

**Remarks of the Hon Marilyn Warren AC
Chief Justice of the Supreme Court of Victoria**

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The Future of Civil Procedure: Innovation and Inertia

This morning I will provide an overview of current developments in civil litigation, with a particular Victorian focus. For over 20 years now, the area of civil litigation reform has been dominated by reports coming out of England, the most recent being the *Civil Court Structure Review Interim Report* by Lord Justice Briggs¹ in December 2015. In that report, the Lord Justice refers back to and draws from the earlier reports and reforms of Lord Woolf on civil justice² and Lord Jackson on costs reform.³

However, it is sometimes forgotten that Australia – and I would suggest to a considerable extent, Victoria – has been a leader in civil justice reform and innovation. We need only recall that when Lord Woolf was researching his reforms, he came to Australia and spent time studying the then expedited Commercial List procedures in the Supreme Court of Victoria. Many of the practices from that list were later developed in Lord Woolf’s reforms.

When Lord Jackson was researching his reforms, he came to Australia on a study tour; he spent time with the Costs Judge in the Victorian Supreme Court, learning about our approach to costs in civil litigation.

There have been significant reports published in Australia, but with perhaps a little less fanfare than the English reports. For example, the Australian Law Reform Commission Report on *Discovery of Documents in Federal Courts* in March 2011.⁴ There was the very significant Victorian Law Reform Commission Report on *Civil Justice* led by Professor Cashman.⁵ This report resulted in the introduction of the *Civil Procedure Act*, which I will suggest later has had a seismic impact on Victorian litigation.

More recently, there has been the Productivity Commission Report on *Access to Justice*. At present in Victoria, the Victorian Attorney-General has asked the Department of Justice and Regulation to conduct a review of civil litigation to identify reforms and recommendations to pick up the proposals contained in the Productivity Commission Report. Consultation is underway. With respect to the Productivity Commission Report itself, ultimately, it had a federal focus. However, it drew from the Victorian civil experience and made many recommendations that are already in place here in Victoria.

¹ Lord Justice Briggs, *Civil Courts Structure Review: Interim Report*, December 2015.

² Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice system in England and Wales*, June 1995.

³ Lord Justice Jackson, *Review of Civil Litigation costs: Final Report*, December 2009.

⁴ *Managing of Documents: Discovery of Documents in Federal Courts*, Australian Law Reform Commission, Report No 115, 25 May 2011.

⁵ *Civil Justice Review*, Report No 14, Victorian Law Reform Commission, 1 January 2008.

So now to the overview. In doing so, I will, as indicated, focus on the Victorian experience, particularly the Supreme Court of Victoria. However, I note that there have been important civil reforms in civil litigation in the Federal sector. I refer in particular to the Federal Court's *Draft Practice Note on the National Court Framework and Case Management*,⁶ and also that Court's *Draft Practice Note on Commercial and Corporations National Practice Areas*⁷ and, in addition, the revised Practice Note with respect to Class Actions.

What I intend to do is move quickly through a wide range of developments and, I believe, future directions in civil litigation.

Civil Procedure Act 2010

I start first with the *Civil Procedure Act*, itself based on the Victorian Law Reform Commission Report. The report is a weighty tome, but for anybody interested in civil procedure, it is a must read. One of the fascinating aspects of that report was the way in which its recommendations were implemented. It was a special, if not unique model, and one which I highly recommend because of its inclusiveness and the cooperation that was achieved across all sectors of the civil justice system.

After the report had been received from the Commission, the then Victorian Attorney-General asked me to Chair a Civil Procedure Advisory Group. This body was ably supported by senior officers from the Department of Justice. The Attorney-General invited to join the Advisory Group representatives of the Victorian Bar, the profession, each of the Victorian jurisdictions, the community legal groups and corporate counsel. A very real endeavour was made to ensure that everybody who needed to be involved and brought in to this process was present at the table.

The way it was tackled, with the support of the Department – and it could not have been achieved without the Department's support – was for the Advisory Group to take topics from the Commission's report, prioritise them in terms of what the courts and the profession saw as pressing, and then to move through a topic at a time, with very lively debate following the provision of provocative and informative papers. At our meetings, assisted by the Department, resolutions would be achieved. If I take, for example, a relatively typical topic – discovery. We had all the players around the table. What some of the courts did – and I certainly did this – was to bring in a 'specialist judge', who would be there to speak on the particular topic.

We had these intensive seminars, effectively, on a discrete topic and the individuals directly engaged in the discussion were experts in their particular area. Recommendations would be resolved, circulated, agreed, and then they would be forwarded to the Attorney-General, who would discuss them with the department and, by and large, almost uniformly, all the recommendations of the Civil Procedure Advisory Group were adopted, instructions then went to Parliamentary Counsel and – this was one of the keys to the success of the whole model – we had Parliamentary Counsel at the table. So as we progressed through our recommendations, the drafts came back to us and the group was therefore right at the very forefront of the drafting of the *Civil Procedure Act*.⁸

⁶ *Interim Practice Note: NCF 1: National Court Framework And Case Management*, 16 February 2015.

⁷ *National Administrative Notice: Nat 1: Commercial And Corporations National Practice Area*, 16 February 2015.

⁸ The second reading speech on the introduction of the legislation provides the background: Victoria, Parliamentary Debates, Legislative Assembly, 24 June 2010, 2607 (Attorney-General, Rob Hulls).

The Act has been very successful in Victoria. Importantly, I believe it has been embraced because of the law reform model that was undertaken to achieve its implementation.

Since its implementation, it was slow to start with in many jurisdictions outside the Supreme Court. We found in the Supreme Court that judges, when the opportunity arose, would apply the *Act*, particularly the overarching obligation provisions in the *Act* with respect to counsel and practitioners and parties. A number of judgments were delivered, but not much attention was being given to the decisions and the *Act* outside the Supreme Court.

In one of my other capacities, I chair the Judicial College of Victoria. I requested that the College run cross-jurisdictional education programs on the application of the *Civil Procedure Act*. So we had magistrates, County Court and Supreme Court judges all training together, and even some VCAT members (although VCAT is not subject to the *Civil Procedure Act*). The College had all the jurisdictions being educated about the particular provisions and how to apply the *Civil Procedure Act*. It has been dramatic in its impact in the Supreme Court and across the jurisdictions.

We have seen a very significant increase in the number of cases resolved in the Supreme Court. That can be for a variety of reasons. It can be because of case management. It can be because of alternative dispute resolution. However, if we conduct an analysis of the last few years of operation of the *Civil Procedure Act*, it has been an important contributor in the management of litigation. Anecdotally, this is certainly the case.

For members of the academy in the audience today, there is a wonderful opportunity in Victoria to conduct an overview and longitudinal study of the impact of the *Civil Procedure Act* in Victorian civil litigation.

In terms of specific examples of how the Act has had an impact, there is a very powerful provision in the Act, s 29. This provision, in a nutshell, enables a judge or a magistrate to initiate an investigation into the conduct of a proceeding, with a view to making special orders and provisions in relation to an individual. It has not been used very often and, of course, it is saved for serious cases.

One such case was a matter called *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (Nos 1 and 2)*⁹ where there were suggestions that in a civil jury trial, an expert had changed his report.

Justice Dixon proposed that pursuant to s 29 of the *Civil Procedure Act* the Court on its own motion would consider whether any order under s 29(1) should be made in the interests of justice. The Court was concerned that the solicitors and an expert witness may have engaged in misleading or deceptive conduct and failed to disclose the existence of documents to the Court. His Honour considered the obligations of an expert witness particularly with respect to s 21 of the Act. Ultimately, Justice Dixon was satisfied that improper practice had occurred and, accordingly, awarded various costs against the expert.

⁹ [2014] VSC 567; [2014] VSC 622.

At one point, the matter was in the Court of Appeal and there are observations about the *Civil Procedure Act* in the Court of Appeal judgment.¹⁰ On the appeal, the Court considered the obligation on parties to ensure the just, timely and cost efficient resolution of the real issues in dispute pursuant to s 7 of the *Civil Procedure Act*. The Court of Appeal, notwithstanding that the appellant had been successful, ordered that senior counsel and the solicitors representing the appellant contribute to a significant proportion of the unsuccessful respondent's costs.¹¹ But it is the s 29 proceeding before Dixon J that I draw to your attention for those who want to see how a model works.

An appendix to this paper provides an overview of cases in the Supreme Court. It reveals, by way of a snapshot, the impact that the *Civil Procedure Act* is having on civil litigation. Importantly, the Court of Appeal has delivered a judgment holding, quite unequivocally, that not only are there duties imposed on the parties to apply the *Civil Procedure Act* but that there are also duties on the courts themselves.

In *Yara Australia Pty Ltd v Oswal*¹² the Court observed:

The court is obliged to give effect to the overarching purpose of the Act 'to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute'. The court is directed to further the overarching purpose by having regard to the objects and matters articulated in s 9 of the Act which include the efficient use of judicial and administrative resources and dealing with the proceeding in a manner proportionate to the complexity and importance of the issues and amount in dispute.

The overarching obligations apply to any person who is a party, any legal practitioner, legal representative or law practice acting for or on behalf of a party. The overarching obligations do not override any duty or obligation of a legal practitioner arising under common law or statute to the extent that such duties and obligations and the overarching obligations can operate consistently. But a legal practitioner or law practice engaged by or on behalf of a client in connection with a civil proceeding 'must comply with the overarching obligations despite any obligation ... to act in accordance with the instructions or wishes of the client'. A legal practitioner is not required to comply with any instruction or wish of a client which is inconsistent with the overarching obligations, and must not cause the client to contravene the overarching obligations. To the extent that there is an inconsistency between a legal practitioner's duty to a client and their overarching obligations, the obligation prevails.¹³

Significantly, the Court of Appeal observed in terms of the universal obligations under the Act: The Court's powers under s 29 of the Act include the power to sanction legal practitioners and parties for a contravention of their obligations as the heading to Part 2.4 indicates. In our view, these powers are intended to make all those involved in the conduct of litigation — parties and practitioners — accountable for the just, efficient, timely and cost effective resolution of

¹⁰ *Hudspeth v Scholastic Cleaning and Consultancy Pty Ltd* [2014] VSCA 3.

¹¹ Senior Counsel and the solicitors for the plaintiff were ordered to pay 80% of the costs awarded in favour of the successful appellant against the relevant respondent. The Court further ordered that Senior Counsel and the solicitors were disallowed any costs and disbursements to which they would otherwise be entitled in relation to the appeal and that they were to pay equally any legal costs and disbursements incurred by the appellant in relation to the appeal which she did not otherwise recover under the Court's order. The Court further ordered that the respondent pay the appellant's costs of the appeal but made the aforesaid orders effecting indemnity in its favour.

¹² (2013) 41 VR 302.

¹³ *Ibid* [9]–[10] (citations omitted).

disputes. Through them, Parliament has given the courts flexible means of distributing the cost burden upon and across those who fail to comply with their overarching obligations. A sanction which redistributes that burden may have the effect of compensating a party. It may take the form of a costs order against a practitioner, an order that requires the practitioner to share the burden of a costs order made against their client or an order which deprives the practitioner of costs to which they would otherwise be entitled. The Act is clearly designed to influence the culture of litigation through the imposition of sanctions on those who do not observe their obligations. Moreover, the power to sanction is not confined to cases of incompetence or improper conduct by a legal practitioner. Where there is a failure by the practitioner, whether solicitor or counsel, to use reasonable endeavours to comply with the overarching obligations, it will be no answer that the practitioner acted upon the explicit and informed instructions of the client. A sanction may be imposed where, contrary to s 13(3)(b), the legal practitioner acts on the instruction of his or her client in breach of the overarching obligations.¹⁴

The Court in *Yara* placed particular emphasis on the obligations of judges:

The Act prescribes that parties to a civil proceeding are under a strict, positive duty to ensure that they comply with each of the overarching obligations and the court is obliged to enforce these duties. The statutory sanctions provide a valuable tool for improving case management, reducing waste and delay and enhancing the accessibility and proportionality of civil litigation. Judicial officers must actively hold the parties to account.

Yet as we have observed, sanctions imposed for a breach of any overarching provisions have been a rarity at first instance. When no party invites the court to determine whether there has been a breach of the Act, there may be a judicial disinclination to embark upon such an own-motion inquiry for fear that inquiry as to a potential breach may be time consuming and may require the introduction of material that was not before the court as part of the proceeding. Such fears cannot relieve judges of their responsibilities. But we would not wish it to be thought that a judicial officer at first instance must undertake a substantial inquiry when considering whether there has been a contravention of the Act. As the sanction for a breach will usually lie in an appropriate costs order, a judge may at the conclusion of the reasons for judgment immediately invite oral submissions as to why there should not be a finding that the Act was contravened. The judge may in a relatively brief way deal with that issue in providing succinct reasons for a finding that there has been a breach of the Act and how that finding affects the orders for costs that are to be pronounced.¹⁵

Further, the Court in *Yara* placed particular emphasis on the obligation to ensure costs are reasonable and proportionate. The Court observed:

The overarching obligation in issue is the obligation of the parties and their practitioners to ensure that legal costs are reasonable and proportionate. Section 24 imposes a positive obligation to take steps to ensure that costs are not excessive and empowers courts to sanction those who breach their obligations.¹⁶

¹⁴ Ibid [20] (citation omitted).

¹⁵ Ibid [26]–[27].

¹⁶ Ibid [12].

...

The legal practitioners' duty is non-delegable. The obligation will override their duty to their client where the discharge of that duty would be inconsistent with the overarching obligation. The legal practitioner will not be relieved of this overarching responsibility because of the instructions of their client.

Legal practitioners, whether solicitor or counsel, involved in the preparation of pleadings, affidavits or other materials that are to be used in the proceeding or who provide advice as to such matters, have individual responsibilities to comply with the overarching obligation. Both solicitor and counsel also have an overarching responsibility with respect to the extent and level of their client's representation. Each must ensure that, having regard to the issues, the extent and level of representation proposed is reasonable and proportionate. Advice or instructions given or received by legal practitioners, and instructions given by the client may inform but will not be determinative of the question whether, viewed objectively, there has been a breach of the obligation.¹⁷

Timeliness and Specialisation

The next topic I raise is general timeliness and specialisation. There has indeed been a significant focus in all sectors across the country on trying to achieve greater expedition and timeliness in cases. One of the ways this has been tackled by courts, especially here in Victoria, is through specialisation.

When I started in law, judges were expected to be generalists, so they would, one month, be doing divorces; the next month they would be doing what were called causes, and they could be doing a wide range of civil matters; then they might turn to civil juries; then they would have a term in crime; and then they would have a term in specific areas of civil litigation, which would probably involve a fair dose of probate and deceased estate work and some commercial litigation. It was sometimes capricious whether a party happened to have a specialist judge matched to the case. Listings have changed. In the Supreme Court, we split the Court into specialist divisions many years ago.

But what the Supreme Court has done is to adapt processes and administrative support arrangements to ensure cases move quickly, that they do not just sit in registries. I will mention a few of the specialist lists we now have in the Supreme Court outside the Commercial Court: Valuation, Compensation and Planning; Major Torts; Civil Circuit; Professional Liability; Probate; Judicial Review and Appeals; Personal Injury; Testators' Family Maintenance and the Dust Diseases List.¹⁸ This provides triaging of cases to ensure that they are moved through all the processes. In addition there is a fairly new Commercial Court Registry structure to service the Commercial Court, which ensures a hands-on, lawyer-managed approach to files. All civil matters in the Victorian Supreme Court are docketed.¹⁹

¹⁷ Ibid [15].

¹⁸ A more detailed overview of the reforms of the Common Law Division are given in an article, Law Institute Journal, 2016 90 (03) LIJ @44, *CLIP bears fruit*, by the Hon Justice J Forrest.

¹⁹ The type of docketing applied depends on the type and urgency of the case. There are 7,700 civil proceedings initiated in the Court per annum. Each case has some form of management, save debt recovery matters.

One of the challenges that we have had in civil litigation is the matter of access for those without legal representation. The Supreme Court continues to provide assistance to those individuals. We publish information to assist self-represented litigants in the preparation of court documents and the procedural conduct of their matters. In 2015 the Supreme Court significantly increased the amount of information available through its website, particularly on the probate side, which has recorded over 45,000 visits in 2014/2015.

The registries also provide in person assistance and referrals to pro bono legal assistance. The number of contacts by self-represented litigants with registry staff continues to increase year on year, with nearly 3,000 contacts in 2014/2015.

The Probate Registry, in addition to answering inquiries day-to-day, provides a small estate service under the *Administration and Probate Act 1958* which allows those seeking to obtain probate of a deceased estate to obtain formal assistance from the Registrar in the preparation of necessary documents. The small estate threshold was recently raised from \$50,000 to \$100,000. As a result 2014-15 saw an 86% increase in the number of small estate grants of assistance by the Registrar.

It might be thought by some that probate matters are not all that significant. In the Supreme Court we put through around 20,000 matters a year. If we reflect, the average member of the public may not have a single engagement or encounter with the Court in their whole lifetime, except perhaps when a family member dies and the estate, often of their parents, has to be managed. These days, with rising house prices, it is not unusual for a deceased estate principally consisting of real estate to be approaching in the order of \$1 million in value. These are substantial matters when the ordinary citizen needs access to justice.

The Commercial Court

Now I will shift to the Commercial Court model.

The Commercial Court model is one that is responsive to the needs of those who use it. It is supported by both technology, which enables it to insist on a digital first approach to all its files, and the highly skilled but small registry led by a specialist Judicial Registrar.

Cases in the Commercial Court are allocated between general and specialist lists which allow for the targeted allocation of proceedings to lists managed by Judges and Associate Judges who have extensive specialist and commercial law experience.

The Commercial Court was re-established and revised in the Supreme Court in 2014. In addition to specialist lists and judge managed lists, there is the RedCrest electronic filing system which provides anytime, anywhere filing, and has case management capabilities. There has been a major review of the practice procedures known as the *Green Book*, to make sure processes are up to date. Relevantly, there is a *Corporations Act* Oppression Proceeding Processes pilot where the Court, in conjunction with Dr Genevieve Grant from Monash University, is overseeing what is happening with oppression proceedings. It is so hard for us as judges when we are in the cauldron of litigation to have an assessment of whether what we are doing is successful, beyond looking at the raw numbers at the end of the financial year. We are gratefully assisted by academic research and analysis into what we are doing.

The Oppression Proceeding pilot is another example of where ordinary citizens engage with the Court, this time because of the provisions of the *Corporations Act* – take a small family company dispute where a brother disagrees with another brother over the running of the company. These are disputes over minority shareholders’ treatment and oppression proceedings are issued. The Commercial Court is providing very carefully managed court annexed mediation so that these cases are resolved. It is proving to be very successful.

The key to the success of the Commercial Court has been having a specialist registry. There is a Judicial Registrar who is supported by specialist commercial lawyers who triage the cases. The files are selectively docketed to individual judges. What we are finding is that the case load has become very significant in the Commercial Court because of the specialisation, which is what the litigators want, and, I venture to say, the quality of the specialist judge sitting on the bench hearing the cases.

In the last financial year, the Commercial Court’s filings increased by about 30%. By and large, none of these cases are easy. The other feature of these cases we are observing is that there are very substantial amounts of money at stake. It is not unusual for millions of dollars or more to be in issue in very, very complex commercial proceedings.

The Commercial Court has received a clear message from business. The business community want to get into court expeditiously and have a dispute resolved quickly so that it can go back to doing what it wants to do – ongoing business. The business community does not want to be tied down in long, drawn-out litigation. It wants a decision quickly, and that is what the Commercial Court strives to provide.

As part of the provision of that service, we now have specialist commercial duty judges available. We continue to have a Practice Court duty system in the Supreme Court, but we have carved out the Commercial Court matters so that there is always a Commercial Court duty judge on hand to hear urgent matters such as injunctions and freezing orders.

That is a short overview, but I want to give you an individual example of the magnitude of the litigation in the Commercial Court.

One particular case was the *Great Southern*²⁰ trial. This case involved 15 group proceedings or class actions comprising 22,000 group members, plus 33 related individual proceedings. The plaintiffs had sought to avoid loans owed by investors in the Great Southern Group worth \$300 million. A special referee was appointed by the trial judge. In context, this was a quite an innovative thing to do. The referee was appointed to oversee the discovery process. Discovery consisted of 10 million documents. In the four years prior to trial, over 200 interlocutory orders were made, with the goals of narrowing the issues in dispute, facilitating the provision of relevant material to the Court and minimising delay. The hearing of the trial itself occupied 90 sitting days over a 12 month period, with adjournments to allow for Court ordered mediation, as well as to resolve further discovery issues. At trial, the judge – a single judge – faced over 17,000 documents, heard 104 witnesses and had cited to him well over 500 cases. On average, each day there were 13 counsel and 15 solicitors in court. In the end, the judge reserved and went away to write his judgment. The judgment consisted of 2,050

²⁰ *Clarke v Great Southern Finance Pty Ltd (in liq)* [2014] VSC 516.

pages. It was a herculean task. It so happened that the night before the day the judge was due to hand the judgment down, the associates received an email. The case had settled. However, as events transpired the judgment came to be published because the settlement had to be approved by the Court. But the *Great Southern* case is one of a number of mega pieces of litigation that we are accommodating, as well as all the other matters that come into the Court.

Civil Appeals

The next area I want to move to – and it is a marvellous example, I believe, of civil justice reform – is the civil appeal reforms in the Supreme Court.

About four years ago we introduced very significant criminal appeal reforms which slashed the number of criminal appeals in the Court of Appeal of the Supreme Court but, in particular, delays. There were in the order of 680 criminal appeals pending. As currently advised, the numbers are under 130 – around about 125. Past delays of 18 months, sometimes two years, have been reduced to six months.

Justice Nettle, now of the High Court, was asked to consider transposing the experiences of the criminal appeal reforms onto our civil appeals. The reforms were developed and implemented. At the end of December 2013, there were 154 civil appeals pending in the Court of Appeal; a number that was fairly representative for that year. The delays in receiving judgment were sometimes in the order of 12 months, sometimes in difficult cases, 18 months, mostly because of the wait to get on. I suspect that there were parties in litigation, particularly commercial litigation, who were taking advantage of the delay to lodge an unmeritorious appeal or an appeal with dubious merit in order to gain time to be used as a lever in discussions or negotiations, or just for commercial delay.

In November 2014, led by Justice Nettle, the Court introduced a raft of reforms aimed at reducing the backlog of civil cases and the time for the final disposition of each case. Central amongst these reforms was the introduction of the universal requirement of leave to appeal. It was not without some reservation. There was an argument that every citizen should be entitled to an automatic right of appeal. The Court took the view, ultimately accepted by the Attorney-General, that if an appeal was meritorious then leave would be granted and thus a meritorious appeal would proceed to a hearing.

The test for the grant of leave is that the appeal must have a real prospect of success. Parties are generally expected to come to court ready to argue the appeal at the same time as the hearing of the application for leave. While three judges continue to hear most applications, there is now greater capacity for single judges, or a bench of two, to determine leave applications, which further enables greater expedition in suitable cases.

One phenomenon that has come out of this new regime is a reduction in the impact of self-represented litigants. Prior to its existence, the Civil Appeals List of the Victorian Court of Appeal was much populated by self-represented litigants. At times, as much as 25% of the civil appeals involved self-represented individuals.

As a result of the new civil appeal procedures, the impact of the self-represented litigant has been significantly reduced. This is because the individuals must now go through rigorous application processes. There is assistance in achieving that and extensive support from the Victorian Bar and Law

Institute pro bono schemes. It has been very effective. Parties now, with the new civil appeal reforms, are required to file their written cases setting out their contentions on the leave application and on the appeal at the time their application is initiated. The resultant expedition has had a dramatic impact.

At the end of December 2015 there were only 80 pending civil appeals in the Court of Appeal. Remembering that the number back in December 2013 was 154, we have virtually halved the number of pending appeals. The waiting time for completion is close to six months and that is an excellent reduction in time.

Alternative Dispute Resolution

I now turn to alternative dispute resolution.

It is the case in the Victorian Supreme Court that virtually no civil case goes to trial without at least one round of mediation (indeed most civil appeals are also required to have undergone mediation subsequent to the appealed judgment). We have implemented a model, which has been in place for a number of years, of court-led mediation, which is mostly conducted by associate judges and the judicial registrars, particularly, Associate Justices Efthim and Wood. It is a finite resource and we cannot offer this service to every case. We select cases where court-led mediation is suitable for the particular case.

It also happens that there are parties who cannot afford to pay for a mediator and that is where the Court will step in and provide assistance. This occurs extensively in the Corporations oppression proceedings I adverted to earlier and also with respect to deceased estate matters, particularly testators' family maintenance claims. You will recall those sorts of cases where, for example, an adult child claims to have not been sufficiently provided for in a parent's will. Rather than the case running for some days before a judge, these matters are being mediated by the Court. This has been extremely successful, with a very, very high resolution rate. I am very pleased to say that Mr Gary Cazalet of the University of Melbourne Law School will shortly assist the Court in conducting a value assessment of Supreme Court-led ADR.

The next phenomenon I want to focus on within the Court is the class action.

Class Actions

Class actions have had a significant impact on the Court. I referred to the *Great Southern* proceeding earlier; I now want to mention as another example the Kilmore East bushfire trial which was conducted by Justice J Forrest.

The bushfire cases, for those of you who might need a refresher, were against electricity companies for breach of common law and statutory duties such as failure to replace powerlines. There were also cases against government agencies, the Country Fire Authority and Victoria Police and others.

There were six class actions across Victoria arising from Black Saturday – and remember, these bushfires took the lives of 173 people and injured over 1,000 people, and 5,600 homes and other

structures were destroyed. The largest and most complex was the Kilmore East class action. It was an extraordinary challenge for the Court.

The fire itself at Kilmore East took 119 lives and there were claims against SPI Electricity and government agencies. There were concurrent cases with principal parties selected to represent others. The trial commenced on 30 March 2013 and ran for 208 days. It had 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.

The case ran extraordinarily successfully, for a number of reasons, one being that the judge utilised the provisions of the *Civil Procedure Act* extensively. A series of rulings were delivered by J Forrest J which are available on the Supreme Court and Judicial College of Victoria websites, which demonstrate the effectiveness of the legislation.

Secondly, and it was an absolute key to the success of the management of the litigation, was the use of technology. The judge ran the case as a wholly electronic trial. Trolleys were banned by judicial edict. Occasionally, a folder would find its way into the courtroom; perhaps if a barrister was cross-examining an individual the judge would be tolerant. But it was essentially a paper-free trial. It was conducted in a special courtroom built for that purpose in the William Cooper Justice Centre, and it is a model proceeding. It demonstrates that if courts are provided with the facilities, if they are given the tools, they can conduct litigation in a wholly innovative way.

Independent assessments conducted for the court disclose that approximately one third of the class action trials' duration was saved by the trials being conducted on a wholly electronic basis.

The model applied in the Kilmore East trial has been emulated subsequently in other cases. We now have multitudinous class actions on the books in the Supreme Court. We need to run them electronically so far as possible and we are utilising the Great Southern and Kilmore East models for that purpose. For completion, I mention that, ultimately, after the judge in Kilmore East had reserved judgment the case also settled.

With respect to other bushfire proceedings, most of those, save a couple which remain on foot, have been resolved through the use of the court-led mediation.

Courts have come a long way in terms of how to manage these mega cases.

Technology

I want to turn now to technology, because what the courts are trying to do is link into the needs of the law firms and litigants who are accustomed to operating electronically. Many courts are moving to electronic filing and case management systems. Much of the discovery process already occurs electronically.²¹

²¹ A fuller discussion on the impact on courts from technology may be found in the author's speech *Embracing Technology: the Way Forward for the Courts*, 19 April 2015.

To illustrate, I will give a recent example of how this works. In 2015, a mesothelioma nervous shock trial was before the Supreme Court. The presiding judge travelled to Greece to hear evidence from several witnesses. The evidence was taken in conference venues within two hotels. Each of the parties was represented by both senior and junior counsel with an instructing lawyer. An interpreter was also available. The Supreme Court personnel involved were the judge, his associate and one court reporter. His Honour wrote to me following the trip, and I quote:

The court's approach was paperless. The hard copy court file was not taken to Greece because of its size. Similarly, the court books and associated discovered documents were not taken as part of the court's materials. Rather, all documentation was maintained in the Cloud on the One Drive system. My associate and I primarily utilised our laptops throughout the course of the hearing and all-in-all, we travelled with about five kilograms of court material, which was mainly the weight of the laptops. The wireless internet connection at both hotels was of a very good standard, so access to documents and the transcript during the course of the hearing was almost instantaneous. In addition, we were able to work jointly on the draft judgment which was stored on the One Drive.

His Honour continued:

By contrast, the parties travelled with paper files. This meant that the solicitors had to cart approximately 50 kilograms of material, each in folders, to Greece. This meant that special arrangements for the luggage had to be made and that delays were encountered at the airport.

Upon his Honour's return from Greece, the Court resumed sitting two days later and took evidence from a medico-legal expert psychiatrist via video-link from Miami. The case settled that afternoon. One can readily contemplate that the Court's ability to remain on top of the case via technology played an important part in the resolution of the case.²²

I cannot emphasise enough the power and opportunity provided to the courts through technology. Our only frustration is securing sufficient funding to be able to ensure e-filing and e-management of trials and appeals.

We also need to bear in mind that the graduates coming through from the law schools are absolutely computer and tech-savvy. It is not for them to cart trolleys and folders around to courts. We need to reflect upon the opportunities that we can utilise through these young law graduates and their technological skills. There are opportunities for virtual courtrooms; it is just a matter of courts having enough funding. It is a 'blue sky' opportunity.

Shifts in Jurisdiction Forums – The Rise of the Tribunal

One phenomenon that cannot be forgotten about in civil litigation is the rise of the tribunal.

The Victorian Civil and Administrative Tribunal and its operations were established on 1 July 1998. VCAT has proved to be an extraordinary success. It was established to ensure cost-effective, fast delivery of justice to individuals. Its case load is somewhere in the order of 100,000 matters a

²² Ibid.

year. Such has been the success of the model that it has been adopted in Queensland with QCAT, New South Wales with NCAT and Western Australia with WACAT. The Victorian Attorney-General, at this time, is looking at the prospect of whether the civil jurisdiction remaining within the Magistrates' Court in Victoria should be transferred wholly to VCAT, such is its success.

There is jurisdiction now within VCAT in Victoria that not very long ago was exclusive Supreme Court jurisdiction. VCAT has unlimited, exclusive jurisdiction in areas such as domestic building contracts. If we think of the growth of skyscraper construction of apartments around Melbourne, we can appreciate very quickly the magnitude of the jurisdiction of the Tribunal.

Without the tribunal model across the country, but particularly here in Victoria, the courts could not have coped with their workloads.

Costs

I want to touch on costs.

In Victoria, we have the Costs Court. It has been extremely successful, having a specialist judge, judicial registrar and registrars dealing with costs assessments for all jurisdictions in Victoria. One phenomenon – and it is very important in a setting where there is now discussion about the capping of costs, particularly in the federal sector – is that proportionality is a factor that has been carefully considered within the assessments of the Costs Court.

The concept of 'proportionality' has now made its way into the *Civil Procedure Act* – notably in ss 24 and 65A, 65B and 65C. The sections, particularly s 24, were considered in the case I already mentioned of *Yara*. Proportionality is also included in the *Legal Profession Uniform Law*. Proportionality and greater transparency and control of costs by courts are a significant way that the landscape is changing. Section 172 of the *Legal Profession Uniform Law* provides that legal costs must be 'fair and reasonable in all the circumstances' and in particular 'proportionately and reasonably incurred' and 'proportionate and reasonable in amount'. Relevantly, under s 65C(2)(d) of the *Civil Procedure Act*, a court can cap or fix costs in advance if it is so minded. However, capping is not a new concept; it has just been rarely utilised.

Courts Governance – the Setting

There is one aspect also that we need to take account of when considering civil litigation in Victoria, and that is courts governance. We have had Court Services Victoria now in Victoria for 18 months. The Victorian courts and VCAT have been separated from the Department of Justice and hence we are able to advocate directly to the Attorney-General, the Department of Treasury and Finance and work with the Department of Justice to ensure that the courts are properly resourced and able to provide the services expected of them.

As Court Services Victoria develops under the guidance of its governing council, the Courts' Council, the quality of service and the performance of the courts in the administration of justice generally will be improved.

I am reminded of the commentary of the Rule One initiative *Change the Culture, Change the System – Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow*.²³ Under the heading *Efficiency Up the Court Ladder*, the statement is made that ‘we need to utilise everyone within the court structure more effectively and efficiently’. This is where Court Services Victoria comes in. Already in a period of 18 months we are seeing a more effective and efficient utilisation of court staff to support Victorian judges and magistrates in their work. Relevantly, the *Change the Culture* document provides:

A critical way in which courts can make a difference in the provision of court services is to rethink the court structure so as to utilize everyone in the most efficient and effective way. With the advent of electronic filing and electronic case management systems, there are different staff needs in our courthouses today than there were 20 years ago. The modern court must be staffed in a way that employs each person in the most efficient way possible.

Moreover, we need to rethink how we utilize the court infrastructure. Starting with judges, we need to recognize when a task requires a judge's deliberative function and when the task can be done by someone else. Judges have the most experience and education. They should be doing the work that requires that experience and education, and other tasks should be more efficiently allocated to others who can provide support for the judges be it law clerks, staff lawyers, etc. Certain aspects of case processing can clearly be undertaken by non-judicial or quasi-judicial personnel. It is critical that everyone work as a team, recognizing the valuable roles that everyone plays at all levels. We should not be cabined by the traditional positions or responsibilities of court staff. We need to rethink how best to allocate the work of the court in this modern age. Just as law firms are being moved in this direction by the market, so too must courts adjust to the needs of modern society. We need to think with openness about the best way to do what court systems do.²⁴

Courts Performance²⁵

I also need to touch upon the International Framework for Court Excellence. In Victoria, all of the Victorian courts are subject to assessment, effectively self-assessment, under the International Framework. The Australasian Institute of Judicial Administration has played a leadership role in the foundation of the Framework. Victoria has adopted the Framework. As far as I know, we are the only jurisdiction where every court and tribunal has committed to the Framework. Our performance is being measured by the criteria laid down in the Framework.

The International Framework for Court Excellence has provided a means for court accountability through self-assessment and self-improvement without compromising judicial independence.

²³ BAT Kauffman, Rule One Initiative, *Change the Culture, Change the System*, co-published by IAALS, the Institute for the Advancement of the American Legal System, University of Denver, October 2015.

²⁴ Ibid 17.

²⁵ This section of the speech draws on a paper delivered by the author: *The Aspiration of Excellence: Judiciary of the Future*, delivered at the International Conference on Court Excellence, Singapore, 28-29 January 2016.

The Framework

The foundation of the Framework is the clear statement of the fundamental values to which courts must adhere if they are to achieve excellence. The Framework then presents seven detailed Areas for Court Excellence aligned with those values, by reference to which courts worldwide can voluntarily manage, assess and improve the quality of justice and court administration.

The Framework splits a court's processes, practices, roles and functions into seven Areas for Court Excellence. Each area represents an important focus for a court in its pursuit of excellence. The significance of each of the seven areas is further clarified by their grouping into three categories. The Framework clearly articulates that leadership and management is the "driver" of a court's performance. It then clusters three of the areas under the heading of "systems and enablers" and, finally, the three remaining areas under "results".

The Framework also promotes the concept of organisational self- assessment. It declares that "the first step on the journey towards court excellence involves an assessment of how the court is currently performing ... measured against the Seven Areas for Court Excellence". The Framework anticipates that engaging in this self-assessment process will allow a court "to identify those areas where attention may be required" and "to set a benchmark against which the court itself can measure its subsequent progress".

The Supreme Court of Victoria goes to great lengths to make it clear that it is not a commercial enterprise. It does not manufacture "widgets" and it cannot be monitored by inputs and outputs that simply count how busy the Court might be. However, as the Framework suggests, the Court does deliver justice and court administration. The challenge has been to determine how the Court should define what it delivers so that its performance might be more readily assessed and improved.

To date, the Framework has proved very effective for the Victorian Supreme Court, both internally and externally. More information is available on the court's website (<http://www.supremecourt.vic.gov.au>).

For those who are researching civil litigation, do not overlook the Framework. In the next five years, maybe longer, but I expect in the next five years, it will transform courts' assessment.

Judicial Training and Education

Mentioning Singapore is a segue into Asia. I spoke earlier about commercial litigation. If we think about what has been happening at the federal level, we have the Trans-Pacific Partnership and other significant trade arrangements with important parts of Asia. Then there is the change in the migration patterns coming into Victoria. There is a very large number of people from Asia, particularly China, who are dual citizens and who reside both in China and in Australia.

What we are starting to see in the Commercial Court are numbers of cases being issued each week where parties are contesting large amounts of money (often tens of millions of dollars). The parties do not speak English, the relevant agreement was reached orally and off-shore in Asia, often China. The commercial judges have to manage these cases, dealing through interpreters with cultures that come from an entirely different culture to our common law Anglo-Saxon model.

In an endeavour to address this phenomenon, the judges of the Supreme Court together with some other judicial officers recently gathered at the Judicial College of Victoria for a seminar on Asian law and litigation by Asian parties. This was done to ensure that judges are best equipped in how to grapple with these very different cases.

The seminar was entitled *Asian Cultural Awareness in the Courtroom*. It had three aims:

- (a) to provide judges with insights and practical tools to ensure effective communications and court management in proceedings involving parties from an Asian background;
- (b) to give judges a better understanding of the culture and perspectives of parties from an Asian background so that they can more effectively assess evidence and behaviour; and
- (c) to explore ways to increase the effectiveness of mediation within the context of commercial disputes.

The program commenced with leading academics providing judges with an overview of the key elements of the legal systems in China, Vietnam and Indonesia. Analysis was provided of each relevant country's legal system and traditions, particularly as they relate to the commercial context. The overview included analysis of the different legal systems and traditions that might affect attitudes to law, contract, courts, lawyers and commercial dispute resolution in Victoria. Next, the seminar provided analysis on the cultural and linguistic challenges that arise when people from different cultures communicate in a legal context. Then the seminar looked at the important topic of mediation. A specialist academic in the field outlined the relevance of western and non-western mediation practices in the Victorian multi-cultural context and how tensions between cultures can be addressed through mediation.

The seminar provided judges with a mixed panel of academics and legal practitioners to provide practical insights into how those individuals engage with their clients, focussing on how they manage cultural misunderstandings that arise in commercial matters involving Asian parties. The program was an outstanding success. We cannot underestimate the significance of judicial education in providing ongoing professional development for the judiciary.

Health and Wellbeing²⁶

There is one final topic I do want to touch upon, and it is very important. Wellbeing is something that we need to be acutely aware of across the legal profession and the judiciary. To state the obvious, if we want the courts of the State and the country to function effectively, we have to have judicial officers who are well and healthy in the roles that they perform.

Similarly with the legal profession. It has one of the highest depression levels of all professions. It is very important that we be aware of wellbeing issues and the impact that they have on the delivery of civil justice.

²⁶ This section of the speech draws on a paper delivered by the author *The Aspiration of Excellence*, Judiciary of the Future, delivered at the International Conference on Court Excellence, Singapore, 28-29 January 2016.

Last year, my colleague Associate Justice Ierodionou delivered the Jepson Memorial Lecture on wellbeing for the profession.²⁷ It is on our Court website, and I do urge you to read it.

Wellbeing issues have come to the fore in the legal profession — the recruiting ground for judges. As long ago as in 1995, Justice Kirby, then President of the New South Wales Court of Appeal and later a justice of the High Court of Australia, delivered a paper to a judicial orientation program co-hosted by the AIJA. It was entitled *Judicial Stress: an unmentionable topic*. Twenty years later, many of his observations stand.

In August 2015, the Judicial College of Victoria ran a two day seminar for judicial officers on the topic of judicial wellbeing and stress. It was a significant event where judges, including the President of the Victorian Court of Appeal and myself, met with experts on sources of judicial stress; the links between lawyers, lawyering and stress; the factors and signs of stress; how to build wellbeing with positive psychology; resilience training and performance enhancement strategies (including mindfulness, vicarious trauma and burnout management strategies); and, relevantly, institutional responses to judicial wellbeing. In the feedback on the seminar, one judicial officer said:

Excellent stuff on a long-neglected area. Heads of jurisdiction ought to take heed of the real concerns exposed in this valuable seminar. There are real risks associated with not taking proper care of emotional well-being of the judges of this state.

The Judicial College of Victoria, the Victorian Bar and the Law Institute of Victoria now have a very strong focus on judges and lawyers' wellbeing.

Conclusion

Based on my wide-ranging overview I suggest there are three themes to highlight.

First, on the question of costs, proportionality is starting to develop in the courts and, in time, it will become a very significant aspect of civil litigation. It may or may not obviate the need for capping of costs; that remains to be seen.

The second theme is the extent of innovation and creativity across the Australian courts, in particular, the Victorian courts. There is an evident responsiveness by jurisdictions to meet problems. In other words, courts are taking the initiative themselves, rather than awaiting reforms driven by the profession or introduced by government. They are also finding opportunities to work collaboratively with government departments to effect important and innovative reform.

The third theme I note is the responsiveness of the courts on an incremental basis, as distinct from a global or 'big bang' approach. There is much to be said for that approach as it facilitates the ongoing commitment and involvement of all those who participate in the administration of civil justice. Again I cite the example of the *Civil Procedure Act*. The Victorian courts would reject any suggestion of "inertia".

In closing I suggest some forecasts for the future, or topics to be aware of:

²⁷ Associate Justice Ierodionou: *Inspiring Change: Creating a healthy workplace*: Tristan Jepson Memorial Foundation Lecture, 6 October 2015.

- (1) Tribunal jurisdictions will expand.
- (2) There will be more class actions.
- (3) ADR will continue to expand.
- (4) Judicial control will increase indeed, it is now an expectation.
- (5) Technology will transform the courts.

Appendix

Notes

All reference to the ‘Act’ and the ‘Rules’ in this summary are references to the *Civil Procedure Act 2010* (Vic) and the *Supreme Court (General Civil Procedure Rules) 2005* (Vic) respectively.

Case	Outcome
<i>Actrol Parts Pty Ltd v Coppi (No 3)</i> [2015] VSC 758	The conduct of a party may be such as to warrant dismissal of proceedings rather than an award of nominal damages. There is ‘no warrant’ for giving a restricted meaning to the terms ‘any power’ or ‘any order’ under section 28 and 29 of the Act.
<i>Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 9)</i> [2014] VSC 622	Costs may be awarded against an expert personally where the Act and/or Code of Conduct have been contravened.
<i>Kenny v Gippsreal Ltd</i> [2015] VSC 284	‘Finalisation’ within the meaning of section 30(2) of the Act must be given its ordinary and natural meaning’, and assessed in a practical, and not technical sense.
<i>Refaat v Barry (No 2)</i> [2015] VSCA 268	Whilst a lack of representation does not excuse a party from liability for costs or their obligations under the Act, it is nonetheless relevant to the consideration of the manner in which that party conducted their case.
<i>Chan v Chen & Ors</i> [2013] VSC 538	A plaintiffs’ proceeding may be struck out pursuant to ss 29(1) and 29(1)(f) of the Act as a result of the plaintiffs’ contraventions of the overarching obligations, particularly the obligation to minimise delay (s 25).
<i>Matthews v SPI Electricity Pty Ltd (Ruling No 31)</i> [2013] VSC 575	The failure to make an application at an earlier, available, stage in proceedings may be taken into account in the exercise of a discretion as to whether to admit evidence. This is particularly the case where the failure was unacceptable and unreasonable in the circumstances.
<i>Redline Towing & Salvage Pty Ltd v The Convenor of Medical Panels (No 2)</i> [2012] VSC 483	A legal practitioner’s failure to meet the overarching obligations may justify the imposition of a costs order against that practitioner on a higher scale.
<i>Yara Australia Pty Ltd v Oswal</i> [2013] VSCA 337	Judicial officers must play an active role in holding parties to civil proceedings to account with respect to their obligations under the Act.

Case	Outcome
<i>Trevor Roller Shutter Service Pty Ltd v Crowe</i> (2011) 31 VR 249	The overarching purpose does not affect a party's prima facie right to a trial by jury.
Kilmore-East-Kinglake Class Action	<p>The Kilmore-East-Kinglake Class Action involved extensive and unprecedented pre-trial case management, and over 60 rulings were made, many of which involved considerations under the Act. Practitioners are encouraged to review the index of rulings made, available through the following link:</p> <p>http://www.judicialcollege.vic.edu.au/sites/default/files/Index_to_the_Rulings_from_the_Kilmore_East_Kinglake_Bushfire_Class_Action_FINAL2015_0.pdf</p>