

Remarks of the Hon Marilyn Warren AC
Chief Justice of the Supreme Court of Victoria
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The Democratic, Moral and Socio-Economic Value of the Commercial Bar / Commercial Litigation

Introduction

I was invited to speak to this Conference on ‘the “costs” of commercial litigation’, however, it is a long way to travel from Melbourne to London to talk about the costs of litigation and contemplate why barristers should charge less, or even earn less.

Much has been written about costs, particularly in the field of commercial litigation. We need only think of the report of Lord Justice Jackson, an inquiry that I note was partly instigated by my fellow speaker, Lord Clarke.¹ In Victoria, we have the Costs Court. We have a specialist judge, a judicial registrar and other registrars who have developed an expertise in costs assessments for all jurisdictions in Victoria. Then there is the introduction of

¹ Elsa Booth, ‘The cost of civil justice: time for review or revolution?’ [2011] *New Law Journal* 3 <http://www.newlawjournal.co.uk/nlj/files/article_files/The%20cost%20of%20civil%20justice_Elsa%20Booth_4.pdf>.

the Civil Procedure Act in Victoria and its impact. Of particular note are sections 24, 65A, 65B and 65C, which impose an obligation on practitioners to ensure that costs are reasonable and proportionate, allow the Court to require a memorandum from practitioners on the expected or actual costs and disbursements of a proceeding at any time, and grant the Court the power to make any order as to costs it considers appropriate to further the overarching purpose of the Act (read: cost and time efficiency). These pillars of transparency, proportionality and control of costs by courts are embodiments of a serious commitment to developing and improving the costs landscape.

Having said that, it seems to me that, rather than exploring further something as dry as the costs of commercial litigation, it would be more relevant and pertinent to address the far less understood and appreciated, democratic, moral and socio-economic *value* of commercial litigation and, for that matter, the Commercial Bar.

It would probably be acknowledged by most in the audience that when it comes to the moral and social high ground of legal practice it has been much dominated by the Criminal Bar and to some extent the Common Law Bar. The criminal barrister

defends the rights or even the innocence of an accused person or, alternatively, prosecutes on behalf of the State. Similarly, perhaps, the common law barrister assists the maimed and catastrophically injured to achieve justice against parties who have injured them. Commercial barristers, by contrast, are sometimes portrayed as transactional and income focused. However, such crude commentary fails to appreciate the contribution made by the Commercial Bar in many respects. Hence, the need to step back and reflect on the value of commercial litigation — what its costs ultimately buy. This is the topic I will address.

The Importance of Quelling Disputes

The Commercial Bar plays a vital role in the quelling of disputes between citizens and between the citizen and the State. We are able to live and function in an orderly society because of the work commercial barristers do. There is no violence involved in achieving dispute resolution. Consider as a counterpoint the fate of the Russian tax lawyer Sergei Magnitsky. It is reported that, having been called in to assist a large investment firm that had suddenly accrued enormous tax liabilities after its CEO began to complain about corruption in Russian companies, Sergei Magnitsky began to file criminal complaints against certain

Russian police officers and members of the Interior Ministry. Mr Magnitsky was then arrested and detained for almost a year; he is now dead. The CEO he was assisting, Bill Browder, is confident he was tortured and murdered by Russian officials.² Another different approach to a system of justice is evident in the developments in the Philippines following the recent election of Rodrigo Duterte who is to be sworn in as president on June 30. The President-Elect has directly instructed the people of the Philippines to go after wrong-doers themselves; he is reported to have said 'if [criminals] are there in your neighbourhood, feel free to call us, the police, or do it yourself if you have the gun ... If he fights and fights to the death, you can kill him.'³ Here and in Australia, parties, by and large, do not take the law into their own hands. We have established respect for and compliance with outcomes provided by our system of justice. Again, consider by contrast the revelation that, in Russia, many politicians, judges and university heads have qualifications for dissertations that were bought and, in fact, were also plagiarised

² Bill Browder, 'The Russians Killed my Lawyer. This is How I Got Congress to Avenge Him.' *Politico Magazine* (online), 3 February 2015 <<http://www.politico.com/magazine/story/2015/02/sergei-magnitsky-murder-114878>>.

³ Australian Broadcasting Corporation, 'Philippines' president-elect Rodrigo Duterte urges public to kill criminals, offers bounties', *ABC News* (online), 6 June 2016 <<http://www.abc.net.au/news/2016-06-06/philippines-duterte-urges-public-to-kill-criminals/7479608>>; Japan Times, 'Manila gets taste of Duterte's promised crackdown on crime and delinquency', *Japan Times* (online), 13 June 2016 <<http://www.japantimes.co.jp/news/2016/06/13/asia-pacific/manila-gets-taste-of-dutertes-promised-crackdown-on-crime-and-delinquency/#.V2NM3Xlf270>>.

by the seller; a revelation that came with no consequences for the falsely credentialed officials.⁴

The importance of the law and order we enjoy, therefore, cannot be overstated. I am reminded of the comments the Baron of Montesquieu made in his work *The Spirit of Laws* in 1748:⁵

The political liberty of [an individual] is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

Dame Hazel Genn reiterated this in her 2008 Hamlyn Lectures when she commented:⁶

the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements

⁴ Leon Neyfakh, 'The Craziest Black Market in Russia', *Slate*, 22 May 2016 <http://www.slate.com/articles/news_and_politics/cover_story/2016/05/the_thriving_russian_black_market_in_dissertations_and_the_crusaders_fighting.html>.

⁵ Charles Louis de Secondat, Baron de Montesquieu, *Complete Works* (Evans and Davis, 1748–77) vol 1, 198 <http://oll.libertyfund.org/titles/montesquieu-complete-works-vol-1-the-spirit-of-laws#lf0171-01_label_797>.

⁶ Dame Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2009) 3. She also quotes from a 1950 article in the *Tulane Law Review* in which Eduardo J Couture said 'The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities': Eduardo J Couture, 'The Nature of the Judicial Process', (1950) 25 *Tulane Law Review* 1, 7.

to be honoured and for the power of government to be scrutinised and limited.

Our justice systems are tenets of the civilised society in which we live. Each case brought through these systems — that the Commercial Bar enables to be brought — reinforces the systems themselves.

Having sketched out the value of commercial litigation in the broad, I will move now to a more granular explanation of my meaning.

The Moral Role

The Commercial Bar plays an important part in the governing of commercial behaviour. The corporate world will go to the Bar for advice as to the limits of what may be done. Incrementally but surely, the cases run by the Commercial Bar sketch out the behaviour that our society deems acceptable.

When the State of Victoria altered the legislation overseeing gambling licences and disputed its liability to pay almost \$1 billion in termination fees and interest to Tabcorp and Tatts,

the behaviour of the State came under question. Ultimately, the High Court found that the State was not liable to pay either company because the amended legislation had effectively displaced the obligation; however, this was not before the Court of Appeal made some censorious comments about the State's behaviour. In particular, the bench noted:

The emasculating of s 4.3.12 which has now been accomplished by the enactment of s 4.3.4A may do little to enhance the State's reputation for reliability and commercial morality in its dealings with private investors.⁷

Whilst the High Court partly overturned the Court of Appeal judgment,⁸ the latter judgment remains important for the normative signal it sends about the standard society considers to be proper in commercial dealings.

Although possessed of this ability to guide perceptions of fair commercial conduct, the Courts have taken a balanced approach to commercial arrangements. Another aspect of appropriate commercial dealing that is well established is a strong respect for the ability of parties to agree the terms of a contract between

⁷ *Victoria v Tabcorp Holdings Pty Ltd* [2014] VSCA 312 [35] (Nettle, Osborn and Whelan JJA).

⁸ *Victoria v Tatts Group Ltd* (2016) 328 ALR 564.

themselves. For example, in *Esso*, a case that concerned an order for the winding up of a member of a joint venture into a mining project, one party argued that an implied duty of good faith should preclude the counterparty from a 'cynical resort to the black letter' of the contract. In the judgment, which allowed the 'cynical resort' to go ahead, I noted that ultimately:

If one party to a contract is more shrewd, more cunning and out-manoeuvres the other contracting party who did not suffer a disadvantage and who was not vulnerable, it is difficult to see why the latter should have greater protection than that provided by the law of contract.⁹

A similar hands-off approach was taken in the 2014 High Court case *Barker v Commonwealth Bank of Australia*. There, an employee argued there was a duty of mutual trust and confidence implied into his employment contract which, he contended, required his employer to ensure an opportunity for redeployment was provided before terminating him. French CJ and Bell and Keane JJ found that the term ought not be implied because it did not meet the requirement of necessity.¹⁰ Their

⁹ *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (recs and mgrs apptd) (admins apptd)* [2005] VSCA 228 [4].

¹⁰ *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 [37]–[38].

Honours also considered that the Court's intervention was not appropriate in this commercial arrangement, stating:

It may, of course, be open to legislatures to enshrine the implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. It is a different thing for the courts to assume that responsibility for themselves. The mutual aspect of the obligation cannot be put to one side by characterising its operation with respect to employees as merely a restatement of the existing duty of fidelity. It is more broadly worded than that obligation. As Jessup J observed in his dissenting judgment in the Full Court, the proposed implied duty of mutual trust and confidence might apply to conduct by employees which was neither intentional nor negligent and did not breach their implied duty of fidelity, but objectively caused serious disruption to the conduct of their employer's business.¹¹

Their Honours chose to leave the contract as it stood rather than interfering with the employer's right to operate its company according to its own judgement.

Of course, through the courts, enforcement agencies such as ASIC and APRA also play an important role in maintaining

¹¹ Ibid [40].

appropriate moral conduct in corporate behaviour by bringing enforcement proceedings.

For example, in *Elliott v ASIC*, ASIC successfully prosecuted a managing director, a board chairman and a non-executive director for the insolvent trading of two companies known as Water Wheel. The companies had, in the final five months before administrators were appointed, incurred a further \$3 million of debt. The managing director 'was shown to be seriously incompetent and irresponsible in the management of Water Wheel'.¹² The non-executive director was found to have made 'serious' and 'inexcusable' contraventions in 'stubbornly and tenaciously allow[ing] Water Wheel to trade ... [and doing] nothing to protect the creditors from the inevitable insolvency of the company'.¹³

The Australian Wheat Board cases provide another good example. ASIC pursued the directors of AWB, alleging that they breached their duties to act in good faith and for a proper purpose, and dishonestly used use of their positions, by channelling money to Saddam Hussein's government in Iraq

¹² *Elliott v ASIC* (2004) 10 VR 369 [144].

¹³ *Ibid* [140].

through the use of 'bogus inland transportation fees' for lucrative wheat contracts.¹⁴

ASIC's prosecution of the directors in those cases ensured the penalties for contraventions of directors duties have real steel. All this adds to the moral framework within which commerce operates.

Furthermore, when there are economic downturns, inevitably liquidations increase. It is important for the Courts to supervise the conduct of liquidators. This is where the Commercial Bar plays a significant role in the supervision and control of liquidators and the testing of their powers. I note the comments Marks J made in his *Timberlands* judgment as long ago as 1980 when he ordered the removal of a liquidator who, amongst other things, had appointed his own firm to the liquidation; giving it work for which it would receive remuneration from the liquidated funds. His Honour commented on how little 'official scrutiny' liquidators receive and noted

the cloistered nature of the work which a liquidator performs and the unique hold on vital information to which he succeeds. If he becomes minded to keep the information to himself he is

¹⁴ *Re AWB Ltd (No 7)* [2009] VSC 413 [10]; *Re AWB Ltd (No 1)* (2008) 21 VR 252 [8]–[12].

exceedingly well placed. His power in this regard cannot be underestimated.¹⁵

It is only appropriate, given the power we repose in liquidators and the imperative nature of their work that there is due acknowledgement for role the Commercial Bar plays in advising and acting for liquidators and, conversely, acting for parties seeking to impose some checks on liquidators' behaviour.

Socio-Economic Value

In addition to behavioural and democratic stability as already outlined, the Commercial Bar plays a vital role in making a socio-economic contribution to the State in a wider sense. First of all, the Bar enables business to do what needs to be done and to keep the economy ticking over.

Commercial disputes can clog the flow of money and the progress of businesses, and relationships between people can be frozen while a dispute is being examined and remains

¹⁵ *Commissioner for Corporate Affairs v Harvey* [1980] VR 669, 762-3 ('*Timberlands*').

unresolved. As Heydon J said in *Aon Risk Services Australia Ltd v Australian National University*.¹⁶

Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

Then there is the actual economic contribution made by the Commercial Bar through commercial litigation.

The legal precinct in the heart of the business district of Melbourne is home to 13,000 legal services jobs. On top of that, it is estimated a further 14,700 jobs have been indirectly created to support the legal service providers. It is estimated that the

¹⁶ (2009) 239 CLR 175, 224.

economic value the legal services sector makes to the Melbourne economy comprises an estimated \$3.1 billion per annum by way of direct contribution and an additional \$4.2 billion as an indirect contribution (chiefly the consumption of goods and services in Melbourne by employees in the legal services sector), making a total of \$7.3 billion per annum. There is a further value-added contribution of \$3.5 billion to the direct output of the legal services sector (being goods and services consumption in Melbourne by local employees). There are currently 201,000m² of legal services floor space in Melbourne's CBD, representing a 67% increase in the last decade. Whilst it cannot be said that these figures relate solely to the impact of commercial litigation, nonetheless, the Commercial Bar has been a significant contributor.

When the contribution commercial litigation makes to the economy of the State is borne in mind, it must be appreciated that government has a role to play in facilitating and financing the Commercial Court system. Indeed, the Commercial Court in Victoria (consistent with the position nationally) is a significant contributor to the provision of Court fees reaped by government. In Victoria, the Commercial Court contributed \$6.8 million in 2014-15 and \$5.2 million as at March 2016 for the year 2015-

16. Our projections indicate that fee revenue from the Commercial Court in 2015–16 is likely to exceed \$7 million. These monies go into consolidated revenue and are later the source of modest contributions to Victorian Courts and VCAT more widely through what is known as the Court Fee Pool.

It is important, indeed relevant, for the Commercial Bar to play a role in informing government of the needs of commercial litigators so that litigation is resourced to an appropriate standard in terms of both physical environment and technology. However, more on that later.

Indeed, in England, business went to the government of the day and pointed out the importance of a properly financed and facilitated Commercial Court. The development of the English Commercial Court as a consequence has seen it set a worldwide standard. The delivery of English justice has become a valuable commodity in itself, and a 'major contributor to [England's] economic health'.¹⁷ It is reported that almost 48% of Commercial Court claims in 2014 consisted of foreign parties

¹⁷ <http://www.legalbusiness.co.uk/index.php/disputes-yearbook-2014/market-view/2922-what-s-in-store-for-london-s-commercial-court>

turning to the Court for its expertise, its careful commitment rule of law and, crucially, its purpose-built facilities.¹⁸

If we reflect on the mega-litigation which now occurs frequently in the Victorian commercial sector — such as the *Timbercorp*, *Great Southern*, *Kilmore East* and *Centro* proceedings among others — we see that they have resulted in multiple benefits to society. To take one clear cut example, the *Kilmore East* bushfire class action was a case run not in the Commercial Court but in the Common Law Division of the Supreme Court, although it nevertheless involved a strong presence of the Commercial Bar.

This well and truly met the definition of mega-litigation. The hearing ran for 208 days. It involved 26 counsel, hundreds of solicitors, 26 pre-trial directions hearings, 34 pre-trial in-court applications, 83 orders, over 21,000 pages of transcript, 40 expert witnesses, 60 lay witnesses, 400 pages of pleadings, 700 pages of opening submissions, 23,000 documents in the electronic court book, and 500 pages of closing submissions.

¹⁸ Ibid.

The economic impact of this matter alone on the Victorian legal sector would have been significant. And, crucially, this was not without careful scrutiny from the Court as to the costs being incurred. Justice J Forrest, who ran the trial, utilised the provisions of the Civil Procedure Act extensively, delivering a series of rulings which demonstrate the effectiveness of that legislation (a matter to which I will return in a few minutes). An absolute key to the success of the management of the litigation was the use of technology. Independent assessments conducted for the Court have shown that approximately one third of class action trials' duration is saved when those trials are conducted on a wholly electronic basis. *Kilmore East* was, in particular, a success in establishing a useful model for this practice, one which I believe demonstrates that if courts are provided with the facilities, and given the tools, they can conduct litigation in a wholly innovative way, to the benefit of the parties and of society more broadly.

Finally, most importantly of all, the *Kilmore East* parties were able to achieve a resolution. In fact, the resolution was a settlement, reached after almost a year of trial, but no doubt the conduct of the trial was crucial in making that settlement come about. The matter being on foot (and the counsel being on their

feet) placed pressure on the parties to come to a settlement. Furthermore, the resolution is one over which the Court has had careful oversight to ensure it is a proper one and is justly administered. It has ensured that those seeking compensation for the injury, damage or loss they suffered in the extraordinarily deadly Black Saturday bushfires will be able to do so.

The *Great Southern* class action before Croft J provides another example. It concerned investments people had made into agricultural managed investment schemes and the collapse of the group responsible for those schemes. It was another piece of mega-litigation; this one, unfortunately on one view for Croft J, settled the night before his 4200 paragraph judgment was to be handed down. The settlement in that case resulted in some, though very little, return for the investors, but Croft J commented that the case had been unlikely to succeed. In his judgment approving the settlement, however, he referred to the importance of class actions such as that case and cited the purpose of class action legislation:

[The legislation] provide[s] a real remedy where, although many people are affected and the total amount in issue is significant, each person's loss is small and not economically viable to recover in individual actions. [The legislation] thus give[s] access to the courts

to those in the community who have been effectively denied justice because of the high cost of taking action.¹⁹

Of course it must be acknowledged that the efficacy of mega-litigation such as *Kilmore East*, *Great Southern* and I expect also *Centro* and other cases is achieved because the Courts are given support, assistance and cooperation by the Bar, particularly the Commercial Bar. As I have said on occasion, we are all in this together and necessarily there must be support, cooperation and recognition for the different roles that we all play in litigation.

What I think all this indicates is that commercial litigation and specifically mega-litigation can be of vital value in delivering justice for the community. Such cases can put enormous strain on the Bar, firms and the Court. But it is also of vital social value to enable these cases to be heard and of significant economic benefit. The importance of the socio-economic value of commercial litigation is often underappreciated, even ignored. The focus is rather always upon the cost of litigation. As the Productivity Commission's 2014 *Access to Justice Arrangements* report noted, its inquiry was prompted by the 'many concerns

¹⁹ *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (recs and managers apptd) (in liq)* [2014] VSC 516 [27], quoting the second reading speech for the Federal Court of Australia Amendment Bill 1991 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

focus[sing] on costs — including costs to parties of accessing services and securing legal representation, and costs to governments of providing services'.²⁰ What I have been seeking to emphasise to you today, as the Productivity Commission's report ultimately did,²¹ is the great inherent value commercial litigation has, economically and socially.

One final matter on this point: I noted recently in a paper with Justice Croft the growing need for international commercial courts, and have already spoken about the successful model London's Commercial Court provides. It is apparent to many working in commercial law that there is an increasing need for an international focus; there are a number of examples of global trade having a direct influence on the development of commercial law. As Chief Justice French said recently:²²

[i]mportant aspects of our law on such topics as crime, money laundering, company regulation, intellectual property, competition, taxation, insolvency and commercial transactions cross national boundaries. Many of our laws give effect to international conventions of one kind or another.

²⁰ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, Vol 1, 5 September 2014), 74.

²¹ *Ibid* 138–43.

²² Robert French, 'The State of the Australian Judicature' (29 April 2016), 7.

His Honour noted that the 'internationalised legal environment' has resulted in a need to 'effect dispute resolution across national boundaries'.²³ Although arbitration plays its part in answering this need, the Chief Justice commented on the need to ensure that 'the role of the courts in the development of commercial law and the affirmation of the rule of law through that development not be diminished.'²⁴

As Justice Croft and I suggested in our paper, an Australian international commercial court could be established which has both 'an analogous international focus to that of ... other international commercial courts' and 'a national domestic jurisdiction enabling commercial parties from anywhere in Australia to litigate in a forum populated by the best commercial judicial minds in the country.'²⁵

The opportunities provided by an International Commercial Court are boundless. If we were able to provide such a response in Victoria, not only would the moral and social value of resolving commercial disputes continue in Victoria, but we could greatly

²³ Ibid.

²⁴ Ibid.

²⁵ Marilyn Warren and Clyde Croft, 'An International Commercial Court for Australia: Looking beyond the New York Convention' (Paper presented at the Commercial CPD Seminar Series, Melbourne, 13 April 2016) 35–6.

enhance the economic contribution the legal industry makes to the Victorian and Australian economy.

Of course, developing such a model would not be straightforward, but the Commercial Bar in my experience has always demonstrated great entrepreneurialism, a commitment to innovation and high levels of preparedness to embrace difference and reform. Certainly the President of the Victorian Bar has embraced the opportunity (see his recent CPD Commercial Court/Monash University commentary on an International Commercial Court) so we can see how the opportunities are ready to be exploited.

Civil Procedure Act and case management reform

To return to my designated topic, I do not intend to understate the significant issues around the costs of litigation. However, there is a dedicated ongoing effort by the Courts, the profession, the Bar and government to improve the situation. Indeed, I note that the cost of the justice system and concerns about access to justice underpin significant procedural law reform such as the Civil Procedure Act in Victoria, reforms to discovery in the Federal Court, and expert evidence reforms in NSW. These reforms are part and parcel of a national movement towards the Courts

exercising greater management over the conduct of cases before them.

The process of development of the Civil Procedure Act in Victoria demonstrates the result of cooperative effort. Following recommendations of the Victorian Law Reform Commission, an advisory group was established, chaired by me, at the request of the Victorian Attorney-General. It comprised representatives from across the civil justice system, including the Victorian Bar. The committee worked methodically through a process and made recommendations to the Attorney-General. Most of the recommendations found their way into the Civil Procedure Bill later introduced in the Victorian Parliament. It was a fine example of cooperation by all interested in ensuring an operational model was achieved to guide the conduct of civil litigation in our State.

The Supreme Court has expressed firm views about the proper approach to the conduct of litigation, the expectations of counsel and parties, and the impact that the CPA has on litigation. The effect is overwhelmingly positive in promoting high standards of conduct, and promoting new ways of doing things with a focus on the essence of justice. On a day to day basis, the CPA is

reminding barristers and solicitors of the need to take a proactive application in keeping the costs of proceedings in proportion. The Act gives impetus to the judiciary to use innovative means of conducting cases and structuring hearings.

One facet of the Act is its scope to penalise excessive and inappropriate conduct. These powers are not used lightly, especially against barristers or solicitors. But there have been some cases, such as *Yara Australia Pty Ltd v Oswa*²⁶ and *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd*,²⁷ where aspects of excessive conduct meant that some disciplinary measures were warranted.

For example, in *Yara*:

The court was provided with six application folders, comprising submissions, affidavit material, transcript and authorities running to over 2700 pages. ... The affidavit material from the parties' solicitors contained a variety of largely extraneous materials, included old statements of claim, swathes of email correspondence, materials from related proceedings in Western Australia, and transcripts from related hearings in the Supreme Court of Victoria. Much of this

²⁶ (2013) 41 VR 302.

²⁷ (2014) 42 VR 236.

material was either peripheral to the application or entirely unnecessary.²⁸

The Court found that the materials produced were excessive and as a consequence ordered the solicitors of each applicant be disallowed recovery from their clients for 50% of the costs relating to the application books and further ordered the solicitors to indemnify their clients for 50% of the respondent's costs incurred because of the excessive and unnecessary content of the application books.²⁹

The application of the CPA is not without complexity. Anecdotally it seems that there are instances of the overarching obligations sections of the CPA having an effect that was not intended. It is being conveyed to me that some practitioners and even barristers are using the obligations under the CPA as the basis for foreshadowing claims for orders against barristers and practitioners personally. Once that occurs it immediately raises the spectre of a conflict of interest for the individual lawyer vis-à-vis their clients in continuing to conduct the litigation.

²⁸ *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 [40] (Redlich and Priest JJA and Macaulay AJA).

²⁹ *Ibid* 318 [61].

Care is and must be taken by the Bench in deploying and monitoring the powers of the CPA. As Judd J commented only a month ago, the threat of costs orders against practitioners can 'have the tendency to interfere with the ability of a litigant, the practitioner's client, to advance a case for adjudication by the court.'³⁰ They 'can also have a chilling effect on a practitioner's ability to act in the best interests of a client. A solicitor or counsel, against whom a threat is made, may feel compelled, or may take advantage of the opportunity, to apply for leave to withdraw on the threshold of a hearing or trial'.³¹

However, I reiterate Judd J's explication that improper claims of that kind may cause the maker to be in breach of the paramount duty to further the administration of justice, and the overarching obligations to ensure a proper basis for the foreshadowed claim at the time it was made, rendering them amenable to an order under s 29 of the Act themselves.³²

³⁰ *ACN 005 490540 Pty Ltd v Robert Frederick Jane Pty Ltd* [2016] VSC 217 [21].

³¹ *Ibid*[22].

³² *Ibid* [19]

Vexatious use of the provisions of the Act for tactical advantage would be in breach of the Act, given the obligation to reduce potential conflicts.

Importantly, these obligations on lawyers are now largely shared by their clients. This extension of obligations to a broad range of participants in litigation has been another change under the *Civil Procedure Act*.

As I mentioned at the start of my comments today, there is now an expectation that costs can be scrutinised by the Court and will be proportionate to the size and complexity of the matter. Parties, too, are responsible for this. Last week, a bench consisting of Tate ACJ and Kyrou and Ferguson JJA dismissed an appeal brought by a Mr Marriner regarding a dispute that has persisted since 2005 over a property development joint venture involving a relatively small amount of money.³³ Mr Marriner had pursued the appeal after rejecting a *Calderbank* offer from Australian Super Developments. The bench noted, after

³³ *Marriner v Australian Super Developments Pty Ltd* [2016] VSCA 141, [1]–[2].

reference to the obligation to keep costs proportionate to the matter,³⁴ that:³⁵

If a party wishes to press on stubbornly with expensive and prolonged litigation on a point of principle which is unconnected to the legal merits of the party's case, and refuses to accept a reasonable *Calderbank* offer, that party should expect to be visited with appropriate costs consequences.

Bell J has commented that this obligation to maintain proportionate costs is so vital to the conduct of litigation that costs orders may not be the only consequence of a breach. In his judgment in *Actrol Parts Pty Ltd v Copp*³⁶, his Honour dismissed the proceedings brought by *Actrol Parts* as that party had repeatedly rejected reasonable offers of settlement, relying on its greater financial resources to be able to proceed with expensive litigation for only nominal damages.³⁷ Bell J commented that:³⁸

In my view, the court possesses power to dismiss the present proceeding under s 28(1) and, taking into account *Actrol's* contravention of its overarching obligation, should exercise it. This is especially so because the nature of its contravention has some

³⁴ Ibid [266].

³⁵ Ibid [269].

³⁶ *Actrol Parts Pty Ltd v Coppi (No 3)* [2015] VSC 758.

³⁷ Ibid [40], [60], [67], [69], [72].

³⁸ Ibid [82]; see also [79].

analogies with abuse of process, including abuse constituted by oppression of a relatively unequal party. The court's new power in s 29(1) to make any order it considers appropriate should also be exercised to make an order dismissing the proceeding because it is in the interests of justice to do so. This is especially so having regard to the overarching purpose in s 7(1) (see the court's obligation in this regard in s 8(1)), the objects in s 9(1) and, particularly, the overarching obligation in s 24(1) of ensuring reasonable and proportionate costs.

Without doubt the CPA has had a significant impact on commercial litigation and it has imposed new standards for commercial barristers (indeed all civil barristers). In my view the time has come for a longitudinal study to be conducted on the impact of the CPA now that its earliest provisions have been in operation for over five years. In 2011 the Department of Justice sought to measure the costs saved by court rule amendments limiting the scope of discovery. That report estimated the savings at between \$30 and 70 million. This was only one small aspect of civil procedure reform, albeit in one of the most costly aspects of modern litigation. Having this kind of analysis is invaluable when it comes to dealing with Government. All too often the economic benefits of improving the conduct of civil litigation go unmeasured and therefore, in the eyes of treasury officials, do not exist. The result is a reluctance to invest in

measures to make further improvements. I intend to suggest to the Attorney-General that a study be commissioned to ensure that the results of the ongoing cultural change effected by the CPA and supported by leadership in the judiciary, the Bar and the profession is appropriately analysed and recognised.

Putting all this in context, I would make the observation that both *Yara* and *Hudspeth* (the first s 29 hearing) involved unusual if not unique circumstances. Neither case was a routine matter. This needs to be borne in mind when parties, indeed judges, make observations about the conduct of litigation.

To return to the less appreciative view of commercial barristers I described earlier, it must be thought truly inaccurate and unfair. Commercial barristers have generally led the way in embracing reform in case management and case procedure. If we contrast the way cases were conducted in the then-radical commercial list 20 years ago with how they proceed in the Commercial Court now, we can see that case management has become far more intense, interventionist and pervasive. There has been a dramatic shift from the non-interventionist position favoured by the High Court in *J L Holdings* to the emphasis on case management and expense reduction more recently boosted

by *Aon*, which has now been accelerated by the *Civil Procedure Act*. What I do say with some emphasis is that the Commercial Bar has been at the forefront of the dramatic shift that has occurred, for the reasons I have stated.

The Potential Value of the Commercial Bar

The Commercial Bar is constantly refining, adapting and demonstrating its flexibility. There are outstanding opportunities that await the Commercial Bar in the international sphere. Given the participation of Australia in major international trade agreements, it is a reality that needs to be faced.

Doubtless there are challenges ahead for the Commercial Bar. There are pressures and constraints within the legal profession and, more and more, solicitors are making inroads into what was traditionally barristers' work. On other occasions I have spoken about the need for the Bar to embrace this opportunity and reinvent itself. I urge that response once again, not merely for the enduring survival of the Commercial Bar itself, but importantly because of the democratic, moral and socio-economic role that the Commercial Bar plays.

All in all, it may be seen that it is bereft of true meaning to simply consider the cost of litigation, especially commercial litigation, in monetary terms. I hope that my pointing to the democratic, moral and socio-economic value of the Commercial Bar and commercial litigation heightens awareness of what commercial barristers do and why what they do is important.