By comparison, lawyers at Victoria Legal Aid or at a community legal centre have the benefit of telephone interpreting services.¹⁴⁸

1.2.7 Submissions

The need for interpreters

A number of submissions specifically addressed the need for the provision of interpreters in civil proceedings for litigants who require them.

PILCH argued that the unavailability of interpreting services in the courts for impecunious litigants presents a major barrier to access to justice which requires urgent redress.¹⁴⁹

The Federation of Community Legal Centres suggested that the absence of access to interpreters in the civil jurisdiction was a significant barrier for its clients when attending court. The Federation suggested that the provision of interpreters in civil jurisdictions in Victoria would achieve greater fairness in the courts and would 'expedite civil proceedings and ensure that all people have access to justice regardless of their financial means'.¹⁵⁰

Springvale Monash Legal Service noted that more than 50% of the population in its local government area are born overseas and that it is one of the largest users of interpreters in Victoria. The service advised that many of its clients from non-English speaking backgrounds have difficulties in accessing legal information or actively participating in legal proceedings. It noted that interpreting services are not provided as a matter of course in civil proceedings even though 'the implications of losing a civil matter can have a much bigger impact on their lives than a criminal matter'.¹⁵¹ The expansion of court interpreting services to all civil matters was called for as well as the availability of court documents in plain English and languages other than English to prevent language from being a barrier to civil justice.¹⁵² The service indicated that it would like to see the Magistrates' Court replicate VCAT's interpreting services.¹⁵³

Fitzroy Legal Service indicated that 40% of its clients are from culturally and linguistically diverse communities and that a lack of understanding of English is an enormous barrier to understanding the system and its processes. This is compounded by a lack of interpreting services. It argued that further resources for civil interpreting services should ameliorate this problem.¹⁵⁴

The Civil Law Reform Working Group of the Federation of Community Legal Centres recommended the provision of court-based interpreting services for civil litigants in financial need.¹⁵⁵

The Human Rights Law Resource Centre noted that in the UK public authorities must ensure that any person subject to a decision-making process has access to an interpreter if required.¹⁵⁶ The centre lamented that the courts do not play a role in the provision of interpreting services in civil cases in

138 The Allens Consulting Group, *A Needs Analysis of Language Services: Executive Summary* (Report to the Department of Premier and Cabinet, Victorian Office of Multicultural Affairs) (2002) <[www.multicultural.vic.gov.au/web24/rwpgslib.nsf/GraphicFiles/Executive+Summary/\\$file/Executive+Summary.pdf](http://www.multicultural.vic.gov.au/web24/rwpgslib.nsf/GraphicFiles/Executive+Summary/$file/Executive+Summary.pdf)> at 26 February 2008.

139 Victorian Office of Multicultural Affairs, *Improving the Use of Translating and Interpreting Services: A Guide to Victorian Government Policy and Procedures* (2003) <[www.multicultural.vic.gov.au/web24/rwpgslib.nsf/GraphicFiles/Improving+the+Use+of+Translating+and+Interpreting+Services/\\$file/Improving+the+Use+of+Translating+and+Interpreting+Services.pdf](http://www.multicultural.vic.gov.au/web24/rwpgslib.nsf/GraphicFiles/Improving+the+Use+of+Translating+and+Interpreting+Services/$file/Improving+the+Use+of+Translating+and+Interpreting+Services.pdf)> at 26 February 2008.

140 *Ibid* 12.

141 Multicultural Affairs, *Language Services Strategy Report Card* (2004) <[www.dvc.vic.gov.au/web17/voma/rwpgslib.nsf/549C66914048D264CA2569D600063620/26968FDA90680D78CA2570C00011B4AD/\\$file/Language%20Services%20Strategy%20Report%20Card.pdf](http://www.dvc.vic.gov.au/web17/voma/rwpgslib.nsf/549C66914048D264CA2569D600063620/26968FDA90680D78CA2570C00011B4AD/$file/Language%20Services%20Strategy%20Report%20Card.pdf)> at 26 February 2008.

142 Department of Justice, *Language Services Policy and Guidelines for Working with Interpreters and Translators* (2006) <www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebf244099f0c07c/Language_Service_Policy_Guide_2006.pdf> at 26 February 2008.

143 *Ibid* 7.

144 *Charter of Human Rights and Responsibilities Act 2006* s 24 provides: 'Fair hearing—A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.

145 This is particularly so given the statement in the Explanatory Memorandum that s 24 of the Charter is 'modelled on art 14(1) of the ICCPR and the direction in s 32(2) of the Charter to consider international law and the judgment of international courts and tribunals relevant to a human right.

146 United Nations Human Rights Committee, *General Comment No 32: Art 14: Right to Equality before Courts and Tribunals and a Fair Trial*, UN Doc CCRP/C/GC/32.

147 Submission CP 34 (Public Interest Law Clearing House). See also submission ED1 31 (Law Institute of Victoria).

148 PILCH referred to its use of the Victorian Interpreting and Translating Service and the Department of Immigration's Translating and Interpreting Service (TIS). See Submission CP 34 (Public Interest Law Clearing House). TIS provides telephone interpreting services free of charge to non-profit, non-government, community-based organisations for case work and emergency services where the organisation does not receive funding to provide these services. See <www.immi.gov.au/living-in-australia/help-with-english/help_with_translating/index.htm>

149 Submission CP 34 (Public Interest Law Clearing House).

150 Submission ED1 9 (Federation of Community Legal Centres). See also submission CP 32 (Federation of Community Legal Centres).

151 Submission CP 59 (Springvale Monash Legal Service).

152 Submission ED1 26 (Springvale Monash Legal Service).

153 Submission CP 59 (Springvale Monash Legal Service).

154 Submission CP 44 (Fitzroy Legal Service).

155 Submission CP 61 (Civil Law Reform Working Group of the Federation of Community Legal Centres).

156 Submission CP 36 (Human Rights Law Resource Centre) citing Department of Constitutional Affairs, *Human Rights: Human Lives* (2006) 23 <www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf> at 26 February 2008.

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Victoria. It strongly endorsed the call for the provision of court-based interpreting services in all civil cases in Victoria. It also supported the provision of telephone interpreting services for legal practitioners acting on a pro bono basis.¹⁵⁷

In Exposure Draft 2 the commission made a number of preliminary proposals regarding the provision and funding of interpreting services in Victorian courts. Submissions received in response to the draft proposals strongly supported the proposals.

The Law Institute submitted that the 'current policy of the Supreme Court and County Court regarding the provision of interpreters in civil matters is inadequate and creates a barrier to making pro bono referrals to members of the Law Institute who would otherwise be prepared to provide pro bono advice and representation to clients through the Scheme'.¹⁵⁸

The Institute was also concerned that the current practice may be inconsistent with the human right to a fair hearing as provided for in section 24 of The Charter. The Institute and PILCH recommended that interpreting services be made available in all civil proceedings in the Magistrates', County and Supreme Courts and the Court of Appeal.¹⁵⁹

The Consumer Action Law Centre advised that it frequently deals with consumers from non-English speaking backgrounds that are 'deeply disadvantaged by the civil litigation process'. It argued that an interpreters fund would go 'a long way to address this disadvantage'.¹⁶⁰

State Trustees believed that the broader use of interpreters as suggested by the commission would promote greater access to justice, and would move the justice system forward in its responsiveness to litigants from diverse backgrounds.¹⁶¹

The Federation of Community Legal Centres and Victoria Legal Aid strongly supported the commission's proposals.¹⁶²

Interpreting fund

One of the commission's preliminary proposals was that a fund be established to fund interpreters in civil proceedings in Victorian courts in appropriate cases. The Law Institute, Legal Aid, the Consumer Action Law Centre and PILCH supported the creation of an interpreting fund.¹⁶³

The commission proposed that the following factors should be considered in deciding whether to recommend payment from the interpreting fund:

- the means of the litigant
- the capacity of the litigant to obtain an interpreter
- the nature and complexity of the proceedings and
- any other matter that the court considers appropriate.

The commission received a number of submissions addressing these proposed discretionary factors. The Consumer Action Law Centre submitted there should be a rebuttable presumption that funding for an interpreter is available to all defendants in all cases. It argued that the presumption could be rebutted by evidence that the party had a certain level of assets or income.¹⁶⁴

Legal Aid thought the discretion should be broader than the commission's preliminary proposal, and that funding should be available if 'a person, who is not able to communicate effectively in English, is required to make significant decisions concerning their lives or where essential information needs to be communicated to them to inform decision making'. Legal Aid suggested that this approach was in line with the Department of Justice's Language Services Policy and submitted that the power to confer payment from the proposed interpreting fund should be consistent with this policy.¹⁶⁵

PILCH and the Law Institute suggested that it was only necessary to consider the means of the litigant.¹⁶⁶ In PILCH's view none of the other factors listed in the commission's preliminary proposal were appropriate. It noted that it will always be in the interests of justice for those who need interpreters to have them and the only relevant factor is the litigant's ability to pay for the service.¹⁶⁷

State Trustees supported the commission's preliminary proposal and noted that it would be well placed to assist the courts in the administration of such a fund.¹⁶⁸

Costs

In Exposure Draft 2 the commission proposed that the provision of interpreting services be the subject of a party-party costs order and any funds recovered should be reimbursed to the interpreting fund. Such orders would be subject to the general judicial discretion in relation to costs.

Submissions generally supported this proposal.¹⁶⁹ The Consumer Action Law Centre argued that the costs of interpreting services be recoverable by the interpreting fund from an unsuccessful plaintiff, but not from an unsuccessful defendant, unless that defendant had sufficient financial means.¹⁷⁰

PILCH and the Law Institute argued that the proposal should be re-formulated so that interpreting services 'may be' subject to party-party costs, not 'should be'. It maintained that it was important that the court retain its discretion to award costs.¹⁷¹

Definition of interpreter

Our proposal for a legislative definition of an 'interpreter' was supported by PILCH¹⁷² and was commended by the Law Institute.¹⁷³

Telephone interpreting service

The commission also proposed that the Department of Justice provide funding for the provision of telephone interpreting services for lawyers acting on a pro bono basis through a Victorian pro bono referral scheme. This proposal was supported by the Law Institute, the Consumer Action Law Centre and PILCH.¹⁷⁴

Policy formulation

Support for the commission's proposal for the courts to develop detailed policies about the provision of interpreters and make such policies publicly available was expressed by Legal Aid, PILCH and the Law Institute.¹⁷⁵

1.2.8 Conclusions and recommendations

The commission remains of the view that it is highly desirable that proper provision is made for interpreting services in civil proceedings in Victorian courts and that proper resources are made available to achieve this end. Such provision is fundamental to the proper administration of justice, and is essential for ensuring a person a fair hearing.

Some minor modifications have been made to the commission's preliminary proposals in light of the responses we received to Exposure Draft 2. In particular, we have reconsidered the factors we believe the court should consider in deciding whether to recommend payment from the interpreting fund. The commission agrees with PILCH that the only relevant consideration should be the means of the litigant. The commission has also included a discretion to allow the court to consider any other matter it thinks appropriate.

RECOMMENDATIONS

Interpreting fund

118. A fund should be established ('the interpreting fund') which may be drawn on to fund interpreters in civil proceedings in Victorian courts in appropriate cases (as provided for below).

Payment from the interpreting fund

119. Victorian courts should be given the discretion to recommend that it is in the interests of justice for payment to be made from the interpreting fund for interpreting services in civil proceedings for litigants who require it. In exercising the discretion the court should be able to take into account:

- (a) the means of the litigant
- (b) any other matter that the court considers appropriate.

Costs of interpreter

120. Insofar as the existing rules do not so provide, there should be, subject to judicial discretion in relation to costs, provision for an order that such services should be the subject of a party-party costs order and any funds recovered should be reimbursed to the interpreting fund.

- 157 Submission CP 36 (Human Rights Law Resource Centre).
- 158 Submission ED1 31 (Law Institute of Victoria).
- 159 Submissions ED1 31 and ED2 16 (Law Institute of Victoria), ED2 18 (Public Interest Law Clearing House).
- 160 See submission ED2 12 (Consumer Action Law Centre).
- 161 Submission ED2 7 (State Trustees Limited).
- 162 Submissions ED2 9 (Federation of Community Legal Centres), ED2 10 (Victoria Legal Aid).
- 163 Submissions ED2 16 (Law Institute of Victoria), ED2 10 (Victoria Legal Aid), ED2 12 (Consumer Action Law Centre), ED2 18 (Public Interest Law Clearing House).
- 164 See Submission ED2 12 (Consumer Action Law Centre).
- 165 See Submission ED2 10 (Victoria Legal Aid).
- 166 See Submissions ED2 16 (Law Institute of Victoria) and ED2 18 (Public Interest Law Clearing House).
- 167 See Submission ED2 16 (Law Institute of Victoria).
- 168 See submission ED2 7 (State Trustees).
- 169 See submission ED2 10 (Victoria Legal Aid).
- 170 Submission ED2 12 (Consumer Action Law Centre).
- 171 Submissions ED2 16 (Law Institute of Victoria), ED2 18 (Public Interest Law Clearing House).
- 172 Submission ED2 18 (Public Interest Law Clearing House).
- 173 Submission ED2 16 (Law Institute of Victoria).
- 174 Submissions ED2 16 (Law Institute of Victoria), ED2 12 (Consumer Action Law Centre), ED2 18 (Public Interest Law Clearing House).
- 175 Submissions ED2 10 (Victoria Legal Aid), ED2 16 (Law Institute of Victoria), ED2 18 (Public Interest Law Clearing House).

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Definition of interpreter

121. The legislation should provide a definition of interpreter along the following lines: *‘interpreter’ means an interpreter accredited with the National Accreditation Authority for Translators and Interpreters Limited.*

Telephone interpreting service

122. The Department of Justice should provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis through a Victorian pro bono referral scheme.

Development of policies

123. All Victorian courts should develop detailed policies about the provision of interpreters and such policies should be made publicly available.

1.3 VEXATIOUS LITIGANTS

1.3.1 Introduction

Among self-represented litigants is a small subset of people labelled ‘vexatious litigants’ who demonstrate particular behaviour in pursuing litigation inappropriately in the courts. Such behaviour includes ‘taking legal action without any reasonable grounds, a repetition of arguments which have already been rejected, disregard for the court’s practices and rulings, and persistent attempts to abuse the court’s processes’.¹⁷⁶ Typically, vexatious litigants will pursue the same person or persons or cause repeatedly.

The court has the power to control abuse of process during the course of proceedings, and can ultimately declare a litigant a vexatious litigant. It is a mechanism that may be warranted only when all other filters and barriers cease to be effective. Once declared vexatious, the person requires leave of the court to institute or continue proceedings. This has the effect of removing the person from the court system.

This is a dramatic step. As has been noted by Justice Kirby in *Re Attorney-General; Ex parte Skyring*:

*It is regarded as a serious thing in this country to keep a person out of the courts. The rule of law requires that, ordinarily, a person should have access to the courts in order to invoke their jurisdiction. It is a rare thing to declare a person a vexatious litigant.*¹⁷⁷

The issue was also addressed in submissions, specifically by the National Pro Bono Resource Centre, which drew attention to the issue from a different angle. It submitted that:

*The impact [of some self-represented litigants] on the administration of justice may from time to time result in a perceived need to divert certain vexatious litigants from the court[s]. However, a broader cost-benefit analysis of the ‘problem’ of self-represented litigants would likely reveal that ... removing citizens’ ability to defend or pursue their rights in the courts results in the diversion of these litigants to other sectors of government responsibility. In effect, diverting self-represented litigants out of the civil justice system and into other sectors such as the welfare sector is simply a cost-shifting exercise.*¹⁷⁸

Although having a person declared a vexatious litigant should be done sparingly and with utmost caution, it should nonetheless be possible to take such a step efficiently and in a straightforward manner when necessary. As we discuss below, the current Victorian provisions for having a litigant declared vexatious suffer from a number of limitations. For example, they do not deal with litigants who display vexatious behaviour in the context of a single proceeding, and do not permit interested parties to make the relevant application.

1.3.2 Distinction between self-represented and vexatious litigants

It has been noted that:

*Whilst it cannot by any means be said that all litigants in person are vexatious practically all vexatious litigants are litigants in person. No consideration of one can be undertaken without an understanding of the challenges presented by the other.*¹⁷⁹

However, what is critical in distinguishing ‘vexatious’ litigants from other self-represented litigants is their approach to litigation:

*A ‘normal’ complainant believes they have experienced a loss and if the loss is assessed as being caused by an external agency they feel aggrieved. They may seek redress, usually in the form of reparation or compensation.*¹⁸⁰

By contrast the ‘morbid’ or ‘querulous’ litigant has been described as follows:

*In general, they have belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss were personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self and others). There will be evidence of significant and increasing loss ... in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, Judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge rather than compensation or reparation.*¹⁸¹

Even if a party exhibits many of the characteristics of a ‘morbid’ or ‘querulous’ litigant, that does not necessarily make him or her vexatious. To qualify as a vexatious litigant under the current law a person must habitually and persistently and without reasonable cause institute vexatious proceedings. For a proceeding to be vexatious it must be brought in bad faith or for an improper purpose or be utterly hopeless.¹⁸² A further explanation of these requirements appears below.

1.3.3 Scope of the problem

Only 14 people in Victoria have been declared vexatious in the almost 80 years between 1930 and 2007.¹⁸³ Of these, six were declared vexatious in the past decade.

In the context of increasing concerns about the numbers of self-represented litigants, it is not possible to point to why the number of people actually declared vexatious litigants is so small. It does not appear to be, at least in recent years, a disparity between the number of applications for an order and the number of orders actually made; that is, applications for a declaration that a person is vexatious are generally successful.¹⁸⁴ However, there is no way of ascertaining whether more applications could or should appropriately be made. It may be that the category of people with standing to bring applications is too limited, or that the test to be fulfilled is too stringent. It certainly seems, anecdotally at least, that many more litigants exhibit vexatious tendencies or bring vexatious proceedings than have been declared vexatious.

Conversely, it may be that the legislation achieves a reasonable balance, given the rights to be curtailed. It may also be that the numbers of litigants who exhibit the necessary extremes of behaviour to qualify for an order are in fact relatively small, compared to the overall number of self-represented litigants.

1.3.4 Victorian legislation

In all Australian jurisdictions legislation provides for a person to be declared a vexatious litigant. The relevant order generally prevents the vexatious litigant instituting or continuing litigation without leave of the court. Leave will only be granted where the court is satisfied that the proceeding is not an abuse of process.

The application is typically made in the jurisdiction’s Supreme Court, which makes an order binding on the conduct of the person in all other courts in that jurisdiction. Historically, most orders of this kind are made on the application of the Attorney-General, although there are variations and, in some cases, recent reforms to extend standing. In the Family Court an order restraining a person from initiating further proceedings without leave can only be made on an application by a party to the proceedings.¹⁸⁵ In the Federal Court such an order may be made on the court’s own motion, on the application of the Attorney-General or Solicitor-General of the Commonwealth or of a state or territory or on the application of the registrar.¹⁸⁶ The Federal Court Rules also provide for applications to be made by a ‘person aggrieved’ by a vexatious litigant, that is, a person against whom the litigant

176 Explanatory Notes, Vexatious Proceedings Bill 2005 (Qld) 1.

177 *Re Attorney-General, Ex parte Skyring* (1996) 135 ALR 29, 31–2.

178 Submission CP 16 (National Pro Bono Resource Centre).

179 Claire Thompson, ‘Vexatious litigants—Old Phenomenon, Modern Methodology: A Consideration of the Vexatious Proceedings Restriction Act 2002 (WA)’ (2004) 14 *Journal of Judicial Administration* 64, 68.

180 Diana Bryant CJ, ‘Self Represented and Vexatious Litigants in the Family Court of Australia’ (Paper presented at Monash University Access to Justice: How Much is Too Much? Conference, Prato Italy, 30 June–1 July 2006) 4 citing Dr Grant Lester, ‘The Vexatious Litigant’ (2005) 17(3) *Judicial Officers’ Bulletin* 17.

181 Lester (2005) *Ibid* 18.

182 See *Attorney-General v Wentworth* (1988) 14 NSWLR 481, 491; *Attorney-General v Michael* [1999] WASCA 181, [126] (Anderson J); *Attorney-General v Weston* [2004] VSC 314, [14]–[19].

183 Based on records kept by the Prothonotary of the Supreme Court of Victoria.

184 Consultation with Victorian Government Solicitors Office and Department of Justice (17 July 2007).

185 *Family Law Act 1975* (Cth) s 118(1)(c).

186 *Federal Court Rules 1979* (Cth) r 21(1) (2).

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'habitually and persistently and without reasonable grounds' institutes a vexatious proceeding.¹⁸⁷ Other recent state reforms in this respect are discussed further below. In Victoria the applicable provision is found in section 21 of the *Supreme Court Act*. It relevantly provides:

- (1) *The Attorney-General may apply to the Court for an order declaring a person to be a vexatious litigant.*
- (2) *The Court may, after hearing or giving the person an opportunity to be heard, make an order declaring the person to be a vexatious litigant if it is satisfied that the person has—*
 - (a) *habitually; and*
 - (b) *persistently; and*
 - (c) *without any reasonable ground—*
 - instituted vexatious legal proceedings (whether civil or criminal) in the Court, an inferior court or a tribunal against the same person or different persons.*
- (3) *An order under subsection (2) may provide that the vexatious litigant must not without leave of—*
 - (a) *the Court; or*
 - (b) *an inferior court; or*
 - (c) *a tribunal constituted or presided over by a person who is an Australian lawyer—*
 - do the following—*
 - (d) *continue any legal proceedings (whether civil or criminal) in the Court, inferior court or tribunal; or*
 - (e) *commence any legal proceedings (whether civil or criminal) in the Court or any specified inferior court or tribunal; or*
 - (f) *commence any specified type of legal proceedings (whether civil or criminal) in the Court or any specified inferior court or tribunal.*
- (4) *Leave must not be given unless the Court, or if the order under subsection (2) so provides, the inferior court or tribunal is satisfied that the proceedings are not or will not be an abuse of the process of the Court, inferior court or tribunal.*

Before the Supreme Court can exercise its discretion to make such an order, the threshold test in subsection (2) must be met. The test for obtaining an order requires that there has been a level of recurrence and lack of reasonableness in the institution of vexatious legal proceedings. Specifically the test requires that a person has habitually and persistently without any reasonable grounds instituted vexatious legal proceedings. The Act does not provide a definition of 'vexatious legal proceedings'. If an order is made, a vexatious litigant cannot without leave of the court commence or continue proceedings in any court or tribunal in Victoria.

In *Attorney-General v Weston* [2004] VSC 314, Justice Whelan summarised the legal principles applying to an application under section 21 as follows:

- (1) *The application seeks a remedy of a most serious nature and a clear and compelling case must be shown to warrant it.*
- (2) *The requirements of the section are that the person must have*
 - *instituted proceedings*
 - *which are vexatious*
 - *and to have done so habitually and persistently and without reasonable cause.*

If the requirements are met, the Court must then consider whether an order ought to be made.
- (3) *A proceeding is 'instituted' where originating process is filed, and also where a person counterclaims, appeals against an otherwise final determination of the substantive matter, or applies to have an otherwise final determination set aside. Interlocutory applications and appeals [from determinations on] interlocutory applications do not ordinarily constitute the institution of proceedings.*

(4) *Vexatious proceedings are proceedings which have either been brought for an improper purpose, or which have been revealed to be hopeless. Hopelessness ought to be apparent from the ultimate disposition. A genuine claim, or element of a claim, may exist within a vexatious proceeding, where it is deeply buried in untenable claims and bizarre allegations.*

(5) *Vexatious proceedings are instituted 'habitually' where they appear to be commenced as a matter of course. 'Persistence' suggests determination and an element of stubbornness. An absence of reasonable grounds will necessarily be the position where the proceedings have been revealed to be hopeless.*

*If the requirements of the section are met, the person's conduct as a whole must be then assessed to determine if, in all the circumstances, an order ought to be made.*¹⁸⁸

1.3.5 Limitations

Standing

Application by Attorney-General only

One of the major limitations of the existing Victorian provision is that an order may only be made on the application of the Attorney-General. No other parties may apply, nor can the court make an order under section 21 of its own initiative.

Having the Attorney-General as the only party with standing arguably provides an appropriate protection and reduces the risk of the process being used oppressively by private parties. However, it has been suggested that this is one of a number of explanations for the small number of orders that have been made.¹⁸⁹

Some commentators have pointed to potential concerns about limiting standing to the Attorney-General, as it 'inevitably adds a political dimension to the initiating process that inhibits the number of applications'.¹⁹⁰ It has also been noted that:

*There are many reasons why an Attorney-General may not wish to take an application, including the merits, but also including for political and other reasons. It is not difficult to see that an Attorney-General might be reluctant to bring an application particularly in circumstances where the litigant's actions were primarily directed at commercial interests, for example a bank.*¹⁹¹

By comparison, private litigants have different motivations which may prompt them to be more expeditious in making applications to protect their own interests.¹⁹² However, they may face other obstacles. For instance, private litigants may not have the resources to bring an application. Or they may be loath to take assertive action for fear of inflaming ongoing disputation.

The court's own motion

As part of its inherent jurisdiction, a court may restrain a party from making unwarranted and vexatious applications in a pending proceeding, including of its own motion.¹⁹³ However, the court's inherent jurisdiction is limited to controlling a proceeding which has actually commenced and hence the court has no power, other than pursuant to subsections 21(3)(e) and (f), to prevent the commencement of proceedings by a person who in the past has instituted proceedings inappropriately.¹⁹⁴

Definitional problems

Other limitations of the existing provision include the inherent difficulties of satisfying all of the requirements. For instance, no statutory definition of 'proceedings' is provided and therefore, as appears from Justice Whelan's summary (above), interlocutory applications and appeals in such applications do not constitute the institution of proceedings for the purposes of the provision. Further, it is not possible to take proceedings instituted in the High Court, Federal Court or interstate courts into consideration. Further, as noted above, there is also no statutory definition of 'vexatious legal proceedings'.

Delay

Because there is a delay between initiating the proceedings for an order declaring a person to be vexatious and the first hearing in the application, the litigant may issue further proceedings without restraint.¹⁹⁵ It is not until the first return date that an interlocutory order for a stay of existing

187 *Federal Court Rules* 1979 (Cth) r 21(2).

188 *Attorney-General v Weston* [2004] VSC 314, [23].

189 Grant Lester and Simon Smith, 'Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia's Vexatious Litigant Sanction 75 Years On' (2006) 13 *Psychiatry, Psychology and Law* 1, 18.

190 *Ibid.*

191 Thompson (2004) above n 179, 79.

192 *Ibid* 77 citing Dewar et al (2002) above n 20.

193 See *Commonwealth Trading Bank of Australia v Inglis* (1974) 131 CLR 311; *Wentworth v Graham* [2003] NSWCA 307, *Wentworth v Graham* [2003] NSWCA 229.

194 In consultation we were informed that as a matter of practice some magistrates have been making orders restraining applications under the *Crimes Family Violence Act 1987* without leave of the court. The orders are made under s 136 of the *Magistrates Court Act 1989*, which gives the court the discretion to make directions for the conduct of a proceeding: Consultation with Victorian Government Solicitor's Office and Department of Justice (17 July 2007).

195 Consultation with Victorian Government Solicitor's Office and Department of Justice (17 July 2007).

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proceedings or a prohibition against the issuing of further proceedings can be made.

Evidence

The legislation does not specify the type of evidence that may be relied on to prove the application or the manner in which the evidence is to be given. For instance, it is not clear from the legislation whether evidence of ‘information and belief’ is acceptable. Currently in Victoria, the practice is generally for evidence to be given on affidavit sworn by a solicitor for the applicant. The deponent is generally exposed to lengthy cross-examination by the respondent.

Notification

The legislation requires the Attorney-General to cause a copy of any order made to be published in the *Government Gazette*.¹⁹⁶ There is no other requirement for notifying other interested parties, including other courts. This raises the possibility that an order may be made but may not come to the attention of those who may need the benefit of it, or who are required to practically enforce it, such as court registry staff.

Applications for leave to commence proceedings

Litigants who have been declared vexatious may make repeated applications for leave to commence proceedings. In some cases this may effectively thwart the intent of the original order. In one such case the Attorney-General has applied to vary the original order to avoid the need for a hearing or response from other parties unless the court considered the application to have merit.¹⁹⁷ The application was made following the possibility of making such an order being raised by the court in relation to one of the litigant’s applications.¹⁹⁸ At the time of writing the application was in abeyance to enable the litigant to obtain legal representation.

Court fees

The issue of court fees was also raised in consultation. In bringing contempt proceedings, the Attorney-General is exempt from payment of court fees.¹⁹⁹ This is not the case in proceedings relating to vexatious litigants. However, in such matters the volume of material to be collated and copied from court files is generally voluminous. Hence, it was suggested that consideration be given to providing an exemption from paying court and photocopying fees in such matters.

1.3.6 Developments in other jurisdictions

The Commonwealth, state and territory governments have been reviewing the legal and policy issues associated with vexatious litigants through the Standing Committee of Attorneys-General. The committee has considered options for reform and has considered developing a nationally consistent legislative approach.

Accordingly, a Model Vexatious Proceedings Bill 2004 has been developed.²⁰⁰ The Model Bill apparently builds on the Western Australian *Vexatious Proceedings Restriction Act 2002*, which implemented recommendations made by the Law Reform Commission of Western Australia.²⁰¹

Under section 4 of the WA Act, where a court is satisfied that a person has instituted or conducted vexatious proceedings or it is *likely* that the person will institute or conduct vexatious proceedings, the court may stay the proceedings (or part of the proceedings) and/or prohibit the person from instituting proceedings without leave of the court. The inclusion of the word ‘likely’ allows the court to speculate about the possible future conduct of a litigant.

Section 3 of the WA Act defines proceedings in broad terms and clearly stipulates that interlocutory proceedings and appeals are included. It also provides a comprehensive definition of ‘vexatious proceedings’ as those:

- (a) *which are an abuse of the process of a court or a tribunal;*
- (b) *instituted to harass or annoy, to cause delay or detriment, or for any other wrongful purpose;*
- (c) *instituted or pursued without reasonable ground; or*
- (d) *conducted in a manner so as to harass or annoy, cause delay or detriment, or achieve any other wrongful purpose.*

An order may be made by the court on its own motion or on the application of

- the Attorney-General; or
- the Principal Registrar of the Supreme Court or the Principal Registrar of the District Court; or,

with the leave of the court,

- a person against whom another person has instituted or conducted vexatious proceedings, or
- a person who has a sufficient interest in the matter.

The definition of 'vexatious proceedings' in the WA Act gives some clarity to the criteria to be used by the court in making its determination. Such a definition is absent from the Victorian legislation. The WA Act also requires evidence that the person has instituted or conducted vexatious proceedings or is likely to. This can be contrasted with the Victorian position, which requires evidence that a person has previously instituted vexatious proceedings habitually, persistently and without reasonable grounds. Also, unlike in Victoria, the WA Act permits the court to take into account interlocutory proceedings. The categories of person who may make an application for the order is notably broader than in Victoria.

In 2005 Queensland also enacted new legislation to prohibit or limit actions brought by vexatious litigants.²⁰² The Queensland Act also specifically provides powers in relation to persons acting in concert with vexatious litigants. It appears that the Queensland Act largely gives effect to the Model Bill. The definition of 'vexatious proceedings' is the same as that in the WA Act, as is the definition of 'proceeding', which includes:

- any cause, matter, action, suit, proceeding, trial, complaint or inquiry of any kind within the jurisdiction of any court or tribunal; and*
- any proceeding, including any interlocutory proceeding, taken in connection with or incidental to a proceeding pending before a court or tribunal; and*
- any calling into question of a decision, whether or not a final decision, of a court or tribunal, and whether by appeal, challenge, review or in another way.*²⁰³

The categories of person with standing to make application under the Queensland Act are substantially the same as under the WA Act, but also include the Crown solicitor.²⁰⁴ However, there is no requirement that a person against whom another person has instituted or conducted vexatious proceedings or a person with sufficient interest must obtain leave of the court before bringing the application.

There are some other points of difference between the WA Act and the Queensland Act. In particular, pursuant to the Queensland Act:

- the court must be satisfied that a person has 'frequently' instituted or conducted vexatious proceedings in Australia or has acted in concert with such a person²⁰⁵
- for the purpose of establishing the above requirement, the court can have regard to proceedings commenced in any Australian court or tribunal²⁰⁶
- among the orders available to the court is 'any other order ... [it] considers appropriate in relation to the person'.²⁰⁷ The notes to this provision in the Queensland Act provide the following examples of the 'other order' that may be made:
 - an order directing that the person may only file documents by mail
 - an order to give security for costs
 - an order for costs.²⁰⁸
- the registrar of the court must arrange for a copy of the order to be
 - published in the gazette within 14 days
 - entered in a publicly available register kept in the registry of the court.

The registrar may also arrange for details of the order to be published in another way, for example, on the court's website.²⁰⁹

196 *Supreme Court Act 1986*, s 21(6).

197 In seeking the variation, the Attorney-General is relying on the court's power under s 21(5) of the *Supreme Court Act 1986* to vary the original orders and the court's power to regulate its own proceedings, as well as arguing that the variation could be made on the basis of the court's inherent jurisdiction to make orders to prevent an abuse of its processes.

198 See *A-G v Kay* [2006] VSC 9; also [2006] VSC 11.

199 Consultation with Victorian Government Solicitor's Office and the Department of Justice (17 July 2007).

200 Model Vexatious Proceedings Bill 2004 as noted in the Explanatory Notes, Vexatious Proceedings Bill QLD 2005, 2.

201 Thompson (2004) above n 179, 77–8. See also Bryant (2006), above n 180, 37–38.

202 *Vexatious Proceedings Act 2005* (Qld).

203 *Vexatious Proceedings Act 2005* (Qld), s 3, schedule dictionary.

204 *Vexatious Proceedings Act 2005* (Qld), s 5.

205 *Vexatious Proceedings Act 2005* (Qld), s 6(1).

206 *Vexatious Proceedings Act 2005* (Qld), s 6(5).

207 *Vexatious Proceedings Act 2005* (Qld), s 6(2)(c).

208 *Vexatious Proceedings Act 2005* (Qld), s 6(2)(c), notes. We were told in consultations that in Victoria the Attorney-General generally does not seek costs on applications in relation to vexatious litigants: Consultation with Victorian Government Solicitors Office and Department of Justice (17 July 2007).

209 *Vexatious Proceedings Act 2005* (Qld), s 9(3), notes.

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In early 2007, a *Vexatious Proceedings Act 2007* was also enacted in the Northern Territory. It is substantially the same as the Queensland Act.

1.3.7 Victorian Parliamentary Law Reform Committee

The Victorian Parliamentary Law Reform Committee is currently inquiring as to the effect of vexatious litigants on the justice system and the individuals and agencies who are victims of vexatious litigants. The committee is due to report no later than 30 September 2008. Specifically, it is to:

- inquire into the effectiveness of current legislative provisions in dealing with vexatious litigants
- make recommendations which better enable the courts to more efficiently and effectively perform their role while preserving the community's general right of access to the Victorian courts.

1.3.8 Exposure Draft 2 proposals and responses

It is desirable that reform to the vexatious aspect of self-representation be given some momentum, particularly in light of legislative developments in other jurisdictions. To this end, the commission made a number of preliminary reform proposals regarding vexatious litigants in Exposure Draft 2. In response to these proposals the commission received a number of responses, which are summarised here.

Standing

The commission proposed that the persons with standing to bring an application for a vexatious proceedings order should be broadened to include:

- the Victorian Government Solicitor
- the Prothonotary of the Supreme Court or the Principal Registrar of the County Court, a person against whom another person has instituted or conducted vexatious proceedings, or someone with 'sufficient interest' in the matter. It was proposed that this second limb be subject to the leave of the court.

Rather than empower the court to bring an application of its own motion (as provided in the Queensland Act) it was proposed that the court be given the power to refer a matter to the prothonotary or the registrar. Similar provision is made in Victoria in relation to contempt proceedings, where the judge can direct the prothonotary or registrar to bring an application.²¹⁰

State Trustees noted that in 'recent times, vexatious litigants appear to have increased in number and organisation' and lauded the commission's proposal to expand standing provisions. It noted that this proposal, combined with moves to liberalise the test applied to such applications, 'promises a reduction in these unmeritorious matters'.²¹¹

The Law Institute supported the expansion of standing in accordance with Order 21(1)(2) of the Federal Court Rules, namely, to the court of its own motion as well as the Attorney-General, the Victorian Government Solicitor and the registrar. The Law Institute said feedback from its members suggested that some litigants 'forum shop' by moving their particular proceedings around between different courts and tribunals. It believed that this problem would be reduced by expanding the class of people who can seek to have a litigant declared vexatious.²¹²

The Consumer Action Law Centre did not support extending standing to parties or those with sufficient interest in the matter, and argued that the Attorney-General's standing is appropriate. It was concerned that wider standing may be used as a procedural weapon, particularly because a declaration would prevent the issuing of new proceedings.²¹³

PILCH supported the extension of standing to the Victorian Government Solicitor and the prothonotary/registry, provided that these parties practice an impartial and independent approach. PILCH also supported the extension of standing to parties to the litigation subject to the leave of the court, but was concerned about extending standing to persons with 'sufficient interest' on the basis that this would only amplify the inefficiencies of the current application process. PILCH also submitted there was no guarantee that persons with 'sufficient interest' or defendants would make applications in good faith. It argued the impartiality of the Attorney-General and the Victorian Government Solicitor provides for a fairer application process as would the leave requirement for parties.²¹⁴

PILCH also noted the tendency to label people with disabilities as vexatious or unreasonable, and was concerned that widening standing would further amplify the vulnerability of the mentally ill. PILCH also observed that the social and personal implications of declaring someone vexatious are significant and supported the need for a cautious approach to reform. It referred to the media coverage which is 'merciless and unforgiving' and also the 'severe impact on an individual's reputation and position in the community'.

PILCH acknowledged that ultimately standing may be able to be extended more broadly; however, it suggested that this should not occur until the legislation and the process is better defined and operational.²¹⁵

Adoption of legislative reforms in other states

The commission proposed that a number of legislative developments in other jurisdictions should be taken up in Victoria to streamline and simplify the process of obtaining a vexatious proceedings order.

State Trustees and an individual litigant supported the commission's proposal that the requisite test be liberalised along the lines of that contained in the Queensland Act.²¹⁶

The commission also proposed that the court be given powers to make orders prohibiting and limiting the right of a person acting in concert with a vexatious litigant. The Consumer Action Law Centre opposed this proposal, noting that the purpose of vexatious litigant laws is to prevent the repeated filing of unmeritorious claims, not 'to prevent people communicating with one another, even if that communication amounts to encouraging vexatious litigation'. It argued that section 6 of the Queensland Act was too broad.²¹⁷

The proposal that the court be empowered to extend its orders to encompass corporate entities or incorporated associations affiliated with the vexatious litigant was specifically supported by an individual litigant.²¹⁸

In relation to the publication of vexatious proceedings orders the commission proposed that orders be entered in a register that would be made available by the court on request. The commission did not propose that the prothonotary have a broad discretion to publish the details of any order. Instead, the prothonotary would be required to notify the heads of all jurisdictions in Victoria and the principal registrars in all jurisdictions in Victoria of any order made.

The Law Institute suggested that a list of vexatious litigants should be published on the Supreme Court's website. This is the practice in NSW, where a list of vexatious litigants appears on the NSW Supreme Court website together with a fact sheet on vexatious litigants.²¹⁹

Legal Aid was concerned to ensure that a person who is ruled vexatious but later has a case with merit has the opportunity to be heard.²²⁰

Vexatious proceedings in other courts and tribunals

Traditionally legislative powers in relation to vexatious litigants have been conferred on and exercised by the Supreme Court only. This reflects the seriousness of the potential curtailment of rights and gravity of the orders that may be made. There is no change to this approach in the Queensland Act or the WA Act. These Acts give the Supreme Court in each of those states the power to make orders that have effect in any court or tribunal in those states.

In Exposure Draft 2 the commission discussed the arguments for and against broadening of this approach to allow each of the courts in Victoria, and VCAT, to make vexatious proceedings orders in respect of proceedings in that particular court or tribunal.

This would enable courts or tribunals to control abuses of the processes in their own jurisdictions. It would also obviate the need to bring proceedings in the Supreme Court, particularly where the activities of a litigant have been focused in another jurisdiction. However, orders made by courts or tribunals other than the Supreme Court would necessarily be limited in scope. This may result in matters being dealt with in a piecemeal way or the need for multiple applications. For instance, where an application is brought in one court, the activities of a litigant in another jurisdiction may be overlooked. It is also foreseeable that a litigant whose activities are curtailed in one court may simply shift activity to another jurisdiction, which would in due course require another application. Conferring jurisdiction on all courts in Victoria and VCAT would also be a divergence from the move to nationally consistent legislation.

210 See *Supreme Court (General Civil Procedure) Rules 2005* O 75.

211 Submission ED2 7 (State Trustees).

212 Submission ED2 16 (Law Institute of Victoria).

213 Submission ED2 12 (Consumer Action Law Centre).

214 Submission ED2 18 (Public Interest Law Clearing House).

215 Submission ED2 18 (Public Interest Law Clearing House).

216 Submissions ED2 2 (Confidential, permission to quote granted 17 January 2008), ED2 7 (State Trustees).

217 Submission ED2 12 (Consumer Action Law Centre).

218 Submission ED2 2 (Confidential, permission to quote granted 17 January 2008).

219 Supreme Court of New South Wales, *Fact Sheet on Vexatious Litigants* (last updated 2007) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_vexlitstable> at 26 February 2008. See also s 84 of the *Supreme Court Act 1970* (NSW) and rr 13.4, 4.10, 4.15 of the *Uniform Civil Procedure Rules 2005* (NSW).

220 Submission ED2 10 (Victorian Legal Aid).

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Legal Aid supported this proposal, but emphasised that the operation of these procedures needs to adequately implement the rights contained in the Charter in particular the right to a fair hearing in section 24(1).²²¹

Declaring proceedings a nullity

In Exposure Draft 2 the commission proposed that if proceedings were commenced despite a vexatious proceedings order, such proceedings should be a nullity. This proposal was supported by State Trustees, which noted that it was an ‘appropriate and even-handed reform’ given the costs imposed on a party otherwise forced to defend itself from vexatious proceedings.²²²

Other preliminary proposals

The commission did not receive any responses to the remainder of its preliminary reform recommendations, namely:

- the introduction of a statutory definition of vexatious proceedings
- the introduction of a provision setting out the types of orders a court can make in relation to a vexatious litigant
- the automatic stay of proceedings once an application for a vexatious proceedings order is made and the prohibition on initiating further proceedings unless ordered by the court
- that evidence in support of an application be on affidavit on the basis of ‘information and belief’ and that cross-examination on affidavit evidence should only be allowed with leave
- that legislation provide that, unless otherwise ordered, vexatious proceedings applications be determined on the papers
- that the prothonotary have the discretion to waive court fees and charges associated with orders in relation to a vexatious litigant.

1.3.9 Conclusions and recommendations

Significant obstacles exist to bringing a vexatious proceedings order under the current Victorian legislation. The commission is mindful of the reforms that have been implemented in other jurisdictions, and believes similar reforms should be introduced in Victoria to ensure that vexatious litigants can be dealt with more effectively and efficiently. The commission notes that it has also sought to ensure that any changes preserve fundamental rights to access the courts. We are also mindful that the Victorian Parliamentary Law Reform Committee is undertaking a detailed review of these laws, and we invite the committee to take our recommendations into consideration when developing its responses.

It is important for further information about the ambit of the problem of vexatious litigants to be gathered.

The categories of people who have standing to bring a vexatious proceedings order should be broadened. We are conscious of the concerns expressed in submissions about extending standing to persons with ‘sufficient interest’ in a matter. The commission believes that this extension would allow those most affected by the conduct of vexatious litigants to take some action, and that the requirement that private litigants are entitled to do so only with leave of the court builds in an appropriate protection against misuse of the process. This safeguard should help prevent the process being used as a procedural weapon. The court will be in the best position to appropriately assess the circumstances and merits of the parties’ cases.

We acknowledge that for a range of reasons initiating an application may not be possible or desirable for a private litigant. A person may nonetheless have insights into the behaviour or activities of a particular litigant that may provide an appropriate foundation for a public officer to make an application. The commission therefore considers it desirable that a procedure or protocol be developed to assist private litigants who cannot or do not wish to bring proceedings themselves to nonetheless have proceedings instituted by an appropriate public officer.

The acting in concert reforms are intended to specifically target litigation that is brought in a coordinated manner for vexatious purposes, and are not intended to prevent freedom of communication or expression.

The commission is now of the view that the names of people declared vexatious litigants should be available by searching a database through the Supreme Court's website. This would enable interested parties to ascertain if a particular person has been declared vexatious.

RECOMMENDATIONS

Research

124. Empirical research should be undertaken to ascertain the ambit of the problem of 'vexatious' litigants, not limited to those who may be subject to an order under existing provisions. Research identifying the impact of vexatious litigants on the courts would be useful, as well as research considering the impact or effectiveness of the making of orders declaring a person to be vexatious.

Standing

125. The categories of persons who should have standing to bring an application should be broadened:

125.1 The Victorian Government Solicitor should be included, in addition to the Attorney-General, as a public officer with standing to bring an application.

125.2 The commission is not of the view that it is necessary or desirable to provide that the court of its own initiative may bring an application (as provided in the Queensland Act). Rather the court should be empowered to refer a matter to the prothonotary or registrar for action.

125.3 The categories of parties who have standing to make an application should be widened to include not only the Attorney-General and the Victorian Government Solicitor but also:

- the Prothonotary of the Supreme Court or the Principal Registrar of the County Court; or,

with the leave of the court,

- a person against whom another person has instituted or conducted vexatious proceedings, or
- a person who has a sufficient interest in the matter.

Adoption of legislative reforms in other states

126. The following reforms (which are largely in place in the Queensland Act and the WA Act) should be introduced:

126.1 The requisite test should be liberalised to reflect the test contained in the Queensland Act, namely, where a person has 'frequently' instituted or conducted vexatious proceedings in Australia the court may make orders prohibiting or limiting the right of a person to take or continue legal action.

126.2 The court should be empowered to make an order prohibiting and limiting the right of a person acting in concert with a vexatious litigant to take or continue a legal action. Legislation should also prevent a vexatious litigant from acting in concert with, or directing, another person to bring legal proceedings that are the subject of the order against the vexatious litigant. Such provisions appear in the Queensland Act.

126.3 A statutory definition of 'vexatious proceedings' should be introduced along the lines of the definition in the Queensland Act and the WA Act.

126.4 The court should be empowered to have regard to 'proceedings' broadly defined, including interlocutory and appellate proceedings (as in the definition in the Queensland Act and the WA Act) as well as proceedings in any Australian court or tribunal (as in the Queensland Act).

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- 126.5 A provision should be introduced that sets out the types of orders that the court may make, including orders staying existing proceedings and prohibiting the institution of proceedings and 'any other order the court considers appropriate' (as in the Queensland Act). The last of these options envisages orders restraining certain conduct or orders awarding costs.
- 126.6 A provision should be introduced that specifically allows the court to extend its orders to corporate entities or incorporated associations affiliated with the litigant the subject of the order.
- 126.7 In addition to the gazetting of any order, a provision should be introduced that requires the Prothonotary of the Supreme Court to enter any order in a register at the court. This register should be able to be searched through the Supreme Court's website so as to determine if a particular party is a vexatious litigant. Unlike under the Queensland Act, it is not proposed that the prothonotary have broad discretion to publish the details of any order. Rather it is proposed that the legislation require the prothonotary to notify the heads of all jurisdictions in Victoria and the principal registrars in all jurisdictions in Victoria of any order made.

Vexatious proceedings in other courts and tribunals

127. Each of the courts and tribunals in Victoria (other than the Supreme Court) should have express power to make a vexatious proceedings order limited to proceedings within the jurisdiction of that court or tribunal. The Supreme Court should retain the power to make orders in respect of any court or tribunal in Victoria.

Automatic stay

128. Once an application for a vexatious proceedings order is made, there should be an automatic stay in relation to pending proceedings and a prohibition on the commencement of further proceedings pending the hearing unless the court orders otherwise.

Evidence

129. Evidence in support of the application should be on affidavit and may be provided on the basis of 'information and belief'. Cross-examination on affidavit evidence should only be allowed with leave of the court.

Declaring proceedings a nullity

130. If, despite the making of a vexatious proceedings order, proceedings are commenced by the person the subject of the order, such proceedings should be a nullity.

Determination on the papers

131. To circumvent the problem of vexatious litigants absorbing court time by making repeated applications for leave to commence proceedings, legislation should provide that, unless the court otherwise orders, such applications should be determined on the papers without the need for a formal oral hearing.

Discretion to waive court fees

132. The prothonotary or registrar should have the discretion to waive court fees and photocopying and other charges otherwise payable by the applicant in proceedings for orders in relation to a vexatious litigant.

1.3.10 Additional matters

There are a number of additional issues relating to vexatious litigants that have been brought to the commission's attention. The commission is of the view that these matters require further consideration. Some or all of these issues, which are briefly summarised below, may be considered by the Victorian Parliamentary Law Reform Committee in the course of its inquiries.

Law Institute's reform suggestions

The Law Institute made a number of reform recommendations in its submission in response to Exposure Draft 2.²²³ It noted that people who regularly institute frivolous or vexatious proceedings may also have outstanding costs orders against them in previous matters which have been struck out or dismissed. To combat this problem the Law Institute recommended that the registrar for each Victorian court or tribunal develop, and maintain, a list of applicants with outstanding cost orders in proceedings which have been struck out or dismissed. Litigants on this list could be required to deposit a costs bond, or some other security for costs, with the court to prevent further potential abuse of the system. It noted that the proposed bond could be reviewed or reversed if at the directions hearing a judge or tribunal member found that the litigant's claim was meritorious.

It also recommended that a person who has initiated multiple actions in relation to the same matter have all those related matters heard before the same judge. It was suggested that this would save court time and resources because the judge hearing the case would already be familiar with its history.

Mental health issues and the appointment of litigation guardians

Consultations and academic literature have raised the relationship between mental health issues and the vexatious or inappropriate use of legal proceedings exhibited by some litigants.²²⁴

The issues that warrant further consideration include:

- the appointment of a litigation guardian and/or a guardian or administrator (or both) in appropriate cases; and
- incorporating strategies in the vexatious proceedings regime that specifically take into account mental health issues in the management of or assistance for those litigants who engage in inappropriate or vexatious use of litigation.

Not all litigants that exhibit behaviour which involves inappropriate or vexatious use of litigation are under a disability and would qualify for the appointment of a litigation guardian. However, there may be circumstances where it is appropriate. Mechanisms currently exist in Victoria for the appointment of a litigation guardian in circumstances where a person is under a disability and has an inability to manage his or her affairs in relation to a proceeding.²²⁵ Otherwise there is no test provided in the rules for determining whether the person is capable of managing his or her affairs. Further:

*The cases do not consider the level of mental capacity required to be a 'competent' litigant in person but it cannot be less than that required to instruct a solicitor. It should be greater because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.*²²⁶

A litigation guardian stands in the place of a party to a proceeding. Except where he or she is a lawyer, a litigation guardian usually will have to employ a lawyer to be an advocate.²²⁷ The role of litigation guardian is a potentially onerous task, requiring a person to assume full power and authority as a party in the proceeding and risk exposure to the other parties' costs. A litigation guardian can be any person who is not under a disability and has no interest in a matter which is adverse to the person he or she represents. In practice, a litigation guardian must be willing to act in the role and will often be a friend or family member.

It is important that where a litigant displays the requisite criteria, a litigation guardian is appointed rather than allowing the litigant to proceed unrepresented. Failure to do so may render any decision subject to being overturned on appeal.²²⁸

The issue also arises as to the proper process to be followed in relation to the appointment of a litigation guardian and/or a guardian or administrator (or both) under the *Guardianship and Administration Act 1986*.²²⁹ An administrator is entitled to 'bring and defend legal actions' on behalf of the represented person²³⁰ but there is no such provision for guardians in relation to litigation that is not to do with a person's estate. A guardian appointed under the *Guardianship and Administration Act 1986* may have to be appointed the represented person's litigation guardian in order to act in litigation.

It is foreseeable that the litigant concerned may not acquiesce or consent to such an appointment. Indeed in consultations we were informed of one recent matter that had proceeded in both the County and Supreme Courts where the process for the appointment of a guardian and/or

223 See Submission ED2 16 (Law Institute of Victoria). These submissions were also made to the Victorian Parliamentary Law Reform Committee's Inquiry into vexatious litigants. See Law Institute, *Vexatious Litigants—6 September 2007* (2007) <www.liv.asn.au/members/sections/submissions/20070906_89/index.html> at 26 February 2008.

224 Consultation with Victorian Government Solicitor's Office and Department of Justice (17 July 2007).

225 See generally *Supreme Court (General Civil Procedure) Rules* O 15. See also s 66(1) of the *Guardianship and Administration Act 1986*, which provides that if in any civil proceedings before a court the court considers that a party may need to have a guardian or administrator or both appointed, the court may refer the issue to VCAT for its determination.

226 *Murphy v Doman* [2003] NSWCA 249, [35].

227 *Supreme Court (General Civil Procedure) Rules* r 15.02(3).

228 See, eg, *Murphy v Doman* [2003] NSWCA 249.

229 See *Guardianship and Administration Act 1986* s 66(1) and above n 225.

230 *Guardianship and Administration Act 1986* s 58B(2)(l).

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administrator has been the subject of appeal by the litigant against whom the order was sought to be made.²³¹ It is therefore critical that a proper process is followed in relation to such matters and that the litigant in question is afforded procedural fairness and natural justice, including a right to be heard.

With particular reference to litigants who engage in inappropriate or vexatious use of litigation, the matters that may require further consideration include:

- identifying matters where the appointment of a litigation guardian and/or guardian or administrator (or both) may be appropriate
- the proper process to be followed by parties and courts in initiating the appointment of a litigation guardian and/or guardian or administrator (or both)
- the effectiveness of the process for the appointment of litigation guardians in Victoria, particularly in restraining inappropriate or vexatious conduct.

Some academic and judicial commentary suggests there may be a correlation between the conduct of vexatious litigants and a psychiatric disorder or mental illness and that accordingly psychiatric assistance should be one of the methods employed to deal with the problem.²³² We note the following observation:

*Courts are not equipped to provide this type of assistance and it is clear from the legislation ... that there is no power to make orders requiring a litigant to undergo some type of psychiatric assessment or treatment either as a result of being declared vexatious, or as a prerequisite to commencing further litigation following an order being made declaring them vexatious. Perhaps this is something for a future Law Reform Commission to consider.*²³³

Victoria Legal Aid expressed some concern about the current operation of litigation guardians in the civil justice system. It suggested that the reason that many people or organisations do not act as litigation guardians is because by doing so they potentially expose themselves to adverse cost orders. Accordingly, Legal Aid called for the consideration of the introduction of cost indemnities for litigation guardians.²³⁴ It did not support any requirement for compulsory psychiatric examination of vexatious litigants, as this would overly intrude on a person's private life and may raise mental health issues unrelated to the court proceedings.²³⁵

Criminal prosecutions

During consultations we became aware that some litigants inappropriately bring private prosecutions for criminal offences against public officials.²³⁶ Subject to a statutory provision restricting the identity of persons who can lay a private information, any person can lay an information for either a summary or indictable offence. Some of these prosecutions are what would be described in civil proceedings as frivolous, vexatious or an abuse of process of the court. Once the prosecutions are issued they create considerable intrusion into the role of public officers and require significant resources to bring about a resolution.

In civil matters issued in the Supreme Court, the prothonotary may refuse to accept an originating process without the direction of the court where he or she considers that the form or contents would be irregular or an abuse of the process of the court.²³⁷ No equivalent rule exists in relation to criminal proceedings. The Director of Public Prosecutions may, however, take over the proceedings and, if appropriate, withdraw or discontinue the charges.²³⁸ This process, nonetheless, involves substantial cost and considerable inconvenience.

In NSW, the registrar can refuse to accept criminal proceedings if they are not within the rules of court.²³⁹

Consideration should be given to making legislative provision for the registrar to also refuse to accept an originating process for criminal proceedings where he or she considers that the form or contents would be irregular or an abuse of the process of the court. The commission notes that a proposal of this sort is beyond the scope of this review.

Preventing conduct of claim unless party is legally represented

Another issue that may warrant further consideration is the possibility of providing the court with a power to prevent the pursuance of a claim unless a party is legally represented. It has been suggested that in certain circumstances where it appears to the court that a self-represented litigant is pursuing a claim or defence that appears vexatious or without any merit, the court should be given the power

to make an order (similar to the present situation in relation to corporations) that the claim or defence cannot be pursued on behalf of the person except by a legal practitioner with a practising certificate. The engagement of a legal practitioner may assist to distil the meritorious dimensions of the claim from otherwise overwhelmingly irrelevant material or vexatious conduct. The legal practitioner would also be subject to the overriding obligations, ethical standards and, if necessary, appropriate disciplinary sanctions.

The policy rationale in favour of such a proposal is the need to ensure that cases are conducted efficiently and with regard to the real issues.

Arguments against this proposal include:

- access to justice issues
- offending against the principle of the right to appear in person
- potential inconsistency with the provision in the *Charter of Human Rights and Responsibilities Act (2006)* providing for a right to a fair hearing
- imposition of an unreasonable financial burden on persons of limited means.

It was also argued that compelling a lawyer to act on behalf of someone is problematic because they may not be paid even if the litigant succeeds.

Legal Aid opposed preventing parties from pursuing a claim if they are not represented. It argued that this would 'arbitrarily restrict that person's access to justice, flout the right to appear in person, is overly expensive, and is likely to be in contravention of the right to a fair hearing contained in the Charter. of Human Rights and Responsibilities.²⁴⁰

The Law Institute also expressed concern at this proposal. It argued that it imposed a burden on litigants and required resources for legal representation.²⁴¹

231 Consultation with Victorian Government Solicitor's Office and Department of Justice (17 July 2007).

232 See discussion by Bryant (2006) above n 180. [5–6]. See also Ian Freckelton, 'Querulent Paranoia and the Vexatious Complainant', (1988) 11 *International Journal of Law and Psychiatry*, 129; Alan Murdie, 'Vexatious Litigants and de Clerambault Syndrome', (2002) 152 *New Law Journal* 61.

233 Thompson (2004) above n 179, 70.

234 Submission ED2 10 (Victoria Legal Aid).

235 Submission ED2 10 (Victoria Legal Aid).

236 See for example *Attorney-General for the State of Victoria v Shaw* [2007] VSC 148.

237 *Supreme Court (General Civil Procedure) Rules 2005* r 27.06.

238 See *Public Prosecutions Act 1994* ss 22(1)(b)(ii) and 25.

239 See *Criminal Procedures Act 1986* (NSW) s 49 and 179.

240 Submission ED2 10 (Victoria Legal Aid).

241 Submission ED2 16 (Law Institute of Victoria).

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Chapter 9

Helping Litigants with Problems and Hindering Problem Litigants



Chapter 10
**Achieving Greater Access
to Justice: A New Funding
Mechanism**



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Chapter 10



Achieving Greater Access to Justice: A New Funding Mechanism

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Recommendations

*The expense which governments incur in funding legal aid is obvious and measurable, but what is real and substantial is the cost of the delay, disruption and inefficiency which results from the absence or denial of representation. Much of the cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.*¹

1. ACCESS TO LEGAL ASSISTANCE

1.1 INTRODUCTION

An essential element of a fair legal system is the ability to access legal assistance and to obtain a fair hearing. Accessibility of the law depends on awareness of legal rights and of available procedures to enforce such rights. When access to legal assistance is not available, meritorious claims or defences may not be pursued or may not be successful. In many instances 'injustice results from nothing more complicated than lack of knowledge'.² The availability of legal assistance in civil law matters is, therefore, important both in facilitating access to justice and in ensuring that disputes are resolved fairly. As has been noted by the United Nations Human Rights Committee,

*the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.*³

Although Australian law generally recognises a right to representation in courts,⁴ in both civil and criminal matters, there is no 'right' to be provided with legal representation at public expense.⁵

The commission received a number of submissions that highlighted the importance of obtaining legal assistance. The submissions on this issue could be said to support the notion that:

*Legal aid cannot, by itself, eliminate all of the effects of discriminatory factors and sources of inequality [and] nor can it, alone, produce a just society. However, without an effective legal aid system the opportunity to realise a just and democratic society is threatened and so are the citizens that make up that society.*⁶

Many of these submissions also outlined current limitations on accessing legal assistance, most particularly because of a lack of legal aid funding for civil law matters. The views expressed in the submissions reflect a wider debate about how access to justice is facilitated, and who is responsible for funding.

Issues related to the adequacy of legal aid funding for civil legal proceedings are matters of some complexity. They are beyond the scope of this first stage of this inquiry, as are the issues of eligibility guidelines for legal aid funding and the allocation of available legal aid funds. Similarly, the commission has not investigated the issue of funding to community legal centres or other organisations outside the private profession involved in the provision of legal services.

The commission acknowledges the importance of this issue and supports calls for further legal aid funding. The first part of this chapter provides a brief summary of the current framework for legal assistance for civil matters in Victoria. The submissions received by the commission illuminate areas where demand is high, and include suggestions for reform.

In the second part of this chapter, we outline our proposal to address, in part, a gap in the provision of funding for civil law matters in Victoria. The commission believes that the establishment of a new funding mechanism, the Justice Fund, will assist in achieving greater access to justice.

1.2 LEGAL ASSISTANCE SCHEMES

1.2.1 Legal aid funding framework

Prior to 1997, the allocation of legal aid funding was largely determined by legal aid commissions in each state and territory. Each commission set its own budget priorities and expenditure. Funding was derived from a combination of state and federal government allocations and from other sources, including funds derived from interest on trust accounts. In 1996, the Commonwealth withdrew from this arrangement. From July 1997, the Commonwealth Government entered into new funding arrangements with legal aid commissions whereby Commonwealth funding was restricted to matters arising under Commonwealth law and the previous commitment to people for whom the Commonwealth accepted a 'special responsibility' was abandoned.⁷

- 1 Chief Justice Murray Gleeson, 'State of the Judicature' (Speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).
- 2 Chief Justice Murray Gleeson, 'Conference Opening and Keynote Address' (Speech delivered at the National Access to Justice and Pro Bono conference, Melbourne, 11 August 2006).
- 3 Human Rights Committee, United Nations, *General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, [10], UN Doc CCPR/C/GC/32 (2007).
- 4 Statutory restrictions on or exclusions of the right to legal representation before tribunals and other bodies are not uncommon. See Paul Latimer, Michael Hocken and Stephen Marsden, 'Legal Representation in Australia before Tribunals, Committees and other Bodies' *Murdoch University E Law Journal* 14 (2) (2007) 122.
- 5 In the criminal law context, see *Dietrich v R* (1992) 177 CLR 292, a case arising on appeal from the County Court of Victoria. The right to a fair trial is, however, fundamental and, in the absence of exceptional circumstances, a criminal trial may be adjourned or stayed to enable the accused to obtain representation. See also *Jago v District Court (NSW)* (1989) 168 CLR 23.
- 6 Julian Gardner, 'Foreword' in Jeff Giddings (ed.) *Legal Aid in Victoria: At the Crossroads Again* (1998) iii.
- 7 Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System* (February 2004) 22; Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004), 3.

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The introduction of this new funding arrangement saw the Commonwealth contribution to legal aid decline from 1996 to 2000, with an increase from 2000 to 2004. State and territory contributions to legal aid have increased steadily from 1996 to 2004.⁸

The change in funding priorities essentially diminished the available funds across the spectrum of legal matters. State legal aid commissions directed funds to criminal matters (where personal liberty was at stake) and family law matters (where the care of children was at issue).⁹ According to the Victorian Department of Justice, the impact of this policy change on funding for civil law matters

*was severe. It included the almost complete abolition of legal aid for civil matters so that now grants of legal aid are very rarely made for matters such as discrimination, consumer protection, tenancy law, social security law, contract law and personal injuries. Some of those matters have been picked up by the private profession on a 'no win, no fee' basis, but substantial areas of law, particularly poverty related law, have not been picked up.*¹⁰

The impacts of this policy change have been analysed elsewhere.¹¹

In their submission in response to the commission's Consultation Paper, Victoria Legal Aid reported that before the 1996 changes, it funded on average 1972 civil cases each year and civil expenditure totalled on average \$3.2 million each year. After 1996, civil expenditure dropped to \$138 000 each year. On average there were 188 cases in which assistance was provided each year.

For the same period, the Federation of Community Legal Centres also reported a large increase in demand for legal assistance in civil law matters. Its casework statistics show that in 1996, Victorian community legal centres gave civil law advice to 9278 clients, and a further 9248 cases were conducted. In 2006, 40 508 clients were given legal advice on civil law matters, and 13 593 cases were conducted. Civil law makes up 61 per cent of advice and casework performed by community legal centres, more than family law (33 per cent) and criminal law (6 per cent).¹²

Such an increase in civil law work may be partly attributed to a growth in community legal centre services. However, it is also likely that demand on community legal centres is increasing. Fitzroy Legal Service also reported an increase in demand for civil law legal advice:

*FLS has had more clients seeking advice in relation to civil matters, whilst the courts have witnessed significant increases in the number of self-represented litigants involved in civil litigation. The lack of legal aid for civil law matters contributes to significant inefficiencies and additional costs in the civil justice system.*¹³

The Public Interest Law Clearing House also noted

*[a] clear correlation between the erosion of legal representation caused by the changes to legal aid funding and the need, and increased demand, for pro bono services to be provided by the profession, particularly in civil litigation.*¹⁴

Beyond these reports, there is little data available on the accessibility of legal assistance for civil legal problems. There has been a lack of systemic research about legal needs of Victorians. While projects in NSW are attempting to tackle the lack of statistics in that state,¹⁵ research in Victoria has been ad hoc.¹⁶ Victoria Legal Aid has called for a national survey of demand and unmet need for legal services.¹⁷ The commission supports further research into legal needs and constraints on access to the civil justice system. The commission has not carried out or commissioned any such research, given the limited time constraints and terms of reference of the first stage of the present inquiry.

1.2.2 Victoria Legal Aid criteria for funding

Victoria Legal Aid is a statutory body established to provide legal aid in Victoria and to administer legal aid funds provided by state and Commonwealth governments.¹⁸ The *Legal Aid Act 1978* provides that Legal Aid may provide legal assistance where:

- a person is in need of legal assistance but is unable to afford the full cost of obtaining it from a private legal practitioner
- it is reasonable having regard to all relevant matters.¹⁹

Victoria Legal Aid uses a means test to determine if an applicant is able to pay for legal assistance. In assessing the reasonableness of a grant of assistance, Legal Aid will consider 'the nature and extent of any benefit that may be gained by the applicant, the public or any section of the public from providing legal assistance', and any detriment that might arise if assistance is not granted.²⁰ The merits of a case are considered and there must be reasonable prospects of success.²¹

The Legal Aid *Grants Handbook* outlines additional criteria for a grant of legal aid. Assistance may be granted in civil law cases if the amount claimed is \$5000 or more. Prospective plaintiffs will not receive a grant of assistance if they could be assisted by a private practitioner through a conditional (no win, no fee) costs agreement or by Law Aid. Assistance is only available to defendants if their sole place of residence is at immediate risk, or there is a strong prospect of obtaining a life tenancy in respect of the property.²²

Civil matters in which Legal Aid may grant assistance if an applicant meets both means and merit tests include Mental Health Review Board matters, guardianship and administration cases, coroner's inquests, equal opportunity and discrimination cases, Crimes (Family Violence) Act cases, adoption and some infringement penalties.

Assistance may also be granted in public interest cases that involve a legal issue that affects or is of broad concern to a significant number of disadvantaged people, or if there is an untested or unsettled point of law that affects a significant number of disadvantaged people.²³

Victoria Legal Aid will not grant assistance for any other classes of matters, including:

- cases at the Residential Tenancies Tribunal
- town planning disputes
- royal commissions or parliamentary inquiries
- internal disputes in organisations
- proceedings on behalf of an unincorporated association
- employment disputes
- building disputes
- change of name applications
- commercial or business disputes
- testator family maintenance applications.

Where the guidelines are silent about a matter, assistance will not be granted unless there are special circumstances. These include if an applicant is under 18 years of age, has a language or literacy problem, or has an intellectual or psychiatric disability.²⁴

Over the past three decades, the proportion of grants approved for civil law matters has generally declined compared with criminal and family law cases.²⁵

Table 2

GRANTS APPROVAL BY TYPE OF MATTER						
Approvals	1981–82	1986–87	1991–92	1996–97	2001–02	2006–07
Criminal %	47.4	59.6	73.5	66.5	60.8	58.8
Family %	33.63	24.0	20.9	20.8	28.4	27.7
Civil %	19.3	16.4	5.6	12.7*	10.8*	13.5*

*Mainly child protection matters

1.2.3 Community legal centres

Community legal centres are not-for-profit, independent, community organisations that provide a range of free legal services. Community legal centres are funded by a mix of state, federal and local government funding, donations, grants and pro bono contributions. The centres provide free legal advice, information, assistance and representation as well as contributing to community legal education and law reform. The services available at each centre vary, depending on resources.

Community legal centres

*tend to fill identified gaps in legal aid services in places of high need, providing complementary but different services to those provided by [legal aid commissions] and the private legal profession.*²⁶

A national report also found that community legal centres 'have a vital role to play in helping to achieve a fairer and more effective legal aid system that is available and accessible to all Australians'.²⁷

- 8 Senate Legal and Constitutional Affairs Committee (2004) above n 7, 6. See also: Law Council of Australia (Feb 2004) above n 7, 24–6.
- 9 Submission CP 31 (Victoria Legal Aid).
- 10 Victorian Department of Justice, Submission to the Inquiry on Legal Aid and Access to Justice, quoted in Senate Legal and Constitutional Affairs Committee (2004) above n 7, 23.
- 11 See, eg, Senate Legal and Constitutional Affairs Committee (2004) above n 7.
- 12 Submission CP 32 (Federation of Community Legal Centres).
- 13 Submission CP 44 (Fitzroy Legal Service).
- 14 Submission CP 34 (Public Interest Law Clearing House).
- 15 The Law and Justice Foundation of New South Wales is conducting an ongoing research program into access to justice and legal needs. Publications completed include: Law and Justice Foundation of New South Wales, *Quantitative Legal Needs Survey: Bega Valley (pilot)* (2003), Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry and Katrina Wong, *The Legal Needs of Older People in NSW* (2004), Suzie Forell, Emily McCarron and Louis Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW* (2005), Maria Karras, Emily McCarron, Abigail Gray and Sam Ardasinski, *On the Edge of Justice: the Legal Needs of People with a Mental Illness in NSW* (2006), Christine Coumarelos, Zhigang Wei and Albert Z Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (2006).
- 16 For a summary of recent projects across Australia, see Mary Anne Noone, 'Access to Justice Research in Australia' (2006) 31 *Alternative Law Journal* 30.
- 17 Submission CP 31 (Victoria Legal Aid).
- 18 *Legal Aid Act 1978*, s 6.
- 19 *Legal Aid Act 1978*, s 24.
- 20 *Legal Aid Act 1978*, s 24(4).
- 21 Victoria Legal Aid, *Grants Handbook* (12th ed 2006) [2.3], 20.
- 22 *Ibid* Appendix 2B.
- 23 *Ibid* [11].
- 24 *Ibid* 24, 20.
- 25 Table taken from Victoria Legal Aid, *Annual Report 2006–07* (2007) 13.
- 26 Senate Legal and Constitutional References Committee (2004) above n 7, 205.
- 27 *Ibid* 217.

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The Federation of Community Legal Centres, the peak body for the 52 community legal centres in Victoria, reports that their centres assist over 100 000 Victorians each year. In Victoria, generalist centres service geographic communities and specialist centres provide services in discrete areas of law.²⁸ They describe the pathways of their clients as follows:

People come to Community Legal Centres for help for different reasons. Often people seek assistance from a CLC because Legal Aid cannot assist them ... People may also come to a Community Legal Centre because they cannot afford a private solicitor or because there is limited private work done in the areas of civil law that CLCs provide assistance ... Increasingly, people come to a CLC after being referred from a court because they are self-represented litigants, and the court feels that they should be legally represented or the client should be advised to investigate other avenues of resolution.²⁹

In the 2006 financial year, Victorian community legal centres dealt with more than 72 193 clients in relation to civil law matters. Although community legal centres and other organisations, including PILCH, are endeavouring to cope with the increased demand for legal assistance in civil matters, such bodies are not usually able to provide the necessary assistance for the conduct of major civil litigation, including class actions.

1.2.4 Law Aid

In Victoria, funding is also available (on application) to cover the costs of disbursements in litigation. Law Aid is a charitable trust administered by the Law Institute of Victoria and the Victorian Bar Council.³⁰ Law Aid can cover the costs of disbursements that arise in civil litigation including experts' fees, travelling and accommodation expenses, court filing fees, jury fees and witness expenses.

Law Aid aims to be a self-funding scheme. The scheme assesses the means of applicants and the merits of their cases before assistance is granted.

An applicant must pay an application fee of \$100 and repay all monies spent on disbursements if the case is successful. The Law Aid fund also receives a percentage of the judgment or settlement (5.5 per cent). The legislation provides that such percentage shall not exceed 10 per cent of the award of settlement, excluding costs, or the market value of any property that may be recovered in the legal proceeding. Recoupment of expenses may also be through recovery of costs by court order made against the other party to the proceedings in which the assisted person is involved.

Funding from Law Aid is dependent on the barrister and solicitor acting on a pro bono or 'no win, no fee' basis, and not seeking any payment until proceedings are completed.³¹

The types of civil litigation that may be funded include:

- substantial personal injury claims
- claims against institutions involving oppressive behaviour
- loss or destruction of property claims
- professional negligence claims
- wills and estate claims.

Law Aid is not available for criminal matters or family law matters.

Although Law Aid is a useful scheme it is limited in scope and has provided assistance in a relatively small number of matters to date. The existing legislative cap on the proportion of any settlement that may be recouped by the Law Aid scheme undermines its commercial viability.

1.2.5 Pro bono schemes in Victoria

There are three formal pro bono assistance schemes in Victoria. The Public Interest Law Clearing House (PILCH) Scheme, the Law Institute of Victoria Legal Assistance Scheme (LIVLAS) and the Victorian Bar Legal Assistance Scheme (VBLAS) each facilitate the provision of pro bono assistance by solicitors and/or barristers. These schemes are co-located and coordinated by PILCH, a community legal centre. The schemes provide assistance as a last resort, and only if all other avenues of assistance have been exhausted. Assistance is also subject to a means test and merit test.³²

The PILCH Scheme provides legal assistance only in public interest matters, namely legal matters for not-for-profit organisations with public interest objectives. Public interest matters can also include requests by individuals where the issue needs addressing for the public good, affects a significant

number of people, is of broad public concern, or impacts on disadvantaged or marginalised groups. The PILCH scheme is funded by its members. During 2006–07, the scheme received 568 requests for legal assistance; 223 of those matters were referred to barristers and solicitors for pro bono assistance.³³ From 1 July 2005 to 1 December 2006, approximately 48 per cent of inquiries to PILCH, and 46 per cent of referrals made, were in relation to state civil legal aid matters.³⁴ PILCH also operates a Homeless Persons' Legal Clinic that provides free legal assistance, including for civil matters, for homeless persons.

The LIVLAS is a pro bono assessment and referral service that links members of the public to lawyers willing to provide pro bono legal assistance. A person seeking assistance must meet the criteria noted above. Where an applicant receives assistance and is successful in the matter, the solicitor–client legal costs will be agreed between the client and the solicitor. The applicant remains liable for any adverse costs order, and must cover the costs of all disbursements. In 2006–07, LIVLAS received 767 enquiries and made 110 referrals to solicitors.³⁵ Many of the rejected applicants were assisted to pursue other forms of legal assistance.

The VBLAS is a similar referral service that links people in need of assistance to barristers willing to provide pro bono assistance. Assistance is available, on application, where:

- the assistance of a barrister is required
- the case has legal merit
- the applicant does not have the financial means to obtain assistance from a barrister
- the applicant is unable to obtain assistance from another source
- an application for legal aid has been refused.³⁶

Applicants to VBLAS are required to first seek assistance from community legal centres or 'no win, no fee' firms wherever possible. Over 570 barristers are registered with VBLAS. In 2006–07, VBLAS received 448 enquiries and made 245 referrals to barristers.³⁷

The Supreme Court operates a pro bono referral program for self-represented litigants.³⁸ There are no other formal court-based pro bono referral programs in Victorian courts although individual judicial officers may often recommend that pro bono assistance be obtained.

Apart from what the National Pro Bono Resource Centre describes as an evolving pro bono industry that has resulted in formalised pro bono schemes,³⁹ many lawyers and barristers perform work on a pro bono basis that is not administered by one of the above schemes. The resource centre reports that 'the majority of pro bono work being done in Australia is done by lawyers in their private capacity'.⁴⁰ Small firms account for a large proportion of pro bono work conducted in Australia, but perform this work outside formal schemes.⁴¹

It is difficult to determine the amount of pro bono assistance that is provided for civil law matters in Victoria. It is possible to calculate amounts of assistance through various services, but the ad hoc nature of private assistance means that calculations are problematic.⁴² In 2003 a NSW study showed that civil work was the most common pro bono work undertaken in that state, accounting for 30 per cent of matters.⁴³ However, a National Pro Bono Resource Centre survey rates family law as the most common matter type, followed by criminal law and wills and probate.⁴⁴

There are constraints on the capacity of pro bono work to meet demand. Limitations on the scope of pro bono services include a mismatch of skills, conflicts of interest, and constraints on the capacity of those involved to undertake litigation. Uncertainty regarding the size, length, complexity and cost of litigation is a recognised deterrent to pro bono support for litigation.⁴⁵

28 Centres that specialise in civil law include the Consumer Action Law Centre, Environment Defenders Office, Tenants Union of Victoria, JobWatch, Welfare Rights Unit and the Human Rights Law Resource Centre.

29 Submission CP 32 (Federation of Community Legal Centres (Vic) Inc).

30 *Legal Aid Act 1978* Part VIA.

31 Law Aid, 'Funding Disbursements in Civil Litigation' <www.lawaid.com.au> at 30 January 2008.

32 Submission CP 34 (Public Interest Law Clearing House).

33 PILCH, *Annual Report 2006–07*, 4.

34 Submission CP 34 (Public Interest Law Clearing House).

35 PILCH (2007) above n 33, 14.

36 The Victorian Bar Legal Assistance Scheme, 'A Guide to the Provision of Legal Assistance under the Scheme', <www.vicbar.com.au> at 30 January 2008.

37 PILCH (2007) above n 33, 12.

38 This program is discussed further in Chapter 9.

39 National Pro Bono Resource Centre, *Mapping Pro Bono in Australia* (2007) 5.

40 Submission CP 16 (National Pro Bono Resource Centre).

41 National Pro Bono Resource Centre, (2007) above n 39, 15; Gillian McAllister and Tom Altobelli, *Pro Bono Legal Services in Western Sydney* (2005).

42 National Pro Bono Resource Centre, (2007) above n 39, 77.

43 New South Wales Law Society Pro Bono Referral Scheme, reported in *ibid* 83.

44 *Ibid* 76.

45 *Ibid* 101.

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2. CALLS FOR REFORM

The Commission received many submissions that documented a critical lack of legal aid funding for civil matters.

Many submissions called for an urgent increase in legal aid for civil law matters.⁴⁶ The submissions often noted that a mix of services—including legal aid, conditional costs agreements and pro bono—currently supports the provision of legal aid systems. Victoria Legal Aid noted that ‘it is important to get the balance [between services] right’.⁴⁷ The Environment Defenders Office reported that while speculative fee agreements have filled a gap in personal injuries litigation, many other civil law matters remain unfunded.⁴⁸ Certain claims, such as family and property matters, are unlikely to attract commercial litigation funders.⁴⁹ Similarly, the Homeless Persons’ Legal Clinic emphasised that ‘the significant pro bono contribution made by private practitioners is no substitute for proper government funding of VLA and CLCs’.⁵⁰

The current Legal Aid funding guidelines for civil law matters came under scrutiny in submissions received by the commission. A number of organisations were critical of the guideline that stipulates that, subject to Legal Aid guidelines, a civil claim must value at least \$5000 for a person to be eligible for assistance. It was submitted that this figure is too high⁵¹ and is arbitrary.

The Homeless Persons’ Legal Clinic commented on the guideline that Legal Aid funding is only provided where assistance is not available through a conditional costs agreement. The Clinic reported that an upfront contribution of \$2000 is sometimes sought to secure assistance on that basis, which is out of reach for homeless people and other low income applicants. Other requirements exclude homeless people by definition.⁵²

Some submissions suggested that a restrictive interpretation of the guidelines by Legal Aid denies legal assistance to people with meritorious claims.⁵³ PILCH is in consultation with Victoria Legal Aid about these matters, including the ‘special circumstances’ guideline, the equal opportunity guideline and the guideline for public interest and test cases.⁵⁴ PILCH also recommended that where applicants do not meet the means test Legal Aid consider a system of ‘cascading’ financial contributions from applicants.⁵⁵

Submissions highlighted a number of areas of civil law that are not covered by legal aid funding. These include *Crimes (Family Violence) Act 1987* matters, employment law, de facto property settlements, family law settlements, tenancy matters and advice for prisoners. Springvale Monash Legal Service noted that civil matters often have a significant impact on families, and argued that their importance warrants legal aid funding.⁵⁶

Some submissions called for targeted legal aid funding for particular groups in need—including homeless people,⁵⁷ Indigenous people,⁵⁸ low income earners,⁵⁹ immigrant and culturally and linguistically diverse communities⁶⁰—who all have particular civil law problems. The Victorian Aboriginal Legal Service noted that the economic impact of civil law problems on these groups is disproportionately greater.

State Trustees also noted that the differing natures, obligations and requirements of the various assistance schemes introduce a level of complexity to obtaining assistance that can result in a meritorious claim being defeated.⁶¹

2.1 SUGGESTIONS FOR CHANGE

The commission received many suggestions for improving the provision of legal assistance for civil law matters. In many cases, these suggestions were made alongside a call for additional funding of legal aid.

Particular mention was made of the need for more funding for frontline services to provide initial advice.⁶² Ensuring access to initial advice can prevent an escalation of disputes:

*Significant time and money for parties to a dispute, court resources, PILCH resources, and pro bono resources could be saved if people were able to obtain appropriate legal advice in civil matters at an early stage.*⁶³

The Victorian Aboriginal Legal Service outlined a proposal for an urgent list for civil law matters,⁶⁴ while the Federation of Community Legal Centres supported a dedicated civil law duty service at court.⁶⁵ The Mental Health Legal Centre argued that courts should be able to order representation,

either through a pro bono service or through legal aid.⁶⁶ Other submissions also supported a court-based pro bono referral program.⁶⁷ Different structures for administering legal aid were also suggested.⁶⁸

The Australian Legal Assistance Forum has advocated for the reinstatement of a national civil legal aid scheme. This coalition of legal bodies includes the Law Council of Australia, the National Aboriginal and Torres Strait Islander Legal Services Secretariat, National Legal Aid and the National Association of Community Legal Centres. The proposed scheme entails a national civil legal aid program and funding on a cooperative basis by state and federal governments. A grant of assistance would be available if an applicant:

- has a right of action against a person, a corporation or government, which is justifiable in a court or a tribunal of competent jurisdiction or has been or is likely to be the subject of action in such a court or tribunal
- has a legal position which is assessed as having such merit, ie, it has passed the ‘reasonable prospects of success’ test, the ‘prudent self-funding litigant’ test and the ‘appropriateness of spending public funds’ test.

The proposal suggests that grants should be available for discrete stages of a matter, such as taking instructions, commencing negotiations, seeking the assistance of a mediator, assistance to prepare and issue proceedings, preparation of the matter for trial, conducting the hearing or trial.⁶⁹

National Legal Aid has also issued a vision statement for the provision of legal aid in Australia.⁷⁰ Australia’s eight Legal Aid Commissions have set priorities for funding based on areas of need, rather than a state/federal dichotomy. Of the five priority areas, the second is supporting Australians at risk of social exclusion due to poverty. This ‘recognises the “cause and effect” relationship between poverty and other problems’.⁷¹ The policy recommends that federal legal aid funding be available for the following matters, irrespective of whether the legal issue arises under Commonwealth, state or territory legislation:

- social security
- employment
- housing
- consumer legislation matters, particularly credit and debt.

2.2 COMMISSION’S VIEW

The commission strongly supports calls for greater funding for legal aid in civil matters.

The commission notes that the Victorian Government has acknowledged the relatively small number of grants available for civil matters.⁷² The Attorney General’s Justice Statement also records a government commitment to ‘commence discussion with Victoria Legal Aid to identify those means by

- 46 Submissions CP 22 (Mental Health Legal Centre), CP 16 (National Pro Bono Resource Centre), CP 27 (Victorian Aboriginal Legal Service Co-operative), CP 44 (Fitzroy Legal Service), CP 29 (PILCH Homeless Persons’ Legal Clinic), ED1 19 (Human Rights Law Resource Centre), ED1 31 (Law Institute of Victoria).
- 47 Submission CP 31 (Victoria Legal Aid).
- 48 Submission CP 17 (Environment Defenders Office (Vic) Ltd), also Submission CP 22 (Mental Health Legal Centre).
- 49 Submission ED2 13 (Peta Spender).
- 50 Submission CP 29 (PILCH Homeless Persons’ Legal Clinic).
- 51 Submissions CP 34 (Public Interest Law Clearing House), CP 29 (PILCH Homeless Persons’ Legal Clinic), CP 44 (Fitzroy Legal Service), CP 17 (Environment Defenders Office (Vic) Ltd), ED1 31 (Law Institute of Victoria).
- 52 For example, the requirements for defendants to obtain assistance in civil law matters relate to them having tenancy or residence: Victoria Legal Aid, (2006) above n 21, State Civil Law Matters guidelines, 1.5.
- 53 Submission CP 34 (Public Interest Law Clearing House).
- 54 The Environment Defenders Office also supported the inclusion of environment as a matter for public interest: submission CP 17 (Environment Defenders Office (Vic) Ltd).
- 55 Submission CP 34 (Public Interest Law Clearing House).
- 56 Submission CP 59 (Springvale Monash Legal Service Inc.).
- 57 Submission CP 29 (PILCH Homeless Persons’ Legal Clinic).
- 58 Submission CP 27 (Victorian Aboriginal Legal Service Co-operative).
- 59 Submission CP 27 (Victorian Aboriginal Legal Service Co-operative).
- 60 Submission CP 44 (Fitzroy Legal Service).
- 61 Submission CP 23 (State Trustees Ltd).
- 62 Submissions CP 44 (Fitzroy Legal Service), CP 16 (National Pro Bono Resource Centre), ED1 20 (Public Interest Law Clearing House), ED1 19 (Human Rights Law Resource Centre).
- 63 Submission CP 34 (Public Interest Law Clearing House).
- 64 Submission CP 27 (Victorian Aboriginal Legal Service Co-operative), supplementary submission.
- 65 Submission CP 32 (Federation of Community Legal Centres (Vic) Inc).
- 66 Submission CP 22 (Mental Health Legal Centre). See also *Federal Court Rules 1979*, O 80.
- 67 Submission CP 37 (Transport Accident Commission), Submission ED2 16 (Law Institute of Victoria).

68 For example, a government agency could administer funds to community legal centres, as is done by Consumer Affairs Victoria in relation to debt matters: submission CP 22 (Mental Health Legal Centre).

69 Australian Legal Assistance Forum, *Restoration of a National Civil Legal Aid Scheme* (2006); copy supplied to the commission by Public Interest Law Clearing House (Vic).

70 National Legal Aid, *A New National Policy for Legal Aid in Australia* (2007). Some submissions received by the commission endorsed this model.

71 *Ibid* 6.

72 Department of Justice, *Attorney-General’s Justice Statement* (2004) 71.

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which some funding for civil cases may be restored'.⁷³ The government has committed to introduce further reforms to ensure the civil justice system is more responsive, accessible and affordable, particularly for the vulnerable and disadvantaged.⁷⁴

The commission supports these commitments, but notes that there is still a substantial demand for legal assistance that is met by way of pro bono assistance, and considerable demand that is not met at all. The commission believes the government should not rely on the pro bono sector to fulfil what is a fundamental government responsibility. The commission believes that, if implemented, its recommendations throughout this report will result in a more efficient justice system. Adequate legal aid funding is an essential component of the civil justice system.

The commission is, however, mindful of constraints on state and federal funding for legal aid services. Although a federal matter, and thus beyond state responsibility and outside the terms of reference of the current civil justice inquiry, the issue of the continuing tax deductibility of legal costs was raised by a number of persons in the course of submissions and consultations. One obvious source of additional federal funding for legal aid services, without any net increase in Commonwealth Government expenditure, could be through removal or restriction of the present deductions allowed to businesses for legal fees and other expenses incurred in litigation. Whatever policy position is adopted in relation to tax deductibility generally, there are cogent arguments in favour of restrictions on or removal of such deductibility in cases where the party claiming the deduction did not have a meritorious legal claim or defence but conducted the matter in a way that incurred considerable public and private expense. Whether such private expense should continue to be allowed as a tax deduction warrants review by an appropriate body.

Mindful of the constraints on state government expenditure in providing financial and other assistance in civil litigation, the commission has developed a model for a form of 'self financing' litigation funding that we believe will meet some of the present demands. This model is discussed below.

3. FUNDING MECHANISMS

In its October 2006 Consultation Paper the commission sought views on whether the law relating to representative or class actions needs reform. The submissions received are summarised in Chapter 8. Views were also sought on whether there is a need for reform in relation to the funding of representative or class actions. The submissions received are summarised in this chapter.

On 28 June 2007 the commission released an exposure draft setting out preliminary reform proposals for public and professional comment. The draft proposals for reform of the statutory class action provisions in Part 4A of the *Supreme Court Act 1986* are set out in Chapter 8, along with a summary of the submissions received. That exposure draft also included proposals for the funding of class actions and litigation generally. The submissions received are summarised in this chapter.

The exposure draft set out recommendations for the establishment of a new funding mechanism, with benefits for both plaintiffs and defendants who are parties to litigation, including statutory class actions. The operation of the fund would not be limited to class actions. It could provide assistance in representative actions brought under the representative action rule or in any other civil proceeding. However, the proposed fund is likely to be in demand in class action litigation and likely to derive substantial revenue from class action proceedings.

After reviewing the various submissions received the commission has recommended that certain reforms should be implemented. The remainder of this chapter deals with the recommendations in relation to the funding of class actions and other litigation and incorporates the commission's proposals in relation to the establishment of a new funding body.

3.1 NEW LITIGATION FUNDING MECHANISM: JUSTICE FUND

Class actions are now an established part of the legal landscape. However, Victoria remains the only jurisdiction, apart from the Commonwealth, to have enacted a comprehensive statutory class action regime. The Victorian provisions in Part 4A of the *Supreme Court Act 1986* are modelled on the provisions of Part IVA of the *Federal Court of Australia Act 1976*. The federal provisions were based substantially on the recommendations of the ALRC.⁷⁵ However, the Commonwealth Government failed to implement the ALRC's important proposal in relation to the establishment of a class action fund. The proposed Victorian Justice Fund will remedy this problem. However, it is presently proposed that the fund will *not* be restricted to funding class actions. The fund is intended to be self-funding, as discussed below.

It is proposed that a new funding body be established (provisionally titled the Justice Fund) which would provide financial assistance to parties with meritorious civil claims, provide an indemnity in respect of any adverse costs order and meet any requirements imposed by the court in respect of security for costs.

In return for providing this financial support, the proposed fund would, subject to judicial approval, receive an agreed percentage of the amount recovered in successful cases. The body would seek to be self funding (through income derived from success fees in funded cases, costs recovered from unsuccessful parties and payments into the fund which the court would be empowered to order pursuant to the *cy-près* type remedies referred to in Chapter 8).

The ALRC report that led to the introduction of Part IVA of the *Federal Court of Australia Act 1976* (on which the Victorian class action provisions are based) recommended the establishment of a special fund to assist in financing class action litigation and as a source of funds to pay costs awarded against representative parties.⁷⁶ The ALRC also proposed that the fund could be 'self-financing to some extent' through receiving the residue of monetary relief not claimed by eligible class members or returned to the defendant.⁷⁷

The Law Council of Australia submission to the Standing Committee of Attorneys-General on litigation funding recommended that a similar fund be created. The Law Council called it a Litigation Guarantee Fund.⁷⁸

Funding and costs are a particular problem in class action litigation for a number of reasons:

- Class action litigation is often expensive to conduct and protracted.
- There are often numerous interlocutory applications and appeals.
- Class members have statutory immunity from adverse costs orders and thus the representative plaintiff may be ordered to pay the costs of the defendant(s) or any amount required by way of security for costs.
- The present law relating to orders for security for costs against representative plaintiffs in class action litigation is unclear. It is arguably unfair for a representative party to provide security for the costs of pursuing remedies for the benefit of others.
- Although the amount at stake in the litigation may be very large, the representative plaintiff's individual claim may be very modest.
- Civil legal aid is generally not available for plaintiffs.
- Corporate defendants and insurers often have substantial financial and human resources and may be able to claim a tax deduction for the legal fees and expenses incurred in defending an action.

There are also particular costs problems for defendants and their insurers:

- It may be difficult to quantify the total value of the claim(s) and thus settlement may not be practicable and the proceedings may become protracted and expensive.
- Until the case is advanced or concluded it may not be possible to determine how many members of the group will in fact proceed to submit claims, even if liability is established.
- Where there are multiple defendants it may be difficult to apportion liability or determine appropriate contributions.
- Apart from the substantial costs of determining the common issues, there may be substantial transaction costs in determining the claims of individual class members.
- Because of the statutory immunity of class members, any costs orders in favour of the defendant may only be against the representative party, who may be unable to pay such costs.

To some extent, several of these problems have been ameliorated, for the benefit of both plaintiffs and defendants, by the emergence of commercial litigation funders. Some commercial funders are prepared to finance the litigation, meet any obligations to provide security for costs and provide an indemnity in respect of any adverse costs order. This is usually in consideration of agreement by the assisted parties to pay to the litigation funder a specified percentage of the amount recovered if the litigation is successful.

73 *Ibid.*

74 Department of Justice, *Strategic Priorities 2007: A Statement of Our Focus and Direction* (2007).

75 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988).

76 *Ibid* [308].

77 *Ibid* [312].

78 Law Council of Australia, *Litigation Funding: Submission to the Standing Committee of Attorneys-General* [No 1907] (2006) 5.

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However, such agreement cannot be entered into by the representative party on behalf of the class. In order to secure a legal entitlement to share in the amount recovered by class members, litigation funders usually endeavour to get individual class members to enter into contractual litigation finance arrangements. Litigation funders are usually only willing to fund litigation on behalf of those class members who have entered into litigation finance agreements.

These commercial considerations have led to a proliferation of class actions which the defined classes are limited to persons who have agreed to enter into litigation finance arrangements with commercial litigation entities. In effect, the opt out statutory class action regimes have been, in many cases, used by groups limited to those who have contractually agreed to opt in to proceedings brought to recover money on their behalf.

This has a number of undesirable policy consequences given that the class action procedure was designed as a means of obtaining a remedy for 'all' of those adversely affected by the conduct giving rise to the litigation. This has attracted judicial scrutiny and expressions of concern. Some judges have refused to allow class actions to proceed where the classes have been restricted to claimants who have either entered into litigation finance arrangements with a commercial funder or have agreed to fee and retainer arrangements with a particular law firm.

There are a number of ways these problems might be addressed, in whole or in part:

- A legal mechanism could be adopted to allow a litigation funder to claim a share of the total amount recovered by litigation on behalf of an opt out class, without necessarily requiring each of the group members to enter into separate contractual arrangements with the funder on commencement of the proceeding (but preserving the existing right of individual class members to opt out of the litigation if they are unhappy with the proposed payment to the litigation funder out of any money recovered on their behalf).
- The existing statutory provision empowering the court to deduct from sums recovered on behalf of class members any 'shortfall' between the legal costs incurred by the representative applicant in the proceeding and the amount of costs recovered from the defendant could be expanded to include settlements (as distinct from judgments) and amounts payable to a litigation funder (as distinct from legal costs).
- The existing prohibition on law practices being able to charge a fee calculated by reference to the amount recovered in the litigation could be abolished, at least for class actions.
- A fund could be established which could provide financial assistance in class actions, satisfy any order for security for costs and provide an indemnity for any adverse costs order made against the representative plaintiff if the class action is unsuccessful.

The first three of these alternatives (which are not mutually exclusive) are not discussed here. The way in which the proposed fund would operate is explained below.

3.1.1 How the Justice Fund would operate

For administrative convenience, and to reduce establishment costs, the fund should be set up, at least initially, as an adjunct to an existing entity. One appropriate body would be Victoria Legal Aid. Alternatively, the existing Law Aid scheme could be modified to incorporate the proposed features of the Justice Fund.

The fund would require a statutory foundation, including to facilitate its recovery of a share of the proceeds of the litigation (given that the representative party has no legal authority to contractually assign a share of the amounts recovered on behalf of other class members), and to limit its potential legal liability for adverse costs (see below). The statutory provisions would also specify the objects of the fund and the criteria for granting assistance.

Although an initial seeding grant would be required to establish the fund,⁷⁹ it would seek to become self-funding out of revenue derived from class action cases that were financially supported.⁸⁰ It could also enter into joint venture arrangements with commercial litigation funders. However, unlike such commercial funders that distribute profits to shareholders, the fund would use any profits received by it for the purpose of:

- providing additional funding for commercially viable meritorious litigation
- funding important test cases or public interest cases

- financing research on civil justice issues
- funding initiatives of the Civil Justice Council.

The fund should have considerable commercial flexibility to determine the nature and extent of financial assistance provided and the terms and conditions of such assistance. For example, in some cases it might provide comprehensive financial support for the litigation as a whole, including financial assistance for the conduct of the case, satisfying any requirements in relation to security for costs and providing an indemnity for adverse costs orders made against the assisted party. In other cases it might provide only some parts of this 'package', or assistance only up to a certain point in the litigation, subject to further review.

In class action proceedings, notice would be required of the terms and conditions of the funding arrangement, and group members who were not agreeable to the financial terms would retain the right to opt out of the proceeding.

The fund would seek to make a 'profit' out of providing assistance rather than merely seek to recoup its outlays. It would be permitted to provide assistance on the basis that the assisted party agreed to pay to the fund a percentage of the amount recovered. This revenue would be used for the purposes of the fund.

The statutory provisions establishing the fund would authorise the fund to recover monies not only from the representative party conducting the class action proceedings but also from any monies recovered for the benefit of class members, including by way of judgment or settlement.

The fund should be structured to minimise potential liability for income tax or capital gains tax on any 'profits'.

In order to reduce the level of 'cash' initially required to finance its operations each law firm acting in funded cases would be normally expected to continue to conduct the case to its conclusion (including any appeal) without any financial contributions from the fund, other than a guarantee that the firm would ultimately be paid agreed fees and reimbursed agreed expenses if the case was unsuccessful.

For the purpose of conducting the case, the firm would be required to utilise its own professional and financial resources, including meeting expenses and disbursements such as counsel's fees and the cost of witnesses.⁸¹

Thus, in all successful cases the fund would receive income without having to outlay monies. Leaving aside the administrative costs of operating the fund, in crude financial terms the fund would break even if there were at least twice as many successful as unsuccessful cases (assuming that the average cost of such cases is the same). There would need to be twice as many successful cases because in unsuccessful cases the fund would be liable for the costs of both the unsuccessful applicant and the successful respondent. Since the fund would only provide assistance in cases that were determined to have merit, on the basis of independent expert opinion, the success rate of the funded cases should be relatively high.

To maintain the financial viability of the fund, it would be desirable, initially at least, to be able to quantify the potential liability of the fund to meet any adverse costs order in cases where assistance has been provided. This could be done using the approach of the English Court of Appeal in determining the liability of commercial litigation funders for adverse costs in civil litigation in England and Wales.⁸² The legal liability of the fund for adverse costs would be capped at the level of financial assistance provided by the fund. For example, if the fund had provided assistance of \$1 million to the assisted party, the maximum liability of the fund for any adverse costs order would be that amount. This may not adequately indemnify successful defendants in some cases, particularly where there are multiple defendants, but would be a considerable improvement on the present position of defendants in class actions brought by parties of limited means. The fund would have discretion to pay in excess of the statutory cap, and the defendant would also retain any rights under existing law to seek enforcement of any costs order.

The fund would be able to receive income by way of *cy près* orders made in cases, including cases where the fund had not provided financial assistance.

Decisions about the funding of cases would be made in the light of independent advice concerning the merits and financial viability of the proposed litigation, including by counsel and experienced solicitors.

- 79 The commission has received several suggestions about sources of funding to establish the fund. Such funding need not necessarily be from the Victorian Government. One possible source is the Consumer Credit Fund, which is discussed in Chapter 9. There are other non-government funding sources in Victoria.
- 80 Following the Quebec model, it might be feasible to establish a mechanism for the fund to derive revenue from *all* class action proceedings, whether financially supported by the fund or not. The Quebec model is discussed further in paragraph 3.2.3 of Chapter 8.
- 81 In cases where this might not be practicable, the fund could agree to advance or reimburse disbursement expenses before the case finishes.
- 82 *Arkin v Borchard Lines Ltd* [2005] 3 All ER 613. English courts have held that 'pure funders' (as distinct from commercial litigation funders) should not have liability for adverse costs: see *Hamilton v Al Fayed* [2003] QB 1175. A legislative provision could be enacted to impose a statutory limit on liability for costs, similar to s 46 of the *Legal Aid Commission Act 1979* (NSW). That provision seeks to limit the liability of the legally aided person. To that extent, it has been held to be inapplicable in federal proceedings: *Woodlands v Permanent Trustee Co Ltd* (1996) 68 FCR 213, *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334. See also Peter Cashman, *Class Action Law and Procedure* (2007) ch 7. This would not create a difficulty in the present context as the proposed fund would only provide assistance in connection with proceedings in Victorian courts. For a review of English, Australian and other judicial decisions concerning litigation funding see Rachael Mulheron and Peter Cashman, *Third Party Litigation Funding: A Changing Landscape* (forthcoming) (2008) *Civil Justice Quarterly*.

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Once it became sufficiently solvent, the fund would be able to provide financial assistance on non-commercial terms in areas of litigation other than class actions, including test cases and public interest cases. At its inception the fund would not be restricted to funding class action proceedings, but it is likely to be a highly desirable source of financial support in such cases and also likely to derive substantial income from successful class actions.

Funding in class actions would be limited to actions in the Supreme Court of Victoria, pursuant to Part 4A of the *Supreme Court Act 1986* and representative actions under order 18 of the *Supreme Court (General Civil Procedure) Rules 2005*.⁸³

There would be a minimum of fulltime professional and support staff, and a board of directors or trustees who would serve in an honorary capacity. There needs to be detailed consideration of how such people would be appointed. Initially, at least, the fund might only require a chief executive officer and an administrative assistant. If the fund is implemented through existing bodies (eg, Victoria Legal Aid or Law Aid) then it may be that additional personnel may not be required.

The operation of the fund would be subject to audit and under the scrutiny of the proposed Civil Justice Council.

Although the fund may compete with commercial litigation funding entities, it could also enter into joint venture agreements, in particular cases, both with commercial litigation funders and with private law firms engaged in the case on behalf of the party assisted by the fund. Where a joint venture agreement is entered into with a private law firm the fund would be able to negotiate with the law firm about both the degree of financial risk the firm would assume in the litigation and the sharing of a percentage fee between the fund and the firm. The intention is that the fund should have considerable commercial flexibility as to how it operates.

Where a joint venture arrangement is entered into with a commercial litigation funder or a law firm, the funder or law firm could contribute capital for the purpose of financing the litigation and/or meeting any order for costs or security for costs, assist in assessing the legal merits and commercial viability of the proposed litigation and use its experienced personnel to assist in the management of the litigation.

The commission has considered whether more detailed financial and actuarial calculations are needed concerning the financial viability of the proposed fund. Any such analysis is unable to be undertaken by the commission within the limited time frame and terms of reference of this stage of the civil justice inquiry. Moreover, because of the unique features of most class action litigation, it is not feasible to carry out meaningful financial analyses without reference to particular cases. The costs of conducting such litigation are variable, the amount of damages differs significantly between cases and the number of actual or potential group members varies enormously. Furthermore, using current or recently completed class actions for the purpose of assessing the financial viability of the proposed fund is problematic. Many such cases were brought on behalf of limited classes comprising group members who consented to the conduct of proceedings on their behalf. The proposed fund would be able to facilitate proceedings on behalf of larger 'opt out' class where the amount of damages recoverable (and hence the return to the fund) would be significantly greater. The commission's proposals as to how the fund would operate are intended to help ensure that it is financially viable.

3.1.2 Responses to draft proposal

Support for proposed Justice Fund

The Environment Defenders Office expressed support for the proposed Justice Fund on the basis that it would support public interest litigation generally, and in the expectation that funding would extend to public interest environmental law matters.⁸⁴ Similar support for the fund came from the Mental Health Legal Centre, the Public Interest Law Clearing House and the Consumer Action Law Centre.⁸⁵

The Human Rights Law Resource Centre drew attention to the findings of the Senate Legal and Constitutional Affairs Committee into legal aid and access to justice⁸⁶ and the need for additional funding for legal aid generally, including for Victoria Legal Aid and community legal centres. It contended that there would be a significant saving in 'time and money for parties to a dispute, court resources and pro bono resources ... if people were able to obtain appropriate legal advice in civil matters at an early stage'.⁸⁷ Other submissions drew attention to the need for a general expansion of legal aid for civil proceedings, whether through legal aid bodies, pro bono organisations or community legal centres.

Professor Peta Spender noted that the creation of the Justice Fund would be ‘an important adjunct to the growth of commercial litigation funders in Australia, particularly by creating competition in the market for litigation funding’. However, given the reduction in public funds allocated to legal aid in recent years, she expressed a preference for the fund to be ‘used more broadly for civil claims, particularly in ... family and property matters that are unlikely to be funded by the commercial litigation funders’.⁸⁸

State Trustees was highly supportive of the commission’s draft proposals, including in relation to litigation funding.⁸⁹

Victoria Legal Aid expressed support for the proposed Justice Fund. However, it noted the proposal that the fund be administered through Victoria Legal Aid would require certain legislative, administrative and financial reforms. It did not believe the fund should be required to use profits to fund initiatives of the Civil Justice Council.⁹⁰

In its initial submission, the commercial litigation funder IMF (Australia) Ltd reiterated certain concerns expressed by the Civil Justice Council in the UK about the viability of a particular type of fund being established, in the context of the present litigation funding system in England and Wales.⁹¹

The UK Civil Justice Council had concluded that there was ‘no realistic prospect’ of a freestanding contingent legal aid fund being established to support civil litigation in England and Wales because of:

- the inability to ‘compete effectively’ with lawyers acting on the basis of conditional fee arrangements
- adverse case selection
- an inability to obtain seed funding
- exposure to adverse costs orders.⁹²

In its report the Civil Justice Council differentiated a contingent legal aid fund (CLAF) from a supplemental legal aid scheme (SLAS). Both adhere to the principle that in return for funding a recovery is made from damages. The fundamental difference is that a SLAS is operated as an adjunct to an existing body, such as a legal aid organisation, whereas a CLAF is a freestanding privately financed fund.⁹³ The Civil Justice Council had recommended that a SLAS should be established and operated by the Legal Services Commission:

*A SLAS would expand access to justice by increasing legal aid coverage, [at] good value for money by (i) creating additional funds and (ii) reducing the net costs of the scheme. The SLAS would introduce a form of self-funding mechanism into the legal aid scheme whereby, if a case was won, costs would be recovered and an additional sum would be payable to the fund by means of a levy to be paid as a percentage of damages recovered, or out of recovered costs. The SLAS would offer protection to parties from adverse costs if a case is lost. Positive recovery via the levy could be used to expand public funding for the civil legal aid budget. Also, the SLAS scheme could be engineered to link with Conditional Fee Agreements as a complementary method of funding via a levy on costs/damages recovered.*⁹⁴

The Civil Justice Council report also recommended recognition of properly regulated commercial third party funding of litigation and the introduction of regulated contingency fees in multi-party cases, ‘where no other form of funding is available’, to provide access to justice.⁹⁵

The IMF submission noted one major difference between commercial litigation funders and the proposed Justice Fund: the former distribute (after tax) profits to shareholders, whereas the Justice Fund would presumably be exempt from income or capital gains tax.⁹⁶ The Justice Fund would apply any ‘profits’ to further litigation funding, including in public interest cases, and for the purposes of civil justice research, including through the proposed Civil Justice Council.

IMF also noted that commercial litigation funders such as itself have a strong board with relevant expertise, an experienced management team, substantial capital in the form of cash to invest through the funding of cases, and substantial experience in civil litigation funding. In contrast, the proposed Justice Fund would have ‘(a) a board of directors or trustees serving in a[n] honorary capacity, (b) a minimum of full time and professional and support staff ...’, (c) a less immediate drain on funds as firms would be expected to advance the costs of conducting cases until conclusion and would only require financial support from the Justice Fund where cases were unsuccessful and (d) the prospect of

83 In future it may be appropriate to consider extending such assistance to class actions under Part IVA of the *Federal Court of Australia Act 1976* (Cth) when the Federal Court is sitting in Victoria. If the fund is to provide assistance in Federal Court proceedings, it may be necessary to consider potential inconsistency between the proposed statutory provisions relating to costs and federal law governing costs.

84 Submission ED1 14 (Environment Defenders Office). The EDO felt it was unclear to what degree the fund would fill the need for the funding of public interest litigation.

85 Submissions ED1 11 (Mental Health Legal Centre); ED1 20 (Public Interest Law Clearing House); ED2 12 (Consumer Action Law Centre).

86 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004).

87 Submission ED1 19 (Human Rights Law Resource Centre).

88 Submission ED2 13 (Professor Peta Spender).

89 Submission ED1 6 (State Trustees).

90 Submission ED1 25 (Victoria Legal Aid).

91 Submission CP 57 (IMF (Australia) Ltd). See also Civil Justice Council [UK], *Improved Access to Justice – Funding Options and Proportionate Costs* (2007), (A Series of Recommendations to the Lord Chancellor to Improve Access to Justice through the Development of Improved Funding Structures).

92 Submission ED1 8 (IMF (Australia) Ltd). See also Civil Justice Council (2007) above n 91, 11, 22–4.

93 Civil Justice Council (2007) above n 91, 14–15.

94 *Ibid* 11.

95 *Ibid* 12.

96 Submission ED1 8 (IMF (Australia) Ltd). On the issue of whether income from ‘profit’ making activities carried on by ‘charitable’ institutions is subject to income tax, see the recent decision of the Full Court of the Federal Court in *Commissioner of Taxation v Word Investments Limited* [2007] FCAFC 171 (14 November 2007) (Stone, Allsop and Jessup JJ).

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receiving income 'without having to outlay any money'.⁹⁷ As noted above, the proposed fund would be able to enter into litigation joint venture arrangements with commercial litigation bodies, such as IMF, and in doing so would be able to draw on their significant legal and management experience and resources.

In class actions funded by the Justice Fund, the fund would be able to seek court approval for a payment of a contribution from any judgment or settlement in favour of an opt out class. In contrast, commercial litigation funders at present have limited funding of statutory class actions or representative action proceedings to persons who have individually agreed to the commercial terms of the litigation funding arrangements. Effectively, this has limited the number of beneficiaries of class action proceedings and converted what was intended to be primarily an opt out procedure to an opt in mechanism, with consequential disadvantages for access to justice and frequent expressions of judicial concern.⁹⁸

Under the draft reform proposals the Justice Fund would only be liable for adverse costs awarded in favour of the other party up to an amount equal to the amount of funding provided by the fund. The Justice Fund could also be the beneficiary of *cy præs* distributions of damages if the commission's proposals for a judicial power to make *cy præs* awards in appropriate cases are implemented.

The commission's proposals are intended to overcome solvency restraints and to maximise the prospect of the Justice Fund becoming financially viable in circumstances in which funding from the state or federal government cannot be guaranteed and where private sources of funding may not be readily available, other than through joint venture arrangements with commercial litigation funders.⁹⁹

IMF contended that the Justice Fund should compete on "a level playing field" with commercial funders, except for its likely tax preferred status'.¹⁰⁰ On one view, there is no policy reason why a public body with public interest objectives and an obligation to apply the income received from litigation to fund additional cases should be required to operate on the same financial terms as a profit oriented commercial litigation funder which seeks to distribute profits to private shareholders. However, the proposed Justice Fund is intended to supplement rather than supplant existing commercial litigation funding arrangements. This is likely to be achieved because in practice the Justice Fund may choose not to fund cases where commercial litigation funding is available. However, there is considerable scope for commercial litigation funders and the Justice Fund to operate on the same 'playing field' through joint venture funding arrangements, whereby commercial litigation funders would enjoy the same, or substantially the same, advantages as the Justice Fund.

The commission's view is that the Justice Fund should proactively seek to enter into joint venture arrangements with commercial litigation funders. Such 'public-private' models for various forms of service delivery have become increasingly common. There would be advantages for both the Justice Fund and commercial litigation funders through partnership or joint venture funding arrangements.

For example, commercial litigation funders are currently unable to secure any return from group members in class or representative action proceedings, other than by contractual arrangements with those individuals who are identified and who consent. In contrast, the fund would be able to obtain a return from the class as a whole, subject to judicial approval, and this advantage would flow on to a commercial litigation funder involved in a joint venture arrangement with the fund. At present commercial litigation funders spend a considerable amount of time and expense in seeking to 'sign up' group members to litigation finance agreements. Alternatively, a case could be conducted whereby the commercial litigation funder maintained its existing *modus operandi* and funded the cases of those who consented to litigation funding arrangements and the Justice Fund could finance the additional claims brought on behalf of unidentified class members. In appropriate cases, if joint venture cases were conducted on the basis that the lawyers who conducted the proceedings were not paid until the conclusion of the case, and were only paid by the fund/commercial funder where the case was unsuccessful, this would have substantial cashflow advantages for the commercial funder. At present, many commercially funded cases are conducted on the basis that some or all of the legal fees and expenses incurred in conducting the case are paid monthly from the inception of the litigation.

In such joint venture arrangements, access to justice would be improved as the existing trend from opt-out to opt-in classes could be reversed, which would increase the number of beneficiaries of class action litigation.

The Justice Fund would benefit greatly from joint venture arrangements with commercial litigation funders. In such arrangements the fund would have the advantage of the resources, experience and expertise of commercial litigation funders. This could provide invaluable assistance, including

in assessing the merits of proposed litigation and in the management of funded cases. Also, the commercial litigation funders could provide capital input. The Justice Fund and the commercial litigation funder involved in any joint venture funding arrangement would negotiate on their respective input and on the allocation of any profits between them.

The Law Institute of Victoria supported the establishment of the proposed Justice Fund in the absence of the introduction of a national civil legal aid scheme.¹⁰¹ The Law Institute contended that once financially viable the Justice Fund should not limit its funding to “commercially viable” meritorious litigation’, and that the profits of the Fund should also be applied in providing assistance to ‘any litigant in a commercial matter ... who has a meritorious claim [or defence] regardless of whether there is a prospect of the Fund recovering a percentage of a monetary award’. The Law Institute also recommended that the fund should pay for disbursements as they are incurred during proceedings. It contended that the fund might meet the costs of providing advice to self represented litigants ‘from accredited specialists about the prospects of success and/or preparation for trial of the matter’. It further suggested that the fund should be able to provide assistance to litigants for compliance with pre-action protocols.¹⁰²

The Consumer Action Law Centre supported the proposed Justice Fund. However, it expressed concern that the proposed limit on the fund’s liability for adverse costs would defeat the purpose of the fund, as potential litigants would be unwilling to embark on litigation where they remained at risk for the shortfall between the liability of the fund and the total amount of costs ordered to be paid. It suggested that a possible solution to this could be legislation to enshrine certain common law principles relating to costs orders in public interest litigation.¹⁰³ Alternatively, it suggested there could be a presumption that the costs claimable by a successful defendant would be limited to the capped costs (payable by the fund) unless the defendant could show that further costs, calculated on a party-party basis, were ‘necessary, proportionate to the nature of the claim, reasonably incurred and not incurred due to the defendant’s lack of good faith’.¹⁰⁴

Although not opposing the proposed fund, the Australian Bankers’ Association contended that there is a need for a more ‘in-depth examination of litigation funding in Australia ... with particular emphasis on the economic benefits and disadvantages ... for both the community and for business’.¹⁰⁵

Opposition to proposed Justice Fund

Submissions opposing the proposed fund or aspects of the proposal were received from a number of companies, several commercial law firms acting for defendants in class action proceedings and the Australian Corporate Lawyers Association.

In a joint submission, Allens Arthur Robinson and Philip Morris contended that any present difficulties with access to justice were ‘not sufficient to warrant the introduction of such a fund’. The proposed fund was unnecessary in light of (a) the availability of ‘no win, no fee’ arrangements with plaintiff law firms, (b) the ability of regulators such as the Australian Competition and Consumer Commission to take action on behalf of plaintiff classes, (c) the availability of non-profit funding schemes such as Law Aid and (d) the services of commercial litigation funders.¹⁰⁶

The aspects of the proposal which were of particular concern include the cap on the fund’s liability for adverse costs and the absence of any proposal to ‘regulate commercial litigation funders to ensure that parties who successfully defend funded cases are able to enforce costs orders against the funder’.¹⁰⁷

The joint submission was adopted by the Australian Corporate Lawyers Association, which also proposed that commercial litigation funding arrangements should be disclosed to the defendant and to the court.¹⁰⁸ The commission is in favour of the disclosure of litigation funding arrangements.¹⁰⁹ In any event, it is the practice of many litigation funders, including IMF, to disclose arrangements to the defendants in any litigation in which a party is in receipt of funding.

Corrs Chambers Westgarth contended that the proposed Justice Fund was unnecessary in view of the availability of commercial litigation funding and the willingness of plaintiff law firms to take on cases on a speculative fee basis.¹¹⁰ Expressing concerns about the proposed cap on the fund’s liability for adverse costs, the firm suggested that if this cap is retained it should only apply to personal injury claims and not claims for economic loss. Corrs also suggested that the Justice Fund was likely to attract the less meritorious claims rejected by commercial litigation funders and that such cases were therefore more likely to result in adverse costs orders. It stated that additional judicial and

97 Submission ED1 8 (IMF (Australia) Ltd).

98 See the discussion in 1.2.2 of Chapter 8. See also *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, *Rod Investments (Vic) Pty Ltd v Adam Clark* [2005] VSC 449, *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061, *Multiplex Funds Management Limited v P Dawson Nominees Pty Ltd* [2007] FCAFC 200; *Jameson v Professional Investment Services Pty Ltd* [2007] NSWSC 1437.

99 Submission ED1 8 (IMF (Australia) Ltd). IMF noted that in its 10 years of involvement in litigation funding it had raised about \$40 million in capital but had only been able to pay dividends of about \$3 million. To deal with its potential liability to pay adverse costs orders in funded cases, IMF has recently entered into insurance arrangements. A commercial insurer, Brit Insurance Limited, has agreed to cover the adverse costs liability of IMF up to \$2.5 million in any one case, with an aggregate of \$5 million. See IMF (Australia) Ltd, ‘Adverse Cost Order Insurance’ (Release to the Australian Stock Exchange, 7 June 2007) <www.brr.com.au/event/24126> at 17 April 2008.

100 Submission ED1 8 (IMF (Australia) Ltd).

101 Submission ED1 31 (Law Institute of Victoria). The submission notes that the idea of a National Civil Legal Aid Scheme was ‘developed by the Australia Legal Assistance Forum and launched by the Law Council of Australia at the *Access to Justice and Pro Bono Conference* in Melbourne in September 2006’.

102 Submission ED1 31 (Law Institute of Victoria).

103 See also *Plumb v Penrith City Council* [2003] NSWLEC 161.

104 Submission ED2 12 (Consumer Action Law Centre).

105 Submission ED1 29 (Australian Bankers’ Association).

106 Submission ED1 12 (Allens Arthur Robinson and Philip Morris). The role of commercial litigation funders is particularly important given the approval of such arrangements by the High Court in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

107 Submission ED1 12 (Allens Arthur Robinson and Philip Morris).

108 Submission ED1 16 (Australian Corporate Lawyers Association).

109 This is discussed in the commission’s discovery recommendations contained in chapter 6.

110 Submission ED1 32 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted 14 January 2008).

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other resources would be required to deal with the increased workload generated by class action proceedings commenced as a result of access to the new litigation fund. In an earlier submission, the firm contended that there is a need to introduce prudential oversight and legislative regulation of commercial litigation funders, together with a legislative obligation to meet adverse costs orders.¹¹¹

Law firm Clayton Utz raised concerns about the need for such a fund and expressed the view that the proposed fund would be 'the likely province of endless bureaucracy and non-market decision making'.¹¹² It was also concerned at the proposal to cap the fund's liability for adverse costs orders.

Having considered the various arguments in favour of and against the proposed fund, the commission is of the view that there is a pressing need for the establishment of such a fund. However, a number of the concerns raised have been taken into account in modifying the original proposal. It is presently proposed that the cap on the fund's liability to pay costs ordered against the assisted party should only exist for a limited period (five years or such lesser period as the trustees of the fund may determine in light of financial circumstances). It is also proposed that those administering the fund should have discretion to meet some or all of the amount of any shortfall between the amount of costs ordered against an assisted party and the capped amount payable by the fund.

3.1.3 Funding of representative or class actions

In addition to seeking views on reform of representative and class action procedures (discussed in Chapter 8), the commission in its initial Consultation Paper sought views on whether there is a need for reform in relation to funding of representative or class actions.

In support of reform, the Mental Health Legal Centre submitted that legal aid funding or 'guaranteed expert pro bono assistance for class actions should be a priority'.¹¹³

After noting recent developments, including the decisions in the *Fostif* proceedings,¹¹⁴ the Law Institute proposed that the rules for opt out proceedings should be amended so that:

- a funded plaintiff would be expressly empowered to apply for the class to be 'closed' following the close of pleadings
- the available orders of the court would apply only to the current proceeding and would not operate to prevent the commencement of future proceedings by non-funded plaintiffs.¹¹⁵

Some submissions expressly commented on costs in these types of proceedings. Allens Arthur Robinson submitted that 'litigation funders involved in class action proceedings [should] be obligated to meet costs orders adverse to the parties they fund'.¹¹⁶ The Legal Practitioners' Liability Committee said that 'uplift fees in representative proceedings or class actions add to the cost of litigation'.¹¹⁷

In view of what it contended are the 'very large' costs incurred in class action proceedings, Maurice Blackburn proposed that:

- there should be greater use of indemnity costs orders against unsuccessful defendants in class action proceedings
- there should be reform of the rules relating to success fees, including a significant increase in the maximum percentage uplift allowed under current legislation
- percentage contingency fees should be permitted, particularly given that commercial litigation funders are now able to charge on this basis.¹¹⁸

IMF (Australia) Ltd also said that the court should be empowered, 'at the commencement of proceedings, to order that a certain percentage of any fund created [as a result of class action] proceedings be paid to the funder of the proceedings'.¹¹⁹

RECOMMENDATIONS

133. A new funding body (the 'Justice Fund') should be established to (a) provide financial assistance to parties with meritorious civil claims, (b) provide indemnity for any adverse costs order or order for security for costs made against the party assisted by the fund.
134. For administrative convenience, and to minimise establishment costs, the fund should be established, at least initially, as an adjunct to an existing organisation. One possible body is Victoria Legal Aid.

135. The fund should be structured to minimise potential liability for income tax or capital gains tax on any amount received by the fund.
136. The fund should seek to become self funding through (a) entering into funding agreements with assisted parties whereby the fund would be entitled to a share of the amount recovered by the successful assisted party; (b) having statutory authority in class action proceedings under Part 4A of the *Supreme Court Act 1986* (Vic) to either (i) enter into agreement with an assisted representative party whereby the fund would be entitled to a share of the total amount recovered by the class under any settlement or judgment, subject to approval of the court, or (ii) to make application to the court for approval to receive a share of the total amount recovered by the class under any settlement or judgment; (c) recovering, from other parties to the proceedings, costs incurred in providing assistance to the assisted party where the assisted party is successful and obtains an order for costs; (d) receiving funds by order of the Court in cases where *cy-près* type remedies are available and (e) entering into joint venture litigation funding arrangements with commercial litigation funding bodies.
137. Where the fund provides assistance the lawyers acting for the assisted party should normally be required to conduct the proceedings without remuneration or reimbursement of expenses until the conclusion of the proceedings. Where the proceedings are successful they should normally be remunerated by costs recovered from the unsuccessful party and/or out of any monies recovered in the proceedings, without the fund having to pay the costs incurred in the proceedings. Where the assisted party is unsuccessful the fund should meet the costs of the funded party as set out in the funding agreement or varied thereafter by agreement between the fund and the law firm conducting the case of the assisted party.
138. During its first five years of operation (or such lesser period as the trustees of the fund may determine in light of the financial position of the fund), the liability of the fund for any order for costs or security for costs made against the funded party should be limited, by statute, to the value of the costs incurred by the assisted party which the fund is required to pay to the lawyers acting for the assisted party under to the funding agreement. During such period the fund would have a discretion to pay some or all of the shortfall between the amount ordered by way of adverse costs or security for costs against the assisted party and the amount of such costs for which the fund is liable.
139. At any stage of the proceedings the fund or the assisted party could apply to the court for an order limiting the amount of costs that the assisted party may be ordered to pay to any other party if the funded party is unsuccessful in the proceedings.
140. The operation of the fund should be subject to audit and monitored by the Civil Justice Council.

- 111 Submission CP 42 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted 14 January 2008).
- 112 Submission ED1 18 (Clayton Utz).
- 113 Submission CP 22 (Mental Health Legal Centre).
- 114 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.
- 115 Submission CP 18 (Law Institute of Victoria).
- 116 Submission CP 38 (Allens Arthur Robinson).
- 117 Submission CP 21 (Legal Practitioners' Liability Committee).
- 118 Submission CP 7 (Maurice Blackburn).
- 119 Submission CP 57 (IMF (Australia) Ltd).

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Chapter 11
**Reducing the Cost of
Litigation**



Reducing the Cost of Litigation



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There is only one immutable rule in relation to costs, and that is that there are no immutable rules.¹

1. INTRODUCTION

Issues relating to costs permeate all aspects of the administration of civil justice and affect both access to the courts and the quality and cost to the parties of the justice delivered. As the Human Rights Law Resource Centre noted in its submission:

An important aspect of ensuring equal access to justice is the applicant's ability to pay the associated costs of litigation and the discriminatory effect this has on disadvantaged members of the community.

Apart from the cost to the parties there is of course the cost borne by the public purse through the provision of court facilities and personnel and arising out of the tax deductibility, to certain litigants, of the legal costs incurred in litigation.

In view of the variety and complexity of the issues which have a bearing on costs it could not reasonably be expected that there is a simple solution to the problem of 'excessive' cost.

Moreover, important cost consequences have flowed from various policy changes. For example, the deregulation of legal fees and the legislative imprimatur given to conditional fees and success fees has important cost implications.

Changes in legal aid have also contributed to an increase in costs in some areas of civil litigation. For many years it was assumed that many people were deprived of access to justice because of the absence of adequate legal aid in civil matters. The subsequent expansion of salaried and private sector legal aid schemes was relatively short lived. At present, conditional fee arrangements and commercial litigation funding have superseded legal aid arrangements in many areas of litigation. This has undoubtedly facilitated access to the courts but has also resulted in a significant increase in the costs borne by clients and losing parties. Lawyers who may have hitherto been prepared to do civil legal aid work at relatively modest hourly rates (payable in any event) are now able to recover (in the event of success) higher 'commercial' hourly rates, success fees, interest and disbursements, which include a substantial profit element.

In the case of litigation funders, they may receive a substantial percentage of the amount recovered in the litigation. Such higher returns are, however, a by-product of the fact that law firms and commercial litigation funders have assumed many of the commercial risks inherent in litigation and facilitated access to justice by persons who could not otherwise afford it and who may not have previously qualified for legal aid in any event.

The substitution of a private sector legal service delivery model for state-funded legal aid schemes could only be expected to work if the element of profit were sufficient to justify the risk of nonpayment in civil cases undertaken on conditional fees. Moreover, these developments have other important policy dimensions. The extension of the 'profit for risk' model of legal service delivery is likely to have had a beneficial impact by screening out cases with insufficient legal merit, thus reducing the burden of unmeritorious cases on both potential defendants and on the court system generally. However, one downside is that lower value meritorious claims may not be sufficiently profitable to justify the investment of resources by private firms or litigation funders.

In any event, the transition from public funding to private legal service delivery models in civil litigation is symptomatic of the change in public policy described by Professor Ian Scott:

We live in a time in which the political and economic climate is shifting the public good and private benefit balance. The theory is that the government should pay for less and the user should pay for more.²

As Professor Scott proceeds to note, this policy, as reflected, for example, in the increasing cost of court fees paid by users, may aggravate the proportionality problem. Moreover, as Scott also observes, a substantial increase in judicial case management may bring about a reduction in the costs of civil litigation borne privately by litigants, but may require an increase in the public cost of court services. Thus, 'the private benefit cost will go down but the public cost will go up'³, contrary to the direction of much current government policy.

Those attracted to solutions to complex problems derived from modern management theory may benefit from a consideration of the 'quality triangle'. As noted by Professors Peysner and Seneviratne,⁴ in the business world there is virtually an iron law that of the three objectives of improving the business by increasing the speed of delivery, reducing the cost of production and improving the quality of service, it is possible to improve two out of three, but rarely all three.

In reviewing data on the increase in the costs of civil litigation in the aftermath of the Woolf reforms, Peysner and Seneviratne noted that Lord Woolf's hypothesis was that by increasing the efficiency of the litigation process, by diverting disputes from litigation and by cutting delay in most cases there would be a reduction in costs with the constrained procedures. Their research concluded that this has proved wrong. However, as noted below, there are other factors which explain the ongoing high cost of civil litigation in those courts in England and Wales, where the Woolf reforms have been implemented.

In the aftermath of the Woolf reforms there are ongoing changes in civil procedure and court administration in various Australian jurisdictions, including Victoria. Various reforms of civil procedural rules, substantive law and case management seek to achieve strategic objectives in connection with the conduct of civil litigation.

Such strategic objectives may seek to achieve significant changes in not only the formal rules for the conduct of proceedings but also in the culture of dispute resolution and the conduct of participants. Some important strategic objectives of the reform proposals in this report are as follows:

- facilitating the resolution of disputes, through pre-action protocols, without the necessity for litigation
- improving primary standards of conduct of participants in the civil justice system
- accelerating disclosure of information and documents
- enhancing judicial management of cases and the conduct of trials
- reducing the incidence and duration of interlocutory hearings and appeals
- increasing the determinacy of sanctions for procedural default
- facilitating greater use of mediation and other ADR mechanisms
- improving mechanisms for the judicial resolution of issues likely to dispose of the proceedings
- achieving a greater level of certainty or 'proportionality' in relation to both solicitor–client and party–party costs.

Each of the commission's proposals has costs implications.

Whether any current or future reform initiatives will bring about a marked reduction in the costs of civil litigation or facilitate greater access to the courts is likely to be difficult to establish, particularly in the absence of reliable or comprehensive empirical data.

The commission has made recommendations regarding various costs issues. We believe:

- there is a case for the establishment of an independent body, provisionally called the Costs Council, similar to the body recently recommended in England and Wales by the Civil Justice Council. This would comprise representatives of relevant stakeholders under judicial leadership and would have an ongoing role in monitoring costs reforms and proposing further reform after appropriate research and consultation
- there is a need for a change in the principles and procedures governing the recovery of costs by successful parties in civil litigation
- there is a case for review of the present prohibition on allowing *clients* the option of fee agreements which provide for the calculation of legal fees as a percentage of the amount in issue
- the present system of allowing substantial commercial mark-ups or profit on out-of-pocket expenses and disbursements is not defensible, except for clients of substantial means

1 *Taylor v Pace Developments Pty Ltd* [1991] BCC 406, 408 (Lloyd LJ).

2 I Scott, 'Adjusting The Interests of Parties and Courts: Uniformity, Diversion and Proportionality' (Paper presented at the 22nd Australian Institute of Judicial Administration Annual Conference, Sydney, 17 September 2004) 31.

3 *Ibid.*

4 J Peysner and M Seneviratne, *The Management of Civil Cases: the Courts and Post-Woolf Landscape*, DCA Research Series 9/05 (2005).



- there is a case for the establishment of a contingency legal aid fund, which would operate in a manner similar to commercial litigation funding arrangements, but which would retain the profits derived from funding successful cases to facilitate the funding of further cases, the provision of an indemnity in respect of successful defendants' costs, the provision of security for costs, and the financing of 'public interest' litigation
- there is a need for more determinate, predictable or 'fixed' costs for certain types of work or certain categories of cases
- there should be more automatic costs sanctions in the event of interlocutory and procedural default
- court and associated fees should be standardised, simplified and re-structured including for the purpose of providing an additional economic incentive for the early disposition or settlement of disputes
- there is a case to require parties to disclose estimates of costs to the court and to the other party
- there is a need to modify costs rules to accommodate problems experienced in certain categories of cases, including 'public interest' cases
- there is a need for further research on costs.

There are additional recommendations, which have an important bearing on costs, in connection with a number of the other proposals discussed in other chapters of this report.

The proposed new pre-action protocol provisions are designed to accelerate disclosure of information and facilitate early resolution of disputes without the necessity for proceedings to be commenced. Insofar as disputes are resolved early without litigation, this is likely to reduce the costs of dispute resolution. Where disputes proceed to litigation compliance with pre-action protocol requirements may increase costs.

Both the overriding obligation provisions and the overriding purpose proposals incorporate important elements which explicitly seek to reduce the costs of dispute resolution and court proceedings. The overriding obligations include a duty to be imposed on all key participants in civil litigation to use reasonable endeavours to ensure that legal and other costs are minimised and proportionate to the complexity or importance of the issues and the amount in dispute. The overriding purpose proposals focus on, among other things, the cost-effective resolution of the real issues in dispute and proportionality.

The proposed new procedure for oral pre-trial examinations has important cost implications. Insofar as use of this procedure may accelerate disclosure of information and facilitate settlement this may reduce the costs that might otherwise be incurred in the proceedings. However, the introduction of this new procedure may increase the costs incurred in some cases, particularly those that still proceed to trial.

The various proposals in respect of discovery and disclosure are likely to reduce costs in many cases. The proposals in respect of case management and alternative dispute resolution have complex costs consequences. More proactive judicial management of litigation may increase costs in some cases which proceed to trial but may facilitate earlier and cheaper resolution of others. Similarly, greater use of ADR processes may increase costs by requiring parties to pay for the expense of third parties and facilities otherwise available through the court system. However, such costs may be less than the costs incurred if the matter proceeds to trial. Therefore, cases which are settled or resolved through ADR processes may incur less cost, but where the matter still proceeds to trial there may be an increase in the overall costs borne by the parties. However, if there is a narrowing of the issues, or if certain matters are resolved during the ADR process that might otherwise have led to significant interlocutory costs, then the ADR process may result in a net decrease in costs in cases which still proceed to trial. Generalisations about the likely costs consequences of many of the commission's civil justice reform proposals are fraught with difficulty.

In this chapter the focus is on the rules, procedures and practices relating to legal costs. As this is only the first stage of a longer inquiry the commission has been selective in identifying a limited number of areas in which reform in relation to costs is required. In Chapter 12 we identify a range of other areas where, in submissions and consultations, others have proposed reforms, including in respect of costs.

2. VICTORIAN RULES AND PROCEDURE ON COSTS

2.1 FEE AND RETAINER ARRANGEMENTS FOR CIVIL LITIGATION CONDUCT

In Victoria the *Legal Profession Act 2004* governs fee and retainer agreements with clients, including in connection with the conduct of litigation. Although the legislation imposes onerous disclosure and other obligations, it does not, with several exceptions, seek to prescribe or limit the basis on which legal fees may be calculated and charged to the client under a valid costs agreement.⁵ The principal exceptions are that fees may not be calculated as a percentage of the amount in issue,⁶ success fees in conditional fee agreements in respect of 'litigious' matters must not exceed 25 per cent of the base amount of the fee,⁷ and fees and charges may be varied if the costs agreement is not fair, just or reasonable.⁸ Moreover, a costs agreement that contravenes or is entered into in contravention of the legislation is void.⁹

Lawyers are required to disclose to clients:

- an estimate of the total legal costs or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the variables that will affect the calculation of those costs
- the range of legal costs that may be recovered if the client is successful in the litigation
- the range of costs that the client may be ordered to pay if the client is unsuccessful.¹⁰

Additional disclosure obligations arise in connection with settlement.

The provisions of the *Legal Profession Act* governing cost agreements and costs disclosures were amended in May 2007. The amendments:

- made provision for agreements and disclosure obligations with respect to 'third party payers'¹¹
- refined the definition of uplift fees and the provisions governing the terms, nature and disclosure requirements of conditional fee agreements¹²
- removed the prohibition on percentage fees for non-litigious matters¹³
- refined and amended the provisions governing obligations on each party when a client disputes a legal bill, and the procedures governing reviews of costs by the taxing master.¹⁴

2.2 PRINCIPLES GOVERNING VICTORIAN COSTS TAXATION

In court proceedings in Victoria there are four bases for the taxation of costs: party-party, solicitor-client, indemnity, or such other basis as the court may direct.¹⁵ The rules state that unless the court orders otherwise or as provided for by the rules the general basis for all taxations will be the party-party basis.¹⁶

In Victoria, where costs are taxed on a party-party basis, all costs 'necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed shall be allowed'.¹⁷

The 'necessary or proper' test was incorporated in the English civil procedural rules in the period 1883 to 1986. The test of 'reasonableness' was substituted for the test of 'necessity' in 1986 because of the perception that the party-party basis had operated too harshly and that the successful party was not recovering a sufficiently high proportion of the costs reasonably incurred.¹⁸ The only difference between costs awarded on a standard party-party basis and costs on an indemnity basis was the way in which any doubt was resolved. The standard of reasonableness was retained in the period 1986 to 1998. Since that time the Civil Procedure Rules (UK) have retained the reasonableness criterion but altered the definition. The court may not allow costs which have been unreasonably incurred or are unreasonable in amount. However, a new benchmark was introduced. The court will only allow costs which are 'proportionate' to the matters in issue. Although the indemnity basis makes no mention of proportionality, the overriding objective requires the court to take account of proportionality and the Costs Practice Direction requires the court to have regard to the overriding objective. As noted by Senior Costs Judge Peter Hurst, in England the issue of proportionality had already become a problem by the late 17th century.¹⁹

5 In the absence of a costs agreement, costs may be payable in accordance with an applicable remuneration order or scale of costs or, if this is not applicable, according to the fair and reasonable value of the legal services provided: *Legal Profession Act 2004* s 3.4.19.

6 *Legal Profession Act 2004* s 3.4.29(1).

7 *Legal Profession Act 2004* s 3.4.8 (3).

8 *Legal Profession Act 2004* s 3.4.32.

9 *Legal Profession Act 2004* s 3.4.31.

10 *Legal Profession Act 2004* s 3.4.9.

11 *Legal Profession Act 2004* ss 3.4.2A, 3.4.17, 3.4.18A.

12 *Legal Profession Act 2004*, Part 3.4, specifically ss 3.4.2, 3.4.4, 3.4.9, 3.4.14, 3.4.27, 3.4.28.

13 *Legal Profession Act 2004* s 3.4.29.

14 *Legal Profession Act 2004* ss 3.4.35, 3.4.36 and Part 3.4: Costs Disclosure and Review, Division 7—Costs Review by Taxing Master.

15 *Supreme Court (General Civil Procedure) Rules 2005* r 63.28; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.28; *Magistrates' Court Civil Procedure Rules 1999* r 26A.02.

16 *Supreme Court (General Civil Procedure) Rules 2005* r 63.31; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.31; *Magistrates' Court Civil Procedure Rules 1999* r 26A.07.

17 *Supreme Court (General Civil Procedure) Rules 2005* r 63.29; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.29; *Magistrates' Court Civil Procedure Rules 1999* r 26A.04.

18 See generally, P Hurst, 'Going Round in Circles' (2006) 25 *Civil Justice Quarterly* 546.

19 *Ibid* 547.



What had more than 20 years ago been abandoned in England and Wales as the principle for the determination of party–party costs remains the basis in Victoria for the determination of costs as between parties. On taxation on a solicitor–client basis all costs ‘reasonably incurred and of reasonable amount’ shall be allowed.²⁰

In Victoria, where the taxation is for the purpose of determining the amount payable by the client (as distinct from the amount to be recovered from the losing party) costs not reasonably incurred or not of reasonable amount may be allowed in certain circumstances.

On taxation on an indemnity basis in Victoria all costs may be allowed except where they are of an unreasonable amount or have been unreasonably incurred.²¹ The cost of any work which was not necessary or which was done without due care may be disallowed.²² In taxation on an indemnity basis, when the taxing master has any doubt as to whether costs were unreasonably incurred or were of an unreasonable amount the rules provide such shall be resolved in favour of the party to whom the costs are payable.²³ Misconduct in the litigation may entitle a party to costs on a more generous basis than the normal party–party method would entail.

2.3 STATUTORY POWERS AND METHODS OF CALCULATING COSTS IN VICTORIA

The power for each of the Victorian courts to make costs orders in civil proceedings is found in each of their governing statutes. These statutes confer broad discretions on the courts with respect to costs orders, with the *Magistrates’ Court Act 1989* setting out some further limitation to the discretion. The discretion as to costs orders can be further limited by the rules of each of the courts.

Section 24(1) of the *Supreme Court Act 1986* provides:

Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.

Section 78A of the *County Court Act 1958* similarly provides: ‘The costs of and incidental to all proceedings are in the discretion of the Court and the Court may determine by whom and to what extent the costs are to be paid’.

The rules of the relevant courts state that no costs will be recovered unless there is an order of the court (or agreement between the parties).²⁴

The rules make provision for presumptive costs orders. Rules in each of the Supreme Court and County Court provide that costs are to be paid in the specified circumstances unless the court orders otherwise:

- application for extension of time²⁵
- discontinuance or withdrawal of part of a proceeding/claim²⁶
- filing a notice on party who has failed to make discovery/answer interrogatories²⁷
- amendment of pleading.²⁸

The statutory power as to costs in the Magistrates’ Court Act has the same broad discretion as provided for in the Supreme and County Courts.²⁹ The Magistrates’ Court Act also expressly provides the court with a power to take into account any unreasonable act or omission by a party when making a costs order, but this power is subject to having given that party a reasonable opportunity to be heard.³⁰

The Magistrates’ Court is required under its governing statute to refer any small claim (less than \$10 000) to arbitration.³¹ If in such an arbitration the court awards a party less than \$500 then the court must not award costs unless satisfied that special circumstances make a costs award appropriate.³²

Under the Magistrates’ Court Rules there are specified circumstances in which the court must order costs.³³

Across the courts, the exercise of judicial discretion in relation to costs may encompass orders for:

- party–party costs
- solicitor–client costs
- indemnity costs
- orders that each party bear their own costs
- parties being awarded costs for only part(s) of the proceeding in which they were successful
- orders that a third party pay the costs
- orders that the lawyer(s) for a particular party pay the costs
- reserving costs orders in interlocutory matters until a later date
- such other basis as the court deems fit.³⁴

In addition to the statutory provisions and rules the Victorian courts are generally guided by the principle that costs follow the event. Often described by lawyers and judges as ‘the usual rule as to costs’, this principle entitles a successful party to receive his or her costs unless special circumstance warrant otherwise. However, the ‘entitlement’ is subject to the exercise of judicial discretion. The rules of the Victorian courts do not codify this general principle but it has a long history. A number of other jurisdictions have expressly incorporated the ‘general rule’ that costs follow the event unless the court believes some other order should be made.³⁵

If a party obtains an order for costs from the court such costs can be taxed and paid forthwith. This means there is no further need for any order allowing taxation to proceed on those costs even if they are for an interlocutory matter. This is different to other jurisdictions, such as the Federal Court and NSW courts, where interlocutory costs will not normally be taxed and paid until final resolution of the matter unless there is a special order of the court.³⁶

If a party has a costs order in the County or Supreme Courts (other than a lump sum or fixed costs order) they then need to prepare a bill of costs in the prescribed form.

The presiding magistrate in the Magistrates’ Court will fix the costs, usually on the day of the hearing pursuant to the scale.³⁷ Recent amendments to the Magistrates’ Court Rules, which came into effect in 2006, gave power to registrars and deputy registrars to assess the costs of parties. The 2005–6 Magistrates’ Court annual report notes that this amendment was made as part of the court’s preparation for its increased jurisdiction. It also notes that currently, pursuant to an administrative arrangement, the task of assessment of costs is presently undertaken by County Court registrars.³⁸

Bills of costs will be prepared pursuant to the relevant scale of the court, as ordered.

2.3.1 Scales of costs

If the order does not specify the scale it will be on a party–party basis, also called the ‘ordinary scale’. The three courts all operate pursuant to their own scales, which vary considerably.

In the Supreme Court, there are scales for party–party costs and costs calculated on a solicitor–client basis. The scale fixes amounts for various items of work, with a limited discretion allowed to the master to increase allowances or expenses given the circumstances of a case and to add amounts for reasonable instructions.

Unlike the Supreme Court item-by-item approach, the County Court scale allows costs on a composite item basis. Instead of step-by-step amounts, the County Court allows a lump sum for certain stages such as work associated with the institution of proceedings.

Also, unlike the Supreme Court, which simply has one party–party scale, the County Court divides its scale into four tiers, depending on the monetary value of the case. The scales cover the following tiers:

- A matters up to and including \$7500
- B matters over \$7500 up to and including \$20 000
- C matters over \$20 000 up to and including \$50 000
- D matters over \$50 000.

Similar to the County Court scale, the Magistrates’ Court scale provides for items (which may include a composite item for all work relating to matters such as the institution of proceedings). The scale then sets out fees on a tiered basis, providing for seven tiers, according to the value of the claim.

- 20 *Supreme Court (General Civil Procedure) Rules 2005* r 63.30; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.30; *Magistrates’ Court Civil Procedure Rules 1999* r 26A.05.
- 21 *Supreme Court (General Civil Procedure) Rules 2005* r 63.30.1; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.30.1; *Magistrates’ Court Civil Procedure Rules 1999* r 26A.06(1).
- 22 *Supreme Court (General Civil Procedure) Rules 2005* r 63.70; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.70.
- 23 *Supreme Court (General Civil Procedure) Rules 2005* r 63.30.1(2); *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.30.1(2); *Magistrates’ Court Civil Procedure Rules 1999* r 26A.06(2).
- 24 *Supreme Court (General Civil Procedure) Rules 2005* r 63.13; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.13.
- 25 *Supreme Court (General Civil Procedure) Rules 2005* r 63.14; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.14.
- 26 *Supreme Court (General Civil Procedure) Rules 2005* r 63.15; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.15.
- 27 *Supreme Court (General Civil Procedure) Rules 2005* r 63.16.1; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.16.1.
- 28 *Supreme Court (General Civil Procedure) Rules 2005* r 63.17; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.17.
- 29 *Magistrates’ Court Act 1989* s 131.
- 30 *Magistrates’ Court Act 1989* ss 131(2A), (2B).
- 31 *Magistrates’ Court Act 1989* s 102.
- 32 *Magistrates’ Court Act 1989* s 105.
- 33 Eg, when a complaint is dismissed for default: *Magistrates Court Civil Procedure Rules 1999* r 10.06.
- 34 *Supreme Court (General Civil Procedure) Rules 2005* r 63.28.
- 35 See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 42.1.
- 36 *Federal Court Rules* (Cth) r 62.3(3); *Uniform Civil Procedure Rules 2005* r 42.7(2).
- 37 Costs in the Magistrates’ Court are often agreed by consent by the parties.
- 38 *Magistrates’ Court of Victoria, Annual Report 2005–2006* (2006) 28.



2.3.2 Taxation of costs

There is a prescribed process for the filing and service of bills of costs, notices of objections and callovers for taxation. Taxations are controlled and managed by the master of taxation in the Supreme Court and the registrar in the County Court.

In the taxation process the master or registrar reviews the objections to the bill of costs. The onus is on the party seeking to uphold the bill to prove entitlement to those costs claimed. The master or registrar will then tax the bill or otherwise assess an amount for costs, and this becomes an order which is authenticated and filed. Any party can seek a review of the taxing master's orders by applying by notice to the taxing master.³⁹

The taxing master then reviews the taxation and may make an order confirming or varying the amount sought. During this process the taxing master can receive further evidence and parties can seek written reasons for the decision.

A party can then make an application for review by a judge. Further evidence cannot be received and the notice for review cannot raise any new ground of objection. The judge may confirm, set aside or vary the taxing master's orders, or remit any item in the bill to the taxing master or make such other order as the case requires.⁴⁰ There is a strong presumption by the court in favour of the correctness of the taxing master's decision unless it is clear there has been an error.

2.3.3 Offers of compromise

Order 26 of the Supreme Court Rules provides a regime for the making of early offers of compromise which aims to encourage parties to accept a fair and reasonable offer. Under Order 26, an offer may be made by any party to the proceedings at any time before judgment. The offer will be kept in confidence prior to judgment but must:

- be in writing
- be served on the party to whom the offer is made
- remain open for not less than 14 days.

Order 26 outlines the costs consequences of failing to accept an offer of compromise. All orders are subject to the discretion of the court.

Table 3.

SCENARIO	RESULT	CONSEQUENCE	ORDER 26
Plaintiff makes offer to defendant	Plaintiff wins and the offer is not less favourable than the judgment	If damages claim in personal injuries or wrongful death case, defendant pays plaintiff's costs on indemnity basis For all other claims, defendant pays plaintiff's costs on party-party basis up to day of service of offer; and thereafter defendant pays plaintiff's costs on indemnity basis.	26.08(1)
Plaintiff makes offer to defendant	Plaintiff wins but its offer is less favourable than the judgment (alternatively, the defendant wins)	The usual orders as to costs would apply to the relevant outcome as the offer will not be relevant to the deliberations for the purpose of costs.	N/A
Defendant makes an offer to plaintiff	Plaintiff wins and defendant's offer is less favourable than judgment	The usual orders as to costs would apply as the offer will not be relevant to the deliberations for the purpose of costs.	N/A
Defendant makes an offer to plaintiff	Plaintiff wins but defendant's offer is more favourable than the judgment	Defendant to pay plaintiff's costs on party-party basis up to date of service of offer; thereafter plaintiff pays defendant's costs on party-party basis.	26.08(2)
Defendant makes an offer to plaintiff	Defendant wins and therefore the offer is more favourable than the judgment	Supreme Court Rules are silent so it falls to the court's discretion. 'However it is well established that ... in the exercise of its general discretion, [the court may] award costs to defendant on a more generous basis than party and party from the time the offer was served.' <i>Stipanov v Mier</i> (No 2) [2006] VSC 424 at 2 (Hollingworth J).	

Offers for settlement may also be made outside the framework of the provisions discussed above. Such offers are often expressed as being made 'without prejudice ... save as to costs'. They are commonly known as *Calderbank* letters.⁴¹ The court rules for offers of compromise do not apply to these offers, and the court retains full discretion to make an order as to costs. Ordinarily, a party will be penalised in relation to costs if it does not accept an offer and proceeds to obtain a less favourable result.

2.4 PROCEDURES FOR REVIEW AND REFORM OF COSTS

2.4.1 Power of courts to set costs scale

Pursuant to section 25 of the Supreme Court Act, the judges of the Supreme Court are given broad powers to make 'Rules of Court' covering a wide range of matters. This includes the scale of costs. These powers can be exercised by a majority of judges present at a meeting for that purpose.⁴²

A similar power to make rules for the County Court is granted to a majority of the judges of that court.⁴³ The County Court Act also makes provision for the court to fix the fees to be allowed to lawyers practising in that court and expenses to witnesses as fixed by the scale in the rules.⁴⁴

In the Magistrates' Court the Chief Magistrate together with two or more deputy chief magistrates may jointly make rules of court for or with respect to any matter relating to the practice and procedure of the court in civil proceedings.⁴⁵

39 *Supreme Court (General Civil Procedure) Rules 2005* r 63.56.

40 *Supreme Court (General Civil Procedure) Rules 2005* r 63.57.

41 *Calderbank v Calderbank* [1976] Fam 93.

42 *Supreme Court Act 1986* s 26.

43 *County Court Act 1958* s 78.

44 *County Court Act 1958* s 33.

45 *Magistrates' Court Act 1989* s 16.



In both the Supreme and Magistrates' Courts the rules are subject to disallowance by the parliament.⁴⁶ There is no express provision as to disallowance by parliament in the County Court Act.

The power granted to make rules under the County Court Act expressly extends to the repeal and amendment of rules even if they have been ratified, validated and approved by the parliament.⁴⁷ In any case not provided for in the County Court Act or Rules, the general principles of practice and the rules observed in the Supreme Court may be adopted and applied.⁴⁸

2.4.2 Councils of judges

There is a legislative requirement that each of the Supreme, County and Magistrates' Courts have a council of judges, which is to meet at least once a year. These councils are broadly required to consider the operation of the legislation and the rules, consider the working of the offices of the court and enquire into and examine any problems with the procedure or administration of the law in the court or in any other court from which an appeal lies to the court.⁴⁹ All courts are required to report annually to the Governor on the operations of their court.⁵⁰

In the Supreme Court, the Council of Judges delegates this power to make rules to a rules committee, which then makes recommendations to the judges for any rule change. In 2007, the Council of Judges agreed to a new scale of costs, which came into effect on 1 January 2008.⁵¹

The Council of Judges for the County Court also agreed amendments to their rules, which came into effect on 1 January 2008 to substitute an increased scale of costs.⁵²

2.4.3 Role of parliament

The parliament has a role in ensuring that rules are not made beyond the powers of the court to make rules. A statutory rule includes a rule relating to a court or tribunal or the procedure, practice or costs of a court or tribunal.⁵³ Under the *Subordinate Legislation Act 1994*, a statutory rule that is beyond power may be disallowed or amended. Rules of court, including those relating to costs, are also subject to oversight by the Scrutiny of Acts and Regulations Committee of Parliament.

2.4.4 Joint costs committees

To further assist the courts with costs, in 1987 a Costs Coordination Committee was established to advise the courts about applications relating to costs and to ensure coherence in the scale of costs.

The Costs Coordination Committee met once during 2004–5.⁵⁴ The committee has membership from the Supreme, County and Magistrates' Courts, including judges and masters or registrars, and also includes representatives from the Victorian Bar, the Law Institute and the Attorney-General's office.

A further costs committee, the Legal Costs Committee, is established pursuant to section 3.4.25 of the *Legal Profession Act 2004*. The committee has the power to make orders about costs that may be charged by law practices for legal services other than litigious matters.⁵⁵ Membership of this committee must be constituted by the Chief Justice of the Supreme Court, nominees from the Attorney-General and representatives from the Law Institute, Victorian Bar and the Legal Services Board.⁵⁶

2.5 CURRENT VICTORIAN REVIEWS OF COSTS

The commission is aware that a number of costs issues are already the subject of investigation and report by others. These include a review of the scales and taxation of costs in the Supreme Court, discussed below. PILCH and the Victoria Law Foundation are also developing a public interest costs protocol for the Supreme Court, while new scales of costs in the Supreme and County Courts were to commence on 1 January 2008.

2.5.1 Scales of costs

Concurrently with the commission's civil justice review, the Law Institute of Victoria has been undertaking a review of the scales of costs and making recommendations as to revised scales of legal fees for the civil justice system. The revised scale, which is due to be presented to the court in mid 2008, proposes the basis of costs recovery be 'on a reasonable basis' and an 'indemnity basis as assessed on scale'.⁵⁷

Currently, the Victorian scales in relation to costs recoverable on a party-party basis are adjusted by the courts themselves. Although we understand there is a consultation process whereby submissions are made by the Law Institute and the Victorian Bar Association as to amendments for scale items on an annual basis, the power to set the scale is retained by the individual courts.

2.5.2 Taxation of costs

In 2006 the Victorian Attorney-General issued terms of reference to the Crown Counsel seeking a review of the offices of master of the Supreme Court and master of the County Court. This review was separate to the review of the Supreme Court scale. The review was directed to recommend areas of reform for the office, to review the current structure for resolving cost disputes between parties in Victorian courts and make recommendations, including the possibility of creating a central taxing office.

The Crown Counsel published an issues paper in response to these matters in May 2006. This paper described recent developments in NSW and the UK with respect to the assessment of costs rather than the traditional taxation. Under the NSW scheme, parties entitled to costs can apply to have their costs assessed by a costs assessor appointed by the Chief Justice. There is also provision for a panel to then review the assessor's determination as to costs and in turn the panel's determination can be appealed to the Supreme Court. In the UK a Supreme Court Costs Office has been established to assess party-party costs. The Costs Office has broad jurisdiction to assess costs awarded by judges from the Court of Appeal, High Court or County Court and, more recently, the Family Division of the High Court.

In conclusion, the issues paper noted that there may be benefit in making a number of changes to the nature, function and powers of the office of master.⁵⁸ With respect to the conduct of taxations in Victoria the issues paper noted that the Law Institute's proposal to create a single taxation of costs office 'appears to have the potential to create efficiency and consistency'.⁵⁹

The Crown Counsel's final report was published in 2007.⁶⁰ The report recommends replacing the office of master with a new office of 'associate judge' to reflect the current functions of the master. The functions of associate judges would be an internal matter for the courts.

The report also recommends the creation of a Victorian Costs Court. Under this proposal, the Costs Court would exist as a division of the Supreme Court. An associate judge would head the court, which would perform the functions currently performed by the taxing master in the Supreme Court, and by registrars in other Victorian jurisdictions. The report recommends that further consideration be given to expanding the membership and functions of the Legal Costs Committee to perform coordination and advisory functions.

At the time of writing, there had been no parliamentary response to the Crown Counsel's recommendations. However, the Department of Justice noted that '[t]he report's recommendations are consistent with the government's commitments to modernise the office of master and to continue with the process of modernising the Victorian court system'.⁶¹

2.6 COURT FEES AND CHARGES

In Victoria court fees and charges are governed by various regulations and orders of the Magistrates' Court,⁶² the County Court⁶³ and the Supreme Court.⁶⁴

Depending on the court and the particular list within the court, such fees encompass fees for the commencement of proceedings, entry into certain lists, the filing of documents, hearing fees, jury fees, late filing fees, mediation fees, notice of trial, production of court files and searching of court files, the filing of motions, pre-trial conference fees, photocopying,⁶⁵ setting down and issuing subpoenas. Fees may be waived in cases of hardship.

It is not clear what the costs of administering such a piecemeal system of charges are. At least for certain types of cases it would appear that it may be more administratively convenient, and involve less 'transaction costs', to have one uniform aggregate fee either payable or incurred at the outset, with provision for a reduction or refund in the event of settlement, as an added financial incentive.

The quantum of the fees collected and where they end up are matters of interest to both the government and the courts for obvious reasons. Fees payable in the Supreme Court go, prima facie, into the consolidated revenue of the State, but by agreement with the Treasury a proportion of the fee revenue collected is maintained as a 'revenue pool' which is allocated to the courts in accordance with priorities approved by the Attorney-General.⁶⁶ Similarly, a portion of the fees collected by the Magistrates' Court and the County Court is retained pursuant to administrative arrangements.⁶⁷ Court fees collected by the County Court in the financial year 2005–6 totalled approximately \$5.1 million, a decrease on \$5.8 million in the previous year.

- 46 *Supreme Court Act 1986* s 27; *Magistrates' Court Act 1989* s 16(2).
- 47 *County Court Act 1958* s 78(4).
- 48 *County Court Act 1958* s 78(5).
- 49 *Supreme Court Act 1986* s 28; *County Court Act 1958* s 87; *Magistrates' Court Act 1989* s 15.
- 50 *Supreme Court Act 1986* s 28; *County Court Act 1958* s 87; *Magistrates' Court Act 1989* s 15.
- 51 *Supreme Court (Chapter I Amendment No. 10) Rules 2007*, Appendix A.
- 52 *County Court (Chapter I Amendment No. 22) Rules 2007*.
- 53 *Subordinate Legislation Act 1994* s 3.
- 54 Supreme Court of Victoria, *Annual Report (2004–05)*.
- 55 *Legal Profession Act 2004* s 3.4.22.
- 56 *Legal Profession Act 2004* s 3.4.25.
- 57 Submission CP 18 (Law Institute of Victoria); correspondence from Meg Gourlay, Costing Manager, Law Institute of Victoria (14 December 2007).
- 58 Victorian Crown Counsel, *Review of Office of Master and Costs Office (2006)* 27.
- 59 *Ibid* 28.
- 60 *Ibid*.
- 61 Department of Justice, *Review of Office of Master and Costs Office Report*, <www.justice.vic.gov.au/wps/wcm/myconnect/DOJ+Internet/Home/Courts/Victorian+Courts/JUSTICE++Review+of+Office+of+Master+and+Costs+Office+Report++PDF> at 11 December 2007.
- 62 *Magistrates' Court (Fees, Costs and Charges) Regulations 2001*.
- 63 *County Court (Court Fees) Order 2001*.
- 64 *Supreme Court (Fees) Regulations 2001*.
- 65 \$1.50 per page in the Supreme Court and in the Court of Appeal.
- 66 Senior Master of the Supreme Court, *Special Purpose Financial Report for the Year Ended June 2005 (2005)* 43.
- 67 Made under the *Financial Management Act 1994* s 29; see County Court of Victoria, *Annual Report 2005–2006 (2006)* 20.



Recently, there has been some professional and public debate about the desirability of requiring certain parties, including corporate litigants in commercial disputes, to pay higher fees. There have also been suggestions that courts should be empowered, or should make more use of existing powers, to require well-resourced litigants to reimburse some or all of the 'public' costs incurred in pursuing claims or defences, particularly those found to be without merit. Elsewhere in this report we have also referred to the issue of whether commercial parties involved in commercial proceedings should continue to be entitled to claim a tax deduction for all legal and other expenses incurred in the conduct of litigation, particularly where a claim or defence is found to lack merit. These matters require further consideration.

The Chief Justice of the NSW Supreme Court has also canvassed the option of demanding full cost recovery from unsuccessful parties in lengthy cases.⁶⁸ Full costs recovery could entail costs of judges' time and overheads, such as building rents, etc.⁶⁹

The commission's present proposals for overriding obligations recommend that in exercising discretion in relation sanctions, the court should be empowered to make an order for payment into the (proposed) Justice Fund of such amount as the court considers reasonable having regard to the time spent by the court as a result of the failure to act in accordance with the overriding obligations or any civil claim or civil proceeding arising out of the failure to act in accordance with the overriding obligations.

3. CONCERNS ABOUT THE COST OF ACCESS TO THE COURTS

Legal and associated costs are often the most critical determinant of whether members of the community have access to the courts. Moreover, for those who are litigants, costs considerations will not only determine the price of access to justice but will often have an important impact on the conduct and outcome of litigation.

Contemporary concerns about costs in civil litigation are many, varied and well documented. At least in the higher courts, it is often contended that problems arise out of a multitude of factors which either singularly or in combination prevent access to the courts, give rise to injustice, or result in justice at too high a price. Some of these factors can be directly attributed to costs rules and principles, including:

- fear of adverse costs which may prevent many claimants from commencing meritorious claims, or may impact on the conduct of claims and defences
- the open-ended method of calculating legal fees based on hourly rates, which leads to uncertainty and which is conducive to inefficiency, over-servicing and in some instances overcharging
- the high cost of out-of-pocket expenses and disbursements, particularly those which include substantial mark-ups on the real cost to the law firm of the items
- the inherent complexity of the subject matter of some types of cases
- the disproportionate relationship between costs and the subject matter of the dispute
- the inability of successful parties to recover a substantial proportion of their costs in the event of success.

Many other factors which contribute to prohibitive costs have been discussed elsewhere in this report. They include:

- the lack of incentives or mechanisms to facilitate disclosure of the strengths and weaknesses of the parties' positions both prior to and following the commencement of proceedings
- the absence of procedures or powers to require persons with knowledge relevant to the issues in dispute to disclose such information other than through being called as a witness at trial
- the failure of parties and their legal representatives to limit the factual or legal issues in dispute and the perceived necessity to cover all issues because of concern about professional responsibilities and potential liability
- the multiple processing of the same information and documents by multiple parties

- the deployment of numerous professional personnel on each side, both within firms and through the use of counsel as a result of the divided legal profession
- the predominant use of oral argument and adversarial processes at both interlocutory proceedings and at trial
- insufficient use of ADR techniques, both in and outside the court process
- a lack of proactive judicial management of litigation
- the wide ambit of document discovery, which is alleged to be a major contributor to excessive costs in complex matters
- the use of multiple expert witnesses and the increasing cost of the professional services of such experts
- the apparent increase in the number of self-represented litigants.
- the complexity and technicality of civil procedural rules
- factors relating to behaviour and 'litigation culture', including adversarial conduct and gamesmanship.

The high cost of civil litigation thus arises out of a combination of complex factors relating to the conduct of participants in the process, the business practices of the legal profession, micro-economic considerations, the legal and procedural framework governing the conduct of litigation, the managerial methodology adopted by courts and a variety of diffuse cultural considerations.

3.1 CONCERNS IDENTIFIED IN SUBMISSIONS

The submissions that the commission received in response to the Consultation Paper identified a multiplicity of issues of current concern in relation to costs. These include:

- insufficient use of modern technology
- lack of early disclosure of witness statements
- lack of early identification and narrowing of the issues
- insufficient judge-managed lists operating within a docket system
- unnecessary interlocutory steps
- lack of uniform civil procedure
- requirements for the production of court books
- unacceptable delay
- insufficient judicial resources and court resources
- continual amendment of pleadings
- uncontrolled discovery
- lack of data to enable better assessment of efficiency
- lack of defined time frames for the resolution of cases
- lack of simplified and streamlined processes
- lack of funding available to litigants
- absence of costs protection in public interest cases
- the need for greater flexibility in legal costs arrangements
- absence of costs budgets which are adhered to
- the need to fix the amount of recoverable costs
- problems in relation to the rules governing offers of compromise
- the deterrent effect of the indemnity principle on meritorious claims generally and public interest claims in particular
- the need to narrow the gap between actual costs and costs recovered from the losing party
- changes in the method of assessing and recovering costs

68 Marcus Priest, 'Big litigators should foot the bill: judge', *Australian Financial Review* (Sydney), 11 January 2008, 1.

69 *Ibid* 2.



- the need for better provisions for the waiver of fees for disadvantaged litigants
- lack of available funding for disbursements
- the need to restructure court fees
- the need for the sharing of transcript costs
- the need to better take into account the financial resources of the parties in making costs orders
- more accessible and less costly alternatives to the Supreme Court in certain types of cases
- the imbalance between litigants arising out of the tax deductibility of legal expenses for some parties and insurers
- particular problems arising out of the conduct of cases by self-represented litigants
- use of court fees to deter the undue prolongation of litigation
- the need for greater regulation of commercial litigation funders.

These issues encompass:

- court and case management and judicial and court resources
- pre-litigation disclosure by persons in dispute
- court fees and transcript costs
- fee and billing methods used by lawyers
- the conduct of participants in the civil litigation process
- procedural rules for the conduct of litigation
- procedures for the assessment and recovery of costs
- particular problems for certain categories of litigants.

The submissions that the commission received regarding these matters are discussed below. The proposals in relation to costs made in the submissions extend from micro issues about sharing transcript fees to macro issues about funding, resource allocation and management.

3.1.1 Costs impacts and causes of delay

A number of submissions in response to the consultation paper raised the interconnectedness of delay, cost and court procedure. The Human Rights Law Resource Centre noted that '[a]n important aspect of a fair hearing is its expeditiousness'.⁷⁰ A person's right to a fair hearing is now enshrined in the Victorian Charter of Rights and Responsibilities.⁷¹ At international law, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties are not compatible with the right to a fair hearing.⁷²

The Law Institute of Victoria reported that anecdotal evidence suggests there is unacceptable delay and cost in some parts of the civil justice system. The Institute argued that there are insufficient judicial resources available to manage and hear long, complex cases and there is a sense that delays are unsatisfactory and lead to increased costs. It was further contended that this latter type of delay significantly affects the perception of the civil justice system.

Other factors identified as contributing to delay included:

- failure to identify the core issues in dispute at an early stage
- unnecessary interlocutory steps⁷³
- continual amendment of pleadings (perhaps in part due to the failure to take adequate instructions at the outset)
- uncontrolled discovery⁷⁴
- excessive court books⁷⁵
- the late briefing of counsel.⁷⁶

Many of these issues are dealt with in other chapters of this report.

Many submissions identified broad reform proposals to deal with various issues. Recommendations in submissions included the simplification and streamlining of court processes and increased judicial

management, including the early identification and narrowing of issues in the litigation process. There was support for the introduction of measures to avoid disputes and for strategies to discourage litigation.

Some submissions identified measures to reduce delay, including:

- a uniform code of civil procedure across all jurisdictions⁷⁷
- greater reliance on written submissions⁷⁸
- specialised judge-managed lists operating within a docket system⁷⁹
- increased use of technology, such as electronic filing, electronic courtrooms and discovery of documents in electronic form⁸⁰
- removal of unnecessary interlocutory steps.⁸¹

The Victorian Bar, however, argued that further research into the causes of delays and costs is required before introducing reforms to reduce excess cost and delay. The Law Institute noted its lack of support for any proposal to reduce the length of trials by greater use of sworn witness statements. It argues that any costs saved at trial through such means would be subsumed by the additional costs of drafting and settling the statements.

3.1.2 Disclosure of costs estimates

The Consultation Paper queried whether there is a need for a procedure whereby the court would be informed, at an early stage of the proceeding, of the parties' estimates of the likely costs of the proceeding. In their initial submissions the Victorian Bar, Transport Accident Commission and Law Institute did not support disclosure of costs estimates to the court. The TAC noted that there are costs provisions in its protocols which are publicly available.

In a recent submission the Victorian Bar noted that:

Many in the profession agree that a lack of transparency in costs throughout the pre-trial process makes it difficult for clients and judges alike to adequately assess the true cost of litigation and to manage cases accordingly. We believe there is significant merit in revising rules related to costs transparency, for example rules that require parties to produce costs estimates at the first directions hearing or scheduling conference. These reforms are consistent with many reforms worldwide.⁸²

3.1.3 Fee and billing methods used by lawyers

Time costing

The commission received submissions that were critical of the current method of hourly billing for lawyers' costs. It was contended that time billing allocates risk to the client and encourages over-servicing. A submission that the commission received from a litigant was highly critical of the hourly billing method. The litigant wrote:

When the going per-hour rate is typically some \$200 or more the temptation for lawyers to fill in a few idle hours with judicious over-servicing must often be irresistible—and that points the finger at 'blank cheque' arrangements for costs ... There should be no presumption that lawyers are in any way entitled to recover costs associated with 'make work' of no meaningful consequence. There should be an agreement on the total costs at the outset.⁸³

Harris Cost Lawyers Pty Ltd supported the use of a range of fee arrangements, including those where the lawyer bears part of the risk of litigation. For example, a fixed fee arrangement offers the client cost certainty, and also spreads the risk between client and lawyer.

In contrast, the Victorian Bar submitted that this area does not require reform. The Bar argued that the labour intensive and complex nature of litigation mean that current costs are reasonable.

The Supreme Court noted that while some solicitors are attempting to move away from time sheets, hourly billing arrangements 'remain the dominant paradigm'. Taxation of solicitor and own client bills accounts for approximately 10–15 per cent of all Supreme Court taxations.

The Bar supported conditional fees (colloquially known as 'no win/no fee'), with the ability to agree an additional margin or 'uplift' fee.

70 See also United Nations Human Rights Committee, *General Comment No 32: Art 14: Right to Equality before Courts and Tribunals and a Fair Trial*, UN Doc CCRP/C/GC/32 (21 August 2007).

71 *Charter of Human Rights and Responsibilities Act 2006* s 23.

72 Human Rights Committee, *General Comment 32*.

73 Submission CP 18 (Law Institute of Victoria).

74 Submission CP 33 (Victorian Bar).

75 Submissions CP 33 (Victorian Bar), CP 48 (Victorian WorkCover Authority).

76 Submission CP 33 (Victorian Bar).

77 Submission CP 18 (Law Institute of Victoria).

78 Submissions CP 37 (Transport Accident Commission), CP 48 (Victorian WorkCover Authority).

79 Submission CP 18 (Law Institute of Victoria).

80 Submission CP 19 (<e.Law Australia Pty Ltd).

81 Submission CP 18 (Law Institute of Victoria).

82 Submission CP 62 (Victorian Bar), February 2008.

83 Submission CP 10 (Peter Mair).



Percentage contingency fees

The Transport Accident Commission and Victorian WorkCover Authority opposed percentage contingency fees, contending that this would increase legal costs paid in a dispute. They submitted that existing conditional fee arrangements were sufficient to increase access to justice in their areas of expertise. Moreover, conditional fee arrangement protocols contain generous event-based costs for lawyers to recognise their contribution to early dispute resolution.

A number of large commercial law firms opposed the introduction of percentage contingency fees on the following grounds:

- there is a real risk that a lawyer's independent financial interest in the litigation will conflict with the lawyer's duty to the client and the court
- lawyers who stand to benefit from a contingency fee arrangement may not be disposed to inform their clients that the contingency fee in question is too high in light of the work involved
- allowing lawyers to charge contingency fees may damage the reputation of the legal profession and public confidence in the administration of justice by encouraging lawyers to advertise for plaintiffs and to persuade potential plaintiffs to commence proceedings for their own benefit.

The firms also argued that the prohibition on contingency fees should extend to prohibiting lawyers and law firms from having any financial association with commercial, third party litigation funders. Otherwise, they argued, law firms could own, directly or indirectly, litigation funders and thereby circumvent the prohibition on percentage contingency fees.

The Victorian Bar also opposed the introduction of contingency fees calculated by reference to the value of a particular item in dispute (such as property), or according to any award or settlement that may be recovered. In addition to the arguments canvassed above, the Bar submitted that such contingency fees 'would act as a grave threat to the independence and detached objectivity of the Bar, which is one of the basal justifications for its existence'.

Associate Professor Adrian Evans argued that lawyers should not be put in a position of conflict which could arise if they were able to take a percentage share of their client's damages. However, if contingent fees were to be introduced, Associate Professor Evans suggested that all proposed contingent fees be court approved, similar to the scheme proposed by the Law Institute of Victoria.

Other submissions were supportive of percentage contingency fee arrangements.⁸⁴ The Law Institute submitted that there is nothing to suggest that contingency fees would increase speculative claims, which would still be governed by rules concerning abuse of process as well as the availability of adverse cost orders, which act as a significant deterrent. The Institute stated that any provision to allow lawyers to charge a contingency fee or an uplift fee must be overseen by the courts and the agreement must be 'fair and reasonable'.

A number of law firms, particularly those who traditionally act for plaintiffs, including in personal injury litigation, expressed support for the removal of the current prohibition on fees calculated as a percentage of the damages recovered.

Overall, the submissions indicated that the legal profession is divided on the question of whether percentage contingent fees should be permitted.

3.1.4 Taxation and scale

Taxation of costs

Victoria Legal Aid suggested that the court fee scales should be simplified. Current problems and complexities in the system include:

- each of the courts having a different scale that covers different professional items and disbursements
- the distinction between party-party costs and solicitor-client costs
- the fact that most legally aided work is funded based on lump sum fees fixed by Legal Aid, whereas many private practitioners charge fees based on hourly rates.

Legal Aid supported a coordinated approach across the jurisdictions, particularly in light of increases in the jurisdiction of the Magistrates' and County Courts. Where practical, they submitted, court fee scales should be based on lump sum fees for particular tasks. The Transport Accident Commission also supported greater consistency in costs between jurisdictions, including VCAT.

The Law Institute submitted that there should be a single scale of costs in Victoria that reflects current commercial rates charged. This would reduce the gap between party-party and indemnity costs orders. The Institute also submitted that the basis on which costs are awarded should be modified to a reasonable basis.

3.1.5 Court fees and transcript costs

A large number of the submissions received by the commission commented on court fees.⁸⁵

Some submissions argued that there is no need to change court fees,⁸⁶ but that adjusting court fees could provide an economic incentive to the parties to reduce delay. Litigation funder IMF submitted that court fees should remain on a user-pays basis, 'other than where public policy dictates access to justice considerations prevail'.⁸⁷

The Victorian Aboriginal Legal Service (VALS) maintained there is a need to restructure court fees so they are not dependent on the amount of damages being claimed.⁸⁸ The current system means that people who sue for a higher amount are subject to higher court fees, which the legal service submitted, disadvantages some claimants.

Court fees can impact on a person's access to justice. The Human Rights Law Resource Centre drew attention to the European case of *Kreuz v Poland*, where the requirement to pay court fees was held to be a violation of article 6 of the *European Convention on Human Rights* because it imposed a disproportionate burden on the individual. While the right to a fair hearing does not confer on citizens the right to free civil proceedings, the European Court said that the imposition of court fees must be balanced against the burden placed on the individual litigant. The relevant factors in this case were:

- the level of court fees involved
- the court's refusal of the application without taking into consideration any evidence and
- the fact that under the relevant domestic law, an exemption from fees could be revoked when the circumstances of the individual changed, effectively suspending the fees temporarily and allowing the applicant to commence proceedings.

Fee waiver

It is at the discretion of the court whether to waive the payment of court fees required to commence and conduct litigation. A person may apply to the court for a fee waiver. The decision-maker will have regard to the income, day-to-day living expenses, assets and liabilities of a person liable to pay a fee. If the decision maker is of the opinion that payment of the fee would cause financial hardship, the decision maker may exercise a discretion to waive the fee.⁸⁹ Only individuals may apply for a fee waiver. An application form and affidavit of financial situation must be filed with the court. A separate application must be made for each fee waiver sought.

PILCH, the Mental Health Legal Centre, Victoria Legal Aid and the Federation of Community Legal Centres (the Federation) commented on the current fee waiver system in cases of financial hardship. The Mental Health Legal Centre said that the right to have fees waived for financially disadvantaged parties should exist across all civil jurisdictions. Legal Aid supported fair and consistent rules about court fee waivers for financially disadvantaged litigants. It reported that the practice of the Supreme Court differs from many federal courts that automatically waive all fees for legally aided parties.

The Federation submitted that the current procedure for applying for a fee waiver (which involves writing a statutory declaration describing financial circumstances) is a barrier to litigants obtaining the waiver, particularly if they are not represented. The Federation and the National Pro Bono Resource Centre recommended that presentation of a health care card should be sufficient to prove financial hardship and obtain a waiver of court fees and charges. In addition, fees should be waived where the applicant is represented by a publicly-funded legal service providing civil law assistance to marginalised or disadvantaged clients (eg, a client assisted with legal aid, by a community legal centre or an

84 Submissions CP 15 (Edison Masillamani), CP 40 (Harris Cost Lawyers), CP 7 (Maurice Blackburn).

85 Submissions CP 34 (PILCH), CP 22 (Mental Health Legal Centre Inc), CP 32 (Federation of Community Legal Centres), CP 36 (Human Rights Law Resource Centre), CP 27 (Victorian Aboriginal Legal Service Co-operative Ltd), CP 48 (Victorian WorkCover Authority).

86 Submission CP 33 (Victorian Bar).

87 Submission ED1 8 (IMF (Australia) Ltd).

88 Submission CP 27 (Victorian Aboriginal Legal Service Co-operative Ltd).

89 *Supreme Court Act 1986* s 129(3), *County Court Act 1958* s 28(4), *Magistrates' Court Act 1989* s 22(2).



Aboriginal legal service). The National Pro Bono Resource Centre also supported reforms that would see court fees waived where a marginalised or disadvantaged litigant, who is impecunious, is being represented on a pro bono basis.

Disbursements

PILCH and the National Pro Bono Resource Centre argued that the availability of funding for disbursements in litigation is critical to ensuring access to justice in pro bono matters. However, the current court fee waiver schemes do not cover the costs of many disbursements. PILCH noted that the costs of disbursements are significant, 'the lack of available funding for disbursements creates a significant barrier to progressing the matter and may result in a client being unable to obtain access to justice'. In PILCH's experience, the limited availability of funding for disbursements acts as a disincentive to practitioners providing pro bono legal advice.

PILCH recommended that the Victorian Government provide funding for disbursements in pro bono public interest matters, or where the matter raises an issue concerning the human rights of the applicant involved. In the alternative, PILCH recommends that the Law Aid Scheme guidelines for assistance be extended to take into account urgent disbursement needs and provide for fee waiver.

Transcript fees

The Law Institute submitted that courts should facilitate the sharing of transcript fees through the use of online or electronic access. Under the current system, a plaintiff seeking access to a transcript must pay the cost, which can amount to up to \$1000 a day. The Institute noted that the transcript provides a service to the other party and the court, and as such the cost should be shared. It was also contended that courts should make transcript available as a cost of the litigation. The Transport Accident Commission questioned whether there should be more competition in respect of transcription services in civil proceedings.

Some submissions commented on the impact of the high cost of transcripts. Legal Aid noted that the high cost of obtaining transcripts may deter or prevent some litigants from obtaining advice on the merits of appealing decisions. The National Pro Bono Resource Centre supported reforms that would allow marginalised and disadvantaged clients who are represented by a community legal centre, legal aid, Aboriginal legal services or pro bono lawyers to have access to free court transcripts.

3.1.6 Procedures for assessment and recovery of costs

Party-party costs

The commission received a number of submissions on party-party costs. The Victorian Bar noted that the practical effect of such a rule is that a party who has to go to court to vindicate his or her rights will (in the absence of an order for indemnity costs) be out of pocket. However, the Bar supported the rule on policy grounds, namely, that the shortfall in party-party costs provides an appropriate incentive to settle cases.⁹⁰ Submissions noted the broad discretion of the court in making an award of costs, which can take into account the conduct of the parties.

The Victorian Bar's submission also encouraged consideration of permitting the court to order payment of interim costs in cases where the opponent has substantially greater resources and where there is a reasonable likelihood that the weaker party will be entitled to costs at the end of the case.⁹¹

Indemnity principle

Many submissions supported the current indemnity principle that 'costs follow the event'.⁹²

A number of large law firms argued that the costs indemnity rule should be retained.⁹³ They submitted that the rule is a balancing tool, namely, that if a party causes another party to unreasonably incur legal costs, the first party should indemnify the other party for those costs, to maintain an appropriate balance between the various participants in the civil justice system. The submissions noted the following advantages of the rule:

- it allows successful litigants to recover the cost, or at least part of the cost, of asserting their rights
- it helps to deter unmeritorious claims
- it may encourage parties to conduct litigation in an efficient and cost-effective manner, including avoiding unnecessary interlocutory applications and settling proceedings where appropriate.

The Supreme Court, however, submitted that there is merit in considering a more generous basis than the current party and party test that applies in a majority of cases, and moving to a two-tier system similar to the UK model.

Some submissions supported the indemnity rule, but endorsed the court's discretion to modify costs according to the circumstances of the case.⁹⁴ The Victorian Bar argued that the general rule that costs follow the event should be relaxed so that the court could use to the full its wide statutory discretion over costs to support the conduct of litigation in a proportionate manner and to discourage excesses. The Mental Health Legal Centre said that the rule should be subject to consideration of the means of the parties, and their relative financial situations. This should include recognition of a person's current means, their likely future needs and situation, and the impact of debt on, for example, their mental health. The legal centre also said that consideration should be given to the capacity of the other party to bear its own costs.

The Human Rights Law Resource Centre's submission highlighted the impact of the law on human rights. It submitted that an important aspect of ensuring equal access to justice is the applicant's ability to pay the associated costs and the discriminatory effect this has on disadvantaged members of the community. The centre referred to UK cases heard before the UN Human Rights Committee, where the committee held that a rigid application of a policy to award costs to the winning party may breach the right of access to justice contained in the right to a fair hearing.⁹⁵ The imposition of substantial costs against disadvantaged claimants may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights. The Human Rights Committee held that there should be judicial discretion to consider individual circumstances on a case-by-case basis and that, without such a discretion, the imposition of indiscriminate costs acts as a strong deterrent to the whole community, particularly its disadvantaged members, in exercising their right to have their complaint heard.

The Law Institute recommended that if indemnity costs are awarded, the court should be informed of any costs agreement between the parties and their legal practitioners. In addition, the current definition of indemnity costs in the rules should be amended to provide that indemnity costs are to be assessed in accordance with the scale.

Law firm Deacons suggested an alternative procedure for costs orders. It submitted that a procedure similar to the NSW model for assessment of legal costs should be considered. Under that model, a party applies for an assessment of party-party costs by a cost assessor. A party dissatisfied with the determination of a cost assessor can challenge the decision either by:

- review by a panel comprised of two experienced assessors, or
- appeal to the Supreme Court of NSW.

A party who challenges the assessment taxation will not only be liable to pay the filing fee, but should the application fail, or fail to succeed by having the original determination varied by more than 15 per cent, then that party will also be liable for the costs of the review. Deacons asserted that the NSW procedure provides 'expedition and a greater degree of certainty in the process and may result in saving court time'.

3.1.7 Incentives and penalties

Many submissions commented on current economic incentives that exist to facilitate efficient and fair use of the justice system. Costs orders can be a disincentive against pursuing frivolous claims, actions or defences. Moreover, cost orders can be made directly against solicitors. Many pre-litigation requirements and proactive judicial management serve to fetter claims without merit.

Some submissions described incentives and penalties currently operating in Victoria. For example, damages claims following injury in motor vehicle accidents are governed by Transport Accident Commission protocols. Under these protocols, work put into resolving the dispute early is recognised with appropriate stage cost price points, thereby encouraging parties to settle their claims expeditiously. The Victorian WorkCover Authority noted that the *Accident Compensation Act 1985* includes a pre-litigation regime, information exchange provisions, compulsory conference procedures prior to issue of a writ, pre-litigated costs support model and costs consequences provisions. Such provisions were said to encourage bringing or defending only meritorious claims.

90 Submission CP 33 (Victorian Bar).

91 As was proposed in the Woolf reforms.

92 Submissions CP 38 (Allens Arthur Robinson), CP 47 (Australian Corporate Lawyers Association), CP 51 (Deacons), CP 46 (Telstra Corporation), CP 48 (Victorian WorkCover Authority), CP 37 (Transport Accident Commission), CP 27 (Victorian Aboriginal Legal Service Co-operative).

93 Submissions CP 38 (Allens Arthur Robinson), CP 51 (Deacons), CP 47 (Australian Corporate Lawyers Association), CP 46 (Telstra Corporation).

94 Submissions CP 33 (Victorian Bar), CP 38 (Allens Arthur Robinson), CP 51 (Deacons), CP 47 (Australian Corporate Lawyers Association), CP 46 (Telstra Corporation), CP 22 (Mental Health Legal Centre).

95 *Anni Aarela and Jouni Nakkalajarvi v Finland*, UN Doc CCPR/C/73/D/779/1997.



The Victorian Bar suggested that court fees could be used to discourage undue prolongation of civil litigation, or as an incentive to parties to complete the interlocutory steps in the required time. It suggested that any additional costs burden would be imposed at the discretion of the court.

The Bar suggested as an example that higher sitting fees might apply if parties delayed and could not meet a trial date. However, the Bar acknowledged the difficulty inherent in this proposal, that is, it is often one party (usually the defendant) that is dragging its feet. In those circumstances, it is unfair to impose higher sitting fees on the other (innocent) party. There is also concern that this could lead to satellite litigation. Furthermore, safeguards would be necessary to ensure that this did not obstruct access to justice.

Some stakeholders expressed concern at further use of economic incentives or disincentives in the conduct of litigation. Tanya Penovic, Lecturer in Civil Procedure at Monash University, discussed the impact of federal cost 'disincentives' under the *Migration Act 1958*:

The court's ability to administer disincentives in the form of costs has been fortified at the Federal level by the Migration Litigation Reform Act 2005 (Cth). The Act prohibits a person from 'encouraging' a litigant to commence or continue migration litigation which has little prospect of success in circumstances where proper consideration is not given to the prospects of success or the purpose of the litigation is unrelated to the objectives of the court process.

While it is too early in the life of the Act to evaluate its impact on the court system, legislation such as this may have a perverse effect. The deterrent effect on lawyers representing clients in difficult claims may result in an increase in self-representation, thus increasing delay on account of the absence of legal advice and understanding of court process. An increase in self-representation may have the effect of reducing the likelihood of settlement, and increasing the length of trials, the number of unmeritorious claims and appeals.

Such disincentives may also limit access to justice by requiring lawyers (rather than judges) to act as the arbiters of merit in litigation and thus confining access to justice. Once again, the right to a fair hearing enshrined in section 24 of the Charter of Human Rights and Responsibilities Act 2006 may be frustrated.

The National Pro Bono Resource Centre submitted that introducing economic disincentives is a harsh way to deal with people who are likely to already be economically disadvantaged. The centre suggested that:

More holistic, multidimensional approaches should be adopted to assist these people through their legal problems. These approaches may include court-based self-help support officers and resources, court-based support staff, and increased funding to duty lawyers and service providers such as CLCs and legal aid who are adept at dealing with people with complex problems.

3.1.8 Offers of compromise

The commission invited submissions on whether the rules or procedures in relation to offers of settlement or compromise are in need of reform. Submissions were divided between those that believed the current procedures work well or did not need modifying,⁹⁶ and those that believed the current position is unclear and must be regulated.⁹⁷

The Law Institute called for clearer and more comprehensive rules for offers of compromise, accompanied by sanctions, arguing it would assist both lawyers and clients to make decisions about litigation. TurksLegal and AXA noted that under Order 26, different restrictions apply for plaintiffs and defendants in a claim for damages arising out of death or personal injury. The Institute and TurksLegal and AXA supported uniform consequences across jurisdictions and matters for non-acceptance of an offer of compromise.

Other submissions argued that the commission should consider clarifying the operation of Order 26 in relation to multiple defendants, particularly in the context of the introduction of proportionate liability regimes.⁹⁸ Law firm Allens Arthur Robinson said that the order is uncertain in cases where there are multiple defendants. It is also unclear how the offers relate to proportionate liability schemes. Maurice Blackburn also cited difficulties with multiple defendants.

During consultations conducted by the commission, concerns were also voiced about the ineffectiveness of offers of compromise. A plaintiff law firm stated that plaintiffs tend to accept offers of compromise at relatively high rates, whereas defendants with deep pockets are less affected by costs penalties.⁹⁹ Another firm supported broader rules with increased flexibility.¹⁰⁰ Slater and Gordon suggested that, for example, the imbalance in resources between a plaintiff and defendant in a public injury case could warrant the addition of a premium to any unaccepted offer, or additional interest attached to a costs penalty.

3.1.9 Security for costs

The Victorian Bar submitted that the current security for costs procedures work well. The Victorian WorkCover Authority and TAC believe there is no need for revision of the existing rules. WorkCover operates under a costs regime under the *Accident Compensation Act 1985*; the TAC is governed by the *Transport Accident Act 1986*.

The Law Institute said security for costs orders are necessary to provide flexibility for litigants, but should not be allowed to stymie litigation.

The Human Rights Law Resource Centre noted that notions of 'fairness' in matters relating to security for costs have developed in cases before the European Human Rights Commission. In *Ait Mouhoub v France*,¹⁰¹ the requirement to pay 80,000 francs for proceedings against the gendarmes was held to be a disproportionate obstacle to access to the court. However, in *Tolstoy Miloslavsky v UK*,¹⁰² the payment of 124,900 pounds was not considered an infringement of article 6 of the *European Convention on Human Rights*.

3.1.10 Financial resources in public interest cases

A number of submissions expressed concern at the proposition that the financial resources of the parties, or the public interest nature of a matter, should be considered when making an order for costs, or security for costs.

The Victorian Bar submitted that these are already matters that the court may have regard to in an appropriate case when exercising its discretion as to costs. In a similar vein, the Law Institute argued that 'factors of consideration of the financial means of a party can result in a fettering of the discretion of the court to decide a matter'. The Victorian WorkCover Authority considered this to be a matter for the parties, not the courts.

Victoria Legal Aid, however, supported requiring the courts to consider the financial resources of the parties when making costs orders in public interest cases or where there are other exceptional circumstances. Such a requirement could 'redress the inequality in resources that typically exists in public interest cases where an individual challenges a public body or commercial corporation'.¹⁰³

Some public authorities indicated that they consider the financial resources and wider implications of a decision before seeking costs, or security for costs.

The TAC described its obligations under Model Litigant Guidelines, which require the TAC not to take advantage of a litigant who lacks resources. The TAC gives consideration to a TAC client's financial position before determining whether to apply for a costs order at all. Similarly, the financial position of the losing party is considered in any proceedings to enforce an order for costs. The TAC has cost recovery guidelines and will only seek to recover its own costs in the case of fraud, misrepresentation or other exceptionally good reason.¹⁰⁴

The TAC funds appeals to the Supreme Court and Court of Appeal where Transport Accident Act scheme issues or issues affecting a class of injured people are in dispute or require clarification. The court is made aware of this funding in submissions or a supporting affidavit.¹⁰⁵

3.1.11 Review and reform

The Bar called for more research to address the 'dearth of statistics' on the causes of cost and delay in Victoria's civil justice system.

A number of submissions also noted a lack of available information about the incidence and causes of high costs in the civil justice system.

96 Submissions CP 33 (Victorian Bar), CP 48 (Victorian WorkCover Authority), CP 37 (Transport Accident Commission).

97 Submissions CP 41 (TurksLegal & AXA Australia), CP 18 (Law Institute of Victoria), CP 2 (Allens Arthur Robinson).

98 Submission CP 2 (Allens Arthur Robinson).

99 Consultation with Maurice Blackburn, 7 May 2007.

100 Consultation with Slater and Gordon, 16 May 2007.

101 [1998] ECHR 97.

102 [1995] ECHR 25.

103 Submission CP 31 (Victoria Legal Aid).

104 Submission CP 37 (Transport Accident Commission).

105 Submission CP 37 (Transport Accident Commission).



3.2 SOME PROBLEMS IDENTIFIED

3.2.1 Gap between lawyers' costs and costs recovered from losing party

In much of the civil litigation in the higher courts Victorian lawyers, like those in most other Australian jurisdictions, have for some years operated under a costs system whereby a substantial proportion of the costs incurred by the winning party will *not* be recovered from the losing party pursuant to a party-party costs order.

The commission sought to obtain empirical data to determine what that disparity is. Historically, the anecdotal evidence suggests that only about 60–70 per cent of the actual costs could be expected to be recovered. However, there are obviously variations in the percentage amount recovered for different items within the total costs. For example, a higher percentage of amounts for court fees, witnesses' expenses and counsel fees may be recoverable compared with some other items such as solicitors' fees or photocopying charges. At present, many experienced practitioners have suggested to the commission that only about 50 per cent of the total amount of the actual costs is likely to be recovered from the losing party in many instances.

Generalisations are fraught with difficulty because of different practices and procedures applicable to different categories of civil work. Moreover, both the common law and court rules make provision for the recovery of a substantially higher percentage of the actual costs incurred in various circumstances, including where settlement offers are rejected and where there is forensic misconduct. There may be other considerations which reduce the quantum of recoverable costs, for example, in 'public interest' litigation (which is discussed in detail below).

The Manitoba Law Reform Commission in its 2005 report on costs awards in civil litigation reported that in Australian jurisdictions successful parties generally recover a higher proportion of their actual legal costs compared with Canadian jurisdictions. In Australia the proportion recovered was said to be 'probably as much as 60–70 per cent'.¹⁰⁶ By way of comparison, in British Columbia only around 25–30 per cent of actual costs are apparently recovered¹⁰⁷ and in Manitoba it was variously estimated as less than 50 per cent, no more than 25 per cent and on occasions less than 10 per cent of actual costs.¹⁰⁸

The 'gap' between recovered costs and actual legal costs was referred to by the Law Reform Commission of Western Australia in 1999 when it noted '[i]n a sense it is unfair'. The WA commission recommended that reduction of the gap be considered by introduction of a statute, for example the 'Legal Costs Act'.¹⁰⁹

One explanation for this gap is that the scales providing for quantification of recoverable party-party costs are outdated and do not reflect the market price for legal services. If lawyers as professionals are entitled to be remunerated for their skill and expertise at proper commercial rates and if the losing party is paying his or her own lawyers at similar rates, the application of the indemnity principle arguably entitles the winning party to recover the real costs incurred in the pursuit of the claim, or at least a substantial proportion thereof.

One counter to this argument is that lawyers' billing methods, in particular the time-based system, contribute to over-servicing and in turn overcharging. The issue of hourly billing is discussed further below.

3.2.2 Open-ended and indeterminate fees and expenses

Tyranny of billable hours¹¹⁰

According to the Law Commission of New Zealand:

*Hourly billing can drive costs up, especially in firms where lawyer performance is measured by targets of billed hours. This can make 'bill padding' a temptation and rewards inefficiency. Also, hourly billing does nothing to inform a client's understanding of how much a lawyer's services will in fact cost.*¹¹¹

As the NZ commission noted, there are suggestions that commercial clients are using their bargaining power to encourage a movement towards quotes, tenders and costs agreements with lawyers. There is some indication of a 'lawyer-led' trend away from hourly billing, with at least one New Zealand firm having abandoned hourly billing to reduce frustration for both lawyers and clients.¹¹²

Problems with hourly billing may be exacerbated where minimum time units (usually six minutes) are used as a basis of calculating costs charged to the client. This may artificially inflate the actual time for which charges are computed.

Moreover, many firms achieve a relatively high level of profitability by leveraging up charge rates. Employee solicitors, paralegals and others are contracted to provide services at a relatively modest hourly rate but the charge to the client is calculated on the basis of a substantial mark-up on such rates.¹¹³ Obviously, as profit-making entities law firms are no different in this respect from any other commercial enterprise and proper allowance has to be made for overheads and a return on capital investment etc.

However, the open-ended nature of billing arrangements in most civil litigation creates obvious problems for clients, particularly those who don't have the volume of work or the commercial standing to negotiate in relation to the price of legal services. Moreover, as the New Zealand Law Commission has noted, although the open competitive market assumes that regulation of price and quality is carried out by consumers who are the best judge of the value of goods and services, this model does not work effectively in the legal services market for a number of reasons:

*Consumers are not in a good position to judge prices and quality since information is poor and general knowledge and understanding of legal work, its complexity and the extent to which cost can be incurred, is very low.*¹¹⁴

Various members of the judiciary have criticised the time billing method used by lawyers in Australia. Chief Justice Spigelman of the NSW Supreme Court has expressed the view that time billing is unsustainable since 'it is difficult to justify a system in which inefficiency is rewarded with higher remuneration'.¹¹⁵ He noted these views have been echoed by Chief Justice Gleeson of the High Court.¹¹⁶

In some instances, time recording and economic and promotional incentives based on the volume of time recorded serve as an incentive to overcharging and fraud. At least in the US context, it has been suggested that unethical billing practices are widespread.¹¹⁷

Steve Mark, Legal Services Commissioner for NSW, has advocated the use of alternative billing methods in the legal industry.¹¹⁸ 'Alternative' billing methods include fixed fee billing, capped fees, contingency or percentage fees, blended hourly rates, task-based billing and fees based on value. Mark notes that the uptake of alternative billing methods in Australia has been slow, and largely driven by client demand rather than innovation by law firms. This may be because alternative methods of billing are more complex and require individualised assessment of a client's needs.

Value billing, for example, requires fees to be determined on the value given to the client. A written agreement will cover the billing schedule, people within the firm who will work on the matter (and in what capacity), monitoring of the work. The value of the work will depend on the effectiveness, efficiency, urgency, complexity and predictability of the work. Value billing is thus said to encourage negotiations between practitioners and clients, and to focus on 'results, efficiency and reward, not hours billed'.¹¹⁹

However, according to Steve Mark:

*In Australia, the move towards alternative forms of billing has been slow. There has been much resistance by law firms to change[in] their established billing practices. The push for change is thus largely coming from clients.*¹²⁰

Out-of-pocket expenses and disbursements

In order to conduct litigation, it is often necessary to incur out-of-pocket expenses apart from the cost of the legal services provided by law firms and counsel. Such expenses may include telephone, postage and communication expenses, couriers' fees, photocopying charges, travel and accommodation expenses, court fees and the fees payable to expert witnesses and consultants.

In many instances these expenses are passed on to clients with the addition of a component for profit.

To some extent this is encouraged by scales in relation to recoverable party-party costs which provide for recovery of the marked-up price of such items from the losing party. For example, the Victorian Supreme Court makes provision for the recovery of photocopying charges at the rate of \$1.70 per page. Costs agreements of many firms provide for photocopying to be charged to the client at the

106 Manitoba Law Reform Commission, *Costs Awards in Civil Litigation*, Report No 111 (2005), 25, citing E T Spink, *Party and Party Costs* (Unpublished, Alberta Law Reform Institute, 1995) 36, n 129.

107 Manitoba Law Reform Commission (2005) above n 106, 17.

108 *Ibid* 10.

109 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Report No 92 (1999), [16.26]-[16.27].

110 The Hon J J Spigelman, 'Opening of Law Term' (Speech delivered at the Opening of Law Term Dinner, Sydney, 2 February 2004) <www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_020204> at 7 February 2007.

111 New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report No 85 (2004), 47.

112 *Ibid*.

113 In some jurisdictions there is a move by some law firms towards outsourcing legal and other work to lawyers and others in countries at considerably less cost to the firm than persons employed in the jurisdiction. This does not necessarily result in a reduction in the cost to the client. However, in some instances insurers are directly outsourcing legal and other work to people in other jurisdictions to reduce the cost to them.

114 NZ Law Commission (2004) above n 111, 39.

115 Spigelman (2004) above n 110.

116 See, eg, the Hon M Gleeson, 'Are the Professions Worth Keeping?' (Speech delivered at the Greek-Australian International Legal and Medical Conference, Kos, Greece, 31 May 1999).

117 See, eg, Lisa G Lerman, 'Lying to Clients' (1990) 138 *University of Pennsylvania Law Review* 659. See also Dennis Curtis and Judith Resnick, 'Teaching Billing Metrics of Value in Law Firms and Law Schools' (2002) 54 *Stanford Law Review* 1409.

118 See Steve Mark, 'Analysing Alternatives to Time-based Billing and the Australian Legal Market' (Paper presented at the Finance Essentials for Practice Management Conference, Sydney, 18 July 2007).

119 *Ibid* 6.

120 *Ibid* 7.



rate of \$1 or more per page. Commercial photocopying companies, which include a profit element in their charges, often charge around 10 cents or less per page, with substantial further discounts for volume.¹²¹

As part of this enquiry, the commission reviewed data on the taxation of costs from the Supreme Court taxing master. More than half of the 37 bills of costs reviewed included a disbursement figure that exceeded the professional fees claimed. The impact of the costs of disbursements on the total cost of litigation is a matter of obvious concern, particularly to clients.

3.3 COSTS RESEARCH UNDERTAKEN BY THE COMMISSION

The commission sought to investigate the concerns about the cost of litigation raised in submissions by conducting some limited research. The commission sought raw data on costs from both legal firms and the Supreme Court taxing master. This was to examine information on costs claimed, the gaps between recovered costs and actual costs incurred and the time required to finalise costs.

3.3.1 Survey of legal firms

The Commission conducted a survey which sought to ascertain:

- the cost of litigation
- the relative cost of each stage of litigation
- who bears the gap between actual costs and recovered cost
- the costs of particular types of proceedings
- the relationship between cost and delay.

The commission contacted 70 law firms and organisations asking each firm to provide costs data on recently completed matters. In the survey, the commission asked questions about the type, duration and outcome of the matter, the costs sought and awarded (including disbursements) and the method for calculating costs. We asked each firm to complete the survey across a sample of 20 matters.

The response rate to the survey was low. Seven law firms participated and the commission received data on 65 recently completed matters. Of the returned surveys, more than two-thirds were completed by firms representing the plaintiff. Two of the 65 returned surveys were from non-parties to a matter. Not all survey questions were answered. Some firms maintained that they could not disclose certain information on the basis of client confidentiality.

The surveys recorded the length of time required for each matter. In 55 per cent of the surveys returned, the matters were finalised in less than two years (one included an injunction application). The remaining matters took between two and eight years to complete.

The surveys also asked respondents to provide details of recovered and actual legal costs. Only 35 per cent of the surveys were able to identify what percentage of actual costs were recovered, as many of the cases had 'all in' settlements. Other respondents did not disclose recovered costs. Of the 24 cases where information was available, the percentage of recovered costs to actual costs ranged from 44–80.

It was also possible to examine the relationship between the amount of damages recovered and the amount of legal costs incurred. The commission was able to assess this data from 31 plaintiff files and five defendant files. The total legal costs of the parties, as a percentage of the total amount awarded for a claim, ranged from 256 per cent of the amount awarded to just 8 per cent of the amount awarded.

The low response rate, the possibly unrepresentative nature of the cases where costs data were supplied and the relatively small scale of the study prevent firm conclusions being drawn. However, the data tended to support the view that, in many cases, only about half of the actual costs incurred in conducting cases is recovered from the losing party. Also, it would appear that the net costs borne by the client, when calculated as a percentage of the amount of damages recovered, is relatively high in many cases. Further detailed research is required.

3.3.2 Survey of Supreme Court data

The commission obtained data from the Supreme Court regarding the taxation of costs before the taxing master. The 247 summonses for taxation filed with the Supreme Court between July and December 2006 were reviewed.

Of the 247 summonses:

- 113 were dismissed or struck out (in most cases because they were settled)
- 134 were taxed by the taxing master.

In correspondence to the commission, the taxing master noted that while individual bills result in quite different amounts being taxed, on average:

- 77 per cent of costs claimed were allowed for bills taxed by the master
- 74 per cent of costs claimed were resolved to be paid by consent in those cases where the costs had been settled and the court was informed of the settlement amount.

The percentage of the amount allowed by the taxing master compared to the amount claimed in the bill ranged from 99.66–28.

The commission also conducted a review of a sample of 30 files taxed in the period July–December 2006, recording 37 separate bills for costs. These files were selected randomly. This review collected data on the legal fees, disbursements and total costs claimed in each bill of costs and the time taken for resolution of costs before the taxing master.

More than half of the bills were taxed or settled within three to four months of the summons being filed. The longest period for resolution was 11 months.

The length of time between obtaining the relevant costs order and filing the taxation summons ranged from two months to five years. There are obviously a number of factors that can influence this period, most of which are entirely beyond the control of the court.

Twenty of the 37 bills as prepared claimed costs which included a disbursements figure greater than the professional fees.

Twenty-seven of the 37 bills resulted in an amount being taxed or agreed by consent and disclosed to the court. Of these 27 bills the costs recovered ranged from 95.94 per cent to 43.64 per cent of the amount claimed in the bill.

In more than half of the bills taxed (where notations as to the amounts taxed off were made available on the court file) more than half of the amount taxed off came from disbursements claimed. These disbursement amounts taxed off were mostly made up of counsel fees.

4. COSTS REFORMS IN OTHER JURISDICTIONS

Common law civil justice systems have been in an almost perpetual state of review in one way or another since the 19th century.¹²² There have also been various calls for reform of many other justice systems throughout the world for a number of decades.¹²³

Commenting on the commission's civil justice inquiry, an article in the publication *Justinian* noted:

In the 20th century, the Woolf civil justice reforms, introduced in England in 1999, were described at that time by The Economist magazine as, 'the most radical shake-up of the civil-justice system this century'. Indeed, like the revolting Smallweed in Bleak House, the litigation system seems to ask with regularity, 'shake me up'. Back in 1996, when the Woolf reform process had commenced, The Economist noted that since Dickens published Bleak House in 1852 there had been: '60 official commissions or reports on reforming Britain's civil justice system. They have had little impact'.¹²⁴

It cannot be credibly contended that reforms of Britain's civil justice system have 'had little impact'. However, it is of interest to note that as far back as 1953, a committee chaired by the then Master of the Rolls, Sir Raymond Evershed, recommended that masters and judges 'should pursue a more active and dominant course in the interests of the litigant'. Moreover, it was recommended that the 'emphasis in the Rules should be shifted in the direction of imposing on the Court a duty of "robustly" applying the powers which already exist, but which by reason of existing habits and practices are rarely employed today'.¹²⁵

Although the transition from party control of litigation to proactive judicial management has been protracted, and incremental, the pace of civil justice reform has increased in recent years. However, the high costs of litigation remain a major problem.

121 Eg, in December 2006, Copy Captain charged 11 cents per page for up to 100 pages, and thereafter costs decreased progressively to 6 cents per page; Fed Ex Kinkos charged 12 cents per page for up to 500 pages, thereafter costs decreased to 10 cents per page; Kwik Kopy charged approximately 6 cents per page.

122 Lord Woolf refers to 60 reports on civil procedure in the UK since 1851 in his interim report. See also Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [1.72]–[1.73].

123 See, eg, Hector Fix-Fierro, *Courts, Justice and Efficiency: A Socio-legal Study of Economic Rationality in Adjudication* (2004) 1–4.

124 Tulkinghorn, 'Lawyers Safely in Charge of Civil Justice "Reform"' (3 October 2006) *Justinian*, <www.justinian.com.au> at 26 February 2008.

125 *Final Report of the Committee on Supreme Court Practice and Procedure*, Cmnd 8878 (1953), quoted in D Gladwell, 'Modern Litigation Culture: The First Six Months of the Civil Justice Reforms in England and Wales' (2000) 19 *Civil Justice Quarterly* 9–18.



4.1 THE WOOLF REPORT: A BROAD APPROACH TO COSTS

The reforms introduced in the late 1990s to the English civil justice system following Lord Woolf's reports have brought about important changes in civil procedure, judicial management of litigation and the culture of dispute resolution.

Initiatives to reduce costs and delays in civil litigation included:

- the introduction of pre-action protocols requiring greater disclosure
- the imposition of overriding obligations, including the concept of proportionality in relation to the conduct, management and costs of litigation
- the development of separate court lists for cases of varying importance and complexity
- the introduction of provisions for fixed and capped costs
- the filing of cost estimates.

These and other initiatives were designed to reduce costs and delays in civil litigation. Just how successful these reforms have been in achieving more affordable justice is discussed further below.

Civil justice reform is symbiotic in nature. The Woolf reforms were in part based on civil justice developments in other jurisdictions, including Australia, and have served as a further catalyst to reform in other countries. Many of the concepts central to the Woolf reforms, in particular those of proportionality and the overriding objective, have been the subject of analysis in civil justice reviews conducted in other jurisdictions in recent years.¹²⁶

The objectives of the Woolf reforms were to improve access to justice by reducing inequalities, cost, delay and complexity of civil litigation and to introduce greater certainty as to timescales and costs.¹²⁷

Prior to the introduction of the Woolf reforms in England and Wales, the Lord Chancellor engaged Sir Peter Middleton to conduct a further review of civil justice systems. Middleton noted that the Woolf proposals amounted

*to a coherent programme that can improve the efficiency and flexibility of the court system. I have concluded that the reforms are capable of delivering worthwhile overall benefits.*¹²⁸

Middleton then made a number of recommendations. In relation to costs he largely endorsed the proposal for fixed costs while recommending some changes. In particular, he recommended that an alternative to government setting the fixed costs¹²⁹ would be to require lawyers to agree on an all-in fixed fee to cover proceedings up to and including trial.¹³⁰

Following the commencement of the revised Civil Procedure Rules in 1999 there was an intense period of debate and uncertainty in the English civil justice system over the impact of the changes, particularly with respect to costs. The head of the Civil Justice Division of the Lord Chancellor's Department reviewed the impact of the reforms after they had been in operation for six months.¹³¹ After noting that civil servants were paid to take a 'measured view', he indicated that he was 'cautiously euphoric'. However, there were teething problems, including legal challenges to the *vires* of the new rules. One provision had already been struck down.¹³² Another judge had raised concerns about the validity of the rule dealing with privilege attaching to the instructions to an expert witness.¹³³

Notwithstanding various concerns, the overwhelming impression was that the reforms were having their desired effect: cases were settling earlier and there appeared to be a change in culture. Importantly, in a number of instances it had been held that authorities dealing with the old rules were no longer relevant.¹³⁴ The words of Judge Kennedy were adopted with approval:

*The new order will look after itself and develop its own ethos ... references to old decisions and old rules are a distraction. We will not look over our shoulders.*¹³⁵

A firm line appeared to be drawn with the past and the Court of Appeal began to refer to the 'modern litigation culture'.¹³⁶ The profession appeared to accept that 'front loading' was no more than good practice and that doing the work at the outset promoted early settlement. Moreover, solicitors were said to be adopting a more collaborative, less adversarial, approach to their opponents. The approach to the use of experts was also said to have changed appreciably. Judicial case control seems to have been embraced with enthusiasm. As Gladwell notes with reference to one particular incident: 'In May Mrs Justice Arden gave her new powers a test drive and barbecued the parties'. As a result

of proactive judicial intervention in that case, the trial estimate was reduced from 12 to five days and settled the next day. According to Gladwell, judges were taking their case management role very seriously indeed.¹³⁷

The procedures for the summary assessment of costs were apparently causing some difficulties, notwithstanding the fact that this procedure had been developed previously in the Patents Court.

Importantly, an evaluation and monitoring program accompanied the introduction of the new procedural reforms. Also, one of the important elements of the reform program was the establishment of the Civil Justice Council. The council is an independent statutory body, sponsored by the Department of Constitutional Affairs. Its membership comprises representatives of all relevant interests. It has an ongoing role in monitoring the impact of reforms and proposing further reforms following a process of consultation, negotiation and mediation with representatives of different interest groups. Work is coordinated across the following committees: alternative dispute resolution, access to justice (including responsibility for the fees consultative panel and public legal education working group), housing and land, clinical negligence and serious injury, experts, costs, rehabilitation policy and rehabilitation rules. The chair is the Master of the Rolls. Members of the council are not remunerated. The need for a similar body in Victoria is discussed in Chapter 12.

The reforms have not escaped criticism. The introduction into civil procedural rules and statutory provisions of 'overriding objectives' was intended to facilitate more proactive judicial management and a reduction in the costs of litigation. In England and Wales it would appear that the former has been achieved but not the latter.

The issue of cost recovery has been complicated by an explosion in 'satellite litigation' in respect of costs generally, and the use and enforceability of conditional fee agreements in particular. It has also been reported that the number of claims and appeals filed with the English courts has slumped dramatically since the commencement of the Civil Procedure Rules.¹³⁸

Corresponding with this decline in the filing of civil claims was a substantial increase in the filing of applications with the court in respect of costs.¹³⁹ As one expert on costs has commented, '[t]he public is deserting the courts while lawyers flock to them'.¹⁴⁰ The explosion in 'costs litigation' and ensuing debate prompted the Civil Justice Council to issue a report in September 2005.¹⁴¹ The council noted that 'litigation that now extends to "arguments about the costs of arguments about costs" brings the civil justice system into disrepute'.¹⁴²

Based on recent consultations between the commission and English judges, masters, solicitors acting for claimants and insurers, and members of the Civil Justice Council,¹⁴³ there appears to be consensus that the post-Woolf reforms have reduced delays and resulted in a substantial increase in cases settled without the commencement of litigation, and a consequential decline in the number of court proceedings filed. However, there appears to be an almost universal consensus that there has not been any reduction in costs and that there may have been an increase in costs.

Generalisations are fraught with difficulty given the enormous diversity of civil litigation. Moreover, there is a variety of factors which have had an important influence on legal costs in England and Wales unrelated to the civil procedure reforms. These include the:

- curtailment of legal aid for civil disputes
- widespread use of conditional fee agreements with success fees of up to 100 per cent of the underlying base fee
- well developed market for after-the-event legal costs insurance
- introduction of 'full recoverability' of legal costs
- widespread use, particularly in London, of (unregulated) hourly billing based on rates which are relatively high by comparison with legal fees in Australia.

Furthermore, as noted, significant costs have been incurred in connection with satellite litigation and appeals in relation to costs issues in the course of the recent 'costs war' between claimant lawyers and insurers.

126 See, eg, LRCWA (1999) above n 109; ALRC (2000) above n 122; Manitoba LRC (2005) above n 106. The Manitoba report briefly looks at the English system and proportionality and appears to be significantly persuaded by the arguments of Zuckerman that the system is flawed: 'Whatever the merits of the 1999 overhaul of the Rules of Civil Procedure to reflect the principle of proportionality, it is apparent that the current costs regime has serious problems': 23.

127 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 26.

128 Sir Peter Middleton, *Review of Civil Justice: Report to the Lord Chancellor* (1997) [4].

129 He doubted whether the government had the requisite knowledge or expertise.

130 Middleton (1997) above n 128, [2.43]–[2.45].

131 Gladwell (2000) above n 125.

132 *Civil Procedure Rules 1998* (UK) r 48.7(3) on the disclosure of privileged documents on the making of a wasted costs order: *Mediterranean Holdings v Patel* [1999] 3 All ER 673 (Toulson J).

133 *Civil Procedure Rules 1998* (UK) r 35.10(4).

134 See, eg, *Biguzzi v Rank Leisure* [1999] 1 WLR 1926.

135 See also *Walsh v Misseldene* [2000] All ER (D) 261.

136 *Adoko v Jemal* [1999] EWCA Civ 1643, referred to in Gladwell (2000) above n 125.

137 Gladwell (2000) above n 125.

138 In 1997, 2 million claims had been issued in the English County Court. In 2004–2005 it was reported that only 881 300 claims were issued even though the County Court had had an increase in jurisdiction during that period: K Underwood, *Fixed Costs* (2nd ed, 2006) xvi.

139 During 1999–2000, 9525 bills were filed with the Costs Court but 15 812 were received in 2003–4: *ibid*.

140 *Ibid*.

141 Civil Justice Council, *Improved Access to Justice—Funding Options and Proportionate Costs* (2005).

142 *Ibid* 53.

143 Such consultations occurred in London in September 2006 and thereafter by email.



In Hong Kong, reforms to reduce the cost and delay of litigation have also taken a broad, multifaceted approach. The 2004 Final Report of the Chief Justice's Working Party on Civil Procedure Reform made a number of recommendations in relation to costs, including:

- reducing the need for interlocutory applications, including by costs orders aimed at deterring unreasonable interlocutory conduct
- encouraging the parties to adopt a reasonable and cooperative attitude in relation to procedural issues
- giving directions without the necessity for a hearing
- making orders with automatic consequences for noncompliance
- summary assessments of costs at the conclusion of interlocutory applications
- taking into account the conduct of parties, in light of the overriding objective in relation to the economic conduct of the proceedings, in the exercise of discretion on costs
- changes to practices and procedures for the taxation of costs
- greater disclosure obligations and costs transparency.

A proposal for the introduction of a requirement that parties disclose to the court and to each other estimates of costs already incurred and likely to be incurred was not adopted as a recommendation.

4.2 ALLOCATION OF CASES TO DIFFERENT TRACKS

The Woolf reforms provided for the assignment of cases into tracks according to their nature and the value of the amount in issue. Parts 26.7 and 26.8 of the Civil Procedure Rules govern the rules for allocation and other matters which the court must take into account when assigning a case to one of the tracks.¹⁴⁴

The small-claims track is the normal track for any claim which has a financial value of not more than £5000 subject to restrictions in the rules or statute. Specific claims listed in the Civil Procedure Rules for the small-claims track are:

- any claim for personal injuries up to £5000 and where the financial value of damages is not more than £1000
- any claim by a tenant against a landlord for repairs or damages of not more than £1000.

The fast-track is the normal track for any claim:

- for which the small-claims track is not the normal track
- which has a financial value of not more than £15 000.

The court will only allocate one of these claims to the fast-track if it considers:

- the trial is likely to last for no longer than one day
- oral expert evidence at trial will be limited to
 - one expert per party in relation to any expert field
 - expert evidence in two expert fields.

The multi-track is the normal track for any claim for which the small-claims track or the fast-track is not the normal track.

Allocation of matters usually occurs after receipt of the allocation questionnaires being filed by defendants, often soon after defences are filed.¹⁴⁵

4.3 COST ESTIMATES AND BUDGETS

One of the initiatives introduced in England and Wales to control costs (apart from the introduction of 'fixed' costs) was the requirement of parties to file and exchange costs estimates.

The court may order a party to file and serve an estimate of costs at any stage in a proceeding.¹⁴⁶ In addition to this general discretion, all parties other than those within the small-claims track must file an estimate of costs when they file an allocation questionnaire or their pre-trial checklist.¹⁴⁷ Parties must provide an estimate of costs and disbursements already incurred and an estimate of costs and disbursements to be incurred which they intend to seek to recover from the other party if successful in the case.¹⁴⁸

This tool is designed to allow judges to assess the reasonableness and proportionality of the costs ultimately claimed, with parties required to provide explanations if the costs ultimately claimed by a party differ more than 20 per cent from their filed estimate. Compulsory estimates were expected to put downward pressure on costs from the perspective of all involved:

*It was hoped that downward pressure on costs would be exercised by both the potential payers, the losing party and the winner who might not recover all costs on a between the parties basis, and the case managing judge.*¹⁴⁹

In 2005 the Civil Justice Council reported that the use of estimates and costs capping have met with mixed success:

*They are not used consistently and there is much confusion about what each term means in practice and about the relationship between these various devices to control costs.*¹⁵⁰

In a survey of lawyers and the courts following implementation of the new Civil Procedure Rules, serious doubt was cast on the effectiveness of these cost estimation provisions. It revealed a general view of practitioners that no one really followed the rules on estimates at all and that 'judges universally stated that the cost estimation rules were not obeyed, but they seemed somewhat reticent in enforcing them unless, say at the end of a Fast Track trial on summary assessment, the costs claimed far exceeded the estimate'. Later it was noted, '[s]ome judges seemed to be adopting a somewhat laissez faire attitude ... and this appeared to reinforce the lackadaisical attitude of many practitioners'.¹⁵¹

In short, the study by Peysner and Seneviratne concluded that estimates were not acting as an effective control on costs. They noted, however, that as the Civil Procedure Rules did not implement all of the recommendations made by Lord Woolf, it was difficult to see 'how estimates on their own could ever constitute an effective brake on costs'.¹⁵²

In Australia similar procedures for filing and exchange of legal cost budgets and estimates exist in the Family Court. Rule 19.04(1) of the Family Court Rules¹⁵³ requires that immediately before each court event, the lawyer for a party must give the party a written notice of:

- (a) the party's actual costs, both paid and owing, up to and including the court event
- (b) the estimated future costs of the party up to and including each future court event.

These notices must be given to the court and each other party on the day of the court event.¹⁵⁴

Anecdotal reports indicate that in some registries the court does not strictly enforce compliance with these disclosure requirements. Some practitioners advise that at court events registrars will often enquire whether a party has been given a statement of actual and estimated costs but will rarely require production of a written notice. Exchange of this information in writing between parties also rarely occurs. In fact, when the requirement of exchange of costs information between parties was first introduced it caused consternation among family law practitioners, who complained that disclosure of such information was potentially a breach of client legal privilege and/or open to abuse by other parties.

In the recent procedural reforms of civil litigation in NSW, the courts were given explicit statutory powers to order directions regarding the disclosure of actual and estimated legal costs of a proceeding. Section 62(6) of the *Civil Procedure Act 2005* (NSW) provides that the court may by order at any time

direct a solicitor or barrister for a party to give to the party a memorandum stating:

- (a) *the estimated length of trial and the estimated costs and disbursements of the solicitor or barrister; and*
- (b) *the estimated costs that, if the party were unsuccessful at trial, would be payable by the party to any other party.*

Further to this provision, Order 42.32 provides that the court may order at any stage of proceedings that a party's legal representative serve on the party a notice that specifies:

- an estimate of the largest amount (inclusive of costs) for which judgment is likely to be given if the party is successful

144 There is also an extensive Practice Direction on Allocation and Re-allocation to supplement Part 26.

145 *Civil Procedure Rules 1998* (UK) r 26.05.

146 Her Majesty's Courts Services, *Practice Direction About Costs* (2007, 45th Update) [6.3]–[6.4].

147 *Ibid* [6.4].

148 *Ibid* [6.2].

149 Peysner and Seneviratne (2005) above n 4, 69.

150 Civil Justice Council (2005) above n 141, 21.

151 Peysner and Seneviratne (2005) above n 4, 70.

152 *Ibid* 71.

153 The predecessor to the current Rule 19 of the *Family Law Rules 2004* was Order 38, Div 1A of the *Family Law Rules 1984*, which imposed similar requirements. Family Court Practice Direction No 2 of 1991 (which has subsequently been repealed) imposed similar requirements, although it did not require disclosure of costs statements and estimates to the other parties.

154 Family Court Rules, r 19.04(3).



- an estimate of the largest amount (by way of costs) that the party may be ordered to pay if the party is unsuccessful
- estimates of the best and worst case outcomes the party is likely to achieve if successful or unsuccessful in the proceeding.

It has been noted that this order enshrines orders that 'have over the years been made from time to time by other judges and magistrates ... They are of course, a tool to facilitate settlement in face of intransigence'.¹⁵⁵

Unlike the English provisions regarding estimates, the NSW provisions anticipate orders to disclose both the actual costs it is estimated will be incurred (pursuant to the client and solicitor retainer), and the estimated party-party costs that the party could be ordered to pay if unsuccessful. The rules do not extend to the filing or service of the costs estimates with the court or between the parties. To this extent the NSW provisions elaborate and give weight to the statutory obligations for disclosure of costs estimates that already exist in the *Legal Profession Act 2004* (NSW) at sections 309(1)(c) and (f). Similar disclosure obligations for costs estimates exist in Victoria.¹⁵⁶

4.4 PROPOSED ESTABLISHMENT OF A COSTS COUNCIL

The UK's Civil Justice Council has observed that the successful operation and ongoing viability of the costs reforms requires the establishment of an overseeing body. Accordingly, the council has recommended the establishment of a body to be called the Costs Council.¹⁵⁷ This body's role would be to oversee the introduction, implementation and monitoring of reforms and in particular to establish and review annually both the fixed fee regimes and guideline rates for the different tracks provided for in the Civil Procedure Rules.

The Civil Justice Council recommended a member of the judiciary should chair the Costs Council and that membership should be drawn from all stakeholder organisations involved in the funding and payment of costs. The proposal to include all stakeholders in the setting, monitoring and reviewing of costs regimes is in keeping with the modus operandi of the Civil Justice Council itself. Its commitment to this wider involvement of all stakeholders is evidenced through various initiatives. For example, the council has established a dedicated 'costs' website through which stakeholders are encouraged to post questions and answers, and where relevant papers are available.¹⁵⁸

The Civil Justice Council's recommendations were debated by representatives of the legal profession and other stakeholders at a Costs Forum in March 2006. Concerns and queries regarding the proposed Costs Council discussed at the forum included the following:

- government concern that the Costs Council may infringe the government's policy making powers and that it must be clear this body would not be involved in 'implementing' reforms
- concern that the Costs Council should only ever recommend rates which ultimately always remain a judicial decision
- concern that the membership would include representatives of all interested parties
- the need for further work to identify the function and funding of the proposed Costs Council.

At the time of writing, a decision on whether the Costs Council is to be established has not been announced.

The report of the Irish Legal Costs Working Group has also recommended the establishment of a legal costs regulatory body which would take over the existing functions performed by the court rules committees and other bodies, as well as exercising new powers to set guidelines and limits in respect of costs. It is proposed that such a body would also have a public information role.¹⁵⁹

4.5 THE CONCEPT OF PROPORTIONALITY

The concept of proportionality and its application to the issue of legal costs has an immediate attraction in its simplicity. How can justice be associated with a matter in which the hearing of a claim for \$10 000 incurs legal fees of \$12 000 or greater? The research conducted for Lord Woolf's review revealed a number of matters in which the legal costs amounted to 100 per cent or more of the amount

in issue¹⁶⁰—hence Lord Woolf’s push to impose proportionality as a constraint on excessive legal costs and disproportionate use of court resources. The problem is easily identified but the solution is somewhat more elusive.

The exercise of applying proportionality to costs is not as simple, nor effective, as one would hope. It has also been questioned whether the notion of awarding costs proportionate to the value, complexity and importance of a matter is really a new solution:

*There is a question whether proportionality is really something original, likely to have a beneficial impact on procedural law. Or whether it is simply old wine in new bottles, and likely to disappoint us.*¹⁶¹

One problematic issue in relation to the test of proportionality arises out of the fact that often ‘there is no causal link between the amount of fees charged for legal services and the value of the claims’.¹⁶² The complexity of cases, and the demand this will place on both the quality and amount of legal services required, is not necessarily dictated by the amount in issue.¹⁶³ Moreover, the costs incurred will be directly related to the breadth of the claims asserted and the vigour with which the defendant chooses to resist the claims and the resources available.

In its review of the federal civil justice jurisdictions in Australia, the ALRC noted that the simple exercise of applying a test of proportionality to costs and the value of claims runs into difficulty when the case in question does not involve a quantifiable amount of money.¹⁶⁴

The need to factor into costs provisions some allowance for the ‘complexity’ or importance of the issues in dispute has been accepted in a number of jurisdictions. For example, in New Zealand and British Columbia, cases are assigned to the relevant costing tariffs, scales or bands based on the complexity of the issues involved. This practice was most recently endorsed by the Manitoba Law Reform Commission in its report on costs awards in litigation. The Manitoba commission made a specific recommendation that ‘proceedings be assigned to classes on the basis of their relative degree of difficulty and/or importance, rather than the amount of money in issue’.¹⁶⁵

A recent Ontario report on reforming the civil justice system used proportionality as one of four key principles and considerations for reform. The Hon. Coulter Osbourne, former Associate Chief Justice of Ontario, said proportionality ‘reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake’. The report goes on to recommend the inclusion of an overarching principle of proportionality in the Rules of Civil Procedure,

*that the court and the parties must deal with a case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding.*¹⁶⁶

Following from this principle, it was proposed that all cost orders should consider the time and cost *justified* in the circumstances of the case, not merely the time and cost expended.¹⁶⁷

This is not to suggest that Lord Woolf intended that the test of proportionality merely required a quantitative assessment of the economic relationship between the legal costs and the amount in issue. Rule 1.1(2)(c) of the Civil Procedure Rules requires that cases be dealt with in a manner proportionate to:

- (i) the amount of money involved
- (ii) the importance of the case
- (iii) the complexity of the issues
- (iv) the financial position of each party.

Moreover, it was noted that:

*The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.*¹⁶⁸

Lord Woolf has himself given guidance with respect to proportionality:

What is required is a two stage approach: there has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part

155 G Lindsay and J Hamilton (eds), *Thomson’s Guide to Uniform Civil Procedure in NSW* (2005).

156 *Legal Profession Act 2004* s 3.4.9(1) (c), (g). The latter subsection requires disclosure of an estimate of the ‘range of costs’ that may be ordered for recovery or payment in scenarios of the client being successful or unsuccessful in litigation.

157 Civil Justice Council (2005) above n 141.

158 Referred to as the ‘costs debate’: <www.costsdebate.civiljusticecouncil.gov.uk>.

159 See Legal Costs Working Group, *Report of the Legal Costs Working Group* (2005) [7.17].

160 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 80.

161 Scott (2004) above n 2, 7.

162 Submission CP 13 (Vicki Waye).

163 Submission CP 13 (Vicki Waye).

164 ALRC (2000) above n 122, [4.51]–[4.54].

165 Manitoba LRC (2005) above n 106, recommendation 5.

166 Coulter A. Osbourne QC, *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) 135.

167 *Ibid* 134.

168 Her Majesty’s Courts Services (2007) above n 146.



44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the costs for that item should be reasonable.¹⁶⁹

One difficulty with the concept of proportionality, at least in its application to the quantum of damages, arises out of the fact that law firms, as commercial businesses, are subject to inflationary pressures whereas damages, by and large, have not increased correspondingly.¹⁷⁰ As a result of various tort reform measures, the quantum of recoverable damages has been significantly reduced in recent years, while lawyers have experienced significant increases in the cost of overheads.

4.6 COSTS RECOVERY

4.6.1 Indemnity principle

Prior to the *Statute of Westminster* in 1275 there was no entitlement to recover costs. Since then in various common law jurisdictions a variety of mechanisms and formulas have been introduced to facilitate recovery by the winning party of some or all of the costs of the litigation from the losing party. Although the 'indemnity' or 'loser pays' principle has been adopted in many common law jurisdictions, including throughout Australia, most civil litigation before US courts is conducted on the basis that each side bears its own responsibility for the legal costs which it incurs. Moreover, unlike in Australia, fees are usually calculated as a percentage of the amount successfully recovered.

In 1995 the ALRC recommended retaining the principle that 'costs follow the event' or the costs indemnity rule. The ALRC recommendations were endorsed by the Law Reform Commission of Western Australia in 1999, which referred to the principle as that of 'the loser pays'.¹⁷¹

Both of these reports noted that there should be exceptions to the general application of this rule in:

- public interest cases
- cases where orders are made as sanctions or against third parties such as lawyers and
- situations where the financial circumstances of a party means the general rule would adversely impact the presentation of the case or chances of settlement.

Legal costs remain an issue of complexity and continuing controversy. Indeed, in the post-Woolf landscape in England there remain many who call for the end of the indemnity principle. The advent of the fixed costs regimes as part of the Civil Procedure Rules was heralded by many as being the first move towards this goal. However, there are only limited circumstances at present where legal costs are 'fixed', although this matter is under review by the Civil Justice Council. One commentator in the UK has recently observed:

Parliament may have executed a monarch, precipitated a civil war, dismantled an empire and taken on the unions; judges may have taken on the government that took on the unions etc. etc. but no one, it seems, is capable of dealing with this apparently indestructible beast. So unhappy 731st birthday Mr Indemnity Principle and may you have no more.¹⁷²

Historically, the operation of the indemnity principle ceased to achieve its stated intention of indemnification because of the increasing disparity between costs actually incurred and those costs recovered by the successful litigant. Thus, successful plaintiffs were often required to meet the shortfall out of the fruits of the litigation or out of their pockets. Successful parties would often feel justifiably aggrieved. This still remains the position in Australia in most jurisdictions, including Victoria. In many instances, a successful party can expect to recover on a party-party basis only about half of the costs incurred by that party.

In England and Wales, with the introduction of conditional fees and success fees in civil litigation, the government introduced 'full recoverability' of legal fees and expenses concurrently with its curtailment of legal aid funding for civil litigation. Thus, not only are the basic expenses and legal fees (usually calculated on hourly rates) recoverable from the losing party, the losing party is also required to foot the bill for the 'success fee' component. The understandable concern on the part of losing parties has been exacerbated by the fact that success fees are permitted to be up to 100 per cent of the underlying base amount of the fee. Moreover, as in most Australian jurisdictions, the quantum of the base fee is not itself regulated or restricted, at least insofar as the contractual relationship between

solicitor and client is concerned. To make matters worse for the losing party, any premium paid or payable by the plaintiff for 'after the event insurance' (in respect of legal costs) is also payable by the losing party.

The primary regulatory focus in relation to legal fees, as in Australia, is on disclosure and compliance, with quite onerous obligations on lawyers when entering into retainer agreements with clients. Alleged noncompliance with these onerous requirements has led to a considerable amount of 'satellite litigation' whereby unsuccessful defendants (or, more usually, their insurers) have sought to avoid the impact of adverse costs orders. This 'costs war' has been conducted because technical or other breaches of disclosure and other obligations may give rise to an unenforceable fee agreement as between solicitor and client. In this event, the losing party has no obligation to indemnify any amount, let alone the full amount.¹⁷³ Recent judicial rulings and changes in the law have sought to bring an end to this litigious war.

In 2005 the Manitoba Law Reform Commission published its report *Costs Awards in Civil Litigation*. The report commences by examining the rationale for cost awards and listing the broad and often competing goals that need to be balanced to the greatest extent possible:

- Cost rules should provide successful litigants with at least partial indemnification.
- Costs rules should also deter frivolous actions and defences.
- Costs rules should be easy to understand and simple to apply, providing clear guidance to courts and litigants and predictability at each stage of litigation.
- Cost rules should provide financial incentives to settle at every stage of the litigation.
- Cost rules should not inappropriately impede access to the courts and should facilitate access to justice.

The Manitoba commission recommended the partial indemnification of successful litigants at a level of approximately 60 per cent of reasonable fees in a typical case.

It further recommended that six classes of tariffs be designed and that cases be assigned to those classes on the basis of their relative degree of difficulty and/or importance, rather than the amount of money in issue.

The Manitoba commission recommended that parties should indicate the appropriate class for the matter at the time they file their first pleading, and failing consent the judge should assign the case at the first directions hearing.¹⁷⁴

4.6.2 Party-party costs

In 2000 the High Court of New Zealand radically altered the manner in which costs are assessed and recovered on a party-party basis. In 2004, the rules of the District Court in New Zealand were amended to effectively bring that court's costs regime into line with that of the High Court.

The impetus for the change was universal agreement that the existing scale was outmoded and ineffective. Judges had apparently been using their discretionary powers to simply award 60–70 per cent of actual reasonable costs.¹⁷⁵

After broad consultation, a scheme was developed and implemented which categorises cases according to complexity and then assigns them to one of three bands according to time requirements for the steps for that case. The costs are then calculated by multiplying the relevant category hourly rate by the time for each step as set out in the timing band.

As Justice Venning of the New Zealand High Court has noted:

*The costs award is tied to the time allocated to the steps in the proceeding and the skill required to conduct the proceeding. It is unaffected by whether the claim is for \$200 000 or \$2 000 000 or whether the parties took substantially longer than six days to prepare for hearing.*¹⁷⁶

It should be noted, however, that in the 2004 review of the civil justice system in New Zealand, the Law Commission reported that in the submissions it received, those 'commenting on cost recovery almost universally felt that cost recovery bears little relationship to actual fees charged'.¹⁷⁷

169 *Home Office v Lownds* [2002] EWCA Civ 365 [31].

170 One of the by-products of recent tort reforms in Australia has been the introduction of caps on general damages (albeit with provision for some inflationary adjustment) and other restrictions on the quantum of recoverable general and special damages.

171 LRCWA (1999) above n 109, [16.22]; ALRC, *Cost Shifting—Who Pays for Litigation*, Report No 75 (1995).

172 Underwood (2006) above n 138, xv–xvi.

173 In *Hollins v Russell* [2003] EWCA Civ 718 the Court of Appeal gave guidance on technical challenges to conditional fee agreements with a view to curtailing the highly technical arguments based on relatively minor infractions of the requirements contained in the primary and secondary legislation.

174 Manitoba LRC (2005) above n 106, 36, picking up on a recommendation made in P Williams et al, *Report of The Review Scales of Legal Professional Fees in Federal Jurisdictions*, Commonwealth Attorney-General's Department (1998), 3.2.

175 Justice G Venning, 'Alternatives to Activity Based Costing: The New Zealand Approach' (Paper presented at the 24th Australian Institute of Judicial Administration Annual Conference, Adelaide, 16 September 2006) 2.

176 *Ibid* 8.

177 NZ Law Commission (2004) above n 111, 40, n 57.



4.7 FIXED COSTS

The 'fixed recoverable costs scheme' under the UK Civil Procedure Rules applies only to disputes:

- arising from road traffic accidents (on or after 6 October 2003)
- where the total value of the agreed damages does not exceed £10 000
- where the disputes are settled *before* proceedings are issued, and
- where the case would not have been in the small-claims track if proceedings had been issued.¹⁷⁸

Costs are not recoverable in small claims, which encompass claims up to £1000 for personal injury and £5000 otherwise.

The costs payable under the fixed costs regime are *fixed* rather than *capped* at the prescribed amount. There is no need to justify the amount of work done or to specify who carried it out. As Underwood notes, this 'opens up the possibility of fixed cost work being offshored to cheaper jurisdictions'.¹⁷⁹ The court has a discretion to award costs in an amount greater than the 'fixed recoverable costs' in 'exceptional circumstances'.¹⁸⁰

Where the work has been done pursuant to a conditional fee agreement, a success fee is recoverable on top of the fixed costs.¹⁸¹

Importantly, given the historical resistance to percentage-based fees, the fixed costs regime explicitly adopts as part of its methodology a component of the fee calculated as a percentage of the amount of damages recovered. Moreover, as Justice Simon¹⁸² noted in *Nizami v Butt, Kamaluden v Butt* changes made to the Rules of Court, and in particular the provisions of sections II to V of the Civil Procedure Rules Part 45 'were introduced following "industry wide" discussions under the aegis of the Civil Justice Council'.¹⁸³

In *Nizami* Justice Simon commented on the new fixed costs rules:

*It seems to me clear that the intention underlying CPR 45.7-14 was to provide an agreed scheme of recovery which was certain and easily calculated. This was done by providing fixed levels of remuneration which might over-reward in some cases and under-reward in others, but which were regarded as fair when taken as a whole.*¹⁸⁴

The Civil Justice Council has proposed the extension of the fixed costs regime to other areas of litigation. In its 2005 report, the council recommended that the predictable costs scheme should be extended to all personal injury cases in what is referred to as the fast-track, and in turn that the cap for cases in the fast-track be increased to £25 000.

4.7.1 Transport accident protocols

Fixed fees are not totally foreign to the Australian experience generally or to Victoria in particular. In accordance with its Charter and commitment to the Victorian Government's model litigant guidelines, in October 2004 the TAC met with the Law Institute of Victoria and Australian Lawyers Alliance¹⁸⁵ with a view to reaching agreement on various matters, including costs. Three protocols were adopted which deal with no-fault resolutions, impairment benefit claims and serious injury and common law claims. The protocols govern the conduct of both the TAC and lawyers for claimants with respect to claims or matters arising under the Transport Accident Act after 1 April 2005.

The Victorian protocols reflect similar procedures applicable in Queensland under the *Motor Accident Insurance Act 1994*.

The protocols outline measures to avoid procedural conduct that increases the legal costs incurred, including:

- mandating 'early review of claims'
- adherence to procedural steps such as early disclosure of relevant information and documents and minimum requirements for exchange of medical evidence
- strict timetables for delivery of information
- strict timetables for the response by the TAC to applications.

In turn, the protocols provide for payment of fixed legal costs in particular circumstances. Importantly, the protocols allow for costs to be paid on resolution of a claim, even if proceedings were not instituted.

The protocols incorporate an agreed regime for payment of legal costs by the TAC in certain circumstances. For example, when a claim for a serious injury certificate is made and prior to proceedings being issued the TAC issues a certificate consenting to the bringing of common law proceedings but in circumstances where the TAC is not solely on risk, then fixed costs are payable by the TAC within 14 days of such certificate.

In some circumstances the protocols set a cap or limit on costs. For example, where a common law action is resolved in circumstances where the TAC is satisfied the claimant's injury is a serious injury and has issued a certificate consenting to common law proceedings, the TAC will pay legal costs limited to a set amount exclusive of disbursements.

The protocols provide for any party's legal costs not covered by their provisions to be determined by reference to the appropriate court scale. The table of agreed costs annexed to the protocols also provides for certain categories of uplift amounts, for example when court approval is required or when the TAC did not admit liability prior to the case conference.

The fixed costs mandated by the protocols are indexed according to the Consumer Price Index.

4.7.2 Fixed costs for early resolution in the WorkCover scheme

In addition to the TAC protocols, a fixed-costs regime for pre-action conduct regarding certain WorkCover claims has been established by statute under the *Accident Compensation Act 1985*.

On 12 October 2006 a new WorkCover Legal Costs Order was gazetted. This order covers recovery of fixed costs for the early resolution of serious injury proceedings (section 134AB proceedings) under the *Accident Compensation Act 1985*. This costs order was the first revision of the fixed costs for a number of years.

The costs order provides for higher fixed costs if the worker provides a signed consent form and authority to release all related health services/medical or treating documents. The costs order attaches the prescribed form, which authorises any doctor, ambulance service, hospital or any other health service provider who has provided treatment or services to the worker in connection with the injury to give access to all information and documents in relation to such injury or condition to the WorkCover authority or the self-insurer or their legal representatives.

In recent consultations with participants in the TAC and WorkCover schemes, considerable differences of views have been voiced regarding the adequacy and fairness of the fixed costs. The matters raised include:

- the inherent problem of how to determine reasonable fixed costs where cases vary in complexity and resource requirements
- the contention that the fixed costs are set in an arbitrary manner without proper consultation
- the suggestion that the fixed costs simply do not reflect fair amounts for work required to address the steps in the protocols or pre-action scheme
- the absence of an independent umpire or mechanism for independent review to break the stalemate over costs disputes
- the argument that review of the level of the WorkCover fixed costs is not happening often enough.

It should be noted that in fixing legal costs for particular circumstances neither the WorkCover Legal Costs Order or the TAC protocols regulate the costs charged on a solicitor and client basis.

In review of the costs regime in the serious injury protocol one commentator has noted that this approach

*means that there are going to be winners and losers. In some cases the amount allowed will be more than might otherwise have been allowed on scale. In other cases, especially cases with complex liability and/or quantum issues, the amount will be significantly less than scale costs. Consequently, clients with difficult cases will end up paying more, after the party-party offset, than is currently the case.*¹⁸⁶

178 *Civil Procedure Rules 1998* (UK) r 45.7(2).

179 Underwood (2006) above n 138, [2.1].

180 *Civil Procedure Rules 1998* (UK) r 45.12.

181 The success fee is now fixed at 12.5 per cent of the base fee. The base fee includes both a core fee (£800) plus a percentage amount depending on the amount of the claim. This percentage is 20 per cent of the amount of damages up to £5000 and 15 per cent of the amount of damages between £5000 and £10 000. There is an additional 12.5 per cent payable if the claimant lives in a specified geographical region (the 'golden ring') and instructs a law firm practising in that area. Thus, where this is applicable the fee will be 25 per cent above the normal base costs.

182 Sitting with Master [now Costs Judge] Peter Hurst and Mr Jason Rowley as assessors.

183 [2006] EWHC (QB) 159; [2006] 2 All ER 140, [22].

184 [2006] EWHC (QB) 159; [2006] 2 All ER 140, [23].

185 Formerly the Australian Plaintiff Lawyers Association.

186 Unpublished paper by Peter Burt, provided to the Victorian Law Reform Commission.



4.7.3 Widening the application of fixed costs?

Almost a decade ago, the notion of fixing and/or capping costs in the federal civil jurisdiction in Australia was canvassed in a report prepared for the Federal Attorney-General's Department.¹⁸⁷ The report found that the current scales were badly structured and proposed alternative scales to govern both solicitor–client and party–party costs in a number of federal jurisdictions.

Criticisms of costs scales included the contentions that the scales:

- created uncertainty
- were a disincentive to settlement
- created an incentive for wasteful expenditure, or 'padding' and
- created inappropriate biases towards types of inputs such as use of expert witnesses.

Accordingly, the report advocated scales that effectively fixed the costs for a matter at the outset, with allowances being made for the stage of the proceedings when the matter is disposed of and the complexity of the matter. A later Commonwealth Attorney-General's Department strategy paper supported a recommendation to enable a court to specify the maximum amount that may be recovered pursuant to an order for costs.¹⁸⁸

Proponents of fixed costs regimes emphasise the need for predictability and proportionality and the desirability of getting away from open-ended billing arrangements which may be conducive to cost escalation and which reward inefficiency and overservicing.

Opponents of fixed costs point to the complexities and uncertainties of litigation, and the desirability of ensuring that legal work is not rendered uneconomic as a result of arbitrary and inflexible caps on the quantum of chargeable or recoverable fees. Moreover, they say, commercially unreasonable restrictions may result in a lack of access to justice if lawyers are not prepared to do the work, or a deterioration in the quality of legal services in the event that the work is required to be delegated to junior or paralegal staff.

Nevertheless, some commentators have observed that 'notwithstanding difficulties or complexities, it seems to us that a fertile line of inquiry is to explore systems of cost capping and fixed prices'.¹⁸⁹

In the debate about 'fixed' costs it is important to focus on *both* the chargeable costs and the recoverable costs, and the costs chargeable by *both* parties to the litigation. Capping or fixing one component of the costs without taking account of the other may create additional problems. For example, merely capping recoverable costs may simply increase the disparity between chargeable costs and recoverable costs. This may lead to injustice for the winning party and an erosion of the indemnity principle with consequential benefits for the losing party. Capping chargeable costs for one party without capping them for the other party may give rise to commercial and forensic advantages to the party whose costs are uncapped. As Professor Scott has commented:

*If wealthier parties are allowed to cause delay or use non standard procedures, their position might, if anything, be strengthened by fixed costs, because they could put their opponents to extra costs that they would in future be unable to recover, even if they eventually won the case.*¹⁹⁰

Capping chargeable costs for either party may preclude the provision of legal services or have an adverse impact on the quantity or quality of the services provided. Moreover, limiting the ability of lawyers to charge for their services may give rise to other problems, and runs counter to recent deregulatory moves which are said to be in the interests of efficiency and competition in the marketplace.

These difficulties and tensions in relation to capped or fixed costs have been evident in the new costs provisions in NSW, which fix maximum costs for personal injury claims that recover damages up to \$100 000.¹⁹¹ The provisions set maximum costs that may be recovered by either plaintiffs or defendants in such cases in the following manner:

- for plaintiffs maximum costs are fixed at 20 per cent of the amount recovered or \$10 000, whichever is greater¹⁹²
- for defendants maximum costs are fixed at 20 per cent of the amount sought to be recovered by the plaintiff or \$10 000, whichever is greater.¹⁹³

The provisions also purport to fix or cap the amount that a law practice is entitled to be paid for legal services in these cases at the same maximum levels.¹⁹⁴ However, this is subject to section 339 of the Act, which states that the maximum costs do not apply to those law practices which have a complying costs agreement with their client. In effect, the Act fixes the recoverable costs so that a successful party can only recover between \$10 000 and \$20 000. The actual legal costs or 'gap' in costs for such matters are not compulsorily regulated, as law firms may contract out of any cap on fees for legal services provided.

The negative impact of these maximum costs provisions on successful plaintiffs has been criticised.¹⁹⁵ The authors of a NSW report have argued that the section does not have any effect on the overall cost of running matters but simply shifts the cost burden from the defendant to plaintiff, and have described the legislation as creating a 'continuing and gross injustice. The result is that many successful plaintiffs fail to get adequate compensation or compensation at all and many others are dissuaded from commencing meritorious cases'.¹⁹⁶

4.8 BILLING

4.8.1 Approaches to hourly billing

In its recent report, the British Columbia Justice Review Task Force noted but did not proffer any solutions to problems arising out of hourly billing:¹⁹⁷

*For several decades, the vast majority of lawyers have charged for their services based on an hourly billing model. This method, however, has been increasingly criticized as a primary cause of escalating legal costs, decreasing practitioner efficiency, reduced career satisfaction, unhealthy work-life balance, loss of respect for the legal system, and decreased access to justice. Hourly billing was initially adopted as a means of providing clients with cost certainty while facilitating the management of law office budgets. However, the problems with that approach appear to be overtaking its benefits. Although the current predominance of the hourly billing system is recognized as a problem, a solution remains elusive. Alternative billing schemes exist, but it is unclear whether these would in fact address the root problems that plague the current model. Lawyers are reluctant to adopt untested systems that they fear will result in less flexibility, lower profits, and more complicated management. We suggest that the issue be studied further.*¹⁹⁸

In Germany, the general rule in civil procedure is that the losing party bears the costs (court fees, lawyers' fees, witness and expert expenses) of the opposing party.

The lawyers' fees are regulated by the recovery scale (the BRAGO scale). Lawyers normally charge in accordance with the BRAGO scale although, with the agreement of the client, they can charge lower or higher than the scale. Higher costs cannot be recovered from the losing party. It is only recently that lawyers have been allowed to charge lower than BRAGO. This means that it is reasonably clear to the opposing parties what their liabilities might be if they lose the case.

Like court fees, lawyers' fees are set in units with a value that is determined by the value of the claim. The percentage value of the lawyers' fee unit compared to the value of the claim increases the more the value of the claim decreases. The number of units of lawyers' fees payable is set for different stages of the litigation. For example, one fee unit is payable at the commencement of the proceeding; a fee unit is earned when there is a hearing; another fee unit is payable if there is a settlement.

4.8.2 NSW legal fees review

In February 2004 the NSW Premier commissioned an inquiry into the legal costs system, the calculation of prices and the methods in which bills are presented to clients. In addition, the inquiry encompassed a review of the mechanisms through which clients could object to fees that were considered unfair or negotiate other arrangements.

The 2005 report documents the failings and resistance of the legal services industry to address concerns about time billing.¹⁹⁹ However, the panel's report suggests that the market (albeit sophisticated corporate clients and commercial litigation funders) may be mounting a 'push back' which demands change from legal firms.

187 P Williams et al, *Report of the Review of Scales of Legal Professional Fees in Federal Jurisdictions*, Commonwealth Attorney-General's Department (1998).

188 Australian Government, Attorney-General's Department, *Federal Civil Justice System Strategy Paper* (December 2003), supporting the ALRC report, 75.

189 P Sallmann and R Wright, *Going to Court: A Discussion Paper on Civil Justice in Victoria* (2000) 167.

190 Scott (2004) above n 2, 16, referring to Middleton (1997) above n 128, [2.42].

191 *Legal Profession Act 2004* (NSW) s 338.

192 *Legal Profession Act 2004* (NSW) s 338(1)(a).

193 *Legal Profession Act 2004* (NSW) s 338(1)(b).

194 *Legal Profession Act 2004* (NSW) s 338(4)(a).

195 John Rowe and Michelle Castle, *Case Studies on the Effect of Costs Restrictions under the Legal Profession Act 2004* (NSW) (June 2006).

196 *Ibid* 2.

197 British Columbia Justice Review Task Force, *Effective and Affordable Civil Justice* (2006).

198 *Ibid* 116–17.

199 Legal Fees Review Panel, *Report: Legal Costs in New South Wales* (2005).



One of the alternatives to time billing mooted in the panel's report is the greater use of costs budgets. This has considerable support from IMF, the litigation funding organisation which made submissions regarding its successful use of budgets in contracting with lawyers for the conduct of commercially funded litigation.

The panel's various proposals were said to be based on three 'foundational principles':

- the short to medium term goal of improving communication and transparency of information between lawyers and clients
- the medium to longer term goal of encouraging 'cultural change' in the legal profession, reducing the dominance of time billing and moving towards more actively negotiated and more directly value based remuneration and
- the medium to longer term goal of providing information to the market which will help to reduce the 'information asymmetries' which currently distort it.²⁰⁰

Many of the report's 37 recommendations were not adopted by the legal profession representatives on the panel. The recommendations encompass:

- greater disclosure obligations (1–4) with consequences on recoverable fees for failing to comply (12, 15)
- a proposed prohibition on profits on disbursements and separate charges for disbursements in the nature of overheads (5–6)
- proposals for obtaining estimates of experts' fees and client consent (7)
- the establishment of a working group to develop guidelines in respect of barristers' cancellation fees (8)
- a further review of class actions with a view to possible further reforms in relation to disclosure and cost arrangements (9)
- a proposed requirement that, other than in exceptional circumstances or with express consent of the client, solicitors not be entitled to be paid solicitor–client costs until party–party costs are resolved (10);
- provision for costs assessors to refer matters to the Legal Services Commissioner where there has been a failure to comply with legislative disclosure requirements (14)
- a statutorily regulated budgeting process as an alternative to the compulsory disclosure regime and various provisions relating to budgets (16–29)
- a requirement to render final accounts no later than six months after completion of the matter and a prohibition on interest on accounts rendered later than this time frame (30–31) including a requirement that bills rendered express the amount as a percentage of the estimate (32)
- entitlement to interest, at the rate allowed by the Supreme Court, on professional fees and disbursements carried throughout the course of the matter (36)
- the establishment of a research unit to examine and publicly discuss issues of law firm economics and legal practice management and their economic impact on the overall justice systems (37).

4.8.3 Conditional fees

In September 2005 the Conditional Fees Subcommittee of the Law Reform Commission of Hong Kong issued a consultation paper on conditional fees.²⁰¹ In addition to proposing the introduction of conditional fees the report proposed the setting up of a privately run contingency legal aid fund.

4.9 COSTS AND THE ADVERSARIAL SYSTEM

One of the major contributors to the cost of legal services in civil litigation is the adversarial system. Often each of a number of parties has engaged its own team of lawyers, experts and witnesses in support of its case. This inevitably results in a multitude of identical or similar tasks being done more than once by different personnel. The 'multiple' processing of the same information and documents inevitably escalates costs. The calling of multiple experts for the same subject matter substantially increases costs. To some extent this is an inevitable by-product of an adversarial process whereby each

party is partisan and seeks to advance its self-interest. To a large extent this is not only facilitated but is necessitated by traditional civil procedural rules and the litigation culture which has developed. There are, however, many signs of change, as recent developments in England and Ireland show.

4.9.1 Claimants dealing directly with insurers to reduce costs

In England a number of insurers, concerned at the costs of civil litigation (particularly given the introduction of 'full recoverability' of legal costs, including success fees and after-the-event insurance premiums), have recently advocated that claimants should deal with them directly rather than engage their own lawyers and thus precipitate an escalation in legal costs on both sides.

Insurers were concerned that the present compensation system takes too long to resolve claims, delivers insufficient rehabilitation and involves 'disproportionate' and often hidden handling costs. They proposed, inter alia:

- a new process for resolving claims before they reach courts, including fixed timetables, independent arbitration and free legal advice above the small-claims limit
- extended use of fixed fee regimes
- higher financial limits that determine how claims are handled through the courts
- new financial penalties to deter exaggerated claims or unreasonable actions by insurers.²⁰²

Directed at claims under £25 000, which were said to constitute more than 90 per cent of all personal injury claims, the new scheme proposed that the insurer would be able to offer an apology, accept liability and make an offer of compensation *before* the claimant's representatives incurred costs. In part this proposal arose out of concern at the increase in transaction costs in compensation litigation. Claimants' legal costs and disbursements were said to have increased by 40 per cent between 2000 and 2002.²⁰³ It was contended that for every £1 insurers paid out in personal injury compensation, nearly 40 pence went to claimants' representatives. According to the report:

*The personal injury claims process is now an industry in its own right, generating an income out of all proportion to the value it adds. A claimant seeking redress has become a commodity whose case is bought and sold by the different claimant service providers. Each service provider pays large referral fees for the right to provide services to the claimant because the costs flowing around the system enable each provider to make money on top of any referral fees paid. The current system, based on market principles but without an effective market of informed consumers shopping around to get the best price, is allowing claimants' representatives to set their prices and commission reports without sufficient checks and balances.*²⁰⁴

The report was particularly critical of the Woolf civil procedure reforms and the pre-action protocols:

*This front-loading of costs is often disproportionate and unnecessary. For example, in many cases, insurers would accept liability without requiring all of the research undertaken by claimants' representatives.*²⁰⁵

Norwich Union, one of the UK's largest insurers, also proposed a new system for dealing with claims:²⁰⁶

*We want to find a way of settling straightforward claims direct with the claimant. We recognise this requires implicit trust from the public that they will get a fair deal, and that as an insurer, we might be charged with self interest. We accept, therefore, that we must be better and quicker at dealing with claims, and where we are not, are financially punished for it.*²⁰⁷

4.9.2 Independent body and initial assessment of claims

In Ireland, concern about the costs of litigation arising out of adversarial civil proceedings in personal injury cases has led to the establishment of an independent board, the Personal Injuries Assistance Board, to conduct the initial assessment of such claims.²⁰⁸ Interestingly, the board operates without public funding other than the initial grant that supported its establishment in 2004. It is funded by levying fees on respondents who pay the compensation. This funding mechanism is not unlike industry-based dispute resolution schemes in Australia.²⁰⁹

200 Ibid 62.

201 Law Reform Commission of Hong Kong, *Consultation Paper: Conditional Fees* (2005).

202 Association of British Insurers, *Delivering a Fair and Efficient Compensation System* (2005).

203 Based on employers' liability claims of less than £15 000: P Fenn and N Rickman, *Costs of Low Value Employers' Liability Claims 1997–2002* (2003) Department for Constitutional Affairs <www.dca.gov.uk/majrep/claims/elclaims.htm> at 7 February 2007.

204 Association of British Insurers (2005) above n 202, 4.

205 Ibid 6.

206 Norwich Union Insurance, *A Modern Compensation System: Moving from Concept to Reality* (2004).

207 Ibid 1.

208 See *Personal Injuries Assessment Board Act 2003* (Ireland).

209 ADR schemes have been established in some industries to manage disputes more efficiently. For example, the Telecommunications Industry Ombudsman (TIO) is a free and independent ADR scheme for small business and residential consumers in Australia who have a complaint about their telephone or internet service. The TIO is an industry-funded scheme, deriving its income solely from members (telecommunications companies) who are charged fees for complaint resolution services provided by the TIO.



Initially the Personal Injuries Assistance Board adopted a simple solution to the problem of legal costs: it refused to deal with lawyers for claimants and made no payment of legal costs for claims resolved. Following a successful legal challenge,²¹⁰ the board is now required to deal with lawyers for claimants. At present approximately 90 per cent of claimants are legally represented, even though legal costs are not payable by the board if it accepts and pays a claim. Thus the claimant is required to meet legal costs out of the compensation amount.

The board was established to significantly reduce the cost of delivering compensation to claimants, without altering the level of awards, and to implement a less adversarial and faster process for resolving personal injury claims. This was intended to result in a reduction in insurance premiums and was introduced as part of the government's Insurance Reform Program.

The board does not deal with cases which involve legal issues or where liability is disputed.

Proponents of the reform have suggested that the new system has accelerated the process and reduced costs. The board has stated that:

- awards are made within nine months compared with the time frame for litigation which was said to be three to four years
- under the old litigation system 'delivery costs', on top of the amount of awards, including legal and medical expenses, were said to account for around 46 per cent of the amounts paid in compensation
- the new system is three times faster and four times cheaper than the old litigation based process, while still providing awards of similar value
- claims are assessed within the statutory timeframes, with 93 per cent assessed within nine months and the remaining claims within 15 months.

The board has projected it will receive 25 000 cases per annum of which 40 per cent will be assessed, 40 per cent will settle during the process and 20 per cent will proceed to litigation. The cost of processing cases is said to be 7 per cent of the costs of the average claim.

The impact on court statistics is marked. Whereas 15 000 writs were issued in the High Court in 2004 there were only 750 in 2005. In the Circuit Court there were some 20 000 civil claims instituted in 2004 and approximately 3000 in 2005.²¹¹

Critics of the system have suggested that delays have led to large numbers of claimants abandoning the system and returning to the courts. There are claims that the board is making awards in fewer than one in eight claims and has assessed just 4000 claims out of a total of 36 000 lodged since 2004.²¹² It was reported that a large proportion of cases are not being dealt with by the board because insurance companies circumvent assessment by making undisclosed settlement offers and that up to 25 per cent of claims still end up in the courts.²¹³

According to a columnist with the *Sunday Times*:

*That posh whining sound you can hear is a cry of well heeled pain. For Ireland's lawyers, the suffering and emotional distress is concentrated in the most sensitive part of a legal practitioner's body: the wallet.*²¹⁴

As with the adversarial system, the truth may lie somewhere between the extreme positions advocated by the parties. A recent cost-benefit analysis of its operations concluded that the board has reduced the costs of processing personal injury cases considerably, without any diminution in the size of the awards to injured claimants and possibly with some higher awards. Assessments were said to be delivered, on average, 75 per cent faster than the law courts.²¹⁵

4.10 COSTS AND THE CONDUCT OF CIVIL LITIGATION

In England and Wales, and in other jurisdictions including Australia, civil procedural rules and statutory provisions have been amended by the incorporation of overriding objectives designed to facilitate more proactive judicial management of litigation and to reduce costs. Overriding objectives and obligations are discussed in Chapter 3 of this report.

It remains to be seen whether the introduction of such overriding objectives, per se, will give rise to more proactive judicial management of cases or a reduction in costs.

As noted in Chapter 3, in some Australian jurisdictions statutory provisions have recently been introduced to prevent unmeritorious claims or defences and/or to subject lawyers and others to personal liability for costs or other sanctions for inappropriate conduct in the commencement, defence or conduct of civil proceedings.

In response to perceived problems in the civil justice system, the roles and responsibilities of participants in the civil litigation process are being statutorily redefined, albeit in an ad hoc fashion. Some examples are provided in Chapter 3.

All of these disparate developments have one thing in common: they seek to improve the primary standard of conduct of participants in the civil justice process and impose sanctions and penalties for nonconforming behaviour. Costs sanctions are a major part of the armoury sought to be deployed with a view to reducing the incidence of unmeritorious and costly claims and defences.

Such provisions in part seek to legislatively override lawyers' perceived obligations or duties to clients. Lawyers have always been said to have a duty to the court and to the other side, in addition to their duty to their client. In reality, many if not most lawyers have traditionally perceived their duty to their client to be paramount. This has significant implications for the adversarial conduct of litigation and important cost consequences. Where the client is a paragon of virtue a lawyer's duty to the client may not present a potential conflict with other duties. However, like many other members of the community, clients are often motivated by self-interest and are seldom paragons of virtue.

5. COSTS IN 'PUBLIC INTEREST' LITIGATION

*There is little point in opening the doors to the courts if litigants cannot afford to come in.*²¹⁶

5.1 THE CASE FOR PUBLIC INTEREST COSTS ORDERS

Cases brought in the 'public interest' play an important role in determining legal issues for the benefit of the community. As the Australian Law Reform Commission has noted, public interest litigation assists the development of the law, providing 'greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law'.²¹⁷ Public interest litigation can also provide an impetus for reform and structural change and encourage public sector and corporate accountability.

It is also clear that the threat of an adverse costs order, which operates as a deterrent to many forms of litigation, has a particular impact on public interest litigation. It has been noted that:

*As the cost of litigation soars, access to justice suffers. This axiom particularly holds true in the case of public interest litigants. While such litigants typically do not stand to gain financially from pursuing court action, they risk significant economic consequences if their suits are ultimately unsuccessful and they are ordered to pay the victor's legal costs. This is problematic because our civil justice system presumes that plaintiffs are motivated by rational self-interest, typically financial, in making decisions respecting the initiation and conduct of litigation.*²¹⁸

Particular rules for awarding costs in public interest litigation have been under consideration in Australia for over a decade.

The ALRC considered the question of costs in proceedings with a 'public interest' element. Their report, *Cost Shifting—Who Pays for Litigation in Australia* noted that although the courts had the power to depart from the usual rule that costs follow the event, its exercise was uncommon.²¹⁹

The ALRC concluded that 'the significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules',²²⁰ and recommended that courts be permitted to make specific public interest costs orders.²²¹

The commission has taken into account this and other developments in considering the introduction of special costs rules for public interest litigation.

210 *O'Brien v Personal Injuries Assessment Board* [2005] IEHC 100.

211 Personal Injuries Assessment Board, [Ireland], *Annual Report 2005* (2006) 6.

212 *The Irish Independent* investigation.

213 Neil Rose, 'International Dimension' (2006) 46 *Litigation Funding* 6.

214 *Ibid.*

215 Dr Vincent Hogan, *A Cost-Benefit Analysis of the Personal Injuries Assessment Board* (2006) <www.piab.ie/pdf/CostBenefitAnalysis.pdf> at 7 February 2007.

216 Justice Toohey, 'Environmental Law—Its Place in the System' in R Fowler (ed), *Proceedings of the International Conference on Environmental Law* (1989).

217 ALRC (1995) above n 171, [13.6].

218 Chris Tollefson, Darlene Gilliland and Jerry DeMarco, 'Towards a Costs Jurisprudence in Public Interest Litigation', (2004) 83 *Canadian Bar Review* 474, 475.

219 ALRC (1995) above n 171, [13.3]–[13.4].

220 *Ibid* [13.11].

221 *Ibid* Recommendation 37.



5.1.1 The ALRC's proposed 'public interest costs order'

The ALRC proposed that a court or tribunal ought to be empowered to make a 'public interest costs order' (PICO) in respect of proceedings that will:

- determine, enforce or clarify an important right or obligation affecting a significant sector of the community
- involve the resolution of an important question of law or
- 'otherwise have the character of public interest or test case proceedings'.²²²

The ALRC determined that personal interests on the part of one or more parties ought not to preclude a court making a PICO, although the extent and nature of parties' commercial interests were matters to be taken into account in determining whether or not to do so.²²³ The ALRC's criteria were designed to 'reflect those already developed by the courts' and 'preserve the ability of a court or tribunal to determine whether litigation is in the public interest in light of all the circumstances of a the case'.²²⁴ The ALRC rejected the notion that their formalisation would lead to a 'flood of litigation', noting that case management costs orders would remain appropriate in respect of unmeritorious claims.²²⁵

The ALRC considered that a court should retain a broad discretion as to the terms of a PICO, and proposed that such an order could leave the parties to bear their own costs, eliminate or cap the applicant's liability for the other party's costs or render a third party liable for such costs.²²⁶ Relevant factors would include the comparative resources of the parties and their ability to present their cases properly, the probable cost of the proceedings and the extent of the parties' private or commercial interests therein.²²⁷ The ultimate purpose of a PICO should be 'to assist the litigation to proceed';²²⁸ thus, it 'should reflect, as far as is possible, the extent to which a party could satisfy an adverse costs order without such an order affecting the party's ability to pursue the litigation'.²²⁹

The ALRC further proposed that the court ought to be able to make a PICO at any stage of a proceeding, including at its inception.²³⁰ It rejected the claim that the determination of PICO applications would degenerate into 'an expensive and time-consuming interlocutory step'.²³¹

The ALRC chose not to address the difficulties surrounding the definition of public interest litigation, preferring to leave that issue to the courts. Such a broad approach has attracted some criticism. Campbell argues that they are 'so broadly framed as to embrace many kinds of cases which courts have not hitherto recognised as coming within the category of public interest litigation'.²³² Campbell suggests that the enactment of a 'global' PICO provision is not a sensible approach where so much depends on the circumstances of individual cases:

*The better approach, in my opinion, is to move for the incorporation of special costs regimes in particular statutes governing the exercise of particular jurisdictions. That approach would certainly allow for a finer degree of discrimination in selection of the factors to be taken into account by a court or tribunal in the exercise of its discretion in the award of costs.*²³³

Campbell argues that a 'statute-specific approach' would

*[force] legislators to be attentive to the relationship between standing to sue, the role expected of those accorded standing to sue, and principles regarding allocation of costs.*²³⁴

It is arguable that such an approach would also be conducive to the establishment of public interest litigation funds to complement legislative guidelines, in appropriate areas.²³⁵

The ALRC recommendations have not been implemented, though the courts have continued to refine the criteria for adjusting or reversing the normal rule that the losing party should pay the winning party's costs. Some recent litigation is considered below.

5.1.2 Judicial determination of public interest costs orders

Courts have a wide discretion to vary the 'usual rule' regarding costs.²³⁶

The High Court case of *Oshlack v Richmond River Council*²³⁷ affirms the court's discretion to include the public interest character of litigation as a relevant factor when determining an award of costs. That case concerned a specific legislative discretion to make an order as to award of costs under the *Land and Environment Court Act 1979* (NSW).

In *Oshlack*, the applicant brought proceedings under an open standing and seeking 'to preserve the habitat of an endangered native animal on and around the site'. *Oshlack* had no private interest in the matter. At first instance, Justice Stein made no order as to cost on the grounds that:

- the proceedings had been brought to enforce environmental laws (not a private interest)
- *Oshlack*'s concerns had been shared by a significant sector of the public
- *Oshlack*'s case was arguable and the proceeding resolved significant issues as to the interpretation of the Act.

The High Court upheld the decision of Justice Stein. Justices Gaudron and Gummow considered that in light of the broad discretion accorded under the Act, they could not interfere with its exercise.²³⁸ The justices noted that the case related to 'a new species of litigation' such that the costs discretion was 'to be exercised so as to allow for the varied interests at stake in such litigation'.²³⁹ As such, the case has been said to hardly constitute an endorsement of Justice Stein's decision on the merits.²⁴⁰

Justice McHugh, in dissent in *Oshlack*, advanced a sharp criticism of the notion that characterisation of proceedings as being in the public interest could be relevant to the allocation of costs. He emphasised that the discretion as to costs was 'not unqualified' and had to be exercised in a 'judicial' manner.²⁴¹ He also sought to defend the courts' historical presumption that costs ought to follow the event.²⁴²

For Justice McHugh, the displacement of this presumption in public interest proceedings was problematic because much litigation concerns the public interest. Determining a principle that distinguishes 'public interest litigation' would be 'probably impossible'.²⁴³ Without that principle, 'an award of costs will depend upon nothing more than the social preferences of the judge'.²⁴⁴

Justice McHugh disagreed with Justices Gaudron, Gummow and Kirby as to the significance of *Latoudis*,²⁴⁵ suggesting that the case for departure from the usual costs rule was weaker in civil proceedings than it had been in that criminal case (where the court had nevertheless applied the rule).²⁴⁶ In the result, Justice McHugh considered that the holding in *Latoudis* 'forbade Stein J from giving weight to the public interest character of the proceedings'.²⁴⁷

He also rejected the notion of a link between broad standing rules and the costs discretion, noting:

*The possibility of adverse costs orders may well inhibit some individuals and groups from bringing cases to court which involve challenges to aspects of public law. Express recognition of this fact does not, however, mean that the courts should remove this inhibition by adopting a practice of declining to follow the usual order as to costs in cases of 'public interest litigation'. Whether or not one regards a particular applicant's actions as well-intentioned and striving, albeit unsuccessfully, to serve some perceived public interest, the respondent still faces real costs from having to defend the proceedings successfully. The applicant had a choice as to whether or not to be a party to the relevant litigation. The respondent typically had no such choice. The legislature has chosen not to protect such applicants from the affects of adverse costs orders, whether by an express statutory exemption or the creation of some form of applicants' costs fund. In such circumstances, one may well feel some sympathy for the plight of the unsuccessful applicant. But sympathy is not a legitimate basis to deprive a successful party of his or her costs.*²⁴⁸

The character of a respondent as a public organisation was considered to be irrelevant,²⁴⁹ as was the tenability (or otherwise) of an unsuccessful applicant's case.²⁵⁰

It is clear that the decision in *Oshlack*

*does not lay down a rule for application in other cases in the making of costs orders. It affirms the width of the discretion conferred upon a court in relation to costs, with particular reference to the specially wide discretion it held to exist under the legislation with which [Oshlack itself] was concerned.*²⁵¹

In subsequent cases before the courts, the following issues have been considered regarding the order of costs in public interest cases:

- whether the public interest is a valid factor in the exercise of discretion as to costs
- the type of costs order that should be made
- the definition of public interest.

222 Ibid [13.13].

223 Ibid [13.11].

224 Ibid [13.16].

225 Ibid [13.18].

226 Ibid [13.22].

227 Ibid [13.22].

228 Ibid [13.25].

229 Ibid [13.24].

230 Ibid [13.27].

231 Ibid [13.17].

232 Enid Campbell, 'Public Interest Costs Orders' (1998) 20 *Adelaide Law Review* 245, 255.

233 Ibid 257.

234 Ibid 262.

235 See, eg, ALRC (1995) above n 171, [18.9]–[18.12].

236 *Supreme Court Act 1986 s 24, County Court Act 1974 s 78A.*

237 *Oshlack v Richmond River Council* (1998) 193 CLR 72.

238 *Oshlack v Richmond River Council* (1998) 193 CLR 72, [31].

239 (1998) 193 CLR 72, [45].

240 As Campbell notes, 'while the opinions of the majority [make] it clear that the public interest character of the litigation is not to be regarded as entirely irrelevant to the exercise of the discretion, they do not go so far as to suggest that the considerations which Stein J took into account were ones he was required, as a matter of law, to take into account': Campbell (1998) above n 232, 255.

241 (1998) 193 CLR 72, [65].

242 (1998) 193 CLR 72, [67]–[70].

243 (1998) 193 CLR 72, [71].

244 (1998) 193 CLR 72, [75].

245 *Latoudis v Casey* (1990) 170 CLR 534.

246 (1998) 193 CLR 72, [83]; see also at [1]–[2] (Brennan CJ).

247 (1998) 193 CLR 72, [104].

248 (1998) 193 CLR 72, [90].

249 (1998) 193 CLR 72, [92].

250 (1998) 193 CLR 72, [96].

251 *Friends of Hinchinbrook Society Inc v Minister for the Environment (No 5)* (1998) 84 FCR 186, 188 (Northrop, Burchett and Hill JJ), endorsed in *Ruddock v Vadarlis* [2001] FCA 1865, [21] (Black CJ and French J). See also *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 2)* [1998] HCA 35, [5] (Kirby J).



The relevance of the public interest to costs

Departure from the usual costs award is said to occur only in unusual cases.²⁵² For example, in *QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs*,²⁵³ Justice Dowsett cautioned against too liberal an approach to the costs discretion:

*If it seems unfortunate that an unsuccessful party should bear the costs of the successful party, it seems even more unfortunate that a successful party should be left to bear the cost of having vindicated its position.*²⁵⁴

The result of some litigation has been to confirm that public interest is only one factor in the exercise of discretion. In *Ruddock v Vadarlis*, it was concluded that '[t]he award of costs must remain an exercise of discretion having regard to all the circumstances of the case'.²⁵⁵

Factors which support the usual costs award being made are:

- whether the successful party was wholly successful²⁵⁶
- the amount of costs incurred by the successful party
- whether the decision turned on factual, rather than legal matters.²⁵⁷

The following factors will support judicial discretion to vary a costs award:

- the case 'raises a novel question of much public importance and some difficulty'²⁵⁸
- the liberty of the individual is at stake²⁵⁹
- the case has been brought 'selflessly' and conducted 'in a manner that was wholly commendable'²⁶⁰
- the case raises difficult and important questions of construction
- there is public interest in the matter and whether it has been reached according to law²⁶¹
- whether sufficient public interest related reasons connected with or leading up to the litigation warrant a departure from or outweigh the important consideration that a wholly successful respondent would ordinarily be awarded its costs.²⁶²

In *Ruddock v Vadarlis*,²⁶³ Vadarlis and the Victorian Council for Civil Liberties sought orders in the nature of habeas corpus and mandamus to compel the release into Australia of a group of noncitizens who the Commonwealth had detained on the *MV Tampa*. The following factors were relevant to Chief Justice Black and Justice French's decision not to make an award as to costs:

- 'The proceedings raised novel and important questions of law concerning the alleged deprivation of the liberty of the individual, the executive power of the Commonwealth, the operation of the *Migration Act 1958* (Cth) and Australia's obligations under international law'.
- The issues were difficult, and the subject of divided judicial opinion.
- The Commonwealth Parliament had passed laws to exclude the applicants from pursuing the matter further, and legislated to entrench the decision of the Full Court on the merits.²⁶⁴
- The VCCL and Vadarlis had no financial interest in the proceedings, and their legal representation was provided free of charge.²⁶⁵

Their Honours concluded:

*This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights.*²⁶⁶

Scope of a 'public interest' costs award

The case law illustrates that the ultimate award of costs is a matter of judicial discretion. That is, it is possible for the court to decline to award costs, award part of the winner's costs, or order full recovery.

In *Mees v Kemp (No 2)*²⁶⁷ Justice Weinberg noted that the proceedings had raised difficult and important questions of construction and had been brought 'selflessly'. His Honour ordered the applicant to pay 50 per cent of the first respondent's costs, noting:

*The award of costs need not be an 'all or nothing' proposition. Costs are discretionary, and although the discretion to award costs must be exercised judicially, reasonable minds can differ as to what would be appropriate in any given case.*²⁶⁸

Other cases have also made adjustment to the award of costs because of the public interest element of the case. In *North Australian Aboriginal Legal Aid Service Inc v Bradley (No 2)*,²⁶⁹ it was noted that a 'public interest' element had not been 'regarded as decisive' as to the question of costs.²⁷⁰ Justice Weinberg therefore favoured 'an adjustment of the amount of costs' and ordered the applicant to pay 70 per cent of the respondents' costs.²⁷¹

In another example, a proceeding to clarify the operation of the *Sex Discrimination Act 1984* that would 'have the effect of governing the position of persons who find themselves in a similar position to the applicant' was taken to be in the public interest.²⁷² The fact that the public interest was subservient to the applicant's own interest was, however, also a relevant consideration. The applicant was ordered to pay 75 per cent of the respondent's costs.

Defining 'public interest'

A clear definition of what constitutes litigation 'in the public interest' remains elusive. It has been judicially acknowledged that the concept of 'public interest' is broad, even 'nebulous',²⁷³ and that without particulars of the circumstances, it is difficult to determine why the public interest will be relevant to a costs award.²⁷⁴ Moreover,

*[i]n contentious areas of public policy it may be said that there are many 'public interests' and that it is the elected government which must seek to achieve a balance between those competing interests.*²⁷⁵

However, developments in case law have determined a range of factors is relevant to determining that a case is in the public interest. Importantly, a confluence of circumstances, rather than isolated factors, must militate in favour of a departure from the usual principle as to costs.²⁷⁶ Whether proceedings have a public interest element has been relevant but not 'regarded as decisive' as to the question of costs.²⁷⁷

Personal interest

A personal interest will not preclude the proceedings from being characterised as having a public interest element. In *Smith v Airservices Australia*,²⁷⁸ the applicant 'had commenced the proceedings in the public interest because he had grave concerns about the impact of the decision on the safety of air navigation in Australia', a subject on which he had particular expertise but no direct personal interest. The respondent alleged that he had a 'private interest' in the sense of an 'emotional investment'. Justice Stone made no order as to costs, finding that:

It is likely that the only person who could with any credibility or sense challenge the proposed [decision] would be a person with extensive

252 *Ruddock v Vadarlis* [2001] FCA 1865, [29].

253 [2004] FCA 1644.

254 [2004] FCA 1644, [4].

255 *Ruddock v Vadarlis* [2001] FCA 1865, [25].

256 In *Ruddock v Vadarlis*, Beaumont J dissented, holding that the Commonwealth had been 'wholly successful' in defending the proceeding, and that there was no 'good reason' for departing from the usual rule: [2001] FCA 1865, [40]–[42], citing *Milne v Attorney-General (Tas)* (1956) 95 CLR 460.

257 *Northern Territory v Doepel (No 2)* [2004] FCA 46 [14]; see also *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 [73].

258 [2001] FCA 1865, [17].

259 [2001] FCA 1865, [21].

260 *Mees v Kemp* [2004] FCA 549, [20]–[21].

261 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 [73].

262 *The Wilderness Society v Minister for the Environment and Water Resources* [2007] FCA 1863, [30] (Marshall J).

263 *Ruddock v Vadarlis* [2001] FCA 1865.

264 *Ruddock v Vadarlis* [2001] FCA 1865 [28].

265 [2001] FCA 1865, [28].

266 [2001] FCA 1865, [29].

267 [2004] FCA 549.

268 [2004] FCA 549, [23].

269 [2002] FCA 564.

270 [2002] FCA 564, [91].

271 [2002] FCA 564, [107]. This figure also incorporated an adjustment in respect of the applicant's success in resisting challenges to its standing and the justiciability of certain claims.

272 *Jacomb v Australian Municipal, Administrative, Clerical & Services Union* [2004] FCA 1600, [10].

273 *Oshlack v Richmond City Council* (1998) 193 CLR 72, [136].

274 *Ruddock v Vadarlis* [2001] FCA 1865, [14].

275 *Ruddock v Vadarlis* [2001] FCA 1865, [19]; see also *QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1644.

276 *Save the Ridge Inc v Commonwealth* [2006] FCAFC 51, [12]–[16] (Black CJ, Moore and Emmett JJ).

277 *North Australian Aboriginal Legal Aid Service v Bradley (No 2)* [2002] FCA 564, [91].

278 [2005] FCA 997.



*experience in air safety and who would be likely to have deeply held convictions on the matter. Such a person will always have the type of private interest to which the respondent refers ... The applicant is no ordinary bystander, officious or otherwise; he is by virtue of his expertise and experience, in a special position in relation to air safety. For these reasons I am satisfied that there was a public interest element in these proceedings.*²⁷⁹

In a similar vein, that an applicant who alleged discrimination under the Sex Discrimination Act sought to benefit from the proceeding did not preclude a finding that the matter was brought in the public interest.²⁸⁰

The relevance of standing

In *Oshlack*, Justice Kirby suggested that the standing provisions are a consideration in determining costs orders. Justice Kirby expressed concern that the Parliament's conferral of 'open standing' to promote the public interest could be rendered worthless where unsupported by a complementary approach to the question of costs:²⁸¹ 'A rigid application of the compensatory principle in costs orders ... would discourage, frustrate or even prevent the achievement of Parliament's particular purposes.'²⁸² Nevertheless, a costs order should still rely on judicial discretion, so that costs were allocated fairly and that 'litigants espousing the public interest are not thereby granted an immunity from costs or a "free kick" in litigation'.²⁸³

More recent decisions have not adopted this approach. The Full Court of the Federal Court has noted that extended or open standing provisions in relation to the subject matter of an application are not to be taken to militate against the making of orders as to costs.²⁸⁴ Moreover, standing provisions of an Act will 'not alter the ambit of the discretion' of the court to award costs.²⁸⁵

5.1.3 Public interests costs in Victoria

The Victorian Supreme Court has a wide discretion to 'determine by whom and to what extent costs are to be made'.²⁸⁶ However, the Supreme Court has not developed jurisprudence regarding costs in public interest cases in the same manner as the Federal Court. Many of the cases above concern environmental matters arising under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) or the *Land and Environment Court 1979* (NSW). Similar matters in Victoria are handled by VCAT. At VCAT, each party is to bear their own costs, subject to the court awarding otherwise if, for example, a party has failed to comply with an order of the court.²⁸⁷

5.2 COSTS IN PUBLIC INTEREST MATTERS IN THE UNITED KINGDOM

In the United Kingdom, there may be a variation of standard costs rules in public interest litigation. A Protective Costs Order (PCO) can be ordered to render an applicant immune to costs in respect of the substantive hearing. This order sits within the framework of an overriding objective for matters before the court,²⁸⁸ and a broad framework for awarding costs. The costs rules include consideration of the general rules as to costs, circumstances such as the conduct of the parties, the success of the parties and any payment into court.²⁸⁹

5.2.1 Protective costs orders

The conditions for a PCO were outlined in the *Corner House Research* case.²⁹⁰ The applicant sought to challenge the decision of a government department to alter its anti-corruption procedures, arguing that there had been inadequate public consultation prior to the decision.

The UK Court of Appeal summarised the applicable principles for a PCO thus:

- (1) *A PCO may be made at any stage of the proceedings, on such conditions as the Court thinks fit, provided that the court is satisfied that:*
 - (i) *the issues raised are of genuine public importance;*
 - (ii) *the public interest requires that those issues be resolved;*
 - (iii) *the applicant has no private interest in the outcome of the case;*
 - (iv) *having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that is likely to be involved it is fair and just to make the order;*

- (v) *if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.*
- (2) *If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO.*
- (3) *It is for the court, at its discretion, to decide whether it is fair and just to make the order in light of the considerations set out above.*²⁹¹

The form of a PCO is a matter for the discretion of the judge, depending on the circumstances of a particular matter.²⁹² To date, cases where a PCO has been sought include:

- a case where the claimant's lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there should be no order as to costs in the substantive proceeding whatever the outcome
- a case where the claimants were expecting to have their reasonable costs reimbursed if they won, but sought an order capping their maximum liability for costs if they lost
- a case where the claimants were expecting to have their reasonable costs reimbursed if they won but sought an order to the effect that there would be no order as to costs if they lost
- the *Corner House* case, where the claimants brought proceedings with the benefit of a [conditional fee agreement], which is otherwise identical to the previous situation.²⁹³

Where a PCO was granted and the applicant was not being represented pro bono, it would in the usual case be appropriate to cap the costs that the applicant could recover in the event of success:

*The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses and, as a balancing factor, the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.*²⁹⁴

This approach was designed to enable an applicant to present a case without being exposed to financial risks that would deter a case of general public importance. Accordingly, only modest representation would be covered.²⁹⁵

An applicant for a PCO would be responsible for the costs of the application, which provides a 'financial disincentive for those who believe that they can apply for a PCO as a matter of course'.²⁹⁶

In the case at hand, the court determined that a PCO ought to be granted, as all of the requisite criteria (set out above) were satisfied and 'Corner House had a real prospect of showing [it] had been wronged'.²⁹⁷

5.2.2 Status of protective costs orders

A report by the human rights organisation Liberty considered the broad, discretion-based approach to determining whether proceedings were in the public interest adopted in *Corner House* to be reasonable.²⁹⁸ However, several aspects of the decision in *Corner House* have been argued to present difficulties, some of which are outlined below.

First, the bar on an applicant with a private interest in a proceeding seeking a PCO has been argued to be unduly restrictive. The term 'private interest' was not explained in the decision. As Stein and Beagent have pointed out, it seems that 'only the "public-spirited individual" with nothing to gain personally, or an NGO with no direct connection to individuals who might benefit, would be eligible for a PCO'.²⁹⁹

Stein and Beagent further note that often (eg in relation to judicial review), it is actually necessary for a party to have something resembling a private interest in a proceeding to have standing to commence it in the first place.³⁰⁰ On this basis they suggest that the 'no private interest' requirement cannot be the subject of a strict construction. Rather, they suggest:

*Ultimately, it will be a matter of fact and degree as to whether the personal interest of the claimant is to be characterised as a 'private interest', and it is suggested that the financial benefit to the claimant will be the most telling factor.*³⁰¹

79 [2005] FCA 997, [69].

280 *Jacomb v Australian Municipal, Administrative, Clerical & Services Union* [2004] FCA 1600.

281 (1998) 193 CLR 72, [114]; see also at [115]–[119].

282 (1998) 193 CLR 72, [134]. See also *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management (No 2)* [1998] HCA 35, [6] (where Kirby J affirmed the significance of the open standing provision to his opinion in *Oshlack*).

283 (1998) 193 CLR 72, [134].

284 *Save the Ridge Inc v Commonwealth* [2006] FCAFC 51, [17]–[19] (Black CJ, Moore and Emmett JJ).

285 *The Wilderness Society v Minister for the Environment and Water Resources* [2007] FCA 1863, [31] (Marshall J).

286 *Supreme Court Act 1986* s 24(1).

287 *Victorian Civil and Administrative Tribunal Act 1998* s 109. A list of reasons for a departure from the usual rule is found at s 109(3).

288 *Civil Procedure Rules* rr 1.1, 1.2.

289 *Civil Procedure Rules* r 44.3.

290 *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

291 [2005] EWCA Civ 192, [74].

292 [2005] EWCA Civ 192, [75].

293 [2005] EWCA Civ 192, [75] (references omitted).

294 [2005] EWCA Civ 192, [76].

295 [2005] EWCA Civ 192, [76].

296 [2005] EWCA Civ 192, [78].

297 [2005] EWCA Civ 192, [144].

298 Liberty, *Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation* (2006), [75].

299 R Stein and J Beagent, 'Case Law Analysis—*R (Corner House Research) v The Secretary of State for Trade and Industry*' (2005) 17 *Journal of Environmental Law* 413, 438.

300 *Ibid* 438–9. Similarly, the 'no private interest' requirement 'would seem to exclude anyone with a claim under the Human Rights Act': Liberty (2006) above n 298, [80].

301 Stein and Beagent (2005) above n 299, 439.



The Liberty report also concludes that ‘the weight attached to [an applicant’s private interest] should be a matter for the judge considering the application’.³⁰²

Second, it has been suggested that the requirement that the applicant be responsible for the costs of a PCO application is likely to deter ‘many genuine public interest claims’.³⁰³ Moreover, the ability to fund an application would sit oddly with a plea for insulation from costs liability. As Stein and Beagent point out:

*It is ... hard to see how a full PCO, ie one extinguishing all liability, will ever be granted again in future, given that a successful applicant will have run the risk of considerable costs already. If the applicant has been able to run that risk, it is unlikely that [the principle that ‘the applicant will probably discontinue the proceedings and will be acting reasonably in doing so’] will be offended by a PCO limited to the level of costs, which the successful applicant has already shown a willingness to accept.*³⁰⁴

Third, it is easily conceivable that the cost-capping procedure, under which a PCO-protected applicant can be limited to a ‘moderate’ level of representation, will in practice ‘create an artificial inequality of arms’.³⁰⁵ The limitation on the scope of legal representation permitted under a PCO could ‘limit the number of cases where PCOs will significantly increase access to justice’.³⁰⁶

Fourth, the suggestion that different forms of PCO might be appropriate, depending on whether an applicant’s legal representatives were acting pro bono, or under a conditional fee agreement has been criticised. Liberty did not consider that these factors should be relevant to the type of order granted³⁰⁷ (or the question of whether an order should be granted at all).³⁰⁸

The group also questioned the significance of the criterion ‘whether or not the action could continue in the absence of a PCO’, and could

*conceive of circumstances where granting a PCO might be appropriate even though the party seeking it might still be able to pursue the claim without one. The public interest in the case and the disparity of resources between the parties might nonetheless justify granting a PCO.*³⁰⁹

5.3 CANADIAN DEVELOPMENTS

In Canada, the relevance of the public interest to the question of costs has also been judicially considered.³¹⁰ The Supreme Court of Canada has upheld a decision to award interim costs to impecunious litigants, who without such an order could not afford to go to trial. The criteria outlined for such an order were:

- The party seeking the order must be impecunious to the extent that, without the order, the party would be deprived of the opportunity to proceed with the case
- The claimant must establish a prima facie case of sufficient merit to warrant pursuit.
- There must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.³¹¹

A ‘public interest element’ could provide the ‘special circumstances’ required to support its being granted.³¹² It was critical that ‘the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases’.³¹³ Even then, the matter remained at the discretion of the court.³¹⁴ Justice LeBel emphasised, ‘[w]hen making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them’.³¹⁵

The decision was not without contention, however, and dissenting opinion raised concern that an advance award of costs could be seen as ‘prejudging the merits’ and amounted to ‘a form of judicially imposed legal aid’.³¹⁶

The capacity to award interim costs so that litigation may proceed is perhaps the most progressive approach to public interest costs to date. Tollefson, Gilliland and DeMarco suggest that:

*The Okanagan Indian Band decision is important in three respects: for its affirmation of the social utility of addressing costs issues early in the course of such proceedings, for its unequivocal assertion of the judicial jurisdiction to undertake this task, and for its recognition that, in certain exceptional public interest cases, only an interim costs award will satisfy the interests of justice.*³¹⁷

5.4 SUBMISSIONS

The commission received a number of submissions in respect of the issue of costs in proceedings with a public interest element. In the Consultation Paper, the commission asked whether, in making orders for costs or security of costs, the court should be required to have regard to whether the proceeding involves issues that affect or may affect the public interest.

Some submissions, including that of the Victorian Bar, favoured the maintenance of the status quo, that is, leaving the matter of costs to judicial discretion, with ‘public interest’ ramifications an available but not a mandatory consideration.³¹⁸

A number of submissions, including those of Victoria Legal Aid and the PILCH, expressed concern about the ‘inequality [of] resources that typically exists in public interest cases’, suggesting that it tended to preclude the proper ventilation of meritorious claims.

PILCH suggested as a solution:

- the adoption by the Victorian Government of Model Guidelines to govern its conduct in relation to public interest proceedings, in combination with
- an amendment to Order 63 of the Victorian Supreme Court Rules, which would allow an applicant to be declared a ‘public interest litigant’ and thus be protected against adverse costs orders.

The Human Rights Law Resource Centre recommended that proposals be developed to:

- establish a disbursements fund to aid pro bono, human rights and public interest matters³¹⁹ and expand the guidelines for the Law Aid scheme³²⁰
- establish model guidelines for the Victorian Government regarding costs in pro bono, human rights and public interest proceedings³²¹
- amend Order 63 of the *Supreme Court Rules* to incorporate provisions relating to costs in pro bono, human rights and public interest proceedings.³²²

Other submissions, including those of the Environment Defenders Office Victoria (EDO) and the Federation of Community Legal Centres, proposed the implementation of the ALRC model discussed above. The EDO submitted that:

The threat of adverse costs is a crude exclusion device the burden of which falls disproportionately on individuals and community groups which do not have the same deep pockets as government and corporations.

The EDO suggested that the establishment of clear procedures in connection with public interest costs orders could require ‘potential public interest litigants to turn their minds to the strengths and public interest merits of the case at an early stage’.

2.2 DRAFT PROPOSAL AND RESPONSES

In response to the submissions received, and the developments regarding costs in public interest litigation (above), the commission drafted the following proposal:

*There should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.*³²³

This proposal was supported by the Environment Defenders Office, Human Rights Law Resource Centre, PILCH and Victoria Legal Aid.³²⁴ In particular, the Environment Defenders Office welcomed the recognition in the draft proposals that ‘the threat of adverse costs orders are a significant obstacle to public interest litigation’.³²⁵

The EDO supported a case-by-case approach that would not preclude a court from determining that the proceedings are in the public interest where an applicant has a pecuniary interest in the proceedings. The Law Institute of Victoria also supported the proposal, but noted that courts already have a wide discretion in ordering costs.³²⁶

- 302 Liberty (2006) above n 298, [84].
- 303 Stein and Beagent (2005) above n 299, 441. See also Liberty (2006) above n 298, [54]–[55], [99].
- 304 Stein and Beagent (2005) above n 299, 441.
- 305 Ibid 444.
- 306 Liberty (2006) above n 298, [93] Other members of the group, however, considered the restriction to be a reasonable one: [92].
- 307 Ibid [87].
- 308 Ibid [96].
- 309 Ibid [97].
- 310 The key case being *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371.
- 311 [2003] 3 SCR 371, [36].
- 312 [2003] 3 SCR 371, [37].
- 313 [2003] 3 SCR 371, [40].
- 314 [2003] 3 SCR 371, [41].
- 315 [2003] 3 SCR 371, [41].
- 316 [2003] 3 SCR 371, [62].
- 317 Tollefson et al (2004) above n 218, 507.
- 318 Submission CP 33 (Victorian Bar).
- 319 See also Submission CP 34 (Public Interest Law Clearing House Inc), Recommendation 12.
- 320 See also Submission CP 34 (Public Interest Law Clearing House Inc), Recommendation 13.
- 321 See also Submission CP 34 (Public Interest Law Clearing House Inc), Recommendation 14.
- 322 See also Submission CP 34 (Public Interest Law Clearing House Inc), Recommendation 15.
- 323 VLRC, Exposure Draft 1, Proposal 9.11.
- 324 Submissions ED1 14 (Environmental Defenders Office), ED1 19 (HRLRC), ED1 20 (PILCH) and ED1 25 (VLA).
- 325 Submission ED1 14 (Environmental Defenders Office).
- 326 Submission ED1 31 (Law Institute of Victoria).



The Human Rights Law Resource Centre and PILCH noted the importance of permitting costs orders to be made at the outset.³²⁷ However, the Law Institute observed that it may not be possible to decide if a case is in the public interest until the proceeding is complete.³²⁸

A submission received from Telstra queried how 'public interest' would be defined.³²⁹ As the discussion above shows, the definition of public interest, and the scope of protective public interest costs orders has been the subject of judicial consideration in Australia and abroad.

5.6 CONCLUSIONS

The commission believes there should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases. This could include orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.

The commission notes that PILCH is currently working on a costs protocol for public interest litigation in the Supreme Court. PILCH's proposal envisages that Order 63 of the Supreme Court Rules should be amended in order that on application, a litigant could be declared a 'public interest litigant'. A public interest litigant would be protected from an adverse costs order, provided the court's declaration remained in place throughout the proceedings.³³⁰

The commission supports this development, and believes the protocol would supplement an express provision that permits courts to make orders protecting public interest litigants from adverse costs in appropriate cases.

6. CLASS ACTION COSTS

Class actions under Part 4A of the *Supreme Court Act 1986*, and representative actions generally, give rise to a number of unique and vexed issues in relation to costs.

In considering the introduction of class actions in the Federal Court, the Australian Law Reform Commission recommended that a class action fund should be established to overcome a number of the costs problems likely to arise in class action litigation. Such a fund was intended to not only provide financial assistance for representative parties but to also meet the costs of defendants who had been successful. Also, any uncollected damages might be paid into such a fund. However, such a fund was not established, either at federal level or in connection with the statutory class action regime introduced in Victoria.

Group members represented in class action litigation are protected from adverse costs orders (except in limited circumstances where they participate in the litigation as subgroup representatives or for the determination of individual issues arising in respect of their claim). However, the representative party is potentially liable for adverse costs and may be required to provide security for costs.

To some extent the 'void' arising out of the failure to establish a class action fund has been filled by commercial litigation funders who are prepared to finance cases, provide security for costs and provide indemnity for adverse costs. However, this comes at a price and on terms which run counter to the philosophy underlying the introduction of opt out class action regimes. Litigation funders, as profit-making entities, usually seek to 'sign up' group members on contractual terms requiring the group members to give the litigation funder a percentage share (usually between 25 per cent and 40 per cent) of the amount recovered in the event that the litigation is successful. This has resulted in the class action being commenced and pursued only for the benefit of those who opt in by agreeing to the commercial terms for the conduct of the litigation. This has led to several somewhat controversial decisions, in both the Federal Court³³¹ and the Victorian Supreme Court,³³² whereby the courts have declined to allow class actions to proceed, in class action form, for the benefit of only those who agreed to the litigation funding arrangements and were clients of the one law firm.³³³ These decisions, and more recent judgments, are discussed in further detail in Chapter 8.

The attempt made in the *Fostif* litigation³³⁴ to commence a representative action but only continue to conduct it for the benefit of those who agreed to the terms proposed by the litigation funders was derailed by the High Court, (by majority) for reasons which are not relevant here. However, the judicial imprimatur given to the commercial litigation funding arrangements is of broader significance.

In the absence of a class action fund or commercial litigation funding arrangements, many if not most 'economically rational' claimants would be deterred from agreeing to be a representative in class action litigation. The costs of conducting such litigation are enormous. The proceedings are likely to be protracted. There are likely to be numerous contested interlocutory battles. The potential liability for adverse costs and security for costs is likely to deter anyone who is neither poor nor rich.

Apart from the economic disincentives to representative applicants there are glitches in the class action legislation which may give rise to further problems in relation to costs. Although there is provision for the recovery from group members of any shortfall between the costs of conducting the action and the amount of costs recovered from the losing party, the express power conferred on the court³³⁵ is able to be invoked only in the event of an award of damages. In this event the group members' contributions can only be deducted out of the damages awarded to them. Thus, the legislation does not expressly deal with how such a shortfall may be recovered in the event of a settlement. Even where the individual claim of the representative plaintiff proceeds to judgment, and is successful, it is relatively rare for the claims of each of the remaining group members to proceed to formal judgment. The general powers of the court may be sufficient to enable contributions to be extracted from group members in the event of settlement of the proceedings as a whole, given that settlements of the class action require judicial approval. However, there is nothing to prevent group members individually settling their individual cases (even en masse) without court approval.

This is not intended to be an exhaustive list of costs problems in class action litigation. Chapter 8 incorporates the commission's recommendations for improving remedies in class action proceedings. Chapter 10 sets out the commission's proposals in relation to a new funding mechanism (the Justice Fund) which could finance class action and other civil litigation, provide an indemnity against adverse costs and meet any order for security for costs.

7. DRAFT PROPOSALS AND RESPONSES

The issues and problems relating to the cost of litigation are extensive. The commission has been unable to address all of the issues, criticisms and suggestions that it has received in the course of the review. We addressed a number of significant cost issues in our draft proposals, published in June and September 2007. The proposals and the responses received are outlined below. In this section, we also explain the approach we have taken to particular problems and identify further areas where review is required. Chapter 12 deals in detail with ongoing civil justice review and reform and also incorporates various proposals for further reform made by various interested persons and organisations in the course of the present review.

7.1 ONGOING REVIEW AND REFORM OF COSTS

7.1.1 Establish a costs council

The commission proposed that a specialist Costs Council should be established, as a division of the (proposed) Civil Justice Council.³³⁶

Some submissions were unclear about what the role of a specialist costs council would be.³³⁷

The commission envisages that the Costs Council, in consultation with stakeholder groups, would perform the following functions:

- review the impact of the commission's recommendations on costs which are implemented
- investigate the additional matters in relation to costs referred to in the commission's report, including those matters raised in submissions
- carry out or commission further research on costs
- consider such other reforms in relation to costs as the council considers appropriate.

Submissions from the Law Institute and Legal Aid questioned the need for a costs council, given the 'impending introduction of the Victorian Costs Court'.³³⁸ The Office of Crown Counsel recommended the introduction of a Victorian Costs Court in its review of the Office of Master in 2007.

The Costs Court proposed by the Office of Crown Counsel would be established as a division of the Supreme Court and would perform the functions currently performed by the taxing master in the Supreme Court, and by registrars in other Victorian jurisdictions. The report also recommends that

327 Submissions ED1 19 (Human Rights Law Resource Centre) and ED1 20 (Public Interest Law Clearing House).

328 Submission ED1 31 (Law Institute of Victoria).

329 Submission ED1 17 (Telstra Corporation).

330 Correspondence with Tabitha Lovett, PILCH Manager, 23 January 2008. PILCH has prepared a Discussion Paper to support the development of their proposal (on file with the commission).

331 *Dorojay Pty Limited v Aristocrat Leisure Limited* [2005] FCA 1483.

332 *Rod Investments (Vic) Pty Ltd v Clark & Ors* [2005] VSC 449.

333 See generally P Cashman, 'Class Actions on Behalf of Clients: Is This Permissible?' (2006) 80 *Australian Law Journal* 738, and also P Cashman *Class Action Law and Practice* (2007) ch 4.

334 *Campbells Cash and Carry Pty Limited v Postif Pty Limited; Australian Liquor Marketers Pty Limited v Berney* (2006) 229 CLR 386; [2006] HCA 41.

335 *Supreme Court Act 1986* s 33XJ.

336 VLRC, Exposure Draft 1, Proposal 9.1.

337 Submission ED1 17 (Telstra Corporation).

338 Submissions ED1 31 (Law Institute of Victoria), ED1 25 (Victoria Legal Aid).



further consideration be given to establishing an advisory and coordination role for the Legal Costs Committee. This proposal is similar to the commission's proposal but the commission proposes a body with broader stakeholder participation.

Moreover, the proposed functions of the Costs Council are broader than those envisaged by the Office of Crown Counsel for the Legal Costs Committee. The commission believes a specialist Costs Council, operating as part of the proposed Civil Justice Council, is the preferred body to carry out these functions. If adopted, the Civil Justice Council would have statutory responsibility for review and reform of the civil justice system and would be resourced to conduct its own research. This broader ambit is necessary to ensure that the rules for costs can continue to be reviewed and reformed. As noted above, costs are a key determinant of the fairness and efficacy of the civil justice system.

The establishment of a council was supported in other submissions.³³⁹

7.2 COSTS DISCLOSURE

7.2.1 Costs estimates disclosed on order of the court

The commission proposed that the court should have the power to require parties to disclose to each other and the court estimates of costs and actual costs incurred.³⁴⁰

Giving the courts power to require disclosure of costs could have the following benefits:

- it may encourage use of ADR or bring pressure for parties to settle
- it could give the court more intelligence to ascertain the duration and complexity of a matter before the court
- it allows a party to gauge the intentions of the other side
- it allows the court to gather data on costs estimates and outcomes.

The proposed power need not be exercised, but could be exercised at any stage of the proceedings.

The submissions received by the commission expressed divergent views on the merits of this proposal.

Some submissions supported this proposal as a key measure to give predictability to stakeholders in the civil justice system. IMF said 'increased transparency regarding expected costs would benefit the Courts, the parties and the parties' lawyers', noting that the biggest risk in litigation is 'assuming the risk of paying the other side's costs if the claim is unsuccessful'.³⁴¹

IMF argued that costs estimates allow for informed decision-making by parties, as well as providing information for effective case management by the courts. In addition, it contended that the provision of estimates to the court allows courts to monitor excessive costs and timelines and to quantify costs orders more efficiently.

Other submissions pointed out that existing disclosure requirements require lawyers to advise clients about the costs to be incurred in litigation.³⁴² Others thought the taxation of costs was a sufficient measure to address the issue of excessive costs.³⁴³

The Law Institute opposed the draft proposal. It contended that the 'NSW experience would suggest that solicitors find this requirement quite onerous or alternatively give estimates that are not credible'. The Institute suggested that requiring disclosure of cost estimates could:

- increase the costs to litigants
- be used by a party with greater resources to delay or increase costs to the other party³⁴⁴
- 'influence the court to unfairly assist a party with less resources to even out the playing field'.³⁴⁵

The commission also received submissions on whether there should be limits on the type of information that should be disclosed to the court. Telstra argued that estimates of costs could reveal strategic decisions of a party and disclosure would give a way a forensic advantage. In contrast, IMF said that budgets and timelines should be disclosed to the court and parties to the litigation.

The commission has considered the arguments raised in submissions and has decided to modify its original proposal. We maintain that the court should have an express power to require parties to disclose to each other and the court estimates of costs and actual costs incurred. Costs estimates can offer predictability to all stakeholders and offer parties the opportunity to make informed decisions about their approach.

However, the commission acknowledges that information about costs may include material relevant to the strategy or conduct of litigation. We believe that the information disclosed to the court should be of a limited nature. Information that may have confidential, strategic or forensic significance or which might otherwise be privileged (other than information concerning the quantum, break up or method of calculation of legal fees and expenses) should be protected from disclosure.

7.2.2 Parties to disclose costs data to the court

The commission believes there is a need for more data and research on costs. We proposed that this might be achieved by empowering the court to require parties to disclose costs data at the conclusion of the matter.³⁴⁶

The lack of available data on costs was raised in a number of submissions to the Consultation Paper. In their responses to the Exposure Draft, the Law Institute and Legal Aid agreed that more data is needed. However, Telstra submitted that because parties in commercial litigation agree to costs, taxation before the court is rare.

The Law Institute suggested that additional data could be provided anecdotally through stakeholder groups. This would mean that parties do not have to bear the cost of providing this information. In contrast, IMF submitted that collation of data from the commencement of the process ought to be systemic, not discretionary.

The commission believes that it is essential to obtain data on costs and for systematic research to be conducted on the causes of excessive costs, and the impacts of costs rules. For this reason, the commission has recommended the creation of a Costs Council as part of the (proposed) Civil Justice Council.

If our recommendation empowering the court to order disclosure of cost estimates and actual costs incurred is implemented, data will be available to the court about the costs of litigation. We make no additional recommendation regarding disclosure of costs data at the conclusion of the matter.

7.3 FIXED OR CAPPED COSTS

7.3.1 Capped costs for particular areas of litigation

The commission proposed that fixed or capped costs should be developed for particular areas of litigation after consultation and with agreement of stakeholders (under the auspices of the Costs Council or Civil Justice Council).³⁴⁷

This proposal was made in light of developments in the area of fixed costs in other jurisdictions, as outlined above.

The commission received submissions that supported further consideration of fixed costs in appropriate cases. Victoria Legal Aid noted that if a lump sum is set at a reasonable level, this could remove the need for more complex cost recovery procedures.³⁴⁸ It would also counter some of the unpredictability of litigation.

The commission also received submissions that opposed fixed costs. The Law Institute submitted that it does not consider capped costs to be 'a good idea in principle'. It argued that capped costs rarely reflect actual work done and that it is impossible to determine what is the amount of work required in any one type of matter. It also noted that the Federal Court decided not to introduce fixed costs.

Submissions that supported the fixed costs proposal acknowledged practical difficulties with setting fixed costs. IMF, for example, argued that caps should not be set on a macro level because it would lead to a distortion in the market for legal services. In NSW, it argued, caps on personal injury costs have prevented some plaintiffs from being able to bring a claim. Rather, IMF argued, in recognition that each piece of litigation is potentially different, caps should be individually determined according to cost budgets at or shortly after the initial pre-litigation conference.³⁴⁹

The Australian Bankers' Association suggested that any changes to costs should be accompanied by a study of the economic impact on practitioners and their clients.³⁵⁰

The commission acknowledges these concerns. However, we maintain that fixed costs, if appropriate, can bring both predictability and proportionality to the costs of litigation. The Costs Council of the (proposed) Civil Justice Council would be well placed to determine which matters should be subject to a fixed costs regime, and to determine how fixed costs will be set.

339 Submissions ED1 8 (IMF (Australia) Ltd), ED2 12 (Consumer Action Law Centre).

340 VLRC, Exposure Draft 1, Proposal 9.2.

341 Submission ED1 8 (IMF (Australia) Ltd).

342 Submission ED1 10 (Legal Services Commission).

343 Submission ED1 16 (Telstra Corporation).

344 Legal Aid also expressed this concern: Submission ED1 25 (Victoria Legal Aid).

345 Submission ED1 31 (Law Institute of Victoria).

346 VLRC, Exposure Draft 1, Proposal 9.12.

347 VLRC, Exposure Draft 1, Proposal 9.3.

348 Submission ED1 25 (Victoria Legal Aid).

349 Submission ED1 8 (IMF (Australia) Ltd).

350 Submission ED1 29 (Australian Bankers' Association).



7.4 TAXATION OF COSTS

7.4.1 Simplification of multiple bases of costs

In Exposure Draft 1 the commission proposed that the present multiple bases of taxation should be simplified.³⁵¹ As discussed above, there are four bases for the taxation of costs: party-party, solicitor-client, indemnity, or such other basis as the court may direct.³⁵²

Simplification of multiple bases of costs was supported by the Law Institute and Legal Aid.

As noted above, the Institute has been funded by the Victoria Law Foundation to develop a revised Supreme Court scale of costs. That revised scale proposes the basis of costs recovery be 'on a reasonable basis' and an 'indemnity basis as assessed on scale'. Reasonably incurred costs, it argues, is a preferable basis to costs 'necessary or proper for the attainment of justice'.³⁵³

The commission believes the bases for taxation of costs should be simplified to include three categories only: standard, indemnity and any other basis as the court may direct. The principles to be applied are discussed further below.

7.4.2 Interlocutory costs orders

During consultations, it was suggested to the commission that the present process for the 'routine' taxation of interlocutory costs orders is expensive to the parties, unduly burdensome to the court and in many cases ultimately a waste of time because most cases are settled on terms whereby the interlocutory costs orders are either waived or are otherwise irrelevant to the terms of settlement. The practice in Victoria is said to differ from that followed in the Federal Court and in NSW. Moreover, enforcement can be a problem for impecunious parties and can be used as a strategic forensic weapon by deep pocketed parties.

On the other hand, the fact that such orders are normally enforceable during the interlocutory stages can curtail inappropriate interlocutory behaviour.

The commission circulated a draft proposal that the presumptive rule should be that interlocutory costs orders are not to be taxed prior to the final determination of the case unless the court orders otherwise.³⁵⁴

The commission received submissions that supported the proposal on the ground that it could reduce delay. White SW Computer Law, for example, submitted that taxation of costs prior to trial only serves to 'protract the dispute and antagonise the parties'.³⁵⁵

Legal Aid noted that in some cases it may be appropriate for the court to delay taxation of costs. However, it did not support the presumptive rule because the process of making timely interlocutory costs orders may limit abuse of process.

The Law Institute also opposed the proposal, on the ground that costs relate to the professional responsibility of their clients. The Institute submitted that the 'draft proposal may end up encouraging more litigation as recalcitrant parties will know that they do not face an immediate costs penalty'.

The Law Institute's submission also raised the implications of the proposal on the interest a party may claim on costs. In Victoria, interest is calculated on costs only when they are taxed. If interlocutory costs are not taxed until the final determination of the case, a party will not be entitled to interest until that time. There seems no reason in principle or in practice why the courts should not, in appropriate cases, exercise their discretion to award interest on costs.

Other submissions reported that the courts do not often order costs until the end of litigation, and that interlocutory costs orders would encourage compliance.³⁵⁶

The commission proposes a presumptive rule that interlocutory costs orders should not be taxed prior to the determination of the case unless the court orders otherwise. This proposal should be considered in conjunction with the commission's further recommendation, discussed below, that courts should more often make costs orders on a more determinate basis (eg in a lump sum amount, or as a specified percentage of the actual costs) to avoid the costs and delays arising out of the present process for the taxation of costs.

7.5 SOLICITOR–CLIENT COSTS AND PARTY–PARTY COSTS

7.5.1 Party–party costs should be ‘all reasonable costs incurred’

The present gap between party–party and solicitor–client costs is unreasonable in a number of cases. Research carried out by the commission showed that in many instances only half or less of the solicitor–client costs are recovered on a party–party basis following the taxation of costs.

The commission, in its earlier draft proposal, suggested that the recoverable costs on a party–party basis should be ‘all reasonable costs incurred’.³⁵⁷

There was some support for reforming the current rule for party–party costs.³⁵⁸ The Law Institute suggested that ‘costs should be allowed as “all costs reasonably incurred and of a reasonable amount” as defined as the current solicitor and client basis in Order 63.30 of the Supreme Court Rules’.

Despite its support for the proposal, the Law Institute noted it had not seen the research to support the proposal.³⁵⁹ It reported that anecdotally, in NSW, changes did not narrow, and in some cases widened, the gap between costs actually paid by the client and those recovered. Legal Aid suggested the current gap may actually serve as a check within the system that encourages parties to settle early.³⁶⁰

There was also opposition to any change in the principles governing the award of party–party costs. The Insurance Council of Australia did not support a change to party–party costs. If there is a change, the Insurance Council supported a test of ‘reasonable and necessary’. The Australian Bankers’ Association was unsure how the proposal would address the gap.

IMF commented that the critical issue is when ‘reasonable’ is determined; at a pre-litigation conference or at the conclusion of proceedings. The Law Institute submitted that ‘reasonable’ must be ‘interpreted in terms of what is realistic in the marketplace’. It suggested that sometimes costs are disallowed because they are ‘not reasonable’, despite there being no way of avoiding a particular fee (such as barristers’ fees). IMF suggested reasonable costs in Supreme Court matters should be estimated and fixed at or shortly after the pre-litigation conference.

The commission has taken into account these suggestions. We believe that the Law Institute’s proposal that recoverable costs should usually be ‘all costs reasonably incurred and of a reasonable amount’ is appropriate. We believe that the court should continue to have discretion to make an order on some other basis, when considered appropriate by the court.

7.5.2 Other methods for ordering recovery of costs

In Exposure Draft 1, the commission proposed that other methods for quantifying the legal costs recoverable by a successful party should be utilised (more often), including ordering costs as a specified percentage of the actual (reasonable) solicitor–client cost, with a view to avoiding the costs and delays associated with the present process of taxation of costs.³⁶¹

Submissions expressed concern about how the proposal would be practically implemented. Telstra and Australian Commercial Lawyers Association said ordering a percentage of costs would require a standardised assessment of costs, for example, the hourly rates of law firms.³⁶²

The Law Institute argued that the proposal should not be adopted. It submitted that the current *taxation of costs based on detailed bills on scale allows for an impartial decision maker to fix the costs based on the actual work reflected in the clients’ solicitors’ file.*

The proposal, the Institute argued, would create additional work for courts to assess the basis on which costs were charged, thereby increasing cost and delay. Moreover, it submitted that the proposal contradicted the commission’s proposal that the present multiple bases for taxation of costs be simplified.³⁶³

Clayton Utz submitted that the basic problem is ‘that the current system of taxation by reference to scales of costs is outdated and unnecessarily consumes significant court resources and generates significant additional costs between the parties’. It proposed that:

- (a) *once judgment is given and an order for costs is made, the parties should be required to disclose to the court what their actual costs were*
- (b) *the parties should then be heard on whether the court should depart from the normal rule*
- (c) *the normal rule should be that a party awarded costs recover all of its costs*

351 VLRC Exposure Draft 1, Proposal 9.5.

352 *Supreme Court (General Civil Procedure) Rules 2005* r 63.28; *County Court Rules of Procedure in Civil Proceedings 1999* r 63A.28; *Magistrates’ Court Civil Procedure Rules 1999* r 26A.02.

353 Submission ED1 31 (Law Institute of Victoria).

354 VLRC Exposure Draft 2, Proposal 6.1.

355 Submission ED2 3 (White SW Computer Law).

356 Submission ED1 22 (AXA Australia & TurksLegal).

357 VLRC, Exposure Draft 1, Proposal 9.6.

358 Submissions ED1 8 (IMF Australia), ED1 31 (Law Institute of Victoria), ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra Corporation).

359 ACLA and Telstra also supposed that a review of scales for fees was ‘timely’: submissions ED1 16 (Australian Corporate Lawyers Association), ED1 17 (Telstra Corporation).

360 Submission ED1 25 (Victoria Legal Aid).

361 VLRC, Exposure Draft 1, Proposal 9.7.

362 Submissions ED1 17 (Telstra Corporation), ED1 16 (Australian Corporate Lawyers Association).

363 Submission ED1 31 (Law Institute of Victoria).



- (d) *in deciding whether to depart from the normal rule, the court should make an assessment as to whether the costs incurred by the successful party are unreasonably excessive having regard to the costs incurred by the other parties and*
- (e) *there is no reason why, in all but the most exceptional cases, the parties need be heard for more than 10 minutes each on the question of costs.*³⁶⁴

The commission agrees that this proposed approach to the resolution of costs makes sense and could be appropriate in many cases. Such a summary approach may be best suited to cases where the costs do not exceed a certain economic threshold.

The commission is of the view that it is desirable for the courts to more often utilise methods, such as lump sum costs orders or orders for payment of a specified percentage of the actual reasonable costs incurred, rather than require the parties to proceed with a taxation of costs. In this respect it is of interest to note, from the costs data obtained from the Supreme Court referred to earlier in this chapter, that where bills of costs are submitted for taxation, the amounts allowed where the bills are taxed, and the amounts agreed where the parties resolve the costs issue without the need for formal taxation, are around 75 per cent of the amount of the bill of costs. However, there is obviously considerable variability between individual cases.

In England and Wales the Commercial Court Long Trials Working Party has recently recommended that courts should be prepared to make a summary assessment of costs where the total costs claimed are £250 000 or less.³⁶⁵

At present, the processes involved and the procedures required to be complied with in relation to the assessment of costs are relatively expensive and time consuming. Often independent costs consultants are engaged who may charge a fee based on a percentage of the amount of the bill.

No doubt these costs and delays would be substantially reduced by appropriate computer software which could take data routinely recorded by legal practices for the purpose of time recording and preparing solicitor–client bills and automatically convert the items into a bill in a form taxable on a party–party basis. There would no doubt need to be adjustments for certain items. However, part of the present cost and delay arises out of the necessity to prepare different bills in different form using different methods of quantifying legal costs (and to then submit the bill for assessment by an independent court officer). The issue of court scales of costs is considered further below.

7.6 SCALES OF COSTS

7.6.1 Courts scales

In Exposure Draft 1 the commission proposed that court scales of costs be revised or updated.³⁶⁶

There was support for reviewing the scales of court costs.³⁶⁷ IMF suggested the scales could form the basis of cost estimates or caps and data collected on estimates and actual costs would inform the scale.

7.6.2 Common scale of costs

The commission proposed that there should be a common scale across courts.

The commission did not express a view on the question of whether there should be proportionate differentials between courts in terms of recoverable party–party costs.³⁶⁸

Legal Aid supported this proposal. The Law Institute advised that a revised Supreme Court costs scale is currently being developed. It reported that the scale will be adopted by all courts, but the rates will vary with jurisdiction.

IMF argued that different levels of liability and quantum—and not necessarily the court involved—should be the basis for different scales:

Differentiation is clearly necessary between personal injury, workers compensation, motor vehicle damage, intestacy, contract, trade practices, medical negligence, Corporations Act, product liability and other civil claims.

Other submissions opposed a common scale. Telstra and the Australian Corporate Lawyers Association argued that it is important to differentiate between courts and as such, different scales should be retained.

The commission maintains that there should be a common scale of costs across courts. However, we

note that further research is required on whether there should be proportionate differentials, between courts, in terms of recoverable party–party costs. We believe that the issue of whether or not there should be proportionate differentials should be considered by the proposed Costs Council.

In the event that there is a common scale for recoverable party–party costs, the Costs Council should also consider whether the principle that the recoverable costs should be ‘reasonable’ is sufficiently flexible to accommodate variations between courts (in the event that such variations are considered desirable) without the need for prescribed variations.

7.7 DISBURSEMENTS

7.7.1 Prohibition on profiting from disbursements

In Exposure Draft 1 the commission proposed that there should be a prohibition on law firms profiting from disbursements, including photocopying, except in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit. Where a client recovers costs only the reasonable actual costs of the disbursements (excluding any profit element) should be recoverable from the losing party.³⁶⁹ However, under the commission’s draft proposal law firms would still be entitled to recover a reasonable allowance for law practice office overheads.

A number of submissions commented on the commission’s draft proposal, ranging from those who argued that profiteering should be prohibited,³⁷⁰ to those who said profiteering did not occur.

Some law firms disputed the assertion that there is abuse by practitioners in relation to charging disbursements. One law firm submitted that ‘gross overcharging is professional misconduct and can be dealt with within the current regulatory framework for practitioners provided by the *Legal Profession Act 2004*’.³⁷¹

Law firms also submitted that some ‘profit’ must be factored in for disbursements such as photocopying, because business must outlay costs for equipment. Indeed, the current scale of costs permits high rates, including up to \$2 per page of photocopying in the County Court.

Other submissions suggested that disbursement costs are a question for clients, and that clients could choose another law firm if they are unhappy with the costs of disbursements.³⁷² Market forces, they said, mean that photocopying occurs ‘pretty much at cost now anyway’.³⁷³

The Law Institute noted that photocopying and other in house services are not disbursements but are charged as ‘legal costs’ and as such should be charged according to scale. Legal Aid recommended that fixing the rate charged per day would prevent profiteering.

The Law Institute was critical of the commission’s proposed provision, and argued it is ‘far too onerous, imprecise and would not be workable in practice’.

The commission has taken into account these concerns. We have also considered the current practice of the courts in relation to costs and disbursements, and analysed the courts’ own data. We remain concerned about the costs of disbursements incurred in the conduct of civil litigation.

The commission is aware that the County Court has given litigants guidance on the costs that may be recoverable for the production of court books. Judge Strong of the County Court has applied the following guidelines:³⁷⁴

- where copies of the court book are produced commercially: two copies on scale and subsequent copies at commercial copying rates to be determined by the taxing officer, plus necessary attendances
- where as a matter of choice all copies of the court book are produced ‘in-house’: one copy on scale and subsequent copies at a reasonable rate to be determined by the taxing officer, plus necessary attendances
- where as a matter of necessity all copies of the court book are produced ‘in-house’: once copy on scale and subsequent copies at a reasonable rate³⁷⁵ to be determined by the taxing officer, plus necessary attendances.

This approach is flexible but intends to ensure that the costs recoverable reflect commercial reality.

364 Submission ED1 18 (Clayton Utz).

365 Judiciary of England and Wales, *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007, 10.

366 VLRC, Exposure Draft 1, Proposal 9.8.

367 Submissions ED1 17 (Telstra Corporation), ED1 16 (Australian Corporate Lawyers Association), ED1 31 (Law Institute of Victoria), ED1 25 (Victoria Legal Aid).

368 VLRC, Exposure Draft 1, Proposal 9.9.

369 VLRC, Exposure Draft 1, Proposal 9.10.

370 Submission ED1 25 (Victoria Legal Aid).

371 Submission ED1 32 (Corrs Chambers Westgarth, Confidential submission, permission to quote granted 14 January, 2008).

372 Submissions ED1 16 (Australian Corporate Lawyers Association), ED2 17 (Telstra Corporation).

373 Submissions ED1 16 (Australian Corporate Lawyers Association), ED2 17 (Telstra Corporation).

374 *Hodson v Consolidated Transport Industries Ltd* [2007] VCC 838.

375 A reasonable rate may be a commercial rate: it will depend on the circumstances of the particular solicitor.



The commission is also aware that in practice experienced litigants, particularly corporations and insurers, often strictly control costs incurred in relation to disbursements and limit the amounts able to be charged for items such as photocopying.

The commission maintains that there should be a prohibition on law firms profiting from disbursements, including photocopying, but that there should be a reasonable allowance for office overheads. This prohibition should not apply in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit. Where a client recovers costs, only the reasonable actual costs of the disbursements (excluding any profit element but making allowance for reasonable overheads of the law practice) should be recoverable from the losing party.

Where a law firm incurs an out of pocket expense on behalf of a client pursuant to a case being conducted under a conditional costs agreement, if the costs agreement provides that such disbursement expenditure will only be payable by the client in the event of success in the litigation (however defined) there is arguably no reason in principle why the law practice should not be entitled to charge a component for 'uplift' or 'success', as provided for in the *Legal Profession Act 2004*, in respect of the disbursement amount. This would compensate the firm for the risk of having to bear such expense in the event of the case failing. However, this would remain subject to disclosure and agreement by the client in accordance with the requirements of the *Legal Profession Act 2004*.

At present section 3.4.27 of the *Legal Profession Act 2004* provides that payment of 'some or all of the legal costs' may be conditional on the successful outcome of the matter to which those costs relate. Legal costs include legal fees and disbursements. It is further provided that a conditional costs agreement may provide for the disbursements to be paid irrespective of the outcome of the matter.³⁷⁶ However, where a conditional costs agreement relates to a litigious matter 'the uplift fee must not exceed 25 per cent of the legal costs (excluding disbursements) otherwise payable'.³⁷⁷ It is not clear whether the inclusion of the words 'excluding disbursements' in parenthesis is intended to preclude the charging of an uplift in respect of the 'disbursement' component of legal costs. If so, this warrants further consideration.

7.8 PERCENTAGE FEES

In the Consultation Paper and in Exposure Draft 2 the commission canvassed the possibility of removing the present prohibition on charging proportionate (or percentage) fees in civil litigation.³⁷⁸

At present, the *Legal Profession Act 2004* prohibits a law practice from entering into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.³⁷⁹

The legislation envisages that this prohibition does not apply to the extent that the costs agreement adopts an applicable scale of costs.³⁸⁰

A number of the arguments in favour, and against allowing the charging of legal fees proportionate to the amount in dispute are set out below.

More than two decades ago, the previous incarnation of the commission, the Law Reform Commission of Victoria, considered the issue of percentage fees. A discussion paper reviewed the arguments for and against allowing proportionate fees and the then commission's views were that the weight of the arguments was in favour of allowing such fees.³⁸¹ After considering responses to the discussion paper that commission recommended that the statutory prohibition on charging proportionate fees should be removed. It was envisaged that the Law Institute and the Bar Council would make rules in relation to 'contingent fees'³⁸² and proposed that both such bodies would be subject to the *Trade Practices Act 1974*.

7.8.1 Arguments against proportionate fees

The commission has received submissions or views expressed in consultations in favour of retaining the prohibition on proportionate fees. They include the following:

- Fees should properly reflect the nature and extent of the legal services provided.
- Lawyers should not have a proportionate pecuniary interest in the outcome of litigation.
- Where lawyers have a proportionate pecuniary interest in the outcome of litigation:

- this may give rise to the pursuit of unmeritorious claims in the interests of a financial return for the lawyers
 - this may result in ethical standards being undermined with a view to achieving a favourable outcome
 - this has a negative impact on community perceptions of the professional role of lawyers generally, on the fiduciary obligation to clients in particular, and on lawyers’ duties to the court
 - this may drive up the value of settlements or judgments and reduce incentives to alternative dispute resolution.
- It is a hallmark of a profession for remuneration to be based on fee for service arrangements.
 - There is potential for windfall profits, and scope for ‘cherry-picking’ in high value cases.
 - Remuneration at a proportionate rate disguises from the client the actual work required and performed for a matter.
 - The absence of proportionate fees has not been shown to lead to a denial of access to justice.
 - Proportionate fees are not permitted in other jurisdictions, such as the United Kingdom.
 - The prospect of large proportionate fees may encourage lawyers to engage in more extensive advertising and ‘ambulance chasing’.

Insofar as proportionate fees are proposed as a solution to the problems of open-ended hourly billing practices, the submissions argued that an alternative solution would be to address that problem directly. This could be done by a variety of means, including event-based charges, regulating hourly rates or cost-capping.

7.8.2 Arguments for proportionate fees

The commission has also received submissions or views expressed in consultations that the historical prohibition on lawyers charging proportionate fees is arguably anomalous in the light of recent developments:

- The prohibition on proportionate fees by lawyers runs contrary to the goal of ‘proportionality’ which has become accepted as a goal of civil justice reform.
- In practice many if not most clients would prefer the option of a proportionate fee as it provides certainty determinacy and ensures that ultimately the client is the beneficiary of the (successful) litigation, regardless of how long and protracted the litigation is.
- In present civil litigation virtually every person and entity other than a law practice is able to charge a fee calculated as a proportion of the amount in dispute. This is now routinely done by commercial litigation funders,³⁸³ some accounting firms providing assistance in connection with litigation, liquidators³⁸⁴ and companies providing services in connection with litigation.³⁸⁵
- The *Legal Profession Act 2004* now permits lawyers to charge proportionate fees in other areas of (non-litigious) legal work.
- The historical concern about lawyers having an ‘interest’ in the outcome of legal proceedings and the concern about potential conflicts arising out of this has been superseded by the contemporary fact that in some areas of civil litigation (particularly personal injuries litigation) cases are conducted on the basis that the lawyers will only be paid if the case is successful and will be paid out of the proceeds of the litigation (no win, no fee arrangements).
- Empirical research on legal costs carried out by the commission suggested that at present the fees charged by law firms in many cases comprise a significantly higher percentage of the amount in issue than is likely to be the case where fees are capped at a specified proportion of the amount in dispute.

376 *Legal Profession Act 2004* s 3.4.27(3) (b).

377 *Legal Profession Act 2004* s 3.4.28(4) (b).

378 VLRC, Exposure Draft 2, Proposal 6.2. In the Consultation Paper, we asked whether the manner in which lawyers are able to charge or calculate fees is in need of reform, and whether clients should be able to agree to legal fees being calculated as a percentage of the amount recovered in civil proceedings.

379 Section 3.4.29(1)(b) *Legal Profession Act 2004* (Vic). Contravention renders a law practice liable to a penalty of 120 penalty units.

380 Section 3.4.29(2) *Legal Profession Act 2004* (Vic).

381 Law Reform Commission of Victoria, *Access to the Law: Restrictions on Legal Practice*, Report No 47 (1992).

382 As proposed in its earlier discussion paper: LRCV, *Access to the Law: Restrictions on Legal Practice*, Discussion Paper No 23 (1991) 53.

383 Endorsed by the High Court, by majority, in *Campbell’s Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 ALR 58.

384 The Institute of Chartered Accountants submitted that proportionate fees are not permitted under current accounting standards. The Statement of Forensic Accounting Standards—APS11, which is mandatory for all members of the Institute of Chartered Accountants in Australia and Certified Practising Accountants Australia, states that: ‘23 No part of any fee charged or received, whether directly or indirectly, when acting as an independent accounting expert is to be related to the outcome of a matter or the amount of the damages awarded’: Submission ED2 14 (Institute of Chartered Accountants in Australia). The Law Institute also questioned if such fees are currently being charged.

385 Including companies established by the partners of law firms where the partners are the directors of the companies providing the litigation ‘support’ services and where the principal place of business of the company is the office of the law firm which the directors are partners of.



- The present open ended nature of fee charging practices by lawyers often results in fees which:
 - are disproportionate to the amount in dispute
 - are impossible to estimate or quantify in advance
 - provide an incentive for inefficiency, over-servicing, and/or fraudulent billing practices and a disincentive to early resolution of the dispute.
- At present there is no prohibition on charging a fixed lump sum fee for the provision of legal services. Any such fee will in fact be a proportion of the amount in dispute or the amount recovered even if it is not purportedly calculated on a percentage basis;
- In a number of areas of litigation at present fees are limited or calculated by express reference to the amount recovered in the litigation.³⁸⁶
- The *Legal Profession Act 2004* expressly contemplates that legal fees may be calculated by reference to the amount of any award or settlement insofar as a costs agreement adopts an applicable 'scale of costs'.³⁸⁷

At the request of the commission a large firm agreed to include questions on fee arrangements in a survey of over 1000 clients conducted by an independent market research firm.³⁸⁸ The client survey sought to ascertain clients' views on preferred fee arrangements; 42 per cent clients who were contacted commented on fees and charges. In 85 per cent of these cases the clients were being represented on conditional fee arrangements; 40 per cent of such clients said they would not have pursued their claim but for the conditional fee arrangement. Importantly, for present purposes, 46 per cent of clients said they would have preferred a fee arrangement where legal fees were calculated as a percentage of the amount recovered.

7.8.3 Safeguards and protections

In considering whether or not the existing prohibition should be retained the commission has considered what safeguards and protections, if any, would be appropriate in the event that proportionate fees were to be permitted.

Safeguards, in addition to the fee review mechanisms presently available under the *Legal Profession Act 2004*, may be necessary to protect the interests of clients, to avoid 'cherry-picking' and to provide for appropriate adjustment in the event of changes in circumstances during the conduct of proceedings.

Various safeguards and protections have been suggested to the commission in the course of the review. These include:

- a requirement that a law firm seeking to act on a percentage fee basis offer clients the choice between this option and other 'customary' methods of calculating fees with the client having the right to determine which arrangement to accept
- a requirement that any percentage fee agreement be approved by the court at the conclusion of any proceedings to which the agreement relates following either judgment or settlement
- a requirement that clients be advised to seek independent legal advice before entering into a percentage fee agreement³⁸⁹
- a requirement that clients be advised to obtain 'quotes' in relation to proposed fee arrangements from more than one firm before entering into a percentage fee agreement
- a requirement that where there is a material change in circumstances in connection with the proceedings which are the subject of the fee agreement then there should be a means whereby the fee arrangements can be varied³⁹⁰
- a possible cap on the maximum percentage amount of the fee or a sliding scale of permissible maximum amounts, which decrease as the amount of the recovery increases
- retaining the existing legislative right of clients to have a costs agreement set aside where it is not fair or reasonable pursuant to section 3.4.32 of the *Legal Profession Act 2004*

- a requirement that where a proportionate fee agreement is entered into the law practice should also maintain records of the actual work carried out and the time incurred so that this may be taken into consideration in any subsequent dispute about the reasonableness of the fee charged under the agreement
- a cooling off period for a specified number of days after any proportionate fee agreement is entered into³⁹¹
- regulation of proportionate fee and retainer arrangements by the Law Society and/or Bar Council and/or Legal Services Commissioner.

There is already a common law³⁹² and statutory requirement³⁹³ in 'no win no fee' cases that the lawyer be satisfied about the 'merit' of the client's case and this is also dealt with in the commission's recommendations in relation to overriding obligations.

7.8.4 Dealing with party-party costs

It is also necessary to consider how party-party costs awards would operate if proportionate fees were to be allowed and costs were recovered by the party to the proportionate fee agreement.

One option is as follows:

*In any case where the successful party has entered into a proportionate fee arrangement the fee and retainer agreement would need to specify, at the outset of the litigation, how any costs recovered are to be treated.*³⁹⁴

There are obvious difficulties inherent in any attempt to prescribe how such party-party costs should be treated. In some cases it may be appropriate for a firm to have a 'relatively low' proportionate fee with an entitlement to retain any costs recovered. In other cases, where there is a 'relatively high' proportionate fee it may be appropriate for the client to be paid the full amount of any party-party fees recovered.

The position in relation to out of pocket expenses and disbursements may depend on who advances such costs in the course of the litigation. Where they are advanced by the client then clearly the client should receive any such expenses that are recovered. Similarly, where they are funded by the law firm it may be appropriate for the law firm to retain any amount recovered in respect of such expenses.

7.8.5 Conclusions

This commission is of the view that the current absolute legislative prohibition of percentage contingent fees should be reconsidered, provided that any proposed (regulated) percentage fee arrangements are subject to adequate safeguards to protect consumers and to prevent abuse. Alternatively, (regulated) percentage fees could be considered for introduction by way of a 'scale of costs', within the meaning of the *Legal Profession Act 2004*. This is discussed below.

The determination of whether regulated percentage fees should be introduced, with appropriate safeguards, should be made by the proposed Costs Council after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar Council. The Costs Council could also consider whether there are particular types of legal work where percentage fees should not be permitted.³⁹⁵ Removal of the prohibition on percentage fees would permit not only plaintiffs but also defendants to engage lawyers on a percentage basis.

Although in many instances allowing fees to be calculated on a percentage basis will result in greater certainty and lower fees for consumers of legal services, in other instances this may result in substantially higher fees than under current fee-for-service arrangements. Accordingly, the commission does not favour mere abolition of the current prohibition on percentage legal fees. If percentage fees are to be allowed there is a need for safeguards to protect consumers and to prevent abuse. Some of the safeguards have been outlined above.

Although this is a matter to be considered by the Costs Council, provision for the calculation of fees on a percentage basis does not have to be limited to cases conducted on a speculative basis (ie, where the lawyer is only entitled to be paid in the event of success). In principle, if (regulated) percentage fees are permissible there is no reason why a client, whether plaintiff or defendant, should not be able to agree to pay fees calculated as a percentage of the amount in dispute where such fees are payable, regardless of the outcome of the proceedings.

386 See, eg, O 26 r 2 *Magistrates' Court Civil Procedure Rules* and Appendix A to the rules.

387 *Legal Profession Act 2004* (Vic) s 3.4.29(2).

388 These questions were included on the basis that the identity of the firm would remain confidential.

389 Section 3.4.27(3) (d) of the *Legal Profession Act 2004* requires conditional costs agreements to incorporate reference to the client's right to seek independent legal advice before entering into an agreement.

390 An example of a potential problem is where a fee arrangement is entered into in a case where both liability and quantum are in serious dispute but where, after relatively little work has been done, the defendant admits to liability. A fee arrangement which may be appropriate in circumstances where substantial legal work was likely to be required and where the law firm undertook to accept the risk on nonpayment in the event of the case failing may no longer be reasonable where liability is no longer in issue and where little further legal work is required.

391 Section 3.4.27(3)(e) of the *Legal Profession Act 2004* provides for a cooling off period of not less than five clear business days following a conditional costs agreement during which the client may terminate the agreement.

392 See *Clyne v New South Wales Bar Association* (1960) 104 CLR 186.

393 Section 3.4.28(4) of the *Legal Profession Act 2004* provides that where a conditional fee agreement provides for an uplift fee the law practice must have 'a reasonable belief that a successful outcome of the matter is reasonably likely'.

394 In Ontario legislation provides that a contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement unless the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of 'exceptional circumstances': *Solicitors Act*, RSO 1990, c S15.

395 For example, in the areas of family law and criminal law, where at present conditional costs agreements are prohibited: *Legal Profession Act 2004* s 3.4.27(2).



A client may lawfully enter into an agreement to pay an agreed lump sum amount for fees, whether on a contingent basis or otherwise. The current statutory prohibition prevents the amount of any such lump sum payable to the law practice, or any part of that amount, being calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.³⁹⁶

The legislation states that this prohibition does not apply to the extent that the costs agreement adopts an applicable scale of costs.³⁹⁷ Thus, in conformity with this legislative framework, (regulated) percentage fees could be introduced by way of a 'scale of costs' within the meaning of the *Legal Profession Act 2004*.

7.9 PROPORTIONATE AND OTHER FEES IN CLASS ACTIONS

Apart from the issue of proportionate fees in ordinary civil litigation it is necessary to consider whether it may be desirable to permit proportionate or other types of fees to be recovered in class action litigation.

The commission sought submissions on the issue of whether proportionate or other types of fees should be recoverable in class action proceedings.³⁹⁸

Maurice Blackburn contended that proportionate fees could increase access to justice for victims of cartel and other corporate misconduct.³⁹⁹ Cartel claims, they argued, are particularly expensive, risky and complex. It is difficult to find representative plaintiffs willing to bear the risk of an adverse costs order. Lawyers who run the case take on a significant financial burden and may claim ordinary fees plus a 25 per cent uplift fee.

Maurice Blackburn submitted that percentage fees subject to court supervision would allow more people to bring claims for corporate misconduct. It submitted that the prohibition against lawyers charging percentage fees when non-lawyers are permitted to do so is 'illogical'.

The commercial litigation funder IMF expressed support for percentage contingent fees in class action proceedings.

Although commercial litigation funders are able to charge a fee calculated as a proportion of the amount recovered by assisted parties (who contractually consent) there is no mechanism at present for the funder to obtain a return from class members who have not entered into litigation funding arrangements.⁴⁰⁰ This has led to a situation whereby funders, for obvious commercial reasons, are only prepared to provide financial assistance to those who enter into litigation funding agreements. The consequences of this are that much time and effort is expended in 'signing up' class members, and only group members who have executed litigation funding agreements can have proceedings brought on their behalf. This restriction of the class runs contrary to the policy objective of class action legislation to facilitate larger 'opt-out' classes. This situation has received adverse judicial comment.⁴⁰¹

The commission notes that the issue of legal fees in class action proceedings is different from the position in ordinary litigation. In part, this is because where there is an 'opt-out' class, most of the class members will usually not be parties to any fee or funding agreement and may obtain the benefit of the litigation without any risk or cost.⁴⁰²

Class action proceedings are also different from most other civil litigation in that any settlement is required to be approved by the court and this includes approval of fees and expenses.

The commission also received submissions opposing the introduction of proportionate fees in class actions. The Law Institute maintained that:

*The use of contingency fees in litigation creates a conflict between the interests of the law firm as the law practice acquires an interest in the litigation over and above acting for the client.*⁴⁰³

The Institute submitted that the level of risk should not warrant a new fee and regulation regime, rather 'the fact that the represented party is at a costs risk is part and parcel of the litigation'.

7.9.1 Class action fee arrangements in other jurisdictions

In class action proceedings in both Canada and the United States, courts are also required to approve fee arrangements and payments out of any settlement or judgment monies. However, in all jurisdictions there is provision for recovery, subject to judicial approval, or more than just the legal costs incurred in conducting the litigation in order to:

- provide compensation for the risks involved
- provide an adequate incentive for lawyers to take on the conduct of such proceedings and
- ensure that the beneficiaries of the litigation contribute to the costs rather than remain ‘free riders’.

Importantly, lawyers conducting class actions in the United States and Canada do not contract to provide legal services on a proportionate basis. However, courts have discretion (either under statutory provisions or based on principles developed by the courts)⁴⁰⁴ to allow payment, out of any fund created by judgment or settlement, of amounts which may exceed the actual legal costs and expenses incurred in conducting the litigation. Such fees may be allowed:

- as a proportion of the recovery
- based on the actual legal fees and expenses increased by a multiplier (the lodestar method)
- based on some combination of these methodologies.

Often information on the actual quantum of fees, based on hourly rates, is used as a yardstick in determining the reasonableness of the fees awarded at the conclusion of the case. This is done at an open hearing at which any interested person, including class members, may appear, make submissions and object.

In 2007, the Civil Justice Council recommended that in England and Wales consideration should be given to the introduction of proportionate fees on a regulated basis, along similar lines to those permitted in Ontario,⁴⁰⁵ particularly to assist access to justice in group actions and other complex cases where no other method of funding is available.⁴⁰⁶

7.9.2 Conclusions

In light of the divergent submissions received in response to this issue, the commission believes that more research and consultation is necessary. We believe that the proposed Costs Council should also review proportionate fees in class actions.

The Costs Council, after consultation with the Legal Services Commission, the Law Institute and the Bar Council, should also consider whether proportionate and other types of fees—including fees based on the work actually done with a multiplier (similar to the ‘lodestar’ method applied by Canadian and US courts)—should be recoverable in class action proceedings.

However, fees in class action proceedings should be subject to court approval where they will ultimately be paid or reimbursed by class members who have not individually consented to the fee arrangements.

7.10 COURT FEES

The issue of court fees was raised in the Consultation Paper. The commission received a strong response to this issue, which is summarised earlier in this chapter.

In light of the concerns raised in submissions, the commission believes that court fees should be reviewed by the proposed Costs Council. There is a need for greater standardisation and simplification of court fees. There are strong arguments in favour of higher ‘user pays’ fees for commercial litigation and easier and simpler methods for reducing or waiving fees for those who cannot afford them.

The Consumer Action Law Centre’s submission proposed that court fees in all Victorian courts should be changed so that complainants or defendants that are businesses pay a higher fee than individuals. It suggested that this would to some extent offset the commercial advantages businesses obtain through the tax deductibility of legal costs incurred in some cases.

7.11 OFFERS OF COMPROMISE

The commission received further submissions regarding offers of compromise following the Consultation Paper.

396 *Legal Profession Act 2004* s 3.4.29(1) (b). Contravention renders a law practice liable to a penalty of 120 penalty units.

397 *Legal Profession Act 2004* s 3.4.29(2).

398 VLRC, *Exposure Draft 2, Proposal 6.2.*

399 Submission ED2 19 (Maurice Blackburn).

400 Except that the legislation allows the court to order that any shortfall between the solicitor–client costs of the successful representative party and the amount of party–party costs recovered from the unsuccessful party be met out of any monies payable to the class members as a result of any judgment. The legislation does not expressly extend to settlements and only provides for recovery of the actual costs incurred in conducting the litigation.

401 See, eg, the decision of Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394; and the decision of Hanson J in *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449. Finkelstein J came to a different view in the recent decision in *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061.

402 Other than the possible cost, referred to above, of having to contribute, out of any judgment sum, to any shortfall between the solicitor–client costs of the representative party and the amount of costs recovered on a party–party basis.

403 Submission ED2 16 (Law Institute of Victoria).

404 For example, US courts have recognised that a litigant or lawyer who recovers a ‘common fund’ for the benefit of other persons is entitled to reasonable legal fees from the fund as a whole. The common fund doctrine reflects the traditional practice of equity courts. The doctrine also rests on the perception that persons who obtain the benefit of the litigation without contributing to its costs are unjustly enriched at the successful litigant’s expense. The court’s jurisdiction over the fund permits it to spread the fees proportionately among the beneficiaries: see, eg, the decision of the United States Supreme Court in *Boeing Co v Van Gemert* 444 US 472 (1980).

405 See *Solicitors Act, RSO 1990, c. S. 15.*

406 Civil Justice Council, *Improved Access to Justice: Funding Options and Proportionate Costs* (2007) 68.



Litigation funder IMF submitted that 'offers of compromise are the only way that parties can, unilaterally, seek to manage their costs exposure'. IMF submitted that:

Open offers be required to be made at or shortly after the Pre Litigation Conference (when disclosure of material information has been made), which should not only have cost consequences but also be relevant to the project line and budgets either agreed or set by the Court. This procedure would enhance proportionality, enable the parties to reality test their positions and provide material data for the Court in exercising its case management and cost allocation functions.

The commission believes that the rules relating to offers of compromise and costs consequences need further investigation. These matters should be reviewed by the Costs Council.

7.12 THE JUSTICE FUND

7.12.1 Assistance, including indemnity in respect of costs

The commission's proposals in relation to a new funding mechanism (the Justice Fund) are discussed in Chapter 10.

The commission proposed that the Justice Fund should be able to provide assistance, including indemnity in respect of adverse costs, in cases other than class actions after it has become self funding.⁴⁰⁷

That proposal envisages:

- placing a limit on the liability of the proposed fund for adverse costs orders made against the party assisted by the fund for a limited period
- leaving the party assisted by the fund liable to meet any shortfall between the total amount of an adverse costs order and the capped liability of the fund.

One difficulty with limiting the liability of the fund in respect of an adverse costs order is that the successful party who obtains an order for costs against a funded party may not recover all of the costs from the fund. That would leave the assisted party liable to meet the shortfall. The commission received submissions contending that many persons would not agree to be a representative party in class action proceedings in view of such potential liability.⁴⁰⁸

The discussion in this chapter has highlighted the significant role that costs, and the threat of adverse costs, play in mediating access to justice. A number of respondents supported the view that the Justice Fund should fully indemnify assisted parties on these grounds.⁴⁰⁹ The Consumer Action Law Centre argued that 'failing to fully indemnify the assisted party against adverse costs orders would in large part defeat the purpose of the Justice Fund'.⁴¹⁰ It noted that the risk that adverse costs could exceed the proposed Justice Fund's cap on liability would result in litigation not being pursued. The Law Institute also submitted that in order to facilitate access to justice, there should be no limit on the liability of the fund.⁴¹¹

The proposal, however, represents a departure from the standard rule that the losing party pays the winning party's costs. Giving the assisted party immunity from liability for any adverse costs not met by the fund would alter the standard rule that the losing party pays the other side's costs. Such an approach could have broader application for cases that are being funded by Legal Aid or conducted on a pro bono basis, and should be carefully considered. IMF submitted that the Justice Fund should compete on an 'equal playing field or not at all'.⁴¹²

The commission also sought further submissions on whether the fund-assisted party would remain liable for any shortfall between the capped liability of the proposed fund and the total amount of party-party costs ordered against an unsuccessful party.⁴¹³ We canvassed the options of:

- giving the assisted party immunity from adverse costs⁴¹⁴
- giving the proposed Justice Fund standing to apply to the court in which the funded proceedings are pending for an order limiting the potential liability of the funded party for adverse party-party costs.⁴¹⁵

One submission suggested that the fund-assisted party should remain liable for the shortfall between capped liability and any costs order. They acknowledged this would dissuade some plaintiffs, but on balance would be 'fairer to defendants'.⁴¹⁶

QBE opposed providing the Justice Fund with immunity against adverse costs.⁴¹⁷ It argued that a possible adverse costs order discourages unnecessary litigation and assists settlement. In the alternative, QBE submitted that the fund should be liable for the full amount of costs made against the assisted party. Similarly, State Trustees submitted that the prospect of adverse costs may not be against the interests of justice per se. Thorough consideration of the merits of a matter, they said, together with reliance on model litigant guidelines, would reduce the potential for adverse costs orders.⁴¹⁸

Other submissions reiterated their support for the Justice Fund, including in connection with the provision of indemnity against adverse costs orders. Victoria Legal Aid said that 'protecting parties from adverse costs orders, especially in public interest cases, is important in ensuring these cases are dealt with adequately by the civil justice system'.⁴¹⁹ The Consumer Action Law Centre submitted that public interest costs principles ought apply, or that costs should be capped, except where a defendant could show that further party-party costs were 'necessary, proportionate to the nature of the claim, reasonably incurred and not incurred due to the defendant's lack of good faith'.⁴²⁰

The commission has taken into account these views. As discussed in Chapter 10, we believe that the Justice Fund would play an important role in the civil justice system, particularly in class actions and public interest proceedings and in facilitating access to justice for disadvantaged litigants. However, we are concerned that the fund could be vulnerable to adverse cost orders before it is self-funding, which would render it unviable. For this reason, the commission recommends that for the first five years of its operation, adverse costs orders against the fund should be limited to the amount equivalent to the amount of funding provided to the assisted party.

This recommendation means that an assisted party would remain personally liable to meet any shortfall between the amount of an adverse costs order and the maximum liability of the fund. Nevertheless, the commission expects that where the fund is in a financial position to do so, it should have a discretion to pay any shortfall. The commission also recommends that the fund should have standing to apply to the court for an order limiting the potential liability of the funded party for adverse costs.

7.13 RESEARCH ON COSTS

The commission has been considerably hampered in the course of the present inquiry by the lack of comprehensive and reliable data on legal costs incurred and recovered in civil litigation before Victorian courts.

There is clearly a need for more research and empirical data on legal costs. Information about court ordered disclosure of costs incurred (and estimated further costs) at the commencement of litigation, and costs actually incurred at the conclusion of litigation, would be of considerable value, not only to the parties and to assist the court in the management of proceedings, but also to facilitate further research and reform. The proposed Civil Justice Council and Costs Council could play a valuable role in facilitating such further research and reform.

The commission understands that three years ago the Supreme Court proposed that a Court Statistics and Information Resources Centre should be established. In its recent submission the Victorian Bar stated that this is an important initiative that should be pursued with urgency and urged the Government to support it.⁴²¹ The establishment of such a centre would no doubt assist in facilitating further research on costs and on the operation of the civil justice system generally.

8. CONCLUSIONS

Although it is easy to pinpoint a variety of problems in relation to the costs of dispute resolution generally and civil litigation in particular, solutions are far more elusive. It is important to bear in mind the problematic nature of civil justice reform, especially in relation to the issue of costs and the impact of other reforms on the costs of litigation:

- Reforms which accelerate disclosure and disposition don't always reduce costs.
- Cost penalties and sanctions require careful design and cautious application.
- Draconian costs penalties and the loss of substantive rights may be too high a price for procedural irregularity.
- Provisions with benign intent may have unintended consequences (eg, further costs disputes and satellite litigation).

- 407 VLRC, Exposure Draft 1, Proposal 9.2.
- 408 Submission ED2 12 (Consumer Action Law Centre).
- 409 Submissions ED1 14 (Environment Defenders Office), ED1 25 (Victoria Legal Aid), ED1 20 (Public Interest Law Clearing House), ED1 19 (Human Rights Law Resource Centre), ED1 31 (Law Institute of Victoria).
- 410 Submission ED2 12 (Consumer Action Law Centre).
- 411 Submission ED2 16 (Law Institute of Victoria).
- 412 Submission ED1 8 (IMF (Australia) Ltd).
- 413 VLRC, Exposure Draft 2, 73.
- 414 See, eg, *Legal Aid Commission Act 1979* (NSW) s 47.
- 415 See, eg, O 62A *Federal Court Rules*.
- 416 Submission ED2 19 (Maurice Blackburn Lawyers).
- 417 Submission ED2 17 (QBE Insurance Group).
- 418 Submission ED2 7 (State Trustees Ltd).
- 419 Submission ED2 10 (Victoria Legal Aid).
- 420 Submission ED2 12 (Consumer Action Law Centre).
- 421 Submission CP 62 (Victorian Bar).



- Reforms which have the effect of increasing costs and procedural hurdles may make access to justice less affordable and outcomes less just.
- The complexity of the legal and factual matters required to be determined will have a significant bearing on the cost of dispute resolution.
- Lawyers play an important role in the civil justice system and cost reforms which restrict, curtail or render uneconomic legal services may not be in the public interest or in the interests of clients.
- On the other hand, the traditional adversarial approach to the conduct of civil litigation and the commercial and professional practices of the legal profession have increased the cost of dispute resolution.

There are complex, conflicting or countervailing policy and economic considerations to be factored into any proposed solution to perceived costs problems in the civil justice system.

RECOMMENDATIONS

Ongoing costs review and reform

141. A specialist Costs Council should be established, as a division of the Civil Justice Council. The Costs Council, in consultation with stakeholder groups, would: (a) review the impact of the commission's implemented recommendations about costs; (b) investigate the additional matters in relation to costs referred to in the commission's report, including those matters raised in submissions; (c) carry out or commission further research in relation to costs; and (d) consider such other reforms in relation to costs as the council considers appropriate.

Costs disclosure

142. The court should have an express power to require parties to disclose to each other and the court estimates of costs and actual costs incurred.
143. In exercising the proposed power to order disclosure of costs incurred and estimates of costs likely to be incurred, there should be limits on the type of information required to be disclosed to protect information that may have confidential strategic or forensic significance or which might otherwise be privileged (other than information concerning the quantum, break up or method of calculation of legal fees and expenses).

Fixed or capped costs

144. Although fixed or capped costs are a good idea in principle, there are practical problems in their implementation. These should be developed for particular areas of litigation after consultation and with the agreement of stakeholders (under the auspices of the Costs Council/Civil Justice Council).

Taxation of costs

145. The present multiple bases for taxation of costs should be simplified.
146. There should be a presumptive rule that interlocutory costs orders should not be taxed prior to the final determination of the case unless the court orders otherwise.

Solicitor–client costs and party–party costs

147. The present gap between party–party and solicitor–client costs is unreasonable in a number of cases⁴²². The recoverable costs on a party–party basis should usually be 'all costs reasonably incurred and of a reasonable amount', unless the court, in the exercise of its discretion, makes an order on some other basis.
148. Other methods for ordering recovery of legal costs of a successful party should be utilised (more often), including ordering costs as a specified percentage of the actual (reasonable) solicitor–client costs, with a view to avoiding the costs and delays associated with the present process of taxation of costs.

Scales of costs

149. The court scales of costs need to be revised and/or updated.
150. There should be a common scale of costs across courts. The question of whether there should be proportionate differentials, between courts, in terms of recoverable party–party costs should be considered by the Costs Council.
151. In the event that there is a common scale for recoverable party–party costs applicable across the three courts, in addition to considering whether there should be ‘standard’ percentage reductions in the amount of costs recoverable depending on which court the proceeding is in, the Costs Council should consider whether the principle that the recoverable costs should be ‘reasonable’ is sufficiently flexible to accommodate variations between courts (in the event that such variations are considered desirable) without the need for prescribed variations.

Cost of disbursements

152. There should be a prohibition on law firms profiting from disbursements, including photocopying, except in the case of clients of reasonably substantial means who agree to pay for disbursements which include an element of profit. When a client recovers costs, only the reasonable actual costs of the disbursements (excluding any profit element) should be recoverable from the losing party.

A draft provision is as follows:

- (1) *Unless the client or another person providing indemnity or financial support for the client is (a) of reasonably substantial means and (b) agrees to pay in excess of the prescribed rate for disbursements, a law practice shall not charge a client any amount for disbursements in excess of the prescribed rate.*
- (2) *In making any order for costs against a party or other person who is not a party the court shall not allow recovery of any amount for disbursements in excess of the prescribed rate.*
- (3) *Law practice includes any related person or entity, including a service company.*
- (4) *Prescribed rate means the approximate actual cost of the disbursement without any allowance for mark-up by the law practice or profit by the law practice. The actual cost may include a reasonable allowance for law practice office overheads. (For example: the ‘actual cost’ of internal photocopying would include (i) the cost of the paper, (ii) charges payable to an unrelated lessor or owner of any photocopying equipment used in making the copies and (iii) other costs associated with the purchase, lease or use of photocopying equipment in the possession of the law practice. The cost of the labour involved in the copying and collating would be included as part of the allowance for law practice office overheads. The ‘actual cost’ of copying done externally would be the charges made by an unrelated commercial photocopying company plus a reasonable allowance for law practice office overheads, including the labour involved in collating, despatching and collecting the documents.)*
- (5) *To avoid complicated computations, the law practice may make a reasonable estimate of the approximate actual cost of the disbursement or charge at a rate approximate to the rate charged by unrelated commercial suppliers of services (eg, photocopying).*
- (6) *The prescribed rate for disbursements may be set by the Costs Council.*

Comment 1: Rather than use the term ‘client’, it may be preferable to pick up the terminology currently incorporated in the *Legal Profession Act 2004* in respect of related persons to whom the costs disclosure obligations now apply.

Comment 2: The commission is mindful that the expression ‘of reasonably substantial means’ is imprecise.

Public interest litigation costs

153. There should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases, including orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest.

422 Based on research carried out by the commission, it would appear that in many instances only about half or less of the solicitor–client costs are recovered on a party–party basis following taxation of costs.



Percentage fees

154. The current absolute legislative prohibition of percentage contingent fees should be reconsidered, provided that any proposed (regulated) percentage fee arrangements are subject to adequate safeguards to protect consumers and to prevent abuse.
155. The determination of whether regulated percentage fees should be introduced, with appropriate safeguards, should be made by the Costs Council after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar Council. The Costs Council could also consider whether there are particular types of legal work where percentage fees should not be permitted.
156. The Costs Council should also reconsider whether percentage fees could be introduced by way of a 'scale of costs' within the meaning of the Legal Profession Act 2004.
157. The Cost Council should consider what safeguards and protections, if any, would be appropriate in the event that proportionate fees were to be permitted.

Proportionate and other fees in class action proceedings

158. The Costs Council, after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar should also consider whether proportionate and other types of fees, including fees based on the work actually done with a multiplier (similar to the 'lodestar' method applied by Canadian and US courts) should be recoverable in class action proceedings. However, fees in class action proceedings should be subject to court approval where they will ultimately be paid or reimbursed by class members who have not individually consented to the fee arrangements.

Court fees

159. Court fees should be reviewed by the Costs Council. There is a need for greater standardisation and simplification of court fees. There are strong arguments in favour of higher 'user pays' fees for commercial litigants and easier and simpler methods for reducing or waiving fees for those who cannot afford them.

Offers of compromise and costs

160. The rules relating to offers of compromise and costs consequences should be reviewed by the Costs Council.

Justice Fund

161. The (proposed) Justice Fund should provide assistance, including indemnity in respect of adverse costs, in cases other than class actions, after it has become self-funding.
162. In cases where funding is provided by the Justice Fund during its first five years of operation the liability of the fund in respect of adverse costs should be limited to an amount equivalent to the amount of funding provided to the assisted party. The assisted party would remain personally liable to meet any shortfall between the amount of an adverse costs order and the maximum liability of the fund. However, during this period the fund should have a discretion to pay any shortfall if it is in a financial position to do so. Also, the fund should have standing to apply to the court for an order limiting the potential liability of the funded party for adverse costs.

Research on costs

163. There is a need for more data and research on costs. One means by which this might be achieved is by empowering the court to require parties to disclose costs data at the conclusion of the matter or at any other stage of the proceeding.

Chapter 12

Facilitating Ongoing Civil Justice Review and Reform



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Facilitating Ongoing Civil Justice Review and Reform

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*'Managing justice is an ongoing process. There is no simple, once and for all solution to the problems of civil justice systems, no single best practice for managing or resolving disputes.'*¹

1. INTRODUCTION

Our terms of reference ask us to have regard to the aims of the *Attorney-General's Justice Statement: New directions for the Victorian Justice System 2004–2014*, and in particular the modernisation, simplification and harmonisation of the rules of civil procedure within and across jurisdictions.

The Attorney-General's Justice Statement identified the following potential areas for procedural reform (among others):

- Reform of the processes for commencing litigation. This may include common commencement forms between jurisdictions and the inclusion of the plaintiff's statement of claim with the originating process.
- The present variety of procedures in different jurisdictions, all of which fundamentally are directed at getting the parties to state their cases, identify issues in dispute and disclose relevant supporting information, adds to the costs of litigation and clouds the transparency of the processes. Greater harmony between the rules of all three Victorian court jurisdictions should be the goal, provided that this does not encumber the lower jurisdictions with processes more appropriate to more complex litigation.

Our terms of reference also ask us to identify the process by which the courts, the legal profession and other stakeholders can be fully involved in any further detailed review of the rules of procedure.

In this chapter we examine the processes by which procedural rules are made and amended in Victoria and other jurisdictions, outline recent moves towards uniform rules of civil procedure, and consider mechanisms for ongoing review and reform of the rules of civil procedure.

In the course of the present inquiry we received numerous submissions proposing reforms in areas outside the matters which have been taken up in stage 1. In this chapter we summarise these reform proposals. Some of these may be taken up in stage 2 of the present inquiry. Some may be matters for consideration by the proposed Civil Justice Council. Others may be implemented, either by legislation or rule change, without the need for further investigation.

2. RULES AND RULE-MAKING POWERS

2.1 VICTORIA

The rules that govern civil procedure in Victorian courts are made by the courts themselves as subordinate legislation. The principal rules are as follows:

- *Supreme Court (General Civil Procedure) Rules 2005* (Chapter I)
- *County Court Rules of Procedure in Civil Proceedings 1999*
- *Magistrates' Court Civil Procedure Rules 1999*.

The rules of the Supreme and County Courts share a large number of common provisions, which the Supreme Court has noted 'allows for a common jurisprudence in relation to the application of the rules'.² There are some distinctions between the rules, reflecting different case management approaches, and variations in jurisdiction. The Magistrates' Court rules are simpler and shorter than those that apply in the other courts. The courts also issue practice notes and guidelines to 'provide more detailed and specialised information on the practices adopted in specialist lists, procedures for certain types of applications or new Court initiatives'.³

The judges of the Supreme Court may make rules 'on any matter relating to the practice and procedure of the Court or the powers, authorities, duties and functions of the officers of the Court'.⁴ The judges of the County Court 'may make rules for regulating and prescribing the pleading, practice and procedure of the court'.⁵ In any case not provided for in the County Court Act or Rules, the general principles of practice and the rules observed in the Supreme Court may be adopted and applied.⁶ In the Magistrates' Court, the Chief Magistrate, together with two or more Deputy Chief Magistrates, may jointly make rules of court 'for or with respect to any matter relating to the practice and procedure of the Court in civil proceedings'.⁷

1 ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, (2000) [1.14].

2 Submission CP 58 (Supreme Court of Victoria).

3 Submission CP 58 (Supreme Court of Victoria).

4 *Supreme Court Act 1986* s 25.

5 *County Court Act 1958* s 78.

6 *County Court Act 1958* s 78(5).

7 *Magistrates Court Act 1989* s 16.

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A council of the judges or magistrates of each Victorian court must meet at least once in each year to consider the operation of the legislation and rules, and to enquire into and examine any defects that appear to exist in the system of procedure or administration of the law in the court.⁸ Each court delegates its rule-making power to a rules committee, which then makes recommendations to the judges or magistrates for any rule change.⁹ The legislation does not prescribe who the members of the rules committees should be, or how their deliberations should be conducted.

The courts' rules committees generally comprise judicial members, masters and registrars, representatives nominated by the Victorian Bar Council and the Law Institute of Victoria and an officer from the Office of the Chief Parliamentary Counsel.¹⁰ During 2005–6 the Magistrates' Court Rules Committee's primary focus was the alignment, where possible, of the court's civil rules with those of the County and Supreme Courts.¹¹

The Supreme Court reported in relation to its Rules Committee:

In addition to acting in response to new legislation, the Committee receives suggestions for new rules or amendments from within the Court, from the profession and others. The Court also participates, through the Council of Chief Justices, in the National Harmonisation of Rules Committee which provides a forum for the development of uniform or harmonised rules on common issues across superior courts.

The Rule making power of the Court is an important aspect of the Court's power to control its own procedure. The composition of the Rules Committee allows matters to be raised by those dealing with the Rules on a day to day basis. It allows expert consideration of any proposed change and an efficient procedure for amendment without recourse to parliamentary or departmental processes.¹²

The *Subordinate Legislation Act 1994* governs the status of rules made by the courts. Rules made by the courts are subject to disallowance by the Parliament.¹³

A proposed rule that is to be made by, or with the consent or approval of, the Governor in Council must be submitted to the Chief Parliamentary Counsel for the issue of a certificate that the rule is within power and appears otherwise appropriate.¹⁴ The rule must be published in the *Government Gazette* as soon as practicable after it is made, and within six days must be laid before each House of Parliament.¹⁵

The Scrutiny Committee may report to Parliament if it appears that any statutory rule laid before Parliament does not appear to be within the powers conferred by the authorising Act, contains principles which should properly be dealt with by an Act and not subordinate legislation, unduly trespasses on rights and liberties of the person previously established by law, etc. The Scrutiny Committee may recommend that a rule should be disallowed or amended.¹⁶

The Minister may make guidelines for the preparation, content, publication and availability of statutory rules, and the procedures to be implemented and the steps to be undertaken for the purpose of ensuring consultation, coordination and uniformity in the preparation of statutory rules.¹⁷

The courts are also empowered to make rules under section 50 of the *Interpretation of Legislation Act 1984*, which provides:

Where an Act or subordinate instrument confers any jurisdiction on a court or other tribunal or extends or varies the jurisdiction of a court or other tribunal, the authority having for the time being power to make rules or orders regulating the practice and procedure of that court or tribunal may, unless the contrary intention appears, make such rules or orders (including rules or orders with respect to costs) as appear to the authority to be necessary for regulating the practice and procedure of that court or tribunal in the exercise of the jurisdiction so conferred, extended or varied.

In addition to express statutory powers, courts have an inherent or implied power to regulate their own procedure. The judges of superior courts and most other courts of record have the power to make rules of court regulating the procedure of the court to ensure the parties use the process of the court fairly and conveniently.¹⁸ The inherent power of the court is rarely used because courts are given wide statutory rule-making power.

As members of the High Court have noted, 'power' and 'jurisdiction' are not discrete concepts and the distinction between them is often blurred.¹⁹

In *Harris v Caladine* Justice Toohey noted that:

*Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'*²⁰

Challenges to the rule-making power

In *Ousley v R* the High Court had occasion to consider the general principles of the rule-making power in the context of a challenge to a Victorian rule prescribing the form of warrants.²¹ Justice McHugh summarised the principles as follows:²²

*A rule made under rule-making powers is invalid if it is 'altogether outside the province'²³ of the court as a rule-making authority or is 'patently or absurdly irrelevant'²⁴ to the rule-making power. In less extreme cases, a rule will be invalid where it is not 'capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose'.²⁵ In *Williams v Melbourne Corp.*,²⁶ Dixon J expressed the test for invalidity as being whether the rule goes 'beyond any restraint which could be reasonably adopted' for the prescribed purpose.*

*Section 25(1)(f)(i) of the Supreme Court Act and s 50 of the Interpretation Act enable bodies such as the Supreme Court of Victoria to ensure their efficient operation by providing means for the regulation of 'practice and procedure', a term which has been expressed to denote:*²⁷

the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product.

In Cleland v Boynes,²⁸ the Full Court of the Supreme Court of South Australia approved the following description of 'practice and procedure' given by Falconbridge in his work, *Conflict of Laws*:²⁹

Broadly speaking, it is customary in the conflict of laws to characterise as procedural such matters as forms of action, parties to an action, venue, rules of practice and pleading, proof of facts, admissibility of evidence, rebuttable presumptions and burdens of proof; and it has been suggested that the line between substance and procedure should be drawn on the basis of the general distinction between procedural rules which concern methods of presenting to a court the operative facts upon which legal relations depend, and substantive rules which concern the legal effect of those facts after they have been established.

The members of the High Court who considered the scope of the rule-making power found that section 25(1)(f) only authorises the court to make rules for judicial acts. As the issue of a warrant is an administrative act, section 25(1)(f) could not support the rule prescribing the form of the warrant. However, section 50 of the Interpretation of Legislation of Act 'encompasses administrative as well as judicial functions' and is 'sufficient authority' for the court to prescribe the form of the warrant.³⁰

The scope of the Supreme Court's rule-making power was further considered following the adoption of new class action procedures by that court in 1999.³¹ The Supreme Court introduced rules mirroring the Federal Court's class action procedures contained in the *Federal Court of Australia Act 1976* (Cth).

These class action procedures allowed the court to assess damages in the aggregate. The relevant provision³² was challenged in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia (Ltd)*. A majority of the Court of Appeal held that the rules were valid and could have been made pursuant to section 25(1)(a) (which empowers the court to make rules with respect to any matter dealt with in any rules of court in force on 1 January 1987), or the more general provision, section 25(1)(f)(i).

Justice Ormiston (with whom Justices Phillips and Charles agreed) characterised the rules in dispute as 'rules of practice and procedure', that is, 'they prescribe the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right'. Justice Ormiston found that the new rules did not alter recognised existing legal principles, and further, any calculation of damages would not amount to a substantive alteration of the law.

8 *Supreme Court Act 1986* s 28, *County Court Act 1958* s 87, *Magistrates Court Act 1989* s 15.

9 *Supreme Court of Victoria, Annual Report 2004–05* (2006) 29; *County Court of Victoria, Annual Report 2005–06* (2007) 20, *Magistrates' Court of Victoria, Annual Report 2005–2006* (2007) 16–17.

10 See *Supreme Court* (2006) above n 9; *Magistrates' Court* (2007) above n 9.

11 *Magistrates' Court* (2007) above n 9; and submission CP 55 (*Magistrates' Court of Victoria*).

12 Submission CP 58 (*Supreme Court of Victoria*).

13 *Supreme Court Act 1986* s 27, *Magistrates' Court Act 1989* s 16(2).

14 *Subordinate Legislation Act 1994* s 13.

15 *Subordinate Legislation Act 1994* ss 17, 15.

16 *Subordinate Legislation Act 1994* s 21.

17 *Subordinate Legislation Act 1994* s 26.

18 *Gittins v WHC Stacy and Son* (1964) 82 WN Pt 1 (NSW) 157.

19 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590 [64] (Gleeson CJ, Gaudron and Gummow JJ); *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J). See also *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 227 ALR 425 [5] (Gleeson CJ, Gummow, Hayne and Crennan JJ). In that case the court noted that the phrase 'inherent jurisdiction' is a slippery one [5]. The case concerned abuse of process and the 'inherent jurisdiction' of superior courts to stay proceedings.

20 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590 [64] (Gleeson CJ, Gaudron and Gummow JJ) quoting *Parsons v Martin* (1984) 5 FCR 235, 241.

21 *Ousley v R* (1997) 148 ALR 510.

22 *Ousley v R* (1997) 148 ALR 510, 542–3.

23 *Lynch v Brisbane City Council* (1961) 104 CLR 353, 365.

24 *Foster v Aloni* [1951] VLR 481, 484. See also *State Bank (SA) v Hellaby* (1992) 59 SASR 304, 309.

25 *South Australia v Tanner* (1989) 166 CLR 161, 165.

26 (1933) 49 CLR 142, 156.

27 *Poyser v Minors* (1881) 7 QBD 329, 333 (Lush LJ). See also *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 176–7; *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 75.

28 (1978) 19 SASR 464.

29 (1978) 19 SASR 464, 470.

30 *Ousley v R* (1997) 192 CLR 69, 518 (Toohey J), and 549 (Gummow J).

31 *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia (Ltd)* (2000) 1 VR 545.

32 O 18A. The provision allowing the court to award damages in an aggregate amount was based on s 33Z of the *Federal Court Act 1976*. This is now dealt with by s 33Z *Supreme Court Act 1986*. See Peter Cashman, *Class Action Law and Practice* (2007) 30–3.



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Justices Winneke and Brooking dissented, finding that the new rules permitted the court to assess damages otherwise than in accordance with the law. This amounted to a change in the substantive rights of group members. Justice Winneke commented that the scheme needed to be enshrined in legislation (which it subsequently was).

Reform proposals

In *Going to Court* Sallmann and Wright concluded it was time to devise uniform rules for the three courts as a matter of high priority.³³ They also expressed the view that there was 'a need for a co-ordinating mechanism to collect management information, to present a public face to the system, and to identify and act on apparent or actual deficiencies in service delivery systems, as well as other matters affecting court performance'.³⁴

They further concluded that:

*A type of civil justice council or courts advisory council is worth pursuing. It should not be armed with powers that could bind the courts but ... would need to have a sufficiently important role, and to be supported in such a way, that it could bring about real improvements in the co-ordination and operation of civil justice in Victoria.*³⁵

In 2004 the Courts Strategic Directions Project advocated review of the rules of procedure to simplify and harmonise them:

A feature of all major recent reviews of civil procedure is the general dissatisfaction with some of the current procedures in civil litigation. The various reviews point to the fact that, where appropriate, simpler initiation processes and simpler unified court rules and procedures can improve accessibility.

*The rules and procedures of each of the Courts and VCAT should be reviewed to achieve greater simplicity and, where appropriate, congruity. A Task Force should be established to undertake the initial task of scoping a project and to identify the best form of pre-trial procedure for them.*³⁶

2.2 OTHER AUSTRALIAN JURISDICTIONS

Rule-making procedures similar to Victoria's operate in Western Australia, Tasmania, and the Northern Territory and in the Commonwealth courts.³⁷ That is, each court in those jurisdictions is empowered to make its own rules of court, within the parameters of their enabling legislation. Tasmania³⁸ is the only one of the above jurisdictions in which the composition of the courts' rules committees is prescribed in the legislation.³⁹

In South Australia a Joint Rules Advisory Committee has been established, although this is not provided for in the legislation:

The Joint Rules Advisory Committee (JRAC) comprises two Judges, a Master, the Registrar and the Senior Deputy Registrar of the Supreme Court; three Judges, a Master and the Registrar of the District Court; one Magistrate; the President of the Law Society; and three legal practitioners.

The role of JRAC is to prepare, review and revise the Rules of Court, made pursuant to the Supreme Court Act and the District Court Act. The Rules regulate the procedures of and practice in the Supreme and District Courts. JRAC also has a role in preparation, review and revision of the Practice Directions of both the Supreme and District Courts.

It is JRAC's responsibility to ensure that the Rules of Court and Practice Directions are adequate to deal with the requirements of contemporary litigation, and to assist in the efficient running of the courts.

In order to ensure that the legal profession is informed of amendments made to Rules and Practice Directions, and to ensure that any such amendments reflect practical needs, JRAC liaises directly with the profession by consulting with professional organisations such as the Law Society and the Bar Association.

On 4 September 2006 the Supreme Court Civil Rules 2006 and the District Court Civil Rules 2006, together with new Practice Directions, came into effect. The new Rules represent a major change from the previous Supreme Court Rules 1987 and District

*Court Rules 1992. They are the culmination of a substantial amount of work by JRAC, the Judges of both Courts and of the former Parliamentary Counsel, Mr G Hackett-Jones QC, and other staff in his office.*⁴⁰

By contrast, NSW, Queensland and the ACT each have a single rules committee to develop and monitor rules for *all* courts within their jurisdiction. These committees have been established in the context of developing uniform or harmonised rules between the courts within those jurisdictions.

New South Wales

Civil procedure in all courts in NSW is now governed by the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW), which introduced common rules and procedures in civil proceedings in the Supreme, District and Local Courts. The uniform rules apply in all civil proceedings in the Supreme and District Courts; the Dust Diseases Tribunal; and the General Division and Small Claims Division of the Local Court.

To the extent that each court retains the power to make local rules, they are not authorised to make local rules to amend or repeal a uniform rule in its application to that court.⁴¹ The uniform rules prevail over any provision of any local rules unless the uniform rules expressly provide that the provision of the local rules is to prevail.⁴²

The *Civil Procedure Act 2005* empowers a senior judicial officer of the court to issue practice notes.⁴³ The practice notes are statutory rules for the purposes of the *Interpretation Act 1987* (NSW) and can be disallowed.⁴⁴

The *Civil Procedure Act 2005* provides for a Uniform Rules Committee comprising 10 members, including:

- (a) the Chief Justice of the Supreme Court or a judge of the Supreme Court nominated by the Chief Justice
- (b) the President of the Court of Appeal or a judge of appeal nominated by the President
- (c) two judges of the Supreme Court appointed by the Chief Justice
- (d) the Chief Judge of the District Court or a judge of the District Court nominated by the Chief Judge
- (e) a judge of the District Court appointed by the Chief Judge
- (f) the Chief Magistrate or a magistrate nominated by the Chief Magistrate
- (g) a magistrate appointed by the Chief Magistrate
- (h) a barrister appointed by the Bar Council
- (i) a solicitor appointed by the Law Society Council.⁴⁵

In addition to the Uniform Rules Committee, a Civil Procedure Working Party exists to develop amendments to the rules and review civil forms. It has a cross-jurisdictional composition and in addition to judicial officers it includes representatives from the NSW Bar, Law Society and Attorney-General's Department. The working party developed the uniform rules and the Civil Procedure Act in consultation with the judiciary, profession and special interest groups.⁴⁶ In producing the uniform rules, the working party simplified and consolidated the rules, but retained existing concepts and phrases in order to preserve the substance of the rules.

Queensland

The *Supreme Court of Queensland Act 1991* provides that the Governor in Council, with the consent of the rules committee, may make rules of court, to be known as the Uniform Civil Procedure Rules, in respect of the practice and procedure of the Supreme Court, District Court, and Magistrates' Courts, their registries or other specified matters.⁴⁷ The Chief Justice is empowered to establish a Rules Committee consisting of the following members:

- (a) the Chief Justice, or a Supreme Court judge nominated by the Chief Justice
- (b) the President or a judge of appeal nominated by the President
- (c) two Supreme Court judges nominated by the Chief Justice
- (d) the Chief Judge or a District Court judge nominated by the Chief Judge

33 Peter Sallmann and Richard Wright, *Going to Court: A Discussion Paper on Civil Justice in Victoria* (2000), 205–12.

34 *Ibid* 232.

35 *Ibid*.

36 Courts Consultative Council [Victoria], *Courts Strategic Directions Project* (2004) 19.

37 See *Supreme Court Act 1935* (WA) Pt X, *Supreme Court Civil Procedure Act 1932* (Tas) Pt XIV, *Supreme Court Act 1979* (NT) s 71, *Judiciary Act 1903* (Cth) ss 86, 89, *High Court Act 1979* (Cth) s 48, *Federal Court of Australia Act 1976* (Cth) s 59.

38 There is a Rule Committee consisting of the judges, the master and four practitioners appointed by the Governor: s 202(1). The appointed members of the committee shall hold office for a period of 5 years: s 202(2). The Rule Committee shall meet once at least in each year, and as often as the Chief Justice may direct: s 202(3): *Supreme Court Civil Procedure Act 1932* (Tas). See also s 15AE *Magistrates' Court Act 1987* (Tas).

39 The *Family Law Act 1975* (Cth) s 124 establishes a Rules Advisory Committee, consisting of such judges of the Family Court, such judges of family courts of states and such other persons as are appointed on nomination by the Attorney-General in consultation with the Chief Judge.

40 Supreme Court of South Australia, *Report of the Judges of the Supreme Court of South Australia to the Attorney-General Pursuant to Section 16 of the Supreme Court Act 1935 for the Year Ended 31 December 2006* (2006).

41 *Civil Procedure Act 2005* (NSW) s 10.

42 *Civil Procedure Act 2005* (NSW) s 11.

43 *Civil Procedure Act 2005* (NSW) s 15.

44 *Civil Procedure Act 2005* (NSW) s 15(2).

45 *Civil Procedure Act 2005* (NSW) s 8.

46 See Jenny Atkinson and Stephen Olischlager, *An Introduction to Civil Procedure Act 2005, Uniform Civil Procedure Rules 2005* (2005); Laurie Glanfield, 'Consistency in Court Rules—The NSW Partnership' (Paper presented at the Australian Institute for Judicial Administration Annual Conference, Sydney, 17–19 September 2004); Justice John Hamilton, 'The NSW Civil Procedure Bill 2004 and the Uniform Civil Procedure Rules: An Introduction' (Paper presented at the Australian Institute for Judicial Administration Annual Conference, Sydney, 17–19 September 2004).

47 *Supreme Court of Queensland Act 1991* s 118.



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- (e) a District Court judge nominated by the Chief Judge
- (f) the Chief Stipendiary Magistrate or a magistrate nominated by the Chief Stipendiary Magistrate
- (g) a magistrate nominated by the Chief Stipendiary Magistrate.⁴⁸

The rules committee may conduct its business and proceedings at meetings in the way it decides.⁴⁹ Uniform Civil Procedure Rules came into force in Queensland in 1999.⁵⁰ The rules introduced an overriding philosophy and promote court control of proceedings.

Australian Capital Territory

In the ACT the *Court Procedures Act 2004* (ACT) provides that the rule-making committee may make rules in relation to the practice and procedure of courts or tribunals in the territory.⁵¹ The rules committee comprises representatives of different courts including the Chief Justice, the President of the Court of Appeal (or a judge if this is the same person as the Chief Justice), a judge, the Chief Magistrate and a magistrate. The rule-making committee may conduct its proceedings in the way it decides, whether by holding meetings or in any other way.⁵²

The Act establishes a Joint Rules Advisory Committee (JRAC), comprised of representatives from both courts, the court registrars, the ACT Law Society, the ACT Bar Association, the Director of Public Prosecutions, Parliamentary Counsel, and a public servant nominated by the Chief Executive of the Department of Justice and Community Safety.⁵³

In some jurisdictions the legislation expressly directs the court to exercise its rule making power in a way that facilitates the objectives of the civil justice system. For example in Western Australia in making rules of court (as well as dealing with cases) the court is to ensure that cases are dealt with justly:

Ensuring that cases are dealt with justly' includes ensuring—

- (a) *that cases are dealt with efficiently, economically and expeditiously;*
- (b) *so far as is practicable, that the parties are on an equal footing; and*
- (c) *that the Court's judicial and administrative resources are used as efficiently as possible.*⁵⁴

Steps have also been taken to increase the level of harmonisation of rules across jurisdictions. The Council of Chief Justices of Australian jurisdictions has convened the National Harmonisation of Rules Committee to develop uniform or harmonised rules on common issues across superior courts.⁵⁵ The composition of the committee in 2007 was as follows:

- Chair—Justice Kevin Lindgren
- Victoria—Justice David Harper
- NSW—Justice John Hamilton
- Queensland—Justice Margaret Wilson
- Western Australia—Justice of Appeal Neville Owen
- South Australia—Justice Richard White
- Tasmania—Justice Peter Evans
- Australian Capital Territory—Justice Terence Connolly
- Northern Territory—Master Terry Coulehan
- New Zealand—Justice David Baragwanath.⁵⁶

To date this committee has produced harmonised rules for proceedings under the Corporations Law, subpoenas and freezing and search orders. The committee has subsequently considered rules about service out of the jurisdiction, and is to look at whether further harmonisation can be achieved in relation to discovery.⁵⁷ The changes recommended by the committee are implemented through each court's own rulemaking process. The council has appointed a 'monitoring committee' to review the operation of the new rules and to generate amendments to them where necessary.⁵⁸

Justice Lindgren has in this context noted the advantages and disadvantages of harmonising rules across jurisdictions:⁵⁹

Advantages

- 3.1 Production of a 'model' set of rules based on the pooled experience of all Australian jurisdictions.
- 3.2 Common language ensures that the same text will fall to be construed in all participating courts, with the consequence of a larger corpus of interpretative decisions.
- 3.3 Greater certainty and predictability as a result of 3.2.
- 3.4 It does little to enhance the administration of justice that the same issue is addressed differently in the rules of the various courts, where the difference cannot be supported by reference to local considerations.
- 3.5 Harmonisation of rules militates against forum shopping based on rule differences.
- 3.6 Interjurisdictional practice and a 'national profession'.
- 3.7 Training programs within 'national' firms.

Disadvantages

- 3.8 Slowing of pace of change because of the strong desirability of an individual court's taking up proposed amendments through the relevant harmonised rules monitoring committee.
- 3.9 Perceived interference with local autonomy.
- 3.10 Discouragement of 'trials' of diverse solutions resulting in the emergence of 'the best' one; instead, a tendency to compromise and to adopt the 'lowest common denominator' factor.

2.3 OVERSEAS JURISDICTIONS

New Zealand

In New Zealand neither the Rules Committee nor the Government has the power to make rules unilaterally. The *Judicature Act 1908 (NZ)* empowers the Governor-General, with the concurrence of the Chief Justice and two or more members of the Rules Committee (of whom at least one is a High Court judge) to make rules regulating the practice and procedure of the High Court, the Court of Appeal and the Supreme Court.⁶⁰ Similar provisions apply in the District Court, although the Rules Committee's rule-making powers do not extend to proceedings where district courts derive jurisdiction from any statute other than the *District Courts Act 1947 (NZ)*.⁶¹ For rules governing these other forms of proceedings the Ministry of Justice remains the effective governing body, assisted by other committees on a consultative basis.

The *Judicature Act* provides that the Rules Committee shall consist of:

- the Chief Justice
- the Chief High Court Judge
- two other judges of the High Court appointed by the Chief Justice
- the Chief District Court Judge
- one other District Court judge appointed by the Chief Justice
- the Attorney-General
- the Solicitor-General
- the chief executive of the Department for Courts
- two persons who are barristers and solicitors of the High Court, nominated by the Council of the New Zealand Law Society and approved by the Chief Justice.

United Kingdom

The *Civil Procedure Act 1997 (UK)* provides that there are to be rules of court governing the practice and procedure to be followed in the civil division of the Court of Appeal, the High Court, and county courts. The power to make Civil Procedure Rules is to be 'exercised with a view to securing that the civil justice system is accessible, fair and efficient and the rules are both simple and simply expressed'.⁶²

- 48 *Supreme Court of Queensland Act 1991* s 118C(1).
- 49 *Supreme Court of Queensland Act 1991* s 118C(3).
- 50 See Bernard Cairns, 'A Review of Some Innovations in Queensland Civil Procedure' (2005) 26 *Australian Bar Review* 158; Justice Glen Williams, 'The Changing Face of Procedural Law in Queensland' (Paper presented at Australian Institute for Judicial Administration Fifth Biennial Masters' Conference, Auckland, New Zealand, 26–28 April 2000).
- 51 *Court Procedures Act 2004 (ACT)* s 7(1).
- 52 *Court Procedures Act 2004 (ACT)* s 9.
- 53 *Court Procedures Act 2004 (ACT)* s 11.
- 54 *Supreme Court Act 1935 (WA)* s 13. See also: s 13 *Magistrates Court (Civil Proceedings) Act 2004 (WA)*.
- 55 Submission from Supreme Court of Victoria. See also Justice Kevin Lindgren, 'Harmonisation of Rules of Court in Australia' (Paper presented at AIJA Annual Conference, Sydney, 17–19 September 2004).
- 56 Letter from Greg Reinhardt, Australian Institute for Judicial Administration to the commission 10 May 2007.
- 57 *Ibid.*
- 58 Lindgren (2004) above n 55.
- 59 *Ibid.*
- 60 *Judicature Act 1908 (NZ)* s 51C(1).
- 61 *District Courts Act 1947 (NZ)* s 122.
- 62 *Civil Procedure Act 1997 (UK)* s 1.



Facilitating Ongoing Civil Justice Review and Reform

Civil Procedure Rules are to be made by a committee known as the Civil Procedure Rule Committee, which consists of:

- (a) the Master of the Rolls
- (b) the Vice-Chancellor
- (c) one judge of the Supreme Court
- (d) one circuit judge
- (e) one district judge
- (f) one Supreme Court master
- (g) three persons who have a Supreme Court qualification (within the meaning of section 71 of the *Courts and Legal Services Act 1990*), including at least one with particular experience of practice in county courts
- (h) three persons who have been granted by an authorised body, under Part II of that Act, the right to conduct litigation in relation to all proceedings in the Supreme Court, including at least one with particular experience of practice in county courts,
- (i) one person with experience in and knowledge of consumer affairs, and
- (j) one person with experience in and knowledge of the lay advice sector.⁶³

The prescribed membership of the rule committee reflects the recommendation by Lord Woolf that:

*The new rule-making authority which will be needed to enact the new combined rules should contain in its membership people who can advance consumer, advisory and other lay viewpoints, as a counterbalance to the professional legal interests.*⁶⁴

The Civil Procedure Rule Committee publishes annual reports. The 2005–6 Annual Report notes that:

*The meeting of 19th May was the committee's first open public meeting. 30 guests attended to watch the committee at work, and questions were taken at the end of the meeting. The event was considered very successful.*⁶⁵

Civil Justice Council

Lord Woolf also recommended that a civil justice council be set up to contribute to the development of his proposed reforms.⁶⁶ The Civil Justice Council was established under the *Civil Procedure Act 1997* (UK):

- (1) *The Lord Chancellor is to establish and maintain an advisory body, to be known as the Civil Justice Council.*
- (2) *The Council must include—*
 - (a) *members of the judiciary,*
 - (b) *members of the legal professions,*
 - (c) *civil servants concerned with the administration of the courts,*
 - (d) *persons with experience in and knowledge of consumer affairs,*
 - (e) *persons with experience in and knowledge of the lay advice sector, and*
 - (f) *persons able to represent the interests of particular kinds of litigants (for example, businesses or employees).*
- (3) *The functions of the Council are to include—*
 - (a) *keeping the civil justice system under review,*
 - (b) *considering how to make the civil justice system more accessible, fair and efficient,*
 - (c) *advising the Lord Chancellor and the judiciary on the development of the civil justice system,*
 - (d) *referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee, and*
 - (e) *making proposals for research.*

(4) *The Lord Chancellor may reimburse the members of the Council their travelling and out-of-pocket expenses.*⁶⁷

The Civil Justice Council comprises a full council of 26 members. In addition, it has eight committees comprising around 100 members. The committees undertake the council's day-to-day activities in the following areas: ADR, access to justice, housing and land, clinical negligence and serious injury, experts, costs, rehabilitation policy, and rehabilitation rules.

The council is supported by a small secretariat, including a chief executive officer.

The Civil Justice Council describes its modus operandi as follows:

The CJC policy model provides for genuine stakeholder consultation, before the Government consultation paper is written. Work must initially be undertaken to identify who the key stakeholders are, in terms of organisation, and influence within that organisation.

A broad range of stakeholders are invited to a series of CJC events aimed at:

- a) *Identifying the precise nature of the policy issue*
- b) *Agreeing the key components of the problem*
- c) *Agreeing how those problems will be addressed, and by who*
- d) *Distilling the generic problems into individual or clustered issues*
- e) *Acquiring and agreeing data to inform on the individual problems (if appropriate)*
- f) *Establishing smaller representative groups to develop proposed models to solve the problems*
- g) *Where necessary, mediating solutions with properly mandated representatives of all main interested parties.*
- h) *Reporting back to 'constituencies' for broader 'buy-in'*
- g) *Making recommendations to Government ministers, supported by the senior judiciary, and major stakeholders*
- h) *Overseeing rules of court.*

The process is essentially overseen by Government officials, who can report to ministers on the inclusiveness of the consultation, and confirm that the methods used were appropriate.

*Research or economic analysis is conducted by agreed or recognised independent academics.*⁶⁸

The council adopts a number of different strategies in the development of negotiated policy outcomes: stakeholder forums (to discuss generic issues, mediated by CJC members and chaired by a senior judge or law commissioner, and conducted under the Chatham House protocol), Big Tents (a more focused stakeholder group convened to develop a detailed description of the nature of the specific problem in issue, to draft a model or plan to resolve the problem and to identify any data that may be required), CEO group (a senior management group established to manage a policy program), data (commissioned from independent academics), forensic group (a small group of six to eight people to examine proposed data collection models), mediation (a complex mediation involving multiple parties, overseen by government officials, staged over a number of meetings), agreement (the mediated agreement is sent to the Lord Chancellor by the Master of the Rolls with formal advice to make it law, and the Lord Chancellor instructs the Civil Procedure Rule Committee to make rules of court), Civil Procedure Rule Committee (the rule committee drafts the rules and refers back to the CJC on any matter requiring clarification). Mini consultations may also be conducted in circumstances where a mediated solution is not required (the CJC conducts consultations, works up proposals with government officials and submits them to the Lord Chancellor for implementation).⁶⁹

United States⁷⁰

The federal judiciary in the United States is authorised by Congress to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules.⁷¹

63 *Civil Procedure Act 1997 (UK) s 2.*

64 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) 304 (recommendation 72).

65 Department for Constitutional Affairs (UK), *Civil Procedure Rule Committee Annual Report October 2005 – September 2006* (2007) 2.

66 Woolf (1996) above n 64, 304 (recommendation 71).

67 *Civil Procedure Act 1997 (UK) s 6.*

68 *The Modus Operandi of the Civil Justice Council: Designing Policy, Process and Law Reform from the Bottom up*, document provided to the commission by Bob Musgrove, CEO Civil Justice Council, 7 February 2007.

69 *Ibid.*

70 See: *The Rulemaking Process: A Summary for the Bench and Bar* (2006) <www.uscourts.gov/rules/proceduresum.htm> at 15 February 2007.

71 *Rules Enabling Act*, 28 USC §§ 2071–2077 (2006).

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Chapter 12



Facilitating Ongoing Civil Justice Review and Reform

The Judicial Conference, a statutory body, assists the Supreme Court by researching and recommending rules changes. The Judicial Conference has authority to 'carry on a continuous study of the operation and effect of the general rules of practice and procedure',⁷² and may recommend amendment to the rules to promote:

- simplicity in procedure
- fairness in administration
- the just determination of litigation and
- the elimination of unjustifiable expense and delay.

The Judicial Conference's Committee on Rules of Practice and Procedure (the Standing Committee) reviews and coordinates the recommendations of five advisory committees, and in turn makes recommendations for changes to the rules to the Judicial Conference.

Meetings of the standing committee and its advisory committees are open to the public and are widely publicised. All minutes of meetings, reports, public submissions and other documents are publicly available, and proposed amendments are published on the Judicial Conference website.⁷³

Canada

In 1996 the Canadian Bar Association's Taskforce on Systems of Civil Justice recommended that:

An independent national organization on civil justice reform be created for the purposes of:

- collecting in a systematic way information relating to the system for administering civil justice;*
- carrying out in-depth research on matters affecting the operation of the civil justice system;*
- promoting the sharing of information about the use of best practices;*
- functioning as a clearinghouse and library of information for the benefit of all persons in Canada concerned with civil justice reform;*
- developing liaison with similar organizations in other countries to foster exchanges of information across national borders; and*
- taking a leadership role on information provision concerning civil justice reform initiatives and developing effective means of exchanging this information.*⁷⁴

The Canadian Forum on Civil Justice was created under the *Canada Corporations Act 1998* as a result of the above recommendation. The formal objects of the forum are to seek to improve the civil justice system in ways and means including but not restricted to the following:

- collecting in a systematic way information relating to the system for administering civil justice
- carrying out in-depth research on matters affecting the operation of the civil justice system
- promoting the sharing of information about the use of best practices
- functioning as a clearinghouse and library of information for the benefit of all persons in Canada concerned with civil justice
- developing liaisons with similar organisations in other countries to foster exchanges of information across national borders and
- taking a leadership role in providing information concerning civil justice reform initiatives and developing effective means of exchanging this information.

The forum consists of a board and advisory board, members of which include leading members of the Bar, government, court administration, the judiciary, legal academia and the lay public.⁷⁵

3. SUBMISSIONS AND CONSULTATIONS

3.1 CONSULTATION PAPER

Rule-making power

Submissions generally supported maintaining the courts' rule-making powers, and observed that the current system works reasonably well in ensuring the rules are amended as required.⁷⁶ The Supreme Court said of its rule-making power:

*It is an important part of maintaining the Court's independence from other arms of government. The rule-making process operates in a responsive, practical and expeditious manner. The ability to draw on the collective experience of members of the Court in a range of practice areas is a great asset. When combined with the valuable input from the profession through the Rules Committee and specific consultations, the process allows informed, responsive and considered reform. The judges of the Court regard retention of the rule-making power as an inherent characteristic of their judicial function.*⁷⁷

The Transport Accident Commission (TAC) queried whether 'institutional users of the court system, with large volumes of litigation, should also have a role in this process'.⁷⁸ The Law Institute of Victoria stated that it 'believes that greater collaboration between the rules committees of the various courts will promote and facilitate harmonisation of the court rules'.⁷⁹

The Victorian Bar's submission stated:

*There is no good reason to disturb the existing mechanisms in which the Courts are given the autonomy to make their own rules, and revise them. The Victorian Bar is strongly of the view that rule making should remain the province of the Court itself and not the legislature. Each Court has a Rules Committee which consults and deals responsively with any problems that may arise from time to time with any deficiency in the Rules or any ways to improve the operation of the Rules.*⁸⁰

Harmonisation and simplification

Submissions generally supported the principle that the rules of civil procedure in each jurisdiction should be uniform:

*The rules of Civil Procedure in the Supreme Court, the County Court and the Magistrates' Court require reform. The change that should be implemented is that the current cumbersome rules should be in plain English and standardized so that they are uniform regardless of the jurisdiction.*⁸¹

*The LIV supports greater consistency or uniformity in the rules of civil procedure in all courts to enable the just, timely and cost efficient resolution of issues in civil proceedings. The LIV considers that this fundamental principle should underlie any reforms proposed and developed out of the VLRC's Civil Justice Review. Feedback from practitioners indicates support for a consistent set of rules across all court jurisdictions, including enforcement rules and a single set of common forms across all Victorian courts.*⁸²

The Forensic Accounting Special Interest Group (FASIG) within the Institute of Chartered Accountants of Australia

*would strongly encourage greater consistency between the rules of civil procedure for the Supreme Court, the County Court and the Magistrates' Court in Victoria, particularly in respect the use of expert witnesses. The FASIG would also like to see greater consistency in such procedures between Victorian courts and tribunals and those of other State and Federal jurisdictions.*⁸³

WorkCover raised the need for consistency between the courts in relation to the initial steps for commencing and defending proceedings.⁸⁴

72 28 USC § 331 (2006).

73 US Courts, The Federal Judiciary <www.uscourts.gov>.

74 Canadian Bar Association Task Force, Report of the Canadian Bar Association Task Force on Systems of Civil Justice (1996) 78 (recommendation 52).

75 Canadian Forum on Civil Justice <www.cfcj-fcjc.org> at 3 March 2008.

76 Submissions CP 37 (Transport Accident Commission), CP 48 (Victorian WorkCover Authority), CP 33 (Victorian Bar), CP 55 (Magistrates' Court of Victoria).

77 Submission CP 58 (Supreme Court of Victoria).

78 Submission CP 37 (Transport Accident Commission).

79 Submission CP 18 (Law Institute of Victoria).

80 Submission CP 18 (Law Institute of Victoria).

81 Submission CP 27 (Victorian Aboriginal Legal Service).

82 Submission CP 18 (Law Institute of Victoria).

83 Submission CP 25 (Institute of Chartered Accountants in Australia).

84 Submission CP 48 (Victorian WorkCover Authority).



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TurksLegal and AXA Australia listed the advantages of having a uniform set of rules as has been implemented in NSW and Queensland:

- standardisation of court forms, lessening costs
- standardisation of timetables for procedural steps
- uniform interpretation of the application of rules across the inferior and superior courts
- simplification of the process of reviewing and amending rules.

The Mental Health Legal Centre observed that 'different forms, processes and language in different jurisdictions no doubt only increase people's confusion and incomprehension' and submitted that originating processes and defences should be simplified.⁸⁵

However, even when advocating uniformity in court processes, most people acknowledged the importance of maintaining simplified procedures in the Magistrates' Court, and procedures adopted to achieve specific objectives in particular areas.⁸⁶

For example, The Supreme Court stated that it

*supports efforts to harmonise Rules between courts, both within Victoria and across Australia. Harmonisation brings benefits of greater consistency of application across jurisdictions, shared jurisprudence and efficiencies for practitioners and their clients. However, the Court recognises that the differences in the types, volumes and complexity of cases brought in Victorian courts mean that strict uniformity of Rules and procedure is not appropriate.*⁸⁷

Similarly, WorkCover submitted:

*Any harmonisation of the rules should ... have regard to any efficiencies, including costs benefits, which may be peculiar to a jurisdiction and supported by its rules and that harmonisation does not add complexity in a jurisdiction at the expense of efficiency and cost.*⁸⁸

The Victorian Bar made similar observations:

*The Magistrates' Court has a simplified set of rules along the same general lines as those of the Supreme and County Court, which are adapted to deal with the smaller or less complex civil disputes which are normally determined in the Magistrates' Court. Its field of work and its limited jurisdiction⁸⁹ makes it necessary that it has its own rules very much designed to minimise procedural requirements in order to dispose of the volume of work passing through that Court system. It would be inappropriate to burden litigants in the Magistrates' Court with the additional costs of compliance that would flow from the rules required from Supreme and County Court proceedings.*⁹⁰

The Bar, however, did not believe there is a need for a greater degree of uniformity in the rules of the Victorian courts, 'nor any pressing need to simply them, or to introduce a simpler initiation process. Further, any harmonisation or simplification of the various rules of courts can be achieved through existing mechanisms'. It argued it should not be assumed 'a uniformity of rules would result in reduction of costs for litigants or reductions in delays'. The Bar did support uniformity or harmonisation of rules of court across jurisdictions in Australia 'given that the market for legal services is now undeniably a national legal market (and to some extent an international legal market), particularly in complex commercial litigation'.

The Magistrates' Court reported that it has been reviewing its rules to align them with those of the other courts except in arbitrations for a small claim.⁹¹ It has developed a set of new draft rules, substantially similar to the rules in the other courts, and with the same rule and form numbers. The court submitted that this will have the following benefits for litigants, whether represented or not:

- They will no longer need to ascertain whether a procedural rule in this court is different from the corresponding rule in the other courts. In practice, the existence of differences is often overlooked to the disappointment of litigants. It is unwise, at least in our court, to assume that legal practitioners know of the differences between the rules of the courts.*

- (b) *The learning in relation to the meaning of a rule will be common. There will be no need for a separate jurisprudence to develop in our court in relation to a particular rule, especially through litigation in the Supreme Court.*
- (c) *The use of common forms. This will save costs as the same document can be used in each of the courts. The only change is that of the name of the court.*⁹²

The court considered whether to abandon its notice of defence in favour of the dual process of appearance and defence. It decided not to adopt the procedure that applies in the higher courts 'because it was felt that the need to take two steps in order to defend a complaint would confuse some litigants in person'. The court identified one area specific to that court that should be retained (its judgment debt recovery process), and several areas where the court either lacks jurisdiction or where such procedures would not be used in the court (such as Orders 18 and 18A, which provide for representative and group proceedings).

The Magistrates' Court noted that the potential alignment of its rules with those of the other courts 'provides an opportunity to modernise the language used to describe processes in the courts ... This is an opportunity to use more accessible language'.⁹³

The Consumer Action Law Centre recommended that Magistrates' Court procedures should be reviewed and redesigned, and the terms used to describe forms should be reconsidered.⁹⁴ Similarly, Edison Masillamani submitted that the 'system should be simplified to prevent a litigant in person from being intimidated by complicated rules, forms and paperwork'.⁹⁵

3.2 RESPONSES TO DRAFT PROPOSALS

Civil Justice Council

In the Second Exposure Draft published on 6 September 2007 the commission set out various proposals for reform, including in respect of ongoing review and reform of the civil justice system. This included a draft proposal for the establishment of a new body, the Civil Justice Council.

The following individuals, organisations and agencies expressed support for the establishment of a Civil Justice Council in submissions: the Supreme Court, the Magistrates' Court and Dispute Settlement Centre of Victoria, AXA and TurksLegal, the Environment Defenders Office, the Federation of Community Legal Centres, IMF, the Legal Services Commissioner, PILCH, Springvale Monash Legal Service, State Trustees, the Law Institute of Victoria, Judge Wodak, Victoria Legal Aid, the Consumer Action Law Centre and QBE Insurance.

The Federation of Community Legal Centres thought 'the Council would play an important role in monitoring civil law issues and ensuring that access to justice remains a priority area for Victoria's legal community'.⁹⁶

The following agencies expressed a desire to be represented on the council: Legal Services Commissioner, PILCH, the Federation of Community Legal Centres, the Australian Corporate Lawyers Association, Victoria Legal Aid, the Magistrates' Court and the Dispute Settlement Centre of Victoria.

A number of organisations emphasised the need for the council to reflect the range of participants in the civil justice system.⁹⁷ The Australian Bankers' Association said that 'it is critical that not only business and financial services groups are represented on any such Council but also the processes and means by which decisions are reached by that body are truly representative of the majority of views of those participating on the Council'. The Federation of Community Legal Centres called for 'a strong community presence', and the Australian Corporate Lawyers Association said the interests of in-house lawyers and the organisations they are employed by should be represented on the council. Clayton Utz said that 'it would ... be important to ensure that the composition of both Councils adequately reflects the interests of all classes of litigant, across the full range of civil dispute resolution'.

A number of submissions made suggestions for research and analysis that should be carried out by the council, and also proposed some additional functions:

- The council should have responsibility for reviewing VCAT as well as the courts.⁹⁸
- The council should undertake an analysis of statistics relating to the number of default judgments made by courts and the circumstances in which they are made.⁹⁹

85 Submission CP 22 (Mental Health Legal Centre).

86 Submission CP 22 (Mental Health Legal Centre).

87 Submission CP 58 (Supreme Court of Victoria).

88 Submission CP 48 (Victorian WorkCover Authority).

89 Where the amount in dispute is less than \$100 000 (original note).

90 Submission CP 33 (Victorian Bar).

91 Submission CP 55 (Magistrates' Court of Victoria).

92 Submission CP 55 (Magistrates' Court of Victoria).

93 Submission CP 55 (Magistrates' Court of Victoria).

94 Submission CP 43 (Consumer Action Law Centre).

95 Submission CP 15 (Edison Masillamani).

96 Submission ED1 9 (Federation of Community Legal Centres).

97 For example, Submissions ED1 18 (Clayton Utz), ED1 29 (Australian Bankers' Association).

98 Submissions ED1 31 (Law Institute of Victoria), ED2 12 (Consumer Action Law Centre).

99 Submissions ED1 9 (Federation of Community Legal Centres), ED1 26 (Springvale Monash Legal Service).



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- The council should undertake research on the financial, legal, psychological and social impact on parties both represented and self-represented, their families and the community.¹⁰⁰ The Springvale Monash Legal Service reported that its 'experience is that the impact of pursuing civil litigation on individuals and families can be dire. Individuals can be left in financial hardship, unable to provide for their families, maintain or seek employment. In the interests of justice, this should be thoroughly analysed'.¹⁰¹
- The council should have responsibility for considering how the civil justice system operates with respect to the Charter of Human Rights and Responsibilities.¹⁰²
- The council should assist in the education of the legal profession and judiciary about developments in all aspects of the civil justice system.¹⁰³

Judge Wodak noted that 'In order to effectively monitor the performance of the civil justice system, proper information gathering is needed on all aspects of civil court and tribunal activity ... Without such information, it is very difficult, if not impossible to accurately report on what does, and what does not assist in the timely, effective and cost efficient delivery of civil justice'.¹⁰⁴

Similarly, Judge Anderson said in relation to the proposal that the Civil Justice Council would have responsibility for monitoring: 'It is important to clearly articulate the objectives for each proposal and the standards against which the success or otherwise of the changes are to be measured'.¹⁰⁵

Some stakeholders queried whether the council would oversee the provision of ADR services and schemes.¹⁰⁶

In a supplementary submission the Victorian Bar said there was a need for the acceleration of civil justice reform as well as the creation of system wide reform that ensures that reforms support each other and there is education, professional collaboration as well as a clear articulation of overall aims and objectives.¹⁰⁷ In addition, it emphasised the need for funding and resourcing as well as government leadership and public support. The Bar also called for a significant increase in the Supreme Court's capacity to track and analyse the throughput of cases under a reformed process. In particular, the Bar recommended that the previously proposed Court's Statistics and Information Resources Centre be pursued with urgency.

Harmonisation of rules

The Institute of Chartered Accountants in Australia and the Consumer Action Law Centre both supported the commission's proposal for greater harmonisation and simplification of court rules and forms.

In particular, the Consumer Action Law Centre called for review of the Magistrates' Court Form 4A Complaint, which it believes is confusing and provides insufficient information to defendants about their options. The centre proposed that information about obtaining interpreting and legal assistance be annexed to and served with all complaints, in an effort to reduce the number of 'default judgments for unmeritorious claims against vulnerable Victorian consumers'.¹⁰⁸

Rules committees

During consultations it was suggested that a delegate of each rules committee, rather than the chair, be made an ex-officio member of each other rules committee.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1 RULE-MAKING PROCESS

The rules that govern civil procedure in Victorian courts are made by the courts themselves as subordinate legislation. Each court delegates its rule-making power to a rules committee which then makes recommendations to the judges or magistrates for any rule change. The legislation does not prescribe who the members of the rules committees should be, or how their deliberations should be conducted. During the course of our consultations concerns were expressed about the inefficiencies inherent in having three separate committees considering amendments and reforms to identical, or substantially similar, rules.

Although it would be desirable in principle to have a single rules committee to review and amend rules in all three courts, as is the case in NSW, Queensland and the ACT, because each court deals with discrete practice areas the commission believes it makes sense to retain separate rules committees, although arrangements should be put in place to ensure there is appropriate communication between the committees.

In some jurisdictions provision is made for the appointment of consumer or non-legal representatives. For example, the Civil Procedure Rules Committee established in England comprises representatives of not only the courts and the profession, but also a consumer affairs member and a lay advice member. Given the proposal for broad representation on the Civil Justice Council (see below), we do not consider any need to recommend such a provision in relation to the rules committees.

The commission notes that the UK Civil Procedure Rules Committee (referred to above) has recently resolved to conduct open public meetings and to allow people to ask questions and make contributions at their meetings. In the United States meetings of the federal rules committees are open to the public and their documents are published on the internet. Insofar as this does not happen at present, the rules committees may wish to consider whether it would be useful to them, and more transparent, if meetings were open to be attended by non-members with a relevant interest.

4.2 HARMONISATION AND UNIFORMITY OF RULES

Other jurisdictions in Australia have recently undertaken major reviews of their court rules in order to achieve greater simplification, modernisation and harmonisation. New South Wales, Queensland and the ACT now have a single set of rules that apply in all courts.¹⁰⁹ In 2006 a new set of rules came into effect in South Australia.¹¹⁰

The commission is not persuaded that a 'uniform' set of rules is required in Victoria, having regard to the variety of areas of law and types of litigation conducted in each court. In any event, during the course of the present inquiry the Magistrates' Court was in the process of drafting amendments to the Magistrates' Court Rules with a view to achieving greater uniformity with the rules applicable in the County and Supreme Courts.

However, we do believe that additional steps should be taken to achieve a greater level of harmonisation between the rules of the various courts, in particular in relation to terminology and forms. Greater harmonisation should not compromise the procedures adopted in particular courts or subject areas to achieve specific objectives, for example the procedures for dealing with small claims in the Magistrates' Court. We also believe the rules of the Victorian courts would benefit from a further detailed review aimed at simplifying their structure and language, and bringing them in line with procedural rules in other jurisdictions.

A number of the areas where specific proposals for reform are recommended in this report, for example in relation to expert evidence and discovery, would result in new rules which are more closely aligned with those presently in force in a number of other Australian jurisdictions.

4.3 RULE-MAKING POWER

In various parts of this report it is proposed that the courts should have additional express powers to manage and control civil litigation, including interlocutory processes and hearings, in a variety of ways. For example, there are recommendations in respect of discovery, expert evidence, case management and time limits on parties at hearings, etc. A number of the recommendations include draft statutory provisions to facilitate this.

It may be that many of the commission's proposals could be implemented by the courts themselves, through new rules, rather than through legislation. This would permit any future changes to be made more expeditiously and with greater flexibility. However, there may be scope for argument as to whether some matters are within the existing rule making powers of the courts.

A number of the commission's recommendations seek to facilitate greater and more proactive judicial control of proceedings and to explicitly permit courts to impose limits on procedural steps or the conduct of parties, including at hearings. Legal controversy may arise as to whether some matters may be properly characterized as 'procedural' or concerned solely with the regulation of 'practice and procedure' in the courts in question. Also, as noted in chapters 1 and 5, case management decisions

100 Submission ED1 26 (Springvale Monash Legal Service).

101 Submission ED1 26 (Springvale Monash Legal Service).

102 Submission ED2 10 (Victoria Legal Aid).

103 Submission ED1 7 (Judge Wodak).

104 Submission ED1 7 (Judge Wodak).

105 Submission ED2 4 (Judge Anderson).

106 Consultation with Department of Justice ADR Strategy Team, 17 October 2007.

107 Submission CP 62 (Victorian Bar).

108 Submission ED2 12 (Consumer Action Law Centre).

109 *Uniform Civil Procedure Rules 2005* (NSW), *Uniform Civil Procedure Rules 1999* (Qld), *Courts Procedures Rules 2006* (ACT).

110 *Supreme Court Civil Rules 2006* (SA).



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may be subject to appellate scrutiny if considered to be inconsistent with the dictates of justice, and case management powers may give rise to contentions of incompatibility with the right to a fair hearing provided for in section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006*.

Insofar as a number of the proposals are able to be implemented through rules of court the existing rule making power may be adequate to facilitate this. However, the commission is of the view that there would be utility in broadening the existing legislative rule making power.

Accordingly, it is proposed that the rule making power itself should be amended to explicitly authorize judges of the court to make rules of court in respect of any matter relating to: (a) the powers, authorities, duties and functions of the court in imposing limits, restrictions or conditions on any party in respect of any aspect of the conduct of proceedings,¹¹¹ or (b) the management of cases, or (c) the referral (with or without the consent of the parties) to any form of alternative dispute resolution, or (d) the means by which the [proposed] overriding purpose may be furthered.

In the case of the Supreme Court, such amendments would be to section 25 of the *Supreme Court Act 1986*.

4.4 ONGOING REVIEW AND REFORM

Review and reform of the civil justice system is a complex undertaking. It is necessary to take into account the rights and interests of a diverse range of participants, including litigants large, small and self-represented, the legal profession, government and the courts. Reform initiatives may have unforeseen consequences, or may require modification in light of practical experience. They should therefore be subject to ongoing review and evaluation to ensure their objectives are being met. The collection of relevant data is also required to inform the reform and policy process.

The commission proposes the establishment of a new body to carry out these responsibilities. Similar bodies exist in different forms in England (the Civil Justice Council), Canada (Canadian Forum on Civil Justice), the United States (the Judicial Conference and its standing and advisory committees) and, in a more limited capacity, New South Wales (Civil Procedure Working Party). The Civil Justice Council in England and Wales was established in accordance with the recommendations of Lord Woolf. It plays a pivotal role in the development of civil justice policy. It brings all stakeholders together to debate possible reforms and attempts to reach agreement, often through mediation, on particular initiatives that are then presented to the courts and government for implementation.

It is worth noting that there are several bodies, at state and federal level, that have ongoing responsibility for reviewing or investigating aspects of the criminal justice system, including the Sentencing Advisory Committee, the Department of Justice's Criminal Justice Steering Committee, Ombudsman Victoria, and the Australian Institute of Criminology. Although the courts' rules committees and the Australasian Institute of Judicial Administration play an important role in contributing to the development of the civil justice system, we believe there is a need for a broad-based consultative and research body dedicated to ensuring the system is able to meet the needs of Victorian litigants on a long-term basis.

RECOMMENDATIONS

Rule-making process and powers

164. The courts' governing legislation should make provision for the constitution and operation of each court's rules committee. The chair of each rules committee (or the chair's nominee) could be made an ex-officio member of each other committee entitled to attend the other committees' meetings. This would provide for increased communication between the three jurisdictions.
165. The rules committees should meet jointly when considering rules and procedures which apply in more than one jurisdiction. This may involve a joint meeting of two or three rules committees.
166. The power to make rules should be broadened and exercised so as to further the courts' overriding purpose. A draft amendment to section 25 of the *Supreme Court Act 1986* is as follows:

(1) *The Judges of the Court [...] may make Rules of Court for or with respect to the following:*

...

(f) *Any matter relating to—*

- (i) *the practice and procedure of the Court; or*
- (ii) *the powers, authorities, duties and functions of the officers of the Court;*
- (iii) *the powers, authorities, duties and functions of the Court in imposing limits, restrictions or conditions on any party in respect of any aspect of the conduct of proceedings; or*
- (iv) *the management of cases; or*
- (v) *the referral (with or without the consent of the parties) to any form of alternative dispute resolution; or*
- (vi) *the means by which the Overriding Purpose may be furthered.*

Equivalent amendments to the County Court Act and the Magistrates' Court Act would also be required.

Court rules

167. The legislation and rules of civil procedure in all three courts should be reviewed to:

- achieve greater harmonisation between courts, including standardisation of the terminology used to describe procedural steps, and standardisation of court forms. In particular there should be one form for commencing proceedings and one for making interlocutory applications
- simplify the structure and ordering of the rules
- make greater use of plain English.

168. Each court should clarify the circumstances in which practice notes and directions are made, and consolidate and organise the content and publication of existing practice notes and directions.

Ongoing reform

169. A new body, called the Civil Justice Council, with ongoing statutory responsibility for review and reform of the civil justice system, should be established. Its purpose would be to investigate ways to make the civil justice system more just, efficient, and cost effective.

170. The Civil Justice Council would have the following functions:

- to monitor the operation of the civil justice system generally
- to identify areas in need of reform
- to conduct or commission research
- to bring together various stakeholder groups with a view to reaching agreement on reform proposals, including through the use of mediation and other methods
- to recommend reforms, including amendments to statutory provisions and rules governing the civil justice system
- to facilitate education programs about developments in the civil justice system.

171. The Civil Justice Council should also assist in the implementation of the reforms proposed by the Victorian Law Reform Commission and monitor the impact of such reforms, which may include:

- developing specific pre-action protocols for each relevant area (for example, commercial disputes, building disputes, medical negligence, general personal injury, etc)

111 An alternative formulation is: 'To allow obligations, prohibitions and restrictions to be imposed on any party for the purpose of furthering the [proposed] overriding purpose'.



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- monitoring the operation of the protocols and general standard of pre-action conduct so that any modifications considered necessary in the light of practical experience can be implemented
 - overseeing and developing further the operation of pre-trial examinations, including:
 - developing a general code of conduct in respect of examination conduct
 - developing codes of practice to govern the use of pre-trial examinations in particular litigation contexts
 - overseeing the establishment of education and training programs to assist practitioners and other interested parties to develop good examination practices
 - reviewing the provisions relating to pre-trial examinations with a view to assessing their effectiveness and costs consequences, and considering possible changes to the existing scheme. The Council should also consider and make recommendation on the question of whether pre-trial examinations should be permissible in matters within the jurisdiction of the Magistrates' Court, and if so, whether any modifications to the general scheme are required in relation to such matters;
 - constituting a specialist Costs Council to oversee and monitor issues to do with legal costs
 - reviewing ADR processes in all three courts
 - scrutinising the operation of the Justice Fund
 - assisting in a review of the rules of civil procedure.
172. The Civil Justice Council should comprise members from a broad range of participants in the civil justice system and stakeholder groups, including:
- members of the judiciary
 - members of the legal profession
 - public servants concerned with the administration of the courts
 - persons with experience in and knowledge of consumer affairs
 - persons with experience and expertise relevant to particular types of litigation (for example representatives from the business community, insurance industry, consumer organisations, and the community legal sector).
173. The chair and members of the Civil Justice Council should be appointed by the Attorney-General after calling for nominations from the courts and relevant stakeholder groups.
174. Members of the Civil Justice Council would be appointed for their expertise and experience, and not necessarily as representatives of the entities or organisations for which they work.
175. Members of the Civil Justice Council would serve in an honorary capacity but would be reimbursed for expenses etc. There would be a secretariat comprising a chief executive officer and support staff.
176. The Civil Justice Council should be able to co-opt people to form committees to focus on specific areas under review.
177. The Civil Justice Council should be entitled to an allocation of funds from the Justice Fund to assist it to carry out its functions.

5. ISSUES FOR FURTHER CONSIDERATION

5.1 INTRODUCTION

In the Consultation Paper we sought views on whether reform was needed in a range of areas, including the following:

- the rules about pleadings in civil proceedings
- the rules and procedures which allow non-parties to participate in civil proceedings
- rules about enforcement of judgments and orders
- the rules and procedures for appeals from pre-trial decisions
- the rules and procedures for civil appeals
- the law relating to tax deductibility of legal costs.

Views were sought on the problems with the current rules in the above areas and what changes should be implemented. A summary of the views expressed to the commission is set out below together with additional concerns and reform suggestions that have been raised in the submissions. These matters are not dealt with in the commission's final recommendations. They may be considered in the second phase of the commission's civil justice review or by the proposed Civil Justice Council. In some areas reforms could be implemented without the need for further inquiry.

5.2 PLEADINGS

A complaint common to a number of submissions was that serious problems with pleadings are frustrating the fundamental role that pleadings are intended to play in the litigation process.

Problems

The main complaints brought to the commission's attention were:

- pleadings are frequently word processed precedent documents¹¹²
- pleadings are often vague, formulaic and too broad to be of any assistance in identifying the fundamental issues between the parties¹¹³
- pleadings are deliberately evasive and disguise the real issues to be determined between the parties or omit fundamental information due to inadequate instructions or tactics¹¹⁴
- pleadings are sometimes prolix and do not set out in summary form the material facts as prescribed by the rules in the various courts¹¹⁵
- damages claims are often not properly quantified¹¹⁶
- pleadings do not adequately inform a party of the case they have to meet, do not assist in the supervision of a case and do not assist with the operation of the doctrines of issue estoppel and *res judicata*¹¹⁷
- the pleadings process does not properly facilitate the information that a case generates¹¹⁸
- pleadings are frequently ignored as the litigation progresses¹¹⁹
- significant resources are devoted to interlocutory fights about pleadings—for example, sufficiency of pleadings, whether a claim should be allowed to stand at all, amendment of pleadings and compliance with the rules¹²⁰
- pleadings are often interpreted strictly by the court and this encourages interlocutory disputes¹²¹
- the cost of interlocutory proceedings to enforce compliance is significant, inefficient and not productive to bringing about an early resolution of the dispute¹²²
- interlocutory fights take place at the formalistic level and do not deal with the substance of the issues¹²³

112 Submissions CP 37 (Transport Accident Commission), CP 21 (Legal Practitioners' Liability Committee), CP 48 (Victorian WorkCover Authority).

113 Submission CP 37 (Transport Accident Commission). Similar criticism was made by the Victorian Bar (submission CP 33). The Victorian WorkCover Authority noted that pleadings are precedent driven and are expressed sufficiently broadly so as to apply to most common claims but provide little substantive information as to the key allegations made by the plaintiff: Submission CP 48 (Victorian WorkCover Authority).

114 See submissions CP 33 (Victorian Bar), CP 37 (Transport Accident Commission). The Australian Law Reform Commission has suggested that 'lawyers frequently use pleadings tactically and, for example, fail to admit matters pleaded that they know to be true or make allegations that they cannot prove at hearing': See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000) [7.166].

115 See submission CP 33 (Victorian Bar). Christopher Enright also noted that pleadings often fail to give a good description of the case or to define the issues accurately and precisely: submission CP 50 (Christopher Enright).

116 Submission CP 21 (Legal Practitioners' Liability Committee).

117 Submission CP 50 (Christopher Enright).

118 Submission CP 50 (Christopher Enright).

119 Submission CP 37 (Transport Accident Commission).

120 Submissions CP 33 (Victorian Bar), CP 47 (Group Submission), CP 37 (Transport Accident Commission).

121 Submission CP 50 (Christopher Enright).

122 Submissions CP 37 (Transport Accident Commission), CP 47 (Group Submission).

123 Submission CP 33 (Victorian Bar).



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- fights about pleadings are often brought by defendants seeking to delay the process and discourage plaintiffs by forcing them to incur costs at an early stage¹²⁴
- a practice has developed of serving requests for further and better particulars that are oppressive and serve no real purpose because the parties are already aware of each other's cases and are able to properly prepare¹²⁵
- amendments to pleadings occur frequently and sometimes as late as at trial¹²⁶
- the courts are reluctant to require further and better particulars to be provided in relation to matters under the *Accident Compensation Act 1985* on the basis or assumption that the parties by and large know what the matter is about, by reason of the pre-litigation process.¹²⁷

Reform suggestions

The submissions were divided about the best way to address these problems. The commission notes that significant reforms have been made to pleadings rules in other jurisdictions. These reforms have informed many of the suggestions made in submissions.¹²⁸ Some of the reform ideas proposed in the submissions are summarised here.

Abolition of pleadings

It was suggested that consideration should be given to abandoning the use of pleadings altogether. Instead, a plaintiff's cause of action could be articulated in a summary with an affidavit deposing to the relevant evidence relied upon to prove the case. It was recommended that this occur before a proceeding is filed in court.¹²⁹ Generally, however, the abolition of pleadings was not supported in the submissions.¹³⁰

Reform to the way pleadings are drawn

A range of reform ideas was proposed in relation to the way pleadings are drawn including:

- simplifying and focusing the scope of pleadings
- the standardisation and simplification of rules about pleadings in all jurisdictions¹³¹
- consideration of whether the use of terms other than 'complaint' and 'default' might lead to better understanding¹³²
- the inclusion of information about legal and other services (for example, financial counselling) with a complaint as well as other documents relating to enforcement¹³³
- consideration of a more narrative form setting out the factual matters on which a claim or defence is based. Pleadings could include legal arguments or contentions of law that emerge from the facts alleged. In addition, relevant legal principles could be set out as well as a more comprehensive statement of the relief that is sought.¹³⁴

A more narrative style of pleadings was opposed in some of the submissions.¹³⁵

- the introduction of a requirement in the rules, or a practice note, that the parties prepare a list of agreed issues which are the core issues falling for determination in the proceeding. To the extent that the parties cannot agree they should file a separate list of additional core issues which they contend fall for determination.¹³⁶
- the use of standard forms of referral of disputes to the courts in discrete circumstances such as those under the *Accident Compensation Act 1985*¹³⁷
- the use of a more abbreviated pleadings process in some situations perhaps comprising points of claim and points of defence. However, it was noted that this may be a matter better considered in case management.¹³⁸
- consideration as to whether the more abbreviated approach of the Family Court should be adopted in civil proceedings generally¹³⁹
- the use of a short statement of claim or defence and a basic affidavit in support. It was suggested that this would enable the court to give summary judgment (on the papers) where appropriate.¹⁴⁰
- whether issues in dispute could be narrowed by requiring the parties to expressly admit or deny allegations, and where a denial occurs to provide sufficient particulars.¹⁴¹

One submission cautioned against pleadings reforms that would 'front-load' the work to be undertaken in a litigation process.¹⁴²

Greater use of case management and overriding objectives to control pleadings

It was suggested that:

- the use of overriding obligations would be 'useful in regard to disputes concerning pleadings and particulars'¹⁴³
- an early directions hearing to define issues would be useful for improving comprehensibility of pleadings¹⁴⁴
- a docket judge conducting general supervision and case management would be in a better position to comment on or point out to parties any deficiencies or inadequacies of pleadings and to address any concerns¹⁴⁵
- a rule should be adopted in complex cases that would enable the court to take action against seriously inadequate pleadings¹⁴⁶
- the connection between the admissions of fact and law in pleadings and exchanged material in the pre-litigation process needed to be recognised in any subsequent docket or other management process. It was suggested that at present the two processes occur without reference to each other.¹⁴⁷

The commission has recommended the introduction of overriding obligations as well as considerably broader case management powers generally.

Verification or certification

The submissions were divided about whether the certification or verification of pleadings is a good idea. On the one hand it was suggested that verification focuses the mind of the practitioner on the merits of the case at the outset and limits the possibility that spurious claims or defences will be filed.¹⁴⁸ On the other hand verification was opposed for the following reasons:

- significant care is exercised in preparing pleadings which are often settled by counsel¹⁴⁹
- if disciplinary action is needed there are sufficient professional and ethical obligations on legal practitioners which could be utilised¹⁵⁰
- when counsel 'signs' a pleading he or she is already subject to various ethical obligations concerning the veracity and accuracy of the pleading which in practical terms have a similar effect on the practitioner¹⁵¹
- if the claim is unmeritorious the usual expectation is for an order for costs and possibly indemnity costs¹⁵²
- the certification requirements in NSW have made little difference to the types of claims which are commenced or defended¹⁵³

124 Submission CP 50 (Christopher Enright).

125 Submission CP 33 (Victorian Bar).

126 Submissions CP 47 (Group Submission), CP 50 (Christopher Enright).

127 Submission CP 48 (Victorian WorkCover Authority).

128 The key reforms were canvassed by the Victorian Bar: see Submission CP 33. Reforms have been implemented in the UK and recommended by the Law Reform Commission of Western Australia: *Review of the Criminal and Civil Justice System in Western Australia*, Final Report No 92 (1999), [10.3]. See also the Supreme Court of NSW, *Practice Note No. SC Eq 3: Supreme Court Equity Division—Commercial List and Technology and Construction List* (2007) <www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08275aca41db3044e8ca25731e00254943?OpenDocument> at 11 February 2008, and *Magistrates' Court Civil Procedure Rules 1999 r 9.02* as well as the processes in the Australian federal courts.

129 Submission CP 5 (Confidential, permission to quote granted 4 February, 2008).

130 See Submissions CP 33 (Victorian Bar), CP 47 (Group Submission), CP 4 (Travis Mitchell), CP 21 (Legal Practitioners' Liability Committee).

131 Submission CP 27 (Victorian Aboriginal Legal Service).

132 Submission CP 43 (Consumer Action Law Centre).

133 Submission CP 43 (Consumer Action Law Centre).

134 Submission CP 47 (Group Submission). This submission notes that this approach may require some relaxing of the traditional distinctions between pleading of fact and law and also between pleadings of fact and matters of evidence, although it noted that the distinction is less observed today than in the past.

135 Submission CP 33 (Victorian Bar), CP 42 (Confidential submission, permission to quote granted 16 January 2008).

136 Submission CP 33 (Victorian Bar).

137 Submission CP 48 (Victorian WorkCover Authority). It was suggested that this may be possible where a jurisdiction is largely governed by a statutory authority (such as the Victorian WorkCover Authority) and where there is extensive consultation and liaison processes between the VWA, plaintiff lawyer groups, the Law Institute of Victoria and the courts.

138 Submission CP 47 (Group submission). AXA and TurksLegal also suggested that particular cases may be suitable for a short form of pleadings: see submission ED1 22 (AXA and Turks Legal).

139 Submission CP 10 (Peter Mair).

140 Submission CP 31 (Victoria Legal Aid).

141 Submission ED1 22 (AXA and TurksLegal).

142 Submission CP 47 (Group Submission).

143 Submission CP 33 (Victorian Bar).

144 Submission CP 33 (Victorian Bar).

145 Submission CP 42 (Confidential Submission, permission to quote granted 16 January 2008)

146 Submission CP 33 (Victorian Bar). The Bar provided the example of r 18 of the *UK Civil Procedure Rules* that enables the court to order a party to: a) clarify any matter which is in dispute in the proceeding; and b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.

147 Submission CP 37 (Transport Accident Commission).

148 See submissions CP 47 (Australian Corporate Lawyers Association), CP 46 (Telstra Corporation). It was suggested that Victoria should introduce certification provisions similar to s 47 of the *Legal Profession Act 2004* (NSW).

149 Submission CP 47 (Group Submission).

150 Submission CP 47 (Group Submission).

151 Submission CP 33 (Victorian Bar).

152 Submission CP 18 (Law Institute of Victoria).

153 Submission CP 21 (Legal Practitioners' Liability Committee). This comment was based on the committee's litigation experience in NSW and Victoria.



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- because parties often have an imperfect understanding of what is contained in their pleadings (even when they have read them before filing), verification would need to involve a practitioner explaining the contents of pleadings and ensuring that the party understood the explanation and agreed with the contents of the document. The Magistrates' Court argued that this would be a very time consuming and expensive exercise for little overall result.¹⁵⁴

The commission's recommendations in relation to the certification of the merits of allegations made in pleadings are set out in Chapter 3 of this report.

Defences

Some of the submissions supported the recent Magistrates' Court defence reforms.¹⁵⁵ The Magistrates' Court now requires defendants who deny an allegation to state their reasons for doing so; and if they intend to put forward a different version of events from that given by the plaintiff, they must state their own version. It was argued that consideration should be given to adopting these reforms in the superior courts.¹⁵⁶ An alternative view was that these reforms should be abolished in the Magistrates' Court because they were complicated in practice and added little, if any, value. Instead it was argued that the length of the notice of defence had been extended without providing any substantive information to either the plaintiff or the court.¹⁵⁷

Another submission cautioned against providing court registries with the power to reject defences summarily out of concern that the registry may fail to understand that certain denials are unable to be supported by particulars.¹⁵⁸

Limitation on the amendment of pleadings

The Law Institute called for greater limitation on the amendment of pleadings.¹⁵⁹ A contrasting view was that the existing rules were satisfactory and that there was a significant body of case law concerning when amendment may or may not be granted. It was further argued that costs orders adequately compensated any prejudice or disadvantage suffered by amendment. It was suggested, however, that consideration should be given to whether and in what circumstances a party seeking to amend a pleading should be called on to justify that request.¹⁶⁰

Annexing documents

Some submissions expressed support for annexing documents to pleadings,¹⁶¹ while others argued it was too difficult to define the type of documents to annex or to contain the documents to a reasonable limit.¹⁶² It was further suggested that annexing documents may lead to vague pleadings or require parties to go on a 'search and find' mission if large documents are annexed to pleadings.¹⁶³

Enforcement and interlocutory disputes

Generally the submissions called for a more robust approach to interlocutory disputes about pleadings. The Victorian Bar, the Legal Practitioners' Liability Committee, the Law Institute and Slater & Gordon were all in favour of stricter compliance with procedural timetabling requirements.¹⁶⁴ A further suggestion was to amend the rules so that parties initiating a pleadings dispute would not be awarded costs unless they could show that the pleading caused substantial prejudice to the running of the trial.¹⁶⁵

Other general suggestions

Mr Enright called for consideration of a new pleadings process comprising statements of representation, law, evidence, facts, discretions, claim and disclosure as well as the preparation of amalgamated statements for court.¹⁶⁶ This process would require the plaintiff to plead arguments in support of propositions and provide evidence in support of material facts. The defendant would be required to offer an alternative version of the facts and indicate evidence that might prove it. Enright suggested that if there was information relevant to the case that was not otherwise disclosed, it should be contained in a statement of disclosure. He emphasised that pleadings reforms should focus on the management of information that was generated.¹⁶⁷

The submission from e-law suggested that the electronic preparation and exchange of pleadings with the court and by the parties would save costs.¹⁶⁸

5.3 NON-PARTY PARTICIPATION IN PROCEEDINGS

The commission has received numerous detailed submissions relating to the issue of non-party participation in litigation, with particular emphasis on the role of *amicus curiae* (friend of the court).

Background

An *amicus curiae* offers the court advice in relation to questions of law or fact which may not otherwise have been brought to its attention. This person is not a party to the proceedings and typically cannot file pleadings, lead evidence, examine witnesses or be interrogated.¹⁶⁹ An *amicus curiae* is not bound by the outcome of the proceedings, has no right of appeal and is not liable for costs.¹⁷⁰

No specific provision is made for the appointment of *amici curiae* in the Supreme, County or Magistrates' Court rules in Victoria. Nor is there any guidance in the various court rules about what factors will be considered by the court in its assessment of an *amicus curiae* application.¹⁷¹ The court has an implied or inherent power to grant an *amicus curiae* leave to make a submission on a question of fact or law.

Two submissions suggested that the introduction of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (The Charter) has increased the urgency of the need for reform.¹⁷² Although the Charter makes provision for the involvement of interveners and *amici curiae*, and joinder by the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission, it was suggested that the expertise of other non-parties is also likely to be useful in the context of the development of Charter jurisprudence.¹⁷³ The submissions referred to the increase in non-party participation in litigation in countries where human rights legislation has already been introduced. It was predicted that a similar increase will occur in Victoria and that it is therefore timely to consider reform.¹⁷⁴

Concerns raised in the submissions

Generally, the submissions supported a broader role for *amici curiae* in public interest litigation¹⁷⁵ and were critical of the status quo.¹⁷⁶ Criticism was directed at the vagueness of the law and costs rules, all of which were seen to discourage legitimate 'public interest' participation in court processes. Fitzroy Legal Service suggested that '[a]micus applications are rarely made because those who may consider making them are unable to ascertain with any degree of certainty the likelihood of their application succeeding'.¹⁷⁷

The submission from the Human Rights Law Resource Centre and Blake Dawson Waldron identified some of the problems:

- There is a lack of clear rules or procedures with respect to applications for leave to appear as amicus, and the factors the court will consider in determining such applications. It argued that this has led to inconsistent approaches being adopted by the courts. *Amicus curiae* applicants are often community organisations or non-government organisations with limited resources and are put to significant expense in preparing an application without the benefit of clear guidelines.
- The court often fails to provide reasons to explain why an amicus application is granted or refused and this makes it difficult to determine the weight given by the court to the factors it did consider in reaching its decision.

154 Submission CP 55 (Magistrates' Court of Victoria).

155 Submissions CP 33 (Victorian Bar), CP 47 (Group Submission). The Magistrates' Court now requires a defendant who denies an allegation to: a) state their reasons for doing so; and b) if they intend to put forward a different version of events from that given by the plaintiff, they must state their own version.

156 Submission CP 47 (Group Submission).

157 Submission CP 48 (Victorian WorkCover Authority). WorkCover did, however, indicate that the particulars requirement should be maintained.

158 Submission CP 4 (Travis Mitchell).

159 CP 18 (Law Institute of Victoria).

160 Submission CP 47 (Group Submission).

161 Submissions CP 18 (Law Institute of Victoria), CP 27 (Victorian Aboriginal Legal Service). Also see Submission CP 11 (Dibbs Abott Stillman), which proposed an alternative regime for the issuing of proceedings requiring an affidavit in support of proceedings setting out the facts that give rise to a cause of action and exhibiting all supporting documents.

162 Submission CP 55 (Magistrates' Court of Victoria). By way of example the Magistrates' Court referred to a dispute involving a joint venture agreement which could run into hundreds of pages and would simply be too much to attach to a complaint.

163 Submission CP 33 (Victorian Bar).

164 Submissions CP 33 (Victorian Bar), CP 21 (Legal Practitioners' Liability Committee), CP 20 (Slater & Gordon).

165 Submission CP 14 (Confidential, permission to quote granted 13 February 2008). It was suggested that amendment to pleadings before trial is commonplace and that allowing amendment two years before trial seems useless.

166 Submission CP 50 (Christopher Enright).

167 Submission CP 50 (Christopher Enright).

168 Submission CP 19 (<e.law> Australia Pty Ltd).

169 See Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

170 See Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

171 The rules do make provision for the addition or joinder of a party. However, these rules do not strictly apply to an amicus, who is not a party to a proceeding. Instead, the appointment of an amicus is entirely within the discretion of the court. The court has an implied or inherent power to grant an amicus leave to represent an interest or make a submission on a question of fact or law. See comments by Brennan CJ in *Levy v The State of Victoria & Ors* 1997] 189 CLR 579.

172 See Submissions CP 30 (Tanya Penovic), CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

173 Submission CP 30 (Tanya Penovic). She noted that the Charter is to be interpreted with reference to international law and the judgments of domestic, foreign and international courts and tribunals relevant to human rights. She suggested that the small amount of domestic human rights jurisprudence means that it is likely that experts in international law will be called on to participate in proceedings concerned with the Charter.

174 Tanya Penovic referred to Canada (*Charter of Human Rights and Freedoms 1982*) and the UK (*Human Rights Act 1998*): Submission CP 30 (Tanya Penovic).

175 See Submissions CP 22 (Mental Health Legal Centre), CP 30 (Tanya Penovic), CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron), CP 44 (Fitzroy Legal Service), CP 31 (Victoria Legal Aid), CP 50 (Christopher Enright). The submissions from WorkCover and the TAC indicated that the incumbent regime is adequate to deal with issues relating to the intervention of non-parties.

176 Submissions CP 30 (Tanya Penovic), CP 43 (Consumer Action Law Centre), CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron), CP 44 (Fitzroy Legal Service), CP 50 (Christopher Enright).

177 Submission CP 44 (Fitzroy Legal Service).



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- Applicants must attend court on the day of the hearing fully prepared to participate in the proceeding (with both written and oral submissions, if both are sought to be made) with no certainty about whether they will be granted leave. In addition, parties are also likely to have prepared a reply which will not be needed if leave is not granted.
- The cost of participating as *amicus curiae* is significant (even if as a component of a pro bono budget). If the application is not granted there is a significant waste of resources that could have been otherwise allocated.
- If leave is granted an adjournment may be sought resulting in further delay.
- The court must hear an *amicus curiae* application in full rather than by outline prior to the substantive hearing.
- There is a risk that an amicus applicant could be subject to a cost order. This may act as a deterrent to participation.

Reform ideas proposed in the submissions

The submissions suggested the following ideas for reform of the relevant rules:

- Clear guidelines should be introduced (either through rules of court or practice note) about the pre-conditions that need to be met before *amicus curiae* participation is allowed, as well as parameters for participation, timelines and the appropriate form of the application.¹⁷⁸
- The guidelines should provide that an *amicus curiae* application is made by way of summons and supporting affidavit which annexes a copy of the submissions.¹⁷⁹
- Written submissions should be preferred unless particular circumstances indicate the need for oral submissions.¹⁸⁰
- The guidelines should set out the factors that the court will take into account in considering whether or not to grant leave.¹⁸¹ The submission from the Human Rights Law Resource Centre suggested that such factors should include:
 - whether the case raises issues of public importance, or formulates or elucidates principles of law
 - whether the applicant has some expertise, knowledge, information or insight that the parties are not able to ('could') or willing to ('would') provide
 - whether the court will be significantly assisted by the submission of the *amicus curiae*
 - whether it is in the interests of justice that the *amicus curiae* be permitted to make its submissions (taking into account issues of efficiency of the court process, delay to the parties, cost to other parties)
 - the particular circumstances of the case.
- The court should be required to provide reasons for its decision on an *amicus curiae* application.¹⁸²
- The appointment of *amicus curiae* should occur at least two weeks prior to the substantive hearing.¹⁸³
- The court should have discretion to grant leave on a conditional basis or otherwise impose conditions on the scope of *amicus curiae* participation (for example limiting participation to written submissions or the time that will be allowed for oral submissions).¹⁸⁴
- There should be clear guidance as to the effect of multiple amicus applications being made in respect of a single proceeding.¹⁸⁵
- Costs relating to the application should not be awarded against an *amicus curiae* applicant whose application is in the 'public interest' unless the application comprises an abuse of the amicus process.¹⁸⁶

The commission notes that Tanya Penovic supported protecting litigants from bearing the cost of non-party participation. She suggested this may involve the introduction of costs orders against *amici curiae* with respect to the matters raised in their submissions.¹⁸⁷

Penovic recommended that the commission have regard to previous Australian Law Reform Commission conclusions in relation to the intervention of non-parties,¹⁸⁸ as well as to the proposals put forward by Justice Kenny.¹⁸⁹

Other submissions called for formal amendments to the rules of civil procedure in relation to the participation of non-parties generally. Victoria Legal Aid suggested that 'the rules should be amended to allow non-parties to pro-actively intervene in test cases when it is in the public interest to do so.'¹⁹⁰ Christopher Enright's submission proposed that the role of *amicus curiae* be institutionalised through the Office of the Public Advocate (OPA). He argued that the OPA could make a public interest contribution to any questions of law and ensure that issues that the court may have missed are brought to its attention.¹⁹¹

5.4 ENFORCEMENT OF JUDGMENTS AND ORDERS

We received numerous submissions raising concerns about the enforcement of judgments through the Victorian courts and the Sheriff's Office.¹⁹² It was suggested that the enforcement system should be reviewed to ensure that it functions fairly and more efficiently. It was further suggested that the current civil debt enforcement process is being abused and is unable to serve the interests of both creditors and debtors.¹⁹³

Reform ideas proposed in the submissions

The seizure of property issued by the Magistrates' Court

The Law Institute argued that consideration should be given to amending section 111 of the *Magistrates' Court Act 1989* to 'remove the restriction which currently limits the execution by a Sheriff of a warrant to personal property'.¹⁹⁴ This amendment was also supported by the Magistrates' Court, which noted that 'the existing restriction probably reflects the historical situation of a very limited civil jurisdiction. But a current jurisdictional limit of \$100,000 renders the restriction pointless'.¹⁹⁵

The Law Institute argued that the Sheriff should be required to sell personal property in order to satisfy a judgment debt before selling any real property. In addition, it suggested that it would not oppose a limitation on the right to sell real estate if the amount owed to the judgment creditor was a 'trifling sum'.¹⁹⁶

The seizure and sale of property in the Supreme and County Courts

Pursuant to section 42 of the *Supreme Court Act 1986* the Sheriff is prevented from seizing any property of a judgment debtor which would be exempt from seizure if the debtor were made bankrupt. The Law Institute expressed concern about the lack of a mechanism to challenge certain decisions of the Sheriff.¹⁹⁷ It recommended that rules similar to those for third parties claiming ownership of seized goods should be introduced in Victoria. The Law Institute also expressed some concern about the complex procedures that are required to achieve the Sheriff's sale of a judgment debtor's interest in real estate.¹⁹⁸

178 Submissions CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron), CP 30 (Tanya Penovic).

179 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

180 Submission CP 30 (Tanya Penovic).

181 Submissions CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron), Submission CP 30 (Tanya Penovic).

182 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

183 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

184 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

185 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

186 Submission CP 26 (Human Rights Law Resource Centre and Blake Dawson Waldron).

187 Submission CP 30 (Tanya Penovic).

188 Such ALRC reports include: *Standing in Public Interest Litigation*, Report No 27 (1985); *Equality Before the Law: Women's Equality*, Report No 69, Part 2 (1994); *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78 (1996); *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) as cited in Submission CP 30 (Tanya Penovic).

189 Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159, 169–71.

190 Submission CP 31 (Victoria Legal Aid).

191 See submission CP 50 (Christopher Enright). Sir Anthony Mason suggests the establishment of an office of Advocate General to widen advice to the court and indirectly provide a mechanism for receipt of advice from experts. He acknowledges that the idea might not receive much support. See Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court: A comment' (1998) 20 *Adelaide Law Review* 173, 176.

192 Submissions CP 18 (Law Institute of Victoria), CP 59 (Springvale Monash Legal Service), CP 43 (Consumer Action Law Centre).

193 Submissions CP 59 (Springvale Monash Legal Service), CP 43 (Consumer Action Law Centre).

194 Submission CP 18 (Law Institute of Victoria).

195 See Submission CP 55 (Magistrates' Court of Victoria).

196 Submission CP 18 (Law Institute of Victoria).

197 The Law Institute argued that an action in trespass is not the appropriate mechanism for testing whether or not goods should be exempt, and that a Sheriff should not be at risk of an action in damages: Submission CP 18 (Law Institute of Victoria).

198 Submission CP 18 (Law Institute of Victoria).



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General concerns

The Law Institute suggested the following issues be considered:

- Civil warrants issued by judgment creditors should be regarded as less important than warrants executed by the Sheriff.
- The priority with which civil warrants are executed: the Law Institute recommended that a creditor who incurs costs should gain priority.
- The Sheriff's limited right of entry: subject to some qualifications judgment debtors are entitled to refuse the Sheriff entry to their home. The Law Institute submitted that forced entry should be permitted to seize non-exempt property where it is known that there are valuable assets in the house of a debtor. It argued that such entry should be approved by the court, with the judgment debtor being given an opportunity to reply.
- The Sheriff's powers of entry, seizure and sale should be no less than those in other states and there should be uniformity of processes.
- Adequate resourcing of the Sheriff's office to enable it to execute civil warrants in Victoria: The Law Institute was concerned that without adequate resources, judgment creditors may increasingly turn to bankruptcy and winding up or recovery processes outside the legal system.¹⁹⁹

5.5 VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

The Victorian Civil and Administrative Tribunal (VCAT) did not fall within our terms of reference, but as it plays an important role in the civil justice system, people with whom we consulted raised a number of issues about its operation and jurisdiction. Concerns were expressed about VCAT's inability to enforce its judgments and about its jurisdiction overlapping with that of the courts.

Enforcement of orders

VCAT does not have any statutory power to enforce its orders. As such, enforcement of VCAT orders must occur through the Victorian courts.

Pursuant to section 121(1) of the *Victorian Civil and Administrative Tribunal Act 1998* the appropriate court for enforcement of a monetary order that does not exceed \$100,000 is the Magistrates' Court. In order to enforce orders through the Magistrates' Court, creditors must file a copy of the VCAT order certified by a presidential member or the principal registrar and an affidavit as to the amount not paid under the order. On filing, the order is deemed to be an order of the Magistrates' Court and may be enforced through the Magistrates' Court processes. If the order is a non-monetary order it must be enforced through the Supreme Court pursuant to a similar process (section 122 of the *Victorian Civil and Administrative Tribunal Act 1998*).

It has been suggested that the process of lodging VCAT orders with the Magistrates' Court or the Supreme Court for enforcement purposes is time consuming, costly and unnecessary.

Overlapping jurisdiction

VCAT does not have an inherent jurisdiction. The *Victorian Civil and Administrative Tribunal Act 1998* provides VCAT with both original and review jurisdiction. In some matters VCAT has shared jurisdiction with courts.²⁰⁰ Where VCAT has exclusive jurisdiction, its jurisdiction is unlimited.

Legislative provisions enable VCAT to make an order striking out all or any part of a proceeding if it considers that the subject matter of the proceeding would be more appropriately dealt with by a body other than VCAT.²⁰¹ However, this provision cannot be used to refer a matter to another body if it is a matter over which VCAT has exclusive jurisdiction.²⁰² In addition, pursuant to section 29 of the Act a judge of the Supreme Court may be appointed as an acting member of VCAT on a temporary basis. VCAT's president is a Supreme Court judge and its vice presidents are County Court judges. Each division is headed by a County Court judge. As full time members the president and vice presidents are able to exercise the powers of the Supreme and County Courts respectively.²⁰³

It has been submitted that problems arise where VCAT has exclusive jurisdiction over parts of a broader dispute pending in another court. Although it may be undesirable for claims to be brought in different forums, it is often difficult to ascertain the most appropriate forum for the case.

Other concerns raised in the submissions

It has been suggested the following issues should be further considered:

- whether any VCAT processes and procedures need reform²⁰⁴
- the issue of transfers of matters under the *Fair Trading Act 1999* to VCAT. It was submitted that there is uncertainty surrounding the award of Magistrates' Court costs where a matter is transferred to VCAT.²⁰⁵
- extending to the courts VCAT's powers in relation to consumer credit, to address the problem of many defensible claims being uncontested.²⁰⁶ Specifically, the Consumer Action Law Centre recommended that the courts should have power to set aside all, or part, of a debtor's obligations where the debt arises from inappropriate or reckless lending.²⁰⁷

Supreme Court Judge Kevin Bell has recently been appointed as the President of VCAT and will undertake a review of VCAT to 'assess its current directions and future needs'. It may be that some of the matters referred to above may be appropriate for consideration in the course of that review.

5.6 APPEALS

We received a number of submissions regarding the various appeal mechanisms in the Victorian courts, and in particular about delays encountered in the appeal processes.

Appeals from the Magistrates' Court

Section 109(1) of the *Magistrates' Court Act 1989* provides that an appeal may be made to the Supreme Court on a question of law from a final order of the Magistrates' Court. The Magistrates' Court contended that further appeal from the Supreme Court to the Court of Appeal should be prevented. It also favoured limiting the number of appeals to one.²⁰⁸

Appeals from interlocutory orders of the Magistrates' Court

The Law Institute argued that the historical barring of appeals from interlocutory orders of the Magistrates' Court was inappropriate, particularly given the recent increase in that court's jurisdiction, and should be revisited. It submitted that a better approach might be to allow interlocutory appeals to a Supreme Court judge with leave. It suggested that an application for leave could be brought initially in the Practice Court with the fixture of the appeal set thereafter. The preparation of a simple appeal book was also recommended.²⁰⁹

Alternatively, the Law Institute raised the possibility of removing civil appeals from the Supreme Court to a single judge of the County Court. It noted that criminal appeals proceed to the County Court, and sees little justification for a distinction to remain for civil appeals.²¹⁰ This was not supported by the Magistrates' Court. The court noted that if an appeal is by way of hearing de-novo, it would consume significant resources of the County Court.²¹¹ The court argued that an analogy with criminal appeals was inappropriate because a

199 Submission CP 18 (Law Institute of Victoria).

200 The non-exclusive jurisdictions of VCAT include land valuation, judicial review of decisions by responsible authorities (as opposed to planning authorities) under the *Planning and Environment Act 1987*, state taxation matters (in relation to stamp duty or land tax) and civil claims. The exclusive civil jurisdictions of VCAT are principally in residential tenancies, retail tenancies, domestic building, transport accident injuries, credit (mainly repossession) and drainage. It also appears that VCAT has exclusive jurisdiction in relation to judicial review of decisions of planning authorities under the *Planning and Environment Act* (see s 39).

201 Section 77 of the VCAT Act. This does not apply to a proceeding for a review of a decision.

202 See *Bentley v Cash Resource Australia Pty Ltd* [2002] VCAT 1399.

203 Deputy presidents must have practised for at least five years. Non-judicial deputy presidents head the various Lists.

204 Submission CP 39 (Building Dispute Practitioners' Society Incorporated). See also Submissions CP 37 (Transport Accident Commission), CP 23 (State Trustees).

205 See discussion in Submission CP 43 (Consumer Action Law Centre). It argued that people should be notified of their right to transfer a matter to VCAT and that the Act should be amended to make it clear that there should not be an award of costs if the Magistrates' Court claim is dismissed under the transfer provision of the Act (s 112).

206 See discussion in Submission CP 43 (Consumer Action Law Centre).

207 See discussion in Submission CP 43 (Consumer Action Law Centre).

208 In Submission CP 55 the Magistrates' Court acknowledged that appeals to the High Court cannot be prevented, but noted that these are rare.

209 Submission CP 18 (Law Institute of Victoria). To facilitate interlocutory appeals from the Magistrates' Court the Institute suggested that consequential amendments would need to be made to the *Magistrates' Court Act 1989* and *Supreme Court (General Civil Procedure) Rules 2005*: Submission CP 18 (Law Institute of

Victoria).

210 Submission CP 18 (Law Institute of Victoria).

211 The Magistrates' Court noted that if a hearing ran for three days before a magistrate, then an appeal before a County Court judge would take just as long: Submission CP 55 (Magistrates' Court of Victoria).



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criminal appeal usually related to a sentence which had often been imposed after a guilty plea. In this situation the proceeding before the magistrate would have only taken a matter of minutes and the appeal before the judge would not take significantly longer.²¹²

Supreme Court

The Bar recommended that section 17A of the *Supreme Court Act 1986* be amended to enable the Court of Appeal to rescind a grant of leave to appeal granted by a primary judge. It argued that the existing process was cumbersome.²¹³

The Supreme Court called for reform to the procedure governing appeals from interlocutory decisions in the Supreme and County Courts.²¹⁴ The court suggested that the general requirement for leave to appeal had obliged the courts to define when a decision is final or interlocutory. It argued that this distinction was difficult and that applications for leave 'may be brought out of an abundance of caution, when it serves little practical purpose'.²¹⁵ It proposed a number of reform ideas. Justice Maxwell, President of the Court of Appeal, noted that this uncertainty 'is undesirable, it creates additional costs for the parties and additional burdens for the Court'. He also observed that the term 'interlocutory' is not well understood by many lawyers, and is meaningless to lay people.²¹⁶

WorkCover cautioned against automatic appeal rights in all interlocutory disputes. It argued that such an extension may overburden the court. It did not have any concerns about the rules relating to appeals from damages verdicts and did not support any reform to those rules.²¹⁷

Appeals from non-judicial members of VCAT to the Supreme Court

The TAC suggested that consideration should be given to revising the rules relating to appeals from non-judicial members of VCAT to the Trial Division of the Supreme Court.²¹⁸ It argued that the process would be more efficient if an application for leave to appeal was returnable directly to a judge of the Trial Division.

At present, applications for leave to appeal from VCAT are generally heard by a master in the first instance. A party can appeal to a judge in the Trial Division against a decision made by a master and this is usually heard in the Practice Court. The TAC and Law Institute suggested that in their experience the master's decision is often appealed to the Practice Court. They argued that omitting this step in the appeal process may be more efficient and bring about a reduction in costs. The Law Institute also indicated that appeals from non-judicial members of VCAT should be streamlined.²¹⁹

Costs and the appeal process

The Group submission stated that an appeal from a first instance judgment in Victoria does not remove the unsuccessful party's obligation to pay the amount of the judgment unless a stay is ordered by the trial judge or appeal court or an agreement is reached with the judgment creditor. The submission expressed concern that if a stay is not granted, a prohibitive judgment debt (for example a judgment debt that is large enough to bankrupt the defendant or severely curtail its business activities) may act to bar an appeal right, even where the prospects of the appeal are good. It further suggested that an inability to appeal might persuade a party to settle rather than litigate even if a case has merit.

To address this concern the Group submission recommended the introduction of an appeal bonding scheme. It argued that such a system would result in greater fairness between parties by limiting the difficulties defendants face when they wish to appeal a first instance judgment.²²⁰ It suggested that a cap on the amount to be paid pending appeal could be determined either as a fixed sum (because of the smaller size of judgments in Australia the submission suggested that a cap of \$1 million was appropriate) or as a set percentage of the judgment debtor's net assets, whichever was the lesser. It was also recommended that the bonding system include protections for plaintiffs where it was demonstrated that defendants were deliberately dissipating assets.²²¹

The need to examine the appeal process with the aim of reducing costs, in particular the cost of appeal book documents, was also raised. It was suggested that court books should be constrained if they are to be required.²²²

Section 110 of the Magistrates' Court Act

Magistrate Jillian Crowe also raised a concern about the operation of section 110 of the *Magistrates' Court Act 1989*.²²³ This provision empowers the court to set aside a final order and to rehear the proceeding where a final order is made against a person who did not appear in the proceeding.

Ms Crowe indicated that the matter typically arises where the court has made final orders on an undefended claim and at some time later the court receives a request to set aside the order without conducting a hearing on the merits. This is often because the defendant realises that the judgement debt precludes him or her from acquiring a credit facility, or the order poses some other commercial problem for the defendant. The request is usually accompanied by a letter from the judgment creditor consenting to the process, as the debt under the order has been fully paid.

Ms Crowe suggested there is some uncertainty and inconsistency with the interpretation of section 110. In order to address this, she proposed that a simple amendment be made to section 110 to clarify that parties to concluded litigation be able to consent to have the final order set aside and the proceedings struck out.

Other reform suggestions

In addition to the issues identified above, the commission was also asked to consider the following:

- simplifying the rules and procedures for appeals: in particular, the submission from Legal Aid suggested that the distinctions between appeals on questions of law, appeals de novo and judicial review are confusing for self-represented litigants²²⁴
- the implementation of an appeal guarantee system.²²⁵

5.7 TAX DEDUCTIBILITY OF LEGAL COSTS

The commission has received a number of submissions regarding the tax deductibility of legal fees and expenses in civil litigation. This issue falls within the jurisdiction of the Commonwealth, and any reform in this area would require Commonwealth involvement.²²⁶

The Consumer Action Law Centre expressed concern at the power imbalance between its clients and opposing parties in litigation. It contended that the difference between the risks borne by parties to litigation can make the negotiation of a fair outcome difficult. It explained that cost orders can have a significant impact on its clients (for example they can lead to the loss of property including cars and homes). By contrast, it suggested that opposing parties are almost always companies (and often large companies).

The Consumer Action Law Centre believes that tax deductibility that is available to companies further compounds the inequality between litigation participants and may be a disincentive for a company to settle major litigation at an early opportunity.²²⁷ On the other hand the Bar indicated that it is not aware of any problems in relation to tax deductibility and does not believe that there is any need for reform. It believes that there is no good reason in principle why legal expenses incurred in deriving assessable income should not be tax deductible like any other business expense.²²⁸ The Law Institute suggested that removing the tax deductibility of legal fees would effectively increase the cost to the parties of settling a claim, and consequently, reduce the likelihood of settlement.²²⁹

212 See Submission CP 55 (Magistrates' Court of Victoria).

213 The submission referred to the comments by Charles JA in *Coles Myer v Bowman* [1996] 1 VR 457, who suggested that reform to s 17A of the Supreme Court Act is desirable because the existing system is 'cumbersome and inconvenient' [460] as cited in Submission CP 33. The Bar suggested that at the moment a party dissatisfied with the grant of leave to appeal by a primary judge must obtain leave to appeal from the order granting leave and then successfully appeal against that order. It was argued that this is a cumbersome process (Submission CP 33 (Victorian Bar)).

214 Submission CP 58 (Supreme Court of Victoria).

215 Submission CP 58 (Supreme Court of Victoria). The court refers to the following case examples: *AMP General Insurance Ltd v Victorian Workcover Authority & Ors* [2006] VSCA 236 and the unreported judgments on leave applications in *Major Engineering Pty Ltd v Timelink Pacific Pty Ltd* No. 4122 of 2005, 29 September 2006 (a decision on liability only) and *Janina Puttick v Fletcher Challenge Forests Ltd* No. 4564 of 2005, 17 November 2006 (permanent stay of proceedings).

216 E-mail from Justice Maxwell to Peter Cashman dated 9 October, 2006.

217 Submission CP 48 (Victorian WorkCover Authority) referring to ss 134AD and 134AE of the *Accident Compensation Act 1985*, which govern appeals in serious injury applications 'as of right'. An appeal is allowed without leave on a question of law and no distinction is made between final and interlocutory decisions.

218 Submission CP 37 (Transport Accident Commission) referring to s 148 VCAT Act read together with *Supreme Court (General Civil Procedure) Rules 2005* rr 4.05–4.09, 77.05 and 65.

219 Submission CP 18 (Law Institute of Victoria).

220 Submission CP 47 (Group Submission). Several states in the US have introduced reforms that place a cap on the bond amount or provide that a bond will only apply to the punitive damage component of the award. (See Mark Behrens and Andrew Crouse, 'The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past' (2006) 31(2) *University of Dayton Law Review* 173). The Group submission referred to the model for state legislative reform developed by the American Legislative Exchange Council (ALEC). It advocated the introduction of a similar appeal bonding system in Victoria.

221 Submission CP 50 (Christopher Enright).

222 Submission CP 52 (Hollows Lawyers). See also Submissions CP 48 (Victorian WorkCover Authority), CP 37 (Transport Accident Commission).

223 Submission CP 56 (Jillian Crowe).

224 Submission CP 31 (Victoria Legal Aid).

225 Submission CP 18 (Law Institute of Victoria). The Law Institute believes that the main problems with the civil appeals process stem from delay in hearing appeals and obtaining judgment. The Law Institute recognised that this would require the provision of additional resources to enable the courts to hear an appeal and provide judgment within a reasonably set timeframe, for example, six months.

226 Such reform may involve amendment to the *Income Tax Assessment Act 1997* (Cth). Submissions CP 18 (Law Institute of Victoria), CP 33 (Victorian Bar) and CP 58 (Supreme Court of Victoria).

227 Submission CP 43 (Consumer Action Law Centre).

228 Submission CP 33 (Victorian Bar).

229 Submission CP 18 (Law Institute of Victoria).



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5.8 INTEREST UP TO JUDGMENT

Background

The position in Victoria in relation to the calculation of interest up to judgment is different to rules in all other Australian jurisdictions (except Tasmania).²³⁰ Elsewhere a model is adopted under which the court has a general discretion (sometimes subject to a presumption in favour of interest, and in all jurisdictions subject to specified limitations) to award interest in respect of all or part of the period between the arising of the claimant's cause of action, and judgment. The discretion generally operates in all proceedings in which a monetary amount is at issue.²³¹

By contrast, the Victorian Supreme Court Act deals separately with 'debts or sums certain' and other 'debts or damages', and allows interest to be recovered on the former from the time the relevant amount was payable under a written instrument or demanded (as applicable) and the latter from the time of the commencement of legal proceedings. The Act also makes separate provision for interest in proceedings for trover or trespass to goods and proceedings based on policies of insurance.²³²

Concerns raised by the Law Institute of Victoria

The Law Institute made the following arguments for reform of the Victorian provisions:

- Victoria is out of line with all other jurisdictions apart from Tasmania in allowing interest to be payable only from the date of issue rather than the date of accrual of action.
- Clients may take years to locate a debtor and may automatically lose any interest that would have accrued in that time.
- The award of interest is intended to compensate for the loss or detriment suffered by being kept away from money during the relevant period. Therefore, in order for compensation to be fairly distributed, it should be available from the date the cause of action accrued.²³³
- The penalty interest rate is supposed to underline the seriousness of failing to pay a debt when it falls due and the current Supreme Court position undermines this objective.²³⁴
- The current situation encourages forum shopping or, alternatively, the premature initiation of proceedings to ensure that interest starts to run. It further suggested that 'one of the few alternatives open to plaintiffs—complicating the action by suing for damages for loss of use of the money—is clearly unsatisfactory.'²³⁵

The Law Institute recognised that it will not always be appropriate to award interest from the date of accrual of a cause of action and recommended the introduction of a provision similar to section 51A of the *Federal Court of Australia Act 1976* (Cth) to allow interest to be awarded as is considered appropriate in each case. It also suggested that the rate should be fixed, for instance, at the penalty interest rate, subject to an overriding discretion to depart from this in appropriate cases (for example, where there is delay by one of the parties).

The Law Institute further argued that there was no valid reason for drawing a legislative distinction between debts, damages, trover, trespass and policies of insurance in Victoria. It observed that this does not occur anywhere else in Australia.

5.9 PRESUMPTION THAT NO COSTS ARE RECOVERABLE FOR VERY SMALL CLAIMS

The Consumer Action Law Centre noted that costs are not awarded in the Magistrates' Court for claims of less than \$500, unless there are special circumstances. This limit has remained unchanged despite several increases in the upper limit of the court's jurisdiction. In the centre's experience costs for claims of less than \$500 are awarded as a matter of course where a claim is undefended. It argued that undefended claims give rise to the least actual cost on the part of the plaintiff and cannot constitute any reasonable interpretation of 'special circumstances'. It suggested that this anomaly needs to be addressed as a matter of urgency.

It argued that the legal costs of small claims are unjustified in comparison with the amounts of the claims. In many instances, costs exceed the amount of the claim and result in consumers having to pay substantial legal bills.²³⁶

The Consumer Action Law Centre recommended:

- For small claims of \$1000 or less in the Magistrates' Court, the rules should be changed so that there is a presumption that each party bears its own costs whether the claim is defended or not.
- The no-cost cap should be increased from \$500 to \$1000.²³⁷

5.10 THE NEED TO CONSIDER ECONOMIC ASPECTS OF THE CIVIL JUSTICE SYSTEM

The Victorian Bar highlighted that it is also important to consider the economic aspects of the civil justice system when looking at reform.²³⁸ It proposed the following issues for consideration:

- The civil justice system is an important service industry in Victoria, contributing nearly \$1 billion to the state's economy each year.
- It was suggested that inefficiency in the civil justice system is contributing to the loss of significant civil litigation, especially commercial work, to other jurisdictions, in particular the Federal Court and the Supreme Court in NSW, and is also limiting Victoria's ability to attract work from the growing Asian litigation market. In the Bar's view 'the loss of commercial litigation risks impairing the quality of justice in Victoria and retarding the growth of an important part of the services sector'.²³⁹
- Providing the most predictable and rapid resolution of cases would assist Victoria to achieve national leadership as a centre for litigation excellence and to capture economic growth.
- Becoming an Asia-Pacific centre for litigation excellence would enable Victoria to position itself as a credible choice of jurisdiction for non-domestic civil litigation.
- Major reforms of the civil justice system are not achievable without significant government participation. The Bar envisaged two roles for government. Firstly, the creation of an 'industry policy' for the civil litigation industry and second, support to the Supreme Court in packaging and presenting a reform agenda to the legal profession and the public.
- There is a need for rules to increase transparency in decision making for clients, and the enforcement of appropriate corporate standards of behaviour in Victoria (including seeking common national standards).²⁴⁰
- The Bar pointed to less burdensome contracts legislation in NSW and called for national uniformity in areas such as fair trading and proportionate liability to prevent loss of work.²⁴¹
- The program of 360 degree feedback by the Judicial College of Victoria should be expanded and the program supported by clear performance measures and a regular external peer review system allowing barristers and, where appropriate, solicitors to provide feedback.²⁴²

5.11 COURT GOVERNANCE

In a letter to the commission dated 15 November 2007, Chief Justice Marilyn Warren suggested that some of the important issues the commission might explore in the second phase of its civil justice review were

the extent to which a more independent court governance structure would:

- *free up judge time currently spent in dealings with the Department [of Justice] and preparing specific funding submissions;*
- *reduce duplication of effort between the Department and Courts in relation to administrative matters; and*
- *provide courts with greater capacity to respond and adapt to changing circumstances in a timely fashion.*

The Chief Justice noted that court governance was put forward as an issue requiring attention in the Attorney-General's Justice Statement and the Courts Strategic Directions Statement, which noted:

*A modern governance system needs to be introduced to enable the Courts and VCAT to respond adequately to the changing needs of the community.*²⁴³

230 *Supreme Court Civil Procedure Act 1932* (Tas) ss 34–35.

231 The various tests run up to the date of judgment, the date judgment takes effect, the day before judgment is entered, or the date judgment is entered. See *Civil Procedure Act 2005* (NSW) ss 100(1) and 100(2); *Federal Court of Australia Act 1976* (Cth), s 51A(1)(a) and (b); *Judiciary Act 1903* (Cth), s 77MA; *Supreme Court Act 1995* (Qld) s 47(1), (2) and (3); *Supreme Court Act 1935* (SA) s 30C(1), (2) and (3); *Supreme Court Act 1935* (WA) s 32(1) and (2); *Court Procedures Rules 2006* (ACT) r 1616(1)–(5); *Supreme Court Act* (NT) s 84.

232 *Supreme Court Act 1986* ss 58 and 60.

233 Submission CP 18 (Law Institute of Victoria) quoting *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657, 663 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

234 Submission CP 18 (Law Institute of Victoria).

235 Submission CP 18 (Law Institute of Victoria).

236 For example, Consumer Action's legal practice represented a client who did not fully understand English, who had a complaint against her issued claiming a \$300 debt, and who was required to pay \$293 costs in a default judgment. Failing to understand the nature of the judgment and the direction to pay, the client did not pay and the plaintiff took further action to enforce the claim, and legal costs skyrocketed. A warrant for seizure and sale of this client's home was made to satisfy the amount of \$2315.20. Thus, a \$300 claim can lead to legal costs of \$2000 under the present system. Submission CP 43 (Consumer Action Law Centre).

237 Submission CP 43 (Consumer Action Law Centre).

238 Submission CP 62 (Victorian Bar).

239 Submission CP 62 (Victorian Bar).

240 Submission CP 62 (Victorian Bar). See Courts Consultative Council, Courts Strategic Directions Project, Part B Strategic Directions Statement (2004) recommendation 17.

241 Submission CP 62 (Victorian Bar).

242 Submission CP 62 (Victorian Bar).

243 Courts Consultative Council (2004) above n 240, 11.



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The Chief Justice's suggestion was supported by the Chief Magistrate, Ian Gray, and the Chief Judge of the County Court also supported further consideration of these issues.²⁴⁴

Models of court governance were also considered in some detail in *Going to Court*.²⁴⁵

5.12 OTHER ISSUES RAISED IN SUBMISSIONS

A number of additional issues were raised and reform suggestions made in submissions and consultations during our review, including:

- the early assessment of medical negligence claims by a medial panel of approved independent medical experts appointed by the Specialist Colleges²⁴⁶
- the use of joint medical examinations to save costs and increase objectivity²⁴⁷
- the suggestion that the lack of pleadings in serious injury cases leaves the court and the parties in the dark in relation to the possible 'defence' until trial. In addition, it was suggested that in order to prevent trial by ambush any surveillance evidence should be required to be disclosed before trial.²⁴⁸ It was recommended that a defendant file an affidavit setting out why a serious injury claim is rejected.
- the need for the review of the recently enacted proportionate liability legislation. It was argued that the regime should operate in a manner that involves minimal cost and complexity and maximum expedition. The Supreme Court said consideration should be given to reforming the procedure dealing with non-party concurrent wrongdoers, pleadings, default or summary judgment, offers of compromise, settlement and costs.²⁴⁹ In addition the Supreme Court flagged that the following issues should also be considered by a law reform body: the desirability of eliminating differences between the Commonwealth and Victorian regimes and between state regimes in relation to the role of a contractual allocation of responsibility; the differential impact of limitation periods; issue estoppel and *res judicata* issues.
- the need to amend section 134AB(28) of the *Accident Compensation Act 1985* to make it fairer for workers who remain on weekly payments pending trial.²⁵⁰ It was suggested that consideration be given to the interpretation of section 134AB(28) in light of the Court of Appeal decision of *Raeburn v Tenix Defence Systems Pty Ltd* [2007] VSCA 90.
- increasing in the civil jurisdictional limit of the Magistrates' Court to \$250,000²⁵¹
- review of the Magistrates' Court's limited jurisdiction to deal with WorkCover matters under section 43 of the *Accident Compensation Act 1985*. The Magistrates' Court argued that the restricted jurisdiction under this Act should be removed and, in relation to other claims, be increased to the civil jurisdictional limit of \$100 000.
- the regulation of commercially funded litigation. Risks to plaintiffs and defendants were canvassed in submissions.²⁵² Several submissions called for greater regulation of commercially funded litigation. Some of the reform suggestions canvassed included legislation detailing:
 - the factors that must be addressed in a funding agreement
 - the filing of a funding agreement in court at the commencement of proceedings
 - a direct contractual relationship between the plaintiff and the solicitor running the case rather than a contract between the funder and solicitor
 - proper regulation and disclosure requirements for litigation funders
 - the capping of damages able to be retained by the funder
 - enforcement of costs orders against the plaintiff or the funder
 - requirement to notify the court and the other parties if a funder withdraws
 - entitlement to security for costs if the solvency of the litigation funder is in issue
 - all funding agreements to be subject to court supervision.²⁵³

- providing a right to a jury in a damages trial²⁵⁴
- exploring options for making the determination of motor vehicle disputes simpler and cheaper. It was suggested that compulsory third party property coverage and no-fault accident compensation schemes should be investigated.²⁵⁵ Another suggestion was compulsory mediation or conciliation as a precondition to issuing proceedings in motor vehicle accident matters. Alternatively, it was proposed that the Insurance Ombudsman's terms of reference could be widened to allow it to deal with individuals who believe they are being wrongly pursued by an insurance company.²⁵⁶
- increased and improved regulation of the taxi industry to address concerns arising in relation to insurance.²⁵⁷
- review of the processes applying to claims filed outside Victoria and served on Victorian defendants. It was suggested that often defendants do not act on or seek advice in respect of such proceedings. Subsequent action to stay a matter is complex, and default judgment is often obtained. Consideration should be given to amending the *Service and Execution of Process Act 1992* (Cth) to prevent the issuing of matters outside the appropriate jurisdiction or alternatively to provide for an automatic transfer (unless both parties agree otherwise) to the appropriate jurisdiction when a defence is lodged.²⁵⁸
- extinguishing a debt at the expiration of the limitations period²⁵⁹
- further analysis and review of the 1998 Victorian Parliamentary Law Reform Committee's Review of the *Fences Act 1968*²⁶⁰
- specialised legal assistance for people with disabilities²⁶¹
- increased attention on the impact of court processes on homeless persons. The PILCH Homeless Persons Legal Clinic recommended: increased flexibility and facilities for homeless persons who are required to attend court; judicial training; specialist court lists; the expansion of the homelessness court liaison officer role beyond the Melbourne Magistrates' Court; increased funding.²⁶²
- consideration of the impact of reform on disadvantaged groups. The Victorian Aboriginal Legal Service recommended the establishment of principles which would improve equity and accessibility. It called for a Koori impact statement to be considered in the early stages of policy development.²⁶³
- the enactment of legislation or changes to civil procedure rules to protect individuals and groups from defamation actions aimed at silencing debate about matters of public interest, political debate and dissent. Support was also expressed for reform to allow defendants in defamation cases to apply for the opportunity to prove on the balance of probabilities that the proceeding was brought for an improper purpose.²⁶⁴
- allowing parties to adjourn matters by consent in the County Court without having to apply to the Practice Court
- the use of docket judges in large construction matters in the Building Case List in the Supreme Court.²⁶⁵ The commission notes the case management principles embodied in the recent Supreme Court Practice Note for Building Cases.²⁶⁶

In addition to the miscellaneous law reform proposals referred to and summarised above there were other suggestions made with respect to matters which are dealt with in other chapters of this report.

Some of the reform suggestions referred to above may be appropriate for consideration by the commission during the second stage of the present inquiry, or by the proposed Civil Justice Council. Alternatively, a number of reform proposals could be implemented without the need for further investigation (for example, the proposal that courts should have a discretion to award interest from the date of accrual of a cause of action rather than from the date of commencement of legal proceedings).

- 244 Letter from Ian L Gray, Chief Magistrate, to Dr Peter Cashman dated 30 January 2008; Telephone conversation between Chief Judge Michael Rozenes and Dr Peter Cashman, 30 November 2007.
- 245 Sallmann and Wright (2000) above n 33, 44–53. See also Justice Tim Smith, 'Court Governance and the Executive Model' (Paper presented at the Judicial Conference of Australia, Canberra, 6–8 October 2006).
- 246 Submissions CP 60 and ED1 1 (Royal Australasian College of Surgeons).
- 247 Submission CP 52 (Hollows Lawyers).
- 248 Submission CP 5 (Confidential, permission to quote granted 4 February 2008).
- 249 Submission CP 58 (Supreme Court of Victoria).
- 250 Law Institute of Victoria letter to Professor Neil Rees, 9 July 2007 attaching submission from the Common Law Bar Association to the Hon. Rob Hulls, Attorney-General, 31 May 2007.
- 251 Submission CP 55 (Magistrates' Court of Victoria).
- 252 Submission CP 47 (Group Submission).
- 253 See Submissions CP 47 (Group Submission), CP 38 (Allens Arthur Robinson), CP 18 (Law Institute of Victoria), CP 11 (Dibbs Abott Stillman). A contrasting view was expressed by the Police Association (Submission CP 6).
- 254 Submissions CP 48 (Victorian WorkCover Authority), CP 37 (Transport Accident Commission).
- 255 Submissions CP 59 (Springvale Monash Legal Service), CP 44 (Fitzroy Legal Service), CP 3 (SRC Legal Service).
- 256 Submission CP 32 (Federation of Community Legal Centres).
- 257 Submission CP 32 (Federation of Community Legal Centres).
- 258 Submission CP 43 (Consumer Action Law Centre).
- 259 Submission CP 43 (Consumer Action Law Centre).
- 260 Submission CP 32 (Federation of Community Legal Centres).
- 261 Submission CP 59 (Springvale Monash Legal Service).
- 262 Submission CP 29 (PILCH Homeless Persons Legal Clinic).
- 263 Submission CP 27 (Victorian Aboriginal Legal Service).
- 264 Submission CP 32 (Federation of Community Legal Centres).
- 265 Submission CP 12 (Construction and Infrastructure Law Committee (Vic Group) Law Council of Australia).
- 266 Supreme Court, *Practice Note 1 of 2008, Building Cases—A New Approach*, Case Management Information Sheet, question 5 <www.supremecourt.vic.gov.au> at 22 February 2008.

12

Chapter 12

Facilitating Ongoing Civil Justice Review and Reform



Appendices



Appendix 1

Consultations

CONSULTATION	PARTICIPANTS	DATE
1	David Poulton—Minter Ellison Annabel Evans—CGU Professional Risks Insurance	13 September 2006
2	Bernard Murphy, Greg Tucker—Maurice Blackburn	14 September 2006
3	Bob Musgrove, Michael Napier—Civil Justice Council; Colin Stutt, Head of Funding Policy—Legal Services Commission, UK	15 September 2006
4	Vicki Waye, Associate Dean of Teaching, Law School—University of Adelaide	16 September 2006
5	Vince Morabito, Department of Business Law and Taxation— Monash University	18 September 2006
6	Prof Zuckermann, Prof Camille Cameron, Oxford University and University of Melbourne	19 September 2006
7	Michael W Shand QC, Christine Harvey—Victorian Bar	28 September 2006
9	Judge Wodak, Judge Anderson—County Court	03 October 2006
10	Chief Justice Warren, President Justice Maxwell, Justice Neave AO, Justice Hargrave, Justice Bell, Master Lansdowne, Master Wood, Master Kings—Supreme Court of Victoria	04 October 2006
11	Lou Schetzer, Manager, Research, Civil Law Policy—Department of Justice	04 October 2006
12	Deputy Chief Magistrate Peter Lauritsen—Magistrates' Court of Victoria	11 October 2006
13	Camille Cameron, Gary Cazalet, Jacqui Horan, Ann Genovese, Michelle Taylor-Sands—Melbourne Law School	11 October 2006
14	Judge Wodak—County Court of Victoria	16 October 2006
15	Andrew Tenni, Siobhan Haverkamp—Supreme Court of Victoria	27 October 2006
16	Anna Rowland, Janet Tilley—Civil Justice Council, UK	27 October 2006
17	David Gladwell, Head of Civil Appeals Office, Master in the Court of Appeal—Civil Division, UK	25 October 2006
18	Lord Justice Dyson, Lord Justice of Appeal—High Court, Her Majesty's Courts Service, UK	25 October 2006
19	Peter Hurst, Senior Costs Judge, Judiciary of England and Wales, Supreme Court Costs Office—Royal Courts Of Justice, UK	23 October 2006
20	Master John Ungley, Queen's Bench—High Court, Her Majesty's Courts Service, UK	23 October 2006
21	Janet Tilley, Partner—Colemans-ctts Solicitors, UK	26 October 2006
22	Robert Musgrove, Chief Executive—Civil Justice Council, UK	23 October 2006
23	John Pickering—Irwin Mitchell Solicitors, UK	26 October 2006
24	Colin Stutt, Head of Funding Policy—Legal Services Commission, UK	24 October 2006
25	Laura Wilkin, Partner—Weightmans, UK	24 October 2006
26	Professor Martin Partington CBE, Special Consultant University of Bristol Law School—Law Commission of England and Wales	23 October 2006
27	Dr Rachael Mulheron, Reader in Law, School of Law—Queen Mary University of London	27 October 2006
28	Sue Bence, Partner—Leigh Day & Co, UK	27 October 2006
29	Chief Justice Warren, Justice Hargrave, Justice Bell, Master Lansdowne, Master Wood, Master Kings, Claire Downey— Supreme Court of Victoria	31 October 2006
30	Bettina Miller, Business Analyst and Kate Spillane, Civil Listings Manager—County Court of Victoria	01 November 2006
31	Chief Magistrate Ian Gray, Deputy Chief Magistrate Peter Lauritsen—Magistrates' Court of Victoria	03 November 2006

CONSULTATION	PARTICIPANTS	DATE
32	Tony Parsons, Managing Director—Victoria Legal Aid	08 November 2006
33	Claire Downey—Supreme Court of Victoria	09 November 2006
34	Justice Morris—Victorian Civil and Administrative Tribunal	9 November 2006
35	Andrew Cannon, Acting Chief Magistrate—Magistrates Court [South Australia]	10 November 2006
36	Nerida Wallace, Director—Transformation Management Services	04 December 2006
37	Bernard Murphy—Maurice Blackburn	04 December 2006
38	Alternative Dispute Resolution Strategy team—Department of Justice	12 December 2006
39	Professor Carl Baar—York University, Canada	19 January 2007
40	Professor Peter Sallmann—Monash University	24 January 2007
41	Michael W Shand QC, Albert Monichino—Victorian Bar Council	25 January 2007
42	Richard O’Keefe, Principal Registrar and Samantha Ludolf, CEO—Victorian Civil and Administrative Tribunal	05 February 2007
43	Heather Cook—Government Legal Services	06 February 2007
44	Louis Baziotis—Appeal Costs Board	06 February 2007
45	Damien Cremean—Victorian Civil and Administrative Tribunal	21 February 2007
46	Bronwyn Hammond, Self-represented Litigants’ Co-ordinator—Supreme Court of Victoria	22 February 2007
47	Dr John Lynch—Crown Counsel	01 March 2007
48	Eve Stagoll, Tabitha Lovett—Public Interest Law Clearing House	08 March 2007
49	Ian Kennedy, Cathy Gale—Kennedy Wisewoulds	11 April 2007
50	Vicki Evans, Natasha Sugden, Anna Worrall, Magistrates’ Court 2015 Project—Department of Justice	19 April 2007
51	Steve Walsh, John Voyage, Kate Booth, Lyn Honan—Maurice Blackburn	07 May 2007
52	Paul O’Connor, Jane Bloomfield, John Bolitho—Transport Accident Commission	09 May 2007
53	Gil Brooks—ICMS team	09 May 2007
54	Brian Tee, MLC—Victorian Parliament Law Reform Committee	10 May 2007
55	Andrew Grech, Cath Evans, Mark Walter—Slater & Gordon	16 May 2007
56	Greg Reinhardt—Australasian Institute of Judicial Administration	22 May 2007
57	Denis Nelthorpe, consumer consultant	30 May 2007
58	Jane Dunn—District Court of New South Wales	31 May 2007
59	Chief Justice Warren, Claire Downey—Supreme Court of Victoria	06 June 2007
60	Deputy Chief Magistrate Peter Lauritsen—Magistrates’ Court of Victoria	13 June 2007
61	LLM Litigation and Dispute Resolution class, Law School—University of Melbourne	20 June 2007
62	LLM Litigation and Dispute Resolution class, Law School—University of Melbourne	26 June 2007
63	Justice Maxwell President, Justice Neave AO, Court of Appeal—Supreme Court of Victoria	26 June 2007
64	Judge Bowman, Mark Dwyer, Helen Gibson, Richard O’Keefe, Samantha Ludolf—Victorian Civil and Administrative Tribunal	03 July 2007

Appendix 1

Consultations

CONSULTATION	PARTICIPANTS	DATE
65	Brian Tee MLC, Robert Clark MP, Edward O'Donoghue MLC, Luke Donnellan MP—Victorian Parliament Law Reform Committee	16 July 2007
66	Stephen Lee, Alison O'Brien—Victorian Government Solicitor's Office Ruth Andrew—Department of Justice	17 July 2007
67	Jonathan Kramersch—Corrs Chambers Westgarth Rebecca French—Mallesons Stephen Jaques Maureen Duffy, Peter Holloway—Freehills Sue Laver—Telstra	25 July 2007
68	Bronwyn Hammond, Self-represented Litigants' Co-ordinator—Supreme Court of Victoria	26 July 2007
69	Chief Justice Warren, Justice Neave AO, Justice Hargrave, Justice Whelan, Justice Hansen, Master King, Master Woods, Master Daley, Claire Downey—Supreme Court of Victoria	02 August 2007
70	Peter Gordon—Slater & Gordon	03 August 2007
71	Professor Garry Watson, Osgoode Hall Law School—York University, Canada	13 August 2007
72	Professor Deborah Hensler, Judge John W Ford Professor of Dispute Resolution Law School—Stanford University, US	13 August 2007 & 23 August 2007
73	Adam Cockayne, Janet Cohen, Caroline Morgan—Legal Services Board & Legal Services Commissioner	15 August 2007
74	Sam Parrino – Insurance Ombudsman, John Price – Referee, Peter Hardham – Panel Chair	05 September 2007
75	Aldous Mitchell, Caroline Blanche—Boston Consulting Group	25 September 2007
76	Aldous Mitchell, Caroline Blanche—Boston Consulting Group	28 September 2007
77	Justice Neave AO, Justice Whelan, Justice Byrne, Justice Cavanough, Justice Ashley, Justice Osborn, Justice Harper, Master King, Master Daly—Supreme Court of Victoria	09 October 2007
78	Judge Ruth Anker Hoyer, Judge Jon Bonneview Hoyer—Oslo District Court, Norway Magistrate Barry Braun	16 October 2007
79	Alternative Dispute Resolution Strategy team—Department of Justice	17 October 2007
80	Dr Brendan Dooley—Royal Australasian College of Surgeons	17 October 2007
81	Justice Sackville—Federal Court of Australia	24 October 2007
82	Elizabeth Eldridge, Chris Humphreys, Kylie Kilgour, Jo Metcalf—Department of Justice	14 November 2007
83	Greg Tilse—Quantum Litigation Funding	27 November 2007
84	Justice Finkelstein—Federal Court of Australia	29 November 2007
85	Peter Riordan SC, Mark Moshinsky SC— Victorian Bar	20 February 2008

Appendix 2: Submissions

Consultation Paper

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
1	CONFIDENTIAL	10 October 2006
2	Louise Jenkins, Allens Arthur Robinson	10 October 2006
3	Damian Walsh, SRC Legal Service	12 October 2006
4	Travis Mitchell	15 October 2006
5	CONFIDENTIAL	20 October 2006
6	Paul Mullett , The Police Association	23 October 2006
7	Bernard Murphy, Maurice Blackburn	12 October 2006
8	Associate Professor Adrian Evans	30 October 2006
9	ANONYMOUS	14 November 2006
10	Peter Mair	17 November 2006
11	Neil Hannan, Dibbs Abbott Stillman Lawyers	20 November 2006
12	Hugh Foxcroft SC, Construction & Infrastructure Law Committee (Victorian Group) of the Law Council of Australia	22 November 2006
13	Associate Dean Vicki Waye, The Law School, The University of Adelaide	27 November 2006
14	CONFIDENTIAL	28 November 2006
15	Edison James Masillamani	30 November 2006
16	Jenny Lovric, Pro Bono Resource Centre	30 November 2006
17	Brendan Sydes, Environmental Defender's Office (VIC) Ltd	30 November 2006
18	Catherine Gale, Law Institute of Victoria – Litigation Section	30 November 2006
19	Allison Stanfield, <e.law> Australia Pty Ltd	30 November 2006
20	Andrew Grech, Slater & Gordon	28 November 2006
21	Miranda Milne, Legal Practitioners Liability Committee	04 December 2006
22	Sophie Delaney, Mental Health Legal Centre Inc	05 December 2006
23	Tony Fitzgerald, State Trustees Ltd	05 December 2006
24	Jane Stephens, Australian Medical Association (Victoria)	07 December 2006
25	Lily Shin, The Institute of Chartered Accountants in Australia	30 November 2006
26	Philip Lynch, Human Rights Law Resource Centre Ltd & Blake Dawson Waldron Lawyers	01 December 2006
27	Robin Inglis, Victorian Aboriginal Legal Service Co-operative Ltd	11 December 2006 (ss) 22 February 2007
28	Associate Professor Vince Morabito, Business Law & Taxation, Monash University	08 December 2006
29	Caroline Adler, PILCH Homeless Persons' Legal Clinic	12 December 2006
30	Tanya Penovic, Lecturer Faculty of Law, Monash University	13 December 2006
31	Tony Parsons, Victoria Legal Aid	14 December 2006
32	Sarah Nicholson, Federation of Community Legal Centres (Vic.) Inc	14 December 2006

Appendix 2: Submissions

Consultation Paper

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
33	Michael Shand QC, Bar Council of the Victorian Bar Inc.	15 December 2006
34	Tabitha Lovett, Public Interest Law Clearing House (Vic)	15 December 2006
35	Laurie James, Institute of Arbitrators and Mediators Australia & Chartered Institute of Arbitrators (Australia)	15 December 2006
36	Philip Lynch & Ben Schokman, Human Rights Law Resource Centre Ltd	21 December 2006
37	Paul O'Connor, Transport Accident Commission	22 December 2006
38	Peter O'Donahoo & Susannah Downie, Allens Arthur Robinson	22 December 2006
39	Suzanne Kirton, Building Dispute Practitioners' Society Incorporated	22 December 2006
40	Elizabeth Harris, Harris Cost Lawyers Pty Ltd	22 December 2006
41	Peter Riddell, TurksLegal & Paul Vine, AXA Australia	22 December 2006
42	CONFIDENTIAL	22 December 2006
43	Caroline Bond & Catriona Lowe, Consumer Action Law Centre	22 December 2006
44	Stan Winford, Fitzroy Legal Service Inc.	22 December 2006
45	Luke Bartram, Insurance Australia Group Pty Limited	05 January 2007
46	Sue Laver, Telstra	05 January 2007
47	David Patience, Australian Corporate Lawyers Association. This submission attached a joint submission from Deacons, Allens Arthur Robinson, Corrs Chambers Westgarth, Telstra and Australian Corporate Lawyers Association. However, the commission notes that there were points of difference between the contributors to the joint submission.	08 January 2007
48	Greg Tweedly, Victorian WorkCover Authority	12 January 2007
49	Rebecca French, Mallesons Stephen Jaques	15 January 2007
50	Christopher Enright	16 January 2007
51	Peter E Cash, Deacons	16 January 2007
52	David Forster, Hollows Lawyers	18 January 2007
53	Michael Redfern	22 January 2007
54	Financial Industry and Complaints Service Ltd as National Panel Chairs of the Insurance Ombudsman Service and the Financial Industry Complaints Service	24 January 2007
55	Deputy Chief Magistrate Peter Lauritsen, Magistrates' Court of Victoria	13 February 2007
56	Jillian Crowe	19 February 2007
57	Mr John Walker, IMF (Australia) Ltd	11 April 2007
58	Chief Justice Marilyn Warren AC, Supreme Court of Victoria	20 March 2007
59	Helen Yandell, Springvale Monash Legal Service Inc.	11 April 2007
60	David Hillis, Royal Australasian College of Surgeons	21 May 2007
61	Adrian Snodgrass, The Civil Law Reform Working Group of the Federation of Community Legal Centres	13 September 2007
62	The Victorian Bar Council	14 February 2008

Appendix 2: Submissions

Draft Exposure 1 Proposals

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
1	Brendan Dooley, Royal Australasian College of Surgeons	05 July 2007
2	Paul Mullett, The Police Association	09 July 2007
3	Peter Mair	09 July 2007
4	CONFIDENTIAL	17 July 2007
5	CONFIDENTIAL	17 July 2007
6	A.G Fitzgerald, State Trustees Limited	26 July 2007
7	Judge T Wodak	26 July 2007
8	John Walker, IMF (Australia) Ltd	27 July 2007
9	Hugh de Kretser, The Federation of Community Legal Centres (Vic) Inc.	27 July 2007
10	Victoria Marles, Legal Services Commissioner	27 July 2007
11	Sophie Delaney, Mental Health Legal Centre Inc.	27 July 2007
12	Peter O'Donahoo & Susannah Stone, Allens Arthur Robinson and Philip Morris Ltd.	27 July 2007
13	Dale Battley, Battley & Co	30 July 2007
14	Brendan Sydes, Environment Defenders Office (Victoria) Ltd	30 July 2007
15	Peter Stewart (CONFIDENTIAL)	27 July 2007
16	Sue Laver, Australian Corporate Lawyers' Association	01 August 2007
17	Sue Laver, Telstra Corporation	01 August 2007
18	Fred Hawke, Clayton Utz	01 August 2007
19	Human Rights Law Centre Ltd.	02 August 2007
20	Tabitha Lovett & Tina Giannopoulos, Public Interest Law Clearing House (Vic) Inc	02 August 2007
21	Roza Lozusic, Insurance Council of Australia	03 August 2007
22	Peter Riddell, AXA Australia & TurksLegal	03 August 2007
23	Colin Neave AM, Banking and Financial Services Ombudsman Ltd	08 August 2007
24	Michael Shand QC, Bar Council of the Victorian Council Inc	08 August 2007
25	Tony Parsons, Victoria Legal Aid	08 August 2007
26	Helen Yandell, Springvale Monash Legal Service Inc	10 August 2007
27	ANONYMOUS	16 August 2007
28	Bill Palmer, Forensic Accounting Special Interest Group of the Institute of Chartered Accountants in Australia	17 August 2007
29	Ian Gilbert, Australian Bankers' Association Inc	22 August 2007
30	Deputy Chief Magistrate Peter Lauritsen, Magistrates Court of Victoria & the Disputes Settlement Centre of Victoria	23 August 2007
31	Geoff Provis, Law Institute of Victoria	31 August 2007
32	CONFIDENTIAL	28 September 2007

Appendix 2: Submissions

Draft Exposure 2 Proposals

NO	SUBMITTER / ORGANISATION	DATE RECEIVED
1	Philip Lynch, Human Rights Law Resource Centre Ltd	13 September 2007
2	CONFIDENTIAL	13 September 2007
3	Steve White, White SW Computer Law	14 September 2007
4	Judge Anderson	14 September 2007
5	Judge Wodak	19 September 2007
6	Victoria Marles, Legal Services Commissioner	27 September 2007
7	A.G Fitzgerald, State Trustees Ltd	28 September 2007
8	Peter O'Donahoo & Susannah Stone, Allens Arthur Robinson and Philip Morris Ltd.	28 September 2007
9	Adrian Snodgrass, Federation of Community Legal Centres	01 October 2007
10	Tony Parsons, Victoria Legal Aid	01 October 2007
11	Michael Redfern	02 October 2007
12	Gerald Brody, Consumer Action Law Centre	02 October 2007
13	Peta Spender	02 October 2007
14	Bill Palmer, The Institute of Chartered Accountants in Australia	05 October 2007
15	Paul Mullet, The Police Association	08 October 2007
16	Geoff Provis, Law Institute of Victoria	22 October 2007
17	Duncan Ramsey, QBE Insurance Group	24 October 2007
18	Tabitha Lovett, PILCH	29 October 2007
19	Bernard Murphy, Maurice Blackburn Lawyers Pty Limited	13 November 2007

Appendix 3: Events Attended

NO	EVENT	ORGANISER	DATE
1	Affordable Justice Conference, Adelaide	Australian Institute of Judicial Administration	16–17 September 2006
2	Lecture by Professor Adrian Zuckerman, Supreme Court of Victoria	Anglo-Australasian Lawyers Society	19 September 2006
3	Supreme Court meeting with the Victorian Bar	Supreme Court of Victoria	20 September 2006
4	Lecture by Professor Adrian Zuckerman	Melbourne University Law School	21 September 2006
5	Civil Justice Research and Teaching Symposium	Melbourne University Law School	22–23 September 2006
6	Representative Proceedings Focus Group, Sydney	IMF (Australia) Ltd	26 September 2006
7	Seminar presentation by Dr Peter Cashman	Commercial Bar Association, Victorian Bar	11 October 2006
8	National Conference 2006, Queensland presentation by Dr Peter Cashman	Australian Lawyers Alliance	13–14 October 2006
9	Continuing legal education presentation by President Justice Maxwell	Victorian Bar	23 October 2006
10	President's Luncheon presentation by Dr Peter Cashman	Law Institute of Victoria	02 November 2006
11	Presentation by Dr Peter Cashman at the International Conference on Class Actions, Paris	Cohen Milstein Hausfeld and Toll, PLLC	19 October 2006
12	Presentation by President Justice Maxwell	Law Institute of Victoria	13 November 2006
13	County Court Medical List Users' Meeting	Judge Wodak, County Court of Victoria	29 November 2006
14	Presentation by Dr Peter Cashman at the International Conference on Class Action at the University of Oxford	Oxford University and Stanford University	13 December 2007
15	Law Institute of Victoria Council Meeting	Law Institute of Victoria	14 December 2006
16	Confidence in the Courts Conference, Canberra presentation by Dr Peter Cashman	National Judicial College and Australian National University	9–11 February 2007
17	Beyond Environmental Law Conference presentation by Dr Peter Cashman	University of Sydney Law School and Environmental Defender's Office	17 February 2007
18	Human Rights Conference	Victorian Equal Opportunity and Human Rights Commission	27 February 2007
19	Supreme Court seminar on e-litigation	Supreme Court of Victoria	16 March 2007
20	Annual Conference, Gold Coast presentation by Dr Peter Cashman	Queensland Bar Association	18 March 2007
21	Seminar on Judicial Mediation by Justice North and David Levin QC	Institute of Arbitrators & Mediators Australia	12 April 2007
22	Symposium on Expert Evidence, Sydney presentation by Dr Peter Cashman	University of Sydney Law School and Expert Witness Institute	16 April 2007
23	Justice Finkelstein and Justice Middleton: The New Federal Court 'Fast Track Docket' system	Victorian Bar	19 April 2007
24	Demystifying the role of the Master (SC)	Law Institute of Victoria Litigation Section	24 April 2007
25	Trade Practices Committee Meeting presentation by Dr Peter Cashman	Law Institute of Victoria Commercial Law Section	26 April 2007
26	Protocols Development Forum	Transport Accident Commission	10 May 2007
27	Legal Reform Summit, Sydney presentation by Dr Peter Cashman	Australian Financial Review	15 May 2007

Appendix 3: Events Attended

NO	EVENT	ORGANISER	DATE
28	Victorian State Conference, Victoria presentation by Dr Peter Cashman	Australian Lawyers Alliance	18 May 2007
29	The State of the Victorian Judicature Address delivered by Chief Justice Marilyn Warren	Supreme Court of Victoria	22 May 2007
30	Presentation by Michael Heaton QC and Mark Harrick: Contracts and Good Faith	Law Institute of Victoria Litigation Section	30 May 2007
31	Alternative Dispute Resolution Strategic Planning Conference	Department of Justice	22 June 2007
32	Alternative Dispute Resolution Research Forum	National Alternative Dispute Resolution Advisory Council	13 July 2007
33	Professor Deborah Hensler (Judge John W Ford Professor of Dispute Resolution at Stanford Law School): Responding to Mass Harms: Private Litigation and Public Action	Melbourne University Law School	1 August 2007
34	Supreme Court Judges' Conference presentation by Dr Peter Cashman	Supreme Court of Victoria	9 August 2007
35	Class Actions Reform Roundtable presentation by Dr Peter Cashman	Melbourne University Law School	13 August 2007
36	Discovery Seminar presentation by Dr Peter Cashman	Australian Institute of Judicial Administration	24 August 2007
37	Innovative Hybrid Dispute Resolution Seminar	Institute of Arbitrators & Mediators Australia	25 September 2007
38	International Arbitration & Mediation: Potential and Pitfalls Seminar	Sydney University Law School and Chartered Institute of Arbitrators	11 October 2007
39	Australian Lawyers Alliance Conference, Hobart	Australian Lawyers Alliance	11–12 October 2007
40	Pro Bono Workshop	Victoria Law Foundation	16 October 2007
41	25 th Anniversary Conference presentation by Dr Peter Cashman	Public Interest Advocacy Centre	18–19 October 2007
42	International Class Actions Conference, Sydney presentation by Dr Peter Cashman	Maurice Blackburn	24–26 October 2007
43	Launch of IAMA Arbitration Rules	Institute of Arbitrators and Mediators Australia	29 October 2007
44	Annual Dinner presentation by Dr Peter Cashman	Chartered Institute of Arbitrators (Australia) Limited	10 November 2007

Court Observations

NO	COURT	DATE
1	Supreme Court Commercial List directions	13 October 2006
2	Supreme Court Masters Court	13 October 2006
3	County Court Medical List	16 October 2006
4	Supreme Court Masters Court	19 October 2006
5	Supreme Court Masters Court	20 October 2006
6	Supreme Court Court of Appeal	17 November 2006
7	Supreme Court Court of Appeal	24 November 2006
8	Supreme Court	3 April 2007

Glossary¹

Terminology
amicus curiae – friend of the court. A person granted permission by a court to make submissions on a point of law or matter of practice. An *amicus curiae* has no personal interest in the case and does not advocate for either party.

certiorari – ‘to be informed. A type of prerogative remedy issued by a court to bring before it the decision or determination of a tribunal or inferior court to quash it on the grounds of non-jurisdictional error of law on the face of the record, or for jurisdictional error or denial of procedural fairness’.*

common law – ‘The unwritten law derived from traditional law of England as developed by judicial [precedent], interpretation, expansion and modification.’*

contribution – ‘an equitable right existing between two co-sureties, under which each co-surety is only obliged to contribute proportionately to the satisfaction of the principal debt. A co-surety who has paid more than his or her fair portion of that debt may claim re-imbusement from his or her co-sureties’.* There may be other legal grounds upon which a defendant in a proceeding may claim a contribution (to any amount required to be paid to the plaintiff) from another defendant or person.

conversion – the tort of intentionally and unlawfully interfering with another person’s property. Formerly known as *trover*, conversion is one form of *trespass to goods*.

cy-près – as nearly. An equitable doctrine that allows a court to vary the original terms of a charitable gift, where the intention of the gift cannot be fulfilled. The variation must be as close as practical to the original intention.

declarations – a civil law remedy. ‘Decision of a court or judge on a question of law or rights’.[□]

de novo – A matter that is heard *de-novo* is heard again from the beginning. The body conducting the hearing is not confined to the evidence or materials which were presented in the original hearing. It ‘stands in the shoes’ of the original decision maker, and makes the decision again’.*

discovery – ‘A pre-trial procedure where a party to proceedings makes available for inspection all relevant documents to the other parties’.*

equitable remedy – ‘Equitable remedies are sought where common law remedies such as damages are inadequate to right the wrong done to the plaintiff’.*

equity – ‘The separate body of law, developed by the English Court of Chancery, which supplements, corrects and controls the rules of common law’.*

estoppel – ‘a bar or impediment preventing a party from asserting a fact or a claim inconsistent with a position he or she previously took, either by conduct or words, especially where a representation has been relied or acted upon by others.’[□]

ex parte – ‘In the absence of the other side. Ex-parte applications are heard in the absence of the party against whom the order is sought’.*

ex tempore – ‘by lapse of time. An ex tempore judgement is given without preparation, for example where a matter is urgent ... A transcript of *ex tempore reasons* for judgment produced by a court reporting service may be considered a document of the court.’*

habeas corpus – ‘have the body. Originally a type of writ issued by a superior court allowing a prisoner to have himself or herself removed from prison and be brought before the court to have the matter for which he or she was being detained determined’.*

hot tubbing – permitting experts to give evidence concurrently in a panel format (sometimes also referred to as ‘concurrent evidence’).

in camera – ‘A hearing where the court considers it desirable in the interests of justice or in order to prevent undue hardship to any person to order specified persons or all persons except those specified to remove themselves from the court room during the whole or any part of the proceeding. Courts have an inherent common law power to order that a hearing proceed in camera’.*

indemnity – ‘security or protection against loss or injury’.*

Indictable offence – ‘An offence which can be prosecuted before a judge and jury’.*

injunction – ‘A court order of an equitable nature requiring a person to do, or refrain from doing, a particular action’... ‘Injunctions may require a particular act (mandatory injunctions) or forbid a particular act (prohibitory injunctions), they may be interlocutory (interim) or final’... ‘They may be granted ex parte or inter partes and they may be granted to prevent wrongs currently existing or to prevent wrongs that may not have been committed’.*

1 The definitions marked * in the above list are extracted from Dr Peter E Nygh and Peter Butt (eds), Butterworths Concise Australian Legal Dictionary, Second Edition, 1998 (some definitions are supplemented by the commission). The definitions marked [□] in the above list are extracted from A Delbridge, JRL Bernard, D Blair, S Butler, P Peters and C Yallop (eds), Macquarie Dictionary Australia’s National Dictionary, Revised Third Edition, 2001. The definition marked # is taken from Encyclopaedic Australian Legal Dictionary, ‘Prerogative Powers’ [741](http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?bct=A&risb=21_T3299302778&homeCsi=267785&A=0.8297517147713533&urlEnc=ISO-8859-1&&dpsi=0034&remotkey1=REFPTID&refpt=PREROGATIVE-POWERS&service=DOC-ID&origdpsi=0034>at 18 March, 2008.</p></div><div data-bbox=)

Glossary

interlocutory application – ‘An application to a court to make an order before the court makes a final order in the proceeding’.*

inter partes – between parties.

interrogatories – ‘A form of discovery that involves one party asking the other party specific questions relating to the matters in issue in the proceedings in a written form in accordance with the rules of the Court.’*

jurisdictional error – ‘The purported exercise by a tribunal or court of jurisdiction in excess of that which has been conferred upon it, or the failure to exercise its proper jurisdiction. Jurisdictional error is a ground for judicial review.’*

legal professional privilege – ‘A common law privilege which provides that confidential communications between legal practitioner and client for the sole purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated litigation need not be given in evidence nor disclosed by the client or by the legal practitioner without the consent of the client: (Grant v Downs (1976) 135 CLR 674’.*The precise scope of the common law legal professional privilege is unclear (Cadbury Schweppes Pty Ltd v Amcor Limited [2008] FCA 88 [6] (Gordon J). Privilege relating to legal ‘advice’ and privilege relating to ‘litigation’ is also governed by evidence legislation in many Australian jurisdictions.

letter of demand – is usually sent by a solicitor on behalf of a client prior to the institution of proceedings. The letter usually sets out the general nature of a claim/complaint and what is required to be done and by when in order to resolve the claim before the author takes further action to enforce his or her rights.

liability – ‘a person’s present or prospective legal responsibility, duty or obligation’.*

mandamus – ‘we command. An order issued by a court to compel a public official to perform a public duty or to exercise a statutory discretionary power’.*

nolle prosequi – ‘unwilling to proceed. An entry made in a court record when the prosecutor or plaintiff is unwilling to continue the proceedings against the defendant. In criminal proceedings, a decision by the Attorney-General or the Director of Public Prosecutions not to continue with a prosecution or indictment after a bill has been found. A nolle prosequi does not establish the innocence of an accused, against whom another indictment may later be presented for the same or similar offence.’*

party-party costs – ‘Fair and reasonable costs, including fees, charges, disbursements, expenses and remuneration, incurred by a party in enforcing or defending their legal rights.’*

prerogative powers – ‘The common law powers of the Crown derived from the Queen... Such prerogatives are subject to the Commonwealth Constitution and may be circumscribed or extinguished by legislation... Some prerogative powers are vested in the Attorney-General as first law officer of the Crown’.#

prerogative writ – a ‘writ traditionally within the power of a superior court to issue in its exercise of supervision of the administration of justice’. □ ‘There are six writs in all – mandamus, prohibition, procedendo, certiorari, quo warranto, and habeas corpus’.

pro bono- ‘Legal work performed free or at a reduced rate’.*

procedural fairness – ‘Common law principles applied to statutory and prerogative powers to ensure the fairness of a decision-making procedure of courts and administrators. The term is used interchangeably with natural justice’.*

prohibition – ‘A type of prerogative remedy issued by a court to prevent a tribunal or inferior court which is acting in excess of its jurisdiction, from proceeding any further’.*

proportionate liability – The sharing of liability between parties proportionate to their relative blameworthiness or degree of fault with regard to the same incident.

quantum – amount claimed or due to a particular party.

quo warranto – ‘by what authority. A writ requiring a person to show by what warrant he or she holds official office or exercises a function.’*

res judicata – a judicially determined matter. The rule that if a dispute is judged by a court, then the judgment of the court is finally between the parties to that dispute.

restitution – ‘restoration of property or rights previously taken away, conveyed or surrendered’.

tort – wrong. ‘A civil injury, actionable by a private individual, as opposed to a criminal wrong, actionable by the state.’□

ultra vires – ‘beyond the power. An ultra vires act is beyond the legal power or authority of a person, institution, or legislation, and therefore invalid’.*

unjust enrichment – ‘a benefit for which the recipient is required to make restitution to the person at whose expense it was obtained. An enrichment is unjust if for example, the enrichment was provided by mistake, under duress or influence...’*

viva voce – an examination where questions are asked and answered orally rather than in writing.□

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**Victorian
Law Reform
Commission**

1250 Box Hill Rd
Melbourne Airport 3001 Australia
03 9399 8000

Level 10, 31–33 Green Street
Melbourne Airport 3001 Australia

Telephone +61 3 9399 8000
Facsimile +61 3 9399 8000
1800 000 100 (within Victoria)
TTY 1800 000 100
law.reform@victorian.law.gov.au
www.vic.gov.au/vlc

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