



Innovation in Common Law Case Management¹

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Supreme Court of Victoria

EXECUTIVE SUMMARY

There has been a profound transformation in the management of cases in the Victorian Supreme Court's Common Law Division in recent years, necessitated by the higher volume of cases being filed and the increasing complexity of litigation.

The first stage of reforms took place in the Personal Injuries and Dust Diseases lists, and the work in this area has informed and guided significant reforms across the rest of the Division.

The aim is to make all stages of the litigation process easier and speedier, to ensure Court resources are used more efficiently and, thus, ensure savings for Court users, taxpayers and other stakeholders.

Statistical and anecdotal evidence is showing significant improvements in the way common law cases are being managed. These reforms are influencing an intense and widespread cultural change across the Common Law Division and the legal profession. In short, the Common Law Division has become a more

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active player in the way cases are conducted in the pre-trial and trial phases.

The Supreme Court through the Common Law Division will continue the reform process to ensure it responds to new and emerging trends in litigation, particularly in practice areas involving dust diseases, including asbestos, and sexual abuse claims, and to meet the rising demands of population growth in this state.

Introduction

- 1 In the past two and half years, there has been a profound transformation in the overall management of cases in the Supreme Court of Victoria's Common Law Division. The first stage of the reform process took place in the Personal Injuries and Dust Diseases lists, and the work in this area has informed and guided significant reforms across the rest of the Division.

Work of the Common Law Division

- 2 The Common Law Division is a significant area where the community comes to court. About 50 per cent of its cases involve plaintiffs seeking damages for personal injury, and these claims include a burgeoning number of mesothelioma and other asbestos-related conditions as well as sexual abuse claims. This is a jurisdiction that deals with dying plaintiffs, seriously injured plaintiffs and the families who care for them, as well as defendants, including medical professionals, brought to court to have allegations of negligence against them tested and whose professional reputations may be irreparably damaged in the process.
- 3 About 20 per cent of the Division's cases are disputes concerning wills and estates, and a further 10 per cent involve the review of administrative action and appeals from lower courts and tribunals. The Division also deals with real property disputes, claims for professional negligence, defamation actions, and employment and industrial disputes. The Common Law Division also hears

important cases involving the Human Rights Charter.

- 4 It is important to note that the Division also manages major tortious claims and non-commercial class actions, such as the Kilmore East-Kinglake Black Saturday bushfire class action, which involved over 5,800 individual claimants.
- 5 In 2015-16, 2,379 proceedings were initiated in the Common Law Division. If current trends continue, the number of proceedings initiated this year will exceed 2,500. Considering Victoria is the fastest growing Australian state or territory³, it is clear that the Supreme Court will need to harness all available resources to maintain its high standards and ensure it properly and promptly meets the public right to access to justice.
- 6 The Supreme Court is constantly adjusting to meet increased demands, in particular by employing innovative strategies to manage its caseload. In 2014, the Court restructured the Trial Division, devolving the Commercial and Equity Division and formally establishing the Commercial Court. It also made significant procedural reforms in the Court of Appeal to both criminal and then civil appeals.
- 7 This paper outlines recent reforms in the Common Law Division that have resulted in significant improvements in the Division's ability to meet the needs of litigants in this state.

The imperatives for reform

- 8 Prior to the reforms, the Court mostly tended to be reactive rather than proactive.
- 9 Common law cases in the Supreme Court invariably took longer from initiation

³ Australian Bureau of Statistics, Australian Demographic Statistics, Sept 2016, Cat 3101.0 (23/03/2017) < <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3101.0>> . Victoria's population increased 2.1 per cent in the 12 months to September 30, 2016, outstripping New South Wales (1.4 per cent), Queensland (1.4 per cent) and the Australian Capital Territory (1.5 per cent).

to finalisation compared to other jurisdictions and parts of the Court including the Court of Appeal, and parties were on the whole left to their own devices, based on the view that practitioners were experienced and would seek the Court's assistance when necessary. This laissez-faire approach often resulted in a disregard of orders by practitioners, multiple vacations of trial dates, undue delays and flurries of activity immediately before trial – which, in most cases, led to late settlement of the matter or adjournment. The question had to be asked: why couldn't such activity be done in a more ordered and constructive manner, thereby avoiding the stress on litigants and practitioners, increased costs, delays and general inefficiency?

10 Justice Zammit observed:

I felt like a hamster on a wheel – signing orders on the papers that I had very little confidence would be complied with; conducting directions hearings where parties were unprepared; young inexperienced lawyers appeared, knowing little about the claim and, more often than not, seeking adjournments without any reasonable explanation other than not being ready. I was feeling quite dismayed at what I thought was, on the whole, a service that provided little benefit to the individual litigants and Court users. It was, however, the best I could do given our resources and the structure we had.

I was mindful that we were dealing with seriously injured, and in some cases dying, plaintiffs and the families who were caring for them, not to mention defendants whose reputations may be irreparably damaged as they waited for the litigation process to play out.

The road to reform

11 Under the previous system, management of cases in the Personal Injuries and Dust Diseases Lists rested principally with the Associate Judge working with

the Judge in Charge and ultimately the trial Judge. Various associate judges heard interlocutory applications in a quasi-practice court system, and a separate listings team provided support. There was however limited coordination between these groups.

- 12 Under the previous arrangement, a judicial officer was unable to triage each matter and their associates often did not have either the relevant legal expertise or experience in personal injuries cases to assist in any meaningful way. As a result, case management tended to occur on the first day of trial – leading to belated amendments to pleadings, disputes over discovery and, too often, vacations of trial dates or other delays.
- 13 Importantly, the introduction of legislative reforms under the *Civil Procedure Act 2010* obliged the Court to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute, and this was buttressed by a series of specific obligations on parties and their legal representatives.
- 14 The Common Law Division began the important and necessary shift to a more nuanced role as an active manager of *individual* proceedings. While this was facilitated by a suite of broad powers in addition to the Court’s Rules and inherent jurisdiction, there was a danger that the shift could lead to yet more work for judicial officers – unless there were commensurate changes to the staffing regime behind the scenes. Change had to begin at the front door of the Common Law Division and at every point in between.

Initial Reform Response

- 15 The response in the Court’s large personal injuries jurisdiction was to begin building a team that could actively manage the preparation of cases long before they came before a judicial officer. The aim was to take much of the triage work away from the Associate Judge or Judge in Charge. By mid-2014, staff who

were already providing support to the Personal Injuries List were enlisted to do this work. This included two associates, two administrative support workers, the Judicial Services Coordinator to the Associate Judges' chambers and an individual in the Principal Registry.

- 16 Innovation often starts as something very small. In this case, it began with weekly meetings in which the team clearly identified what each member did, to ensure there was no doubling-up, and highlighted potential sticking points or bottlenecks that led to delay and inefficiencies. These weekly meetings generated enormous learning and the transfer of experience from individual staff members who knew the Common Law Division well and could explain how things operated within the Division and why. Each member who participated in those meetings felt genuine excitement about doing something to improve the way the Common Law Division did its work.
- 17 The other important feature of the Common Law Division was the hearing of cases by specialist common law judges who bring extensive experience and knowledge to the Division's work.

The Boston Consulting Group Review of 2014

- 18 On a broader scale, the Court in 2014 commissioned Boston Consulting Group (BCG) to undertake a wholesale review of the Trial Division.
- 19 BCG's review found that the demand on the Court's resources created by caseload growth had been compounded by increasing complexity of litigation. Further, the high volume of "routine" in-court work diminished the time available for hearing substantive applications and trials and judgment-writing. It concluded that without productivity improvements, the Court would need three more judges and one associate judge by 2020 merely to maintain current

service levels.

The need for a sharper focus on specialisation; early intervention; delegation; teaming; and collaboration in the management of cases was identified.

Response to the BCG review

- 20 Spurred on by BCG's findings, the Common Law Division decided to pilot a case management model for the Personal Injuries and Dust Diseases Lists. The plan was to use judicial registrars, associate judges and highly qualified in-house lawyers, who had real practical experience in personal injury litigation, to provide targeted resources for proper case management. Matters in these lists would be managed in a professional, highly experienced and qualified "one-stop shop".

Common Law Improvement Program -- CLIP

- 21 These changes came together in the Common Law Improvement Program (CLIP). Its goals are to improve court performance measures; use Court resources more efficiently; and generate savings to Court users and to government by making processes easier and more timely.
- 22 CLIP's key features have been informed by a set of case management principles which have the overarching purpose of the *Civil Procedure Act 2010*⁴ as a touchstone. These principles recognise that there can be no "one size fits all" approach to case management but embrace the concepts of specialisation, early intervention, delegation and teamwork.
- 23 The CLIP case management model involves specialised teams of judicial officers, lawyers and registry staff working together to ensure that case management functions are performed by the most appropriate members of the

⁴ "...to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute" see section 7(1).

team. This, in turn, frees up judicial officers to perform functions that only they are qualified to do. To be clear, legally-qualified Court staff are now performing many of the essentially administrative functions that would once have fallen to judicial officers and their chambers shortly before a hearing or trial.

24 The Common Law Division's case management lawyers perform functions such as:

- (a) triaging matters so that they are dealt with by the most appropriate level of judicial officer, and flagging issues for their attention;
- (b) scrutinising pleadings and requests for consent orders;
- (c) overseeing compliance with orders;
- (d) preparing matters for pre-trial directions and applications; and
- (e) liaising with practitioners and self-represented litigants.

25 The lawyers are also involved in project work for developing case management processes, drafting practice material, arranging seminars and consulting with stakeholders.

26 Of course, all this work and management occurs under the watchful eye and supervision of the Judge in Charge, presently Justice Zammit.

Extending Reforms to other Lists

27 After encouraging data emerged demonstrating the impact of reforms in the Personal Injuries and Dust Diseases Lists, the Court in 2016 obtained funding to continue the reforms in these lists and to implement them in other specialist lists, such as the Judicial Review and Appeals; Trusts, Equity and Probate; and the Confiscation and Proceeds of Crime Lists.

- 28 The **Judicial Review and Appeals List** manages a wide variety of matters, including appeals from lower courts and tribunals. Most of these matters have already been subject to a judicial or quasi-judicial process and, apart from review of administrative decisions, matters have already “had their day in court” so they usually do not require additional evidence gathering.
- 29 The Judicial Review and Appeals List has certain enduring challenges, though. The subject matter of proceedings varies enormously, and a significant proportion of litigants (about 25 per cent) are unrepresented and often struggle with formulating grounds of appeal and identifying questions of law to be considered by the Court. A “one size fits all” approach to case management in this List is therefore inappropriate, and the rights of the parties to manage their litigation must be balanced against the public interest in ensuring prompt supervision of judicial and quasi-judicial decision-making.
- 30 Prior to 2016, matters in the Judicial Review and Appeals List of the Common Law Division were managed by different associate judges’ chambers and listed for trial only after interlocutory steps were completed. This led to delays in getting matters on for hearing, particularly where leave to appeal was required from an associate judge before the matter could be listed for hearing before a judge.
- 31 Key reforms introduced in the Judicial Review and Appeals List in mid-2016 included:
- (a) a regular List directions day before the Judge in Charge;
 - (b) early listing of matters for trial and the hearing of leave applications together with the substantive appeal in appropriate cases;
 - (c) hiring a dedicated case management lawyer to liaise with parties (especially unrepresented litigants) to ensure compliance with

procedural steps; and

(d) reform of Rules to eliminate delay between initiation and listing for trial.

32 The **Trusts, Equity and Probate List** has also been a focus of CLIP. A feature of this List is the high level of interlocutory hearings listed before the Judge in Charge – approximately 30-40 matters per week. Many of the case management orders required by parties at these hearings can potentially be made in chambers, so the aim is to resolve as many as possible “on the papers”. Previously, the scrutiny of proposed orders and preparation for interlocutory hearings required a great deal of work on the part of the Judge in Charge and her chambers, leaving less time for trial preparation and judgment writing.

33 A Common Law Division case management lawyer now triages files, identifies non-compliance with orders or additional material required, liaises with parties to obtain consent or proposed orders, drafts orders and prepares case summaries and analysis for the Judge in Charge.

Measuring reform

34 While improved data collection is one of the goals of CLIP, existing measures have shown that, across various Common Law Division lists, the reforms have generated a significant improvement in clearance rates,⁵ time to trial, and the number of court appearances. This data supports the anecdotal evidence from both internal and external sources about the highly positive impacts of CLIP.

35 In 2012-13, 64 per cent of cases in the Common Law Division were managed in specialist lists. This rose to 90 per cent in 2015-16 as a direct result of better triaging of cases at initiation and the creation of additional specialist lists.⁶

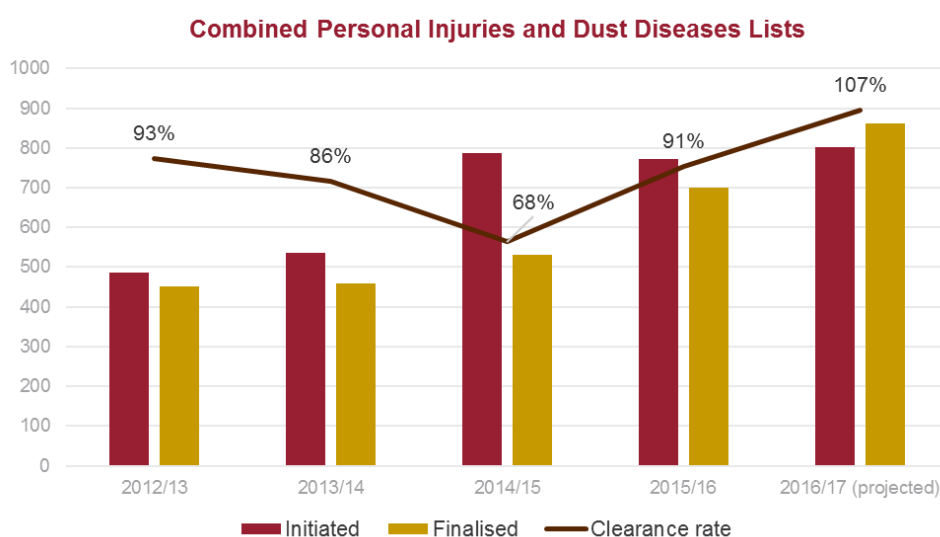
⁵ A comparison of the number of proceedings initiated to those finalised in a given period.

⁶ The Common Law Division now has 12 specialist lists: Civil Circuit; Confiscation and Proceeds of Crime; Dust Diseases; Employment and Industrial, Judicial Review and Appeals; Major Torts; Personal Injuries; Professional Liability; Property; Testators Family Maintenance; Trusts, Equity and Probate; and Valuation, Compensation and Planning.

Some of the improved performances in the case management within certain specialist lists can be seen in the figures and graphs below.

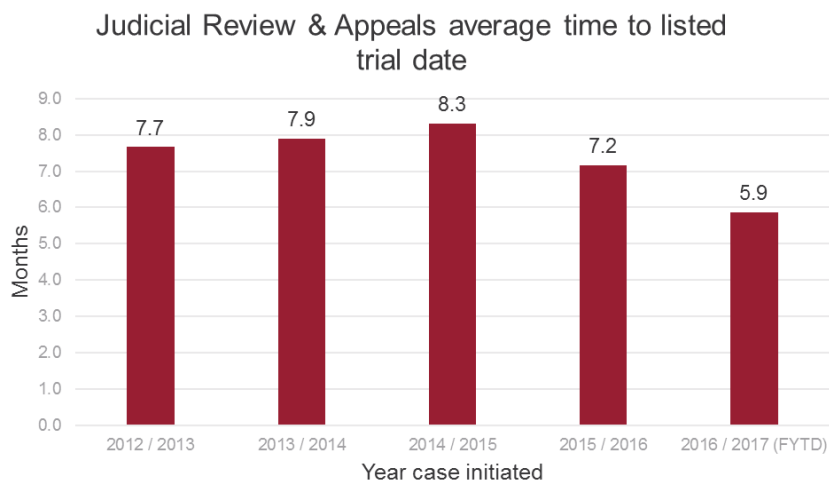
36 As detailed earlier, the Common Law Division needed to meet the increasing demand in the personal injury jurisdiction. Initiations were increasing and clearance rates were declining. This meant longer waiting times for cases to get on, and potentially increased costs as matters took longer to resolve.

37 More intensive case management of the **Personal Injuries and Dust Diseases Lists** began in early 2015 and gained pace in 2015-16. The graph below exhibits the sharp improvement in the clearance rate in these lists: from 68 per cent in 2014-15 to 91 per cent in 2015-16. Projections for the current financial year indicate the clearance rate will exceed 100 per cent. This is a very pleasing turnaround in a relatively short period.

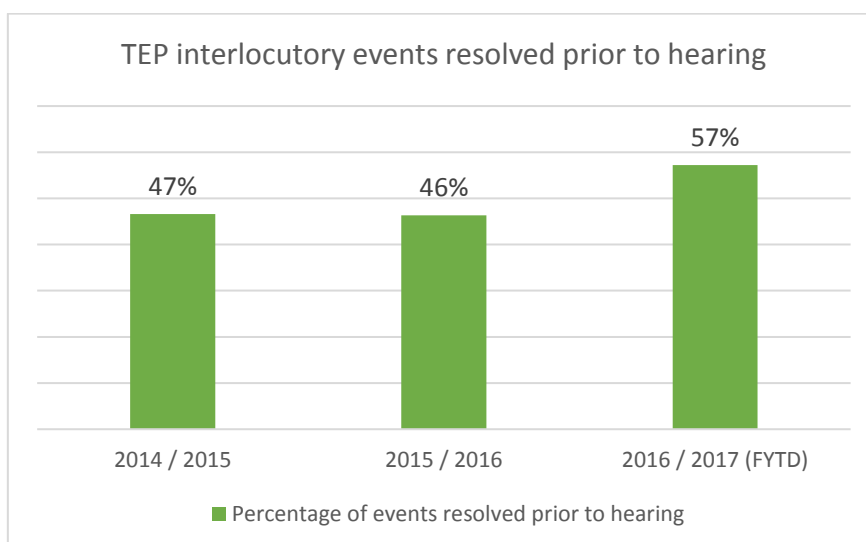


38 One of the main concerns in managing matters in the **Judicial Review and Appeals List** was the time taken for a matter to come on for trial. Time to trial was steadily increasing, as the following graph demonstrates. CLIP reforms, which began in this list in 2016, particularly the latter half of that year, appear to have reversed the trend. Cases initiated in 2014-15 took on average 8.3 months to get to trial, whereas a case initiated in 2016-17 is likely to have a trial

date in less than six months. Of course, there had always been and will continue to be urgent and special Judicial Review and Appeals List cases that require fast-tracking. The Common Law Division maintains that capacity.



39 The assignment of a case management lawyer to the **Trusts, Equity and Probate List** has led to a 24 per cent increase in pre-hearing resolution of interlocutory matters, as demonstrated by the figures below. Anecdotally, the Judge in Charge has reported having more time to concentrate on trials and judgment writing.



Challenges for the future

40 Future challenges for the Common Law Division are mostly predictable and

imminent, particularly in the area of personal injuries.

41 The number of initiations in the Dust Diseases List is increasing steadily, and the number of people diagnosed with “third wave” asbestos-related injuries (from exposure in the general community), is not expected to peak until 2021.⁷ There have recently been some initiations by plaintiffs with silicosis, and conversations with practitioners in this area suggest there will be an increase in the number of these cases coming to Court.

42 As well, the Common Law Division is experiencing a substantial increase in the number of institutional sexual abuse claims, and this is expected to increase further as the Royal Commission draws to a close later in 2017.

43 Organisations need to harness the efficiencies that technology can bring and so, too, will the Court. While the Supreme Court is moving from paper-based filing systems to electronic, there is still much work to be done in developing business management systems and new digital platforms to ensure more streamlined management of cases and a greater interactive experience for litigants.

44 The increasing complexity of litigation and the explosion in digital information means that eTrials need to be the norm rather than the exception. The Supreme Court will expand the infrastructure to support this mode of trial in the Common Law Division.

Conclusion

45 Much has been achieved with hard work from Court personnel and financial assistance from government. Early results of CLIP are positive, with both anecdotal and statistical evidence showing improvements in the way in which

⁷ Asbestos Safety and Eradication Agency, *Future projections of the burden of mesothelioma in Australia*, March 2016 (Finity Consulting) 23. For full report, see *The Third Wave – Australian Mesothelioma Analysis and Projection*, Brett Riley, David McNab (Finity Consulting) March 2016.

cases are managed in the Common Law Division.

- 46 Reforms instituted in the Common Law Division over the past few years are driving cultural change, both within the Division and the common law profession. We are fundamentally changing the way common law litigation is conducted and the Division is much more active in the way these cases are conducted, in accordance with the imperatives of the *Civil Procedure Act 2010*.
- 47 The Common Law Division user group (consisting of barristers and lawyers) reports that the Common Law Division is on the right track with high levels of user satisfaction.