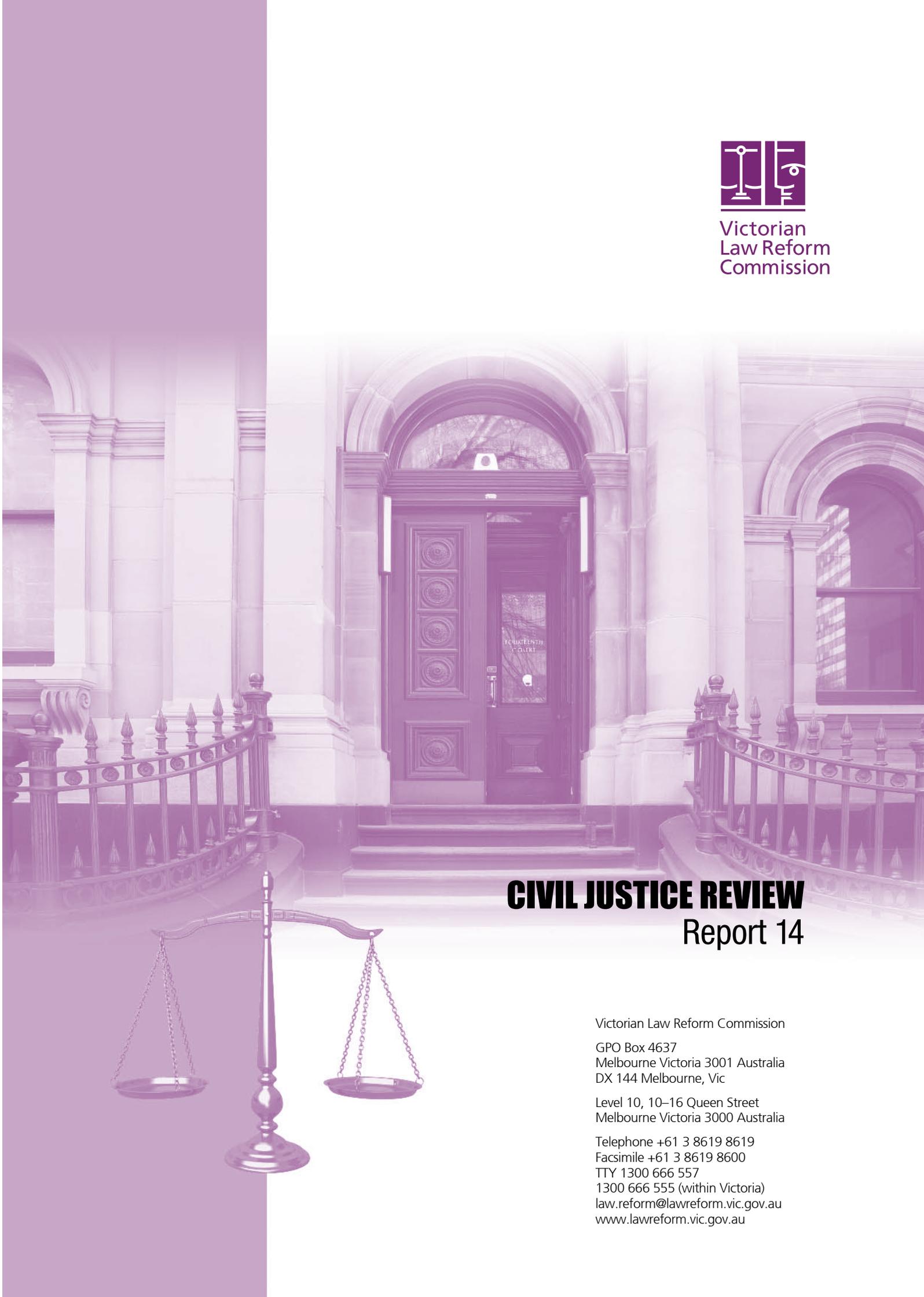




Victorian
Law Reform
Commission



CIVIL JUSTICE REVIEW

Report 14

Victorian Law Reform Commission

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Contents

7	Preface	
8	Terms of Reference	
9	Executive Summary	
15	Recommendations	
47	Chapter 1: Overview of the Civil Justice System	
50	Introduction: About this reference and report	
50	Justice Statement	
50	Terms of reference	
52	Review processes	
54	Report overview	
55	Victorian Courts' and Tribunals' jurisdiction	
55	Supreme Court of Victoria's jurisdiction	
59	County Court civil jurisdiction	
60	Magistrates' Court jurisdiction	
63	Victorian Civil and Administrative Tribunal jurisdiction	
	Jurisdiction of Victoria's civil courts and tribunals	
66	Volume of civil litigation in Victoria's courts	
67	Factors influencing the civil justice system	
69	Legal and factual complexity of litigation	
70	Procedural rules	
71	Resource allocation and distribution of civil and criminal business of courts	
72	Proactive judicial case management or party control of litigation	
77	Economic factors, including cost of conducting litigation	
80	Objectives and conduct of parties	
80	Adversarial 'culture', practices and procedures	
81	Alternative dispute resolution	
83	Human rights considerations	
85	Constitutional considerations	
87	Attractiveness of courts in other jurisdictions	
89	Public opinion, social expectations and confidence in the courts	
89	Civil justice goals and objectives	
90	Desirable goals of the civil justice system	
94	Fundamental requirements of the justice system	
98	Assessing performance of the civil justice system	
101	Views of individuals and organisations consulted	
104	Overview of the Civil Justice System (flowchart)	
108	Chapter 2: Facilitating the Early Resolution of Disputes without Litigation	
109	Introduction and Summary	
109	Legal Challenge to Pre-action Protocols	
110	Traditional Pre-action Procedures	
110	Preservation and other orders	
110	Disclosure to identify a defendant or to determine merit	
110	'New' Pre-action Requirements	
111	England and Wales	
116	Canada	
118	The United States	
118	Hong Kong	
119	Other Jurisdictions	
120	Australian Pre-action Procedures	
133	Consequences of Noncompliance	
133	Impact of Pre-action Procedures	
136	Disclosure and Service of Documents when commencing proceedings	
136	NSW professional negligence claims	
137	NSW workers compensation proceedings	
137	NSW dust disease proceedings	
137	Submissions	
137	Support for Pre-action Protocols	
140	Opposition to Pre-action Protocols	
142	Other Issues Raised in Submissions	
142	Recommendations	
147	Improving the Standards of Conduct of Participants in Civil Litigation	
149	Introduction and summary	
149	Overriding obligations imposed on participants	
152	Overriding purpose and duties of the court	
152	Rationale for the recommendations	
156	Existing obligations on participants in civil litigation	
156	Overriding objectives	
162	Lawyers' duty to the court	
165	Duties of the parties	
168	Model Litigant Guidelines	
172	Duties of witnesses, including expert witnesses	
181	Duties of corporations	
181	Duties of insurers and litigation funders	
182	Specific obligations	
182	The obligation to act honestly	
182	The requirement of merit	
183	The obligation to only take steps to resolve or determine the dispute	
183	The obligation to cooperate	
184	The obligation not to mislead or deceive	
188	The obligation to use reasonable endeavours to resolve the dispute	
188	The obligation to narrow the issues in dispute	
188	The obligation to minimise costs	
189	The obligation to minimise delay	
189	The obligation of disclosure	
190	Application to ancillary negotiations and dispute resolution processes	
191	Confidential and 'without prejudice' ADR processes	
197	Responses to the commission's proposals	

Contents

308	Clearer powers to limit the conduct of pre-trial procedures	357	Conclusions and recommendations
311	Clearer powers to limit trial procedures	358	Controlling interlocutory disputes
316	Other recent reforms	358	The problem
319	Enhancing compliance with procedural requirements and directions	358	Reducing interlocutory steps in proceedings
319	The problem	359	Reducing unnecessary interlocutory applications
319	Directions	361	Submissions
320	Sanctions for failure to comply with rules and court orders	362	Conclusions and recommendations
320	Costs orders	362	Power to make decisions without giving reasons
322	Arguments for and against clearer powers to impose sanctions for failure to comply with court directions and orders	362	The problem
323	Submissions	362	Position in Victoria
323	Conclusions and recommendation	363	The initial proposal
324	Greater use of telephone directions hearings and technology	364	Discussion
324	The issue	368	Recommendations
324	Telephone directions hearings	369	Making decisions on the papers
326	E-litigation	369	Rationale for the proposal
327	Electronic filing of documents ('e-filing')	369	Position in Victoria
327	Videolink/video conferencing	369	Other models
328	The Internet and email	370	Discussion
328	Integrated Courts Management System (ICMS)	372	Submissions
330	Other reforms	373	Conclusions and recommendation
332	Submissions	373	Deterring or curtailing unnecessary litigation
333	Rationale for the recommendations	373	Prothonotary refusing to seal a document
335	Conclusions and recommendations	374	Submissions
336	Case conferences and listing conferences as an alternative to directions hearings	374	Conclusions
336	The problem	375	Other comments in submissions
336	Position in Victoria	376	Recommendations
337	Other models		
338	Rationale for the recommendation	383	Chapter 6: Getting to the truth Earlier and Easier
341	Conclusions and recommendations	386	Introduction
341	Earlier and more determinate trial dates	386	Disclosure prior to and at commencement of litigation
341	The problem	386	Pre-trial oral examinations
324	Position in Victoria	386	Introduction
342	Other models	387	Pre-trial examinations in Victoria
344	Rationale for the recommendation	389	Other forms of examination in Australia
344	Recommendations and conclusions	394	Depositions in the United States
345	Earlier determination of disputes	400	Examinations in Canada
345	The problem	409	Depositions in the United Kingdom
346	Summary disposal	410	Submissions
346	Position in Victoria	414	Conclusions
348	Other models	416	Recommendations
352	Submissions	419	Overcoming confidentiality constraints
354	The right to a fair hearing	419	Confidentiality constraints and the administration of justice
355	Arguments for and against reforming the test	422	Submissions
		424	Recommendations
		426	Discovery of documents
		427	Introduction
		427	Background: What is discovery?

428	Discovery mechanisms in Victoria	545	Existing <i>cy-près</i> type mechanisms
434	Key problems with discovery	549	Supreme Court power to grant <i>cy-près</i> remedies
438	Other discovery models and reforms	551	<i>Cy-près</i> remedies and possible class member claims
456	Submissions and consultations	551	<i>Cy-près</i> remedies and legislative constraints
474	Recommendations	552	Recipients of <i>cy-près</i> distributions
477	Issues for further consideration	553	Payment into a fund
481	Chapter 7: Changing the Role of Experts	553	Manner of <i>cy-près</i> relief
483	Introduction	553	Intervention by other bodies
483	The Problems with Expert Evidence	553	Judicial approval of settlement agreements
487	Current Law in Victoria	554	Requirement to give notice
488	Developments in Other Jurisdictions	554	Right of appeal
488	New South Wales	554	Civil penalties as alternative to <i>cy-près</i> remedies
494	Queensland	554	Stakeholder views
495	South Australia	555	Submissions on general reform of class action laws
496	Western Australia	555	Victorian Bar
497	Commonwealth	557	Law Institute of Victoria
498	UK	557	Mental Health Legal Centre
500	Canada	557	Allens Arthur Robinson
503	USA	557	Legal Practitioners' Liability Committee
505	Submissions	557	Maurice Blackburn
505	NSW provisions	558	IMF (Australia)
505	Court control	558	Consumer Action Law Centre
506	Single joint experts	559	Associate Professor Vince Morabito
507	Court-appointed experts	559	Response to draft proposals
508	Pre-trial conferences and concurrent evidence	559	Recommendations
510	Code of conduct	561	Chapter 9: Helping Litigants with Problems and Hinderling Problem Litigants
510	Disclosure of fee arrangements	563	Introduction
510	Sanctions	563	Self-represented litigants
511	Privilege	582	Recommendations
511	Service of experts' reports	583	Interpreter services
511	Other matters	589	Recommendations
511	Conclusions	590	Vexatious litigants
513	Recommendations	599	Recommendations
521	Chapter 8: Improving Remedies in Class Actions	605	Chapter 10: Achieving Greater Access to Justice: A New Funding Mechanism
523	Introduction and Summary	607	Access to Legal Assistance
524	Technical Amendments to the Law	607	Introduction
524	Class actions limited to persons who consent to proceedings	607	Legal Assistance Schemes
528	Requiring all group members to have individual claims against all defendants	612	Calls for Reform
531	Express Powers to Grant <i>Cy-près</i> Relief	612	Suggestions for change
531	Origins of <i>cy-près</i> remedies	613	Commission's view
531	<i>Cy-près</i> in the context of litigation	614	Funding Mechanisms
537	Australia: background	614	New litigation funding mechanism: the Justice Fund
540	Consumer law statutes	622	Recommendations
544	<i>Cy-près</i> and settlements		

Contents

625 Chapter 11: Reducing the Cost of Litigation

- 628 Introduction
- 631 Victorian rules and procedure on costs
 - 631 Fee and retainer arrangements for civil litigation conduct
 - 631 Principles governing Victorian costs taxation
 - 632 Statutory powers and methods of calculating costs in Victoria
 - 635 Procedures for review and reform of costs
 - 636 Current Victorian reviews of costs
 - 637 Court fees and charges
 - 638 Concerns about the cost of access to the courts
 - 639 Concerns identified in submissions
 - 648 Some problems identified
 - 650 Cost Research undertaken by the commission
 - 651 Costs reforms in other jurisdictions
 - 652 The Woolf Report: a broad approach to costs
 - 654 Allocation of cases to different tracks
 - 654 Cost estimates and budgets
 - 656 Proposed establishment of a Costs Council
 - 656 The concept of proportionality
 - 658 Costs recovery
 - 660 Fixed costs
 - 663 Billing
 - 664 Costs and the adversarial system
 - 666 Costs in the conduct of civil litigation
 - 667 Costs in 'public interest' litigation
 - 667 The case for public interest costs orders
 - 672 Costs in public interest matters in the UK
 - 674 Canadian developments
 - 675 Submissions
 - 675 Draft proposal and responses
 - 676 Conclusions
 - 676 Class action costs
 - 677 Draft proposals and responses
 - 677 Ongoing review and reform of costs
 - 678 Costs disclosure
 - 679 Fixed or capped costs
 - 680 Taxation of costs
 - 681 Solicitor–client costs and party–party costs
 - 682 Scales of costs
 - 683 Disbursements
 - 684 Percentage fees
 - 688 Proportionate and other fees in class actions
 - 689 Court fees
 - 689 Offers of compromise
 - 690 The Justice Fund
 - 691 Research on costs

- 691 Conclusions
- 692 Recommendations

695 Chapter 12: Ongoing Civil Justice Review and Reform

- 697 Introduction
- 697 Rules and rule-making power
 - 697 Victoria
 - 700 Other Australian jurisdictions
 - 703 Overseas jurisdictions
- 707 Submissions and consultations
 - 707 Consultation Paper
 - 709 Responses to draft proposals
- 710 Conclusions and recommendations
- 710 Rule-making process
 - 711 Harmonisation and uniformity of rules
 - 711 Rule-making power
 - 712 Ongoing review and reform
- 712 Recommendations
- 715 Issues for further consideration
 - 715 Introduction
 - 715 Pleadings
 - 718 Non-party participation in proceedings '
 - 721 Enforcement of judgments and orders
 - 722 Victorian Civil and Administrative Tribunal
 - 723 Appeals
 - 725 Tax deductibility of legal costs
 - 726 Interest up to judgment
 - 726 Presumption that no costs are recoverable for very small claims
 - 727 The need to consider economic aspects of the civil justice system
 - 727 Court governance
 - 728 Other issues raised in submissions

731 Appendices

- 732 Appendix 1: Consultations
- 735 Appendix 2: Submissions
- 739 Appendix 3: events attended
- 741 Glossary
- 743 Bibliography

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
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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.

Executive Summary

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

Executive Summary

- 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



1. Introduction: About this reference and report
 - 1.1 Justice Statement
 - 1.2 Terms of reference
 - 1.3 Review processes
 - 1.3.1 Consultation paper
 - 1.3.2 Stage one priority areas
 - 1.3.3 First exposure draft
 - 1.3.4 Second exposure draft
 - 1.3.5 Consultations
 - 1.3.6 Interstate and international reforms
 - 1.3.7 Conferences and seminars
 - 1.3.8 Other law reform bodies
 - 1.3.9 Empirical research
 - 1.4 Report overview
2. Victorian Courts' and Tribunals' jurisdiction
 - 2.1 Supreme Court of Victoria's jurisdiction
 - 2.1.1 Volume of business
 - 2.1.2 Complexity of matters
 - 2.1.3 Civil Procedure Rules
 - 2.1.4 Practice notes and statements
 - 2.1.5 Case management
 - 2.1.6 Divisions
 - 2.1.7 Civil management list
 - 2.1.8 Practice Court
 - 2.1.9 Specialist lists
 - 2.1.10 Court of Appeal
 - 2.1.11 Regional sittings
 - 2.2 County Court civil jurisdiction
 - 2.2.1 County Court Rules
 - 2.3 Magistrates' Court jurisdiction
 - 2.3.1 General civil jurisdiction
 - 2.3.2 WorkCover jurisdiction
 - 2.3.3 Industrial jurisdiction
 - 2.3.4 Civil jurisdiction increase
 - 2.3.5 Impact of jurisdictional increase
 - 2.3.6 Jurisdictional changes and resources
 - 2.3.7 Pre-hearing conferences and mediation
 - 2.3.8 Pre-hearing conference process
 - 2.3.9 Mediation processes
 - 2.3.10 Assessment of costs
 - 2.4 Victorian Civil and Administrative Tribunal jurisdiction
 - 2.4.1 Volume of work
 - 2.4.2 Jurisdiction
 - 2.4.3 Divisions
 - 2.4.4 Appropriate forum

- 2.4.5 Appeals
 - 2.4.6 Rules Committee
- 2.5 Jurisdiction of Victoria's civil courts and tribunals
- 2.6 Volume of civil litigation in Victoria's courts
- 3. Factors influencing the civil justice system
 - 3.1 Legal and factual complexity of litigation
 - 3.2 Procedural rules
 - 3.2.1 Modernisation, simplification and harmonisation
 - 3.2.2 Procedural rules and ascertaining the truth
 - 3.3 Resource allocation and distribution of civil and criminal business of courts
 - 3.4 Proactive judicial case management or party control of litigation
 - 3.5 Economic factors, including cost of conducting litigation
 - 3.5.1 Availability of public and private funding mechanisms
 - 3.5.2 'Loser pays' or costs indemnity rule
 - 3.5.3 Professional and commercial practices of legal profession
 - 3.5.4 Unavailability of legal expense insurance
 - 3.5.5 Rise in commercial litigation funding
 - 3.6 Objectives and conduct of parties
 - 3.7 Adversarial 'culture', practices and procedures
 - 3.8 Alternative dispute resolution
 - 3.9 Human rights considerations
 - 3.10 Constitutional considerations
 - 3.11 Attractiveness of courts in other jurisdictions
 - 3.12 Public opinion, social expectations and confidence in the courts
- 4. Civil justice goals and objectives
 - 4.1 Desirable goals of the civil justice system
 - 4.1.1 Accessibility
 - 4.1.2 Affordability
 - 4.1.3 Equality of arms
 - 4.1.4 Proportionality
 - 4.1.5 Timeliness
 - 4.1.6 Getting to the truth
 - 4.1.7 Reaching the correct result
 - 4.1.8 Consistency and predictability
 - 4.2 Fundamental requirements of the justice system
 - 4.2.1 Fairness
 - 4.2.2 Openness
 - 4.2.3 Transparency
 - 4.2.4 Substantive law application
 - 4.2.5 Independence
 - 4.2.6 Impartiality
 - 4.2.7 Accountability
- 5. Assessing performance of the civil justice system
- 6. Views of individuals and organisations consulted
- Overview of the Civil Justice system (flowchart)

Overview of the Civil Justice System

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.

Overview of the Civil Justice System



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.

Overview of the Civil Justice System



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.

Overview of the Civil Justice System



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.

Overview of the Civil Justice System



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).

Overview of the Civil Justice System



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.

Overview of the Civil Justice System



- 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.

Overview of the Civil Justice System



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.

Overview of the Civil Justice System



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.

Overview of the Civil Justice System



- 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.

Overview of the Civil Justice System



- 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.

Overview of the Civil Justice System



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.

Overview of the Civil Justice System



- 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.

Overview of the Civil Justice System



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.

Overview of the Civil Justice System



*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 intentment'. 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).

Overview of the Civil Justice System



- 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.*



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).



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* (AIJA, 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, AIJA, 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, AIJA, 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 AIJA (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.

Overview of the Civil Justice System



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>

Chapter 1

Overview of the Civil Justice System

